The new Companies Act will make the most far-reaching and fundamental changes to Irish company law in two generations, putting forward a radically different approach whereby the private company limited by shares will become the new model company. The Bill seems likely to be enacted in 2014 and commenced on 1 June 2015.

Who better to explain and contextualise the changes to Irish company law than the Bloomsbury Professional company law authors, to whom practitioners turn when they need to understand a point of company law?

**SEMINAR PROGRAMME**

**The Companies Act 2014: Anatomy of the Act**
- Dr Thomas B Courtney

**Changes in the basics - constitutions, share capital and governance**
- Dr Thomas B Courtney

**Changes to re-registration, registers and filings**
- Daibhí O’Leary

**Taking security, the Summary Approval Procedure and the registration of charges**
- William Johnston

**Changes in the law of directors’ duties**
- Dr Thomas B Courtney

**Corporate Restructuring - schemes, mergers and divisions**
- Lyndon MacCann, Senior Counsel

**Insolvency & Rescue**
- Professor Irene Lynch-Fannon

**Compliance and enforcemen**
- Nessa Cahill BL

---

**VENUE**
The Radisson Blu, St Helens Hotel, Stillorgan Rd, Blackrock, Co. Dublin

**DATE**
29 January 2015, 8.30am – 6pm

**COST**
€590 (includes lunch, course materials plus a copy of *Bloomsbury Professional’s Guide to the Companies Act* (RRP €195) plus complementary parking.

---

**CHAIRPERSON**
Dr Thomas B Courtney

**SPEAKERS**
Nessa Cahill BL, Dr Thomas B Courtney, William Johnston, Professor Irene Lynch-Fannon, Lyndon MacCann SC and Daibhí O’Leary

---

**Book your place today**
To make a booking or for further information contact:
Jennifer Simpson, Sales & Marketing Manager (Ireland), Fitzwilliam Business Centre, 26 Upper Pembroke Street, Dublin 2
T: +353 (0) 1 6373920  F: +353 (0) 1 6620365
E: seminars@bloomsbury.com

Places are at a premium so don't delay, contact us today.
Contents

118 Section 16 of the Criminal Justice Act 2006 and The Judge’s Charge
   Simon Donagh BL

122 Recent Developments in Charities Regulation
   Louise Beirne BL

126 President Higgins Visits Irish Rule of Law Project in Malawi
   Emma Dwyer, IRLI Coordinator

CXXIX Legal Update

127 When the Court can Reverse its Decision
   John Cotter BL

131 Potential Difficulties Arising in Section 117 and Proprietary Estoppel Claims
   Daniel Dwyer BL

134 Voluntary Assistance Scheme Update
   Diane Duggan BL

135 Irish Women Lawyers’ Association
   Mary Rose Gearty SC

136 Law and Government – A Tribute to Rory Brady

The Bar Review December 2014
Section 16 of the Criminal Justice Act 2006 and The Judge’s Charge

SIMON DONAGH BL

Introduction

Section 16 of the Criminal Justice Act 2006 has been considered in two relatively recent decisions of the Court of the Criminal Appeal. A number of issues arose in these cases, but most significantly is the guidance given by the Court as to what is required from the trial judge in charging the jury where statements have been admitted pursuant to section 16. A number of other issues are also discussed below including the requirement that the statement be necessary in order to be admitted. The two decisions in question are DPP v Rattigan and DPP v Murphy.

Summary of Section 16

Section 16 addresses the situation whereby a witness does not give evidence in accordance with their prior statement. This could arise in a number of ways: the witness could simply refuse to give evidence; they could deny making the initial statement; they could give different evidence on the stand, or they could claim to have forgotten the incident in question. Prior to the enactment of s.16, the hostile witness procedure was used in such circumstances. This was limited insofar as the statement’s use was confined to impeaching the credibility of the witness - it could not be used as evidence of its contents per se. Thus if the witness continued to give different evidence, the contents of the statement could not be relied upon at trial. This presented particular difficulties in cases of organised or gangland crime where a witness would be too frightened to give evidence against dangerous criminals for fear of retribution. Section 16 was designed to address this situation and allow the statement (subject to many conditions and safeguards) to be admitted in evidence as the truth of its contents. Thus section 16 constitutes a radical exception to the rule against hearsay insofar as an accused can now be convicted of serious crime based on an out-of-court statement.

Facts of the two cases

In DPP v Murphy, the defendant was accused of setting fire to a car which was parked in the driveway of a dwelling house. The fire caused the mechanisms in the car to melt, which in turn caused the car to roll forward into the house. The house caught fire and the female occupant was killed. The accused was convicted of manslaughter and two counts of arson. Much of the prosecution case rested on the statements of two people to whom it was alleged the accused had admitted lighting the fire. Both statements were admitted into evidence by the trial judge. This decision was challenged on appeal by the accused, as was the manner in which the judge charged the jury in relation to the statements.

DPP v Rattigan was a murder case in which the accused was convicted of stabbing his victim in the early hours of the morning outside a fast food restaurant. Having been stabbed by the accused, the victim made his way inside the fast food restaurant. The security guard closed the door behind him which prevented the accused gaining entry. The accused then ran back to a waiting car and left the scene. A number of people who had witnessed the incident gave evidence as to what they saw. At trial they were able to give precise evidence about the night in general, but then professed to have no memory of the stabbing itself or the ‘knife man.’ Their evidence was crucial as it indicated that the perpetrator pursued the victim all the way to the door of the restaurant. This put the perpetrator at the door of the restaurant where the blood of the victim was found along with a palm-print of the accused. The trial judge admitted two statements pursuant to s.16 and this decision was challenged by the accused on appeal.

The judge’s charge

The manner in which a trial judge should charge the jury in relation to s.16 received extensive treatment by the Court of Criminal Appeal, for the first time, in Murphy. The Court indicated that there should be two aspects to the charge – a general aspect, and a specific aspect. The general aspect should be suitable to any case in which s.16 has been invoked, whereas the specific aspect to the charge should draw the attention of the jury to the relevant facts of the particular case. This is consistent with the manner in which a trial judge would normally charge a jury insofar as the judge would always explain the general concepts (the presumption of innocence, proof beyond reasonable doubt, etc.), but would then draw the attention of the jury to issues which are particular to the case before them. In Murphy McKechnie J stated:

“The approach suggested could conveniently have a general and specific level to it. General as in all cases where s.16 is invoked and specific as to particular circumstances, relating to the individual case and that or those aspects of the section which are involved. In addition it will be necessary to isolate the evidence at issue and to treat it quite distinctly from the more
The ‘general’ charge

The purpose of the general charge is to draw the attention of the jury to the risks associated with admitting evidence pursuant to s.16. The Court was critical of the fact that this had not been done sufficiently in the trial court. The following were identified as matters which should feature in the judge’s charge: 4

1. the historical role of the hearsay rule and the reasons underlying it;
2. the court’s preference for direct sworn evidence tested by existing safeguards; and
3. the difference between oral evidence and witness statements.

The above clearly aims to instil in the jury an appreciation of the fact that s.16 is an exception to the hearsay rule. The law has long appreciated the importance of direct sworn evidence. While the jury are invited to accept the evidence in the statement, in the absence of appropriate guidance, there is always the danger that a jury will over-readily accept what is written on paper before them.

The Court also directed that the jury should be reminded that it remains a matter exclusively for them to determine what weight or value, if any, they place on witness testimony, whether given outside the trial of before them. 5 In essence, the jury should be told of all the traditional concerns about hearsay evidence, and why such evidence can be unreliable, but also be reminded that the decision whether to accept such evidence is ultimately a matter for them.

The ‘specific’ charge

In additional to the above general observations the Court said that the charge must be tailored to the facts of the particular case in question. Thus all matters relevant to the accuracy and reliability of testimony should be brought to the attention of the jury. 6 This would include pointing out whether any sworn evidence is inconsistent with a statement, or whether sworn evidence denies the statement’s existence. The Court noted:

“Unless the jury is so fully informed, their critical role in this context will almost certainly be impaired and could easily be fatally jeopardised.”

On the facts of Murphy, the Court held that the following should have been brought to the attention of the jury: the circumstances by reference to which the statements were admitted; the fact that each statement was supported by statutory declaration; and the individual explanations offered by the witness for making the statement and the latter reason for recanting it. 7 The Court cites with approval a passage from the Canadian case R v B (KG) 8 which is instructive:

“… where appropriate the trial judge might make specific reference to the significance of the demeanour of the witness at all relevant times (which could include when making the statement, when recanting at trial, and/or when presenting conflicting testimony at trial), the reasons offered by the witness for his or her recantation, any motivation and/or opportunity the witness had to fabricate his or her evidence when making the previous statement or when testifying at trial, the events leading up to the making of the first statement and the nature of the interview at which the statement was made (including the use of leading questions, and the existence of pre-statement interviews or coaching), corroboration of the facts in the statement by other evidence, and the extent to which the nature of the witness’s recantation limits the effectiveness of cross-examination on the previous statement. There may be other factors the trier of fact should consider, and the trial judge should impress upon the trier of fact the importance of carefully assessing all such matters in determining the weight to be afforded prior inconsistent statements as substantive evidence.”

Thus, in appropriate circumstances, the following should be canvassed with the jury:

1. the witness’s demeanor at all relevant times i.e. when making the statements, when recanting the statement, or when presenting conflicting testimony;
2. any reasons offered by a witness for changing or recanting their statement;
3. any motivation or opportunity the witness may have had to fabricate either his statement or subsequent evidence at trial;
4. the events leading up to the making of the initial statement;
5. the nature of the interview at which the statement was made - particularly highlighting the use of leading questions, the existence or a pre-statement, or evidence of coaching;
6. any corroboration of the statement by other evidence; and
7. the extent to which the nature of the witness’s recantation limits the effectiveness of cross-examination on the previous statement.

In reality, the jury will have to decide between two conflicting accounts from the same witness i.e. do they believe the recanting witness before them in the box, or do they prefer the evidence in the statement. The above are all relevant considerations in weighing such evidence. A comparison of the demeanour of the witness when making the statement,

---

3 ibid at par 84
4 ibid at par 85
5 ibid at par 85
6 ibid at par 82
7 ibid at par 82
8 ibid at par 82
9 [1993] 1 SCR 740
10 [2013] IECCA 1 at par 87, referencing [1993] 1 SCR 740, at p. 208
as against their demeanor on the stand is clearly relevant. A free talking witness at interview, who now appears hesitant (even scared) on the stand, might well be viewed as indicating a preference for the evidence contained in the statement. If the witness changes their testimony, how credible is their explanation? If they claim to subsequently forget, how credible is that claim? The statement could be devalued if it were merely the repetition of the word “yes” in response to several leading questions. Is there a question of any threats or inducements prior to the statement and/or subsequent testimony? Is either version corroborated by other evidence in the case? There are endless questions which could arise but by drawing the jury’s attention to such issues they will clearly be better equipped to make an informed decision on how they weigh the evidence.

The statement must be necessary

Only statements which are necessary may be admitted pursuant to s.16. A statement will not be admitted if it is unnecessary having regard to the other evidence in the case. The precise parameters of the concept of necessity have yet to be fully considered but it was stated in Murphy that: “evidence which is merely supportive, useful, helpful or even desirable is not sufficient.” McKechnie J elaborated:

“It must be essential in a material and substantive respect. This obviously means that every statement, certainty from the different witnesses, must, at the time of assessment, be critically judged against the existing evidence.”

Thus, the trial judge must be satisfied that the statement is more than merely supportive or helpful, but also that it is to be considered in the context of the other evidence in the case. This is particularly important where more than one statement is concerned. For example, in Murphy the statements of three witnesses were admitted pursuant to s.16. The Court of Criminal Appeal noted that all three were considered and ruled upon concurrently. McKechnie J stated that such an approach was not in compliance with the statute. Each statement ought to have been considered independently but it was stated in Murphy that: “evidence which is merely supportive, useful, helpful or even desirable is not sufficient.”

Does s.16 apply where a witness forgets his evidence?

Per the wording of the Act, s.16 applies in three situations:

11 Criminal Justice Act 2006, s.16(4)(b)
12 ibid s.16(4)(b)
13 [2013] IECCA 1 at par 28
14 ibid at par 28
15 ibid at par 61. As no such objection had been made at the trial the appellant was not permitted to rely on this ground on appeal.
16 ibid at par 10

where the witness refuses to give evidence; denies making the statement; or gives materially inconsistent evidence. On one view an assertion by a witness that he cannot remember the relevant evidence appears not to satisfy either of these criteria in the sense that the witness is not refusing to give evidence, he is not denying that he made the statement, nor is he giving materially inconsistent evidence.

This issue arose in DPP v Rattigan as the witnesses purported to have no recollection of the stabbing. The Court of Criminal Appeal held that s.16 could be used in such circumstances on the basis that such forgetfulness could amount to giving evidence which was materially inconsistent with the prior statement:

“While there was some argument as to whether section 16 could be said to apply to a situation in which a witness had given some evidence and then professed a lack of memory on other matters, this Court is satisfied that it can be said of the two relevant witnesses here that they had given evidence which was materially inconsistent with their statements and therefore came within the terms of the statute, if it was properly applicable in the case.”

Can s.16 be used in the prosecution of offences which pre-date its enactment?

In Rattigan, it was also argued that s.16 statements were unlawfully used in his murder trial as the murder pre-dated the enactment of the section. This, according to the applicant, violated the constitutional prohibition of statutes acting retrospectively. In rejecting this argument O’Donnell J noted:

“on its face, the legislation acts prospectively. It only applies when at a trial, which necessarily must occur after the coming into force of the Act...”

The applicant also made a related argument based on the language of s.16(4) which provides, inter alia, that a statement shall not be admitted if it is unfair to the accused. In this case there had been some delay on the part of the prosecution. In essence the argument was that had the prosecution been conducted with appropriate speed, the trial would have occurred at a time prior to the coming into force of the 2006 Act, and accordingly the applicant suffered a prejudice because s.16 could not have been invoked against him in such proceedings. Again this argument was rejected on appeal on the basis that no prejudice was suffered by the accused. O’Donnell J stated:

“It is not normally a prejudice if applicable law is applied in fact. It cannot be the case that the invocation of section 16 per se is unfair or a prejudice to the accused. … It is difficult to see how the applicant’s position can be said to have suffered the
type of prejudice which would render the trial, or the admission of the statements, unfair to him particularly when the prejudice asserted amounts to a contention that the accused was no longer able to benefit from the lamentable fact that a witness might refuse to give evidence in accordance with a formal statement of evidence provided by him or her, should that occur.\textsuperscript{21}

The statement must be voluntary and reliable

In order for a statement to be admitted pursuant to s.16, it must have been made voluntarily and be otherwise reliable.\textsuperscript{22} Neither of these two cases shed much light on what these concepts entail except insofar as Murphy notes that counsel for both parties sought to rely on the case law dealing with voluntariness in the context of confession statements which it described as “analogous,”\textsuperscript{23} and stated:

“[a]s the Court can see no material difference in the underlying principles, there is no reason why such should not also apply to that requirement of s.16 of the 2006 Act.”\textsuperscript{24}

Discretionary admissibility

It was confirmed in Murphy that the trial judge always retains a discretion not to admit a statement pursuant to s.16 even if it otherwise complies with the statute. This is apparent from two distinct subsections within the Act: first, s.16(1) provides that statements “may, with the leave of the court” be admitted; and second, s.16(4) provides, inter alia, that the statement cannot be admitted if it is not in the interests of justice to do so where this includes a consideration of whether admission would be unfair to the accused. McKechnie J observed that the use of the word “may” (as opposed to “shall”) in the context of s.16(1) clearly indicates that a court has a discretion to admit the statement.\textsuperscript{25} He continued:

“Express recognition is given to this view by virtue of sub. (4)(a), which in fact prohibits a court from admitting a statement, even if the requisite conditions have been established, where there is a risk of an unfair trial or where the justice of the overall circumstances require it. Given the significance of the legal alteration which the provision has brought about, such overall discretion is well justified.”\textsuperscript{26}

Limited to gangland and organised crime?

Section 16 was enacted as a response to the difficulties in prosecuting organised or gangland crime. It had been argued in DPP v O’Brien,\textsuperscript{27} that the section was limited in its scope to such offences. However, the Court of Criminal Appeal held that the section was not so limited.\textsuperscript{28} In Murphy, the Court affirmed that decision. McKechnie J observed:

“[i]ts provisions however to not appear to be so limited in their application, as the instant case shows, where there is an entire absence of any of the features said to have underlain its creation.”\textsuperscript{29}

It is interesting to note that out of the three cases referred to, it is only Rattigan which related to organised crime.

Conclusion

A number of principles emerge from the two cases discussed: s.16 can be used in non-gangland crime cases; it can be used for offences which pre-date its enactment; and it can apply where a witness claims to forget his evidence. It is also noteworthy that the case-law on voluntariness in the context of confessions is applicable in the s.16 context.

Perhaps, however, the most important features of the judgments are the comments relating to, first, what should feature in the judge’s charge and, secondly, the manner in which the court should consider whether admitting a statement is necessary. In a case where there is an application to admit more than one statement pursuant to s.16, the court must consider each statement separately. It may be necessary to admit one (or two) statements, but three, four or five may be excessive. As regards the judge’s charge, it is clear that it should contain reference to the traditional preference for viva voce evidence, as well as drawing to the attention of the jury all matters relevant to the accuracy and reliability of testimony.

\textsuperscript{21} ibid at par 17
\textsuperscript{22} Criminal Justice Act 206, ss.16(2)(b)(ii) and (iii)
\textsuperscript{23} [2013] IECCA 1, at par 31
\textsuperscript{24} ibid at par 31. It is both undesirable and beyond the scope of this article to rehash that case-law at this point; however, the Court did summarise the position as follows: “In summary, as the aforesaid principles apply to the relevant provisions of s. 16 of the 2006 Act, the position of the Court is to determine whether any relevant statement was made under the influence of an inducement from a person in authority which was calculated to induce that result. The motive or intention of such person is irrelevant. The test has both objective and subjective elements. Even if such inducement is found to have been made, but it did not in fact influence the mind of the person in making the statement, the same shall be regarded as having been made voluntarily and therefore is admissible in evidence. Finally, the burden of proof lies on the prosecution, where it invokes the section, to show beyond reasonable doubt that the statement was made voluntarily.” (par 37)
\textsuperscript{25} ibid at par 24
\textsuperscript{26} ibid at par 25
\textsuperscript{27} [2011] 1 IR 272
\textsuperscript{28} O’Brien was a sexual assault case in which the accused was convicted of several counts of sexual assault of his two daughters. The Court adopted a literal interpretation noting that there was no provision which limited the scope of section 16 to such offences. Macken J stated: “It may well be that developments in this area [gangland or organised crime] some time ago precipitated the enactment of the section. However, the section must be read as enacted. It is not confined to gangland crime or to any particular offence or category of offence, and is in no way restricted either expressly or by implication by the words of the section itself or by any other provision of the Act of 2006, or by any other statute produced to the Court .... There is no basis in law for suggesting that it is to be limited in its application in the manner contended for,” at par 69
\textsuperscript{29} [2013] IECCA 1, at par 22
Recent Developments in Charities Regulation

LOUISE BEIRNE BL

Introduction
To coincide with the planned enactment of the Charities Act, 2009 and the establishment of the Charities Regulatory Authority (“CRA”), the Bar Voluntary Assistance Scheme VAS hosted a conference on Charities Regulation on 3rd July, 2014. Mr. Justice Clarke chaired the conference, which was well attended by lawyers and representatives of various charities. There were four speakers at the conference: the CEO Designate of the CRA, a senior counsel and two representatives from charities. In addition to presentations from the point of view of the regulator and the regulated, there was an analysis of some of the major changes in the law to be effected by the Charities Act, 2009 (“the 2009 Act”).

Implementing the 2009 Charities Act
Úna Ní Dhubhghaill, CEO Designate of the CRA, opened the conference explaining that the CRA was in the process of coming into existence. She described the steps which were being taken to implement the 2009 Act from a public administration perspective.

The CEO outlined the various areas of work which the CRA shall be engaged in, namely the establishment of a register of charities, the preparation of reporting frameworks for charities, the provision of education and advice to charities, monitoring and ensuring compliance with the 2009 Act and the regulation of charitable fundraising. The CEO stated that the current focus of the CRA was on its establishment as an agency and the development of an initial register of charities. She stated that a 16 member Board was appointed on 30th April, 2014, that the staff team of the CRA comprised the CEO and 10 members of staff drawn from the Department of Justice and Equality and the Office of the Commissioners of Charitable Donations and Bequests for Ireland and that the CRA was to be formally established on 16th October, 2014.

She stated that the implementation of the 2009 Act shall bring major changes in that charities, which have never before been regulated as charities, shall now be regulated as charities. She stated that the requirement that charities are registered with the CRA, the publication of the register, the submission of annual reports and accounts by charities to the CRA and the publication of these reports and accounts are all major changes, which shall enhance transparency and the accountability of charities. As regards accountability, she referred to the CRA’s powers in terms of investigations and sanctions under the 2009 Act. At the same time that the CEO highlighted the number of changes which were coming down the tracks, she also stated there are more matters staying the same; for example, she highlighted the definition of charitable purpose which has not changed. Therefore, the CRA shall not be able to grant charitable status to an organisation which did not previously meet the definition of a charity. She also stated that there is no change as regards charitable tax exemptions and that this matter is not within the remit of the CRA.

The CEO stated that all charities that are recognised by the Revenue for the purpose of a tax exemption shall be automatically recognised as charities by the CRA. She stated that the register shall contain mandatory data fields, as required by the 2009 Act, but added that the CRA would hope to collect more information than that required by the 2009 Act. She pointed to section 39 of the 2009 Act, which allows for additional information to be collected.

She highlighted that the Act provides that every charity registered is required to submit an annual activity report. She stated that every report submitted shall be published, save for reports submitted by entirely private charitable trusts. She added that the form and content of these reports and audit thresholds shall be set out in regulations.

The CEO stated that the education and advice function of the CRA shall comprise an important part of its work. She envisaged that this function shall involve communicating what the CRA does, in addition to providing advices to charities and information to members of the public. She stated that the next step after the establishment of the initial register shall be communicating with individual charities in such a way that complements existing advisory initiatives.

Fundraising
She explained that monitoring and compliance was not a key area of work for the CRA at this stage of its existence. She also stated that the CRA would not have a direct regulatory role in terms of charitable fundraising and that the Street and House to House Collections Act, 1962 shall remain the key piece of legislation. However, she also stated that the implementation of the 2009 Act shall have an impact on fundraising. For example, she stated that it is an offence under the 2009 Act for an unregistered charity to fundraise and for an unregistered charity to hold itself out as being registered. She also stated that the requirements of the 2009 shall have an impact in terms of increased transparency as regards the use of money which is fundraised. She stated that the CRA has capacity in terms of its advisory role to develop a code of practice for fundraising and that the Minister has powers under section 97 of the Act to make regulations in relation to charitable fundraising.
The CEO hopes that the register of charities shall be published early next year. She stated that there is no definitive date for its publication and that the CRA is in the process of developing an online registration system, which is currently being tested by a small group of charities.

Changes in the Law to be effected by the Charities Act, 2009

Denis McDonald SC presented a paper dealing with some of the major changes to charity law, particularly as regards the regulation of charities, which shall take effect once the 2009 Act is brought into force. He firstly outlined some of the key features of the present system. There was no system providing for the registration of charities in Ireland or unified system for supervising charities or regulating their activities prior to the introduction of the 2009 Act. He stated that such regulation that did exist was carried out by the Commissioners of Charitable Donations and Bequests, the Attorney General, the Garda Síochána and the Revenue Commissioners. He stated that the Commissioners of Charitable Donations and Bequests did not have any real regulatory power, but had limited powers to assist charities. He further noted that the Garda Síochána could intervene in the exercise of its normal powers; for example, if there were evidence of fraud. He stated that the Revenue Commissioners did not really perform a regulatory role as regards charities, but noted that it has had a role, which it shall continue to perform, in the context of tax relief for charities.

Charitable Purpose

He highlighted the new statutory definition of “charitable purpose”. He referred to section 3 of the 2009 Act, which sets out what will be regarded as a charitable purpose:

(a) The relief of poverty or economic hardship;
(b) The advancement of education;
(c) The advancement of religion; and
(d) Any other purpose that is of benefit to the community.

He noted that although these categories are formulated in modern language, they are not in themselves new. He stated that while the definition has not changed, the definition has been developed through judge-made law. The definition is now enshrined in statute.

He also highlighted section 3(2) which states that a ‘purpose shall not be a charitable purpose unless it is of public benefit’. He stated that the requirement of public benefit is not new; however, prior to the coming into force of the 2009 Act, trusts falling within the first three categories (namely the relief of poverty, the advancement of education and the advancement of religion) were presumed to be for the benefit of the community unless the contrary was shown. He pointed out that the 2009 Act removes this presumption, except in the case of religious charities. He stated that once the 2009 Act is brought into force, it will be necessary to prove that a charity (other than one for religious purposes) is of public benefit.

He stated that there were a number of curious provisions in the 2009 Act as regards religious charities. By way of example, he highlighted section 3(10). He stated that this provision makes clear that a gift will not be treated as a gift for the advancement of religion if it is made for the benefit of an organisation or cult, the principal object of which is the making of profit or that employs "oppressive psychological manipulation" of its followers or for the purposes of gaining new followers. He pointed out that there is no definition of "cult" or "religion" in the 2009 Act and described these omissions as curious.

He stated that up to recently, the case law has been quite clear that religion must involve belief in a "supreme being". However, he stated that very recently, the U.K. Supreme Court has taken the view that belief in a supreme being is not required and in those circumstances, in the case of R (Hodkin) v. Registrar General of Births, Deaths & Marriages [2013] UKSC 77, the U.K. Supreme Court held that Scientology should be recognised as a religion.

Charitable Organisation

He also highlighted the definition of “charitable organisation” contained in section 2(1) of the 2009 Act, taking care to point out that this is a newly defined concept. In particular, he noted that that this provision clearly envisages that a charitable organisation that is required under its constitution to expend monies in remuneration and superannuation of staff members shall still be regarded as a charitable organisation. He characterised this as a sensible arrangement given that many charities can only operate with the assistance of paid staff. He also noted that section 2(1) envisages that a religious community may allow some of the funds of that community to be spent on accommodation and care of the community concerned and characterised that provision as unremarkable. However, he also drew attention to the fact that the reference to remuneration and superannuation and to accommodation and care (in the case of religious communities) in this provision is not qualified in any way. He pointed out that the definition does not refer to “reasonable remuneration and superannuation” or to “reasonable accommodation and care”. There is, nonetheless, a requirement that a charity should be of public benefit. While religious charities have a presumption of public benefit, if it transpired that, in fact, a religious organisation was devoting its funds exclusively to the care and accommodation of its members, it is doubtful that it could still be characterised as a charity.

Removal from the Register of Charities

He went on to consider section 43 of the 2009 Act, which sets out the circumstances in which a charitable organisation can be removed from the register: where the CRA, after consultation with An Garda Síochána, is of opinion that the registered body is or has become an “excluded body” by virtue of its promoting purposes that are unlawful or contrary to public morality or public policy or in support of terrorism or terrorist activities or for the benefit of an organisation, the membership of which is unlawful; where the name of the body has been changed without the consent of the CRA, where the charitable organisation has been convicted of an offence, where there has been a contravention of certain provisions of the 2009 Act or where the charitable organisation has contravened or failed to comply with
a direction of the CRA. He noted that the CRA has an important power under section 43(6) of the 2009 Act to apply to the High Court for a declaration that the body is not a charitable organisation in circumstances where the CRA forms the opinion that a body which has previously been registered on the register is not a charitable organisation within the meaning of the Act.

He queried whether the requirement to keep proper books and records actually constitutes a new departure for charities. While he noted that there was no statutory requirement for a charity (which had not been incorporated as a company under the Companies Acts) to maintain any books and records, he added that the non-statutory requirement of a trustee to keep accounts of trust property must surely have applied to charities.

He highlighted section 50 of the Act as an important new requirement that captures charities that are not companies registered under the Companies Acts. He outlined how this provision imposes an obligation on charitable organisations to have the accounts of the organisation audited on an annual basis save where the gross income or total expenditure of the charitable organisation does not exceed a limit which may be prescribed by the Minister but which must not be greater than €500,000. He noted that charities which come within this exception must at minimum, be examined by an independent person approved by the CRA. He further noted that the CRA has the power under section 50(4) of the 2009 Act to give a direction to the charity trustees of an organisation coming within this category requiring the charity to be audited.

Finally, he noted in terms of this provision, that the CRA is given significant powers in the event that a charitable organisation, which is required to file accounts under Section 50(1), either does not have its accounts audited or the CRA is not satisfied with the manner in which the accounts have been audited. He stated that in such circumstances, the CRA may appoint a qualified person to audit the accounts concerned.

He referred to section 52 of the 2009 Act, which concerns the publication of reports submitted to the CRA. In that regard, he considered that companies are only required to provide details of salaries on an aggregate basis. In light of recent controversies, he wondered whether the Minister for Justice might be inclined to require charities to list renumerations over a particular level.

Powers of investigation

He referred to the CRA’s powers of investigation, which he characterised as very significant. He pointed out that section 64 of the 2009 Act, which allows the CRA to appoint an “inspector” to investigate the affairs of the charitable organisation and to prepare a report to the CRA does not contain any requirement that the CRA have a particular concern in order to exercise this power. He compared this provision to the equivalent provision under the Companies Act, which requires that there are good grounds and that an application be made to the High Court.

He stated that where an inspector is appointed, the charity trustees or the agents of the charitable organisation must produce all books, documents and other records and noted that this power is similar to that which previously existed under the 1961 Act. He further noted that the charity trustees or the agents of the charitable organisation must attend before the inspector and give to the inspector all assistance in connection with the investigation as they are reasonably capable of providing. He concluded by observing that this obligation to provide assistance goes well beyond existing law.

The perspective of charities

The next two speakers spoke about the 2009 Act from the perspective of charities. Both speakers have extensive experience of working in and with charities and the voluntary sector and both have been involved in assisting in the development of codes of practice for charities.

Fr. Gerard O’Connor, whose experience includes leadership of the Audit Committee of the Department of Foreign Affairs, spoke first. He outlined how international NGOs have been working with the guidance of Dóchas International NGOs Code of Corporate Governance for the last 10 years. He also noted that most of the seasoned charitable organisations in Ireland have been following SORP (the Statement of Recommended Practice, Accounting and Reporting by Charities) for years. These guidelines were developed, in accordance with Accounting Standards Board guidelines, by the Charity Commission for England and Wales, and by the Scottish regulator.

The burden of regulation

He expressed concern that people who have a genuine interest in making a positive change to their communities might be frightened off by the burden of regulation. He wondered where the next generation of Board Directors or Trustees would come from. He emphasised the difficulty in getting people involved in charities and attending meetings.

He stated that there will be a need for the media to be prudent as regards how it reports on the voluntary sector. By way of example, he examined the potential for misinterpreting a reserve a charity might hold. While a charity might hold a large amount on reserve, this can occur where the funds are designated for a large-scale project, such as the building of a school in Haiti after the earthquake. Charities will need to be able to explain these matters in their reports.

Deirdre Garvey, CEO of The Wheel, which is a support and representative body for community, voluntary and charity organisations in Ireland, spoke next. She stated that The Wheel had advocated for legislation regulating charities. While echoing the concerns expressed by Fr. O’Connor, she stated that The Wheel is of the view that charity regulation is a good idea. She stated that the approach and culture of the CRA in rolling out the legislation will be of paramount importance and that it is also important that the CRA be adequately resourced.

She noted that 50% of the organisations operating in this sector have no paid staff. Bearing in mind the resource constraints which these organisations experience, she identified some of the challenges which the implementation of the 2009 Act will bring; for example she noted that charities must ensure that the information contained on the register is correct. She noted that a Director’s report for SORP accounts can be 35 pages long and suggested that the CRA would ensure that reporting requirements are proportionate to the size of reporting organisations. She also pointed out
that charities have no idea at present how much registration will cost and suggested that the cost of registration also be graded depending on the size of the charity. She noted that the provisions in the 2009 Act concerning whistleblowers will oblige charities to put new policies and procedures in place. She noted that the 2009 Act is silent on advocacy and thus the current situation will continue whereby advocacy is allowed so long as it is limited to charitable purposes.

She welcomed the amendments to the 1962 Act which are contained in the 2009 Act. She noted that these amendments will mean that charities who do not currently have to get a permit for a non-cash pledge donation shall require a permit. She also welcomed the requirement concerning sealed containers with numbers prominently displayed for cash collections.

She concluded by saying that there is a need for those who run charities to communicate differently with the public about what the charity does because the traditional trust which people have had in charities is broken.

Post-script

The CRA was formally established on 16th October, 2014 and the planned enactment of many of the key provisions of the Charities Act, 2009 is awaited.

---

Child Care Law Reporting Project

Pictured at the launch of the second interim report for the Child Care Law Reporting Project are Dr Rosemary Horgan, President of the District Court and director of the project Carol Coulter.
President Higgins Visits Irish Rule of Law Project in Malawi

EMMA DWYER, IRLI COORDINATOR

The Irish Rule of Law International (IRLI) team in Malawi had the opportunity to meet with President Michael D Higgins on 11th November during his visit to the country. This was part of a three-country trip including Ethiopia and South Africa, where President Higgins recognized the immense contribution that Irish aid agencies, workers and missionaries have made in Africa.

As part of his meetings with Irish aid organisations, IRLI gave a presentation about the work being done by Irish lawyers to strengthen the criminal justice system in Malawi. Excessive use of detention and the lack of a comprehensive legal aid system, amongst other factors, have resulted in considerable overcrowding in Malawi’s prisons. The work of IRLI in Malawi involves supporting the provision of legal representation to prisoners being detained for prolonged periods without trial, as well as providing targeted training to advocates, police officers, magistrates and other key stakeholders.

IRLI Project Coordinator, Jane O’Connell and Programme Lawyer, Morgan Crowe explained to President Higgins the overall approach of the project in Malawi, while some of IRLI’s local partners outlined other specific activities. The Chief Resident Magistrate Ms. Ruth Chinanga, spoke about IRLI’s magistrates training workshops; Constable Yotamu Chaoaine of the Malawi Police Force explained how he has worked with IRLI to facilitate police trainings as part of the Diversion Training Programme; and young Thokozani Malimbika spoke about her participation in ‘Mwai Wosinthika’, a life skills education programme for at risk youth and young offenders. In addition, IRLI also works in the Legal Aid Department and Office of the Director of Public Prosecution to support improved case management and case file review, in addition to facilitating Community information sessions to educate people about their legal rights and about the criminal justice system itself.

The project in Malawi has been running since 2011 and is supported by Irish Aid and the Human Dignity Foundation, as well as from donations and fundraising events. Irish lawyers travel to work on the project for periods of 6-12 months and the success of the project is as a result of the incredible work that these volunteers have done. In an interview for the Irish Times, the President said that the project is an “initiative that is being assisted by very fine young people from the legal system in Ireland”.

IRLI is a joint initiative of the Law Society of Ireland and Bar Council of Ireland, and the project in Malawi is one of a number of interventions aimed at strengthening the rule of law in development countries. You can read more about the work of IRLI on our website www.irishruleoflaw.ie.

Pictured are President Higgins with his wife, Sabina, IRLI Project Coordinator, Jane O’Connell, IRLI Programme Lawyer, Morgan Crowe and Chief Resident Magistrate Ms. Ruth Chinanga
ADMINISTRATIVE LAW

Statutory Instruments
Appointments of special advisers (minister for arts, heritage and the gaeltacht) (no.2) order 2014
SI 403/2014

AVIATION

Library Acquisitions
Hanley, Donal Patrick
Aircraft operating leasing: a legal and practical analysis in the context of public and private international air law
N327

CHARITY

Statutory Instruments
Charities act 2009 (commencement) order 2014
SI 457/2014
Charities act 2009 (establishment) order 2014
SI 456/2014

COMPANY LAW

Insolvency

Liquidation

COMPETITION LAW

Energy
Legality of detention


Douglas v DPP

Legislation


Douglas v DPP

Legislation

Challenge to constitutionality of Criminal Law (Suicide) Act 1993, s 2(2) – Declaration sought that criminalisation of aiding, abetting, counselling or procuring suicide or attempted suicide of another invalid having regard to the Constitution and incompatiable with State’s obligations under ECHR – Plaintiff in late stage of incurable degenerative condition – Unable to end own life – Severe pain – Locus standi – Whether possible to argue constitutional rights interfered with by measure indirectly preventing exercise of

Fraud


Specific performance

CONTRACT

Breach


– Breach of Contract
– Finding of binding contract

Legal Update December 2014

Page cxxxii
Park East South East Construction Limited v Bensic

Articles
Ni Filionn, Deirdre
Breach and termination of contracts: recent guidance from the courts
2014 21 (8) Commercial law practitioner 183

CONVEYANCING

Library Acquisitions
Brennan, Gabriel
Casey, Nuala
Law Society of Ireland
Conveyancing
7th ed
Oxford : Oxford University Press, 2014
N74.C5

Articles
Logue, Fred
Monkey see, monkey do
2014 (October) Law Society Gazette 26

CRIMINAL LAW

Appeal
People (DPP) v Caffery

Appeal
People (DPP) v Connolly

Appeal
People (DPP) v Dreams

Appeal
People (DPP) v Finanean

Appeal
People (DPP) v Kelly

Appeal
People (DPP) v McCallagh

Appeal
People (DPP) v McManus

Appeal
Application for leave to appeal against sentence – Possession of firearm with intent – Failure to structure sentence in ideal manner – Failure to fix level of seriousness of offence before applying mitigating factors – Detailed recital of all factors by trial judge – Absence of cooperation – Absence of guilty
plea – Whether sentence imposed in range of appropriate sentences – Firearms Act 1925 (No 17), s 15A(a) – Leave refused (114/2006 – CCA – 27/1/2012) [2012] IECCA 7 People (DPP) v Quinn

Appeal


Disposal of property


Evidence


Extradition

Extradition


Extradition


Extradition


Judicial review


Practice and procedure


Proceeds of crime

Proceeds of crime


Delaney v Judge Coughlan

Sentence


People (DPP) v Bagley

Sentence


People (DPP) v C(N)

Sentence


People (DPP) v Fagan

Library Acquisitions

Young, David
Summers, Mark
Corker, David

Abuse of process in criminal proceedings

4th ed

Haywards Heath : Bloomsbury Professional, 2014

M570

Ormerod, David

Blackstone’s criminal practice

2015

Oxford : Oxford University Press, 2014

M500

Articles

Bird, Petra

A rocky road

2014 (October) Law Society Gazette 38
EDUCATION

Statutory Instruments

Further Education and Training Act 2013 (property vesting day) order 2014
SI 260/2014
Further education and training act 2013 (property vesting day) (no 5) order 2014
SI 264/2014

EMPLOYMENT LAW

Dismissal


Stobart (Ireland) Driver Services Limited v Carroll

ENVIRONMENTAL LAW

Articles

Browne, David Surveillance, monitoring and classification of European sites under the habitats directive 2014 (21) 3 Irish planning and environmental law journal 92
Handy, Niall The environmental impact assessment directive amended: signposts on the new path to development consent 2014 (21) 3 Irish planning and environmental law journal 100

EUROPEAN UNION

Free movement of persons


Lahyani v Minister for Justice and Equality

Articles

Bárd, Petra A rocky road 2014 (October) Law Society Gazette 38

Acts

European Stability Mechanism (amendment) Act 2014
Act No.32 of 2014
Signed on 30th October 2014

Statutory Instruments

European Communities (control of organisms harmful to plants and plant products) (amendment) (no.2) regulations 2014 (DIR/2014-78, DIR/2014-83) SI 415/2014
European Union (common fisheries policy) (Faroe islands) revocation regulations 2014 SI 419/2014
European Union (energy efficiency) regulations 2014 (DIR/2012-27) SI 426/2014

European Communities (controls on the import of food of non-animals origin) (amendment) (no.4) regulations 2014 (REG/1021-2014) SI 454/2014

EVIDENCE

Admissibility

New evidence – Appeal to Supreme Court – Application to admit new evidence of matters arising post High Court hearing – Whether special leave of court required to admit such evidence – Whether discretion of court to exclude such evidence – Grounds

**Articles**

Carey, Gearoid

Expert determination: challenging the determination and recourse against the expert 2014 21(9) Commercial law practitioner 199

**FAMILY LAW**

**Child abduction**


**Child abduction**


**Foreign divorce**


**Judicial separation**


**Maintenance**

Children – Maintenance – Access – Judicial review – Fair procedures – Application to quash orders of District Court – Allegation that applicant not heard – Allegation that orders made in absence of sworn testimony – Long running proceedings – History of enforcement applications against applicant – District Court orders appealed to Circuit Court and affirmed – Maintenance order subsequently varied by District Court – Refusal of respondent to vary access order – Refusal of respondent to hear applicant’s
evidence – Family law cases where interest of children concerned not analogous to other litigation – Sequence of hearings leading to final order – Whether respondent entitled to take into account knowledge of case – Whether respondent ought to have acceded to applicant’s request to give evidence – Whether breach of applicant’s rights – A(K) v Health Service Executive [2012] IEHC 288, [2012] 1 IR 794 considered – Relief refused (2012/913)R – O’Malley J – 18/6/2013) [2013] IEHC 268

C(L) v O’Donnell

FISHERIES

Statutory Instruments

European Union (common fisheries policy) (faroe islands) revocation) regulations 2014 SI 419/2014

FOOD

Statutory Instruments


European Communities (official controls on the import of food of non-animal origin) (amendment) (no. 4) regulations 2014 (REG/1021-2014) SI 454/2014

FORESTRY

Acts

Forestry Act 2014
Act No.31 of 2014
Signed on the 26th October 2014

HOUSING

Statutory Instruments

Housing assistance payment (amendment) regulations 2014 SI 428/2014

Housing assistance payment (section 50) (no. 2) regulations 2014 SI 427/2014

Housing (miscellaneous provisions) act 2009 (commencement of section 32(A)) order 2014 SI 429/2014

Housing (miscellaneous provisions) act 2014 (commencement of certain provisions) order 2014 SI 404/2014

HUMAN RIGHTS

Legal Update December 2014

Evidence: Family law cases where interest of children concerned not analogous to other litigation – Sequence of hearings leading to final order – Whether respondent entitled to take into account knowledge of case – Whether respondent ought to have acceded to applicant’s request to give evidence – Whether breach of applicant’s rights – A(K) v Health Service Executive [2012] IEHC 288, [2012] 1 IR 794 considered – Relief refused (2012/913)R – O’Malley J – 18/6/2013) [2013] IEHC 268

C(L) v O’Donnell

Asylum


A(O) v Refugee Appeals Tribunal

Asylum


Aiwal (Somalia) v Minister for Justice and Equality

Asylum


B v Refugee Appeals Tribunal

Asylum


D(f) v Minister for Justice, Equality and Law Reform

Asylum

Application for leave – Certiorari – Application for extension of time – Negative credibility findings – Subsidiary protection refused – Order for deportation of husband executed – Limitation period – Priority to applications by Nigerian asylum seekers – Declarations of incompatibility sought – Fear of female circumcision – Fear of political persecution – Inconsistencies – Finding in relation to husband’s claim relevant to wife’s claim – Internal relocation – Delay in arriving at decision – Duty to determine appeal within reasonable period – Children’s interests – Whether substantial grounds upon which to grant leave to appeal for judicial review – Whether substantial grounds to justify extension of time – Whether reasonable to expect applicant to seek refuge in different part of country – Whether biased – Whether pre-judgment of wife’s claim – Whether claim properly analysed – Whether tribunal member properly weighed and assessed evidence – Whether delay was breach of right to good administration – Whether delay so unreasonable as to render decision flawed

Page cxxxviii
Claim – Whether forward looking test applied – Challenge to negative recommendation

[2013] IEHC 537


M(LA) v Minister for Justice and Law Reform

Asylum

Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum


Asylum

Deportation


N(A) v Minister for Justice and Equality


Savly v Minister for Justice and Equality

Judicial review


N(D) v Minister for Justice and Equality

Practice and procedure


A(T) v Refugee Appeals Tribunal

INJECTIONS

Interlocutory injunction


Camden Street Investments Ltd v Vangard Property Finance Ltd
Interlocutory injunction

INSOLVENCY

Articles
McDermott, Des
The Berkeley Applegate Order: recovery of a liquidators remuneration from trust assets - The Berkeley Applegate Order: recovery of a liquidators remuneration from trust assets - 16/8/2014

JUDGMENTS

Library Acquisitions
Graham, Ruth
Bingham and Berryman’s personal injury and motor claims cases 14th ed London : LexisNexis, 2014 N294,M6

LAND LAW

Security

McAteer v Sheahan

Articles
Hoj, Kevin
Ramble on 2014 (August/September) Law Society Gazette 20

LANDLORD AND TENANT

Library Acquisitions
N90,C5
Wylie, John C W
Landlord and tenant law 3rd ed Dublin: Bloomsbury Professional, 2014

LEGAL HISTORY

Library Acquisitions
Gaynor, Mary
McDermott, Mark
To end all wars 2014 (August/September) Law Society Gazette 32

LEGAL PROFESSION

Library Acquisitions
Hosier, Maeve
The regulation of the legal profession in Ireland New Orleans : Quid Pro Books, 2014 L50,C5

LEGAL TECHNIQUE

Library Acquisitions
Duncan, Nigel
Wolfgang, Allison
City Law School, London

Articles
Gaynor, Mary
McDermott, Mark
To end all wars 2014 (August/September) Law Society Gazette 32

LEGAL TECHNIQUE

Library Acquisitions
Duncan, Nigel
Wolfgang, Allison
City Law School, London

Articles
Gaynor, Mary
McDermott, Mark
To end all wars 2014 (August/September) Law Society Gazette 32

LOCAL GOVERNMENT

Statutory Instruments
Local government (expenses of local authority members) regulations 2014 SI 236/2014

Local Government (supernuation) (consolidation) (amendment) scheme 2014 SI 288/2014

MEDICAL LAW

Library Acquisitions
Harper, Richard S

Legal Update December 2014

Page cxlii
Medical treatment and the law: issues of consent: the protection of the vulnerable: children and adults lacking capacity
2nd ed
Bristol: Jordan Publishing Ltd, 2014
N185.122

Statutory Instruments
Pharmaceutical Society of Ireland (education and training) (integrated course) rules 2014
SI 377/2014
Pharmaceutical Society of Ireland (fees) rules 2014
SI 378/2014

MENTAL HEALTH

Library Acquisitions
Butler, Michael
A practitioner’s guide to mental health law
N155.3

MORTGAGE

Library Acquisitions
Clark, Wayne
Fisher and Lightwood’s law of mortgage
14th ed
London: LexisNexis, 2014
N56.5

NEGLECT

Medical negligence

Practice and Procedure

Statutory Instruments
Personal insolvency act 2012 (prescribed financial statement) regulations 2014
SI 259/2014
Personal insolvency act 2012 (regulatory disclosure statement of a personal insolvency practitioner) regulations 2014
SI 319/2014

PLANNING & ENVIRONMENTAL LAW

Compulsory purchase order
Practice and procedure

Costs – Planning and development costs – Applicant successful in proceedings – General rule regarding no order as to costs – Discretion to award costs – Costs reflecting extent to which applicant succeeded – Acts or omissions of respondent – Portion of costs – Number of grounds raised – Length of case – Documentation – Apportionment of responsibility – Whether to exercise discretion to award costs – Whether additional grounds materially added to length of proceedings – Whether grounds frivolous or vexatious – Rules of the Superior Courts 1986 (SI 15/1986), O 99 – Planning and Development Act 2000 (No 30), ss 20(3)(q) and 50B – Costs awarded to successful applicant (2011/863JR – Peart J – 1/12/2013) [2013] IEHC 580

Unauthorised use


Costs v O’Toole

Articles

Cummins, Kieran

The Dance

2014 (August/September) Law Society Gazette 24

PRIVILEGE

Articles

Anyadie-Danes, Monye

Mediation privilege

2014 (32) (15) Irish law times 223

PRACTICE AND PROCEDURE

Appeal

Preliminary objection to appeal to Supreme Court – Proceedings seeking declaratory relief and damages – Declarations sought that certain guarantees and charges of shares of plaintiffs invalid and that purported deeds of appointment of second defendant on foot of charges be set aside – Preliminary point of law determined by High Court – Whether plaintiffs should be prevented from relying on acts of illegality alleged against first defendant in advance of any other issue – High Court determination that plaintiffs should not be so prevented – View expressed by judge determining preliminary objection that there should not be an appeal at that stage – Appeal by first defendant – Contention of plaintiffs that first defendant obliged to await final determination of High Court action to proceed with appeal – Absence of determination that appeal impermissible – Whether first defendant obliged to pursue before High Court right to appeal to Supreme Court in advance of main proceedings – Alleged undertaking of first defendant not to appeal order determining preliminary issue until after final determination of proceedings – Whether order of High Court contained any restriction on right of appeal of either party – Whether any reference to alleged undertaking in High Court order – Whether first defendant entitled to proceed with appeal – Distinction between determination of preliminary issue in advance of trial and determination of distinct issues of fact or law in course of trial – Directive 03/6/EC – Companies Act 1963 (No 33), s 60 – Appeal permitted to proceed (150/2012 – SC – 12/6/2015) [2013] IESC 27

Quinn v Irish Bank Resolution Corporation Ltd

Contempt


Legal Update December 2014

Page cxiv
**Costs**


**Costs**


**Costs**


**Delay**


**Dismissal of proceedings**

Legal Update December 2014

Page cxlvi

including damages and costs — Solicitors (Amendment) Act 1994 (No 27), ss 3, 4, 5 and 68 — Attorneys’ and Solicitors’ Remuneration Act 1870 (Chap XXVIII), s 4 — Determination that sum paid in settlement all in sum including damages and costs (2010/11346P – Hedigan J – 22/10/2013) [2013] IEHC 462

Strike out


Summary judgment

Application for summary judgment for loan — Loan to fund investment ventures — Sum not repaid despite demand — Estoppel — Representation that loan would not be called in — Date of representation — Subsequent representation that loan would not be called in — Whether bona fide defence — Whether surgical procedure was of unacceptable standard of surgery — Professional negligence — Liability — Back damages awarded (2011/2448P – O’Neill J – 02/11/2012) [2012] IEHC 294

Third party


Summary of proceedings

Order of Master dismissing the proceedings — Whether papers “in order” — Whether Master had jurisdiction to dismiss summary summons where contested case — ACC Bank plc v Thomas Heffernan and Mary Heffernan, (Unrep, Master of the High Court, 18/10/2012) considered — Rules of the Superior Courts 1986 (SI 15/1986), O 37, rr 1, 4, 6 and 7 — Appeal allowed;
TRIBUNAL OF INQUIRY

Tribunals of inquiry
O’Callaghan v Mahon

TRUSTS

Articles
Sammon, Garret
The rule in re Hastings-Bass: recent clarification from the UK 2014 (32) (15) Irish law times 218
Sammon, Garret
Bribes and secret commissions: Clarification from UK 2014 21(9) Commercial law practitioner 211

WHISTLEBLOWERS

Statutory Instruments
Protected Disclosures act 2014 (commencement) order 2014 SI 327/2014

WATER

Statutory Instruments
Water services (no.2) act 2013 (commencement) (no.2) order 2014 SI 422/2014

BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 14TH OCTOBER 2014 TO THE 10TH NOVEMBER 2014

[pmb]: Private Members’ Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Finance Bill 2014
Bill 95/2014
Health Insurance (Amendment) Bill 2014
Bill 101/2014
Personal Insolvency (amendment) bill 2014 as initiated
Bill 96/2014
Social Welfare Bill 2014
Bill 97/2014
Housing (Homeless Prevention) Bill 2014
Bill 100/2014
[pm] Maureen O’Sullivan
Thirty-fourth Amendment of the Constitution (No.2) Bill 2014
Bill 98/2014
[pm] Deputy Brian Stanley
Thirty-Fourth Amendment of the Constitution (No.3) Bill 2014
Bill 102/2014
[pm] Deputy Brian Stanley

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 14TH OCTOBER 2014 TO THE 10TH NOVEMBER 2014

Immigration (Reform) (Regularisation of Residency Statue) Bill 2014
Bill 94/2014
[pm] David Norris, Fiach Mac Conghail, Sean D. Barrett
Social Welfare and Pensions (Amendment) Bill 2014
Bill 100/2014
[pm] Feargal Quinn, Rónán Mullen, Katherine Zappone

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 14TH OCTOBER 2014 TO THE 10TH NOVEMBER 2014

Civil Registration (Amendment) Bill 2014
Bill 71a/2014
Committee Stage – Dáil
Criminal Justice (Terrorist offences) (Amendment) Bill 2014
Bill 82/2014
Committee Stage –Seanad
Criminal Justice (Mutual Assistance) (Amendment) Bill 2014
Bill 84/2014
Committee Stage- Seanad
European Stability Mechanism (Amendment) Bill 2014
Bill 87/2014
Report Stage- Dáil
Enacted
Forestry Bill 2013
Bill 43b/2013
Report Amendments –Seanad
Enacted
Health (Miscellaneous provisions) Bill 2014
Bill 77/2014
Passed by Dáil Éireann
Intellectual Property (Miscellaneous Provisions) Bill 2014
Bill 81/2014
Committee Stage- Dáil
Merchant Shipping (Registration of Ships) Bill 2013
Bill 139/2013
Committee Stage – Dáil
Workplace Relations Bill 2014
Bill 130/2014
Committee Stage – Dáil
Vehicle Clamping Bill 2014
Bill 51/2014
Passed by Seanad Éireann

FOR UP TO DATE INFORMATION PLEASE CHECK THE FOLLOWING WEBSITES:

Bills & Legislation
http://www.oireachtas.ie/parliament/
Government Legislation Programme
updated 17th September 2014
When the Court can Reverse its Decision

JOHN COTTER BL*

Introduction

It is a long established principle that a court has jurisdiction to reverse its decision at any time until the order is perfected, but not afterwards.1 Until early 2013, the courts of England and Wales had taken a restrictive approach in identifying circumstances in which it would be appropriate for a court to exercise this jurisdiction; the Court of Appeal ruling in a series of cases that it should not be exercised “save in most exceptional circumstances”2 or where there were “strong reasons”3 for doing so. This approach, synthesised by the Court of Appeal in Paulin v Paulin4, was approved by Clarke J in the High Court in In Re McInerney Homes Ltd5 as representing the law in Ireland.

In February 2013, however, the UK Supreme Court in In re L6 rejected the approach taken theretofore, ruling that jurisdiction to reverse before the perfection of an order was not limited to exceptional circumstances and that the overriding objective in the exercise of the power was to deal with the case in question justly. This article sets out a brief history of the jurisdiction and the development of the courts’ attitude to its exercise, before moving on to more recent developments including Irish acceptance of the approach of the Court of Appeal in Paulin and the subsequent rejection by the UK Supreme Court of that approach. Finally, the article will ask whether the Irish courts should retain the status quo or whether the latest approach of the UK Supreme Court should be adopted in Ireland.

Historical Background

In In re Suffield and Watts; Ex p Brown,7 the Court of Appeal of England and Wales made a distinction between orders which had been perfected, in which cases, appeal was the appropriate course of action for a party seeking to reverse the decision, and orders which had not yet been perfected, in which case the court had the power to re-consider the matter. However, as Lady Hale pointed out in In re L, the comments of the judges of the Court of Appeal on the position concerning unperfected orders were obiter as the case at bar concerned the varying of an order made in bankruptcy proceedings which had been perfected.8 However, the principle that a court could reverse its decision prior to perfection of the order was definitively established, in Lady Hale’s words, “no later than” the decision of the Court of Appeal in Milensted v Grosvenor House (Park Lane) Ltd.9 Until 1972, no attempt had been made by the courts in the England and Wales or in Ireland to define or limit the circumstances in which a court should exercise this jurisdiction. Indeed, there seemed initially to be a marked reluctance to place restrictions on the exercise of this jurisdiction. In In re Harrison’s Share under a Settlement,10 the Court of Appeal of England and Wales rejected the submission that it should be exercised in cases of manifest error or omission only. In that case, Jenkins LJ appeared particularly worried about judges being bound by their ex tempore judgments, stating that since in practice few judgments were reserved, “it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae”.11

However, the decision of the Court of Appeal of England and Wales in Barrell marked a significant tightening up of the circumstances in which the jurisdiction could be exercised. In Barrell, the Court of Appeal held that where judgment had been given, but the order had not been perfected, the matter could not be reopened, “save in the most exceptional

---

* BCL (Law and German), LLB (Hons) (NUI-UCC); Barrister-at-Law (King’s Inns; Middle Temple); PhD candidate (Duhl); Senior Lecturer, University of Wolverhampton.

1 Delany, H. and McGrath, D., Civil Procedure in the Superior Courts (Dublin: Roundhall, 2012), p. 784. The judgments of the Court of Appeal in In re Suffield and Watts, Ex p Brown (1888) 20 QBD 693 are generally cited as the first decided authority for this principle, even though the judges’ comments were obiter.


3 Cie Noga d’Importation et ‘Exportation S/A v Abacha [2001] 3 All ER 513.


5 Re McInerney Homes Ltd [2011] IEHC 25.

6 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634.

7 The judgments of Wilson LJ in Paulin v Paulin [2010] 1 WLR 1057 at 1069-1074 and Lady Hale in In re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 640-643 set out useful histories of the jurisdiction and the circumstances in which it should be exercised.

8 In re Suffield and Watts, Ex p Brown (1888) 20 QBD 693.

9 In re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 641.

10 In re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 641; Milensted v Grosvenor House (Park Lane) Ltd [1937] 1 KB 717.

11 In re Harrison’s Share under a Settlement [1955] Ch 260.

12 Jenkins LJ; Hodson LJ and Vaisey J concurring.

13 In re Harrison’s Share under a Settlement [1955] Ch 260 at 276.
circumstances”. The decision in Barrell was subsequently affirmed by the majority of the Court of Appeal in Stewart v Engel. However, there was subsequently some disquiet about the “save in the most exceptional circumstances” formula, with Rix LJ in Cie Noga d’Importation et ‘Exportation SA v Abacha expressing his concern about the possibility of the existing formula becoming a straitjacket at the cost of the interests of justice and his promotion of a formula of “strong reasons” as an acceptable alternative. Wilson LJ (as he was then) giving the judgment of the Court of Appeal in Paulin carried out a comprehensive analysis of the existing authorities, which may act as a useful summary of the law prior to the judgment of the UK Supreme Court in In re L:

(a) A judge’s reversal of a decision should be distinguished from his or her absolute discretion to amplify the reasons for a decision at any time prior to the perfection of the order;
(b) A judge has jurisdiction to reverse his or her decision at any time prior to the perfection of his or her order;
(c) However, the jurisdiction to reverse prior to perfection of an order should not be exercised “save in the most exceptional circumstances”, as per the judgment in Barrell;
(d) The formula suggested by Rix LJ in Cie Noga d’Importation et ‘Exportation SA v Abacha and approved by May LJ in Robinson v Fernsby to the effect that the jurisdiction to reverse could only be exercised where there were “strong reasons” for doing so was an acceptable alternative to the “save in the most exceptional circumstances” formula of the Court of Appeal in Barrell.

This summation of the law was approved by Clarke J in the High Court as representing the law in this jurisdiction in McInerney.

In Re McInerney Homes Ltd; Irish Acceptance of Paulin

The McInerney case arose in the context of examinership proceedings. On Monday, the 10th January 2011, Clarke J in the High Court gave judgment refusing to confirm a scheme of arrangement proposed by the examiner on the grounds that the scheme proposed would be transferred to the National Asset Management Agency (NAMA). Clarke J held that the matter should be re-opened.

The decision of Clarke J to reverse his decision was subsequently raised on appeal to the Supreme Court, where the decision of the High Court was upheld. However, Clarke J decided not to make any formal order on that date, adjourning the matter instead to that Friday, the 14th January 2011, for the making of a formal order, and to hear counsel as to any other orders to be made.

However, when the matter came before Clarke J on the Friday, counsel on behalf of McInerney informed Clarke J of the company’s intention to invite him to reconsider his judgment of the previous Monday. It was asserted on behalf of McInerney that evidence had emerged, in the days subsequent to the judgment, from two e-mails sent to it on behalf of Bank of Ireland Group Legal Services to the effect that there was a very high degree of likelihood that the interests held by Bank of Ireland and Anglo Irish Bank, two members of the Banking Syndicate, in the loans advanced to McInerney would be transferred to the National Asset Management Agency (NAMA). Clarke J after hearing counsel for McInerney, the examiner and the Banking Syndicate adjourned the matter to the following Monday, the 17th January, to allow the Banking Syndicate to file a replying affidavit, which it duly did.

The argument advanced by counsel on behalf of the Banking Syndicate was that the possible involvement of NAMA had been known to all parties from the earliest stages and that McInerney could have advanced this argument at the hearing prior to the judgment of the 10th January. However, counsel on behalf of McInerney argued in response that it had been misled by the complete absence of any materials put before the Court by the Banking Syndicate that the loans in question could be taken over by NAMA.

Clarke J quoted at length the judgment of Wilson LJ in Paulin stating that the quoted portion of that judgment “represents the law in this jurisdiction”. The judge continued that where the basis for seeking that a court revisit its judgment is to be found in the proposed presentation of new evidence or materials, the new materials must be such “that same would probably have an important influence on the result of the case, even if not decisive and be credible”. Moreover, the learned judge held that such new evidence should “not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court at the trial”. Applying these tests to the case before him, Clarke J concluded, firstly, that the new material placed before the Court was credible and had the potential to be of real significance to the outcome of the proceedings. Secondly, the learned judge determined that although McInerney shared some of the blame for the material not being before the Court at the hearing due to its failure to make enquiries, the Banking Syndicate’s failure to advert to the possibility of the loans being taken over by NAMA was “objectively apt to mislead”. Accordingly, Clarke J held that the matter should be re-opened.

The decision of Clarke J to reverse his decision was subsequently raised on appeal to the Supreme Court, where the decision of the High Court was upheld. However,
neither O’Donnell J in the judgment for the majority nor Fennelly J in his dissenting judgment found it necessary to express any view on the criteria set out in Paulin.

**In Re L: The UK Supreme Court’s Rejection of Paulin**

The case of *In Re L* arose in the context of care proceedings brought by a local authority in respect of two children who had suffered numerous non-accidental injuries. However, it could not be determined which of the parents of the children had caused the injuries in circumstances where both parents blamed each other. To resolve the issue of the identity of the perpetrator or perpetrators, the judge at Manchester County Court held a fact-finding hearing. The County Court judge delivered an oral judgment on the 15th December 2011, finding that the father had been responsible. When the judgment was transcribed subsequently, it was headed “preliminary outline judgment approved by the court”.

The order of the 15th December had not been perfected when on the 15th February 2012, without having first heard from counsel for either of the parents, the judge delivered a written “perfected judgment” in which she ruled that she could not on the evidence before her decide which of the parents had caused the injuries and that it could have been either of them. A majority of the Court of Appeal upheld the mother’s appeal on the ground that the judge should not have reversed her judgment. The father then appealed the judgment of the Court of Appeal to the Supreme Court.

Lady Hale, delivering the judgment of the Supreme Court, having considered the authorities, pointed out that unlike the Court of Appeal, the Supreme Court was not bound by the *Barrell* line of authority.28 Rather, Lady Hale expressed her agreement with the dissenting judgment of Clarke J in *Stewart v Engel* that a court when considering re-visiting an unperfected order should do so in accordance with the overriding objective in rule 1.1 of the Civil Procedure Rules to “to deal with cases justly.”29 Lady Hale stated further that a relevant factor must be “whether any party has acted upon the [original] decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up.”30 Lady Hale also approved the examples provided by Neuberger J (as he was then) in *In Re Blenheim Leisure (Restaurants) Ltd (No 3)*31 as to when it might be appropriate to exercise the jurisdiction: where the court had made a plain mistake; where the parties had failed to draw to the court’s attention a plainly relevant fact or point of law; where new facts had been discovered after judgment was given.32 However, Lady Hale emphasised that Neuberger J had considered these as mere examples, and adding a further nail to the coffin of *Barrell* and *Paulin v Paulin* and their “exceptional circumstances”/“strong reasons” rationes, Lady Hale stated that “[a] carefully considered change of mind” could be a sufficient reason for a court to exercise its jurisdiction to reverse, stating further that every case was going to depend on its particular circumstances.33

Turning to the case at bar, Lady Hale considered the question of whether anyone involved in the case had irretrievably changed their position as a result of the judgment of the 15th December. The learned judge concluded that the placement of the child in question had not yet been decided and the child had remained where she was for the time being.34 Lady Hale then addressed an argument which had been raised by counsel on behalf of the mother to the effect that even if the County Court judge were entitled to change her mind, she should not have delivered her second judgment of the 15th February without first having given notice to both parties of her intention and provided them with an opportunity to address her. Lady Hale, relying on *In Re Harrison’s Share under a Settlement,* acknowledged that the jurisdiction to reverse should be exercised “judicially and not capriciously.”35 However, the learned judge took the view that there had already been a mass of documentary material before the County Court, together with “the long drawn-out process of hearing oral evidence”, and very full written submissions, and that it was “difficult to see what any further submissions could have done, other than to reiterate what had already been said.”36 Accordingly, the Supreme Court allowed the father’s appeal, resulting in the reinstatement of the judgment of the 15th February 2012.37

**Should the Irish Courts Re-visit the Decision in McInerney Homes?**

The Irish courts have not yet considered the impact, if any, of the decision of the UK Supreme Court in *In Re L.* On five occasions since the judgment of Lady Hale (delivered on the 20th February 2013), High Court judges have considered the jurisdiction to re-open a judgment before perfection.38 In each of these cases, the judges have referred to the judgments of the Supreme Court and High Court in *McInerney* without

---

32 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 642.
33 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 642.
34 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 644.
35 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 642.
36 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 644.
37 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 644.
38 SZ (Pakistan) v Minister for Justice & Law Reform and Others [2013] IEHC 95 (Hogan J); PM (Botswana) v Minister for Justice & Law Reform and Others [2013] IEHC 271 (Hogan J); Byrne v Judge of the Circuit Court and Another [2013] IEHC 396 (Hogan J); Nne v An Bord Pleanala [2013] IEHC 584 (O’Malley J); Kilarden Investments Limited v Kirwan (Galway) Limited and Others [2013] IEHC (Laffoy J).

---

Macken and McKechnie J concurring, Fennelly J dissented on the substance of the appeal, but concurred with the majority on the procedural issue at issue in this article, agreeing that Clarke J was correct to have re-opened the matter after the emergence of the new material.

25 Re McInerney Homes Ltd [2011] IESC 31, para. 23 of the judgment of O’Donnell J.
26 Re McInerney Homes Ltd [2011] IESC 31, para. 62 of the judgment of Fennelly J.
28 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 642.
29 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 642 and 643.
30 In re L. and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 643.
31 In Re Blenheim Leisure (Restaurants) Ltd (No 3), The Times, 9th November 1999.
mentioning the change of direction in the neighbouring jurisdiction. It will be recalled that the Supreme Court in McInerney refused to be drawn as to whether Paulin represented the law in Ireland. The way forward is, therefore, less than clear.

The factual circumstances in which In Re L arose may go some way to explaining the UK Supreme Court’s decision to re-draw the legal principles surrounding the exercise of a judge’s jurisdiction to reverse. What is striking when one considers the facts of the cases concerning the jurisdiction to reverse is the fact that the majority of such cases prior to In Re L concerned commercial or insolvency law.\footnote{That being said, Paulin did arise in the context of divorce proceedings.} Arising as it did in the context of child custody proceedings, the principles developed in cases such as Barrell may have appeared inflexible and capable of perpetrating an injustice in the case before the UK Supreme Court. Lady Hale was quite correct to point out that “[i]t could not be in the interests of the child to require a judge to shut his eyes to the reality of the case and embrace a fiction.”\footnote{In re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 644.} Nevertheless, the rationale for the less flexible approach taken by the courts hitherto cannot be ignored: the concern of Clarke J in McInerney about reversals causing “procedural chaos”\footnote{Re McInerney Homes Ltd [2011] IEHC 25, para. 3.11.} is equally valid. So how may these equally reasonable positions be reconciled?

In considering its judgment in In Re L, one suspects that Supreme Court was presented with three less than ideal choices. Firstly, the Court could have upheld the Barrell and Paulin line of authority and ruled that the County Court judge in the case at bar had merely changed her mind which did not amount to “exceptional circumstances” or “strong reasons”. The result, of course, would have been the judgment of the 15\textsuperscript{th} December being allowed to stand in circumstances where it was now clear that even the judge who had passed that judgment believed it to be wrong.

Secondly, Lady Hale could have upheld Barrell and Paulin and ruled in the immediate case that given that the best interests of the child were at stake, the exceptional circumstances or strong reasons test had been met. While this approach might have brought a more just outcome in the immediate case and theoretically kept the Barrell and Paulin line of authority intact, it would have provided minimal guidance for courts in future cases where a judge was simply changing his or her mind. If the best interests of the child could provide an exceptional circumstance or strong reason, would a human rights dimension provide such grounds for a judicial change of mind? If so, where should the line be drawn, given that even cases such as McInerney could be framed as involving property rights?

Thirdly, the Court could take the approach which it did in fact take: disapprove the Barrell and Paulin line of authority and rule that the jurisdiction to reverse be exercised in accordance with the exigencies of the case. Like the second option, this approach allowed the Supreme Court to reach a perceived just outcome in the immediate case. However, the judgment of Lady Hale, leaving as it does even less guidance than the second option would have done, will engender a great deal of uncertainty.

The foregoing makes it clear that the facts of the case before the Supreme Court placed the judges in an invidious position. From the options which were available to the Court, however, it is regrettable that the Supreme Court felt it necessary to take such a scorched-earth approach with such a well-established and reasoned line of authority. The concurrence of Lord Wilson with the judgment of Lady Hale is surprising in this regard, given that his was the judgment of the Court of Appeal in Paulin (later relied upon by Clarke J in McInerney). It may be argued that the Barrell and Paulin rationales would have retained a useful check on the exercise of the jurisdiction to reverse in the majority of cases. Certainly, a general rule that a simple judicial change-of-mind would not be sufficient reason for its exercise could have been maintained.

Another regrettable aspect of Lady Hale’s judgment was the view taken of the County Court judge’s handling of matters once she had determined that she wished to change her mind. Lady Hale may well have been correct that there were no further submissions which could have been made on behalf of the parties. Nevertheless, even if the audi alteram partem principle did not require both sides to be re-heard, and even that is not obvious, it would surely have been a common courtesy for the County Court judge to have informed the parties of her intention, rather than drop a “bombshell”\footnote{In re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 638.}, as Lady Hale referred to the second judgment. Lady Hale’s judgment could certainly have been stronger in its censure of the County Court judge’s conduct in that regard.

In conclusion, it is submitted that the approach of Clarke J in McInerney should be retained in Ireland as the general rule in favour of what appears to be an overly flexible and indeterminate approach taken by the UK Supreme Court. Cases may well arise in Ireland along the lines of that in In Re L, the facts of which may require greater flexibility. However, there should be no reason why these cases cannot be accommodated within the existing legal framework as “exceptional circumstances” or “strong reasons”, and authority developed in a more considered manner than has occurred in England and Wales. It should also be recalled that Lady Hale in setting out the new standard for the exercise of the discretion to reverse (the overriding objective being to deal with the case in question justly), identified explicitly as its basis rule 1.1 of the Civil Procedure Rules, a paper rule peculiar to England and Wales. It may, therefore, be argued that the decision of the UK Supreme Court is of no application outside of England and Wales given its normative underpinnings.

Whatever approach is taken by the Irish courts, Lady Hale’s comments at the conclusion of her judgment are, notwithstanding the practical pressures faced by the modern judiciary, surely incontrovertible: “judicial tergiversation is not to be encouraged” and the best safeguard against having to re-visit a judgment is “a fully and properly reasoned judgment in the first place.”\footnote{In re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 647.} 

---

39 That being said, Paulin did arise in the context of divorce proceedings.

40 In re L and another (Children) (Preliminary Finding: Power to Reverse) [2013] 1 WLR 634 at 644.

41 Re McInerney Homes Ltd [2011] IEHC 25, para. 3.11.
Potential Difficulties Arising in Section 117 and Proprietary Estoppel Claims

DANIEL DWYER BL

Introduction

Two recent judgments have made significant changes to essential issues in respect of the administration of estates. The judgments of the High Court (Laffoy J.) in S. 1 v P.R. 1 and P.R. 2 [2013] IEHC 407 and the Supreme Court in Carey v Carey & Ors [2014] IESC 16 respectively, have ramifications firstly, for the six month time limit for issuing proceedings under Section 117 of the Succession act 1965 and secondly, on whether pleas which are essentially grounded in proprietary estoppel come within the provisions of Section 9 of the Civil Liability Act 1961 and the two year limitation period from the date of death in respect of such claims.

Background in S.1 v P.R. 1 and P.R.2

The case relates to the administration of the estate of F who died testate on the 6th July 2008. During his lifetime, F was a successful businessman who left behind a very significant estate. Under the terms of his will, should his wife predecease him, as she did, F’s six children, including the Plaintiff, S.1, and another son S.2, Plaintiff in related proceedings were to be the beneficial owners of his estate in equal shares. The Plaintiff and the two Defendants were to be the executors of the estate of F.

The Plaintiff’s claim was that in July 2000 whilst in the midst of changing employment his father had persuaded him, as she did, F’s six children, including the Plaintiff, S.1, and another son S.2, Plaintiff in related proceedings were to be the beneficial owners of his estate in equal shares. The Plaintiff and the two Defendants were to be the executors of the estate of F.

Just over two years after the death of F, on the 15th October 2010, on foot of a Court Order obtained by a creditor bank, Letters of Administration issued appointing AAL, Administrator ad litem of the Estate of the deceased F for the limited purpose of defending proceedings the creditor bank intended to issue against the estate of F.

Two years and eight months after the death of F on the 28th March 2011, a grant of probate of the Testator’s last will was made from the District Probate Registry at Limerick to the Plaintiff and Defendants. This grant was in the usual form and followed Form No. 6 of Appendix Q to the Rules of the Superior Courts, 1986. It was recorded on the face of the said grant that an Inland Revenue affidavit had been delivered showing the gross value of the estate of F was in excess of €25.8m and the net value in excess of €23.8m.

The Plaintiff issued proceedings claiming relief on the basis of proprietary estoppel and also claiming a declaration pursuant to Section 117 of the Succession Act 1965 that F had failed in his moral duty to make proper or adequate provision for the Plaintiff in accordance with his means.

Legal Position as to time limits applied to Section 117 Applications

It would ordinarily have been accepted that having regard to the decision of Carroll J in MPD v MD [1981] ILRM 179 that an application for relief under Section 117 of the Succession Act had to be brought within the appropriate time limit, which was reduced from twelve to six months by the provisions of the Family Law (Divorce) Act 1996. Furthermore, it was held that it was not possible for that said period to be extended.

In S.1. v P.R.1 and P.R.2 counsel for the Defendants argued that having regard to the provisions of S.117(6), proceedings would of necessity had to have issued within six months of the date of issue of the initial Limited Grant. Section 117(6) provides as follows:

“6 An order under this section shall not be made except on an application made within six months from the first taking out of representation of a deceased’s estate.”

Section 3, which contains interpretation provisions of the 1965 Act provides the following definitions:

a. ‘Representation’ means probate or administration;
b. ‘Probate’ means probate of a Will;
c. ‘Administration’, in relation to the estate of a deceased person, means letter of administration with or without a Will annexed and whether granted for special or limited purposes; and,
d. ‘Grant’ means Grant of Representation.

Applying the strict interpretation of the provisions of the Act would indicate that the relevant six month period ran from the date of taking of any Grant, whether limited or otherwise, however Laffoy J held that when applying the rules of interpretation, and in particular Section 5 of the Interpretation Act of 2005, it could not be what the Oireachtas intended given that a Court would have to know the nature and terms of the Last Will and Codicils of any testator and equally the extent of the estate of the testator has to be identified. Often, in the case of a limited liability company, as was the case in S.1. v P.R.1 and P.R.2, these requirements are often not fulfilled in time.

On that basis, Laffoy J held that the period for instituting proceedings pursuant to the provisions of Section 117 did
not from the date of the Limited Grant, as to hold as such would be to crystallise a patent absurdity, instead, the time limits would run from a full Grant of Probate, which, in the case of S.I. v P.R.1 and P.R.2 would be the date of the 28th March 2011, and as such, the Plaintiff’s application under Section 117 was held to be within time.

**Time limits for Promissory or Proprietary Estoppel actions**

In S.I., Laffoy J indicated that she felt in light of a lack of clarity as to how a debt had arisen, it would be inappropriate to express a definitive view on the issue of Section 9. Notwithstanding same, Laffoy J did offer some analysis of the authorities governing the question of Section 9 and estoppel claims.

Initially, it appeared to be the case that in estoppel proceedings, Section 9 would not be applied in circumstances where it could not reasonably be held that a cause of action pre-dated the death of the party alleged to have made a promise. In Reidy v McGreavy (Unreported, High Court, Barron J, 19th March 1993), the court held that in that case, no cause of action could have arisen before death (assuming the promise was not repudiated prior to death) as it could not be ascertained if the testator had or had not honoured his promise until he died.

This decision is, as Laffoy J put it, “irreconcilable” with two later decisions. In Corrigan v Martin (Unreported, Fennelly J, 13th March 2006), the judge held that when interpreting the provisions of the 1961 Act it was the case that:

“The Oireachtas intended that provision to apply to all causes of action coming into existence right up to the point of death itself. It is unreal and almost metaphysical to distinguish between causes of action existing immediately prior to the death and those which matured on the death itself. I do not believe that the Oireachtas can have intended to make such a fine distinction. It could serve no useful purpose which has been identified in this case.”

Furthermore, Fennelly J relied upon the judgment of O’Higgins CJ in Moynihan v Greenmyth [1977] IR 55 which identified policy considerations in the application of the two year time limit for bringing actions against the estate of a deceased on the grounds that:

“Those charged as executors and administrators of estates of deceased persons are entitled and indeed bound to carry out their tasks with reasonable expedition and that creditors of the estate and ultimately the beneficiaries are entitled to have the estate administered in a reasonable time.”

In those circumstances, Fennelly J held that the Plaintiff’s action was barred by the provisions of Section 9 of the 1961 Act.

In Prendergast v McLaughlin [2011] 1 IR 102, the deceased had died on 28th August 2003 and the Plaintiff had instituted proceedings on the 25th July 2006. The Plaintiff claimed that the deceased had made promises that he would bequeath certain lands to the Plaintiff. In holding that the claim was statute-barred, O’Keefe J considered both Corrigan v Martin and Moynihan v Greenmyth, preferring the reasoning of Corrigan on the grounds that Section 8(1) of the 1961 Act indicated that it governed “all causes of action...subsisting against him.”

In O’Keefe J’s view, any obligation on the part of the deceased to perform a contract or quasi-contract to devise the lands to the Plaintiff was to perform same during his life rather than at the moment of death. In those circumstances, he held that Section 9(2)(b) of the 1961 Act applied and the Plaintiff’s claim was statute-barred.

**Cavey v Cavey & Ors and Section 9**

_Cavey v Cavey & Ors_ [2014] IESC 16 was a somewhat convoluted series of proceedings, a brief timeline of which is as follows. The father of the parties to the action “the deceased” died testate on the 18th December 2006. Probate of his will was granted to the executors on the 13th March 2008. The Plaintiff first brought proceedings seeking reliefs under Section 117 on the 12th December 2008. These proceedings were heard by Laffoy J on the 23rd April 2009 and were dismissed. The decision of Laffoy J was initially appealed to the Supreme Court, however, the Plaintiff, at times appearing as a litigant in person, advised the Supreme Court on the 23rd July 2010 that he was withdrawing his claim. On the 27th July 2010, a second set of proceedings was commenced, the substance of which was what was said to be a representation to the Plaintiff by both of his parents that he would inherit the family home.

A motion was brought by the executors before the High Court seeking to have the action dismissed as:

a) An abuse of process in accordance with the rule in _Henderson v Henderson_ (1843) 3 Hare 100 and/or;

b) That the proceedings must invariably fail as being statute-barred having regard to the provisions of Section 9 of the Civil Liability Act 1961.

Herbert J. delivered judgment on the 7th February 2012 (C v C & Ors [2012] IEHC 537) holding that the proceedings were statute barred under the 1961 Act and thus bound to fail and the proceedings were dismissed on that basis.

As the second set of proceedings had been issued in July 2010, some three and a half years following the death of the Plaintiff’s father, were the proceedings to be held to be bound by Section 9, the Plaintiff’s claim would have to be held to be statute-barred.

In considering the decisions of Prendergast v McLaughlin, Corrigan v Martin and Reidy v McGreavy, Clarke J in the Supreme Court held that “a significant distinction is made in Section 9(2) so far as claims against an estate of the deceased, on the one hand, and a cause of action which may exist against those in charge of the administration of the deceased, on the other.” The judge held that the Plaintiff could only have a cause of action under estoppel if he could establish his father was in breach of a legally enforceable promise in respect of bequeathing the disputed properties to him. If the Plaintiff could establish that such a promise existed, then the failure of his father to make an appropriate will would give rise to a claim.

Clarke J held that such a claim would arise because of a
failure on the part of the Plaintiff’s father rather than any failure on the part of the estate. As such, the judge held that it would fall within the scope of the phrase “a claim surviving against the estate of the deceased.” The judge acknowledged that the deceased could have remedied the alleged breach of the promise at any point up until death by executing a will bequeathing the property in question to the Plaintiff.

**Potential issues arising following the decision in Cavey**

The Cavey decision offers some much needed clarity in the area of claims against an estate brought on the basis of the doctrines of promissory or proprietary estoppel. Notwithstanding same, a potential issue could arise in relation to claims where a party may also seek to bring a claim under Section 117.

Following the decision of Laffoy J in *S.J. v P.R.1 and P.R.2* it is clear that an action brought seeking relief under Section 117 is to be brought within six months of a full Grant of Probate as to hold otherwise would lead to an absurd situation where a court could be forced to consider the application without knowledge of the nature and terms of the Last Will and Codicils, something that could never have been the intention of the Oireachtas when enacting the Succession Act.

Notwithstanding same, problems may arise in the common scenario where a Plaintiff seeks relief under both Section 117 and under the doctrine of proprietary and/or promissory estoppel. It is not uncommon in some circumstances for the executors to be slow in extracting a full Grant of Probate. This is much more common in cases involving large estates, especially in circumstances where there may be outstanding debts in light of the current economic situation. Given the relatively slow operating speed of some financial institutions, a Plaintiff may find that the two year limitation period under Section 9 can expire before a Grant of Probate is extracted. If that is to happen, a Plaintiff may be forced to either apply to a court for sight of the deceased’s will before issuing proceedings or to have an Administrator ad litem appointed, or, in the alternative, issuing two sets of proceedings, one in relation to the estoppel issue and another for relief under Section 117. If there is a necessity to “double-up” on sets of proceedings then it could prove unnecessarily burdensome on Court lists and to place an extra costs burden on disputed estates. ■
Voluntary Assistance Scheme Update

DIANE DUGGAN BL

VAS is operated by the Bar Council of Ireland and accepts requests for legal assistance from NGOs, civic society organisations and charities acting on behalf of individuals who are having difficulty accessing justice. Please contact us for further details or see the Law Library website under ‘Bar Council and You’.

European Pro Bono Nomination

In April and May 2013, thirty-three barristers volunteered with Mr. Justice Quirke on the Magdalen Commission to assist him in conducting a needs assessment of women who had spent time in the Magdalene Laundries. The volunteers dedicated a huge amount of time speaking to these women. The Voluntary Assistance Scheme and the Magdalen Commission Volunteers were recently listed among the top four pro bono projects shortlisted for PILnet’s 2014 European Pro Bono Award for Partnership in the Public Interest.

PILnet is the Global Network for Public Interest Law, an international pro bono organisation. The project was nominated by Ireland’s Public Interest Law Alliance (PILA). Earlier this year, the Magdalen Commission volunteers received an Honorary Human Rights Awards at the 2014 Irish Law Awards.

The thirty-three volunteers were inspirational in their task; demonstrating enormous skill, compassion and integrity in carrying out their work. VAS were incredibly proud to be associated with the project and are delighted that this experience is being recognised in the European context of partnership in pro bono law.

Legislative Drafting Committee

Over the past number of months, a legislative drafting committee has been formed to look at the possibility of producing a piece of legislation at the request of Ana Liffey Drug Project. The committee is chaired by Emily Egan SC and its members include Bernard Condon SC, Rebecca Broderick BL, Rebecca Graydon BL, Marcus Keane BL and Brendan Savage BL. These members are providing an enormous amount of time and expertise to a worthwhile project. If you have experience in legislative drafting and would like to get involved in future projects, please get in touch with VAS.

Get Involved

VAS has been incredibly busy since the beginning of the legal year with new requests for assistance frequently being made. VAS continue to provide help to NGOs and their clients on an advisory basis. If you would like to get involved, please get in touch with us by contacting either Diane Duggan at dduggan@lawlibrary.ie or Jeanne McDonagh at jmcdonagh@lawlibrary.ie.
In a world where most films and story-books for children, and indeed those for adults, still hold out the high office of Princess as being the loftiest aspiration for a young woman, it is still necessary to remind ourselves that girls too can hope to become Chief Justice, Attorney General or the Director of Public Prosecutions. The fact that a woman currently holds each of these positions does not mean that the culture in which this was unusual has changed. At least, it has not changed enough to encourage equal participation by women in politics, law and business at the most senior levels.

The Irish Women Lawyers’ Association (www.iwla.ie) exists because many of us want to meet other women who have encountered similar experiences in their careers and we want to encourage each other in our professional lives.

Anyone who would like to join is encouraged to contact Aoife McNickle BL: email: admin@iwla.ie
Law and Government – A Tribute to Rory Brady

Bláthna Ruane, Jim O’Callaghan, David Barniville, (editors), Law and Government – A Tribute to Rory Brady; ISBN: 9781858007137; price 50 euro; Round Hall

This month sees the publication of a new book Law and Government – A Tribute to Rory Brady. This book is a collection of essays by former colleagues and friends. The inspiration for this collection of essays came from a suggestion by Jim O’Callaghan in the aftermath of Rory’s untimely death that something should be done in his honour and after careful consideration it was decided that the most appropriate way to honour Rory was to produce a book of essays that reflected areas of interest in Rory’s professional life. The editors Blathna Ruane SC, Jim O’Callaghan SC and David Barniville SC carefully chose the topics with the contributors and the book is divided into three sections: a portrait of Rory Brady by David Barniville and Jim O’Callaghan; a section dealing with topical contemporary issues and a section dealing with historical issues.

In his foreword, The Hon Mr Justice John Murray says:

“There are those who are remembered with great respect and those who are remembered with great affection. Anyone who knew the late Rory Brady remembers him with both. Indeed, this book pays tribute to the greatly respected reputation which he enjoyed as a Senior Counsel and Attorney General. But its publication has been largely conceived and motivated by an enduring affection for Rory which was engendered by his infectious warmth and good humour which touched everyone who found themselves in his company. As David Barniville and Jim O’Callaghan explain in their illuminating personal portrait of Rory, he made a formidable contribution to the good governance of this country in the spheres of both public and private law. That, as those authors show, is part of the abundant legacy which he left behind. This publication comprises contributions which profoundly analyse the impact of the law and the administration of justice on the governance of our democracy from a range of different perspectives, both national and international. In doing so, it at once acknowledges his legacy and becomes part of it.”

The first essay in Section II is written by Rory himself (previously published in the Virginia Journal of International Law in 2008). It deals with insights into some of the legal issues relating to combating terrorism which he gained when in his role as Attorney General and his involvement in the Northern Ireland peace process. Other contributions are as follows:

- Michael McDowell – Reflections on the Limits to the law’s ambitions
- Noel Whelan – Changing the Rules of the Political Game
- Paul Gallagher – The Changing Face of law and legal regulation
- Hugh Geoghegan – The Relationship of the Attorney General to Bar and Bench
- Brian Murray – Judges: Institutional independence and financial security
- Paul Sreenan – The State in international litigation – the capacity to sue other Member States of the EU before international tribunals – the MOX litigation
- Michael M. Collins – Public Policy constraints in international commercial arbitration: competition law, private choices and mandatory rules
- Turlough O’Donnell – Reflections on the role of mediation in the resolution of disputes
- Donal O’Donnell – “The Most Curious Forerunner” to the fundamental rights provisions in the 1937 Constitution
- Gerard Hogan – The influence of the continental constitutional tradition on the drafting of the Constitution
- Blathna Ruane – Democratic Control and Constitutional Referenda – the failure of the popular initiative mechanism for constitutional referenda under the Irish Free State Constitution

“In a Foreword I cannot do justice to the calibre of the essays in this volume but, more importantly, what I can say is that they do justice to the legacy and memory of Rory Brady. For that we must be truly grateful to each of the contributors to this book and in particular to Blathna Ruane, Jim O’Callaghan and David Barniville who also undertook the onerous task of editors and, of course, to the publishers, Thomson Reuters Round Hall.”: Murray J.

The book is dedicated to his wife Siobhán and his daughters Maeve and Aoife.

Ar dheis Dé go raibh a anam dílis
NEW TITLE

THE LAW OF LOCAL GOVERNMENT

1ST EDITION
DAVID BROWNE

The Law of Local Government provides a comprehensive and definitive analysis of the law on local government, including the substantive and procedural provisions which are relevant for the application of law on local government and local authority legislative provisions.

- Provides a comprehensive analysis of local government law and the legislative provisions applying to local government law
- Details the main statutory provisions and provides an exhaustive and extensive analysis of relevant case-law
- Analyses particular points of law which require clarification and deserve academic analysis
- Refers to the relevant District Court, Circuit Court and Superior Court Rules for applications and enforcement proceedings under the local government statutory code
- Summarises the law relating to local government administration, functions and services
- Deals with key provisions on the local government system, including the role of the manager, elected members and officials and employees
- Provides an overview of the legal capacity and potential liability of local authorities
- Includes a specific chapter on public procurement and local authorities which will hopefully be of use to a wider audience in the absence of a specific text on public procurement

TO ORDER:
Email: TRLUKI.orders@thomsonreuters.com
Or Call: 1 800 937 982 (From Landlines only) or +44 (0) 203 684 1433 (INT)

€295
December 2014
9780414035195
NEW EDITION - ORDER YOUR COPY TODAY

EVIDENCE
DECLAN MCGRATH

Evidence is unique in its breadth of coverage and detail. It deals not only with the law of evidence as it applies to criminal trials but also with the rules applicable in civil trials.

• Examines the concept of relevance and the basic rules governing the admissibility of evidence
• Discusses the competence and compellability of witnesses, the rules and principles governing the examination of witnesses, previous consistent statements, and legislative provisions permitting evidence to be given by live television link and certificate
• Analyses the various measures adopted to deal with the problems posed by unreliable evidence including accomplice evidence, the evidence of sexual complainants and children, and the rules regarding identification evidence
• Reviews in detail all of the privileges available in criminal and civil proceedings including legal professional privilege, without prejudice privilege and public interest privilege

• TO ORDER:
  Email: TRLUXI.orders@thomsonreuters.com
  Or Call: 1800 937 982 (From Landlines only) or +44 (0) 203 684 1433 (INT)

Exclusive to barristers under 7 years qualified: Please email pauline.ward@thomsonreuters.com to avail of a very special price for barristers under 7 years qualified. €195. Terms and Conditions apply.