Neutral Citation [2013] IEHC 377

THE HIGH COURT

[2012 No. 1731P]

BETWEEN

Padraig Burke

Plaintiff

V.

The Courts Service

Defendant

Judgment of Mr. Justice Hedigan delivered on the 31st of July 2013.

Application
1. The plaintiff seeks declarations that the Court Officers Acts 1926-2008 accord priority to his position regarding the powers, duties, authorities and functions of his office as County Registrar. He also seeks declarations that the said Court Officers Acts have not been amended and that his role has not been reduced by the Courts Services Act 1998 together with declarations that the defendant has inadequately respected the principles of natural and constitutional justice and basic fairness of procedures encompassing an implied term of mutual trust and confidence.

Parties
2.1 The plaintiff is the County Registrar for the County of Kerry. The defendant is a statutory corporation established by the Courts Services Act 1998 and is responsible for the management of the courts including the employment of staff in circuit court offices.

Factual background
3.1 These proceedings have been commenced in circumstances where a dispute has arisen between the plaintiff and the defendant regarding the exercise by the plaintiff of the powers, authorities, duties and functions of his office.

The decision to appoint the plaintiff to the position of County Registrar for Co. Kerry was taken by the government pursuant to Article 28 of the Constitution and the Court Officers Act 1926-2008 and was communicated to him in a letter from the defendant's chief executive dated the 24th July, 2006. The plaintiff took up his position on the 1st December, 2006.

The plaintiff giving evidence on day 2 of the hearing indicated that he believes:-

"…my office is being undermined, my independence is being undermined. I was appointed to the office by the government and assigned to Tralee with direct responsibility to manage and administer the office and litigation of Tralee Circuit Court. The legislation directing me to do so has not been, in my opinion amended, repealed or revoked. I have not been directed by government to abrogate my responsibility or hand them over to a civil servant employed by the Courts service".

3.2 Therefore, the proceedings essentially turn on the independence of the plaintiff's office and the requirement that that independence be acknowledged and respected by the defendant. The plaintiff argues this independence is being undermined by the defendant's failure to provide adequate staffing and submits that he is being impeded in the discharge of the functions of his office due to the inadequate staffing levels in Kerry Circuit Court office, specifically by reason of the non-replacement of three retiring staff members from March 2012 onwards, namely the chief clerk, one staff officer and one clerical officer. He asserts that the failure of the defendant to act in a timely and effective manner in relation to staffing levels and its failure to engage with him in addressing the concerns he has expressed threatens the morale of the remaining staff in the circuit court office. He further contends that the defendant's failure is bringing his office into disrepute, and is exposing him to an increased risk of being judicially reviewed.

Plaintiff's Submissions
4.1 Failure to respect principles of natural and constitutional justice;

The plaintiff argues that his entitlements vis à vis his office have been breached and seeks a declaration that the principles of natural and constitutional justice and basic fairness of procedures have been inadequately respected by the defendant.

In the absence of legislation expressly amending/repealing the statutory provisions giving effect and substance to the plaintiff's office, the plaintiff argues that the principles of natural and constitutional justice protect his rights and entitlements. Thus, he submits that he enjoys the right as office-holder to have the status and integrity of his office respected. He refers the Court to the judgment of the Supreme Court in *Dellway Investments Limited v NAMA* [2011]4 IR and argues that that case emphasised the significance attaching to the principles of natural and constitutional justice in a statutory setting where the rights of individuals are concerned and is now the leading authority in this area. He notes the dicta of Hardiman J. in that case where in addressing fair procedures he observed at para. 326 that property rights were not limited to land or real property but in the immediate context of fair procedures they also extended:-

"…to the rights to one's entitlements under an appointment to an office…." .

He also relies on para. 302 of the judgment wherein Hardiman J. emphasised the importance of the principle of fair procedures in an administrative context:-

"The insistence on fair procedures governs all decision makers in public administration."

The plaintiff notes that while this phrase did not appear in para. 302 of the official report it is emphasised in the approved transcript of Hardiman J.

He submits that he and the defendant overlap in their respective statutory functions with reference to the courts that sit for Co. Kerry and the provision of support services for judges. He argues that fair procedures require engagement between the defendant and himself with reference to those mutual functions and claims that the defendant has failed to enter into such engagement with him.

As an example of this failure the plaintiff points to the fact that the defendant did not discuss with, or explain to him, the criteria applied by it for the replacement of retiring office staff in the Circuit Court office or request any observations from him regarding the matter. He argues that the principles of natural and constitutional justice and basic fairness require the notification of such criteria to him and argues that there is no reason why Mr Coyle, Head of Operations for Circuit and District Courts, could not have explained to him on behalf of the defendant the criteria to be applied rather than simply stating that he had made a judgment call based on his experience.

He remarks that Fennelly J. in *Dellway* (with whom Murray C.J. and Finnegan J. concurred) in relation to the basic principle of fairness of procedures commented at para. 460:-

> "The Courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form…."

Mr Coyle at day 3 of the hearing accepted that he had not engaged the plaintiff when making his decision or deciding on criteria or exercising his judgment. He accepted that the plaintiff could have had a view on some of the criteria used had he been informed of them which could have been relevant or influenced Mr Coyle in his decision making.

4.2 Independence of the office of County Registrar;

The plaintiff argues that he is not requesting the court to "second guess" the decision-making of Mr Coyle or of other servants of the defendant regarding the allocation of resources. He instead is arguing that the stance adopted by the defendant by way of response to the plaintiff's repeated calls for the defendant to provide him with the support necessary to have the independence of his office maintained and respected (as evidenced in the detailed business case submitted by the plaintiff to the defendant's regional manager, Southern Region dated the 9th September, 2009) has been calculated to undermine his office.

As evidence of the independence of his office the plaintiff points to the contents of a letter from the defendant's chief executive dated the 24th July,2006,informing him of his appointment to the position of County Registrar wherein the defendant states:-

> "I have just been informed by the Government that they have appointed you to the position of County Registrar for Kerry"

The plaintiff argues that this letter makes it clear that his appointment was carried out by the government and not by the defendant and he submits that the letter accurately mirrors the language of s.36 of the 1926 Court Officers Act as amended by s.10 of the Court Officers Act 1945.

The plaintiff contends that his independence was encroached upon when Mr Coyle instructed him to allocate a member of staff, Ms Sinead Mc Donnell, selected by the plaintiff to carry out probate work to court registrar duties. He argues that in order to fulfil his duties and discharge his probate function he had assigned this member of staff to attend to probate matters to prevent an unacceptable backlog from building up and thereby prevent probate applicants from having to travel to Dublin to process their applications. In the event the plaintiff was requested to transfer probate temporarily to the probate office in Dublin. He argues that s.129 of the Succession Act 1965 prohibits same without a ministerial order.

The plaintiff does accept that the defendant is given a role in the management of the courts but submits that the Circuit Court falls within his jurisdiction. He argues therefore that the Circuit Court Office is his office, that he is an office holder, not a mere employee, and the Courts Service and Minister for Justice are required to respect the independence of the judicial functions exercised by him as such an office holder.

He argues that the courts have determined that statutory officers are entitled to respect and consideration in the execution of their legal duties and relies on *Miles v Wakefield Council* [1985] 1 WLR 822 CA in this regard. In that case the Court of Appeal held that while the council was responsible for paying a superintendent registrar of births, deaths and marriages his salary he remained an officer of the Crown who held office at the pleasure of the Crown and was not therefore the council's employee.

The differences in the entitlements of office holders in comparison to those of employees was analysed by the House of Lords in *Percy v Church of Scotland* [2008] 2 AC wherein Lord Nicholls of Birkenhead stated at para.15:-

> "The distinction between holding an office and being an employee is well established in English law…in the past an employer could dismiss a servant without notice, leaving the servant with any claim he might have for damages for breach of contract….[b]y way of contrast, some office holders could be dismissed only for good cause. Thereby they were insulated against improper pressures".

Thus, argues the plaintiff so long as he remains assigned to the Circuit Court office the defendant is at all times obliged to respect the jurisdiction exercised by him.

4.3 Section 20(1) of the Courts Service Act 1998;

The plaintiff argues that the case turns on the statutory interpretation of the relationship between the Court Officers Acts 1926-2012 and the Courts Service Act 1998 (as amended).

Section.37 of the Court Officers Act 1926 states:-

> "37.—Every circuit court office shall be under the control and management of the county registrar and there shall be transacted in every circuit court office all such business as is from time to time directed by statute or rule of court to be transacted therein and (unless and until otherwise directed by statute or rule of court) also all other business of the Circuit Court in the county, county borough, or other area served by such office except such business as is required by law to be transacted by or before the Circuit Judge."

Section 20(1) of the 1998 Act provides:-

> "(1) Notwithstanding any other enactment, the Chief Executive shall manage and control generally the staff, administration and business of the Service, including the functions of County Registrars insofar as such functions relate to a function of the Service, and shall perform such other functions as may be conferred on him or her by or under this Act or by the Board".

The plaintiff refutes the defendant's contention that the relevant provisions of the Court Officers Acts have been impliedly amended by s.20 (1) of the Court Service Act 1998 or any amendment thereof.

Under cross-examination Mr Coyle accepted that he regarded the Courts Service as maintaining the "upper hand" when it comes to a circuit court office and the office of County Registrar, which he attributed to the amendment created by s.20(1) of the 1998 Act. The plaintiff argues that no such "upper hand" can be provided to the defendant simply by virtue of the generalised wording of this section and denies therefore that the section diminishes his office.

The plaintiff submits that his office is a direct successor to the combined offices of Clerk of the Crown and Clerk of the Peace. In *Leconfield v Thornley* [1926] A.C. 10 the court assessed if that office, given its inherent nature, could be impliedly or obliquely amended by statute with Lord Atkinson finding at p.22 that :-.

> "In order to determine whether the provisions of the Act of 1888 are clear, direct and explicit enough to effect this revolution, one must refer to the early legislation to appreciate what was the official's position before the latter date"
>
> In the same case Lord Summer stated at p.31 that:-
>
> "….it effected by implication a repeal of the above quoted sections of the Act of 1 Wm. &Mary and of the Clerks of the Peace Removal Act, 1864, and it appears to me that so serious a matter as this is not a case for implied appeal, unless far clearer grounds for the implication exist than can be found here".

The plaintiff submits that his position is analogous to that of the Clerk of the Peace in *Leconfield* since the defendant argues he, as county registrar, has been shorn of his power, duties and responsibilities in respect of the running of the circuit court office obliquely, indirectly and impliedly by the 5 words "notwithstanding any other enactment". The plaintiff submits that this approaches a "revolution" comparable to that outlined by Lord Atkinson above.

In respect of the House of Lords quote above the plaintiff argues that the 5 words of s.20 (1) are not nearly clear, direct and explicit enough to warrant a determination that his office has been shorn of its inherent responsibilities.

By reference to earlier legislation (such as s.37 of the 1926 Act) the plaintiff submits it is clear that the County Registrar remains responsible for the circuit court office.

He submits that following the reasoning in *Leconfield* it cannot be the case the office has been altered to such a wholesale degree by an implied or non-textual amendment/repeal and in any event his position as office-holder is one enjoying a specific constitutional protection and can only be interfered with by express authority from the legislature.

Implied repeal is described by Bennion in Statutory Interpretation (5th ed. 2008) at p.304 as:-

> "Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges posteriors priores contrarias abrogant* (later laws abrogate earlier contrary laws).This is subject to the exception embodied in the maxim *generalia specialibus non derogant…".*

In drafting s.20(1) the Oireachtas has applied this implied or non-textual method of amending legislation which the plaintiff contends due to the generalised wording used lacks clarity as to whether there was an intention on the part of the Oireachtas to impliedly amend or impliedly repeal "any other enactment". There is no schedule to the Courts Service Act 1998 as amended listing the legislation that has been amended and the reader is left to guess.

The plaintiff asserts that because of this ambiguity of implied amendment, textual amendment of legislation is now the preferred means of amending legislation since it gives the greatest clarity. This means that statutory text is repealed and replaced with substituted amended text and nothing is left to guess work.

In Statutory Interpretation (5th Ed.) Bennion has noted that in recent years textual amendment has been on the increase and in the 21st century it may be taken as normal .

In the United Kingdom the Renton Report caused the office of the Parliamentary Counsel to abandon the indirect means of legislation. The report says at p.82:-

> "… the practice of using the textual method should be applied as generously as possible, and we so recommend".

However, the plaintiff argues the non-textual means of amendment or repeal continues to feature in Acts of the Oireachtas in this jurisdiction.

The means of amendment in this case contrasts with the manner in which the Master of the High Court had certain functions removed from his jurisdiction by the relevant provisions of the Court Officers Act 1945. In that instance a form of textual amendment was enacted by the Oireachtas. Under s.2 and s.3 of the 1945 Act he was relieved of the management of the Central Office and of the general superintendence and control of the High Court offices by express statutory provision pursuant to s.2(1) of the 1945 Act which provides:-

> "2 (1) The Minister, after consultation with the President of the High Court, may by order relieve the Master of the High Court of the management of the Central Office".

This means of amending or repealing legalisation used in this case also stands in contrast to the express amendment/repeal of legislation in the manner approved by the Supreme Court in *DPP v Grey* [1986] IR 317.In that case the non-textual method of

amending legislation did not meet the approval of the Court which held that there had been no implied amendment/repeal of the earlier provisions of the Excise Management Act 1827 by s.8 of the Criminal Justice Act 1951.The means of amending legislation preferred by Henchy J. might be described as a textual or direct means. He said at p.325:-

> "It may be stated as a general rule that the courts lean against the repeal or exclusion of earlier statutory provisions by implication….[m]odern statutes tend to be meticulous in indicating, usually in a special schedule, the earlier statutory provisions that are being repealed or amended."

The plaintiff submits that there would have been no need for these proceedings if the drafters of the Courts Service Act 1998 had followed the method approved in that case.

The Supreme Court adopted the Anglo-American test of plain repugnancy in *DPP v Grey.* Henchy J. at p.326 of the judgment adopted the language of the Queen's bench division in West Ham (Church Wardens and Overseers) v. Fourth City Mutual Building Society [1892] 1 QB 654 at p.658 to the following effect:-

> "The test of whether there has been a repeal by implication by subsequent legislation is this; Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together."

The plaintiff argues that the defendant is incorrect to rely on *Sheedy v. The Information Commissioner* [2005] IESC 35 and argues that it is unusual to find a Supreme Court judgment where there is such a stark difference of opinion between the majority and dissenting judgments.

In that case a conflict arose between the stand alone provisions of the Freedom of Information Act 1997 and s.53 of the Education Act 1998. In their judgments Fennelly J. (dissenting) and Kearns J. had differing interpretations of relevant principles of statutory interpretation. Therefore, the plaintiff submits the judgment is not as clear cut as the defendant contends.

Section 32 of the Freedom of Information Act 1997 dealt with the refusal of requests for access to information. Section 53 of the Education Act 1998 dealt with the refusal of access to certain information which would enable the compilation of statistics in relation to comparative performance of schools. Section 53 contained the proviso "notwithstanding any other enactment".

Kearns J. found that the two acts were not in *pari materia* and that s.53 overrode any provision of the 1997 Act unless it could be shown that the information sought did not come within the protection of s.53.

In his judgment Kearns J. quoted from Bennion wherein he explains what implied repeal is. However, he failed to include a comment from Bennion in relation to same which states at p. 293 of Statutory Interpretation:-

> "Implied amendment often presents the statute user with difficult problems of conflation. For that reason it is objectionable and to be avoided by drafters."

Fennelly J. in contrast to Kearns J. in his dissenting judgment found that the acts were in *pari materia*. The principle of *generalia specialibus non derogant* (i.e. general laws do not impliedly repeal earlier particular laws) was used by Fennelly J. in his judgement regarding the manner in which s.58 of the Education Act was to be interpreted.Moreover, there is no comment in the Supreme Court judgment regarding any criticism that has been expressed in the established commentaries on the difficulties brought about by the non-textual means of legislating.

Moreover, that case differs to the instant one in that it related to a straightforward conflict between the 1997 Act and s.58 of the 1998 Act as it impacted on the 1997 Act. This case deals with legislation spanning over 80 years. The law begins with the Court Officers Act 1926 and ends with the Courts and Court Officers Act 2009.This makes it difficult to apply any such implied amendment reasoning in this situation.

The plaintiff argues that had the Oireachtas wished to fetter in any way or adversely affect his office it would have done so by express amendment and submits therefore that this Court should reject any non-textual amendment argument such as that made by the defendant

Defendant's Submissions
5.1 The necessity to reduce staff;

The defendant has suffered severe cuts to its budget in recent years and must secure the most efficient use of its limited resources. The defendant has not been in a position to replace all court office staff who have retired in the past few years. Nonetheless, it argues it has made reasonable and *bona fide* efforts to replace necessary staff in Kerry Circuit Court and elsewhere as appropriate.

5.2 Entitlement to fair procedures;

The applicant in arguing that principles of basic fairness of procedures and natural and constitutional justice have been breached relies firstly on *Garvey v Ireland* [1981]1 IR 75. In that case the Supreme Court held that the guarantee of fair procedures provided for by the Constitution applied to the exercise by government of the power of removal of a Garda Commissioner.

The defendant argues the applicant interprets this case too widely in contending that he is entitled to natural and constitutional justice in all his day to day dealings with the defendant. The defendant argues moreover that the plaintiff's reading of *Garvey* is unsupported by case law regarding natural and constitutional justice e.g. *Dellway v NAMA*.

The defendant argues that there is a difference between the position of Mr Garvey and Mr Mc Killen (in *Dellway*) and the plaintiff's own position. Mr Garvey was given 2 hours to resign from his position as Commissioner and failing to do so was dismissed. At issue in *Dellway* was the acquisition by NAMA of Mr Killen's loans with all of the statutory consequences which would flow from that. Both plaintiffs were personally affected by the decisions. The defendant contends that as Mr Burke has not been personally affected by its decisions and has continued to perform his functions, his position is not analogous to that of Mr Garvey or Mr Mc Killen.

Therefore, the defendant submits that the principles of natural and constitutional justice do not apply to dealings between the plaintiff and defendant regarding the matters encompassed by s.20 (1) of the 1998 Court Services Act such as the management of staff and business of the courts. The plaintiff is not directly or individually affected by virtue of those dealings in a manner which might attract the application of the principles.

The defendant submits that if these principles did apply they would require that reasonable fairness was afforded to the applicant rather than perfect procedural protection or perfect justice (*International Fishing Vessels Ltd. v. Minister for the Marine (No .2) [1991]* 2 IR 93.The defendant submits that the evidence establishes that the applicant was treated fairly by the defendant.

The defendant also argues that it is a principle of administrative law that where general policy is at stake affecting a whole range of interests and considerations, the principles of natural and constitutional justice do not apply. Hogan and Morgan in Administrative Law in Ireland describe these as "polycentric" decisions, requiring account to be taken of a large number of interlocking and interacting interests and considerations. The defendant submits that in this case it must have regard to government policy, budgetary constraints and the needs of each office.

A specific example of the above principle is seen in *The Association of General Practitioners Limited v. Minister for Health* [1995] 1 IR 382.O'Hanlon J. held that where the terms of employment of a group of doctors are being fixed, there is no obligation at common law or under the constitution on the defendant to consult with an organisation representing his employees.

Likewise, in this case the defendant argues it cannot be obliged to consult with or negotiate with each County Registrar and office manager regarding every decision it reaches to apply or not to apply for sanction for the filling of posts from the Department of Finance.

The reasons for this is that because such decisions affect many people and interests -see de Smith's Judicial Review (6th Ed.) at para. 8-021 where it is noted that it may be "manifestly impractical for them all to be given an opportunity of being heard by the competent authority beforehand".

Mr Coyle, the defendant notes, has explained in evidence that in exercising his discretion to apply or not to apply for sanction for the filling of vacant posts, he had regard to caseloads, staff profiles and future strategic plans for particular offices. The defendant argues that if the plaintiff had to be consulted then the defendant would also have to consult with County Registrars in 25-28 offices with unfilled positions each time he wanted to seek sanction and this, it submits, would be unworkable.

5.2 The Reliefs sought would serve no purpose;

The defendant notes that all but one of the reliefs sought by the plaintiff are declaratory in nature and he argues that these declaratory reliefs should be refused on the basis *inter alia* that the reliefs are hypothetical, *jus tertii*, vague and if granted would be futile and serve no useful purpose.

The defendant contends that the loss suffered by the plaintiff is unclear. He submits that staff morale has suffered, as has the provision of legal services and the administration of justice in Kerry. Insomuch as the plaintiff brings this action on behalf of the staff of the circuit court office and/or in the interest of court users, the defendant submits the declaration sought by him constitutes *jus tertii* as he does not have sufficient interest to make some or all of the points raised.

Jus tertii which is closely related to *locus standi* requires the plaintiff to show a sufficient interest in the particular defect in the administrative act/law of which complaint is made. The defendant submits that the plaintiff cannot rely on the rights of a third party (e.g. court users in Kerry) in order to advance his argument.

The defendant also contends that the reliefs sought by the plaintiff are futile. It submits that the plaintiff is seeking, through the guise of declaratory relief, mandatory relief directing the provision of additional resources which cannot be provided in the prevailing economic and budgetary conditions. It submits that the case law is clear on this point. It relies on the Supreme Court decision of *Brady v. Cavan County Council* [1999] 4 IR 99. In that case the applicant sought an order of mandamus by way of judicial review to compel the respondent local authority to repair a public road. The Council had a statutory obligation to maintain roads in good condition and repair. The respondent contended that it did not have the funds available to do so and if the order of mandamus was granted it would not be in a position to comply with same. The order was granted in the High Court but was overturned on appeal. The Supreme Court held that the Court could not make an order of mandamus against a public authority where the Council did not have the means to comply with it. It also held that the High Court could refuse to grant an order of mandamus on grounds that it would be futile to do so in circumstances where the successful implementation of the order would depend on the cooperation of other bodies which were not before the court. Keane J.stated at p.106 that:-

> "…I would not be disposed to hold that the court should bring the rigours of *mandamus* to bear on a public authority where it is acknowledged that it has not the means to comply with the order and that its successful implementation depends on the co-operation of other bodies who are not before the court."

Neither the Ministers for Justice or Finance nor the Attorney General are before the court in these proceedings. Thus, the defendant argues it is hard to see what useful purpose would be served by granting the declarations sought.

The defendant further contends that the declarations sought would confer unjustified priority on the plaintiff. *Brady* also dealt with this issue with Keane J. commenting at p.105 on the suggestion that the respondent would repair a specific road despite the fact the entire network in Cavan required repair at that time. He stated:-

> "…[i]t would simply mean that (the respondent's) admitted responsibilities were being discharged in a haphazard and arbitrary manner by the elevation of this particular strip to an unjustified priority in its road repair programme."

The defendant contends that most Circuit Court and District Court offices are subject to staff shortages. The plaintiff it is submitted is seeking a declaration of priority which would lead to the "haphazard" and arbitrary allocation of limited resources by the defendant in a situation where the defendant should be applying those resources in a systematic way. This would be contrary to the obligations imposed upon the board of the defendant under s.13 (2) (a) of the 1998 Act (as amended) to have regard to the need to secure the most beneficial effective and efficient use of its resources.

5.4 Challenge to Independence;

The defendant denies that its failure to provide replacement staff on the departure of existing staff is a challenge to the plaintiff's independence and management function. The defendant also refutes the plaintiff's assertion that he is totally autonomous in his own functions and in the management of the Circuit Court and staff.

Owing to the staffing issues Mr Coyle requested that a replacement member of staff, Ms Mc Donnell, be assigned to court registry

duties rather than doing only probate work. The plaintiff argues that this request (which was made pursuant to and consistent with the defendant's stated policy of maintaining court sittings) impinges on his independence and describes it as tantamount to setting aside his management function and instructing him how to run his office. Despite this complaint the defendant notes that it appears that the staff member has in fact been assigned to court work as well as probate.

The defendant refutes the applicant's assertion that it further interfered with his independence when Mr Coyle indicated in an e-mail dated the 24th November, 2010, that he would not "countenance any situation where courts will be cancelled in Kerry…". The respondent submits that this priority is reflected in the defendant's strategic plan for 2011-2014 and in cross-examination the plaintiff agreed with it.

The defendant submits that the plaintiff's independence has not been interfered with and relies on a letter dated the 13th April, 2011, which acknowledged the plaintiff's appointment by the government, his independence in the discharge of his quasi-judicial functions and "[s]ubject to the provision of Section 20(1) of the Courts Service Acts 1998", his management responsibility for the Circuit Court office for the County of Kerry. Under cross-examination during the hearing the plaintiff indicated his satisfaction with this reply.

The defendant also relies on s. 9 of the 1998 Act which contains a proviso safeguarding the independence of the County Registrar in the exercise of his adjudicative or quasi-judicial functions.

> "9. No function conferred on or power vested in the Service, the Board or the Chief Executive, under this Act shall be exercised so as to interfere with the conduct of that part of the business of the courts required by law to be transacted by or before one or more judges or to impugn the independence of……..
>
> (b)a person other than a judge in the performance of limited functions of a judicial nature conferred on that person by law."

The defendant accepts that County Registrars are not employees of the defendant but argues that they were transferred to the Courts Service insofar as their functions relate to a function of the Courts Service-see s.31 of the 1998 Act which provides follows:-

"31.—Subject to section 9, every County Registrar shall, on the establishment day, be transferred to the Service in respect of those functions of County Registrars which relate to a function of the Service."

Sections 9 and 31 taken together signify that the plaintiff was transferred to the defendant insofar as his functions relate to functions of the Courts Service (including the management of courts and the provision of support services to judges).This transfer is subject to an obligation on the defendant not to interfere with the plaintiff's independence in the discharge of his quasi-judicial functions, but only those functions.

While County Registrars are not employees it is a function of the defendant's chief executive to manage and control generally those functions of County Registrars which relate to a function of the Courts Service(s.20(1) of the 1998 Act). It would be impossible for the Courts Service to manage the courts in a new unified structure or for its board or chief executive to comply with their respective powers under the 1998 Act were the local "control and management" remit given to the County Registrar by s.37 of the Courts Officers Act 1926 not curtailed by the scheme of the Courts Service Act 1998 and in particular but not exclusively s.20 (1) of that act.

5.5 Non- textual amendment;

The defendant asserts that the plaintiff is incorrect in arguing that s.20 (1) of the 1998 Act due to its non-textual nature does not displace prior legislative provisions which might conflict with it. The defendant argues that s.20 (1) has changed the role of County Registrar.

Section 20 of the Act provides that the defendant "shall manage and control generally the staff, administration and business of the Service" which under s.24 (1) of the Act includes "general staff employed in Circuit Court offices".

Section 20 (1) provides for what is to happen in the event of a conflict between the exercise by the defendant or its chief executive of the functions of the Courts Service and the exercise by the County Registrar of his local office management functions.

This function is conferred "notwithstanding any other enactment". The defendant argues that this phrase makes it completely clear that the defendant's management function regarding staff is unaffected by any other enactment and the statutory provisions setting forth the plaintiff's management functions are necessarily subject to this overriding provision. Thus, the defendant contends overall responsibility for the management control of staff resides in the chief executive.

To the extent that the terms of s.20 are at odds with s.37 of the 1926 Act, the clear and express effect of those words is to override the earlier provision. This means that the control exercised by County Registrars by virtue of s.37 over Circuit Court offices is exercised subject to the powers conferred on the chief executive.

Dodds in Statutory Interpretation in Ireland comments at p.90 that:-

> "The clauses 'subject to' or 'notwithstanding' are commonly employed by drafters. Such clauses expressly deal with the relationship between one enactment and another. Both expressions indicate whether one enactment is qualified by another and which enactment is to prevail in the event of a conflict."

He also says at p.92 that:-

> "If enactment (X) applies 'notwithstanding s.10' or 'notwithstanding any other enactment' this renders enactment (X) with overriding authority."

The defendant argues that this non-textual form of amendment was endorsed by the Supreme Court in *Sheedy v. The Information Commissioner* [2005] IESC 35 where Kearns J. stated at p.295 para.61:-

> "The use of a 'notwithstanding' clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or repeals of such legislation."

In *Sheedy* Kearns J. found that the words were perfectly clear and there was no ambiguity.

Despite this the plaintiff appears to suggest the words used by the drafter in this case in s.20 (1) were not clear. The defendant argues there is no basis for this contention having regard to *Sheedy*.

The plaintiff also appears to make the case that the textual method of amendment is the only permissible method of amendment. But in light of *Sheedy* and Dodds the defendant argues that this is incorrect and that the plaintiff's submission would render redundant the opening phrase of s.20 (1) of the 1998 Act. This is at odds with the presumption against redundancy.

In *Cork County Council v. Whillock* [1992]1 IR 231 the Supreme Court (Egan J.) referred to this presumption stating at p. 239:

> "There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible to all the words used, for the legislature must be deemed not to waste its words or say anything in vain".

The plaintiff relies on the maxim *generalia specialibus non derogant* and the Supreme Court application of this in *DPP v Grey* [1986] IR 317. However Grey, the defendant argues, is totally different to this case and does not support the plaintiff's contention that the approach taken by drafters of s.20 (1) of the 1998 Act was not permissible. The legislation at issue in *Grey* did not involve a clause such as that contained at the outset in s.20(1) of the 1998 Act, moreover the passage from the judgment of Henchy J. on which the plaintiff relies does not support his claim that *Grey* contains a statement of preference for the textual and direct means of legislating.

The *gereralia* maxim is an exception to the usual rule of *leges posteriors priores contrarias abrogant* and is a presumption which can be displaced by clear language used in the legislation, as in the present case. Also this maxim is "just one of a number of criteria affecting the interpretation of statutes" (see Dodd Statutory Interpretation in Ireland at 4.83).

The defendant submits that these maxims have no application where, as in this instance, there is no ambiguity whatsoever in the opening words.

Decision

6.1 The plaintiff's complaint in these proceedings has resolved itself into one concerning the defendant's apparent overriding of his wishes in relation to the disposition of staff in his office together with their failure to fill certain vacancies therein. He complains that his authority as County Registrar has thereby been set aside and that further he was not given the opportunity to be heard in relation to these staff dispositions. All of this, he complains, is disrespectful of his office as County Registrar. His argument on a legal basis is that notwithstanding s. 20 of the Courts Service Act 1998, he still retains control of the staff in his office including their disposition to various duties because this is an essential component of the independence of his office.

6.2 The provisions of s. 20(1) of the Courts Service Act 1998, as amended by s. 43(a) of the Courts and Courts Officers Act 2002, are central to this case and are as follows;

> "Notwithstanding any other enactment, the Chief Executive shall –
>
> (a) manage and control generally the staff, administration and business of the Service, including the functions of County Registrars insofar as such functions relate to a function of the Service,
>
> (b) . . ., and
>
> (c) perform such other functions as may be conferred on him or her by or under this Act or by the Board."

It is to be noted that s. 9 of the same Act provides as follows;

> "No function conferred on or power vested in the Service, the Board or the Chief Executive, under this Act shall be exercised so as to interfere with the conduct of that part of the business of the courts required by law to be transacted by or before one or more judges or to impugn the independence of –
>
> (a) a judge in the performance of his or her judicial functions, or
>
> (b) a person other than a judge in the performance of limited functions of a judicial nature conferred on that person by law."

6.3 It is argued by Mr. O'Reilly, Senior Counsel, on behalf of the plaintiff that this form of amendment is not a satisfactory one and does not alter what the plaintiff claimed was the previous situation wherein he considered himself to have control of the staff in his office. There does appear to be some considerable doubt as to whether this view of the plaintiff's pre-1998 position is actually correct. In fact, it appears that prior to the 1998 Act, the Minister for Justice and not the County Registrar determined the number and grade of staff to be employed in every Circuit Court office. However, it is to the 1998 Act that this Court should direct its attention in determining whether or not this has provided control to the Courts Service of the Courts Service staff including the staff of the Circuit Court offices in Ireland. Mr. O'Reilly has argued vigorously and with some force that the method of amending legislation employed herein which has been described as "non-textual amendment" falls short of the modern ideal form of amendment as practised in comparable countries, notably, the Parliament in Westminster. He has referred this Court to the judgment of the Supreme Court in *Director of Public Prosecutions v. Grey* [1986] I.R. 317, where in his judgment at p.325, Henchy J. stated as follows;

> "It may be stated as a general rule that the courts lean against the repeal or exclusion of earlier statutory provisions by implication. The rationale underlying this approach is that a statutory provision, formally and solemnly enacted by Parliament, should not be deemed to have been abrogated or excluded, obliquely or indirectly or inadvertently, by a provision in a later statute, when that later statute contains no expression of an intention to abrogate or exclude the earlier provision. Modern statutes tend to be meticulous in indicating, usually in a special schedule, the earlier statutory provisions that are being repealed or amended."

I accept this passage reflects a general rule against implied repeal of legislation. It also quite clearly states a preference for the textual method of amendment. Mr. O'Reilly has also prayed in aid the words of Coke C.J. who warned in the archaic but elegant language of Jacobean England in *Dr. Foster's Case* 77 Eng. Rep 1222 (KB 1614) as follows:

> "It must be known, that forasmuch as Acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of a Commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated [but[. . . ought to be maintained and supported with a benign and favourable construction."

I accept the argument that direct or textual amendment is the better and more desirable form of amending legislation. However, it is a very considerable step further to find that non-textual amendment is impermissible in Ireland today. To do so, I fear, would be to trespass into the territorial lands of the legislature where, as Coke C.J. might have said, there be demons. I refer not to the inhabitants of those lands but the risks that abide there. I do not think this Court should venture there. I also consider that the cases and the extracts of learned authors, such as Dodd and Bennion, opened to me are dealing with matters not quite the same as here. Section 20(1) of the Courts Service Act 1998 is not vague or ambiguous. It does not require implication. It is explicit in its form and whilst it does not identify every piece of legislation it repeals, it clearly states what the law is to be for the future and clearly excludes anything conflicting from the past. This it does by use of the ubiquitous phrase "notwithstanding any other enactment". The use of this phrase has clearly been approved by the Supreme Court in *Sheedy v. Information Commissioner* [2005] 2 I.R. 272, where Kearns J. stated (at p. 297);

> "The use of a 'notwithstanding' clause is a convenient form of drafting which skirts or avoids textual amendments to existing legislation but nonetheless operates by implication to bring about amendments or repeals of such legislation."

This is a judgment of the Supreme Court and is binding on this Court.

Thus, whilst I am sympathetic to the argument raised because I cannot see why we should ever readily settle for anything less than the best, I must hold that s. 20(1) does in fact amend any legislation that conflicts with it and thereby trumps the provisions of the Courts Acts 1926, as amended. This means that the power to manage and control all the staff of the Courts Service vests in the Chief Executive thereof. This plainly includes their disposition. Moreover, the Chief Executive Officer also under this provision controls the administration and business of the service including the functions of County Registrars insofar as those functions relate to a function of the service. As noted above, prior to the 1998 Act the number and grade of staff and their terms and conditions were determined not by the County Registrar but by the Minister for Justice. His functions were transferred to the defendant, see the 1998 Act, s. 9 and Schedule 2 thereof.

6.4 The plaintiff claims that this undermines his position and that the Courts Service has severely impeded him in carrying out his functions. The plaintiff claims that the Courts Service "calculated" to undermine him in his functions. I am satisfied that this complaint is without substance. All of the evidence shows that every effort was made to try to accommodate his requests, bearing in mind the extraordinary difficulties faced by the Courts Service in these difficult times. Equally, no lack of respect for him in his functions can be discerned from the evidence. Quite the reverse, it seems to me, is the case. On the evidence it seems that no County Registrar in the country had more access to the management of the Courts Service in order to make his case in relation to filling vacancies in his office. In this regard, on the evidence, I reject any suggestion of unfair procedures in relation to the manner in which these difficulties were dealt with by the Courts Service.

6.6 Senior Counsel for the Courts Service and Mr Coyle in his evidence repeatedly emphasised the respect in which they hold the office of County Registrar. It is unfortunate that the exigencies of the current economic climate have created a conflict such as here. It has been described as a clash of cultures. It may also be described as a clash of personalities. Either way, it seems an example of the difficulties often experienced, albeit here somewhat delayed, where the old must give way to the new. The claims of the plaintiff of disrespect, deliberate impeding of him in his duties are manifestly unsubstantiated by the evidence. It is clear that as both parties pursued what they considered to be their duty, a clash of old and new occurred. The plaintiff's view of his role as County Registrar was not based upon the realities of the new post-1998 regime. The staff in his office are not his staff. They are employed by the Courts Service and are subject to disposition by them. In this regard, the Courts Service quite clearly has control and must exercise it in furtherance of the Courts Service's priorities and principles. In this regard, the disposition of the new officer to court as opposed to probate work was clearly in the control of the Courts Service and not of the County Registrar. The Act could scarcely be clearer on this. Any other arrangement would be inconsistent with any efficient management system.

6.7 Great credit is due to both parties to this dispute and, in particular, to the County Registrar and the staff of Tralee Circuit Court in that despite this dispute and the extraordinary difficulties under which they have been obliged to labour by the diminution in support staff and services occasioned by the economic difficulties of the day, they have somehow contrived to ensure that their heavy workload is satisfactorily dealt with. In this regard they have achieved something of a minor administrative miracle. I hope that grievances having been aired herein and the interbinding of administrative structures having been clarified, the parties will be able to continue to provide in these difficult times the same high level of service they have maintained during the conduct of these proceedings.

6.8 Mr. O'Reilly expressed the hope that in this judgment the respective roles of the County Registrar and the Courts Service would be clarified to the benefit of all. To that end, and in full appreciation of the fact that all the complexities and nuances of such a relationship are all but impossible to encapsulate in one judgment, I will try to set out here the following elements of that relationship as they appear following a full consideration of the submissions, oral and written, made herein:

> (a) County Registrars are officeholders, appointed and holding office at the pleasure of the Government. They are not civil servants.
>
> (b) County Registrars are not employees of the defendant. Notwithstanding this however,pursuant to the 1998 Act they have been transferred to the defendant insofar as their functions relate to a function of the Courts Service.
>
> (c) Although County Registrars are not employees of the defendant, it is a function of the Chief Executive of the Courts Service to manage and control generally those functions of County Registrars which relate to a function of the Courts Service.
>
> (d) By virtue of the 1998 Act, the power to decide on the number and grade of general staff assigned to Circuit Court offices has been transferred from the Minister for Justice to the Chief Executive of the Courts Service. By virtue of this Act, the general staff of individual Circuit Court offices were transferred to and they are now employed by the Courts Service and are civil servants. Overall responsibility for the management and control of such staff, including the general staff assigned to Circuit Court offices, resides in the Chief Executive of the Courts Service. This includes the disposition of their functions to particular staff.

(e) The control exercised by County Registrars over individual Circuit Court offices to which they are assigned is exercised subject to the powers conferred on the Chief Executive of the Courts Service to manage and control generally its staff, including the staff of individual Circuit Court offices.

In its discharge of all of these functions, the Courts Service is required to have regard to the resources available and the need to secure the most beneficial, effective and efficient use of such resources and to have regard also to the principles and priorities of the Courts Service.

6.9 For all of the above reasons, there will be no orders or declarations made as sought by the plaintiff herein.