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NO REDACTION NEEDED



THE COURT OF APPEAL

CIVIL

Appeal Number: 2023/118

Faherty J.

Neutral Citation Number [2023] IECA 287

Allen J.

O'Moore J.

**IN THE MATTER OF THE LAND AND CONVEYANCING LAW REFORM ACT,
2009**

BETWEEN

UNA HIGGINS, NIALL O'HIGGINS, JOHN O'HIGGINS AND OLWYN

(OTHERWISE LOLA) O'HIGGINS

PLAINTIFFS/RESPONDENTS

AND

NIAMH O'HIGGINS-DALBY

DEFENDANT/APPELLANT

EX TEMPORE JUDGMENT of Mr. Justice Allen delivered on the 13th day of

November, 2023.

1. This is an appeal by Ms. Niamh O'Higgins against the judgment and order of the High Court (O'Regan J.) of 27th April, 2023 refusing the reliefs sought by the appellant by notice of motion filed on 6th May, 2022.
2. By special summons issued on 5th August, 2021 the plaintiffs applied to the High Court for an order pursuant to s. 31(2)(c) of the Land and Conveyancing Law Reform Act, 2009 for the sale of a property in Lahinch, County Clare, and the distribution of the proceeds of sale as the court should direct; and for an order pursuant to s. 31(2)(d) of the Act of 2009 directing such adjustments be made as might be necessary.
3. The property, the subject of the application, is a small bungalow which for some years was used by the Higgins family as a holiday home. It is owned by the respondents and the appellant and Ms. Nuala O'Higgins as tenants in common in equal shares.
4. The special indorsement of claim on the summons shows that the plaintiffs are desirous of realising their interest in the property; that the appellant was asked to consent to a sale but refused; and that the property is what is described as an ordinary house which would not be suitable for physical partition.
5. The short grounding affidavit of Mrs. Una Higgins verifies the special indorsement of claim and adds that the property was part of her late husband's estate which, by deed of assent dated 3rd November, 2017 was vested in the parties and Ms. Nuala O'Higgins as tenants in common in equal shares. Mrs. Higgins exhibited a letter of 1st July, 2021 from the respondents' solicitor to the appellant's solicitors which she describes as a letter calling for consent to the sale of the property so as to avoid the necessity for the proceedings but which shows that the unhappy differences in the Higgins family extended beyond whether the house at Lahinch should be sold or not.

6. An appearance was entered on behalf of the appellant on 26th November, 2021 by the solicitors who – as I will come to – had been acting for her for years.

7. On 26th January, 2022, in response to Mrs. Una Higgins two page affidavit, the appellant filed a 207 paragraph affidavit, running to 68 pages, with 198 pages of exhibits. She offered ten criticisms of the special summons and grounding affidavit before embarking on a litany of disputes.

8. John Francis Higgins died on 24th September, 2012. He was survived by his wife, Mrs. Una Higgins, and his children Niall, John, Olwyn, Niamh and Nuala.

9. By his will made on 9th January, 1987 he appointed Mrs. Higgins and Mr. Niall his executors and trustees and left all of his property to his trustees on trust for sale, to hold the same or the proceeds of sale thereof on trust (a) to pay his debts, (b) to hold his house in Dublin for Mrs. Higgins for her sole use and benefit absolutely, and (c) to divide the residue among Mrs. Higgins and – in the events which have transpired – his five children. The will was proved by Mrs. Higgins (only) on 12th January, 2015. The grant of probate shows that the estate was valued at €1,288,458 gross and €1,283,239 net.

10. Among the documents exhibited by the appellant in her replying affidavit was a copy of the inland revenue affidavit which showed that the estate comprised a house in Dublin – valued at €1,000,000 – a house in Lahinch – valued at €260,000, and some deposits; and that the benefit to be taken by each of the children was €45,500.

11. Also among the exhibits was a bundle of copy correspondence dating back to 4th July, 2012. This bundle included a letter of 4th June, 2014 from the estate solicitors to the appellant which said that under the terms of the will, the Dublin house would go to Mrs. Higgins and that the Lahinch house had been left in six equal shares; a letter of 17th June, 2014 from the estate's solicitors to the appellant's solicitors enclosing a copy of the will; and

a number of interim estate accounts which showed the Dublin house as going to Mrs. Higgins and the remainder of the estate being divided in six equal shares.

12. Also among the exhibits was a copy plenary summons issued on behalf of the appellant on 3rd June, 2016 by which the appellant – described in the general indorsement of claim as the heir-at-law – sought to restrain a then proposed sale of the property at Lahinch and a bundle of correspondence before and after which culminated in the vesting of the property in the parties and Ms. Nuala.

13. Also in the bundle of exhibits was a copy of a plenary summons which had been issued on behalf of the appellant on 25th January, 2022 – the day before the replying affidavit was filed. By that summons – which named as defendants Mrs. Higgins, Mr. Niall, Mr. John and Ms. Olwyn – the appellant claimed, broadly:-

1. A declaration that the Dublin house was held on trust for what was described as the Jack Higgins Will Trust;
2. An account and enquiry of the shares and savings beneficially owned by the deceased;
3. An order pursuant to s. 27(4) of the Succession Act, 1965 removing Mrs. Higgins as legal personal representative and giving liberty to the appellant to apply for a grant of letters of administration with will annexed;
4. A declaration that there was a common understanding, agreement and decision in respect of the Lahinch property and/or that the defendants were bound by the compromise of the 2016 action to jointly hold, retain and maintain the Lahinch property for their use and benefit as tenants in common;
5. Damages for breach of trust;
6. Damages for breach of agreement or contract or misrepresentation;

7. Interest;
8. Further and other relief;
9. Costs.

14. On 1st March, 2022 a further affidavit of Mrs. Una Higgins was filed the substance of which was to assert that most of what the appellant had said had nothing to do with whether the Lahinch property should be sold. She said that the Dublin house was not relevant to the application for the sale of the Lahinch house but went on to disagree with the construction of the will for which the appellant contended. There was, said Mrs. Higgins, no agreement or resolution that the Lahinch property would not be sold. This affidavit ran to 53 paragraphs over seven pages.

15. On 5th April, 2022 a second affidavit of the appellant was filed. This ran to 102 paragraphs over 18 pages.

16. A second supplemental affidavit of Mrs. Una Higgins filed on 11th May, 2022 ran to 23 paragraphs over five pages which, to the extent that it was not a repetition of what had previously been said, was argumentative.

17. On 6th May, 2022 a notice of motion was issued on behalf of the appellant. It is the judgment of the High Court on that motion that is the subject of this appeal. The appellant sought:-

1. Liberty to file a counterclaim and directions for any further pleadings;
2. A direction that the respondents give notice of the proceedings to Ms. Nuala, with liberty to Ms. Nuala to apply to become a notice party;
3. An order pursuant to O. 49, r. 6 of the Rules of the Superior Courts consolidating the application for sale with the appellants 2022 action;

4. Alternatively, a stay on the proceedings seeking the sale of the Lahinch property until the 2022 action was certified ready for trial;
5. Further and alternatively, an order adjourning the Lahinch proceedings to plenary hearing, with directions for pleadings and discovery;
6. An order pursuant to O. 38, r. 8 for the trial of an issue of fact as to whether on a true and proper construction of the will the Dublin property was held on trust for sale for the residuary beneficiaries;
7. An order directing the production:-
 - (a) By Mrs. Higgins of the estate file, and
 - (b) By the respondents of the papers in connection with an application for permission to seal and serve a copy of the special summons in lieu of the original;
8. An order adjourning the proceedings to consider whether they should be referred to mediation.

18. This motion was grounded on what was described as a third affidavit of the appellant (71 paragraphs, 15 pages, and another 21 pages of exhibit) which commenced with an assertion that the proceedings involved a family dispute involving two inheritance properties. She suggested that the respondents were attempting to re-litigate what should happen to what was described as the holiday home at Lahinch and that the respondents had ignored her offer *“to purchase their interests by way of a family arrangement involving”* the Dublin property. She suggested that both properties were *“subject to one trust or another, and are interlinked in the context of these proceedings.”* She asked the High Court to consider making one or several orders with a view to saving costs and avoiding duplication. The appellant exhibited a draft proposed counterclaim which raised more or less the same issues as had been identified in the general indorsement of claim on her 2022 plenary summons but sought

different reliefs. And she exhibited a draft third party notice which it was proposed might be issued and served on Ms. Nuala if she did not apply to be a notice party.

19. The proposed counterclaim rehearsed the terms of the will of J. F. Higgins and the 2016 action to restrain the sale of the Lahinch property and variously asserted the existence of an agreement in relation to the Lahinch house and an unreasonable refusal by the respondents to consider a proposal by the appellant that there should be an exchange of their interest in the Lahinch house for her – the appellant’s – interest in the Dublin property. The pleading and the reliefs claimed in the proposed counterclaim were not precisely in the same terms as the statement of claim which had been filed in the appellant’s plenary proceedings but the substance was the same. The appellant asserted an interest in the Dublin property and sought to restrain the disposal of Lahinch property.

20. I pause here to say that although the point does not appear to have been taken – and noting that there is some recent authority in England which suggests that the rule may not be entirely inflexible – it is *prima facie* an abuse of process to have two simultaneous actions in relation to the same subject matter, and this appears to have been precisely what the appellant was proposing.

21. Following a further round of affidavits on either side and an exchange of written legal submissions in these proceedings – and the filing in the appellant’s plenary action on 23rd April, 2023 of a 32 page statement of claim – the appellant’s motion was heard by O’Regan J. on 27th April, 2023. The transcript shows that the judge rose for half an hour before giving an *ex tempore* judgment.

22. At the commencement of the application the judge had deprecated the prolixity of the affidavits and her judgment was fairly terse.

23. The judge started by noting that the appellant’s motion had been brought in proceedings commenced by special summons. Focussing on the first of the reliefs sought, the judge said that the application was a motion pursuant to O. 20 of the Rules of the Superior Courts seeking leave to file a counterclaim.

24. Order 20, r. 1 of the rules provides:-

“1. When the procedure is by summary summons or special summons, no statement of claim or other pleading shall be delivered except by order of the Court, which order may be made in any case in which the delivery of such statement of claim or other pleading appears to be requisite.”

25. The judge identified the guiding feature of the rule as being that the pleading must be requisite.

26. The judge looked briefly at the background to the application, noting that there had been an assent on 3rd November, 2017 – following the institution of proceedings by the appellant in 2016 – to the vesting of the Lahinch property in the six parties as tenants in common in equal shares.

27. The judge noted that there was another property in Dublin in respect of which J.F. O’Higgins had made a bequest. Pointedly expressing no view on the merits of the appellant’s claim in respect of the Dublin property, the judge noted that Mrs. Higgins and the estate solicitors had taken the view that Mrs. Higgins was the sole beneficiary of the Dublin property and had said so in their letter to the appellant of 4th June, 2014 and had later in June 2014 provided the appellant’s solicitors with a copy of the will. It was not, however, until 1st December, 2020 that the appellant had taken issue with the construction which had been put on the will. Again without expressing any view on the merits, the judge observed that the

proposed counterclaim was somewhat confused inasmuch as it variously suggested that the Dublin property was subject to a life estate and that the property might sooner be sold.

28. The judge identified the essence of what the appellant was seeking as being that the sale of the Lahinch property should be postponed until she had realised her interest in the Dublin property. There was no pragmatic suggestion as to how, in the near future, the appellant might realise her interest in the Dublin property.

29. The judge noted that there while were a number of defendants to the appellant's 2022 action, one only of them had been served. She said that those proceedings were essentially proceedings between the appellant, in her personal capacity, and Mrs. Higgins, in her personal capacity.

30. The judge noted the appellant's argument that it would not be inconvenient to delay the sale of the Lahinch property. This, she said, appeared to ignore the evidence of the deterioration of the property and of the relationship between the parties.

31. The judge noted the appellant's argument that the value of the respondents' five sixths interest in the Lahinch property was less than the value of her claim to a one sixth interest in the Dublin property but said that there was no evidence for that. By reference to the valuations in the inland revenue affidavit of the two properties, the value of the appellant's claimed one sixth interest in the Dublin property – taking account of a life interest of Mrs. Higgins – could not equate to five sixths of the value of the Lahinch property. It was, said the judge, the appellant's wish to postpone the sale of the Lahinch property which created the connection between the claims. Emphasising that she was not finding anything as a matter of fact, the judge said that she could not see how a resolution of the issues in relation to the Dublin property might trigger a resolution of the proceedings in relation to the Lahinch property.

32. The judge then looked at the parties to the dispute in relation to the Dublin property and the parties to the dispute in relation to the Lahinch property. She said that the dispute in relation to the Dublin property was between the appellant and Mrs. Higgins, only, whereas the parties to the dispute in relation to the Lahinch property were all six co-owners – five on one side and one on the other. The issue in relation to the Dublin property arose from the will of Mr. Higgins. The Lahinch property, however, had been taken out of the estate by the assent.

33. The judge rejected an argument that it would not be unjust to the respondents to delay the proceedings seeking a sale of the Lahinch property because the respondents had not said that they immediately needed the money.

34. Without getting into the detail of them, the judge referenced the decisions in *Danske Bank v. Beggan* [2016] IEHC 663 and *McCarthy v. McNulty* [1999] IESC 70 and distinguished them on the ground that O. 20 – specifically the guiding principle that the proposed counterclaim must be requisite – was not engaged in either of those cases.

35. The judge then turned to s. 31 of the Act of 2009 and noted that on an application under that section the court had a very wide discretion. She expressed herself satisfied that the issues which the appellant wished to raise in relation to the Lahinch property could be raised and dealt with in the special summons proceedings.

36. The judge then referred to the judgment of the Supreme Court in *Duffy v. News Group Newspapers Ltd.* [1992] 2 I.R. 369 in which McCarthy J. observed that there is a heavy burden on those who seek to join or consolidate actions. She noted that the appellant's claim in respect of the Dublin property was first advanced six and a half years after she had been provided with a copy of the will, and that after the claim had first been made by the appellant

there was a delay first in issuing the 2022 action and then moving for leave to deliver a counterclaim in the Lahinch proceedings.

37. The judge was unconvinced by the suggestion that the making of the orders sought might result in a modest saving of court time. She held that it was not appropriate either to consolidate the 2022 action or to allow a counterclaim for the purposes of bringing in the claims in relation to the Dublin property but went on to say that it was possible – if not, having regard to the rate of progress to date, likely – that the 2022 action might be ready to be heard simultaneously with the special summons proceedings. In the meantime, the appellant was free to raise in the Lahinch proceedings any issues which she wished to raise in relation to the Lahinch property and at the hearing of those proceedings – depending on the outcome – could ask for a stay on any order than might be made.

38. By notice of appeal filed on 29th May, 2023 the appellant appealed on nine grounds.

39. The seventh ground is that the judge erred in “*in effect, dismissing the cross-action without a trial.*” Being as measured and charitable as I can be, this is arrant nonsense. It is perfectly clear from the judgment and order that all the judge did was to refuse – in the broad sense of the word – to consolidate the appellant’s claims in relation to the Dublin property with the respondents’ application for an order for the sale of Lahinch.

40. The first ground is that the judge erred in not applying or not properly applying O. 19, r. 2 – which governs pleadings generally – O. 3 – which governs procedure by special summons – and O. 21, r. 14 – which allows a plaintiff to apply to exclude a counterclaim: none of which, by the way, were referred to in the notice of motion. It is not suggested that the judge erred in applying or did not properly apply the rule that she did, namely, O. 20, rule 1, or that she erred in concluding or was not entitled to have concluded that the proposed counterclaim was not “*requisite*”.

41. Then it is said that the judge erred in determining the application by summarily assessing the merits or prospects of success of the proposed counterclaim or speculating as to the outcome of the proceedings. This, as I have said, is something which the judge pointedly did not do. The judge did identify a lack of clarity as to precisely what the appellant's claim in relation to the Dublin property was – whether it was, as suggested by the statement of claim, that the Dublin house was, without qualification, part of the residuary estate, or, as suggested by the proposed counterclaim, subject to perhaps a right of residence or perhaps a life estate in favour of Mrs. Higgins – but she did not take account of the appellant's prospects of success, still less decide the claims. It was accepted by counsel in the High Court that there was an inconsistency in the appellant's claims. The premise of the judge's assessment of the respective values of the appellant's interest in the Lahinch property and the value of the interest claimed in the Dublin property was that the appellant might make out her claim in relation to the Dublin property.

42. Alternatively, it is said that the judge erred in failing “*as per Order 40, rule 8*” to invite submissions or give directions for a trial or summary hearing of the issues disclosed by the affidavits.

43. Order 40, r. 8 provides that affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. I fail utterly to see what it has to do which the proposition that, on what was a case management application, the judge should have directed a trial of the issues disclosed by the affidavits.

44. In fact the suggestion is that the judge erred in failing to give directions for the trial or summary determination of all or any of a list of eleven issues “*insofar as all or any of the issues ... were necessary for a proper decision with regard to the filing or hearing of the*

counterclaim” – without identifying that the determination of any of the issues was necessary for “*a proper decision with regard to the filing or hearing of the counterclaim*”.

45. When one turns to the list of issues, one of them is “*That there [was] a majority in favour of a sale of [the Lahinch property]*”, which was common case; and another was “*That there was a possible delay by the appellant in advancing her claim on [the Dublin property] since June 2014*”, which was an incontrovertible objective fact. The proposition that the judge might have erred in failing to give directions for the trial of an issue as to whether “*the counterclaim would add to the length of the proceedings*” is nothing short of ridiculous. So also is the proposition that on a motion to consolidate two actions the judge ought to have considered giving directions for the trial of an issue as to whether there was a lack of mutuality in the special summons and the proposed counterclaim.

46. It was self-evident that a trial of the dispute in relation to both properties would be longer than a trial limited to the Lahinch property. Similarly, the lack of mutuality was obvious. Mrs. Higgins is party to the Lahinch proceedings in her personal capacity. Insofar as the Dublin property is concerned, the appellant’s claim is that she failed in her representative capacity to correctly administer the estate.

47. The fifth ground of appeal is that the judge failed to consider all of the circumstances – whatever that is supposed to mean – and failed to take account of the fact that there was no objection to or contrary evidence to the appellant’s evidence. This is bizarre. The appellant’s motion was grounded on what she described as her third affidavit, supplemented by “*the affidavits herein*” – which already ran to hundreds of pages. The affidavit of Mrs. Higgins filed in response to the motion and the appellant’s fourth affidavit added another fifty.

48. The sixth ground of appeal is that the judge erred in “*Alternatively, not considering and directing a separate hearing for the counterclaim (or part thereof) pursuant to the*

inherent jurisdiction of the court.” I have no idea what this is supposed to mean. Was the judge, having refused to allow the appellant to deliver a counterclaim, to have directed a trial of the issues which the appellant sought to raise by her counterclaim? This makes no sense.

49. The eight ground of appeal is that the judge erred in not considering, determining or allowing sufficient time to deal with discovery, the trial of a preliminary issue, and mediation. These reliefs were not separately pursued in the High Court and logically – certainly as far as the Dublin property was concerned – would only arise if the counterclaim were permitted.

50. Paragraph 7 of the notice of motion sought an order directing Mrs. Higgins to produce to the appellant a copy of “*the estate file*” and a copy of the papers filed in connection with an application to seal and serve a copy of the special summons. If there was anything on the estate file that was relevant to the issues in relation to the Lahinch property, the appellant did not say what it might be. If – as seems likely – the appellant hoped that there might be something on the estate file which would be of assistance in advancing her claim in relation to the Dublin property, she did not say what it was. More to the point, the relevance of any such document could only arise on the proposed counterclaim, if permitted.

51. What is referred to in the notice of appeal as the preliminary issue appears to be the issue in para. 6 of the notice of motion – and there said to be an issue of fact – as to the true and proper construction of the will. That could not arise unless the appellant was first permitted to agitate the issue as to the construction of the will in the proposed counterclaim.

52. As to mediation, the respondents’ declared position was that there had been attempts to reach agreement and that it had not been possible to reach any common ground. The respondent’s position was that there was no likelihood of mediation being beneficial to the parties and the respondents wished to proceed with their action. If the judge did not spell it

out, the premise of the appellant's proposal of mediation was that the issues in relation to the Dublin property were already issues in dispute in the Lahinch proceedings. The premise of the appellant's proposal was that the proceedings were objectively amenable to mediation and that in principle the power of the court under the Mediation Act, 2017 may be exercised where there is a reasonable prospect that mediation might resolve or substantially narrow the issues. However, unless and until the court decided either to consolidate the Lahinch proceedings with the appellant's plenary action or to permit the proposed counterclaim, the dispute as to the Dublin property was not an issue in dispute in the proceedings.

53. In their respondents' notice filed on 15th June, 2023 the respondents opposed the entirety of the appeal. The grounds of opposition effectively traverse the grounds of appeal. In the section headed "*Additional grounds on which the decision should be affirmed*" they state:-

1. That the proceedings seek an order for the sale of the Lahinch property;
2. That ownership of the property is not in dispute;
3. That five of the six co-owners want the property sold;
4. That the appellant is attempting to encumber what should be a relatively straightforward special summons application with belated claims in relation to the Dublin property; and
5. That the appellant's actions are serving to delay the respondents' remedy and increasing the costs.

54. I do not see these as additional grounds but as the core grounds on which the appellant's motion was refused by the High Court.

55. It is by now well established that an appellate court should be slow to interfere with a case management direction. In *Dowling v. Minister for Finance* [2012] IESC 32 Clarke J. (as he then was) said-

“Case management only works if there is broad adherence to the directions given by the Court. The trial court must retain a very large measure of discretion over the directions which are appropriate and the measures to be adopted in the event of failure to comply. There would be no reality to the achievement of the undoubted advantages which flow from case management if this Court were, on anything remotely resembling a regular basis, to entertain appeals from parties who were dissatisfied with either the precise directions given or orders made by the Court arising out of failure to comply.”

56. He went on to say that:-

“[o]rdinarily it would seem to me that it would be necessary for this Court to be satisfied that the relevant measures under appeal created a substantial risk of significant procedural unfairness coupled with the likelihood that no remedial action could be put in place either by the trial judge or by this Court on appeal which would have the effect of significantly remedying any unfairness which might be demonstrated to have occurred.”

57. And he concluded by saying that:-

“[I]t seems to me that this Court should only intervene if there is demonstrated a degree of irremediable prejudice created by the relevant case management directions such as could not reasonably be expected be remedied by the trial judge (or at least where the chances of that happening were small) and where therefore,

unusually, the safer course of action would be for this Court to intervene immediately to alter the case management directions.”

58. *McCarthy* is plainly distinguishable. That was a plenary action in which the defendants had been permitted to file a late counterclaim. The counterclaim was one which – if set up with the defence – the defendants would have been entitled to set up under O. 19, r. 2; subject to the plaintiff’s right to apply under O. 21, r. 14 that it be excluded. The issue on the appeal was whether it would be just or convenient that the counterclaim proceed with the action. Denham J. (as she then was) emphasising that the High Court order was a discretionary order, said that there was no evidence that the appellant would be embarrassed or that it would be unjust to permit the counterclaim to proceed.

59. Effectively, the issue in *McCarthy* was whether a counterclaim which the defendant was *prima facie* entitled to set up should be excluded. The onus was on the plaintiff. In this case the issue is whether the appellant should be permitted to set up a counterclaim in proceedings which *prima facie* are to be determined summarily. The onus was on the appellant to establish that it was requisite. In this case, the respondents, other than Mrs. Higgins, would plainly be embarrassed by being impleaded in a dispute in relation to the Dublin property in which they had and claimed no interest.

60. Contrary to the appellant’s submission, the onus was not on the respondents to show why the order sought should not be made but on the appellant to show that the counterclaim was requisite to the determination of the special summons proceedings.

61. As I have said, at the time of the hearing before the High Court on 27th April, 2023, the parties to, and the reliefs claimed by, the proposed counterclaim and the plenary summons were substantially the same and the judge had something to say about mutuality. Later, pursuant to an order made by the High Court (Meenan J.) on 23rd May, 2023 on an *ex parte*

application on behalf of the appellant, the plenary proceedings were substantially reconstituted by striking out Mr. Niall, Mr. John and Ms. Olwyn and by naming Mrs. Higgins both in her representative and personal capacities. Quite apart from the prohibition of simultaneous actions, it seems to me that the reconstitution of the plenary action recognised that the proposed counterclaim was not properly constituted: which – apart from everything else – leaves the appellant in the position of arguing that the High Court judge was wrong not to have permitted her to deliver a counterclaim which was not properly constituted.

62. I am quite satisfied that the order made by the High Court judge was well within her margin of discretion. For the reasons given, the appeal is not directed to the order made by the High Court and is misconceived.

63. For all these reasons, I would dismiss the appeal on all grounds.

[Faherty and O'Moore JJ. agreed.]