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Judgment: approved by the Court for handing down | *Delivered:* **17/12/10**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Steven Turner
and
Carol Turner

Plaintiffs;

And

Patrick Kearney

Defendant.

Master Bell

INTRODUCTION AND FACTS

[1] In 2002 Steven and Carol Turner (hereafter "the plaintiffs") employed Patrick Kearney, a builder, to build an extension to their home. The plaintiffs were not satisfied with the works carried out. They contended, for example, that there was damp, condensation and mould on the inside walls. They complained to Mr Kearney who assured them that he would remedy the defects. He did not do so. As a result, on 16 October 2008 the plaintiffs issued a Writ against Mr Kearney. For various reasons the Writ was not served immediately. Then, in or around July 2009, the plaintiffs' solicitor became aware that Mr Kearney had died. No grant of representation has issued in respect of Mr Kearney's estate.

[2] At the hearing before me the plaintiffs applied under Order 15 Rule 16(4)(a) of the Rules of the Court of Judicature to appoint Mrs Jennifer

Kearney, the widow of the late Patrick Kearney, as the personal representative of the estate of Patrick Kearney for the purpose of defending the proceedings against the estate. Mr Donal Lunny appeared on behalf of the plaintiffs instructed by Thompsons, solicitors. I received the assistance not only of Mr Lunny's oral submissions but also of his written skeleton argument.

[3] The writ in this action has been extended under Order 6 Rule 7 on three occasions following *ex parte* applications. On the second of these occasions I directed that the hearing of any application by the plaintiffs to appoint a representative of the late Mr Kearney's estate should be on notice to Mrs Kearney and that the listing of any application should be timed in order that she might have an opportunity to apply for legal aid if she so wished. At the hearing of the plaintiffs' application I then extended the validity of the Writ for a further six months (to ensure that the writ would remain valid during the period of any appeal of my decision) and reserved judgment. I now give my decision on the plaintiffs' application to appoint Mrs Kearney as representative and set out my reasons for that decision.

[4] The plaintiffs' application is grounded by five affidavits of Mark Jackson solicitor, these having been sworn on 12 October 2009, 11 January 2010, 15 June 2010, 8 October 2010, and 2 December 2010 and by one affidavit of Heather Stratton, solicitor, this having been sworn on 3 December 2010.

[5] Mrs Kearney has declined to engage in the application. I am satisfied from the affidavit of Heather Stratton that Mrs Kearney was aware of the time and location of the hearing.

[6] Mr Jackson's affidavit of 11 January 2010 deposes that he has had some contact with Mrs Kearney. She had telephoned him and left a message which said that she had received his earlier correspondence; she had health difficulties; there was no estate left by her late husband; she and her late husband had experienced financial problems; and she could not afford to instruct a solicitor nor could she afford to pay the plaintiffs any money. Mrs Kearney also spoke with another member of Mr Jackson's firm and indicated that there had been no relevant insurance in place and she was unwilling to act as representative of her late husband in any proceedings.

[7] Mr Jackson avers that he wrote to Mrs Kearney and sought proof of her late husband's impecuniosity but his correspondence received no reply. Mr Jackson avers that his clients are unwilling simply to accept Mrs Kearney's untested assertion that her late husband left no estate and wish to continue with their action. Mr Lunny submitted that Mrs Kearney has an inherent financial interest in the proceedings in that, if the late Mr Kearney left any estate, she was the person who was likely to have been the beneficiary of it.

[8] Mr Jackson avers in his affidavit of 2 December 2010 that he originally approached Kenneth Chambers who initially agreed to be appointed as personal representative of Mr Kearney. Mr Chambers later withdrew that consent. His reasons for doing so were that if, after his appointment, he did nothing and so permitted judgment to be marked against him, he would have a High court judgment against him and this might adversely affect his credit status.

[9] Mr Jackson then wrote to the Official Solicitor inviting her to act as a representative defendant. She has declined to give her consent to act in that capacity.

[10] The plaintiffs have also personally invited three individuals to act as representative defendants and each of those individuals has declined to do so. In addition, Mr Jackson then wrote to two solicitors and a chartered accountant enquiring whether they would consent. Each declined to do so. Two of the three proffered the explanation that, in the event that a judgment was entered against them, this would affect their credit status.

[11] It is in these circumstances the plaintiffs apply to the court for the appointment of Mrs Kearney as the personal representative of her late husband's estate.

THE RULES OF THE COURT OF JUDICATURE

[12] Order 15, Rules 15 and 16 provide :

> "*Representation of deceased person interested in proceedings*
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> 15. (1) Where in any proceedings it appears to the Court that a deceased person was interested in the matter in question in the proceedings and that he has no personal representative, the Court may, on the application of any party to the proceedings, proceed in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent that estate for the purposes of the proceedings and any such order, and any judgment or order subsequently given or made in the proceedings, shall bind the estate of the deceased person to the same extent as it would have been bound had a personal representative of that person been a party to the proceedings.
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> (2) Before making an order under this rule, the Court may require notice of the application for the order to be given to

Such (if any) of the persons having an interest in the estate as it thinks fit.

Proceedings against estates

16. (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.

(2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of AB deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.

(3) An action purporting to have been commenced against a person shall be treated, if he is dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.

(4) In any such action as is referred to in paragraph (1) or (3)-

(a) the plaintiff shall, during the period of validity for service of the writ or originating summons, apply to the Court for an order appointing a person to represent the deceased's estate for the purpose of the proceedings or, if a grant of probate or administration has been made since the commencement of the action, for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person so appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;

(b) the Court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in sub-paragraph (a) and allow such amendments (if any) to be made and make such other order as the Court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

(5) Before making an order under paragraph (4) the Court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to such (if any) of the persons having an interest in the estate as it thinks fit.

(6) Where an order is made under paragraph (4) rules 7(4) and 8(3) and (4) shall apply as if the order had been made under rule 7 on the application of the plaintiff.

(7) Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings."

THE CASE LAW

[13] The principal Northern Ireland decision on the issue is *Firth Finance and General Limited v McNarry* [1987] NI 125. In that case the plaintiff sought to recover from a former employee who had died after misappropriating monies. There had been no grant of probate or administration of the deceased's estate and the deceased's widow believed that the deceased had left neither will nor assets and did not intend to take any action in the matter of the deceased's estate. The plaintiff issued a writ to recover the misappropriated funds, naming the deceased's estate as defendant. When the widow refused to take any part in the action, the plaintiff applied to have the Official Solicitor appointed under Order 15 Rule 16(1) as the representative defendant. The Official Solicitor was willing to consent for the purpose of accepting service and Master Stephens appointed the Official Solicitor as representative defendant for the purpose of accepting service only, since he was not willing to consent to act further in the matter. The plaintiff therefore applied to the Master to substitute the widow as the representative defendant. Master Wilson granted this application and joined her as a defendant despite her opposition. The widow appealed and Murray J set aside Master Wilson's order. Murray J took the view that there was nothing in Order 15 Rule 16(4) to suggest that a person can be appointed as a representative defendant against his or her will and, since an appointment would, *inter alia*, expose the appointee at least to the risk of having to incur costs, he considered that in principle it would be objectionable and could not be validly ordered. Murray J was, however, conscious that the plaintiff was not without a remedy. Firstly, he considered that the plaintiff could apply to have their own nominee appointed by the court. Secondly, he considered that, if the plaintiff was successful in obtaining judgment against the defendant, the consequences of Order 15 Rule 16(7) were that any judgment in favour of the plaintiff would

bind the estate and the plaintiff, as a judgment creditor, would have the necessary *locus standi* to make an application for administration of the deceased's estate.

[14] Of the English decisions to which Murray J was referred, *Pratt v London Passenger Transport Board; Green v Vandekar* [1937] 1 All E.R. 473, a decision of the Court of Appeal for England and Wales, is authority for the proposition that there was no power under Order 16 Rule 46 of the rules then in force to appoint a person against his will to represent the estate of a deceased person. The factual context of the first appeal was that the defendants in a personal injury action attributed the blame to a third person who had since died. He had left no estate but he had been insured against claims for negligence. The plaintiff applied for an order that the Official Solicitor should represent the deceased's estate and be added as a defendant. The order was granted despite a lack of consent by the Official Solicitor. The factual context of the second appeal was similar, save that the deceased was a defendant to the action and the court was made without the consent of the Official Solicitor. Greer LJ observed that the main object of the appeals was to give assistance to the Official Solicitor as to decisions when he was asked to represent a deceased person. The decision of the Court of Appeal is stated, however, in broader terms than simply when a court may involve the Official Solicitor in legal proceedings. Greer LJ's concern was clearly that of costs. He observed that if the deceased person was someone who would have had to incur expense in the litigation, his representative would necessarily have to incur that expense and the court might well think that it was not a proper case in which to make an appointment of the Official Solicitor or anyone else who might be considered suitable for appointment without his consent.

[15] Slesser LJ expressed his opinion in forceful terms :

> "… in my opinion, it would be contrary to all principles of justice, and indeed contrary to decided authority, such as there is, to hold that that power to appoint such person to represent the estate could be made against the will and without the consent of the person sought to be appointed. Authority, if authority be needed for such a proposition, is to be found in the case of *Re Curtis and Betts* [1887] W.N. 126 where the court, Cotton, Bowen and Fry L.JJ. said …
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> > 'It was also wrong to appoint to represent an estate a person who was unwilling to act.' "

[16] Scott LJ observed that the case involved an important matter of public policy :

"These appeals have touched upon certain important questions of public policy arising out of recent legislation in regard to the rule that a personal action dies with the death of the person and in regard to the subject of the rights of plaintiffs against insurance companies with regard to substantial motor accidents on our roads. I express no opinion at all as to what is the appropriate remedy with regard to those matters, because that is not the business of a court and not before us, but I recognise that the question before the court here is one of great importance in order that the authorities concerned may consider what steps, if any, should be taken in regard to those matters of policy. The only question before the court, as I conceive it, is whether an order can be made under RSC Ord 16, r 46, appointing a person to be a representative of the estate of the deceased person, where that person so appointed does not consent to his appointment. In my view it is impossible to apply the rule where that consent is not given, and I think the decision of this court cited by Slesser LJ, *Re Curtis and Betts* is direct authority for that proposition. It has been suggested in the course of the argument that possibly the same result as was intended by the order in this case under r 46 might be achieved, and more successfully achieved, by an order of the Court of Probate for a limited administration *ad litem* and the appointment of a limited administrator for that purpose. That question again is not before the court, and I therefore express no opinion as to whether such an order could properly be made, but in my view for practical purposes neither one nor the other is possible without consent, and therefore no procedure can regularly be employed unless a person is willing to consent, and he will not consent in a normal case unless he is protected adequately against the financial risks involved in his appointment for the purpose of litigation. In other words, the opportunities available for adopting either the one procedure or the other, that is, under r 46 or the procedure of the Probate Division, will be exceedingly limited. If that is so, the result of our decision must necessarily be that a practical question will arise frequently in a very concrete form of its being impossible to proceed with the litigation for the ultimate purpose of getting payment out of the insurance company, which has taken the liability to

> third parties of a defendant who is responsible in law for causing injuries and then dies. Therefore the practical decision is that in this court all we can say is that the order was an order which ought not to have been made, and that the question is a matter for consideration from the point of view with which this court is not directly concerned."

[17] However, the question arises whether the Writ requires to be served at all. In *Re Richerson, Scales v. Heyhoe (No. 2).* [1890 S. 2760.] Chitty J held that when an order was made under Order 16 rule 46, the English rule then in force, it should appear on the face of the order, to render it binding on the estate of a deceased person, either that the Court, having had its attention called to this point, had dispensed with the legal personal representative of the deceased person interested in the matter, or had appointed some person to represent the estate. However the decision does not appear to provide a power to the court to allow an action to proceed in circumstances where the writ has not yet been served. It appears rather to provide a power to allow the court to dispense with the involvement of persons who have already been served.

PLAINTIFFS' SUBMISSIONS

[18] Mr Lunny submitted that the earlier case law must now be viewed through the prism of the Human Rights Act 1998 and the European Convention on Human Rights. The essence of his submission is that I must not follow the decision in *Firth Finance* because to do so would breach his clients' right to a fair trial under Article 6 of the Convention as it would prevent his clients from gaining access to a court.

[19] It is clear from the Strasbourg jurisprudence that Article 6 includes a right of access to the courts. In *Golder v United Kingdom* [1975] 1 EHHR 524 the European Court said :

> "Again, Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right."

[20] However legislation and court procedures may limit the right of access. In *De Geouffre de la Pradelle v France* (Application No 12964/87) judgment of 16 December 1992 the European Court said :

> "The Court reiterates that 'the right to a court' enshrined in Article 6 is not an absolute one. It may be subject to limitations, but these must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired."

[21] Mr Lunny submitted that Lester, Pannick and Herberg correctly summarises the position with regard to access to a court as follows :

> "There is no express guarantee of the right of access to a court in the text of Article 6, but in *Golder v United Kingdom* [1975] 1 EHHR 524… the ECtHR… decided that such a right of access was inherent in the object and purpose of Article 6(1)…The right is a right of effective access to a court….The right of access is not absolute but may be subject to limitations, since the right by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals. Nonetheless, the limitations applied to the right of access to court must not be such that the very essence of the right is impaired; they must, moreover, pursue a legitimate aim and comply with the principle of proportionality; and they should be legally certain."

[22] A more pithy expression of the issue is found in "A Practitioner's Guide to the European Convention on Human Rights", 3rd Edition, 2007, by Karen Reid where she states :

> "Procedural and practical impediments may contravene the Convention where they operate to bar effective access to the courts."

[23] Article 6 requires that the state provide a system of civil justice in which individuals may bring proceedings. The right to sue may be regulated. The state is entitled to restrict proceedings in a number of ways. It can impose a requirement that there be an identifiable cause of action. It can impose limitation periods within which proceedings must be initiated. Mr Lunny however submitted that an absolute principle that no one shall be appointed as a personal representative of a deceased person's estate without their consent is not sustainable in the face of Article 6. Mr Lunny submitted that the rule of public policy identified in *Pratt v London Passenger Transport Board; Green v Vandekar* requires to be modified in the light of the incorporation into domestic law of the European Convention.

[24] Mr Lunny also mounted an argument deduced from the decision of Morgan J in *Breslin and Others v McKenna and Others* [2009] NIQB 50. In that case the plaintiffs sued a number of individual defendants together with an unincorporated association, the Real Irish Republican Army. According to Morgan J's judgment, the Real IRA entered no appearance in the proceedings and took no part in it. The court acknowledged that, on the basis of the decision in *London Association for the Protection of Trade v Greenlands Ltd*. [1916] 2 AC 15, the Real IRA could not be a defendant in its own right. The issue for the court was whether certain other individual defendants could be held to be representatives of the Real IRA and an order made to that effect under Order 15 Rule 12 of the Rules of the Court of Judicature. Mr Lunny argued that it was unclear from the final judgment of Morgan J or from any of his interlocutory rulings in the case whether the writ had been served on any of the individual defendants as representative of the Real IRA. (It would be illogical for the judgment to have stated that the Real IRA had entered no appearance if the writ had not been served upon someone as its representative.) Mr Lunny's argument was therefore it seems unlikely that any of the individual defendants would have *consented* to accept service on the Real IRA's behalf. Hence Mr Lunny submitted that the common law must have evolved past the position as articulated in 1987 by Murray J in *Firth Finance* that one may not be appointed by a court as a representative unless one consents.

[25] I have reservations about the correctness of this argument. Firstly, it is not clear from the decision what the factual position in *Breslin* was in relation to service of the writ on the various defendants. Secondly, there is a distinct difference between an appointment under Order 15 Rule 12 and an appointment under either Order 15 Rule 15 or Order 15 Rule 16. For a court to be able to make an appointment under Order 15 Rule 12 it must reach a conclusion that "numerous persons have the same interest". It may therefore be inappropriate to draw the conclusion that Mr Lunny invites me to draw. However, it is not necessary for me to reach a conclusion on the merit of this argument for the purposes of this application given my conclusions on Mr Lunny's primary submission.

CONCLUSION

[26] With the passage of the Human Rights Act 1998 Parliament significantly altered the judicial task of statutory interpretation. Section 3(1) of the Human Rights Act 1998 provides :

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

[27] In *R v A* [2001] UKHL 25 Lord Steyn explained the impact of section 3 :

> "…. the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature… Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it … Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. "

[28] I accept Mr Lunny's argument that, following the coming into force of the Human Rights Act 1998, *Firth Finance and General Limited v McNarry* and *Pratt v London Passenger Transport Board; Green v Vandekar* can no longer be considered as representing good law if the circumstances of the case are such that declining to appoint a person as a personal representative has the effect of denying a plaintiff access to the courts. The guiding principle must now be understood to be that, while a court will be slow to appoint a personal representative who does not consent, each case must be looked at on its own facts and such an approach will not be justified if it has the effect of breaching a plaintiff's Article 6 rights. An important issue therefore is whether there is an alternative remedy for the plaintiffs if I were to refuse their application.

[29] The plaintiffs have found themselves unable to gain the consent of a responsible, professional person to be appointed personal representative of the estate of Mr Kearney. I accept Mr Lunny's submission that the plaintiff could probably gain the consent of someone to act as, in his description, "a puppet of the plaintiff". There appears to be no case law on the issue of whether, if the plaintiffs could find a "puppet" to act as personal representative, that person would have to robustly defend the proceedings to the best of his ability or whether that person could deliberately chose to allow the action to be lost by default. I agree with Mr Lunny's submission that, if the plaintiffs were to appoint a "puppet" as personal representative who would then deliberately agree to allow the action to be lost by default, this would make a mockery of what is supposed to be an adversarial litigation process and would not amount to a fair trial of the issues between the parties.

[30] I have concluded that, if I decline to grant the plaintiffs' application, the impact of that decision would be to stop the plaintiffs' action in its tracks. Effectively, I would bring their litigation to an end and breach their Article 6 right of access to the courts. I have therefore decided that the application should be granted.

[31] However that is not an end of the matter. A secondary question I must now address is to what extent the application should be granted. There are two alternatives. The first alternative is that I could appoint Mrs Kearney as the personal representative of the estate of Patrick Kearney for the purpose of service of the writ. The second alternative is that I could appoint Mrs Kearney as the personal representative of the estate of Patrick Kearney for the purpose of defending the proceedings in full.

[32] In *Firth Finance* Murray J was concerned that if he were to grant the application he would expose the appointee to the risk of having to incur costs in the action. Similarly in this case, if I were to grant the application in full and the estate of Mr Kearney is insolvent then there is a risk that Mrs Kearney, unless she was to be successful in obtaining legal aid, might have to incur costs in obtaining legal advice as regards whether or not to defend the action. On the other hand, if I were simply to order that she be appointed as personal representative for the purpose of accepting service of the writ, then in the event that the plaintiffs continue with their action and are successful in obtaining judgment, they may themselves apply for a grant of representation to administer any estate which Mr Kearney left. The latter alternative is also more desirable in that it observes the principle of *stare decisis* to the maximum extent possible, save for any necessary modification required by an interpretation of the Rules carried out in compliance with section 3 of the Human Rights Act 1998.

[33] I therefore grant an order under Order 15 Rule 16(4)(a) of the Rules of the Court of Judicature to appoint Jennifer Kearney, the widow of the late Patrick Kearney, as the personal representative of the estate of Patrick Kearney for the purpose of accepting service of the writ.