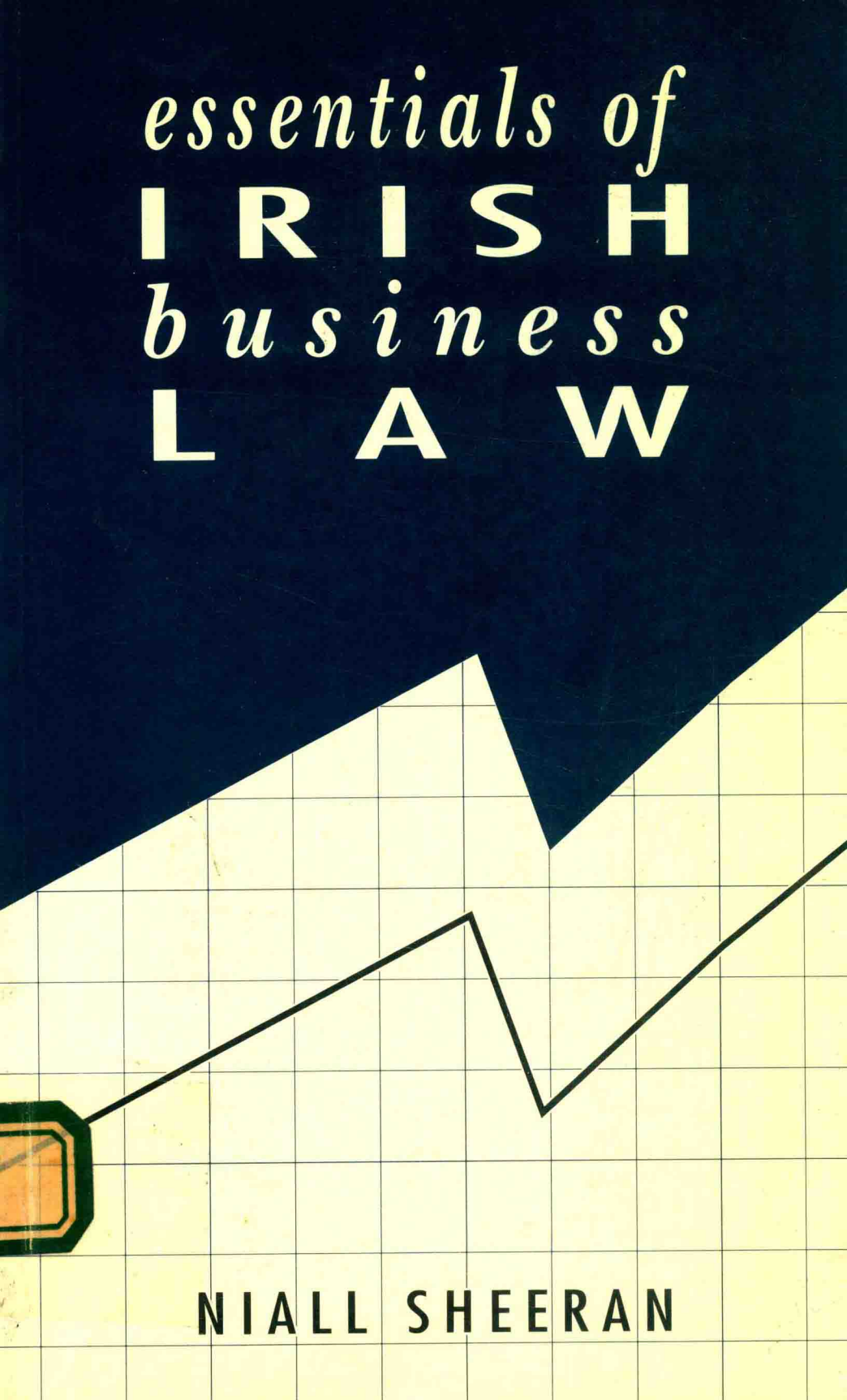
essentials of IRISH *business* LAW



NIALL SHEERAN

ESSENTIALS OF IRISH BUSINESS LAW

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To Anne

PREFACE

This book has been written to give a clear and concise exposition of the principles of Irish business law. It is designed primarily for students sitting examinations in third level colleges and professional institutes, but it is also relevant to students taking an introductory law course.

The book is laid out in seven sections, and includes a total of thirty-two chapters. Each chapter contains:

(a) a list of the important topics covered by the chapter;
(b) a summary of the purpose of the chapter;
(c) a presentation of the related rules of law in a style and format which will help students to assimilate the necessary facts;
(d) a progress test based on, and cross-referenced with, the contents of the chapter; and
(e) a list of the important cases and/or statutes referred to in the chapter, where applicable.

Each section is completed with a series of examination questions from past papers of professional institutes.

Every effort has been made to illustrate the various principles of law by relevant cases, in a style of presentation which should enable students to read the text and obtain a thorough understanding of the subject matter in a relatively short period of time. I have attempted to state the law as at 1 January 1991.

I wish to thank my family for their constant support; Michael who started this endeavour with me, and Deirdre who helped me complete it; my colleagues at Senior College, Dun Laoghaire for their encouragement and assistance; and the Institute of Accounting Technicians in Ireland, the Institute of Chartered Secretaries and Administrators, the Chartered Institute of Management Accountants and the Chartered Association of Certified Accountants for permission to use selected examination questions.

November 1991 Niall Sheeran

Contents

section 1

INTRODUCTION TO THE STUDY OF LAW

The functions and sources of law
The divisions of law—civil and criminal
Administration of law
Structure of the courts

chapter 1

THE FUNCTIONS AND SOURCES OF LAW

Topics covered in this chapter are:

- Functions of law
- Sources of Irish law
- Historical sources of law
- Legal sources of law

Summary of the chapter

This chapter examines the purpose and effect of Irish law and how that law has come into being.

• Functions of law

1. The law is the body of rules imposed by a State upon its members, designed to regulate human conduct within that State. The courts interpret these rules of conduct, decide whether they have been broken and pass sentence or make an award of compensation. A certain standard of behaviour is thereby maintained amongst the members of the State in the interest of the common good.

2. The law is not static. It changes and develops, reflecting the values and institutions of each era. Not alone does it define and safeguard rights of property and uphold public order, but it is also used to develop the national economy and to deal with social problems.

• Sources of Irish law

3. The term 'sources of law' is used in several different senses.
(a) Historical sources—generally regarded as common law and equity.
(b) Legal sources—the means by which the law is currently brought into existence.

There are five legal sources:

(i) legislation (statute law)
(ii) subordinate legislation (statutory instruments)
(iii) the Irish Constitution 1937
(iv) European Community Law
(v) judicial precedent—interpretation of statutes

• Historical sources of law

4. Irish law is a common law system derived from English law. It was implemented after a conquest which replaced the highly developed

native Brehon laws. Since the foundation of the Irish Free State in 1922, however, Irish law has developed a character of its own with the coming into effect of a written Irish Constitution (Bunreacht na hÉireann) on 29 December 1937 and the enactment of different statutes.

5. Because of the similarities between the legal systems of Ireland and England, having in most areas of the law a common base, it is necessary to refer initially to the historical development of English law.

Common law

6. At the time of the Norman Conquest in 1066 there existed a primitive legal system based on local custom. Afterwards, these local customs were unified into one system of law with the King at its head. A judicial system was gradually established through the Justices who travelled to different parts of the realm to settle criminal and civil disputes. Although these Justices at first applied the customary law of the neighbourhood, often hearing their cases with the assistance of a local jury, they developed rules of law, selected from the differing local customs which they had encountered, applied uniformly in all trials throughout the kingdom. This ancient unwritten law was made common to the whole of England and Wales, and for this reason was known as 'common law' (*ius commune*). The Irish had generally become entitled to the benefits of the common law by 1331.

7. To commence an action before any of these courts a writ had to be obtained. This specified the ground of complaint and gave a brief summary of the facts on which the plaintiff required judgment. After a period of time it was decided that writs could only be issued in one of the established forms in order to bring a grievance before the royal courts. The fact that no new types of writ could be issued unless it was approved or developed by Parliament made the common law system very rigid and hence an inadequate way of providing justice.

8. Over the years, the common law grew into a rigid and harsh system. Rules of procedure were complex, and any minor breach of these could leave a plaintiff, who had a good case, without a remedy. A plaintiff could be frustrated in civil actions, where the only remedy which the common law courts could grant was an award of damages. He could even find himself unable to enforce a judgment given in his favour because there was no suitable common law remedy. The practice grew in such cases of dissatisfied litigants petitioning the King to exercise his prerogative power in their favour. The King, through his Chancellor, set up the Court of Chancery to deal with these petitions.

Equity

9. The body of law developed by the King's Court, and administered by the Court of Chancery was called Equity. Initially, in dealing with each petition the Chancellor's concern was to establish the truth of the situation and to impose a just solution without undue regard for technicalities or procedural points. Gradually, the court began to be guided by its previous decisions and formulated a number of general principles, known as the 'maxims of equity' upon which it would proceed. These are still applied today when equitable relief is claimed.

10. The following are some examples of the many maxims:

(a) *He who seeks equity must do equity.* A person who seeks equitable relief must be prepared to act fairly towards his opponent as a condition of obtaining relief.
(b) *Equity looks to the intent rather than the form.* Although a person may attempt to pretend that he is doing something in the correct form, equity will look to see what he is really trying to achieve.
(c) *He who comes to equity must come with clean hands.* To be fairly treated, the plaintiff must also have acted properly in his past dealing with the defendant.
(d) *Equality is equity.* What is available to one person must be available to another. This reflects the effort made by the law to play fair and redress the balance.

11. Equity was not a complete alternative to the common law. Instead, it provided a gloss on the law by adding to and improving the common law. The major changes produced by the interaction of equity and common law included:

(a) the recognition and protection of rights by equity for which the common law gave no safeguard;
(b) the more effective procedure of equity in bringing a disputed matter to a decision;
(c) the development under equity of discretionary remedies.

12. By its nature, the Court of Chancery was bound to come into conflict with the common law courts. This rivalry was resolved in 1615 by a decision of the King that where common law and equity conflicted, equity would prevail.

13. By the nineteenth century it became the rule for judges in the Court of Chancery and the common law courts to respect and follow previous decisions and precedents. In view of the fact that the separate existence

of the Court of Chancery and the common law courts was not satisfactory, it was decided to merge the administration of equity and common law. Reforms were introduced in Ireland by the Judicature (Ireland) Act, 1877, which established a logical court structure, simplified procedures and fused the administration of common law and equity. The Act decreed that in cases of conflict, equity should still prevail over common law.

• Legal sources of law

Legislation or statute law

14. Legislation is the laying down of legal rules by an institution which is recognised as having the right to make law for the community. Such laws are known as statutes.

15. Our oldest statutes were ordinances made by English kings before parliaments existed, and which were applied to Ireland. The Parliament of Ireland made statutes for this country until the Act of Union, 1800 joined Ireland and Great Britain in the United Kingdom of Great Britain and Ireland. Between 1800 and 1922, statutes applying to Ireland were made in the Parliament at Westminster. Upon the establishment of the Irish Free State in 1922, legislative independence was restored. From 1922 to 1937, the legislative source was the Oireachtas of Saor Stát Éireann and, from 1937, under the Constitution, the Oireachtas. Legislation prior to 1922 continues in force, by virtue of Article 50 of the Constitution, to the extent that it is not inconsistent with the provisions of the 1937 Constitution.

16. Our current legislative body, therefore, is the Oireachtas which is empowered by our Constitution to legislate for the country. Article 15.2.1 states:

> The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has powers to make laws for the State.

The Oireachtas consists of two houses, being Dáil Éireann and Seanad Éireann, and the President.

17. Superior legislation, i.e. laws enacted by the legislature before they become law, are known as Bills. A Bill must go through five stages in each House of the Oireachtas. The first stage, which may take place in either the Dáil or the Seanad, consists of placing the title of the Bill before the House. After this the Bill is printed, but if it does not pass this stage then the Bill is defeated. Otherwise the printed Bill is circulated and given

a second reading. The minister responsible for guiding the Bill through the Oireachtas normally explains the nature of his intended legislation and often goes through the Bill section by section. The third stage is the committee stage. The 'committee' is normally the entire House, except where the Bill is of a highly technical nature, in which case it is examined by a Standing Committee representing the main parties and including some members at least who specialise in the relevant subject. The Bill is examined section by section and may be amended. The fourth stage is the report stage. Further amendments may be made. If the government has undertaken in committee to reconsider certain points, it often puts forward its final amendments at this stage. The fifth stage is the final reading. The Bill is then referred to the other House where a similar process must be followed. The Taoiseach then presents to the President, for his signature, all Bills passed by both Houses of the Oireachtas. It is then promulgated by the President who publishes a notice in Iris Oifigiúl (the Official Gazette) stating that the Bill has become law, and is now called an Act.

18. If at a later date a statute, or part of a statute, is found to be repugnant to the Constitution, it can be declared invalid by the High Court or, on appeal, by the Supreme Court.

19. Judges have established certain guidelines—which are not rules of law—to assist themselves in interpreting statutes. The three recognised judicial approaches to statutory interpretation are:

(a) *The Literal Rule.* This is the basic rule of interpretation. A judge must give to words their literal or usual meaning unless the Act defines or restricts the meaning to be taken.
(b) *The Golden Rule.* Where a literal interpretation of the statute would lead to an absurd or inconsistent result, the courts will usually attempt to modify the strict grammatical meaning of words in order to avoid such a result. Where a statute permits two or more possible meanings, application of the golden rule is not inconsistent with the literal rule, since the literal rule cannot be applied in such cases.
(c) *The Mischief Rule.* Where an Act is passed to remedy a mischief, the court must adopt the interpretation which will have the effect of remedying the mischief in question. The judge must look at the law which existed prior to the statute and then the defect in the law which the statute purported to remedy. The statute should then be construed in such a way to suppress the defect and advance the remedy.

Subordinate legislation

20. Subordinate, or 'delegated', legislation arises from laws laid down by a body or individual to whom the Oireachtas, i.e. the superior legislature, has delegated power to make regulations for specified purposes. The Oireachtas has delegated such power to government ministers, local authorities and other bodies.

21. Delegated legislation saves the time of the Oireachtas, by allowing it to concentrate on debating matters of general policy. It enables the government to act quickly in emergency situations, since such legislation may be implemented swiftly. Finally, it provides greater flexibility, because subordinate legislation can be added to or modified easily and quickly when it becomes outdated or impractical.

22. Delegated legislation is implemented by statutory instruments, orders, regulations and bye-laws which have the same force of law as statutes passed by the Oireachtas.

23. Delegated legislation must be reasonable, must apply basic fairness of procedures and must be *intra vires*, i.e. within the confines of powers delegated under statute. If delegated legislation is beyond the powers of those exercising it, it may be challenged in the courts on the grounds that it is *ultra vires* and be declared by the court as void.

24. Subordinate legislation is reviewed by the Seanad Select Committee on Statutory Instruments.

The Irish Constitution 1937 (Bunreacht na hÉireann)

25. The Constitution, which came into effect on 29 December 1937, is the basis of our constitutional law. The law of the Constitution:

(a) regulates the structure and function of the principal organs of government;
(b) regulates the relationship of these organs to each other and to the citizen.

It deals with such topics as the nation, the state, the office and function of the President, the Oireachtas, the government and the courts. It also concerns itself with the Attorney General, the Council of State and the Comptroller and Auditor General. It contains a section which guarantees certain fundamental rights to every citizen. These include personal rights (Article 40) and rights relating to the family (Article 41), education (Article 42), private property (Article 43) and religion (Article 44).

26. The Constitution has a higher status than any other domestic law in that it may only be changed by a majority of voters in a referendum and in that any legislation which is held to be repugnant to the Constitution is invalid.

27. The President has power, after consulting the Council of State, to refer a Bill before it becomes law to the Supreme Court for a decision as to its constitutionality. Legislation enacted by the Oireachtas may be challenged under the Constitution in the High Court, and on appeal in the Supreme Court, by the President or by any party with an actionable interest.

Case: Murphy v Attorney General (1980)

Article 41 of the Constitution declares that the State pledges to guard with special care the institution of marriage on which the family is founded, and to protect it against attack. The plaintiff challenged parts of the income tax code which taxed a married couple living together more heavily than two single persons living together with similar incomes.

Held: The nature and potentially progressive extent of the burden was a breach of the pledge by the State to guard with special care the institution of marriage. The provisions in the Income Tax Act, 1967 were therefore held to be unconstitutional.

Case: Educational Company of Ireland v Fitzpatrick (1961)

Article 40.6.1 of the Constitution guarantees the right of freedom of association. Employees of the company, who were members of a union, in order to force their employer to employ only trade union labour, picketed the premises in an attempt to force all the employees to join the union.

Held: Employees who, when being employed, were not required to belong to a union had the constitutional right to dissociate. Thus, picketing for the purpose of forcing persons to join a union against their wishes was inconsistent with the right to freedom of association and, hence, unconstitutional.

European Community law

28. On the accession of Ireland to the European Community in January 1973, the Constitution has no longer been supreme in all respects. A constitutional amendment was necessary to allow laws of the Community made externally, and not by organs established under the Constitution, to be part of our domestic law. Such a modification was accepted by the People in a referendum on the third amendment to the

Constitution on 10 May 1972 and was enforced by special statutes, namely, the European Communities Act, 1972 and the European Communities (Amendment) Act, 1973.

29. The primary law of the Community, which is contained in the principal treaties, i.e. the Treaty of Paris, 1951 and the Treaty of Rome, 1957, takes precedence over domestic law. This primary law is self-executing in that ratification of the treaties means that the provisions of the treaties become automatically embraced in the law of the State.

30. The secondary law of the Community, made by the Council of Ministers or the Commission, consists of Regulations which apply to the Member States immediately without further legislation. Directives are made obligatory by special statutes or statutory instruments if necessary. Decisions, Recommendations and Opinions expressing the Council of Ministers' and Commission's views may also be issued. These, however, are only binding on the parties concerned, and are merely persuasive in other disputes.

31. While it is true that membership of the EC does restrict the supremacy of the Constitution, the community law to which Ireland must ultimately conform is made as a result of negotiation and often agreement between the Irish government and the other governments of the EC. The Irish government has the support of a majority of members of the Dáil. Therefore the Oireachtas through government action has indirect influence, to a certain extent, on the EC law-making process.

Judicial precedent

32. Common law and equity have been developed through the centuries by judges in giving their decisions in the courts. Judge-made law involved the application of customary law to new situations, thereby maintaining consistency. As the law became more sophisticated, the decisions of the judges were recorded and reports were made of law cases. It became possible to follow previous decisions of judges and this brought about a level of certainty and progressive development in judge-made law. The reform introduced by the Judicature Acts, 1873–75 led to the modern doctrine of precedent which depends for its operation on the fact that the courts are organised in a hierarchy.

33. Judicial precedent is the application of a principle of law, as laid down by a higher court, or a court of equal status, on a previous occasion in a similar case to the case before the court. This is known as the doctrine of *stare decisis*. A precedent (or previous decision) may be persuasive or binding.

34. A *persuasive precedent* is one which does not have to be followed by a court. The judge, however, may be influenced by it because it is worthy of the court's respect.

35. A *binding precedent* is a decision which the court must follow. This is based on the view that it is not the function of a judge to make law, but to decide cases in accordance with existing rules. Not all of the decision is binding on a later court, but only its authoritative element which is called the *ratio decidendi* (reason for the decision). This is the principle of the law upon which the judgment was based. The remainder, known as *obiter dicta* (by the way), are comments not directly related to the case and do not constitute binding precedent.

36. Not every decision made in a court is binding as a judicial precedent. The court's status has a significant effect on whether its decisions are persuasive, binding or disregarded. The higher the court, the more universally followed will be the decision. A superior court may overrule or replace a precedent set in a lower court. The old principle is then void of authority and is replaced by the new principle. Courts of equal seniority have no power to overrule each other, and decisions of such courts act as persuasive authority only. Finally, the court may decide that the *ratio decidendi* of the previous case is not relevant to the current action because of factual differences which justify the court in not following the earlier case. This is known as 'distinguishing' the case, and allows a different legal principle to be formulated.

37. The highest court of authority, the Irish Supreme Court, binds all the courts. Because it is the highest court it is not bound by decisions of any other court. Since 1965, however, it has broken with its tradition of always following its own previous decisions, and also the decisions of those courts which had preceded it as the court of ultimate jurisdiction.

38. In the State (Quinn) v Ryan (1965), the Supreme Court declared unconstitutional a statutory provision which it had previously declared constitutional in the earlier case of the State (Duggan) v Tapley (1952). This more liberal approach was extended beyond the confines of constitutional issues in the Attorney General v Ryan's Car Hire Ltd (1965). In this case, Justice Kingsmill Moore, while accepting the need to follow precedents in order to avoid uncertainty in the law, was of the opinion that 'the rigid rule of *stare decisis* must in a court of ultimate resort give place to a more elastic formula. Where such a court is clearly of the opinion that an earlier decision was erroneous, it should be at liberty to refuse to allow it, at all events, in exceptional cases.'