



MATHESON ORMSBY PRENTICE 

**STEP ANNUAL CONFERENCE
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Legal Issues Concerning Debts in Estates**

**JOHN GILL
MATHESON ORMSBY PRENTICE
70 SIR JOHN ROGERSON'S QUAY
DUBLIN 2
IRELAND**

**Direct Line - + 353 1 232 2159
Email – john.gill@mop.ie**

- Introduction
 - The New Environment – Relevance of Issues for Practitioners
 - Range of Debt - Standalone Debt – Debts effecting Estate Solvency
 - Civil Liability Act 1961
 - Section 8(1)...*on the death of a person on or after the date of the passing of this Act, all causes of action (other than excepted causes of action) subsisting against him shall survive against the deceased's estate.*

- *Section 9(2)...No proceedings shall be maintainable in respect of any cause of action whatsoever which has survived against the estate of a deceased person unless either –*
 - *proceedings against him in respect of that cause of action will commence within the relevant period or are pending at the date of his death, and*
 - *proceedings are commenced in respect of that cause of action within the relevant period or within the period of two years after his date of death, whichever period first expires.”*

- Impact of Section 9(2)
 - Importance of a Cause of Action Subsisting at Date of Death
 - No cause of Action – Statute of Limitation Act 1957
 - Section 11 (6 year rule) for actions founded on contract

- Event of Default/Security Documentation
 - *Bank of Ireland v O'Keefe*
 - Guarantees furnished by Deceased
 - Deceased died on 11 February 1982
 - Proceedings issued in February 1985
 - First demand made on 6 May 1982

- Demand pre-condition to enforcement of security
 - *AIB v Philip English*
 - In this case, demand was made for guarantee during lifetime of deceased

- Closely examine security documentation
- Executors duty to preserve and protect value of estate
- Challenge proceedings issued two years after date of death

- Secured v Unsecured Debt
 - Distinction – Actions for simple debt recovery v claims for possession?
 - Section 8(1) - Actions in Personam?
 - However, Section 9(2) any cause of action whatsoever
 - No formal judicial interpretation
 - Prudent view to issue Proceedings within 2 years of death notwithstanding Section 13(2) of Statute of Limitations Act 1957 – 12 years
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- Impact of Acknowledgement
 - Section 52 Statute of Limitations Act 1957
- Acknowledgement of Mortgage Debt
 - Right of action accrues on date of acknowledgement
 - Obiter in Barron J in *Bank of Ireland v O'Keefe*
 - *“The Plaintiff had contended that if the defence of the section was a good one, that nevertheless there was a valid acknowledgement on behalf of the estate which stopped the statute from running. I do not think it is necessary to deal with this point in any great depth.*

- *“However, it does seem quite clear from the provisions of Section 9 that the relevant period referred to in Section 9(1) includes not only the basic period of limitation laid down by the statute but also the extension of such basic period by reason of such matters as acknowledgments in writing, mistake, etc. For this reason, had the section applied to the fact that there might or might not have been an acknowledgment in writing by the estate, would not have availed the Plaintiff.”*
- Contrasting view of Sheridan J in *AIB v English*
- Contrasting judicial views – conclusion err on the side of caution

- Against whom should proceedings issue?
- Distinction between Executors/Administrators
- Executor acknowledges/subsequently renounces
 - Liability as Executors de Son Tort
- Section 23 Succession Act 1965
 - Liability to extent of estate coming into his hands

- Creditor Grants
 - Against whom should proceedings issue?
 - Testate estate – proceedings against named executors
 - Intestacy – note Section 13 Succession Act 1965
 - Executors intermeddling
 - liability as “*executor de son tort*”
 - Options for Creditors if executors renounce/reserve rights

- **Creditor Grants**
 - Order 79 rule Section (4) - where all other persons cleared off
 - Order 79 rule 6(g) - right to apply for ensuring payment of debt. Grant of Administration Will annexed
 - Section 27(4) – most common
 - Administrator Ad Litem - function to defend proceedings
 - Procedural requirements – Special summons by way of notice of motion and grounding affidavits
 - Section 27(4) application may be accompanied by application under Section 26(2) or 27(2) revoking original Grant and removing appointed personal representative

- Exceptions to Section 9(2)
 - Section 1048 Assessments - within 3 years of the end of tax year if Grant issues in year of death, otherwise 2 years after the expiration of the year in which Grant issued in any other case
 - Section 341(4) Social Welfare (Consolidation) Act 2005 - debts due to Minister
 - Possibility of a claim should be investigated by the personal representatives
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- Debts in a Solvent Estate
 - Section 45 –
 - Assets of estates to be used for debts/liabilities
 - Explore full beneficial interest of deceased in all assets
 - All creditors paid
 - Order of application of assets to discharge liabilities
 - Part V Succession Act 1965 (Section 45 – 49)
 - Solvent estate (Section 46(3) First Schedule Part II)
 - Right of Retainer/Right to Prefer Creditors
 - Right to have assets marshalled (Section 46(5))

- Section 46 to be read with Section 47 – charges on property to be paid out of the property, unless Will states otherwise
 - Section 47 – Rights of a chargee not effected. Chargee may seek to have payment out of the general assets of the deceased, if deemed personally liable
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- Insolvent Estate
 - First Schedule Part 1
 - Priority of funeral, testamentary and administration expenses
 - What constitutes such expenses?
- Section 46(1) – introduction in Succession Act 1965
 - Impact of Schedule 1 Part 1
 - Rights of Creditors
 - Priority of Debts
 - Valuation of Liabilities and Proving of Assets (special bankruptcy rules)
 - Specific provisions of Bankruptcy Act 1988 excluded
 - Section 50 and 57 – 59 1988 Act

- Administration in Bankruptcy
 - Death of a Bankrupt individual
 - Administration in Bankruptcy continues
 - Individual not Bankrupt but estate insolvent
 - Petition for Administration in Bankruptcy Personal Representative or Creditor
 - Section 115 to 120 – Section 120 specifically applies provisions of Bankruptcy Code to Administration in Bankruptcy
 - Provisions such as Section 81 - Priority of Debts provisions
 - Lodge in Examiners Office/duplicates with Official Assignee
 - a statement of affairs regarding deceased's estate and on account of dealings with the estate in a form required by Official Assignee

- Link between Succession Act and Bankruptcy Act
 - First Schedule Part 1 – specific language
 - Apart from funeral, testamentary expenses, Bankruptcy rules apply
 - Role of Official Assignee/Trustee in Bankruptcy/Personal Representative

- Priority of Payments – Section 81
 - Preferential debts, Rates, Taxes, etc
 - Super Preferential – Social Welfare (Consolidation) Act 2005
 - Section 81(2) Category of Preferential Creditors rank equally
 - Personal Representative
 - Section 46(2) - Right of Retainer does not apply in an insolvent estate
 - Right to prefer creditors still applies
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- Role of Personal Representative
 - Gather in assets/identity liabilities
 - Adhere to priority of payments
 - May be personally liable in terms of historic distributions up to extent of assets received by him as part of estate

- Protection for Personal Representatives
 - Section 49 Notice
 - potential deficiencies, quality of notice
 - *“in the opinion of the court in which the personal representatives is sought to be charged, would have been given by the court in administration”*
 - Creditors in foreign jurisdictions
 - Application to Court
 - Benjamin Order to permit distributions on an assumed basis

- Implications for Will Drafting
 - Selection of Executors – independent, commercial, robust
 - Give broad powers to executors
 - Partial disclaimer power for beneficiaries



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20677630.3