The implications of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 for the admission of documentary evidence

Introduction

Documentary evidence is subject to the general rules of admissibility. Of particular importance in this regard is the hearsay rule, which serves to exclude any document sought to be relied on as evidence of the truth of its contents unless an exception to that rule is applicable. In addition, there are two specific rules at common law relating to the proof of documents and their receivability in evidence which must be satisfied before a party can rely on the contents of a document: first, the party must prove the contents of the document; and second, the party must prove that the document is authentic or, in some instances, that the document was properly executed.[1]

The Law Reform Commission examined the rules and principles governing the admission of documentary evidence in its *Consultation Paper on Documentary and Electronic Evidence,*[2] in which it provisionally recommended the adoption of an inclusionary approach to the admissibility of manual and electronic documentary evidence, subject to a number of safeguards and the continuance of the discretion of the court to exclude the evidence.[3] In its *Report: Consolidation and Reform of Aspects of the Law of Evidence*, the Law Reform Commission adopted a more nuanced approach, whereby it recommended that a copy of an original document ought to be admissible in civil and criminal proceedings where the court is satisfied as to its relevance and reliability,[4] and the authentication of documents should remain a matter for the courts to determine, subject to a number of specific recommendations.[5] The Commission further recommended that records compiled in the course of business should generally be admissible in both civil and criminal proceedings as an inclusionary exception to the hearsay rule.[6]

In a welcome piece of reform, the recommendations of the Law Reform Commission in relation to the admissibility of business records in civil proceedings have been implemented in the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (the "2020 Act").[7]

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1 See *The Leopardstown Club Limited v Templeville Developments Limited* [2010] IEHC 152 at [5.17]–[5.20].

2 LRC CP 57–2009.

3 LRC CP 57–2009, at [5.19].

4 LRC 117–2016, at [4.33].

5 LRC 117–2016, at [4.46].

6 LRC 117 – 2016 at [2.43].

7 Part 3 was commenced on 21 August 2020 by the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (Commencement) Order 2020 (SI No. 306 of 2020)

Exception to the Hearsay Rule

The lack of any general exception to the hearsay rule covering business records was highlighted by the decision of the House of Lord in *Myers v DPP*[8] where it was held that manufacturer's records compiled in the ordinary course of business and of undoubted reliability were inadmissible. That decision was addressed on the criminal side by Part II of the Criminal Evidence Act 1992 (the "1992 Act") which created a wide ranging exception for business records in criminal cases. However, there was no equivalent reform on the civil side which led to adverse judicial comment about the "strange position" which had been reached whereby the hearsay rule had a greater exclusionary effect in civil cases than in criminal cases.[9]

In practice, the adverse effects of this anomaly had been mitigated by the good sense and co-operation of legal representatives who routinely waived any objection on hearsay grounds to the admission of documents.[10] Over time, tacit agreement to the admission of such documentation evolved into a more formal practice whereby parties agreed that identified documents could be admitted as *prima facie* evidence of their contents on what has become known as the *Bula/Fyffes* basis whereby the documents the subject of the agreement (usually the documents discovered in the proceedings) could be admitted as *prima facie* evidence of the truth of their contents, either *simpliciter* or as against the party who created the original of the document in question.[11] However, in a series of cases taken by financial institutions and their successors in title relating to unpaid loans, a far less accommodating approach was taken by debtors, and objections were raised to the admissibility of bank and business records.[12]

By the time that the Court of Appeal came to give judgment in *Promontoria (Aran) Ltd v Burns*,[13] the law in this area was regarded as being in a "most unsatisfactory state"[14] as a result

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[8] [1965] AC 1001.

[9] In *Bank of Scotland Plc v Beades* [2019] IESC 61 at [28], O'Donnell J observed that a somewhat strange position had been reached in Ireland, where the decision in *Myers v. Director of Public Prosecutions* [1965] A.C. 1001 had been abrogated by statute in respect of criminal proceedings but not in civil proceedings. He observed that: "It is surely desirable that the question should be addressed in the context of civil proceedings generally and modern practices and technology, and not merely where questions under the [Bankers' Books Evidence Act 1879] arise in respect of claims made against financial institutions." To similar effect, in *Promontoria (Aran) Ltd v Burns* [2020] IECA 87 at [8], Collins J identified the "curious position" that the hearsay rule applied more strictly in an application for summary judgment than it did in a prosecution for a serious criminal offence and said that this "clearly deserves the attention of the legislature".

[10] See by way of example, *Hughes v Staunton*, unreported, High Court, 16 February 1990 and *Shelley-Morris v Bus Atha Cliath* [2003] 1 IR 232.

[11] See *Moorview Developments Ltd v First Active plc* [2008] IEHC 211 at [3.4]–[3.8] and [2009] IEHC 214 at [3.1].

[12] See the comments of McKechnie J in *Bank of Scotland plc v Fergus* [2019] IESC 91 at [59] – [60], [2020] 1 ILRM 313 at 345.

[13] [2020] IECA 87.

[14] [2020] IECA 87 (judgment of Collins J at [2]).

of the "somewhat inconsistent and discordant judgments of the superior courts".[15] The Oireachtas has finally addressed the situation in Part 3, Chapter 3 of 2020 Act which is based on the draft Bill produced by the Law Reform Commission in its Report and the provisions of the 1992 Act.[16]

(i) Admissibility

Section 13 creates an inclusionary exception to the hearsay rule [17] in respect of business records whereby, in civil proceedings,[18] "any record in document form compiled in the ordinary course of business shall be presumed to admissible as evidence of the truth of the fact or facts asserted in such a document" where such a document complies with the requirements of Chapter 3. Indeed, the section goes further than s.5 of the 1992 Act in that it not only creates an inclusionary exception, it contains a presumption of admissibility"[19] and that presumption is reinforced by s.14 which stipulates that, if the requirements laid down by that section are satisfied, a business record "shall be admissible" of any fact in the document of which direct oral evidence would be admissible.

In order to come within the scope of s.13, a document[20] has to be "complied in the ordinary course of business" and s.12 defines "business" broadly to include "any trade, profession or other occupation carried on, whether for profit or otherwise, either within or outside the State". This accords with what might be regarded as the natural meaning of the term but the section does on to give the concept of a "business" an extended and somewhat artificial meaning to also encompass "the performance of functions by or on behalf of – (a) any person or body remunerated or financed wholly or partly out of moneys provided by the Oireachtas, (b) a charity within the meaning of the Charities Act 2009, (c) any institution of the European Union, (d) any national or local authority in a jurisdiction outside the State, or (e) any international organisation."

The exception also applies to business records in document form that originate from outside

[15] [2020] IECA 87 (judgment of Baker J at [5]).

[16] See the Explanatory and Financial Memorandum at p. 5.

[17] This exception is additional to the existing common law and statutory exceptions with section 14(8) stipulating that nothing in Chapter 3 shall be interpreted as altering or affecting the admissibility of any document that would otherwise be admissible under any rule of law or enactment (including the 2020 Act) to prove the truth of any fact or facts asserted in it. Therefore, in an appropriate case, recourse can be made to another common law or statutory exception to the hearsay rule to admit a business record.

[18] Section 10 defines "civil proceedings" as including "any cause, action, suit or matter, other than a criminal proceedings, in any court". Accordingly, Chapter 3 is somewhat narrower in its application than the Bankers' Books Evidence Acts 1879 – 1989 which, by virtue of the definition of "legal proceeding" in s.10, apply to any inquiry in which evidence may be given and an arbitration as well as court proceedings.

[19] In *People (DPP) v O'Mahoney* [2016] IECA 111 at [54], Birmingham J highlighted that s.5 of the 1992 Act did not contain any presumption of admissibility when stating that it did not provide for the admission "willy nilly" of business records in criminal proceedings.

[20] A document is defined as including "(a) a map, plan, graph, drawing or photograph, or (b) a reproduction in permanent legible form, by a computer or other means (including enlarging), of information in non-legible form".

the State, which are admissible notwithstanding that any person who may act on behalf of such a business is not compellable to give evidence in a court in the State,[21] and to the records of a business that has ceased to exist.[22]

Pursuant to s.14, information contained in a business record within the meaning of the Chapter is admissible in civil proceedings "as evidence of any fact in the document of which direct oral evidence would be admissible" if the information: (a) was compiled in the ordinary course of a business, (b) was supplied by a person (whether or not he or she so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge[23] of the matters dealt with, and (c) in the case of information in non-legible form[24] that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.[25] Subsection (2) goes on to provide that the information is admissible whether it was "supplied directly or indirectly but, if it was supplied indirectly, only if each person (whether or not he or she is identifiable) through whom it was supplied received it in the ordinary course of a business".

Where information is admissible under s.14 but is expressed in terms that are not intelligible to the average person without explanation, an explanation of the information is also admissible if either (a) it is given orally by a person who is competent to do so, or (b) it is contained in a document and the document purports to be signed by such a person.[26]

There are a number of limitations on the applicability of the hearsay exception created by s.14(1) which replicate those contained in s.5 of the 1992 Act and are likely to be of more relevance in criminal proceedings. Thus, other than in certain specified circumstances,[27] the exception in respect of business records does not apply to information that is: (a) privileged from disclosure in civil or criminal proceedings,[28] (b) supplied by a person who would not be compellable to give evidence at the instance of the party wishing to give the information by

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[21] Section 14(6).

[22] Section 14(7).

[23] It is not necessary that the individual who created the record be identified so that their personal knowledge can be assessed (*R. v Ewing* [1983] QB 1039, [1983] 2 All ER 645) because such personal knowledge may be inferred (*R. v Foxley* [1995] 2 Cr App R 523 at 536).

[24] Section 2 of the 1992 Act defines "information in non-legible form" to include "information on microfilm, microfiche, magnetic tape or disk". There is no equivalent definition in the 2020 Act. However, it is clear from the Law Reform Commission, *Report: Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117 – 2016) and the draft Bill appended thereto on which Chapter 3 is modelled that the Law Reform Commission envisaged this exception operating broadly on the basis of a technology neutral definition of document.

[25] These criteria were described in *People (DPP) v O'Mahoney* [2016] IECA 111 at [55] as statutory preconditions as to admissibility, each of which has to be satisfied. It was further held (at [58] – [59]) that the onus is on the party seeking to adduce the evidence to establish that these statutory preconditions have been satisfied.

[26] Section 14(5).

[27] These are set out in subs.(4).

[28] Section 14(3)(a).

virtue of s.14,[29] or (c) compiled for the purposes or in contemplation of any (i) criminal investigation, (ii) investigation or inquiry carried out pursuant to or under any enactment, (iii) civil or criminal proceedings, or (iv) proceedings of a disciplinary nature except in certain specified circumstances.[30]

The effect of the presumption of admissibility is that the party seeking to adduce business records in evidence does not have to adduce any evidence as to the non-applicability of these limitations and it will be a matter for the party seeking to challenge the admission of the business records to establish that they are not admissible on this basis.[31]

(ii) Notice Requirements

Section 15 contains an important procedural safeguard requiring notice to be given of an intention to rely on business records. Subsection (1) provides that information in a document shall not, without the leave of the court, be admissible in evidence by virtue of s.14 unless a copy of the document has been served[32] on the other party or parties or, not later than 21 days before the commencement of the trial, a notice of intention so to give the information in evidence, together with a copy of the document, is served by or on behalf of the party proposing to give it in evidence on each of the other parties to the proceedings.

It is important to note that notice of an intention to adduce evidence of business records is only required in advance of a hearing if copies of the documents have not have already been provided. As a result, in most civil cases, no such notice will in fact be necessary. In applications and actions heard on affidavit, the business records on which a party seeks to rely will have been provided by way of exhibits to affidavits and, in plenary actions, they will generally have been provided by way of discovery. Therefore, it will generally only be in plenary actions in which discovery has not been made or a party seeks to rely on documents which fall outside of the categories of discovery that a specific notice under s.15(1) will be required.

If copies of the documents sought to be adduced in evidence have not been provided or a notice of intention to give the information in evidence has not been given at least 21 days before the commencement of the trial, then business records can only be adduced in evidence with the leave of the court. No guidance is given as to the factors to be taken into account by the court in deciding whether to give leave but the focus is likely to be on whether the opposing party or parties have been prejudiced by the failure to provide advance notice and copies of the documents.

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[29] Section 14(3)(b).

[30] Section 14(3)(c).

[31] See Law Reform Commission, *Report: Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117 – 2016) at [2.177].

[32] Subs.(3) specifies how a document a document required by the section to be served on a person may be served.

Subsection (2) goes on to provide that a party to the proceedings on whom a notice has been served pursuant to subs. (1) shall not, without the leave of the court, object to the admissibility in evidence of the whole or any specified part of the information concerned unless, not later than 7 days before the commencement of the trial, a notice objecting to its admissibility is served by or on behalf of that party on each of the other parties to the proceedings. Two points should be noted, Firstly, the wording of the subsection suggests that this obligation only seems to arise where a notice of intention to adduce evidence of business records has been given, not where copies of documents have been provided without such notice. However, this would make little sense because, as noted above, such a notice will not be necessary in most cases and, if notice is not given, the party proposing to adduce the business records in evidence may be deprived of the opportunity to obtain alternative evidence. Accordingly, the better view would seem to be that a notice should be given whenever it is sought to raise a hearsay objection. Secondly, it appears from this subsection that there is no requirement to set out in the notice of objection the grounds of the objection and it is enough to simply flag the objection.

(iii) Discretion of the Court to Exclude Evidence

The presumption of admissibility created by s.13 is rebuttable and, even if a document satisfies the conditions of admissibility specified in s.14, s.16(1) confers on a court a discretion to exclude information or any part thereof where "the court is of opinion that in the interests of justice the information or that part ought not to be admitted". Pursuant to subs.(2), in considering whether, in the interests of justice, all or any part of such information ought not to be admitted in evidence, the Court is required to have regard to all of the circumstances including the following:

> (a) whether or not, having regard to the contents and source of the information and the circumstances in which it was compiled, it is a reasonable inference that the information is reliable,[33]
> (b) whether or not, having regard to the nature and source of the document containing the information and to any other circumstances that appear to the court to be relevant, it is a reasonable inference that the document is authentic, and
> (c) any risk, having regard in particular to whether it is likely to be possible to controvert the information where the person who supplied it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to any other party to the civil proceedings or, if there is more than one, to any of them."

Accordingly, there are a wide range of matters, potentially bearing on the authenticity of the

[33] For example, such evidence may be inadmissible if the maker of the statement had a motive to misrepresent, or the statement is a self-serving statement. See *Northern Wood Preserves Ltd v Hall Corp (Shipping) 1969 Ltd* [1972] 3 OR 751, (1972) 29 DLR (3d) 413.

document and the reliability of the information contained therein, that can be taken into consideration.

(iv) Weight

Section 16(3) provides that, in estimating the weight, if any, to be attached to information which is adduced in evidence under Chapter 3, regard must be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise.

Important in the assessment of weight will be the credibility of the declarant and s.17 makes provision for the reception in evidence of a number of categories of evidence relevant to assessing the credibility of the declarant:

> "(a) any evidence which, if the person who originally supplied the information had been called as a witness, would have been admissible as relevant to his or her credibility as a witness shall be admissible for that purpose,
> (b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him or her in cross-examination as relevant to his or her credibility as a witness but of which evidence could not have been adduced by the cross-examining party, and
> (c) evidence tending to prove that that person, whether before or after supplying the information, made (whether orally or not) a statement which is inconsistent with it shall, if not already admissible by virtue of section 14, be admissible for the purpose of showing that he or she has contradicted himself or herself."[34]

The purpose of the section is to place the declarant whose hearsay statement is admitted in the same position, for the purpose of impeaching credibility, as if he or she had been called as a witness.

Proof of Copies of Business Records

Section 18 of the 2020 Act effectively abolishes the primary evidence rule in respect of business records. However, it is less extensive in its application than s.30 of the 1992 Act in that s.18 of the 2020 Act does not make copies of all 'documents' receivable in civil proceedings; rather, it makes copies of 'business records' so receivable.

Section 18(1) provides that where, in accordance with Part 3, Chapter 3 of the 2020 Act,

[34] Subs.(2) stipulates that the section is without prejudice to provisions in any other enactment concerning evidence as to the credibility of the supplier of information in business records.

information contained in a business record in document form[35] is admissible[36] in evidence in civil proceedings, "the information may be given in evidence, whether or not the document is still in existence, by producing a copy of the document, or of the material part of it, authenticated in such manner as the court may approve."[37] It is immaterial how many removes there are between the copy and the original, or by what means[38] the copy produced or the intermediate copy was made.[39] It is also immaterial that the quality of the copies is poor if they have been sufficiently authenticated.[40] This provision confers a very wide discretion on a judge to accept copies, be they photocopies or otherwise, as admissible evidence. It is a matter for the judge to determine the manner in which he or she will deem a copy of a document to be duly authenticated.[41] Where a copy is admissible under s.18, the copy document adduced in evidence is "good for all purposes, as the original would have been".[42]

Declan McGrath SC
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[35] A 'document' is defined as including – (a) a map, plan, graph, drawing or photograph, or (b) a reproduction in permanent legible form, by a computer or other means (including enlarging), or information in non-legible form. This definition is the same as that contained in s.2 of the 1992 Act. Notably, however, s.18 does not contain a provision equivalent to s.30(3) of the 1992 Act, which provides that for the purposes of s.30(1), 'document' includes a film, sound recording or video recording.

[36] Referring to s.30 of the Criminal Justice Act 1992, Hardiman J stated that copy documents are "freely admissible" under the section. The same applies to s.18.

[37] The language quoted is identical to that contained in s.30(1) of the 1992 Act.

[38] Which means may include transmission by means of electronic communication: s.18(2).

[39] Section 18(2). This provision is in the same terms as s.30(2) of the 1992 Act.

[40] *Public Prosecution Service v Duddy* [2008] NICA 18.

[41] *Carey v Hussey* [2000] 2 ILRM 401.

[42] *People (DPP) v McGrath* [2020] IECA 103, at [28].