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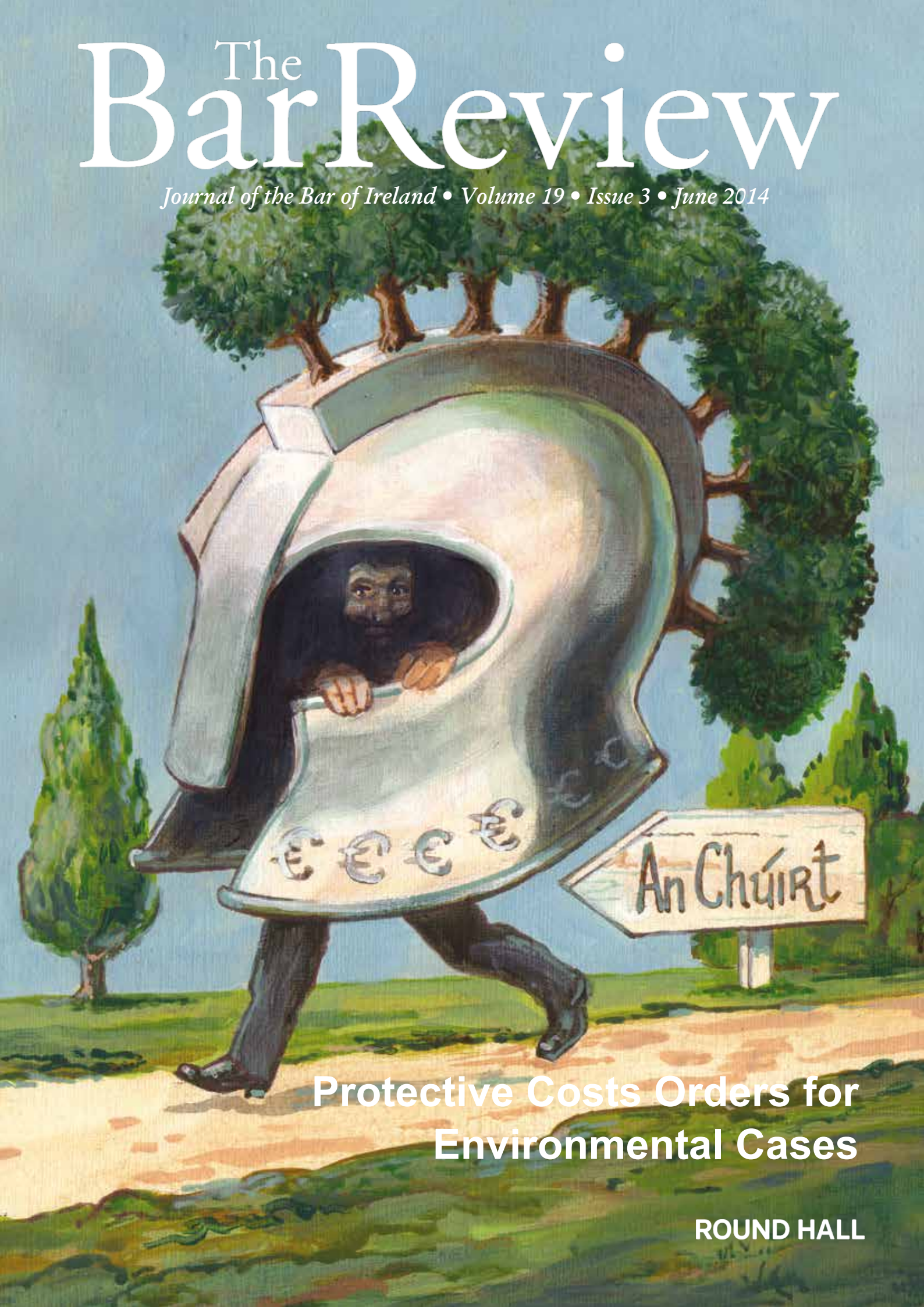

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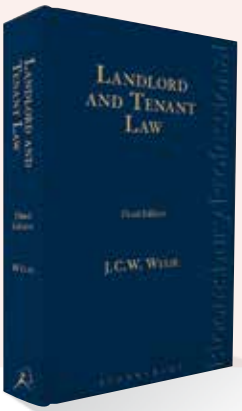

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McKenzie Friends and the Right of Audience Before a Court

David Kavanagh BL

Introduction

This article seeks to examine the rights of persons, other than members of the legal profession, to speak on behalf of parties to litigation. The Courts have long recognised the limited right of a McKenzie friend to address the court on behalf of a litigant in person. In addition to the McKenzie friend, the Courts can give a full right of audience to unqualified advocates. It now appears that the distinction between the limited right of audience enjoyed by a McKenzie friend and the full right of audience, granted as an indulgence by the Court in the exercise of its inherent jurisdiction where the interests of justice so require, has become blurred. This article also seeks to highlight the current undesirable situation where, on the day of a hearing, judges are left in the situation where they may have to allow a full right of audience to an unqualified advocate or adjourn a case.

Those Who May Address the Court as of Right

The right of audience in the courts is a privilege enjoyed by a relatively small number of persons. Court proceedings of all types are often momentous event in the lives of the individuals involved. The privilege and responsibility of representing persons at such significant times is reserved to the legal professions, and it brings with it great responsibilities. Barristers enjoy a right of audience under Common Law subject to the requirement that they be instructed by a solicitor who must, in general, be in attendance.

S.17 of the Courts Act 1971 extends the right to Solicitors.

> "A Solicitor who is acting for a party in an action, suit, matter or criminal proceedings in any court and a solicitor qualified to practice (within the meaning of the Solicitors Act, 1954) who is acting as his assistant shall have a right of audience in that court."

No other profession or individual enjoys the right to speak for another's interests in a court. Legal executives do not enjoy the right. The restriction reflects a concern for the proper administration of justice rather than an attempt to protect the legal profession. Persons from outside the profession might be surprised to learn that a lawyer's duty in respect of his client is generally subordinate to his duty to the Court. The duty on any lawyer never to mislead the Courts is applied across the board. In civil cases, this duty extends to an obligation to bring relevant case law to the attention of the court, even if it is directly at odds with the cases the advocate is making. The courts rely on this level of support from participants in litigation. Many unqualified advocates would not be aware of this aspect of the advocate's job. Fennelly J. in the Supreme Court recognised the benefit to the administration of justice when parties are represented by qualified professionals.

> "There is no doubt that courts are better able to administer justice fairly and efficiently when parties are represented"[1]

An individual has the right to appear as a litigant in person, this is a matter of necessity as well as a right. The right of access to the Courts cannot be limited to those who can afford legal representation. In the Court system at present, there are a large number of litigants in person; this is due to the current economic situation. Debt recovery litigation, which is unfortunately very common at present, by its nature tends to involve many litigants in person. Companies do not enjoy a right of audience, owing to the fact that a company has a legal personality which is separate to that of its directors, shareholders, members and staff. These persons, therefore do not have a right to represent the company in court, for they are neither lawyers nor parties to the litigation[2].

The McKenzie Friend

The Courts have long recognised that a lay litigant enjoys a right to assistance from a friend who may take notes, make suggestions and give advice. This right was recognised as far back as 1831 by Lord Tenterden C.J. in *Collier v Hicks*.[3] After the case of *McKenzie v. McKenzie*[4] this legal assistant became now known as a 'McKenzie friend' and it is widely recognised in Common Law jurisdictions that such support is enjoyed as a right.

Mr McKenzie was petitioning for divorce. He had benefitted from the advice of a solicitor, provided through legal aid, however before the hearing began, his legal aid certification was withdrawn. The former solicitors sent a young Australian barrister to the hearing as a courtesy to their former client. At the hearing, the Australian barrister sat beside the petitioner keeping notes, giving advice and prompting him. Lord Jones J. told the young barrister that he must not take part in the proceedings and the young barrister left. The case lasted 10 days and the result was favourable to the wife. Mr McKenzie appealed on the ground that he was entitled to the help of the young barrister. The appeal was successful and it was held that every lay litigant has the

1 *Re Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & ord* (2013) IESC 11 Fennelly J. at para 25
2 *Battle v. The Irish Art Promotion Centre Limited* [1968] I.R. 252
3 Lord Tenterden C.J. in *Collier v Hicks* (1831) 2 B. & AD. 663
4 *McKenzie v McKenzie* (1970) 1 P.33

right to have a friend assist them in Court, to take notes and advise them.

It is important to note that the involvement of the McKenzie friend in litigation was traditionally limited to the right to take notes, make suggestions and give advice. However, it is also widely accepted that a Court may ask a McKenzie friend to address the Court on a point, mainly, if clarification is required.[5] It should be noted that this is an indulgence that will not be offered lightly[6]. It has also been held that a McKenzie friend should be allowed attend in the judge's chambers even when the matter affects a child.[7] A McKenzie friend does not enjoy a general right of audience. It has been summarised as the right to have a friend assist the lay litigant in making submissions.[8]

Where Permission is Required to Address the Court on Behalf of Another

Outside of the McKenzie friend right, the Courts have the discretion to allow non-professionals to represent a person or company in Court. This is permitted at the sufferance of the Court. Permission is only granted on rare occasions and where it is necessary to save a particular injustice.[9] In *P.ML.B. v. P.H.J. and P.H.J and Company and the Incorporated Law Society of Ireland* [10] Budd J. referred to the jurisprudence of the New Zealand Court of Appeal, on this point, quoting with approval from Somers J. in. G.J *Mannix Limited*[11];

> "But I consider the superior courts to have a residual discretion in this matter arising from the inherent power to regulate their own proceedings. Cases will arise where the due administration of justice may require some relaxation of the general rule. The occurrence is likely to be rare, their circumstances exceptional or at least unusual and their content modest. Such cases can confidently be left to the good sense of the judges. "[12]

One example of such an exception is *Coffey v Tara Mines*.[13] The Plaintiff had commenced proceedings for personal injury he suffered but shortly before the hearing, he suffered a debilitating sickness. The applicant's legal representatives had come off record and despite her best efforts, his wife failed to secure alternative legal representation. The Plaintiff's wife made an application before the High Court for the right to represent her husband in these proceedings. Johnson J. directed that the issue of the wife's right of audience be heard as a preliminary issue. O'Neill J. allowed the wife to represent her husband and found that this case contained extraordinary circumstances such as would justify the exercise of the court's discretion.

The Supreme Court was confronted with this issue in *In Re Coffey*.[14] This case involved an *ex parte* appeal of thirteen cases from the High Court in which leave was refused to judicially review a decision of the Environment Protection Agency. Twelve of these cases were taken by natural persons and one by a company, No2GM Ltd, which was limited by guarantee. Each of the applicants filed identical affidavits for the appeal stating that the applicant wished to be represented by a Mr Percy Podger, the affidavits went on to aver that Mr Podger had a better understanding of the EU law involved and better advocacy skills than the deponent. The affidavits made it clear that the deponent sought full advocacy rights for Mr. Podger. It was stressed that McKenzie friend rights were not sufficient. Each deponent suggested that any refusal of this request would be a violation of the deponent's rights under EU law.

The right of the plaintiffs to appoint Mr. Podger as a representative was heard as a preliminary issue. Judgement was delivered by Fennelly J. with Denham C.J., and McKechnie J. agreeing. Fennelly J. approved the decision in *Battle v. The Irish Art Promotion Centre Limited*[15] and stated;

> "Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The Courts have, on rare occasions, permitted exceptions to the strict application of that rule, where it would work particular injustice. The present case comes nowhere near justifying considering the making the exception[16].

The Court went on to quote Article 19 of the Statute of the Court of Justice which requires parties other than Member States and Institutions of the Union to be represented by persons with a right of audience in their own member state as evidence of the position in EU law. The application was refused, on the grounds that the circumstances of this case came nowhere near the standard necessary to allow Mr. Podger to represent the applicants. The applicants later added Mr Podger as a member of No2GM Ltd in an attempt to afford him a right of audience to run the appeal. This was unsuccessful as members of companies do not have a right to represent them in court.

The appearance of a non qualified representative in the High Court is not as rare as the above quote from Fennelly J. would suggest. Frequently, non-qualified persons appear in Court representing other persons interests. This can be an appearance in the Master's Court or motions list by a co-defendant speaking for the other co defendant, or by a spouse or blood relative. It might also involve the full running of a High Court case by a party with no relationship to the litigant and no personal interest in the proceedings. There is rarely any objections raised by the opposing parties, as

5 *In re N (A Child) (McKenzie Friend: Rights of Audience)* [2008] EWHC 2042 (Fam)
6 *Izzo v Philip Ross & Co (A Firm)* Times Law Report 09 August 2001
7 *In re H (a minor)* Times Law Reports 06 May 1997
8 *McMahon & Sharma v Wj Law and Company LLP, Wj Law Castleblayney Limited, Mary Comer, Peter Comer, Corrigan Coyle Kennedy Mccormack, and Jj Keenan And Son* (2007) IEHC 194
9 *Re Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & ord* (2013) IESC 11 Fennelly J. at para 37
10 *P.ML.B. v. P.H.J. and P.H.J and Company and the Incorporated Law Society of Ireland* Unreported, Judgment delivered 5th May, 1992
11 *G.J Mannix Limited* [1984] 1 N.Z.L.R. 309
12 *Ibid* at 316
13 *Coffey v Tara Mines* (2007) 7 JIC 3105
14 *Re: Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & ors* (2013) IESC 11
15 *Battle v. The Irish Art Promotion Centre Limited* [1968] I.R. 252
16 *Re Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & ord* (2013) IESC 11 Fennelly J. at para 36

they want to avoid the case being put back to a later date, at the end of often lengthy lists. Therefore, the strict rule is often overlooked by the judge. On occasions, the court may enquire as to why the party cannot represent themselves but the "particular injustice" test is not always applied strictly and judges often are forced to apply the rule leniently, lest the case be adjourned, thus putting further pressure on the court lists and placing extra costs on the opposing party.

The Blurring of the line Between McKenzie Friend and Right of Audience

The limited options open to a court can be seen in *Mooney & Kelly v Financial Service Ombudsman and Aviva life and Pensions Notice Party*.[17] The case involved an appeal from a decision of the Financial Service Ombudsman (FSO) where the FSO had upheld the notice party's cancelation of his income protection policy. After the case was assigned to Hogan J., it transpired that the first named plaintiff, a Mr Mooney, who was a union representative, had no standing in the proceedings; he had been named as a plaintiff for the purpose of representing the second named plaintiff in his appeal. After submissions from counsel for both the Defendant and Notice Party, Hogan J. determined that the first named plaintiff had no standing and should be removed from the proceedings. He then moved to the issue of the first named plaintiff's right to represent the second named plaintiff.

The second named plaintiff handed a note into court to highlight a medical condition he was suffering from, this was not disclosed to the parties, Hogan J. informed the other parties that the second named plaintiff may have to leave the court from time to time and that this would be accommodated. The second named plaintiff informed the Court that he was not prepared to represent himself and if Mr Mooney was not allowed to do so, the case would have to be adjourned. No evidence was offered to the Court of any attempt by the second named plaintiff to obtain legal representation. It should also be noted that neither counsel for the defendant or the notice party objected to Mr Mooney representing the second named plaintiff.

Hogan J. referred to *Re Coffey*[18] and the discretion allowed to the trial judge under this decision, and hesitantly allowed Mr Mooney limited rights to represent the second named plaintiff's interests. Hogan J. suggested a species of McKenzie friend right which would be closely supervised by the Court. What materialised was somewhat different. The second named plaintiff barely spoke at all during the hearing which lasted nearly a full day and Mr Mooney made lengthy submissions which continued even when the second named plaintiff left the Court due to his medical condition.

This case highlights a situation which exists presently where the lines between a McKenzie friend and a full representative have become blurred. In this case, the plaintiff would not have satisfied any application of the "particular injustice" test and so, Mr Mooney was allowed to attend as a McKenzie friend. However, his role in representing the second named plaintiff turned out to be a much wider and more expansive role than that of the traditional McKenzie friend.

Conclusion

The case of *Coffey v Tara Mines* is a good example of the type of exceptional circumstances which might justify a court in exercising its discretions in favour of allowing a non-qualified representative a right of audience. Conversely, *Mooney & Kelly v Financial Services Ombudsman* illustrates the difficulties when a judge is faced with the stark choice between allowing a trial to proceed in circumstances where the traditional role of a McKenzie friend may be greatly expanded or causing the inconvenience and expense of an adjournment by not allowing the friend/advocate to be heard. Had Hogan J. refused Mr. Mooney a right of audience, the case would have to have been adjourned, causing disruption to the Court lists and extra expense to the other parties involved who had retained solicitors and counsel who were present in Court on the day and ready to proceed.

It is arguable that an issue such as this should be dealt with at an earlier date and the party who wishes to have an unqualified representative should have to be heard by a judge or perhaps the Master of the High Court at a date in advance of the hearing to seek leave to be represented. This motions list would have to operate on the basis of strict criteria in order that an evolving case law did not allow the rule and exception to become reversed. The criteria should be applied to ensure the proper administration of justice, which Fennelly J declared to be the key principle, underpinning the limitation on the right of audience. ■

17 *Mooney & Kelly v Financial Service Ombudsman and Aviva life and Pensions Notice Party* unreported High Court case 4th February 2014

18 *Re Applications for Orders in Relation to Costs in Intended Proceedings: Coffey & ord* (2013) IESC 11

Protective Costs Orders for Environmental Cases; the first successful application in an Irish Court

Ellen O'Callaghan BL

Introduction

This article will explore and analyse the first judgment in which an application for a Protective Costs Order, hereafter referred to as a "PCO", has been successful, as provided for under s.3 and s.7 of the Environment (Miscellaneous Provisions) Act 2011, hereafter referred to as the "Act". Guidance from the High Court in respect of making an application for a PCO will be delineated and discussed. Analysis will also focus on the practicality of such an order for clients and practitioners.

First Cost Protection Order

The case of *Hunter v. Nurendale Limited Trading as Panda Waste*[1], hereafter referred to as *Hunter*, has been the first case in this jurisdiction in which a determination has been made that a PCO applies to the proceedings. In that case, Hedigan J. set out detailed guidance as to the principles that apply in respect of the granting of a PCO, as well as the evidence that ought to be put before the Court in future applications where a PCO is sought.

In *Hunter,* the Applicant sought orders pursuant to s. 160 of the Planning and Development Act 2000 in respect of the operation of a waste facility by the Respondent on lands adjacent to the Applicant's home where she resides with her husband and son. The Applicant alleges that the facility is not being carried out in compliance with the respective planning permission and waste licence. She also alleges that certain unauthorised development has been carried out at the waste facility without the benefit of planning permission. The application for substantive relief is still pending before the High Court.

In *Hunter,* the Respondent sought security for costs and/or an order joining the Applicant's husband to the proceedings in circumstances where the Applicant is a Chinese national and has no known assets in the jurisdiction. In response to the Respondent's motion for such relief, the Applicant sought an order pursuant to s. 7 of the Act declaring that s. 3 of the Act was applicable to the proceedings. The effect of these provisions is considered in detail below.

Sections 7 and 3 of the Act provide for the availability of a PCO which protects an applicant involved in environmental cases by means of an order in which each party must bear their own costs.

The basis for such an order stems from the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereafter referred to as the Aarhus Convention, which aims to facilitate parties taking actions where environmental issues arise but who may be discouraged from initiating such actions due to the high costs attached[2]. As such, the PCO aims to allay the fears of parties who are seeking to protect the environment but who do not want to expose themselves to significant legal costs being awarded against them, in the event that they are unsuccessful in their claim.

In coming to the conclusion that the Applicant in *Hunter* was entitled to a PCO, Hedigan J noted that it was accepted as common knowledge that the costs of the proceedings would be of a *very high level* such that the Applicant would be unlikely to be able to meet same without *very serious and prejudicial financial consequences* and further that there is at the *very least some substance to the claim*[3]. Further, the Court considered that the matters at issue were of great importance to the Applicant and were ones which involved the protection of the environment. He noted that the relevant law and procedure were matters of complexity. As such, the Court was satisfied that in the absence of any serious argument regarding the proceedings being of a frivolous nature, it was appropriate to make a declaration that s.3 of the Act applied to the proceedings[4].

When will a CPO be available?

The types of civil proceedings in which costs protection may be obtained are set out in s.4 of the Act. Section 4 sets out that in a case where s.3 is applicable, it is sought to ensure compliance with or enforcement of a statutory requirement or condition attached to a licence, permit or permission when failure to comply has caused, is causing, or is likely to cause environmental damage.

The meaning of the concept of "environmental damage" was discussed by Hedigan J in *Hunter* and held to encompass *harm to air, water, soil, land, biological diversity and the interaction between all or any of those things; not limited to the health and safety of humans*[5].

Questions arising over whether s.3 is applicable to proceedings where there is an absence of planning permission or licence (as distinct from where activities are alleged to have

1 [2013] IEHC 430.

2 See Article 9 of the Aarhus Convention .
3 [2013] IEHC 430 at Para 14.
4 *Ibid*
5 [2013] IEHC 430 at Para 10.

been carried out in contravention of a planning permission or licence or condition attaching to same) were answered by Hedigan J in *Hunter*. The court held that the jurisdiction to grant a PCO is not excluded where the complaint concerns an activity being carried out in the absence of planning permission or licence[6]. Therefore, it is not a defence to a PCO application to state that the land in question does not have planning permission or does not have a licence to carry out the activities it is carrying out.

However, s.3 does not apply in circumstances where the applicant seeks damages arising from damage to the property or person or where the proceedings are instituted by a statutory body or a Minister of the Government as set out in s.4(3) of the Act.

The effect of a declaration that costs protection is available

Section 7 of the Act provides for an application to be made to a court seeking a declaration that s.3 of the Act applies to the proceedings:

> 7.—(1) A party to proceedings to which section 3 applies may at any time before, or during the course of, the proceedings apply to the court for a determination that section 3 applies to those proceedings.
>
> (2) Where an application is made under subsection (1), the court may make a determination that section 3 applies to those proceedings.
>
> (3) Without prejudice to subsection (1), the parties to proceedings referred to in subsection (1), may, at any time, agree that section 3 applies to those proceedings.
>
> (4) Before proceedings referred to in section 3 are instituted, the persons who would be the parties to those proceedings if those proceedings were instituted, may, before the institution of those proceedings and without prejudice to subsection (1), agree that section 3 applies to those proceedings.
>
> (5) An application under subsection (1) shall be by motion on notice to the parties concerned.

An applicant seeking a PCO must make an application under s.7 and, if successful, will receive a declaration from the relevant court that s.3 applies to the proceedings. Section 7 affords a party to proceedings the opportunity to apply at any time before, or during the course of the proceedings for a determination of the court that s.3 applies to the proceedings.

On foot of an application under s.7, the court may make a determination as to whether s.3 of the Act applies to the proceedings. Section 7 of the Act also provides for the agreement of each party to the proceedings that s.3 of the Act does apply to the proceedings and such agreement can occur prior to the institution of those proceedings. Where an application for a declaration is to be pursued, s. 7(5) provides that is to be made by way of motion on notice to the parties to the proceedings.

Section 3 of the Act states that notwithstanding Order 99 of the Rules of the Superior Courts, Order 66 of the Circuit Court Rules and Order 51 of the District Court Rules, the costs of relevant proceedings to s. 3 applies are to be borne by each party. As such, the normal principles for costs shall not apply if a court finds that s. 3 of the Act applies, with the result that the default position is that the parties to such litigation should bear their own costs.

However, an applicant enjoys a significant additional advantage in that s. 3(2) provides that the Court may award costs, or a portion of costs, to the applicant, to the extent that that the applicant is successful in obtaining relief. Such costs can be ordered to be borne by the respondent or notice party, to the extent that the actions of the respondent or notice party's acts or omissions gave rise to the applicant being in a position to obtain relief.

Costs can also be awarded in favour of a party in a matter of public importance or where the circumstances of the case require such a result in the interests of justice.

However, the court can award costs against a party to the proceedings where the court considers it appropriate on the basis that a claim or counter-claim is frivolous or vexatious, the manner that the party has conducted proceedings or where a party is in contempt of court. As such, this underlines that the fact that an applicant has received a declaration that s.3 of the Act applies is not irreversible and can be varied where certain circumstances arise.

European Court interpretation of Protective Costs Orders

In the case of *Edwards & Anor. v. Enviromental Agency & Others*[7], hereafter referred to as *Edwards*, the Court of Justice of the European Union, in considering the protective costs regime in the United Kingdom, held that the costs in an environmental case should not be prohibitively expensive. The Court held that:

> "the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result[8]."

The judgment in *Edwards* places an obligation on national courts to carry out an objective analysis of the estimated costs in such proceedings, in order to assess whether such costs would be excessive. Such an assessment cannot be solely based on the claimant's financial situation but needs also to consider[9]:

1. The situation of the parties;
2. Whether the claimant has a reasonable prospect of success;
3. The importance of the environmental issues;
4. The complexity of the law and the existence of a protective costs regime;
5. Whether on objective analysis such costs would be considered excessive.

6 *Ibid* at Para 15.

7 (C-260/11) 11th April 2013

8 (C-260/11) 11th April 2013, at para 35.

9 *Ibid*, at para 46

In *Hunter*, Hedigan J. applied the criteria set out in *Edwards* and held that in order for an applicant to secure a declaration of entitlement to costs protection under the Act, she would have to satisfy the Court that the proceedings have a reasonable prospect of success; such claimant needs to make a case that has a "*certain measure of substance to it*[10]". While this, "*certain measure of substance*", seems a vague term, Hedigan J explains that such a threshold requires that there is a good chance of success rather than probability of success[11]. The difficulties of assessing the likelihood of success in the early stages of a case were recognised by Hedigan J. [12]

Procedural requirements that an applicant must satisfy when seeking a PCO

In *Hunter,* Hedigan J set out the requirements that an applicant needs in order to bring an application seeking a PCO; such proceedings need to be made by motion on notice and evidence of the applicant's means and a broad estimate of costs will need to be set out on affidavit[13]. Further the claimant will need to set out on affidavit the reasons why she believes that the proceedings stand a reasonable prospect of success and set out the environmental protection issues arising and the impact of the proceedings on her[14]. If the respondent contends that the proceedings are frivolous or vexatious, the applicant will need to address this[15]. Finally, the applicant will need to address on affidavit the likelihood of access to legal aid or any costs arrangements which have been made with her solicitor[16].

Procedural requirements that a respondent must satisfy

Where an application for costs protection is brought and the respondent objects to same, the replying affidavit should provide a broad estimate of the potential costs. The respondent should also address the situation of the parties concerned in the application and its view in relation to whether the proceedings stand a reasonable prospect of success[17]. Further, with regard to the environmental impact, within the respondent's affidavit, a full reasoning as to why the respondent considers the applicant's claim to be frivolous, will need to be set out if that is being asserted[18]. A replying affidavit should also deal with the issue of the availability of legal aid[19].

Finally, prior to the application, a "Scott Schedule" should be agreed and provided to the Court. Such a schedule sets out relevant information regarding the applicant's claims and the responses from the respondent[20].

Conclusion

It should be noted that although the applicant in *Hunter* secured a PCO, it is likely that the stringent requirements laid down by Hedigan J. will mean that future successful applications will remain relatively rare. It is this author's view that the proofs required by Hedigan J. in *Hunter* aim to ensure that only those who truly need cost protection in environmental cases will be able to obtain a PCO, thus giving effect to the true intention of the Act and the Aarhus Convention.

Although the *Hunter* decision is a win for environmentalists everywhere, it must be borne in mind that were an applicant to bring such an application and fail, an order of costs could be made against the applicant in the circumstances where the respondent successfully resisted the application. Therefore, this author considers that the proofs listed by Hedigan J are important and relevant factors for any would-be applicants and practitioners to consider before bringing a PCO application. It might also be appropriate in the circumstances for rules of court to be specifically drawn up to deal with such applications. ■

10 [2013] IEHC 430 at Para 15.
11 *Ibid.*
12 *Ibid* at Para14.
13 *Ibid* at Para 16.
14 *Ibid.*
15 *Ibid.*
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*

Trespass to the Person Claims and PIAB

Sarah O'Dwyer BL

Introduction

Trespass to the person covers the torts of assault, battery, intentional or reckless infliction of emotional suffering and false imprisonment. Such claims are governed by The Civil Liability and Courts Act 2004 (2004 Act) and the Personal Injuries Assessment Board Act 2003 (PIAB Act) in a somewhat awkward mesh. As noted by Justice Baker recently in the case of *P.R. v K.C. Legal Personal Representative of the Estate of M.C. Deceased*[1] the Acts are substantially *in pari materia* despite any legislative provision providing for their collective interpretation. This article shall consider some procedural aspects in respect of trespass to the person claims, specifically the statute of limitations and the requirement for PIAB authorisation.

Statute of limitations

Cases where personal injuries have been sustained on foot of trespass to the person are subject to a six year statute of limitation period[2]. The 2004 Act states that a personal injuries action, for the purposes of the Act, does not include a claim where damages for trespass to the person are sought[3]. Such claims are not bound by a requirement to commence proceedings by way of personal injuries summons within a two year period as seen in the Supreme Court case of *Devlin v Roche & Ors*[4].

The 2004 Act does not specify the type of trespass to the person which must be claimed in order for a case to fall outside the definition of a personal injuries action. The existence of the plea per se appears to suffice in order to render a claim subject to a six year statute of limitation period. While the 2004 Act does not expressly state that the inclusion of a claim for damages for trespass to the person be bona fide, it seems prudent to avoid surmising the plea as legitimate and instead to ensure that it is a real claim for trespass to the person.

Proceedings for trespass to the person are brought by way of plenary summons. An application can be made to the court by a defendant to strike out proceedings if brought by a plaintiff in an incorrect form. In deciding whether or not to strike out proceedings on that basis- the court will consider what prejudice, if any, has been suffered by the defendant on foot of the incorrect constitution of proceedings.

1 [2014] IEHC 126.
2 Section 11(2) (a) of the Statute of Limitations Act 1957.
3 Section 2(1).
4 [2002] 2 IR 360.

PIAB authorisation

PIAB authorisation is required in certain cases where trespass to the person is claimed, but not all. The PIAB Act states that PIAB can decline to assess damages in trespass to the person claims where it is of the view that such an assessment would not respect the dignity of the claimant due to the limited means by which PIAB can employ[5] [6].

In the case of *Cunningham v North Eastern Health Board*[7] Justice Hedigan observed how PIAB authorisation was still required in a case which involved a trespass to the person action. In this case, damages were sought for breach of fiduciary duty, assault, trespass and intentional infliction of emotional distress along with a number of declaratory reliefs. The claim arose on foot of an assault which took place while the plaintiff was a patient in Monaghan General Hospital. Monaghan County Council were joined as a co-defendant by the plaintiff on the basis that it was the owner, occupier and manager of Monaghan General Hospital.

The Judgment in *Cunningham*

Justice Hedigan dismissed the plaintiff's claim as against Monaghan General Hospital on foot of the plaintiff's failure to seek authorisation from PIAB before commencing proceedings. The Judge noted that it was a jurisdictional matter and without the authorisation from PIAB, the court had no authority to entertain the proceedings as against the hospital[8]. In reaching this decision, the Judge referred to the provision in the PIAB Act which requires that PIAB authorisation must first be sought before court proceedings may be brought. He noted that the PIAB Act contains a statutory prohibition on actions being instituted "at all, unless and until an application is made to PIAB and an authorisation is issued"[9].

Further, the Judge observed the significance of the cause of action in such cases. In this case, personal injury was the only cause of action and it was noted that "the other matters raised in the pleadings are just different ways of seeking the same thing i.e. damages for personal injury". The fact that the cause of action was solely personal injuries sustained meant

5 Section 17 (1) (IV).
6 Medical malpractice actions are exempt from the requirement to submit to prior assessment through PIAB. The PIAB Act 2003 s. 3(d) provides for the exclusion of claims which arise out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in respect of a person or the provision of any medical advice or treatment to a person.
7 [2012] IEHC 190.
8 Section 12(1) of the 2003 Act.
9 Section 12(1) of the 2003 Act.

that the claim fell within the definition of a civil action[10] for the purposes of rendering the PIAB Act applicable[11].

P.R. v K.C.

In contrast, in the recent decision of Justice Baker in *P.R v K.C. Legal Personal Representative of the Estate of M.C. Deceased*[12], PIAB authorisation was not required in a trespass to the person claim. The plaintiff made a claim for damages for assault and battery, trespass to the person, the intentional infliction of emotional suffering and breach of the plaintiff's constitutional right to bodily integrity. It was alleged that the plaintiff had been wrongfully sexually assaulted and abused by the defendant.

Justice Baker addressed the preliminary issue of whether the proceedings were barred[13] on the basis that the plaintiff had not sought PIAB authorisation prior to issuing proceedings. It was held that PIAB authorisation was not required in this case and the plaintiff could proceed with the claim.

The Judge contemplated whether the plaintiff's claim was in reality an action for trespass to the person and assault- or was it really a civil action for personal injuries? The Judge cited a number of cases[14] where the courts had taken the view that a consideration of the factual circumstances was the key to understanding the nature of the cause of action in ascertaining whether PIAB authorisation was required. She noted how the absence of PIAB authorisation in a case to which the PIAB Act applied is not a mere fault in procedure but goes to the root of the court's jurisdiction to hear and determine the claim.

Justice Baker considered the substance of the claim, as opposed to the way in which the claim was pleaded. The substance of the action was found to be one in which the plaintiff sought to vindicate his personal and constitutional right to bodily integrity and the person, and not a civil action for personal injuries. The Judge noted how trespass to the person is a claim founded in a tort which is actionable per se and is one which, as a matter of law, does not require the plaintiff to establish personal injury. No proof of actual damage is required to succeed in recovering damages arising from the tort of trespass to the person or assault. A plaintiff is entitled to damages merely on account of having been subjected to the trespass and in those circumstances the plaintiff does not have to show that any injury resulted from the assault.

Another factor which led to the Judge's decision to hold the claim outside the PIAB authorisation requirement was the fact that the plaintiff's claim included a claim for breach of constitutional rights which was not one ancillary to the claim for trespass to the person and therefore was excluded from the operation of the PIAB Act[15].

Conclusion

PIAB authorisation is still required in claims which include damages for trespass to the person where personal injuries sustained are the only cause of action. PIAB has discretion to decline to assess damages in such cases but authorisation to proceed with one's claim is still required. It seems counterintuitive that authorisation from PIAB is still required in cases which are not a personal injuries action by definition, and further are drafted on a plenary summons and subject to a six year statute of limitation period.

PIAB authorisation is not required in a trespass to the person claim where the cause of action is other than personal injuries sustained[16], where there is a claim for damages for any other cause of action in conjunction with the personal injuries claim, and in cases where a real breach of constitutional rights is asserted. The recent decision of Justice Baker highlights how the courts are required to establish the real substance of a trespass to the person claim in order to determine whether or not it has jurisdiction to hear such cases in the absence of a PIAB authorisation. ■

10 Section 4 (1) (a) of the PIAB Act.
11 Section 3 of the PIAB Act.
12 [2014] IEHC 126.
13 By virtue of section 12(1) of the PIAB Act.
14 *Campbell v. O'Donnell & Ors.* [2008] IESC 32, [2009] 1 I.R. 133., *Cunningham v. North Eastern Health Board and by order Monaghan County Council* [2012] IEHC 190., *Gunning v. National Maternity Hospital & Ors.* [2008] IEHC 352, [2009] 2 I.R. 117, *Carroll v. Mater Misericordiae Hospital* [2011] IEHC 230.
15 Section 4(1) (iii) of the PIAB Act.
16 Medical negligence actions are not subject to PIAB authorisation.

The new short-selling Regulation; More Powers for the EU

Mary Thompson BL

Introduction

The UK recently challenged the new EU short selling regulation,[1] arguing that the regulation accorded too much power to an independent financial regulator (ESMA[2]) over the heads of national state regulators. The European Court of Justice dismissed the United Kingdom's legal challenge, solidifying ESMA's powers under the new regulation.

This decision will have wider significance for the European regulatory landscape, allowing the EU more scope to delegate more powers to independent agencies, so long as these agencies' are created and operate for the purposes of ensuring 'financial stability'. It is clear that the concept of 'financial stability' has been interpretatively stretched by European legislators giving them a wide discretion to regulate for this purpose.

The new Regulation

Regulation (EU) No. 236/2012 of short-selling and credit default swaps[3] came into force from November 2012. After the financial crisis of 2008, short selling was prohibited throughout the EU, however, the laws regarding short selling varied across member states' and the regulation was implemented for the purposes of creating a European regulatory framework for all types of short selling.

Short selling

In essence, short selling is the sale of security that the seller does not yet own, with the intention of buying back the security cheaper at a later point, gaining a profit. 'Covered' short selling means that the seller has borrowed the securities he intends to buy back in the short term.

The regulation focuses on 'uncovered' short selling, where the seller has not borrowed the securities at the time of the short sale. This type of short sale is risky because the vendor has not borrowed the shares at the time of sale, so if the market swings against the bet and the share price goes up, the vendor is forced to buy back the shares before prices further increase. This sudden buying up of shares can cause volatile swings in the market. 'Uncovered' short selling otherwise known as 'naked shorting' aggravates the share prices in financial institutions resulting in instability in financial markets.

The regulation has two key features; mandatory disclosure of net short positions in order to increase transparency in short selling and a prohibition on short selling except in circumstances where the seller has effectively "covered" the security.

Notification Regime

The regulation sets up a notification regime for net short positions of shares, sovereign debt and 'uncovered' sovereign credit default swap positions. In summary, a sovereign credit default swap or (CDS) involves speculators taking a gamble on countries' debt via bonds, meaning investors buying and selling government debt in the form of bonds in order to generate a profit.

The regulation imposes stringent notification requirements, it requires private notification to national regulators once issue share capital and/or sovereign debt reaches a threshold as specified by ESMA and further public disclosure once a higher threshold has been reached. All net short positions will be published on ESMA's website. However national reporting mechanisms across the EU are not yet fully operative, as a result of which ESMA's initial list of net short positions published in October 2012[4] was incomplete. ESMA will need to ensure that national reporting mechanisms are harmonised across the all EU member states', otherwise public disclosure is significantly curtailed.

Restrictions on uncovered short sales

The second key feature of the regulation is that short selling is proscribed except in certain instances. Under the regulation, short selling can only happen if sellers either have borrowed the shares and/or sovereign debt, entered into an agreement to borrow the shares, sovereign debt or made an agreement with a third party meaning that the shares or sovereign can be reasonably expected to be repaid.

ESMA sets out the form these agreements must take for the purposes of ensuring that all short selling is 'covered'. In accordance with ESMA, all agreements must cover the number of shares included, the amount of sovereign debt being sold at the time of the short sale, the date of the delivery of the securities including the expiration date of the delivery of the securities and such agreements must exist in a durable medium (meaning they must exist in adequate electronic format). The above must also extend to a wide variety of financial instruments and agreements covering futures, options, repurchase agreements, standing agreements and rolling facilities.

1 Case C-270/12 *United Kingdom v European Parliament and Council of the EU*.

2 European Securities and Markets Authority.

3 Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

4 Accessed on ESMA's website http://www.esma.europa.eu/page/Net-short-position-notification-thresholds-sovereign-issuers.

ESMA's power to curb national regulators

Article 28[5] vests in ESMA the power to impose legally binding measures on EU member states including a complete prohibition on the short selling in some circumstances. Additionally, it ensures ESMA's power takes precedence over that of national state regulators.

According to Article 28(2);

a. ESMA may intervene where it deems there is a threat to the orderly functioning and integrity of financial markets or to the stability of whole or part of the financial system of the EU
b. where it assess that there are cross border implications;
c. where competent authorities have not taken measures to address the threat or the measures that have been taken do not sufficiently address the threat of Article 28.

The criteria under Article 28(2) are vague and loosely defined. There is no clear definition of what can be classed as a 'threat to the orderly functioning and integrity of financial markets' or what qualifies as a 'cross border implication.'

Article 28(3) does set out further criteria ESMA should consider when imposing a measure on a member state, including the impact of a proposed measure, its ability to address a threat to financial markets or in the alternative any negative impact a measure may have on the stability of financial markets. However, there are no criteria on how ESMA should determine whether a measure will have the effect as set out in Article 28(3)

ESMA and the European Court of Justice

ESMA's power under Article 28 of the short selling regulation is mirrored in Article 9(5)[6] of the regulation establishing ESMA, conferring on it the power to 'prohibit or restrict certain financial activities' with the ultimate objective of promoting financial stability.

The UK recently challenged the legality of ESMA's power arguing that ESMA was acting outside of its legislative capacity as conferred on it by the Treaty on the Functioning of the European Union. The UK had two main grounds of challenge; firstly that ESMA was acting outside of its capacity under EU law and secondly, that the power vested in ESMA to ban short selling has been established on an incorrect legislative basis.

The UK contends that the powers accorded to ESMA were in contravention of the Meroni principle[7]. The Meroni ruling sets out the long-established principle that EU powers cannot be delegated to independent regulatory agencies unless such delegated powers could be clearly defined. In the judgment, a careful distinction was drawn between 'clearly defined executive competencies' and a 'discretionary power' which could result in 'the execution of actual economic policy'.

The UK's main challenge was that Article 28 vests in ESMA a discretionary power resulting in the execution of policy. However, the European Court of Justice ruled that the regulation was not in contravention of the Meroni principle due to the number of factors ESMA were obliged to take into account before exercising its power under Article 28.

The UK's second contention was that the powers conferred upon ESMA exceeded its legal basis under the Treaty of the Functioning of the European Union. ESMA derives its legal basis under Article 114 of the EC Treaty[8] which is an article aimed at harmonisation of national laws. It was argued that ESMA is clearly going beyond its remit under Article 114 EC.

Advocate General's Preliminary Ruling

This contention was also raised by the Advocate General of the European Court of Justice, whose opinions are non-binding but often followed by the European court. He argued in his preliminary ruling[9] that the decision was not 'harmonisation but replacement of national decision making with EU decision making' and article 114 of the EC treaty[10] was an incorrect legal basis for ESMA's powers arguing that article 352 of the Treaty[11] would be the appropriate basis for ESMA's powers via the short selling regulation. This is significant because article 352 requires that any measures adopted under the EC Treaty would require the unanimous agreement of all member states giving the United Kingdom the right of veto in contrast to article 114 which only requires a qualified majority vote by the council and parliament. However, the European Court, in rejecting the challenge from the U.K., did not follow the opinion of the Advocate General.

Conclusion

The decision indicates that the European Court is content to hand over more power to EU agencies, so long as it is for the legitimate purpose of achieving 'financial stability'. When it comes to 'financial stability' it appears that it is everything but the financial markets themselves that need stabilisation, (national laws, national supervisory structures), apparently everything but 'finance' itself which is by its very nature impossible to regulate.

Clearly, the new short selling regulation is short changing EU member states, allowing an independent agency (ESMA), to replace their national laws, circumventing their right to veto EU legislation in the process. The Court's judgement is worryingly vague and there exists no method of appeal, notwithstanding the dissent of the Advocate General.

The decision will also have future implications for the European regulatory landscape with a new piece of legislation currently in the pipeline, proposing the creation of another european agency, the Single Banking Resolution Board, conferring on it similar powers to ESMA in the banking arena. ■

5 Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps OJ L 86/19.

6 Regulation (EU) No 1095/2010 of the European Parliament and of the council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331/96.

7 Case 9/56 *Meroni v High Authority* [1957 & 1958] ECR 133.

8 Article 114 (TFEU) (2010/C 83/01) OJ L115.

9 Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=140965&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=127454.

10 Article 114 (n8).

11 Article 352 (n8).

Voluntary Assistance Scheme

of The Bar Council of Ireland

Charities Regulation Conference – July 3rd 2014

The Voluntary Assistance Scheme will host a conference on Charities Regulation on Thursday 3rd July 2014 at 4.30pm in the Distillery Building. Speakers will include Ms. Úna Ní Dhubhghaill, CEO of the Charities Regulatory Authority and Ms. Deirdre Garvey, CEO of The Wheel, among others. The enactment of the Charities Act 2009 heralds a new era of regulation for Irish charities and VAS are striving to assist charities in making a smooth transition. All members of the Bar are cordially invited to attend and CPD points will be available.

VAS experience in the words of a volunteer

***by* Aoife Lynch BL**

In November, 2013, I was contacted by Diane Duggan BL of VAS enquiring if I would be interested in assisting the Irish Travellers Movement (ITM) with a discrimination case being taken in Kerry (I am a proud member of the South Western Circuit). The particulars of the case struck a chord with me and I jumped at the chance to get involved.

The ITM was founded in 1990 and has over seventy traveller organisations from around Ireland in its membership. The ITM champions traveller rights and the organisation consists of a partnership between travellers and settled people committed to seeking full equality for travellers in Irish society.

After agreeing to assist, I was contacted by Susan Fay, Managing Solicitor of ITM Independent Law Centre, regarding the case which involved an allegation of discrimination, contrary to the Equal Status Acts 2000-2012, against two female members of the travelling community. The discrimination complained of occurred when the women, having purchased tickets to an event raising funds for depression and suicide awareness, were refused admission to the licensed premises in which the event was taking place. Both women believed that they had been refused admission because they were members of the travelling community. This refusal was all the more reprehensible having regard to the fact that both women, who are in their early twenties, have tragically lost their husbands to suicide. The women contacted the ITM and it was decided that they would each take a case against the licensee of the premises.

This case was particularly strategic for the ITM as not only did it highlight the arbitrary discrimination experienced by travellers around the country, it also highlighted the issue of suicide within the traveller community. According to the All Ireland Traveller Health Study 2010 the suicide rate amongst traveller men is 6 times the national average and accounts for 11% of all traveller deaths.

The case also emphasised the difficulties experienced by litigants, and members of the travelling community in particular, in prosecuting discrimination cases. Section 19 of the Intoxicating Liquor Act, 2003 transferred the jurisdiction to determine these cases from the Equality Tribunal to the District Court in circumstances where the discrimination alleged occurred on, or at the point of entry to, licensed premises. It is worth noting that cases commenced before the Equality Tribunal are heard in private; the same is not true of claims brought before the District Court. More significantly however, as all practitioners are aware, commencing proceedings before the District Court requires knowledge of the District Court Rules and the relevant legislation. Therefore, this process is more formal than bringing a claim before the Equality Tribunal and will often require a claimant to engage a solicitor so as to ensure that the Notice of Application is technically correct. Simply put, many people do not have the resources to do this and one wonders how many incidents of discrimination go undetected as a result. Furthermore, an unsuccessful litigant may have an order for costs made against him/her in the District Court.

My main point of contact from VAS was Diane, who regularly checked in with me to see how the case was progressing. The support offered by VAS was very reassuring. The cases were heard in January, 2014 and both women were awarded €1,000. We were all delighted with the outcome.

As a result of my involvement with VAS and ITM, I had the opportunity of partaking in training related to Traveller and Roma rights organised by the ITM in conjunction with the Council of Europe which was a great educational experience.

The work done by VAS is extremely important and affords members of the Bar an opportunity to volunteer in a way that is both meaningful and of tangible benefit to those who avail of the scheme. I look forward to working with the VAS in the future. If you would like to get involved please contact either Diane Duggan at *dduggan@lawlibrary.ie* or Jeanne McDonagh at *jmcdonagh@lawlibrary.ie.* ■

Legal The Bar Review Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 26th March 2014 up to 13th May 2014
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Deirdre Lambe and Vanessa Curley, Law Library, Four Courts.

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Van Dokkum, Neil
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Animal health and welfare (restriction on horned cattle) regulations 2014
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Termination

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damages to be assessed gross or net of tax – Whether damages for loss of earnings were chargeable to tax – Whether damages for wrongful dismissal were taxable – Whether deduction of tax element from all or part of the award – Whether reputational damage – Addis v Gramophone Co Ltd [1909] AC 488; Allen v Ó Súilleabháin (Unrep, Murphy J, 11/3/1997); British Transport Commission v Gourley [1956] AC 185; BSkyB Ltd v HP Enterprises UK Ltd [2010] EWHC 862; Carey v Independent Newspapers (Ireland) Ltd [2003] IEHC 67, [2004] 3 IR 52; Holland v Athlone Institute of Technology [2012] 23 ELR 1; Sharkey v Dunnes Stores (Ireland) Ltd [2004] IEHC 163, (Unrep, Smyth J, 28/1/2004) and Sullivan v Southern Health Board [1997] 3 IR 123 considered – Glover v BLN Ltd (No 2) [1973] IR 432 followed – Finance Act 1964 (No 15), ss 8 and 9 – Redundancy Payments Act 1967(No 21), s 7(2) – Taxes Consolidation Act 1997 (No 39), ss 112, 123 and 201 – Protection of Employees (Fixed-Term Work) Act 2003 (No 29), ss 2, 9 and 12 – Directive 99/70/EC, art 14 – Damages for loss of remuneration awarded (2012/7269P – Laffoy J – 22/3/2013) [2013] IEHC 127
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EVIDENCE

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Surrender – Form of warrant – Content of warrant – Circumstantial evidence – Whether failure to specify degree of involvement in alleged offences – Whether sufficient degree of particularity concerning alleged offences – Whether failure to specify when and where alleged offences committed – Whether warrant defective due to offences alleged against aliases – Whether issuing state seeking to exercise extraterritorial effect – Whether sufficient detail of participation in alleged offences – Whether court could order surrender where charges based on circumstantial evidence – Whether obligation on issuing state to provide detailed evidence that respondent used aliases relating to alleged offence – Minister for Justice v Ferenca [2008] IESC 52, [2008] 4 IR 480; Minister for Justice v Desjatnikovs [2008] IESC 53, [2009] 1 IR 618 and Minister for Justice v Stafford [2009] IESC 83, (Unrep, SC, 17/12/2009) applied – Minister for Justice v Hamilton [2005] IEHC 292, [2008] 1 IR 60 and Minister for Justice v Shannon [2012] IEHC 91, (Unrep, Edwards J, 15/2/2012) approved – Minister for Justice v Jarzebak [2010] IEHC 472, (Unrep, Peart J, 30/11/2010) considered – European Arrest Warrant Act 2003 (No 45), ss 3, 11, 13, 16, 23, 41, 44 and 45 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), ss 21A, 22, 23, 24, 72, 79, 80, 81 and 82 –Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, arts 2 & 8 – Application granted, surrender ordered (2011/153EXT – Edwards J – 4/5/2012) [2012] IEHC 180
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FAMILY LAW

Child abduction

Application for order for return of child – Habitual residence in England – Family law proceedings in England – Child moved to Ireland with mother – Orders made in England for return of child – Orders made for placing of child in care of father – Whether child ought be interviewed by child psychologist – Age of child – Whether grave risk that return would expose child to harm or intolerable situation – Allegations against applicant – Allegations against respondent – Report by children's services in England – Whether report to be taken into consideration where author could not be cross-examined – Whether court to determine issues of fact – Whether sufficient case made out that life of child would be intolerable if returned – PL v EC (Child abduction) [2008] IESC 19, [2009] 1 IR 1; AS v PS [1998] IR 244; Re K (Abduction: Child's Objections) [1995] 1 FLR 977; RK v JK [2000] 2 IR 416 and Friedrick v Friedrick (1996) 78F 3d 1060 considered – Council Regulation EC No 2201/2003, arts 11, 12 and 13 – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Order to return child to England made (2012/7HLC – White J – 6/6/2012) [2012] IEHC 579
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Application for judicial review – Application to prevent respondent from further investigating applicant regarding fatal road accident – Local authority – Collision with traffic island and cones outside working hours – Purpose of health and safety legislation – Definition of 'place of work' – Cork County Council v Health and Safety Authority [2008] IEHC 304, (Unrep, Hedigan J, 7/10/2008) and Donegal County Council v Health and Safety Authority [2010] IEHC 286, (Unrep, Kearns P, 9/7/2010) considered – Safety Health and Welfare at Work Act 2005 (No 10), ss 2, 34, 58, 64 and 66 – Safety, Health and Welfare at Work (Construction) Regulations 2006 (SI 504/2006), regs 10, 12, 16, 22 and 30 – Relief refused (2012/9135JR – Kearns P – 11/4/2013) [2013] IEHC 140
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Summary recovery of property – Judicial review seeking certiorari of decision of housing authority to apply for order for possession – Constitutional protection of home – Right to respect for private and home life – Discrimination between public and private tenants – Constitutional

guarantee of equality – Delay in seeking judicial review – Retrospective alteration of reasons for decision – Breach of local housing tenancy agreement – Arrears of rent – Absence of independent decision maker to consider allegations made – Presumption of constitutionality – Declaration of incompatibility with European Convention on Human Rights 1950 – Exigencies of common good – Absence of material conflict of fact – Whether Housing Act 1966 (No 21), s 62 unconstitutional – Whether Housing Act 1966 (No 21), s 62 accorded with the principles of social justice – Whether Housing Act 1966 (No 21), s 62 was necessary, legitimate and proportional solution – Whether discrimination was arbitrary, capricious or unreasonable – Whether judicial review application brought promptly – Whether decision to evict proportionate – Dillane v Attorney General [1980] ILRM 167; Donegan v Dublin City Council [2012] IESC 18, (Unrep, SC, 27/2/2012); Dublin City Council v Fennell [2005] IESC 33, [2005] 1 IR 604; O'Brien v Manufacturing Engineering Co Ltd [1973] IR 334; Quinn's Supermarket v Attorney General [1972] IR 1 and Ryan v. Attorney General [1965] IR 294 applied – Central Dublin Development Association v Attorney General [1975] 108 ILTR 69 and Dublin City Council v Gallagher [2008] IEHC 354, (Unrep, Ó Néill J, 11/11/2008) approved – Byrne v Dublin City Council [2009] IEHC 122, (Unrep, Murphy J, 18/3/2009); Chapman v UK (App No 27238/95), (2001) 33 EHRR 18; Damache v DPP [2012] IESC 11, [2012] 2 IR 266; De Róiste v Minister for Defence [2001] 1 IR 190; Dekra Éireann Teoranta v Minister for Environment [2003] 2 IR 270; Dreher v Irish Land Commission [1984] ILRM 94; Finlay v Laois County Council (Unrep, Peart J, 20/12/2002); Grealish v An Bord Pleanala [2006] IEHC 310, [2007] 2 IR 536; Laurentiu v Minister for Justice [1999] 4 IR 26; Leonard v Dublin City Council [2008] IEHC 79, (Unrep, Dunne J, 31/3/2008); Mulholland v An Bord Pleanala (No 2) [2005] IEHC 306, [2006] 1 IR 453; Pullen v Dublin City Council [2008] IEHC 379, (Unrep, Irvine J, 12/12/2008); Quinn's Supermarket v Attorney General [1972] IR 1; R v Westminster City Council ex parte Ermakov [1996] 2 All ER 302; State (O'Rourke) v Kelly [1983] IR 58 and Yordanova v Bulgaria (App No 25446/06), (Unreported, ECHR, 24/4/20012) considered – Bjedov v Croatia (App No 42150/09), (Unreported, ECHR, 29/5/20012); Buckland v UK (App No 40060/08), (2013) 56 EHRR 16; Quinn v Athlone Town Council [2010] IEHC 270, (Unrep, Hedigan J, 8/7/2010) and Robinson v Dublin City Council [2012] IEHC 605, (Unrep, Hedigan J, 24/10/2012) distinguished – Housing Act 1966 (No 21), s 62 – European Convention on Human Rights Act 2003 (No 20), s 5 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Constitution of Ireland 1937, arts 40.1, 40.3, 40.5, 41 and 43 – European Convention on Human Rights 1950, art 8 – Reliefs refused (2010/958JR – Hedigan J – 22/3/2013) [2013] IEHC 119

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Application for judicial review – Certiorari – Order excluding applicant from dwelling of mother – Anti-social behaviour – Sale and supply of drugs – Alternative remedies – District Court proceedings – Whether District Court hearing fair – Civil proceedings – Standard of proof – Power to make order where reasonable grounds for believing anti-social behaviour engaged in – Failure to give advance notice of allegations to applicant – Failure to grant adjournment to allow calling of witness – Whether judicial review appropriate remedy – Cullen v Clarke [1963] IR 368; The State (Irish Pharmaceutical Union) v Employment Appeals Tribunal [1987] ILRM 36 and Petrea Stefan v Minister for Justice and Equality [2001] 4 IR 203 considered – Housing (Miscellaneous Provisions) Act 1997 (No 21), ss 3, 11, 15 and 21 – Certiorari granted (2011/893JR – White J – 3/5/2012) [2012] IEHC 565

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Application for judicial review – Certiorari – Telescoped hearing – Cameroon – Claim of persecution based on political opinion or membership of social group – Negative credibility findings – Requirement to address central controversial issue in clear and reasoned terms – Whether credibility of core claim considered – Whether Refugee Act 1996 (No 17), s 11B applicable where no first safe country claim made – Irrational negative credibility finding – Obligation to assess credibility in context of country of origin information – Selective reference to country of origin information – Obligation to afford person whose rights may be affected opportunity to know case against them – Treatment of documentary evidence – R(I) v Minister for Justice, Equality and Law Reform [2009] IEHC 510, (Unrep, Cooke J, 26/11/2009); O(R) (An Infant) v Minister for Justice and Equality [2012] IEHC 573, (Unrep, Mac Eochaidh J, 20/12/2012); S(AA) v Refugee Appeals Tribunal [2013] IEHC 44, (Unrep, Mac Eochaidh J, 7/2/2013); Camara v Minister for Justice, Equality and Law Reform (Unrep, Kelly J, 26/7/2000); Idiakheua v Minister for Justice, Equality and Law Reform (Unrep, Clarke J, 10/5/2005) and S(P) v Refugee Applications Commissioner [2008] IEHC 235, (Unrep, McMahon J, 11/7/2008) followed – K(AM) (A Minor) [Afghanistan] v Refugee Appeals Tribunal [2012] IEHC 479, (Unrep, O'Keeffe J, 20/11/2012);

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Asylum

Application for judicial review – Decision refusing appeal against negative recommendation – Credibility rejected as new evidence adduced on appeal – Whether reasonable to expect applicant to relocate internally – Fear of persecution based on religious conversion and extra-marital relationship – Whether information elicited on appeal new evidence or mere expansion of claim – Absence of assessment of future risk of persecution – Absence of consideration of fears for future – Absence of clarity regarding acceptance of religious status – Whether rejection of narrative of past persecution obviates need for forward looking test of prospective risk – Da Silveira v RAT [2004] IEHC 436, (Unrep, Peart J, 9/7/2004); Karanakaran v Secretary of State for the Home Department [2000] 3 All ER 449; MAMA v Refugee Appeals Tribunal [2011] IEHC 147, [2011] 2 IR 729 and Minister for Immigration and Multicultural Affairs v Rajalingam [1999] FCA 719 followed – Imafu v The Refugee Appeals Tribunal [2005] IEHC 416, (Unrep, Peart J, 9/12/2005) not followed – Certiorari granted; claim remitted to decision maker (2009/468JR – Clark J – 5/6/2013) [2013] IEHC 249
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Deportation

Constitution – Legality of detention – Statutory interpretation – Breach of detention order – Maximum aggregate statutory detention period of eight weeks – Whether fresh incident of breach of deportation order could give rise to commencement of second eight week period – Whether statute to be interpreted literally – Whether intent of Oireachtas clear – Stare decisis – Whether court could depart from previous decisions – Notification of detention – Whether notification of detention defective due to failure to specify date of expiry of eight week period – Ejerenwa v Governor of Cloverhill Prison [2011] IESC 41, (Unrep, SC, 28/10/11) applied – Irish Trust Bank v Central Bank of Ireland [1976-77] ILRM 50; In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360; RO v Minister for Justice (Unrep, ex tempore, Smyth J, 11/7/2002); Gmemibade v Minister for Justice (Unrep, ex tempore, Finnegan J, 30/11/2005); Re Worldport Ireland Ltd (in liquidation) [2005] IEHC 189, (Unrep, Clarke J, 16/6/2005); Yu v Minister for Justice (Unrep, ex tempore, MacMenamin J, 31/1/2006); Brady v DPP [2010] IEHC 231, (Unrep, Kearns P, 23/4/2010); Moorview Developments Ltd v First Active plc [2010] IEHC 275, (Unrep, Clarke J, 9/7/2010) and BMJL v Minister for Justice [2012] IEHC 74, (Unrep, Cross J, 14/2/2012) considered – Okorafor v Governor of Cloverhill Prison (Unrep, ex tempore, SC, 10/10/2003) distinguished – Immigration Act 1999 (No 22), ss 3 and 5 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 10 – Immigration Act 2003 (No 26), s 5 – Interpretation Act 2005 (No 23), s 5 – Constitution of Ireland 1937, Article 40.4.2° – Appeal allowed; release ordered (2012/159 – SC – 10/5/2012) [2012] IESC 27
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Deportation

Minister – Powers – Delegation – "Carltona doctrine" – Whether Minister required to personally consider and sign deportation order – Whether ministerial powers lawfully exercised by civil servant – Whether "Carltona" doctrine negatived by statute – Whether Minister required to furnish applicant with proposed decision to deport for comment – Whether deportation constituted inference with right to family life – Carltona Ltd v Commissioners of Works [1943] 2 All ER 560; Tang v Minister for Justice [1996] 2 ILRM 46; Devanney v District Judge Shields [1998] 1 IR 230; Meadows v Minister for Justice [2010] IESC 3, [2010] 2 IR 701; OO v Minister for Justice [2011] IEHC 175, (Unrep, Cooke J, 4/5/2011); LAT v Minister for Justice [2011] IEHC 404, (Unrep, Hogan J, 2/1/2011); MM v Minister for Justice (Case C-277/2011), (Unrep, ECJ, 26/4/2012) considered – Aliens Act 1935 (No 14), s 5 – Immigration Act 1999 (No 22), s 3 – Constitution of Ireland 1937, arts 15 and 28 – Directive 2004/83/EEC, art 4 – Treaty on the Functioning of the European Union, art 267 – European Convention on Human Rights and Fundamental Freedoms 1950, art 8 – Leave to seek judicial review refused (2011/850JR – Hogan J – 10/5/2012) [2012] IEHC 189
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Application for leave to seek judicial review – Nigeria – Proposed deportation of HIV positive failed asylum seeker in receipt of anti-retroviral therapy and care – Whether applicant could secure effective access to treatment if returned – Whether applicant would suffer considerable societal discrimination if returned – Country of origin information – Whether decision vitiated by material error of fact – Statement that concerns regarding access to anti-retroviral therapy on return unfounded – Whether substantial grounds for contending reasoning did not meet requisite standard – Whether deportation would violate Constitutional and Convention rights – Overlap of Constitutional and Convention issues – Public policy implications – K v Refugee Appeals Tribunal [2011] IEHC 301, (Unrep, Hogan J, 7/7/2011); Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 IR 701; Carmody v Minister for Justice, Equality and Law Reform [2009] IESC 91, [2009] 1 IR 635; RX v Minister for Justice, Equality and Law Reform [2010] IEHC 446, (Unrep, Hogan J, 12/10/2010); Kinsella v Governor of Mountjoy Prison [2011] IEHC 235, [2012] 1 IR 467; Finucane v McMahon [1990] 1 IR 165; Makumbi v Minister for Justice [2005] IEHC 403, (Unrep, Finlay Geoghegan J, 15/11/2006); OO v Minister for Justice [2004] IEHC 426, [2004] 4 IR 426; TD v Minister for Education and Science [2001] 4 IR 287; Agbonlahor v Minister for Justice [2007] IEHC 166, [2007] 4 IR 309; D v United Kingdom (1997) 24 EHRR 423; Odulana v Minister for Justice, Equality and Law Reform (Unrep, ex tempore, Clark J, 25/6/2009); Garvey v Ireland [1981] IR 75; N v United

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Subsidiary protection

Application on behalf of minor for leave to seek judicial review – Application to dismiss proceedings as abuse of process or as bound to fail – Decision on subsidiary protection – Refusal of application of mother for judicial review on grounds of lack of candour – Application for order dismissing application on behalf of minor – Claim that applicant precluded from maintaining proceedings as moved on same grounds as those determined in application by mother – Application for asylum by father – Issue estoppel – Abuse of process – Whether issue estoppel arose against infant applicant – Absence of privity between child and parent – Potential for wider issues to arise in application of child – Standard of review – Discretion of court – Akram v Minister for Justice [2004] IEHC 33, [2004] 1 IR 461; AA v Medical Council [2003] 4 IR 302; Waldron v Early [2004] IEHC 227, (Unrep, Smyth J, 15/6/2004); D v C [1984] ILRM 173; C v Hackney LBC [1996] 1 All ER 973; Smith v Minister for Justice and Equality [2013] IESC 4, (Unrep, SC, 1/2/2013); A(BJS) v Minister for Justice and Equality [2011] IEHC 381, (Unrep, Cooke J, 12/10/2011); Mbeng v Minister for Justice and Equality [2012] IEHC 225, (Unrep, Cooke J, 7/6/2012) considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Application refused (2012/322JR – McDermott J – 8/2/2013) [2013] IEHC 203
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Interlocutory injunction

Strong prima facie case – Adequacy of damages – Balance of convenience – Laches – No evidence of prejudice – Power of mortgagor to lease – Entitlement of receiver to possession – Interlocutory injunction sought to restrain exclusion from possession – Whether strong prima facie case – Whether damages adequate remedy – Whether appropriate compensation could be actually realised – Campus Oil v Minister for Industry and Energy [1983] IR 88 and Westman Holdings Ltd v McCormack [1992] 1 IR 151 applied – Keating v Jervis Shopping Centre Ltd [1997] 1 IR 512; Maha Lingham v Health Service Executive [2005] IESC 89, (Unrep, Supreme Court, 4/10/2005) and Nolan Transport (Oaklands) Ltd v James Halligan (Unrep, Keane J, 22/3/1994) considered – ICC Bank Plc v Verling [1995] 1 ILRM 123 followed – Land and Conveyancing Law Reform Act 2009 (No 27), s 112 – Injunctions granted (2012/7358P – Laffoy J – 21/6/2013) [2013] IEHC 288
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Leave

Application to set aside grant of leave – Non-disclosure – Test to be applied – Delay – Abuse of process – Refusal of Tribunal of Inquiry to grant costs to application – Whether jurisdiction to set aside grant of leave to be exercised sparingly – Whether applicant failed to disclose existence of similar plenary proceedings at ex parte hearing – Whether judicial review proceedings out of time – Whether grounds for extension of time – Whether delay inordinate – Whether reasonable for applicant to await outcome of similar proceedings before seeking judicial review – Whether excusability of delay and balance of justice arguable – Guerin v Guerin [1992] 2 IR 287; G v DPP [1994] 1 IR 374; Voluntary Purchasing v Insurco Ltd [1995] 2 ILRM 145, De Róiste v Minister for Defence [2001] 1 IR 190; Adam v Minister for Justice [2001] 3 IR 53; GK v Minister for Justice [2002] 2 IR 418; Bambrick v Cobley [2005] IEHC 43, (Unrep, Clarke J, 25/2/2005) and BTF v DPP [2005] IESC 37, [2005] 2 IR 559 approved – R v Secretary of State for the Home Department, ex p Chinoy [1991] COD 381; A v Governor of Arbour Hill Prison [2006] IEHC 169, [2006] IESC 45, [2006] 4 IR 88 and Murphy v Flood [2010] IESC 22, [2010] 3 IR 136 considered – Tribunals of Inquiry (Evidence)(Amendment) Act 1976 (No 3), s 6 – Tribunals of Inquiry (Evidence)(Amendment) Act 1997 (No 42), s 3 – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21 – Application refused (2011/605JR & 2011/5073P – Hedigan J – 22/5/2012) [2012] IEHC 199
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Lease

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Property

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– Whether placement of unreasonable conditions on consent – Whether breach of covenant – Whether trespass beyond lease boundaries – Whether loss of chance – Whether breach of statutory duty – Breach of community law – Whether duty of a public nature – Whether relationship of proximity – Whether public body could be negligent in discharge of functions despite having obtained legal advice – Whether real and substantial chance of success – Ex injuria jus non oritur – Emerald Meats Ltd v Minister for Agriculture and Food [1997] 2 ILRM 275; Glencar Exploration plc v Mayo County Council (No 2) [2002] 1 IR 84; O'Reilly v Gleeson [1975] IR 258 at 274; Pine Valley Developments v Minister for the Environment [1987] IR 23; Rice v Lord Mayor of Dublin [1947] IR 425 and Ward v McMaster [1988] IR 337 applied – Allied Maples v Simmons & Simmons [1995] 1 WLR 1602; Bank of Ireland v Lady Lisa Ireland Ltd [1992] 1 IR 404; Bates v Donaldson [1896] 2 QB 241; Houlder Bros & Co v Gibbs [1925] Ch 575; Howard v Commissioners of Public Works in Ireland (Unrep, O'Hanlon J, 3/121992); Glencar Explorations plc v Mayo County Council [1993] 2 IR 237; Lennon v Hanly [1981] ILRM 84; Moffat v Frisby [2007] IEHC 140, [2007] 4 IR 572; North Sea Energy Holdings NV v Petroleum Authority of Thailand [1998] EWCA Civ 1953; OHS Ltd v Green Property Co Ltd [1986] 1 IR 39 and Smith v Clay (1767) 3 Bro CC 639 approved – Allied Maples v Simmons & Simmons [1995] 4 All ER 907; Beatty v Rent Tribunal [2005] IESC 66, [2006] 2 IR 191; Chaplin v Hicks [1911] 2 KB 786; Davies v Taylor [1974] AC 207; ETS Vehicles Ltd v Fargate Developments Ltd [1997] NI 25; First Interstate Bank of California v Cohen Arnold & Co [1996] PNLR; Foley v Mangan [2009] IEHC 404, (Unrep, Laffoy J, 24/8/2009); Francovich v Italy (Case C-6/90 & C-9/90) [1991] ECR 1-5357; Hayes v Minister for Finance [2007] IESC 8, [2007] 3 IR 190; Jones v Carter (1846) 15 M & W 718; Judd v McAlinden (Unrep, Hamilton J, 28/3/1980); Kennedy v Law Society [2004] 1 ILRM 178; Kennedy v Law Society (No 4) [2005] IESC 23, [2005] 3 IR 228; McIlvenny v McKeever [1931] NI 161; Moffat v Fribsy [2007] IEHC 140, [2007] 4 IR 572; North Sea Energy Holdings Hl v O'Reilly v Gleeson [1975] IR 258; Paul v Ogilvy [2000] Scot CS 19; Petroleum Authority of Thailand [1998] EWCA Civ 1953; Quinn (A minor) v Mid-Western Health Board [2005] IESC 19, [2005] 4 IR 1; Redmond v Minister for the Environment [2004] IESC 24, [2006] 3 IR 1; Siney v Dublin Corporation [1980] IR 400; Upjohn v Hitchens [1918] KB 171; Ward v McMaster [1985] IR 29; Whipp v Mackey [1927] IR 372 and Wildgust v Bank of Ireland [2006] IESC 19, [2006] 1 IR 570 considered – GS Fashions Ltd v B & Q plc [1995] 1 WLR 1088 and Pine Valley Developments v Minister for the Environment [1987] 1R 23 distinguished – Landlord and Tenant Amendment (Ireland) Act 1860 (23 & 24 Vict, c 154), ss 48 and 52 – Conveyancing Act 1881 (44 & 45 Vict, c 41), s 14 – Foreshore Act 1933 (No 12), s 2 – Statute of Limitations 1957 (No 6), ss 27, 56 ,58 and 65 – Waste Management Act 1996 (No 10), s 4 – Council Regulation (EC) No 1260/1999, art 34 – Relief against forfeiture granted subject to payment of outstanding rent; special damages awarded (2005/3374P – McKechnie J – 03/9/2010) [2010] IEHC 541

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[pmb]: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Central Bank Bill 2014
Bill 27/2014

Children First Bill 2014
Bill 30/2014 [Dail Eireann]

Competition and consumer protection bill 2014
Bill 21/2014

Electoral (Amendment) (no.2) Bill 2014
Bill 28/2014

Employment Permits (Amendment) Bill 2014
Bill 36/2014 [Dail Eireann]

Health (General Practitioner Service) Bill 2014
Bill 34/2014

High Pay and Wealth Commission Bill 2014
Bill 37/2014 [Dail Eireann]

Housing (Miscellaneous Provisions) Bill 2014
Bill 39/2014 [Dail Eireann]

Ombudsman for Children (Amendment) Bill 2014
Bill 40/2014

Electoral (amendment) bill 2014
Bill 24/2014
[pmb] Deputy Catherine Murphy

Electoral (Amendment) (no.3) Bill 2014
Bill 38/2014
[pmb] Deputy Eamonn O'Cuív

Employment equality (abolition of mandatory retirement age) bill 2014
Bill 25/2014
[pmb] Deputy Anne Ferris

Non-fatal Offences against the person (Amendment) Bill 2014
Bill 29/2014
[pmb] Deputy Anne Ferris

Ombudsman (Amendment) Bill 2014
Bill 32/2014
[pmb] Deputy Sean Fleming

Thirty-fourth amendment of the constitution (voting rights in referenda) bill 2014
Bill 23/2014
[pmb] Deputy Anne Ferris

Thirty-fourth amendment of the constitution (Inclusive Budget Reform) Bill 2014
Bill 33/2014
[pmb]Deputy Pearse Doherty

Proceeds of Crime (Amendment) Bill 2014
Bill 31/2014
[pmb] Deputy Eamon Maloney

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 26TH MARCH 2014 TO THE 13TH MAY 2014

Higher education and research (consolidation and improvement) bill 2014
Bill 22/2014
[pmb] Sean D. Barrett and John Crown and David Norris

Building control (carbon monoxide detection) bill 2014
Bill 26/2014
[pmb] Senators Feargal Quinn, John Crown, Sean D. Barrett & David Norris

State Airports (Shannon Grup) Bill 2014
Bill 35/2014 (Seanad)

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Bill 93a Report Amendments (Dail)
Bill 93b Passed by (Dail

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Enacted

Employment Equality (Amendment) (No.2) Bill 2013
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Fines (payment and recovery) Bill 2013
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Enacted

Forestry Bill 2013
Bill 43/2013
Report Amendments (Dail)

Friendly societies and industrial and provident societies (miscellaneous provisions) Bill 2013
Bill 90/2013

Committee Amendments (Seanad)
Bill 90a/2013 (Seanad)

Health Identifiers Bill 2013
Bill 130/2013
Committee Amendments (Seanad)
Committee Amendments (Dail)

Health Service Executive (Financial Matters) Bill 2013
Bill 136/2013
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Industrial Development (forfas dissolution) Bill 2013
Bill 138/2013
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Bill 138a Passed by (Dail)

Irish Human Rights and Equality Commision Bill 2014
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Protected disclosures Bill 2013
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Protection of Children's Health from (Tobacco Smoke in mechanically propelled vehicles) Bill 2012
Bill 38b/2012
Passed By (Seanad)

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Bill 140/2013
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Passed by Seanad

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Report Amendments (Seanad)

Upward Only Rent (Clauses and Reviews) Bill 2013
Bill 94/2013
Committee Amendments
Passed by Seanad Éireann

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Truth Commissions and the rule of Law

Brendan Gogarty BL*

Introduction

It is increasingly common for countries emerging from civil war or authoritarian rule to create a truth commission to operate during the immediate post-transition period. These commissions – officially sanctioned, temporary, non-judicial, investigative bodies – are granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report. While truth commissions do not replace the need for prosecutions, they do offer some form of accounting for the past, and have thus been of particular interest in situations where prosecutions for mass crimes are unlikely-owing to either a lack of capacity of the judicial system or a de facto or a de jure amnesty.

Truth commissions first emerged as a transitional justice mechanism in Uganda in 1974. Typically they have emerged from states which have experienced the transition from authoritarian to democratic rule, against the backdrop of mass human rights violations. Truth commissions share various strands as is evident from their mandates. However there is no set model for a typical truth commission. Their nature is informed by the individual history of a given state/region, the crimes to be considered, the periods under investigation, the weakness of judicial and prosecutorial systems, together with the political and societal willingness to ensure the right of truth, its scope and implementation[1]. Some forty truth commissions have come into being since the early 1980s.

Transitional Justice

In post-conflict states, it is probable that the majority of those who authorised and/or carried out mass human rights violations will never face prosecution. The concept of transitional justice is, in part, a tacit recognition of this reality. Transitional justice embraces a range of processes to deal with past abuses. These processes "include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals or a combination thereof"[2].

The right of individuals to know the truth is a core aspect of transitional justice, a right which is supported by several treaty bodies, regional courts and international tribunals[3]. Truth commissions have become a symbol of transitional justice in countries as diverse as El Salvador, Timor–Leste and Liberia. They differ from Commissions of Inquiry which operate under more narrowly defined mandates. Likewise they differ from prosecutions which occur in case specific courtroom settings. In short, truth commissions are non-judicial investigative bodies which map patterns of past violence and identify the causes and consequences of these destructive events. Certain of these bodies embrace a broader (and more ambitious) role in the form of "truth and reconciliation" commissions.

Objectives

The objectives of a truth commission are the commission's raison d'etre and enunciate the contributions and outcomes expected of the commission. Every mandate enunciates its objectives differently, expressing priorities that derive from local circumstances. Whilst there have been wide variations in the mandates of these bodies, certain aims inform the work of most commissions. These have been identified as:

1. To establish an accurate record of a country's past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.
2. To hear, respect and respond to the needs of victims and survivors.
3. To help counter impunity and make recommendations to advance criminal responsibility.
4. To evaluate institutional responsibility for abuses and to outline the reforms needed to prevent further abuses.
5. To "promote reconciliation"[4].

These objectives may appear obvious but can be difficult to achieve due to a lack of real political will, lack of resources and, at times, unrealistic expectations of what can be achieved.

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* This article is the final article in a series of three articles written by this author examining rule of law issues. The first article "Democratisation and the Rule of Law" (Bar Review: July 2013) considered the importance of democratic structures to the rule of law. The second article "The Rule of Law: What it is and What it does" (Bar Review: December 2013) examined the evolution of the rule of law and future developments.

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1 The Right to the Truth: Resolution adopted by the Human Rights Council of the U.N., 27th September 2012.

2 The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies. Report of the Secretary General of the United Nations, 23rd August 2004.

3 The Right to Truth; Resolution adopted by the Human Rights Council of the United Nations: 27th September 2012.

4 Unspeakable Truths: Transitional Justice and the Challenges of Truth Commissions, Priscilla B. Hayner, Second Edition, Chapter 3.

Functions

The functions of a truth commission are the activities required to achieve its objectives. Clarifying these activities in the mandate will provide guidance to commissioners as they design their inquiry, allocate resources, and establish the organisational structures necessary to carry out their work. The following functions are often included in truth commission mandates, in part or in full:

- To prepare and submit a report of its findings and recommendations to national authorities and the public.
- To receive and compile information provided by direct statements, as well as from archives and other documentary sources.
- To conduct investigations and research.
- To protect the integrity and well being of victims and witnesses.
- To conduct public communication activities, such as public hearings, educational events, etc.
- To support other transitional justice policies, such as trials, reparations and vetting.
- To carry out events promoting reconciliation, at the national or local level[5].

The above functions are interlinked with the operational aspects of truth commissions, in particular their membership and investigative powers.

Operational Aspects

(A) Selection of Commissioners

It is widely accepted that no factor will more define the success or otherwise of a commission than the make-up of its membership. All mandates will specify the number of commissioners, their qualifications and selection methods. To ensure credibility and broad support, it is obvious that representatives of political parties, factions or former armed groups should be disqualified from the commission membership. Likewise it seems obvious that appointment through a consultative process would attract the greatest support. In South Africa selection was based on a process which entailed an independent selection panel and a public interview of finalists. Further variants in selection methods are illustrated by that method adopted in Ecuador, where a number of commissioners were selected directly by non-government organisations and in Guatemala where one of the three commissioners was selected from a list proposed by university presidents. As the commissioners are the "public face" of the commission, great care must be taken in their selection.

(B) Investigative Powers

Truth commissions cannot fulfil their primary aims in the absence of robust investigatory powers. Mandates may authorise commissions to investigate human rights violations, political strategies, local histories, specific cases and the consequences of abuse. The commission must obtain information on historical events by interviewing witnesses and survivors, examining documents, and visiting places that may contain evidence, such as detention sites[6].

Earlier commissions such as those of Argentina and Chile were hampered by their limited powers. However the South African Commission gave rise to a new model which was equipped with powers of subpoena, search and seizure and witness protection, alongside powers to hold public hearings and to conduct questioning under oath.[7]

The possession of these quasi-judicial powers has enabled commissions to surmount previous deficiencies which limited their abilities to conduct investigations and to uncover the truth.

Strengths and Weaknesses

Clarification of the truth about past events is considered essential in order for transitional societies to come to terms with their pasts, prevent recurrences of atrocities and move forward to a reconciled future. Apart from helping to establish truths, they can promote the accountability of perpetrators of abuses. They may compliment the work of criminal prosecutors by gathering, organising and preserving evidence that can be used in prosecutions, depending on the mandate provisions. By providing a public platform for victims who may have been long ignored and forgotten by the public, the commission can promote reconciliation through a facing-up to past atrocities and providing reparation programmes[8].

Notwithstanding these benefits, there remains the fear of a "trade-off" between truth and justice combined with amnesty arrangements. In addition there is on-going controversy as to whether a commission should publicly name perpetrators. What is also clear is the concept of a single objective truth is a false construct. Indeed, the South African TRC referred to four notions of truth: factual or forensic; personal or narrative; social; and healing or restorative. In effect there may be different types and levels of truth which have been described as macro and micro truth. The former encompasses the structural causes of violence at the national level, whilst the latter encompasses the circumstances of particular crimes and the individuals responsible for them. The establishment of "micro-truth" would seem to lie more appropriately with prosecutorial institutions, which engage in close scrutiny of specific cases and whose focus is on the culpability of individuals[9].

Truth and Amnesty

Most truth commissions do not have the power to grant amnesty. The majority recommend that there be criminal prosecutions (or judicial investigations leading to possible prosecutions), and they may turn over any evidence they have

5 Drafting a Truth Commission Mandate: A Practical Tool, I.C.T.J., 2013.

6 Truth Seeking: Elements of Creating an Effective Truth Commission: I.C.T.J., 2013, Page 23.

7 South Africa: Promotion of National Unity and Reconciliation Act, No. 34 of 1995.

8 Reconciliation after Violent Conflict: International Institute for Democracy and Electoral Assistance, 2003.

9 Truth Commissions and the Criminal Courts: Alison Bissett, Cambridge University Press 2012.

to prosecuting authorities. A commission may take one of the following approaches to the amnesty issue: (a) recommend prosecutions, (b) grant or recommend amnesty or (c) grant limited and conditional waiver of criminal responsibility, which is a form of plea bargain[10]. South Africa is well known for a truth commission that had amnesty-granting powers. In this instance, amnesty applicants were required to show that their crimes were politically motivated. Applicants were further required to fully and publicly disclose details of the crimes in order for qualify for amnesty. Given the requirement for public disclosure, the truth-for-amnesty offer was probably attractive only to those who feared a serious threat of successful prosecution. The limited impact of the South African amnesty provision is reflected in the final report of the commission which noted that most applicants were the "trigger-pullers" and not their leadership.

Since 1999, the United Nations has prohibited its representatives from backing amnesties to perpetrators of serious crimes under international law[11]. Cases of gross human rights violations include torture, extra-judicial executions and enforced disappearance[12]. U.N. disapproval of amnesty provisions is reflected in the Updated Set of Principles for the Protection and Promotion of Human Rights through action to combat Impunity[13]. These Principles recognise that impunity violates the rights of victims to truth, justice and reparation. Furthermore amnesty measures are viewed as incompatible with a State's obligation to punish serious crimes covered by international law[14]. Not only is it a moral obligation and a legal requirement under international law to bring to justice perpetrators of human rights violations, it is also the practical option for two reasons. First, without punishment there will be no deterrent to prevent military or other forces from carrying out violations in the future. Secondly, accountability is an essential pre-requisite for a successful democratic transition. This being so, amnesty provisions which encapsulate crimes that qualify as crimes under international law are generally not considered appropriate[15]. In addition, the International Criminal Court, which is a permanent international criminal tribunal, adds a significant dimension to combating impunity.

Prosecutions: The Special Court for Sierra Leone

There is a growing consensus that truth commissions and criminal trials bring distinct benefits to transitional states and that they ought not to be viewed as mutually exclusive alternatives, but as contemporaneous complements[16]. Even the South African commission, known for its amnesty granting powers, urged that prosecutions take place where there was evidence of a serious crime, and in those cases where the accused had not sought or had been denied amnesty[17]. Examples of where truth commissions have complemented criminal tribunals include Argentina, Peru, and Sierra Leone.

In order to deal with past atrocities, Sierra Leone established a Truth and Reconciliation (TRC) and also the Special Court for Sierra Leone. The establishment of the TRC and the Special Court was a two-track process where truth-seeking and reconciliation co-existed with criminal accountability. Importantly, this was the first time that a truth commission had run simultaneous to an international or hybrid court, with both international and national judges[18]. The Special Court for Sierra Leone was created in January 2002 through an agreement between the U.N. and the government of Sierra Leone to try those most responsible for violations of international humanitarian law and Sierra Leonean law during the country's civil war.

When the Special Court closed in December 2013, it was the first of the U.N. backed tribunals to successfully complete its mandate. The Special Court's sentencing of former Liberian President, Charles Taylor, was the first conviction of a former Head of State since Nuremberg. Both the TRC and the Special Court also had successes in the area of gender-based crimes against humanity.

Guatemala: A Tale of Two Commissions

The armed conflict in Guatemala began in the 1960s and lasted until 1996, when peace agreements were signed. The death toll is estimated to be two hundred thousand. The war also resulted in fifty thousand "disappearances ", one and a half million internally displaced persons, one hundred thousand refugees and two hundred thousand orphaned children[19]. State forces were responsible for 92% of the arbitrary executions and 91% of the forced disappearances. 83% of fully identified victims were ethnically Mayan[20]. The massacres, scorched earth operations, forced disappearances, and the systematic use of rape destroyed many Mayan communities. The devastation of the Mayan people was part of a State planned policy of annihilation i.e. genocide. This is a central conclusion of the Guatemalan Truth Commission (the CEH).

In the history of truth commissions, Guatemala occupies a unique position, having hosted two independent commissions with markedly different institutional affiliations; the United Nations sponsored Commission for Historical Clarification (CEH) and the Project for the Recovery of Historical Memory (REHMI) which was sponsored by the Catholic Archdiocese of Guatemala. Unlike the South

10 Rule-of-Law Tools for Post Conflict States: Truth Commissions, U.N. 2006.

11 Unspeakable Truths, Priscilla B. Hayner, Second Edition at Page 105.

12 As to enforced disappearance see the International Convention for the Protection of All Persons from Enforced Disappearance and also Enforced or Involuntary Disappearances: Office of the United Nations High Commissioner for Human Rights: Fact Sheet No. 6/Rev. 3.

13 8th February 2005.

14 O.H.C.R. Seminar on the Prevention of Genocide, 21st January 2009, Geneva.

15 See further (a) Rule-of-Law Tools for Post-Conflict States: Amnesties; U.N. 2009; (b) Truth Commissions and Criminal Justice, Amnesty International 2010.

16 Commissioning Justice: Truth Commissions and Criminal Justice, Amnesty International 2010. See also Truth Commissions and the Criminal Courts: Alison Bissett 2012.

17 Unspeakable Truths, Priscilla B. Hayner, 2011.

18 Gender and Transitional Justice Programming: A Review of Peru, Sierra Leone and Rwanda (UNIFEM), 2010.

19 What Happened To The Women? Gender and Reparation for Human Rights Violations, New York. 2006.(Chapter 2).

20 Guatemala: Memory of Silence: Report of the Commission for Historical Clarification (Conclusions and Recommendations).

African TRC which possessed powers of amnesty, neither the CEH or REHMI had this facility.

Of all possible formulas for a truth commission, Guatemala's was thought to be one of the weakest. The Historical Clarification Commission could not subpoena witnesses or records, nor could it name perpetrators. The three-person commission could not "attribute responsibility to any individual in its work, recommendations and report," its work was not to have "any judicial aim or effect" and it was given only six months to conclude its work. Ultimately, it operated for a period of eighteen months and during which period it collected oral testimonies from some nine thousand deponents.

Due to its limited powers, it was expected that the CEH would produce an ineffective report. Nonetheless the CEH, in February 1999, presented a hard-hitting report which shocked observers. It concluded that "agents of the State of Guatemala" committed acts of genocide, a highly significant finding as this crime was not covered under Guatemala's national amnesty law. Whilst the CEH could not name perpetrators, it was not impossible to identify the names of military commanders in charge of various units with reference to dates and locations. It was concluded that the "majority of human rights violations occurred with the knowledge or by order of the highest authorities of the State", leaving open the prospect of prosecutions.

By virtue of the perceived weaknesses in the powers of the Historical Classification Commission (CEH), the Human Rights Office of the Archdiocese of Guatemala set up the REMHI project in order to reinforce the Historical Clarification Commission[21]. Unlike the Commission, REMHI could name both perpetrators and victims. Taken together the CEH and REMHI projects, one being U.N. sponsored and the other being Church based, offer a unique example of the way in which truth commissions with significantly different institutional affiliations can work in co-operation to produce a broader knowledge and understanding of past conflicts, in the pursuit of truth and reconciliation.

Reconciliation

Many truth commissions have the explicit goal of fostering national reconciliation and specifically incorporate "reconciliation" in their mandate and/or title. However, within the arena of transitional justice it has proved to be a complex term. Perhaps this is because "reconciliation" in this context in both a goal and also a lengthy and difficult process "through which a society moves from a divided past to a shared future".[22] That process is directly influenced by the instruments of truth-telling, restorative justice and reparation.[23] Unfortunately there is no guarantee that reconciliation can be achieved. It may be beyond the capacities of many to engage in reconciliation, considering the barbarity of the crimes committed and their long-term impacts. For some, the political discourse of reconciliation is entirely immoral, where victims are requested to reconcile with their tormentors, who in turn do nothing. Whatever of national or political reconciliation, true reconciliation at the individual level is a much more difficult task. Consequently it is recognised that "(a)t best commissions can help to create better conditions for reconciliation by encouraging institutional reform and changes in the political culture of a state, and by restoring the dignity of those most effected by violence"[24]. In other words, commissions can bring about "better conditions" which are conducive to reconciliation and to expect more than that is unwise. Some examples of commissions that have addressed reconciliation include: the East Timorese Commission on Reception, Truth and Reconciliation and the Peruvian Truth and Reconciliation Commission.

Reparations

It is not unusual for a commission to find that many victims come to it expecting to receive reparations. Reparation programmes are designed to redress systematic violations of human rights by providing a range of benefits to victims. These can include monetary compensation, medical and psychological serves, healthcare, educational support, return of property, and also official apologies, building museums and memorials, and establishing days of commemoration. The United Nations re-affirmed the right of victims to reparations in 2005 through the adoption of the *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[25]

Effective and speedy reparations are an important aspect of promoting reconciliation but may leave much to be desired. This is understandable in countries emerging from bloody conflicts with vast numbers of victims and with little financial resources. The Peruvian reparation policy is perhaps the most widely consulted, whilst that of South Africa "was a source of great bitterness and anger, and for some was an indictment of the entire truth commission process," being seen by many as too little, too late[26]. Reparation programmes are particularly important for women and children, where often the death or incapacitation of a husband or son, cause a family to face considerable hardships.

Key Challenges

It is a simple fact that not all violations can be investigated, due to the imbalance between the number of victims and available resources. The lack of resources and inability to hear each and every case, means that difficult choices must be made. This may result in a representative sample of individual cases being chosen and events being investigated in the context of a final over-all identification of patterns of violence, institutional responsibilities etc. at the macro-level. However these realities can erode the credibility of commissions from the perspectives of those victims, who offered testimony and sought the truth concerning their individual cases, individual truths to which they are each

21 The Recovery of the Historic Memory Project (REMHI) that led to the Guatemala's: Never Again Report.

22 Reconciliation after Violent Conflict. International Institute for Democracy and Electoral Assistance 2003.

23 See 22 above.

24 Truth Seeking: Elements of Creating an Effective Truth Commission: ICTJ, 2013 at Page 12.

25 General Assembly Resolution: A/Res/60/147.

26 Unspeakable Truths, Priscilla B. Hayner, 2nd Edition, Chapter 12.

entitled. Further challenges arise in defining the precise parameters of a commission's investigations, the naming of alleged perpetrators in hearings or in reports, the definition of a "victim"[27] and the nature of the crimes to be investigated. The definition of "victim" and that of "politically motivated crime" is important in the context of the right to be heard, the issue of accountability and access to schemes of reparation. The implementation of commission recommendations is also an area of considerable difficulty, when powerful sectors of society are discomfited by a commission's findings.

The greatest challenge currently facing truth commissions concerns the expansion of their mandates. This challenge was highlight in a report of the U.N's *Special Rapporteur on Truth and Justice* in 2013. He identified that commissions are expected to address a broader array of violations, occurring over longer periods of time, where the objective has shifted from clarification of cases to comprehensive analysis of whole contexts and underlying causes, motivating, in turn, the call for comprehensive reform proposals. The Special Rapporteur found "commissions that are laden with objectives which they have no means to satisfy will predictably disappoint expectations"[28]. In short the effectiveness and credibility of truth commissions is endangered by ever expanding mandates.

Conclusion

Truth commissions can be important instruments for the redress of widespread violations in the absence of properly functioning legal systems. They have evolved over time from early models focusing on the "when and why" of what happened to models incorporating reconciliation objectives. However current trends indicate an almost open-ended expansion of functions. Increasingly expansive mandates may place at risk the moral authority of truth commissions and their ability to grapple with potentially excessive expectations. Their mandates need to be drafted so as to avoid overly-ambitious objectives which they cannot reasonably achieve with limited resources, and such that they can focus on providing effective recognition for victims' needs, in particular the need for both truth and justice. ■

27 For example, this definitional difficulty may arise where a perpetrator acted under duress or in the case of child soldiers as victim-perpetrators, a matter which was first considered in the Report of the Truth and Reconciliation Commission of Sierra Leone.

28 Report of the Special Rapporteur on the promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff: 28th August 2013.

Achtung Minen! How the Euro's path to safety has been blocked by the German Constitutional Court

Anthony Moore BL*

The European sovereign debt crisis began in 2010, resulting in the Greek bailout, and from 2011 onwards, it entered a new and dangerous phase as the attention of investors focused on the Spanish and Italian economies, pushing yields on their government debt to unsustainable levels. Spain and Italy were widely classed as "too big to fail, too big to bail," and the crisis led to speculation that they would have to exit the euro, leading to the unravelling of the currency.

Against this background, on the 26th July, 2012, the President of the ECB, Mario Draghi, stated that *"Within our mandate, the ECB is ready to do whatever it takes to preserve the euro."* Less than two months later, on the 6th September, 2012, the ECB announced a decision on Outright Monetary Transactions ("OMTs"), the objective of which was to safeguard two key goals, namely the singleness of the monetary policy and an appropriate monetary policy transmission, *i.e.* the process by which it aims to influence prices in the Eurozone *via* its interest rates.

The ECB considers OMTs to be a non-standard monetary policy instrument, which envisaged the purchase by the ECB of government bonds on secondary bond markets up to an unlimited amount, focusing, in particular, on sovereign bonds with a maturity of between one and three years. OMTs would be subject to "strict conditionality," whereby the Member State whose bonds were being purchased would have to comply with an appropriate European Financial Stability Facility ("EFSF") or European Stability Mechanism "(ESM")

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programme.[1] The ECB stated that it would consider engaging in OMTs as long as such conditionality was fully respected, and would end them once their objectives had been achieved or where there was non-compliance with the programme. Liquidity created by OMTs would be "sterilised", meaning that the ECB would remove as many euros from the system as it created by buying bonds. The OMT decision also indicated that the ESCB would accept the same treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through OMTs. This meant that private investors in bonds need not have any fear that the ECSB would have the status of a preferred creditor in the event of a eurozone Member State defaulting on its debts, which would potentially have made them reluctant to purchase such bonds in the first place.

Although the ECB has yet to engage in OMTs, the announcement of the decision resulted in yields falling as market participants realised that the ECB was ready to stand as a "lender of last resort" for the government bonds in question.

The OMT decision led, however, to a number of challenges being brought in the German Constitutional Court ("GCC") in which it was claimed that the OMT decision was incompatible with Article 119, Article 123 and Article 127.1 and 127.2 of the Treaty on the Functioning of the European Union ("TFEU") and Article 17 *et seq.* of the ESCB Statute.

Decision of the German Constitutional Court

On the 14th January, 2014, the GCC delivered a judgment in which it stated that it considered the OMT decision to be incompatible with various Articles of the TFEU, and it decided to refer a number of questions to the CJEU, the key ones being (1) whether the OMT decision was incompatible with Article 119 and Article 127.1 and 127.2 TFEU, and with Articles 17 to 24 of the ESCB Statute, for exceeding the ECB's monetary policy mandate, as set out in those provisions, and thus infringing the powers of the Member States and (2) whether the decision of the ECB was incompatible with the prohibition of monetary financing enshrined in Article 123 TFEU.

ECB monetary policy and context in which it is framed

In *Pringle v Government of Ireland* (C-370/2012, 27 November, 2012), the CJEU noted that the TFEU refers to the objectives, but not the instruments of monetary policy. Although the phrase "monetary policy" is not defined in the Treaties or in the ESCB Statute, they provide some guidance on what it entails. The crucial issue before the CJEU will be whether or not the OMT decision can be classed as an instrument of monetary policy.

In doing so, it must bear in mind the manner in which the ECB transmits its monetary policy. In this regard, it must be noted that the financial structure of the eurozone differs from other major economies, in that banks are the primary source of funding for households and firms. By contrast, in the United States, the situation is reversed. This difference in financial structure significantly influences the manner in which the ESCB implements monetary policy.

Monetary policy decisions are centralised at the level of the ECB's Governing Council, but their implementation is decentralised and conducted by the Eurosystem, which is composed of the ECB and the national central banks of the eurozone members. This mainly consists of refinancing operations, which are the first link in the chain of monetary policy transmission, and help to set the marginal cost of the refinancing of banks in the various eurozone member states.[2]

Moreover, prior to the onset of the financial and sovereign debt crises, fiscal indiscipline and economic misgovernance had given rise to large debt to GDP ratios in some of the eurozone members. As the crises unfolded, investors in government debt began to differentiate between their bonds and those of members in sounder financial health, giving rise to the differences in yields and spreads discussed above. Government bonds act as benchmarks for private-sector lending rates, and the unwillingness of investors to purchase the bonds of the affected eurozone member states began to impair the transmission of the ECB's decisions on interest rates to the real economy in those states, with potentially adverse implications for public and private lending costs and, ultimately, price stability.

Relevant legal provisions

The TFEU contains a number of provisions pertaining to the ECB/ESCB and its functions, some of which are set out in express terms. However, in assessing whether or not any acts carried out by the ECB comply with those provisions, it is important to bear in mind that the ECJ/CJEU acknowledges in its caselaw an entitlement to act on the basis of powers implied from specific Treaty provisions: see, for instance, C-22/70 *Commission v. Council*; Opinion-2/94 *Accession by the EC to the ECHR*.

Under Article 127.1 TFEU, the ECB's primary function is to maintain price stability and, without prejudice to that, it is also obliged to support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union, as laid down in Article 3 TEU.

As the ECB points out on its website, the objective of price stability refers to the general level of prices in the economy, and implies avoiding both prolonged inflation and deflation. "Price stability" is undefined in the TFEU, but the ECB's Governing Council has defined it as follows:-

> "Price stability is defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%."[3]

1 The EFSF was established as temporary rescue mechanism and was effectively superseded by the creation of the ESM in October, 2010. As of the 1st July, 2013, the EFSF is no longer entitled to engage in new financing programmes or to enter into new loan facility agreements. The ESM is now the sole and permanent mechanism for responding to new requests for financial assistance by eurozone member states.

2 For further detail see *The ECB's Non-Standard Monetary Policy Measures – The Role of Institutional Factors and Financial Structure*, ECB Working Paper Series No. 1528, April, 2013.

3 http://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html

Under Article 127.2 TFEU, the ESCB's basic tasks include defining and implementing the monetary policy of the Union.

The ESCB Statute elaborates on the responsibility of the ECB in the conduct of monetary policy. Article 12 thereof provides *inter alia* that the ECB's Governing Council shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks entrusted to the ESCB under the Treaty and the Statute, and that it shall formulate the monetary policy of the Union, including, as appropriate, decisions relating to key interest rates, and shall establish the necessary guidelines for their implementation. Article 18 of the Statute provides that in order to achieve its objectives and carry out its tasks, the ECB and the national central banks *"may operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments."*

Article 127.5 TFEU also provides that the ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

The TFEU also expressly emphasises at Article 282(3) the independence of the ECB in the exercise of its powers, which the Union institutions and Member State governments must respect. This is buttressed by the contents of Article 130 TFEU, which provides *inter alia* that:-

> "When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body."

Article 130 TFEU also notes an undertaking of the Union institutions and the Member State governments to respect that principle and to refrain from seeking to influence the members of the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

In C-11/100 *Commission v. ECB*, the ECJ noted in respect of earlier incarnations of these provisions that they served *"to shield the Bank from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the Treaty and the Statute."* Although the ECJ was at pains to point out there that such independence did not exempt the ECB from every rule of Community law, arguably some deference should be afforded its decisions when bodies like the CJEU are deciding whether or not a given measure adopted by it falls within the remit of monetary policy.

Objectives of the OMT decision

The CJEU's decision in *Pringle* shows how it will approach the question of whether or not the OMT decision is a monetary policy measure. There, it held that in order to decide whether the ESM was to be classed as a monetary or economic policy measure, it had to establish within which policy its objectives fell. It held at paragraph 56 that a measure could not be held to be equivalent to a monetary policy measure simply because it might have indirect effects on the stability of the euro, which enabled it to conclude that the establishment of the ESM fell within the area of economic policy.[4]

Bearing in mind the wording of Article 127 TFEU, key issues for the CJEU are likely to be whether or not the OMT decision can be said to help to maintain price stability and whether or not it provides support for the general economic policies in the Union.

(a) Price stability

The manner in which the interest rate transmission chain functions suggests that the decision arguably helped to maintain price stability. Before the ECB announced the OMT decision, its ability to influence borrowing costs in those countries' economies by setting interest rates, a key function of any central bank worth the name, was in danger of being rendered entirely nugatory. Rising borrowing costs in those countries would inevitably have had deflationary effects, either through the passing on of such costs to the public and private sectors or through a credit crunch which undermined economic activity. Such outcomes, would in turn, have adversely affected price stability.

Against this backdrop, the ECB would appear to have been entitled under the TFEU and the ESCB Statute to intervene to prevent this by ensuring proper transmission of its monetary policy. Bearing in mind the content of Article 12 of the ESCB Statue, the OMT decision would appear capable of being classed as a decision *"relating to key interest rates,"* and therefore to fall within the area of monetary policy as contemplated in the Statute. The ECB is not expressly precluded by Article 123 TFEU from engaging in the purchases envisaged in the decision and may be said to have the implied power to do so. This would be consistent with Article 18 of the Statute which entitles it to purchase "marketable instruments" (a term potentially capable of encompassing such bonds) in order *"to achieve its objectives and to carry out its tasks."*

By appearing to have reduced yields on the bonds of debt-burdened eurozone members, and restored the relationship between the interest rates set by the ECB and the actual costs of borrowing for and, hence, in such countries, the mere announcement of the OMT decision can therefore be said to have had the desired effects of safeguarding the singleness of the monetary policy and an appropriate monetary policy transmission and, by extension, of maintaining price stability.

In its decision, the GCC ventured to suggest that those interest rate spreads had a rational basis. However, it cannot be ruled out that those yields were irrational or opportunistic in nature. It may be noted, for instance, that when the EFSF was established, its willingness to purchase sovereign bonds of eurozone member states in financial difficulty was motivated by the belief that its presence in the market *"limits the risk that 'out of the market' prices are posted by opportunistic primary dealers to test the needs from the country by ensuring that a minimum size will be secured…"*[5] The same rationale presumably

4 Paragraph 60 of its judgment.

5 EFSF Guideline on Primary Market Purchases, 29th November, 2011, page 2.

underlies the entitlement of the ESM to engage in sovereign bond purchases.

Indeed, the fact that bond yields for countries like Italy and Spain have decreased without any need for them to have entered into an assistance programme with the ESM or for the ECB to have purchased their bonds pursuant to the OTM decision, indicates that purchasers of those bonds believe that, notwithstanding their issuers' economic difficulties, they remain solvent and able to service their debt, implying that the previous high yields were irrational or opportunistic in nature.

(b) Support for general economic policies in the Union

The OTM decision would appear to be consistent with the objective of supporting the general economic policies in the Union, as OMTs will only occur in the context of participation in an EFSF/ESM programme by the eurozone member whose bonds are being bought, the aim of which is to restore the economy of the participating ESM/eurozone member to health. Any bond purchases can therefore be construed as supporting such participation and the economic objectives pursued by it, a conclusion reinforced by the fact that, under the terms of the OMT decision, such purchases would cease if the Member State failed to comply with the conditions of the programme. It was precisely the existence of such "conditionality" that spoke in favour of the legality of the ESM in *Pringle*. At paragraph 69 of that case, the CJEU said:-

> "[T]he reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU…is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies."

The fact that purchases are conditional on participation in an assistance programme and adherence to the conditions prescribed thereunder tends to undermine the view of the GCC that they would bypass the conditions prescribed in the programmes for the purchase of bonds on the secondary market.

The selectivity or targeted nature of any bond purchases, which the GCC found so unpalatable, simply reflects the fact that financial and economic crises are unlikely to affect all eurozone member states equally or simultaneously. The fact that the implementation of monetary policy by the ESCB does not generally have a selective or targeted approach cannot preclude such an approach from being adopted when circumstances warrant it.

Unlawful monetary financing of the budget?

Monetary financing of the budget is prohibited by Article 123 TFEU. However, that Article specifically prohibits only the "direct" purchase by the ECB of debt instruments, like bonds, from national governments. In other words, only purchases on the primary markets are prohibited, leading to the inference that secondary purchases would be lawful and that the ECB has the implied power to engage in them.

As any bond purchases made by the ECB would occur only in tandem with the participation of the relevant eurozone member state in an EFSF/ESM assistance programme, and cease if it failed to comply with their conditions, any fear that that state would be able to use such purchases as a basis for conducting an irresponsible budgetary policy would therefore appear to be unfounded.

Unless the above interpretation were taken by the CJEU, future important ECB policies could be subject to challenge. At the present time, for instance, eurozone inflation has been below 1%, and is therefore out of line with target of 2% referred to in the ECB's definition of price stability, mentioned above. One way of hitting the target would be for the ECB to engage in quantitative easing, as the United States Federal Reserve and the Bank of England have done in recent times. This would include purchasing government bonds from private sector bodies and thereby increasing the amount of money in circulation in the various eurozone economies.[6] The GCC's view would lead to this being classed as monetary financing of the budget contrary to Article 123 TFEU.

Stability of the financial system

It must not be overlooked that, under Article 127(5) TFEU, the ECB is obliged to contribute to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system. Bond purchases made by it under the OMT decision would enable it to comply with that obligation, because reductions in the value of government bonds can directly affect the size of balance sheets of financial institutions and erode their capital base, leading them to shrink their balance sheets and refuse to accept government bonds as collateral, all of which gradually undermines their ability to lend in the real economy. Insofar as the OTM decision helps to prevent this from happening, it supports the stability of the financial system.

Conclusions

The reference to the CJEU by the GCC provides the CJEU with a unique opportunity to provide general guidance on what constitutes the exercise of monetary policy by the ECB. Should it fail to do this, it would undermine, perhaps fatally, the ECB's ability to conduct monetary policy effectively. Moreover, the ECB's independence, enshrined in Articles 130 and 282 TFEU, would be rendered illusory by such an outcome, as it would effectively become subject to the views of the GCC or like bodies in carrying out its tasks. In such circumstances, any claims its officials might make about being prepared to "do what it takes" to preserve the euro, would carry no credibility with financial markets.

The CJEU therefore has the proverbial minefield to cross in dealing with the reference, but as has been shown above, the Treaty and the ESCB Statute provide it with the tools to do so safely, should it choose to use them. ■

6 See, for instance, *Monetary Policy Communication in Turbulent Times*, a speech by the President of the ECB, Amsterdam, 24th April, 2014, mooting the possibility of a broad-based asset purchase programme to combat a worsening of the medium-term outlook for inflation.

Brims Construction, Waiver and Breaches of Natural Justice

Michael Stephens FCIArb, International President, Chartered Institute of Arbitrators

Introduction

The following is an edited version of a speech given by Mr Stephens at a recent conference in Dublin. The speech addressed the topic of "adjudication" which is now specifically provided for in this jurisdiction under the recently enacted Construction Contracts Act 2013 and in particular, included some observations on the recent English case of Brims Construction Ltd v. A2M Ltd [2013] EWHC 3262 (TCC). *One of the key aims of the 2013 Act is to ensure prompt payment in the construction industry. The Act has introduced what is intended to be a fast track dispute resolution procedure entitling parties to refer disputes relating to payment to adjudication.*

The latest edition of the Chartered Institute of Arbitrator's quarterly journal the *Resolver* has an article entitled "Green light for Irish adjudication"[1].Since the Construction Contracts Act 2013 was signed into law last July, there has been a long wait at the red light. Unfortunately, practitioners in Ireland do not have the benefit of an established body of case law to tell them how to interpret these new provisions.

Adjudication has been a fixture of the English legal scene – that is, in relation to construction disputes – since 1996 when the Housing Grants, Construction and Regeneration Act 1996[2], supplemented by the Scheme for Construction Contract Regulations 1998[3], came into effect. That statute has been much litigated over and portions of it in relation to adjudication, together with the Scheme, have been amended recently by the provisions of the Local Democracy, Economic Development and Construction Act 2009[4].

There is an extensive jurisprudence that has developed in respect of virtually every aspect relating to adjudication. The pace of decisions has slowed in recent years as the principles of interpretation of the regime and enforcement of awards that the Court will apply have become clearer. Even so, there is still scope for the inventive lawyer to find "wriggle room" for the reluctant payer.

1 "The Resolver", February 2014, page 4; author Arran Dowling-Hussey FCIArb

2 Part II of the Act, comprising sections 104 to 117; also the general provisions under section 146.

3 The Scheme applies if so provided in the contract or if the parties have agreed that it should apply or where there is no agreed adjudication procedure in a construction contract, when the terms of the Scheme have effect as an implied term of the contract. See further section 108(5) of the Act.

4 These provisions apply from 1 October 2011.

Breaches of Natural Justice as a Defence to Enforcement

Section 6(8) of the 2013 Act requires that "*The adjudicator shall act impartially in the conduct of the adjudication*". On the face of matters, none of us would admit to having difficulty in abiding by the rules of natural justice – hear the other side, do not be a judge in your own cause are the principles that spring to mind. Another aspect of potential breach of the rules is to give a reasonable apprehension of bias or actually to be biased or to have pre-determined a point. It is the perception that the rules of natural justice have been breached that most often results in challenges to the enforcement of the award. As users of the 2013 Act will find out, once the adjudicator has made an award, that award is payable as night follows day[5]. If payment is not forthcoming, the receiving party can seek enforcement by the Court. The English courts generally give short shrift to arguments against enforcement of an award and there has to be an especially compelling reason why the money should not be paid over.

If the paying party is to rely upon a breach of natural justice as a defence to enforcement or otherwise to upset the adjudicator's award, it will need substantial grounds upon which to do so. Breach of natural justice can amount to such a substantial ground. The most recent English cases show that there can be a breach of natural justice when the adjudicator "goes off on a frolic of his own."

In *Herbosh-Kiere Marine Contractors v. Dover Harbour Board* [2012] EWHC 84 TCC, an award was set aside because the adjudicator had made his decision based on a method of assessment that neither party had argued before him and on which he had not asked the parties for their submissions.

Similarly in *ABB Ltd v. BAM Nuttall Ltd* (2013) EWHC 1983 TCC, the adjudicator based his decision on a clause in the contract which neither party had been given a chance to address, even though it was a relevant clause to the decision making process. His award was set aside.

On the other hand, contrast the decision of Ramsey J in *Farrelly Building Services Ltd v. Byrne Brothers (Formwork) Ltd* (2013) EWHC 1186 TCC. The adjudicator had not breached the rules of natural justice, having taken further submissions, ultimately in coming to conclusions in relation to payments due under a subcontract different to those conclusions which he had earlier shared with the parties, because it was not practicable for him to go back to the parties in the circumstances of the case. It was not, in that case, an exceptional situation where an adjudicator's failure

5 See section 6(10) of the 2013 Act.

to put provisional conclusions to the parties constituted such a serious breach of natural justice that a court would decline to enforce his decision.

Nonetheless, parties cannot simply say to the Court that the adjudicator did not ask them for submissions or made a decision on a basis which he had not foreshadowed and expect that to amount to a defence to enforcement.

The effect of these decisions is that parties, trying to find breaches of the rules of natural justice, are increasingly analyzing what was the actual scope or remit of the dispute, the extent of the parties' submissions and evidence and comparing all of that with what the adjudicator did and how he did it. This is in the hope that they can argue the dispute determined by the adjudicator was not the dispute referred to him. This can then allow arguments to be raised either on the basis of breach of natural justice or on jurisdictional grounds. If the adjudicator was not given jurisdiction, properly or at all, or exceeded that jurisdiction, the decision will not be enforced.

Brims Construction

The courts, however, do not approve of this approach of "combing through" decisions looking for any reason not to pay an adjudication award. This is particularly exemplified in the recent decision in *Brims Construction Ltd v. A2M Developments Ltd* [2013] EWHC 3262 where Akenhead J said parties should not engage in "contorted mental gymnastics" to determine what was the scope of the dispute referred to adjudication.

Given that adjudication is a "rough and ready" form of justice, the English courts favour a broad-brush approach and will seek to break down the dispute into its essential nature. In *Brims*, despite convoluted legal arguments, the dispute boiled down to what was due and when it was due.

The claimant Brims sought to enforce an adjudicator's decision relating to its dispute with the defendant A2M. The parties had entered a contract for the construction of a new care home. The contract contained an adjudication clause.

Towards the end of the project, a dispute arose and on 30 July 2013, Brims served a notice of adjudication referring to a dispute concerning A2M's failure to pay the amount Brims was claiming for work done up to 28 June 2013. Brims claimed two specific amounts in the alternative: in round terms £391,000 (which was £326,000 plus VAT) or £120,000 plus VAT (which was about £144,000). A2M had already paid £75,000 in respect of the sum which it said was due.

Brims then served a referral notice on 2 August which also raised in broad terms an issue about whether Brims had made an interim payment application on 28 June or 8 July, following a meeting with the project quantity surveyor (who was to recommend to the architect what amount was to be certified as payable by employer to contractor). The significance of the dates was that, which was relevant had a bearing on whether A2M had given a "pay less notice"[6] within time under the terms of the contract. On 8 August, A2M filed a response and on 15 August, Brims served a reply.

On 22 August, A2M, for the first time, argued a challenge to the jurisdiction of the adjudicator. This was on the basis that the referral notice had purported to expand upon the notice of adjudication (which was supposed to encapsulate the scope of the dispute between the parties) because there had been included in the referral notice an alternative argument about the date of the interim payment application. The adjudicator indicated that the notice of adjudication was wide enough to encompass that argument about the interim payment application and made his decision in favour of Brims.

The issues were whether:

(i) the argument based on the date of the interim payment application was part of the dispute referred to adjudication by the Notice of Adjudication;
(ii) A2M had waived its right to make a challenge to the adjudicator's jurisdiction; and whether
(iii) the adjudicator had exceeded his jurisdiction by deciding the matter on the basis of issues that were not set out in the Notice of Adjudication and so breached the rules of natural justice; he was alleged to have been in breach by inviting submissions on a clause in the contract which neither party had addressed but then effectively not asking them to submit further evidence.

Akenhead J took a characteristically robust, pragmatic approach. He decided the issues in these ways:

(1) he held that the adjudicator had had the jurisdiction to decide what he did. The real issue between the parties was whether and to what extent Brims was entitled to what it claimed in the application of 28 June. The solicitors' correspondence before the Notice of Adjudication demonstrated that part of what was in issue was the date of the interim payment application. On its face, the Notice of Adjudication described the dispute as essentially relating to A2M's failure to pay the amount to which Brims was entitled, for work done up to 28 June, by the final date for payment. That was ultimately what the adjudicator decided in favour of Brims. The fact that the Notice of Adjudication did not specifically mention the alternative argument about whether an interim payment application had been made was not material because it was simply an alternative way of putting the case. It was part and parcel of the dispute which had already crystallized between the parties and, given the correspondence, it was already in their minds.

(2) Even if the interim payment application argument was not part of the dispute referred by the Notice of Adjudication, it was clear that A2M had waived any right to raise a jurisdictional challenge in relation to that point. The referral notice made the argument openly and clearly, even if it was not set out in detail. A2M was also represented by competent solicitors. It was clear that they had considered the contents of the referral notice and replied to it carefully and comprehensively – and there was no hint of any jurisdictional objection. Instead, A2M waited for 14 days more after their response – until 22 August – before raising the objection. By that point, Brims had deployed its solicitors to produce its reply of 15 August. Brims had therefore necessarily relied upon the unqualified participation by A2M in the adjudication. The key elements of waiver were present, namely words or

6 Section 111(3) of the 1996 Act.

conduct by the waiving party which were intended to be relied upon and were actually relied upon by the other party (with time, money and resource expended by it).

(3) There had been no excess of jurisdiction and no material breach of the rules of natural justice on the part of the adjudicator. If he had always had the jurisdiction to address the issue upon which he ultimately decided the case in favour of Brims, he could hardly be criticised for deciding the case on that basis. The argument that he had shut the parties out from presenting further evidence when he invited them to make submissions on a point not previously addressed by either, simply did not stand scrutiny, in the opinion of the judge. Inviting further submissions did not equate to preventing further evidence from being presented. Accordingly, held the judge, there was no good reason why the adjudication decision should not be enforced. The argument there was an alleged breach of the rules of natural justice was dismissed summarily.

Lessons to be Learnt from *Brims*

It is suggested there are three basic points to take away from the decision which will strengthen any party's hand in an adjudication.

First, the notice of adjudication must be drafted with care because this is the document which defines the dispute[7]. It needs to be wide enough to cover all the issues. One wants to ensure that both parties and the adjudicator understand the scope of the dispute and the issues to be determined. That will go a long way to avoiding challenges. A jurisdictional challenge based on the notice of adjudication being drafted too narrowly is unlikely to be a successful challenge.

Secondly, if there is a good ground for challenge to the jurisdiction of the adjudicator, the objecting party should make that challenge sooner rather than later. If the formal movements of the process – the notice of adjudication, the referral notice, the response – are completed without the point being raised, a party is highly likely to be deemed to have waived any objection. This is particularly so where it has allowed, by this default, not only the passage of time but also expenditure on preparation and resources by its opponent.

Thirdly, an adjudicators must remember that he cannot "go on a frolic of his own". An adjudicator may spot an argument that seems germane but is completely overlooked by the parties. However, relying on this runs the risk of offending against the rules of natural justice. That is not to say that one cannot use knowledge and experience to evaluate the situation and reach the just conclusion. But it is sometimes difficult to judge where the line is between using one's own skill and knowledge and going off on that frolic. In *Brims*, the adjudicator slightly misjudged the situation as to whether or not a particular clause in the contract had been addressed by the parties. However, the critical thing was that he sought to share his concerns and approach with the parties. In *ABB,* the adjudicator did not invite the submissions of the parties and so the award was set aside: he had crossed the line; he had gone on a frolic. In *Farrelly,* the adjudicator did share his thinking on a particular point but although he then made a change to his decision without consulting the parties, he had stayed within the boundary. Akenhead J regarded the frolicking challenge in *Brims* as being put "without much justifiable conviction". The advice to an adjudicator has to be that if you are going to share your thoughts with the parties, share them sooner rather than later. ■

7 This was confirmed by Edwards-Stuart J (the judge in charge of the Technology and Construction Court) in *JG Walker Groundworks Ltd v. Priory Homes (East) Ltd* [2013] EWHC 3723 (TCC); earlier decisions to the effect that both the notice of adjudication and the referral notice could both define the scope of the adjudication should now be treated with considerable caution.

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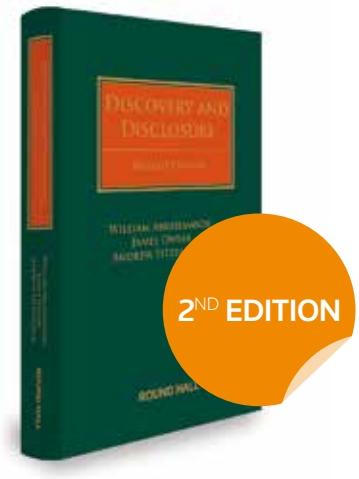

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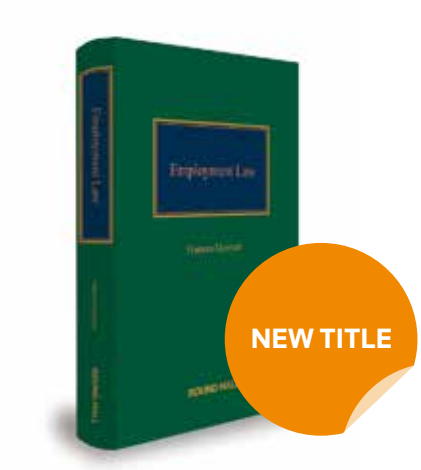

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