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### JUDICIAL CONTROL OF THE REGULATORS

- Impact of Public Law
- Human Rights

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#### INTRODUCTION

For better or for worse, we live in a world in which regulators exercise considerable power over private industry and are capable of affecting, in a most profound way, the fortunes of regulated companies, their employees and investors. These regulators are described as “*independent regulators*” to mark the fact that they are independent of government and the industries concerned. The problem on which I propose to concentrate in this address is the increasing trend of such regulators being regarded as independent of the government to the point that they are treated as isolated from judicial control.

There was a time in the not too distant past, when regulated industries were controlled by ministers served by civil servants. The minister was politically accountable and the civil servants were professional administrators. The courts did not display any particular reluctance to intervene with their decisions.

Then came a time when what have been described as “*independent*” regulators were appointed. In the face of this, the courts treated them as “*experts*” and, declining the capacity to adjudicate upon their decisions, particularly in the context of statutory appeals, referred to themselves rather deprecatingly as “*amateurs*”. The concept of “*curial deference*” borrowed from the United States but especially from Canada, gained force.

Before tackling the central theme of my speech, let me just briefly set out the constitutional background to the exercise of regulatory power in Ireland.

## **THE CONSTITUTIONAL BACKGROUND**

Article 34.1 of the Constitution provides:-

*“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public”.*

There is extensive jurisprudence on the meaning of this provision.<sup>1</sup> Essentially, the provision means that controversies of a justiciable nature are to be determined, and only determined, in the courts.

There is however an exception to this provision. Article 37.1, of the Constitution provides:-

*“Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.”*

Our jurisprudence has recognised that administrative bodies may take decisions which impose liabilities or affect rights (e.g. the refusal or withdrawal of a licence) which do not amount to an administration of justice. Furthermore, on the basis of Article 37.1 powers and functions of a judicial nature may be exercised by persons or bodies of persons who are not judges, but only on condition that (a) the powers and functions are limited and (b) they do not pertain to criminal matters.

Although never decisively tested in the courts, the generally accepted legal view has been that these provisions prevent regulatory bodies imposing fines for two reasons – firstly, it amounts to an administration of justice and secondly, the imposition of a fine is a penal sanction which brings it within the ambit of a *“criminal matter”*.

As a result, one finds that the powers of regulators in Ireland are not as extensive as they may be in other countries. Certainly, Irish regulators have power to grant or refuse licences and attach conditions to licences. However, their enforcement powers tend to be strictly limited. Thus, under the Competition Act, 2002, the Competition Authority does not have power to impose fines. If a person is to be fined for a breach of the Competition Act it involves a prosecution in the courts. Under the Aviation Regulation Act, 2001, the Commission for Aviation Regulation must seek a High Court order to compel compliance with its decisions or requests. The fact that to date at least, enforcement powers in relation to the decisions of regulators have been largely placed within the province of the

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<sup>1</sup> See in particular *Lynham v. Butler (No.2)* [1933] I.R. 74, *McDonald v. Bord na gCon* [1965] I.R. 217, *The State (Clarke) v. Roche* [1986] I.R. 619, *Goodman v. Hamilton (No.1)* [1992] 2 I.R. 542, *Keady v. Garda Commissioner* [1992] 2 I.R. 197.

courts, provides a mechanism whereby some judicial control can be exercised over the decisions of regulators.

One of the really interesting features of the powers ultimately envisaged for the Financial Services Regulatory Authority is that it is apparently intended to confer on it a power to impose sanctions on a financial services provider that is in breach of the rules. This does not currently feature in the draft legislation but if provided for, would undoubtedly be a new departure, the legality of which would have to be tested sooner or later. What this proposal does indicate however, is that there is considerable pressure building up within the system for politicians to confer on regulators a power to impose sanctions.

At any rate, the constitutional provisions emphasise that citizens are entitled to have justice administered by courts – and that includes judicial control of the regulators. The need for judicial control is all the greater where regulators have power to take decisions or impose sanctions which impact on property rights or in some cases livelihood. If regulators are to have power to impose fines on the basis that they are a type of civil sanction, the need for meaningful and rigorous judicial control is all the greater.

### **CURIAL DEFERENCE**

I propose briefly to address the level of scrutiny that the Irish courts apply to regulators.

Before doing so, let me pin my colours to the mast on this. In my view, the jurisprudence of the Irish courts as to the giving of reasons, leads to a most unsatisfactory situation in relation to judicial control of regulators in Ireland. A very low standard of reasons and reasoning is exacted by the courts. Furthermore, the courts (in my view quite wrongly) decline to take a hard look at the decisions of regulators on the basis of a claimed lack of resources and expertise.

Judicial control over regulators is exercised in a number of ways. Let me firstly say that what are known as privation clauses – such as “*sole and exclusive jurisdiction*”, “*no certiorari*” etc – are virtually unknown in Irish law. The closest one comes to it, apart from limitation of appeals to points of law, is a statutory requirement which is often imposed, that applications for judicial review be brought within a strictly limited time period (usually two months) and that the application for leave be on notice to the regulator and other persons concerned. In Irish law, the opportunity of applying for judicial review of a regulators decision always exists. It may be refused on discretionary grounds, e.g. a failure to avail of a domestic appeal procedure<sup>2</sup> but that is a different matter. Apart from applications for judicial review, statutes frequently provide for (what on the face of it) is an unlimited right of appeal to the High Court.<sup>3</sup> Indeed, such a right of appeal to the High Court is provided for in the Bill establishing the Irish Financial Services Regulatory Authority. However, despite the availability of procedures such as

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<sup>2</sup> See in particular the *State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381.

<sup>3</sup> See Section 9(1) of the Competition Act 2002 (formerly Section 9 of the Competition Act 1991) and Section 111(2)(i) of the Postal & Telecommunications Services Act 1983.

statutory appeals and judicial review, the Irish courts display a marked reluctance to scrutinise the decisions of regulators. Personally speaking, I have to say that one of the most regrettable ways in which this reluctance manifests itself is through the application of the doctrine of curial deference.

A case that for me has particularly bitter memories, having appeared on the losing side, is *M & J Gleeson v. the Competition Authority*.<sup>4</sup> That was a case in which the Competition Authority granted a licence to Guinness Ireland Group Ltd to purchase the outstanding shareholding in a drinks distributor United Beverage Holdings, a company in which it already had a minority shareholding. Some competitors exercised their right to a statutory appeal under Section 9 against the decision of the Authority. Section 9 of what was then the Competition Act 1991, provided that any person aggrieved could appeal the decision of the Competition Authority to licence such an acquisition agreement to the High Court and “*on the hearing of any such appeal, the court may confirm amend or revoke the licence so appealed against or, in the case of a certificate, may cancel or refuse to cancel the certificate.*”

On the face of it, this was an untrammelled right of appeal which was provided for by the Legislature as something additional to the remedy of judicial review. However, when it came to consider the scope of the appeal, the High Court was swayed by the Canadian decision of *Southam*.<sup>5</sup> It rejected an interpretation of Section 9 which involved a complete rehearing because of the courts’ view that it would “*impose an enormous burden of the court*” and because the court lacked “*the expertise and specialised knowledge*” of the Competition Authority. Ultimately, the court interpreted the appeal as involving a review on a reasonableness standard but one which was “*more deferential than exacting*”. At the same time, the court appeared to hold that the standard of reasonableness was lower than the judicial review standard of irrationality saying “*the applicants are not to be inched towards a judicial review standard*” and ultimately held that “*in practical terms*” to succeed in the appeal the applicants would have to establish “*a significant erroneous inference which was critical to the grant of the licence and which went to the root of that decision rather than an erroneous inference which relates to some detail, even if that detail is relevant*”. The court held that in applying the “*reasonableness*” standard, it was confined to a review of the material before the Authority. That having been said, the court also opened the door to the parties adducing expert oral testimony – notwithstanding the fact that it was not available to the Competition Authority. Subsequently, the case settled and the Supreme Court did not have an opportunity of pronouncing definitively on the standard set.

The opportunity did however arise a little over a year later in *Orange v. Meteor*,<sup>6</sup> a case which involved a statutory appeal against a decision by the Telecommunications Regulator on the award of the third mobile telephone licence in Ireland. The High Court had allowed the challenge and remitted the decision to the Regulator. The Supreme Court reversed. In reversing, the Court approached the ambit of what on the face of it,

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<sup>4</sup> [1999] 1 ILRM 398.

<sup>5</sup> *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 SCR 748, 144 D.L.R. (4<sup>th</sup>) 1.

<sup>6</sup> [2000] 4 I.R. 159.

was an unrestricted right of appeal to the High Court, by determining that the standard of review was one of reasonableness. In this respect it followed the High Court in defining a narrow scope for the appeal. It held that an appellant had to establish, as a matter of probability, that the decision reached by the Regulator was vitiated by a serious and significant error or a series of such errors. In doing so, the Court also laid emphasis on the doctrine of curial deference, based on the expertise of the Regulator, and the Regulator's ability to draw on specialised knowledge.

When it comes to judicial review, the courts have if anything, been even more deferential to regulators and display a great reluctance to quash the decisions of expert tribunals on the basis of irrationality. In this context, reference is frequently made in argument, to the dictum of the then Chief Justice Hamilton, in *Henry Denny & Sons (Ireland) Ltd v. the Minister for Social Welfare*,<sup>7</sup> a case of a statutory appeal against the Social Welfare Chief Appeals Officer – where he said:-

*“Where conclusions are based upon an identifiable error of law, or an unsustainable finding of fact by a tribunal, such conclusions must be corrected. Otherwise, it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them, it should not be necessary for the courts to review their decision by way of appeal or judicial review.”*

In other cases<sup>8</sup> the courts in declining to interfere with the decisions of expert tribunals have emphasised their specialist expertise, the absence of resources on the part of the court and the inability of the court to understand the technical or scientific detail involved.

In short, when confronted with statutory appeals against decisions of regulators or applications to judicially review their decisions, the courts have genuflected before the regulator and adopted a “*hands off*” approach.

A further acute problem is the lax standard adopted by our courts in relation to the giving of reasons. Surely, the very first step in the judicial control of regulators is judicial insistence on what, to use the words of Chief Justice Hamilton in the *Henry Denny* case could be described as an obligation to provide a coherent and balanced decision? By insisting on detailed and comprehensive reasons, the court takes a first step towards controlling regulators and ensuring that their decisions are rational. However, in planning cases where there is a statutory duty to provide reasons, the courts have been prepared to infer reasons<sup>9</sup> and to accept as “*reasons*” what in truth are no more than statements of conclusions. In *Orange v. Meteor*, a unanimous Supreme Court of five considered a case where the reason given to an unsuccessful applicant in a tender

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<sup>7</sup> [1988] I.R. 34.

<sup>8</sup> See for example *Ni Eili v. Environmental Protection Agency*. Unreported. Supreme Court 30<sup>th</sup> July 1999, *O’Keeffe v. An Bord Pleanala* [1993] 1 I.R. 93 and *Ryanair v. Flynn* [2000] 3 I.R. 240.

<sup>9</sup> See *O’Keeffe v. An Bord Pleanala*. *Supra*.

competition for the third mobile telephone licence, as to why its application had not been successful, was essentially “*you came second*”. Requests for further reasons which would shed light on the comparative evaluation of the bids were refused. The sufficiency of this “*reason*” was upheld by the Supreme Court. The Supreme Court also referred with approval to its earlier decision in *Faulkner*,<sup>10</sup> a 1997 case in relation to a Labour Court decision regarding alleged sexual discrimination. There, the Supreme Court upheld reasons which simply said that they employer “*had reasonable grounds other than sex or marital status for (the claimants) non-promotion*”. In giving the decision, in that case, the Supreme Court stated “*When reasons are required from administrative tribunals they should be required only to give the broad gist of the basis for their decision. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative Tribunal to minute analysis*”. I would respectfully suggest that the opposite is the case.<sup>11</sup>

### **CURIAL DEFERENCE HAS BEEN OVERDONE**

In my view, the whole business of curial deference has, in our domestic jurisprudence, been overdone. Firstly, an across the board presumption of independence or expertise is simply not justified by the facts. Although people of ability and integrity, two of our sectoral regulators are former civil servants and a third is a former solicitor. They are not “*independent*” in the sense in which judges are. They are appointed by the Executive for fixed terms and are dependent on the Executive for re-appointment. Not all regulators have the resources to carry out their task with expertise. They are usually dependent on the Executive to provide the resources. Many have difficulty recruiting appropriately qualified staff on the basis of the salary scales and career structures which they are in a position to offer. Many have difficulty retaining outside experts with appropriate expertise and experience who are not already conflicted. Most statutes include a provision whereby the relevant Minister can give directions to a regulator with which a regulator must comply.<sup>12</sup>

Furthermore, assertions by the courts that they do not have the resources or expertise to handle such issues are simply inconsistent with the approach adopted by the courts in other cases. Thus, since 1991 under our competition legislation, the courts have had to consider numerous claims in relation to alleged anti-competitive agreements and abuses of dominant positions. The court has frequently been involved in the assessment of complex economic evidence. It has never had to throw up its hands in despair and say it could not reach a decision. Here, an even greater burden is imposed by the Legislature on the courts, than that which the court in *M & J Gleeson* presumed could not have been intended by a provision for a statutory appeal! Since 1996, the Competition Authority has

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<sup>10</sup> [1997] ELR 107.

<sup>11</sup> See *Faulkner v. Minister for Industry and Commerce* [1997] ELR 107.

<sup>12</sup> See Section 10 Aviation Regulation Act, 2001; Section 10 and Schedule to Electricity Regulation Act, 1999; Section 13 Communications Regulation Acts, 2002 and Section 30 Competition Act, 2002. The Central Bank and Financial Services Authority of Ireland Bill 2002 provides that IFSRA must comply with guidelines from the Central Bank and report regularly to the Central Bank.

had power to sue for such anti-competitive and abuses. In considering such an action, is the court to afford “*curial deference*” to one party and not the other? Is it to decline to question the view of the Authority that the agreement or activity is anti-competitive in its object or effect or an abuse?

Courts have no particular difficulty in comprehending expert evidence adduced under the adversarial system and assisted by such evidence in reaching a decision, on such complex issues as the way trains are driven, aircraft repaired, babies delivered, accounts audited or pharmaceuticals manufactured. They are not deterred from deciding such cases because they are long or complex or because the defendant is an expert. Why should any different rules apply to regulators?

Indeed, in the Canadian case of Southam on which the Irish courts have placed so much emphasis, Iacobucci J. delivering the judgment of the Supreme Court of Canada, made the very sensible point that if experts are truly expert, they should have no difficulty in coming to court and coherently explaining their point of view in a way which shows it to be evidently reasonable and one which should be upheld. In other words, true experts have no need to hide behind a doctrine such as that of “*curial deference*”.

As for the claimed lack of resources, the only resource that a judge is expected to bring to the resolution of the issues, is intelligence. All other resources such as the results of legal research, expert analysis and opinion are provided by the parties.

Even worse, some Irish cases in referring to curial deference link it to the extent of the expertise of a particular regulator.<sup>13</sup> This is unsatisfactory. Is the court to conduct a preliminary hearing on the expertise of a particular regulator before deciding on the degree of deference to afford to him or her? Surely, not!

Could I suggest an appropriate level of curial deference has already been built into the procedure of judicial review given two factors. Firstly, the need for leave – which frequently involves establishing “*substantial grounds*” in an application contestable by the regulator. Secondly, the substantive rules on the basis of which relief by way of judicial review is granted. There is no need or a further layer, on the basis of which, courts decline jurisdiction in limine. As far as statutory appeals are concerned, deference to the Legislature which has provided a control mechanism by way of appeal to the courts, demands a merits based appeal hearing. Curial deference in such circumstances demands no more than imposing a burden of proof on the appellant and giving the regulator the benefit of the doubt – in other words – a presumption of regularity.

## **FUTURE**

Unfortunately, Ireland does not have an Administrative Procedures Act such as that which has existed in the United States since 1946. However, even in the absence of such a statute, the courts should be able to resolve the tension between scrutiny and deference

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<sup>13</sup> See in particular *M & J Gleeson v. Competition Authority*. Supra.

in a way which provides effective protection from the decisions of regulators who are not elected and not politically accountable in the way in which their ministerial predecessors were. There is some hope for the future in that modern statutes contain within them, what might be described as a mini administrative procedures act. Thus, the Aviation Regulation Act 2001 provides that the Commission for Aviation Regulation must in all his determinations observe the principles of transparency, proportionality and objective justification. It provides that he must give notice of his proposal to make a determination and provide an opportunity to interested parties to be heard. It provides that he must give reasons why he accepts or rejects submissions made to him. It expressly preserves the right of judicial review notwithstanding a statutory appeals mechanism. It is to be hoped that the courts will vigorously enforce these and similar statutory duties.

The Irish courts have in other areas (e.g. decisions of Hepatitis C Compensation Tribunals, The Criminal Injuries Compensation Tribunal, refugee officers, and industrial tribunals), not been hampered by the self-imposed limitations under which they labour in relation to regulators. It is to be hoped that the Irish courts will once again, to use the words of the U.S. Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm Auto Insurance Co.*,<sup>14</sup> be prepared to take a hard look at the decisions of regulators. Indeed, it was the current Chief Justice (Chief Justice Keane) who as a judge of the High Court took the ultimate “hard look” when he entertained expert evidence as to scientific and technical issues in relation to the MMDS transmission system and concluded that a policy decision by a minister in relation to the grant and refusal of retransmission licences was irrational. Such rigorous review by judges of high intellectual ability, assisted by expert evidence adduced by the parties, can only serve the public interests by establishing high standards of administrative action by regulators.<sup>15</sup>

Finally, if curial deference has any logical foundation, it lies surely not in the supposed expertise of the regulator but rather in the presumed intention of the Legislature. I raise the question however, whether there can be such a presumed intention in the absence of a privation clause and when there is an express (and apparently untrammelled) right of appeal to the High Court? If deference is to be shown to any curia, surely it is the Legislature? If the Legislature hys down a right of appeal to the High Court and does not limit it in any way, do the courts show deference to the Legislature by imposing a limitation?

It is generally true that regulators are persons of integrity who try hard to deliver the right decision having followed a fair process. However, they too make mistakes. The best way of ensuring that they have the resources to make decisions that are defensible, that fair procedures are followed and human rights are accordingly, respected, and that their decisions are correct, (an objective which must surely be in the public interest), is to subject them to rigorous control. That control should be exercised by an independent judiciary, who in Ireland at least are now sorely in need of reconversion, so that they have confidence in their own ability to analyse issues, no matter how difficult, on the basis of

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<sup>14</sup> [1983] 463 US 29.

<sup>15</sup> See *Carrigaline Co. Ltd. v. Minister for Transport* [1997] 1 ILRM.

the evidence placed before them. Far from shying away from this on the basis that it is not “judges work”, it must quintessentially be <sup>16</sup> – the work of a judge.

In conclusion, I can find no better summary for my sentiments than the dissenting opinion of the U.S. Supreme Court in *New York v. United States*, <sup>17</sup> subsequently quoted with approval by the U.S. Supreme Court in *Burlington Trucklines Inc. v. United States* <sup>18</sup> and also in *Motor Vehicle Manufacturers Association of the U.S. Inc. v. State Farm Mutual Automobile Insurance Company et al.* <sup>19</sup>

*“There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such...practice...expert discretion is the lifeblood of the administrative process, but “unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion””.*

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<sup>16</sup> As exemplified most recently by the CFI in *Air Tours PLC v. Commission* [2002] All ER (EC) 783.

<sup>17</sup> 342 US 882, 884.

<sup>18</sup> 371 US at 167.

<sup>19</sup> [1983] 463 US 29.