

## DO REGULATORY AUTHORITIES KNOW BETTER THAN CLIENTS ON APPROPRIATE LEGAL REPRESENTATION?

*In a recent decision, **Law Society of Ireland v The Competition Authority** [2005] IEHC 455, the High Court of Ireland considered the circumstances in which a client's right to legal counsel of their choice potentially comes into conflict with a regulator's ability to properly exercise its statutory investigative functions. The case raises issues which are particularly timely in light of the heightened level of investigatory activity undertaken by the New Zealand Commerce Commission (the "Commission"), and in light of recent observations by our own High Court concerning the possible application of the Bill of Rights to the Commission's investigatory process.*

### The challenged notice

At issue was a notice published by The Irish Competition Authority (the "**Authority**"). The notice proceeded on an assumption by the Authority that it had the ability to exclude a client's preferred legal representative from an interview in circumstances where it considered that the legal representative would or might prejudice its investigation. As relevant, the notice read:

#### GENERAL POLICY

- (1) The Authority's ability to carry out effectively its investigative functions under the Act relies heavily on its right to obtain fully the information and forthright testimony and statements of persons attending before it without such efforts being compromised by conflicts which potentially arise where the same lawyer represents more than one person attending before the authority. (...)
- (3) In general the Authority takes the view that **the integrity of its processes is, or is likely to be compromised by the fact that the same lawyer represents more than one person in any particular matter**, be it two parties to an investigation or a party to an investigation and a witness relevant to that investigation. **In general, therefore, the Authority will not permit the same lawyer to represent both persons.**
- (4) In circumstances where the Authority is of the opinion that the integrity of its processes may be compromised by the fact that the same lawyer represents more than one person in any particular matter **it will permit the lawyer to appear before it on behalf of only one of those person.** (...) [Emphasis added.]

The Law Society of Ireland ("**LSI**") sought a declaration that the notice unreasonably infringed the right to a lawyer of choice and that this right was guaranteed by Article 40.3 of the Irish Constitution. The LSI also sought a declaration that the notice infringed the right to a fair hearing under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("**ECHR**").

### A balance of competing interests

The first question for the Court was whether the notice had the effect of interfering with any relevant right. The Court noted that the restriction sought to be imposed by the notice was limited. Nevertheless, it found that the notice had the effect of barring the client from his or her chosen counsel. That was, in the Court's view<sup>1</sup>, "*a significant interference with the lawyer/client relationship which cannot be discounted as being de minimus*".

The Authority tendered affidavit evidence from the manager of its Cartels Division regarding the mischief to which the notice was directed, including:

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<sup>1</sup> *Law Society of Ireland v The Competition Authority* [2005] IEHC 455, page 11.

... the fact that only one solicitor acts for a number of persons under investigation **militates against any one person under investigation getting completely impartial advice as to the suitability of the Immunity Programme** made available by the Director of Public Prosecutions through the agency of the Authority. (...) [Emphasis added.]

The Authority submitted that the purpose of the investigation was for it to discharge its statutory functions that included the prospect of bringing later civil or criminal proceedings. Full rights to representation applied to those subsequent proceedings. Consequently much argument before the Court focussed on whether the right to full representation applies equally to an investigation as to a Court proceeding.

The Court's judgement is a useful summary of the European authorities. By analogy with criminal legal aid proceedings, the Court observed that it always retained the ability to ensure choice of representation did not prejudice the conduct of a trial. However, it held that in an investigation, as in civil proceedings, there must be a strong initial presumption in favour of freedom of choice of representation. Any tribunal empowered to veto a choice of lawyer would invariably raise, at the very least, a perception of unfairness by the person denied that freedom of choice. Where that tribunal is in fact the adversary, as is often the case in investigations by the Authority, that perception would be "*very strong indeed*"<sup>2</sup>.

Ultimately, the Court found that while there was a need to balance the party's right of freedom of choice of legal representative against the Authority's ability to discharge its statutory functions, that balance is achieved by a "*strong presumption of a freedom of choice of legal representation*". It found that the tribunal retains a residual discretion to deny that freedom of choice where it is apparent that to permit a particular legal representative to act, would have the likely result of frustrating of impeding the tribunal discharging its lawful function, but commented<sup>3</sup>:

It would have to be observed that in all types of proceedings and in particular proceedings of a civil nature, the likelihood of a choice of legal representative being an obstacle of the proper conduct of the proceedings, will be rare indeed.

The Court further noted that in many situations, representation of multiple parties will not necessarily or even routinely give rise to a conflict of interest. It cautioned the Authority not to assume that lawyers will neglect or ignore their professional duties by continuing to act where such a conflict exists.

The Court found that the notice was not justified by the possibility that a person who could benefit from the Immunity Programme (which is similar to the leniency policy published by the Commission in November 2004) might not be made aware of that policy by legal counsel also acting for another party potentially put at risk by that person's evidence. In circumstances where such a conflict might arise, the Court concluded that the Authority could instead notify all parties to whom the Programme might apply of the possibility of immunity and, where appropriate, invite a person to take advantage of it.<sup>4</sup>

Finally, the High Court considered the application of Article 6 (1) of the ECHR which provides that "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing*". The Court found that this provision applies equally to an investigative process, if, during such a process, an event can occur which, in later (criminal or civil) proceedings, can have a "*decisive effect*" on a determination of criminal or civil liability on the part of the person investigated<sup>5</sup>. The Court held that the notice breached Article 6 on the same basis as it breached the Constitution, on the basis that the right to legal counsel of the client's choice was "*an integral aspect of a fair trial*"<sup>6</sup>.

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<sup>2</sup> Ibid, page 26.

<sup>3</sup> Ibid, page 27.

<sup>4</sup> Ibid, page 29.

<sup>5</sup> Ibid, page 34.

<sup>6</sup> Ibid, page 39.

## The New Zealand experience

The Irish High Court decision is relevant to a relatively recent observation made obiter dicta by Justice Williams in *Koppers Arch Wood Protection (NZ) Limited v The Commerce Commission*<sup>7</sup>, in relation to the notice which typically accompanies a request for information by the Commission pursuant to section 98 of the Commerce Act 1986 ("**Commerce Act**"). His Honour noted:

- [14] The third part was headed "Information for recipients" of s98(c) notices. Of little relevance to the matters in this proceeding, it is nonetheless interesting to note that in it **the Commission claimed s98(c) entitles it to direct that the interviewee's lawyer is only to be "present to observe and support you" and says "this is ... not an active role"**. The lawyer is not to interrupt the conduct of the interview "other than to confer with you occasionally at your request". The lawyer is unable to make objections or answer questions and cannot re-examine and **if the Commissioner, "considers your lawyer's conduct is obstructing or interfering with the interview" the lawyer will be warned, and if it persists "your lawyer may be asked to leave"**. All questions are to be answered, even if they might incriminate the interviewee (although answers cannot be used in criminal proceedings), and the interviewee is advised that a s103 makes it an offence to refuse to answer questions, or knowingly give false or misleading information.
- [15] **Although not an issue at this hearing, Ms Scholtens QC, senior counsel for the Commission, accepted that if the New Zealand Bill of Rights Act 1990 applies to interviews conducted by the Commission, those notified restrictions on interviewees and their legal advisers may warrant reconsideration.** [Emphasis added.]

The issue of interference with representation before a regulatory authority, identified by Justice Williams, is relevant also in other regulatory contexts. Levels of uncertainty around the nature and extent of the application of sections 27 (and potentially section 22) of the New Zealand Bill of Rights Act 1990 to legal representation in regulatory interviews<sup>8</sup>, have contributed to situations where regulators other than the Commission have sought to restrict the scope of legal representatives' actions in interviews.

The Commission, like the Authority and other international competition regulators, considers that maximising the effectiveness of their leniency (or, if not the first in the door, "co-operation") policies is an important aspect to the discharge of its statutory functions. It cannot be discounted that the practical effect of one lawyer representing a corporate entity and its directors and officers might reduce the likelihood of an individual company officer, in the course of an interview with the Commission, succumbing to questioning and claiming leniency or co-operation. However, as the Irish High Court observed, those considerations must be balanced against the fact that a client must be free to select the legal representative of their choice. That choice must have been made in light of the client's own knowledge of the factual background to a matter. In those circumstances, representation of multiple parties will in many cases not give rise to a conflict of interest.

There are also a number of legitimate practical reasons which operate in favour of a single legal representative appearing on behalf of a corporate entity and its directors and officers. While a corporate entity has a separate legal personality, it is only ever able to act through its directors and officers. In a situation where an individual employee does claim leniency or co-operation, due to the confidentiality orders that the Commission typically makes in relation to matters discussed in interviews, a corporate entity could easily find itself prosecuted in respect of conduct undertaken by that employee, without the benefit of any information from the employee whose actions gave rise to that liability. In those circumstances, the company may have been precluded from claiming leniency or co-operation jointly with the individual. Applying the test set down by

<sup>7</sup> unrep. CIV20044043868, 16 November 2004, High Court, Auckland, Williams J, ("*Koppers Arch*"), page 5.

<sup>8</sup> For a more detailed discussion on the New Zealand position in relation to the rights to legal representation in regulatory interviews please refer to paras 19.7 and Chapter 27 of A Butler and P Butler, *The New Zealand Bill of Rights Act - A Commentary*, 2005, Lexis Nexis.

the High Court of Ireland, in the interview an event can occur which can have a "*decisive effect*" on a determination of civil liability on the part of the corporate entity.

From the practical perspective of the corporate entity, where its directors or officers do not request it (and independent legal advice may be required in order to ensure that this choice is an informed one) it is therefore often in its interests to instruct the same counsel in an investigation as at least its most senior employees. Similarly, it may be in those employees' interests, from a purely financial perspective, to avoid duplication of legal fees in respect of what is essentially the same matter.

Legal counsel must in all circumstances consider carefully the impact of these underlying practical considerations when considering, under the Rules of Professional Conduct, whether or not he or she is able act for more than one party involved in an investigation. The ability of the client to give fully informed consent to joint representation must be kept under constant review, and clearly the practitioner must decline to act further in the matter if so acting would be likely to disadvantage any party (Rule 1.07). Excerpts of the affidavit of the manager of the Authority's cartels division, cited by the Irish High Court provide a useful sounding board for the type of conduct which might lead a practitioner into dangerous waters.

### **Watch this space**

To date, the Commission's practice has been not to interfere with a party's choice of representation in interviews before it. It effectively adopts the approach recommended by the Irish High Court, namely to alert parties to the existence and terms of the Commission's leniency policy, and to deal with issues arising in the course of interviews through the use of confidentiality orders. However, the enforcement issues identified by the Authority are real ones, faced equally by the Commission.

It must only be a matter of time before these questions are brought before the New Zealand High Court again, in one form or other. When they are, the approach adopted by the Irish High Court ought to prevail as representing a fair balancing of, on the one hand, the Commission's obligation to discharge its statutory functions, and on the other, a party's right to choice of legal representation as an *integral aspect* of that legal or natural person's right to a fair hearing.