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# High Court of Ireland Decisions

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HC 310/04

## THE HIGH COURT COMMERICAL

**2004 No. 4729P**

### BETWEEN

**P J CARROLL & COMPANY LIMITED, JOHN PLAYER & SONS LIMITED, VAN NELLE  
(IRELAND), REEMTSMA CIGARETTENFABRIKEN GMBH, GALLAHER (DUBLIN) LIMITED,  
SOCIETE NATIONALE D'EXPLOITATION INDUSTRIELLE DES TABACS ET ALUMETTES  
(SEITA), GERRY LAWLOR AND CONOR FULLER**

**PLAINTIFFS**

### AND

**THE MINISTER FOR HEALTH AND CHILDREN, IRELAND, THE ATTORNEY GENERAL AND  
THE OFFICE OF TOBACCO CONTROL**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Kelly delivered the 29<sup>th</sup> day of July, 2004.**

### **INTRODUCTON**

On 18<sup>th</sup>

June, 2004, I made an order pursuant to the provisions of O. 63A r. 1(b) of the Rules of the Superior Courts entering these proceedings into the commercial list. On that date I gave initial directions and they were followed by further directions, which were given on 2<sup>nd</sup> July, 2004.

In accordance with the rules and practice of the Commercial Court, I directed each side to furnish:

1. the issues in respect of which evidence is to be adduced
2. an outline of the extent of the evidence to be adduced at trial

3. a list of the witnesses or type of witness to give such evidence.

That was duly done and this judgment relates to a dispute which arose at a further directions hearing on 9<sup>th</sup> July, 2004. It concerns the entitlement of the defendants to lead evidence in support of their defence of certain constitutional questions which are raised in the proceedings. The plaintiffs contend that such evidence is neither relevant nor admissible.

### **THE PROCEEDINGS**

The plaintiffs have mounted a wide ranging challenge to the Public Health (Tobacco) Acts, 2002 and 2004 and to the European Communities (Manufacture, Presentation and Sale of Tobacco Products) Regulations, 2003.

The plaintiffs' criticism of the Acts is made on a threefold basis. First, they claim that certain provisions are unconstitutional. Secondly, they claim that certain provisions are invalid because they are in breach of European law. Thirdly, they claim that certain sections are incompatible with the State's obligations under the provisions of the European Convention on Human Rights.

The plaintiffs' challenge to the Regulations falls under the same three headings, but there is also a claim that in making the Regulations, the first defendant acted *ultra vires* and unlawfully.

The plaintiffs' statement of claim sets out *in extenso* the case which it makes under each of these three headings and runs to in excess of 50 pages.

The defendants' defence is equally detailed running to some 40 pages. Apart from denying the plaintiffs' claim, a considerable amount of factual material is pleaded, which in turn was the subject of a lengthy reply from the plaintiffs, which in turn led to the delivery of a rejoinder. I will have to consider these documents in some detail insofar as they contain material pertinent to my decision.

The issue between the parties relates to the defendants' entitlement to lead evidence on the claims of unconstitutionality made by the plaintiffs. The essence of those claims is that the legislation constitutes a disproportionate interference with the plaintiffs' constitutional rights. The defendants contend that to the extent that there has been such an interference, it is justified having regard, *inter alia*, to the harmful effects of tobacco on public health.

### **THE ISSUE:**

In the defendants' list of indicative legal issues, dated 7<sup>th</sup> July, 2004, they identify the issue which falls for determination in this judgment in the following way:-

"whether, having regard to the form of admissions made by the Plaintiffs in their Reply delivered on 29<sup>th</sup> June, 2004, which are limited and specific to this case only, the Defendants can be deprived of their entitlement to adduce evidence in relation to:

- (i) the addictive nature of tobacco products;
- (ii) the health effects of the direct or indirect consumption of tobacco products;
- (iii) the role and effect of advertising on the sale and consumption of tobacco products;
- (iv) the past conduct of the tobacco industry in relation to the acknowledgment of the dangerous and addictive nature of tobacco and

in relation to Governmental attempts to regulate the sale of tobacco;

(v) the economics of the tobacco industry".

The defendants contend that they are entitled to adduce evidence of all of these matters despite the admissions referred to in the document from which I have just quoted.

It is not possible to answer these questions without reference to the pertinent part of the pleadings, which deals with the five areas set out above.

### **THE DEFENCE**

Under the heading 'Tobacco and its Effects' the defence reads as follows:-

"10. Tobacco is a naturally occurring product. The burning of tobacco releases the drug, nicotine. Nicotine has a number of neurological effects, including effects on brain dopamine reward systems similar to those of drugs such as heroin and cocaine. It is addictive. Tobacco products are intended to facilitate the delivery and ingestion of nicotine, leading to addiction. Tar and gases inhaled as part of tobacco smoke cause a variety of diseases. Addiction may therefore lead to illness and death. Cigarettes are the most common form of tobacco product in use. Cigarettes and other tobacco products, when used in the manner intended by their manufacturers, cause illness and death.

11. A significant number of additives are used in the manufacture of the products marketed by the corporate Plaintiffs. The tobacco products marketed by the Plaintiffs contain or are likely to contain some of the type of additives as set out in Schedule 1 to this Defence.

12. Smoke from tobacco products marketed by the corporate Plaintiffs is believed typically to have the chemical profile set out at Schedule 2 to this Defence.

13. The addiction to and consumption of tobacco products causes chronic obstructive pulmonary disease, cardiovascular diseases, several forms of cancer and is implicated in a variety of other diseases:

(a) Chronic obstructive pulmonary disease, in the form of chronic bronchitis and emphysema, is a major cause of disability and premature death. Approximately three quarters of deaths from this disease are attributable to smoking.

(b) Cardiovascular diseases include coronary artery disease and heart attacks, aortic aneurysms, which can lead to sudden death, carotid artery disease, which can lead to strokes and peripheral vascular disease which, in the lower limbs, can lead to severe pain in the leg on walking and may necessitate amputation. Evidence exists which tends to show that smoking causes more rapid expansion of aortic aneurysms.

(c) Evidence exists tending to show that smoking causes increased risk of cancer in several sites, pre-eminently the lung, but also several others such as the oral cavity, pharynx, larynx, oesophagus, pancreas and bladder.

(d) The list of other diseases known to be associated with smoking includes Type 2 or "late onset" diabetes, cataracts,

hip-fracture (from osteoporosis) and periodontal disease.

14. The first named Defendant ("the Minister") has estimated that, in Ireland, every year approximately 7,000 people die prematurely from smoking related diseases.

15. Further, the inhalation of environmental tobacco smoke ("ETS") or passive smoking is a risk in the following areas:-

(a) Exposure to and inhalation of ETS is a cause of lung cancer and of ischaemic heart disease;

(b) Smoking in the presence of infants and children exposes them to ETS which is a cause of respiratory illness and asthmatic attacks. Middle ear disease in children is also linked to ETS;

(c) Smoking in pregnancy causes adverse outcomes, notably miscarriage, reduced birth weight for gestation;

(d) Smoking is a cause of perinatal death and cot deaths.

Evidence also exists tending to show that ETS is the single most important source of harmful indoor air pollution.

16. The World Health Organisation estimates that cigarettes are responsible for approximately 30% of all cancer deaths, 20% of deaths from coronary heart disease and stroke and 80% of cases of chronic obstructive lung disease. Half of all people who regularly smoke will die from diseases caused by smoking cigarettes. Of these deaths, half will occur on or before middle age, i.e. that quarter of all smokers die in middle age from diseases caused by smoking.

17. As a result of the increasing consciousness of the danger to public health posed by tobacco products, the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978 ("the 1978 Act") and the Tobacco (Health Promotion and Protection) Act, 1988, ("the 1988 Act"), were enacted.

18. In view of the concern of the Minister that further legislative measures might be required to counter the threat posed by tobacco products, the Minister established the Tobacco Free Policy Review Group which reported to the Minister, *inter alia*, by way of a report entitled "*Ireland – A Smoke Free Zone: Towards a Tobacco Free Society*" ("the Tobacco Free Society Report"). The group concluded that the existing regulatory regime was unsatisfactory.

19. The Oireachtas, through a Joint Committee on Health and Smoking also reported on the threat posed by smoking in the Report of the Joint Committee on Health and Smoking published in November, 1999 and entitled "*A National Anti-Smoking Strategy: Report on Health and Smoking*". A further report of the Joint Committee on Health and Children was published in July, 2001, entitled "*Second Interim Report of the Sub-committee on Health and Smoking*", ("the Joint Committee Reports").

20. On March 7, 2000, the Minister secured Government approval for, *inter alia*, the publication of the Tobacco Free Society Report and for the preparation of heads of a bill which would set out measures designed to give effect to the recommendations made in the said Report. The Minister proceeded in accordance with governmental policy and prepared and presented heads of a bill which were approved and led to the enactment of the Public Health (Tobacco) Act, 2002, ("the 2002 Act"). Instead of outlawing cigarettes or restricting their sale to pharmacies or to places to which minors do not have access, the Minister proposed and the Oireachtas accepted a regime which permitted the continued sale of tobacco products through existing retail channels but in a highly regulated manner.

## **D THE 2002 ACT**

21. The 2002 Act was enacted with a view to countering the threat to public health posed by tobacco products. The 2002 Act gives effect to governmental policy in relation to the tobacco epidemic, as set out in the Tobacco Free Society Report. The 2002 Act will also replace the 1978 Act and the 1988 Act.

22. The 2002 Act also gives effect to certain provisions of Directive 2001/37/EC of the European Parliament and of the Council of 5 June, 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, ("the 2001 Directive").

## **E THE 2002 PROCEEDINGS**

23. The facts alleged at paragraphs 18 – 23 of the Statement of Claim are admitted.

## **F THE PUBLIC HEALTH (TOBACCO) (AMENDMENT) ACT, 2004**

24. The Public Health (Tobacco) (Amendment) Act, 2004, ("the 2004 Act"), was designed to amend the 2002 Act, in order to allow for the re-enactment of certain provisions of the 2002 Act which required to be notified to the European Commission pursuant to Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC ("the Transparency Directives"). The 2004 Act was also designed to amend certain provisions of the 2002 Act and to give effect to EU and international measures including the 2001 Directive, Directive 2003/33/EC of the European Parliament and of Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, ("the 2003 Directive"), Council recommendation of 2 December 2002 on the prevention of smoking and on initiatives to improve tobacco control ("the Recommendation"), and the World Health Organisation Framework Convention on Tobacco Control done at Geneva on May 21 2003 ("the WHO Convention").

## **G THE 2002 AND 2004 ACTS**

25. In adopting the 2002 and 2004 Acts, the Oireachtas had reasonable grounds for believing that the Acts, and each provision thereof, were justified and proportionate, having regard to the threat posed to public health by tobacco products, including those marketed by the corporate Plaintiffs.

26. In this regard, the Oireachtas was entitled to have regard to the significant body of evidence and scientific and medical opinion that exists leading to the conclusion that smoking causes the diseases referred to at paragraphs 13 to 16 above. The Oireachtas was also entitled, inter alia, to have regard to the measures adopted at EU and international level, the Joint Committee Reports, the minutes of the evidence given to the Joint Committee and the conclusions on the adoption of an anti-smoking strategy set out in the said Reports.

27. Further and in the alternative, in adopting the 2002 and 2004 Acts, the Oireachtas had reasonable grounds for believing that the Acts, and each provision thereof, were justified and proportionate, having regard to the previous conduct of the tobacco industry generally and the first, second and fifth named Plaintiffs in particular. In this regard, the Oireachtas in adopting the 2002 and 2004 Acts, was entitled to have regard to the statement of the first Defendant made in the Dáil that the tobacco industry generally has consistently striven to frustrate and undermine tighter regulation of tobacco and has, despite knowledge of the dangerous and addictive nature of tobacco products, denied that nicotine is addictive, that smoking and second hand smoke

cause disease and death. The Oireachtas was also entitled to have regard to the statements in the Joint Committee Reports to the effect that none of the Irish cigarette manufacturing companies have publicly made available papers or internal company documentation to enable the State or the general public to be informed of research specifically undertaken by those companies.

28. In the circumstances, the 2002 and 2004 Acts, and each provision thereof, are rationally connected to the public health objective sought to be achieved, which is the prevention of smoking related deaths and illness. The Acts are not arbitrary, unfair or based on irrational considerations. Insofar as the provisions of the Acts or any of them impair any rights upon which the Plaintiffs, or any of them, are entitled to place reliance (which is not admitted), such rights are impaired as little as possible. Further, the effect of the said provisions on the alleged rights of plaintiffs is proportionate to the public health objective sought to be achieved.

## **H CHALLENGE TO THE 2002 ACT, AS AMENDED**

### **(I) THE CONSTITUTIONAL CLAIMS**

29. It is denied that the corporate Plaintiffs have the requisite *locus standi* to seek to invoke the provisions of the Constitution of Ireland ("the Constitution") to challenge the Sections of the 2002 Act referred to at paragraph 28 of the Statement of Claim ("the Impugned Sections"). The existence of the seventh and eighth named Plaintiffs as parties does not confer on the corporate Plaintiffs or any of them the requisite or any *locus standi* to invoke the provisions of the Constitution in challenging the Impugned Sections or confer on the corporate Plaintiffs the requisite *locus standi* to seek to challenge the Impugned Sections on the basis of alleged breaches of the rights of consumers.

30. Without prejudice to the foregoing, the Impugned Sections are not invalid having regard to the invoked provisions of the Constitution of Ireland, whether as alleged at paragraph 28 of the Statement of Claim or at all.

31. If the rights which the Plaintiffs seek to invoke in the herein proceedings can be relied upon by them, which is denied, they can only be invoked to the extent that the 1978 and 1988 Acts have not curtailed those rights.

### **(II) SECTION 33A (THE RETAIL PREMISES ADVERTISING RESTRICTION)**

32. The Retail Premises Advertising Restriction ("the Advertising Restriction"), together with Section 43 (5), will replace the power conferred upon the Minister to make regulations for the control and regulation of the advertising of tobacco products conferred by Section 2 (1) of the 1978 Act. Section 8 (3) of the 2002 Act (as amended) will revoke the regulations made under the 1978 Act.

33. There were reasonable grounds for the Oireachtas to consider that the restrictions on advertising provided for by Section 33A was necessary and that the current restrictions were not sufficient to achieve the public health objective.

34. Further, there were reasonable grounds for the Oireachtas to consider that it should give effect to the Recommendation and to the WHO Convention, both of which recommend that countries adopt comprehensive restrictions on tobacco advertising and promotion.

35. Lastly, there were reasonable grounds for the Oireachtas to consider that more comprehensive restrictions on the advertising of tobacco products would better protect children and young people. *Inter alia*, the Oireachtas was entitled to have regard to the following factors:-

- (a) The Report of the Tobacco Free Policy review group concluded that the tobacco industry exploited the immaturity of young people when marketing their tobacco products.
- (b) Advertising plays an important role in the promotion of tobacco products to young people.
- (c) The 1999 Joint Committee Report states that research demonstrates that 34% of children in the 15 - 17 year age bracket smoke.
- (d) A significant number of children commence smoking at an age when they are not lawfully permitted to be sold cigarettes."

I should point out that the facts alleged at paras. 18 – 23 of the statement of claim, which are admitted at para. 23 of the defence, relate to earlier proceedings brought by the plaintiffs in respect of the 2002 Act. During the course of those proceedings, it was conceded by the defendants that certain provisions of the Act ought to have been, but were not, notified in draft form to the European Commission. An undertaking was furnished to the court by counsel on behalf of the first defendant in the course of those proceedings and the proceedings were struck out without prejudice to the entitlement of the plaintiffs to re-enter the proceedings to re-litigate the issues. All of that is admitted by the defence.

The defence deals with many other matters, but I have reproduced here what I perceive to be the parts of the defence relevant to this decision.

### **THE REPLY**

The reply was delivered on 29<sup>th</sup> June, 2004. There is a general joinder of issue contained at para. 1, that is qualified by reference to express admissions which follow. Under the heading 'Admissions for the Purposes of these Proceedings' the following appears:-

- " 3. The Plaintiffs will contend at the hearing of these proceedings that the question of whether the direct or indirect consumption of tobacco products is, directly or indirectly, injurious to the health of humans is not an issue which requires adjudication in these proceedings.
- 4. The plaintiffs admit that the First Named Defendant is and was entitled to propose, and the Oireachtas is and was entitled to enact legislation based upon its concerns regarding the health consequences of smoking but plead that such legislation may only interfere with the Plaintiffs' constitutional rights in a proportionate manner.
- 5. The Plaintiffs further admit, solely for the purposes of these proceedings and for clearly identifying the issues herein, that the First Named Defendant is and was entitled to propose and that the Oireachtas is and was entitled to enact legislation based on the belief that some restrictions on the advertising of tobacco products may achieve a public health objective or protect children and young people and that such legislation may interfere with the Plaintiffs' constitutional rights in a proportionate manner."

There then follows five paragraphs dealing with the question of proportionality. For the most part, those paragraphs either join issue with, or criticise, the form of pleading and particulars contained in the defence.

Under the heading 'Legislative Motive' the following paragraphs appear:-

- "13. Having regard to the pleas contained at paragraph 27 of the Defence herein, and having regard to the fact that the Defendants have put in issue the motive of the Oireachtas in enacting the Act (as amended) and having regard to the reliance by the Defendants upon that motive, the

Plaintiffs will contend at the hearing of these proceedings that the Court is entitled to declare that the impugned provisions of the Act (as amended) are invalid having regard to the provisions of the Constitution and/or are inconsistent with the Constitution because of the intention of the Oireachtas as alleged by the Defendants.

14. For these purposes, the Plaintiffs admit that the Oireachtas acted for the motives alleged at paragraph 27 of the Defence. However, while for the purpose of clarification only, the Plaintiffs deny that those motives were well founded, the Plaintiffs will not seek to contend at the hearing of these proceedings that the incorrectness of the belief of the Oireachtas as recorded at paragraph 27 of the Defence, affords a basis for invalidating the Act (as amended).

15. The Plaintiffs plead that the Oireachtas may not consistently with the provisions of the Constitution of Ireland impair the constitutional rights of persons by legislation for the purpose of punishing such persons for past conduct or for the purpose of expressing its disapproval of such past conduct.

16. Insofar as paragraph 27 of the Defence admits that each and every provision of the Act (as amended) was enacted having regard to the previous conduct of the tobacco industry generally and of the First, Second and Fifth Named Plaintiffs, in particular, the Plaintiffs will contend at the hearing of these proceedings that even if the allegations made at paragraph 27 of the Defence were well founded (which is denied), no reasonable legislature could conclude that each and every provision of the Act (as amended) was required or justified by the matters alleged at paragraph 27 of the Defence.

17. In the premises and having regard to the foregoing plea, the Plaintiffs will contend at the hearing of these proceedings that enacting the Act (as amended) for that purpose, by way of punishment and/or by way of the manifestation of its disapproval of the alleged conduct of such persons, and having regard to the matters set forth in paragraph 27 of the Defence, in particular, to the imputation to these Plaintiffs of the conduct of other entities and other jurisdictions, the impugn provisions of the Act (as amended) are invalid.

18. With reference to the plea contained at paragraph 26 of the Defence to the effect that the Oireachtas was entitled to have regard to (inter alia) the joint committee reports to the minutes of the evidence given to the joint committee and to the conclusions on the adoption of an anti-smoking strategy set out in the said reports, the Plaintiffs plead that the Oireachtas in having regard to those matters and, in particular, in having regard to the joint committee reports, to the minutes of evidence and to the conclusion of the said reports should also have had regard to the partiality and unfairness of the proceedings before the joint committee but wrongfully failed to do so.

19. The plaintiffs will further rely on the matters which it is alleged by the Defendants were taken into account in enacting the Act (as amended) in contending that the impugned provisions of the Act (as amended) are disproportionate, arbitrary and irrational.

20. The Plaintiffs admit that the tobacco products manufactured by the Corporate Plaintiffs are likely to contain some of the additives set out in the list appended at Schedule 1 to the Defence. That list is a version of the list of additives permitted by the United Kingdom Government to be added to tobacco products in the United Kingdom. However, the Plaintiffs do not believe that the issue of additives is in any way relevant to the proceedings. Entirely without prejudice to that contention, the Plaintiffs further plead as follows:-

1. The Defendants are aware of the ingredients added to tobacco products in the various tobacco products manufactured and/or marketed by the Corporate Plaintiffs in Ireland. As the Defendants are aware, in Ireland the Corporate Plaintiffs have, through voluntary agreement with

the Department of Health and Children, complied with the same list of additives which the United Kingdom Government has agreed may be used in the manufacture of tobacco products sold in the United Kingdom. This list is known as the 'Hunter List' and covers all ingredients added to tobacco and cigarette paper and adhesives but does not cover non-tobacco materials such as filters and ink. The list contained in Schedule 1 to the Defence appears to be a version of that list.

2. At the request of the First Named Defendant, the First, Second, Fifth and Sixth named Plaintiffs have provided detailed information as to the ingredients contained in the tobacco, paper and adhesives in each of their tobacco products manufactured and sold in Ireland. Flavourings, which were commercially confidential, were listed generically in these listings. This information was initially provided by the First Named Plaintiff by letter dated 20 March 2000, by the Second Named Plaintiff by letter dated 16 March 2000, by the Fifth Named Plaintiff by letter dated 4 February 2000, and by the Sixth Named Plaintiff by letter dated 19 January 2001. This information has been in the possession of the First Named Defendant since the date of those letters. In order to comply with the 2001 Directive similar information is provided to the First Named Defendant's Department on an annual basis and was most recently provided by the First Named Plaintiff by letter dated 14 November 2003, by the Second Named Plaintiff by letter in December 2003, by the Fifth Named Plaintiff by letter dated 26 November 2003 and by the Sixth Named Plaintiff by letter dated 18 December 2003. No issue has been raised by the First Named Defendant with any of those companies as to the adequacy of the information provided.

3. In addition to the information provided in the manner more particularly pleaded above, information concerning the ingredients of the tobacco products manufactured and/or sold by the First, Second and Fifth Named Plaintiffs in Ireland is contained on those Plaintiffs' websites – e.g. [www.pjcarroll.ie](http://www.pjcarroll.ie), [www.imperial-tobacco.com](http://www.imperial-tobacco.com) and [www.gallaher-group.com](http://www.gallaher-group.com).

4. Article 6 of the 2001 directive lays down specific rules concerning the disclosure to Member States of the ingredients used in the manufacture of tobacco products in countries in which the 2001 Directive has effect. The 2001 Directive requires the disclosure of all ingredients, and the quantities thereof, used in the manufacture of tobacco products by brand name and type accompanied by a statement as to the reasons for inclusion of such ingredients identifying their function and category and accompanied by toxicological data.

5. None of the Corporate Plaintiffs' products use tobacco which contains ingredients which are not referred to in the list contained at Schedule 1 to the Defence. The Schedule does not cover non-tobacco materials such as filters or ink.

6. The First Named Defendant has been provided with, and possess the list of the ingredients used by the Corporate Plaintiffs in tobacco, papers and adhesives concerned in products sold by them in Ireland.

21. The Plaintiffs do not accept that the chemical profile of tobacco smoke is relevant to any

matters properly in issue in these proceedings. The issue of the chemical constituents of tobacco smoke was apparently raised by the Defendants in order to attribute a possible mechanism for disease causation. Since the Plaintiffs in these proceedings are not basing their challenge on the claim that smoking does not cause human disease as alleged by the Defendants, the issue of chemical constituents and the mechanism of disease causation are not relevant to these proceedings."

The reply then goes on to deal with what are described as "pleas to specific aspects of the constitutional challenge". It begins with the denial that legislation which is unconstitutional can be rendered constitutional by virtue of previous and similarly unconstitutional legislation. The plaintiffs then plead that the prohibition on the communication of factual information relating to the corporate plaintiffs' products, the expression of opinion in relation to those products, the imposition of the retail premises advertising ban and the other restrictions and powers contained in the impugned provisions of the Act (as amended) are not justified or proportionate on the basis alleged by the defendants.

Paragraph 24 then provides "without prejudice to the foregoing pleas, each of the particulars relied upon by the Defendants at paragraphs 32 to 37 of the Defence and each and every alleged fact asserted therein as justifying the provisions of Section 33A of the Act (as amended) is denied".

### **THE REJOINDER**

On 6<sup>th</sup> July, 2004, the defendants delivered a rejoinder to the plaintiffs' reply.

The rejoinder begins by the defendants joining issue with the reply.

The second paragraph of the rejoinder reads:-

"The Defendants deny that the question of whether the direct or indirect consumption of tobacco products damages the health of humans (either directly or indirectly) is not an issue which requires adjudication in these proceedings, as pleaded at paragraph 3 of the Plaintiffs' reply."

The rejoinder then proceeds as follows:-

"3. The Plaintiffs do not admit the health effects of smoking and/or exposure to Environmental Tobacco Smoke, as pleaded in the Defence. As a result, the Defendants deny that the issues relating to the health effects of smoking and/or exposure to Environmental Tobacco Smoke can be narrowed as set out in paragraph 6 of the Plaintiffs' reply. The Defendants plead that smoking and exposure to Environmental Tobacco Smoke is in fact injurious to human health, in addition to contending (that which is admitted by the Plaintiffs) that the Defendants and the Oireachtas believe this to be so. The Defendants plead that a factual determination of the health effects of smoking is an essential precondition to an assessment by this Honourable Court of the proportionality of any interference with the constitutional rights the Plaintiffs may place reliance on brought about by the Impugned Sections. The Defendants further plead that a determination of this issue is essential for the proper application of the proportionality principle, since, inter alia, the extent of the pressing social need, the exigencies of the common good and of concerns pressing and substantial in a free and democratic society and the corresponding necessity to override or abridge constitutional rights (if any) are matters which cannot be adjudicated upon in the abstract or on the basis of the concessions made by the Plaintiff made solely for the purposes of this litigation.

4. Further, the Defendants plead at paragraph 35 of the Defence, that advertising plays an important role in the promotion of tobacco products to young people. This is denied by the Plaintiffs at paragraph 24 of their Reply. The Plaintiffs admit solely that the first named Defendant is entitled to propose, and the Oireachtas is entitled to enact legislation, based on the belief that some restrictions on the advertising of tobacco products may achieve a public health

objective or protect children and young people. The Defendants plead that a determination of the correctness of the facts pleaded at para. 35 of the Defence, is essential to the proper application of the proportionality principle, since, inter alia, the extent of the pressing social need, the exigencies of the common good and concerns pressing and substantial in a free and democratic society and the corresponding necessity to override or abridge constitutional rights (if any) are matters which cannot be adjudicated upon in the abstract or on the basis of the concessions made by the Plaintiff made solely for the purposes of this litigation.

5. The Defendants admit the facts pleaded at paragraph 20 (1) to 20 (2) and paragraph 20 (4) to 20 (6) of the Reply."

### **THE DISPUTE**

The dispute between the parties relates exclusively to the constitutional claims. The plaintiffs contend that the only evidence which is necessary in order to deal with these are background facts, such as the trading activities of the plaintiffs, the products manufactured, distributed or supplied by them, the pre-existing regulatory regime and the practical impact of the changes to that regime effected by the Act and the regulations. They will endeavour to agree these facts with the defendant, if possible. Apart from that, it is said that the constitutional claims should be dealt with by legal argument, without the necessity to call any evidence, particularly having regard to the admissions made in the pleadings.

The defendants on the other hand contend that in order to understand the necessity for the regulation of the sale of tobacco products they should be allowed call evidence as to the nature of the product, its harmful effects, the tobacco industries success in recruiting new smokers and the need for further controls. The defendants wish to lead evidence from experts in the field of addiction, toxicology, clinical medicine, epidemiology, public health, environmental tobacco smoke, advertising and promotion, the tobacco industry and the economics of tobacco.

The plaintiffs contend that the evidence proposed by the defendants is neither relevant nor admissible. They say that that is so for two reasons.

First, they contend that the defendants have identified in their defence what they allege to be the nature of tobacco and its health effects. In the reply delivered, particularly at para. 6, the plaintiffs say that they do not dispute, in these proceedings, the health consequences of the consumption of tobacco products relied upon by the defendants. In such circumstances where the facts, or the pleadings, are not in dispute the evidence is neither relevant nor necessary.

Secondly, they contend that the validity of the legislation has to be tested by reference to the provisions enacted by the legislature and not on the basis of motive, intention or purpose of the Minister, or any member of the legislature, who supported or opposed the legislation. They say that either the provisions contained in the legislation are proportional to the objects as discerned from the provisions of the legislation, or they are not. It follows, therefore, as a matter of principle, that the evidence proposed by the defendants is not admissible.

The first of the reasons relied upon is case specific. It depends upon an examination of the pleadings in this case and does not have ramifications for other cases. The second reason is much more far reaching and does have implications for other litigation where legislation is alleged to offend against the principle of proportionality.

### **THE PLEADINGS**

Under the Rules of the Superior Courts, every pleading

*"...shall contain, and contain only, a statement and a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."* (Order 19, rule 3).

When a fact is alleged in a statement of claim and admitted in a defence, it is no longer in issue in the proceedings. The court then proceeds on the basis that that fact, having been admitted, need no longer be proved in evidence.

In the present case, the defendants complain that the admissions of the plaintiffs are made solely for the purposes of the present proceedings. I do not attach any significance to that. The plain fact is that admissions have been made and, therefore, the facts alleged by the defendants and admitted by the plaintiffs are no longer in contention in this suit. The court is only concerned with the present action.

Paragraph 6 of the reply makes it clear that the plaintiffs have admitted that the first defendant is, and was, entitled to propose and the legislature is, and was, entitled to enact legislation based on their concern as to the health effects of smoking. They do not dispute the health consequences of the consumption of tobacco products relied upon by the defendants. Those consequences are set out in detail in the defence at paras. 10, 13, 14, 15 and 16.

Having been admitted, these facts are no longer in issue in these proceedings.

Apart from the particular paragraphs of the defence which I have just mentioned, paras. 17, 18, 19 and 20 deal *inter alia* with the increasing consciousness of danger to public health, the concern of the Minister that further legislative measures were required and the Joint Committee which reported to the legislature. Paragraph 20 deals with the Minister securing Government approval for the publication of the Tobacco Free Society report and the preparation of the heads of a Bill. Paragraph 4 of the reply admits that the Minister is, and was, entitled to propose and the legislature is, and was, entitled to enact legislation based upon its concerns regarding the health consequences of smoking. Furthermore, at para. 5 of the reply, it is expressly admitted that the Minister is, and was, entitled to propose and the legislature is, and was, entitled to enact legislation based on the belief that some restrictions on the advertising of tobacco products might achieve a public health objective or protect children and young people and that such legislation might interfere with the plaintiffs constitutional rights in a proportionate manner.

It seems to me, that having regard to these admissions, these facts as pleaded in the defence are no longer in issue in these proceedings and, therefore, it is not appropriate that evidence should be adduced in support of them. Paragraph 27 of the defence alleges that the legislature had reasonable grounds for believing that the Acts in each provision were justified and proportionate having regard to the previous conduct of the tobacco industry generally, and the first, second and fifth named plaintiffs in particular. The entire of para. 27 is already set forth in this judgment. In para. 14 of the reply, the plaintiffs admit that the legislature acted for the motives alleged at para. 27 of the defence. Furthermore, they indicate that they will not seek to contend at the hearing of this action that the incorrectness of the belief of the legislature as recorded at para. 27 of the defence affords a basis for invalidating the Act. In para. 16 of the reply, the plaintiffs flag that they will contend at the hearing of the proceedings, that even if the allegations made at para. 27 of the defence were well founded, which they deny for this purpose, no reasonable legislature could conclude that each and every provision of the Act (as amended) was required or justified. That gloss, however, has to be seen in the light of the admission made in para. 14.

At para. 18 of the reply, the plaintiffs appear to admit that the legislature was entitled to have regard to the Joint Committee Reports to the minutes of evidence given to the Joint Committee and to the conclusions on the adoption of the anti-smoking strategy set out in the reports. However, they go on to plead that they should also have had regard to the partiality and unfairness of the proceedings before the Joint Committee, but wrongfully failed to do so. That appears to me to amount to an admission that the legislature was entitled to have regard to the Joint Committee Reports and to the minutes of evidence given to the Joint Committee and to the conclusions on the adoption of the anti-smoking strategy set out in the reports, but with the plaintiffs reserving the right to contend that the proceedings before the Joint Committee were unfair and partial.

## **CONCLUSIONS**

I have come to the conclusion that it is possible to decide the issue before me on the basis of the pleadings in this case and without the necessity of going on to consider the arguments in principle which seek to deal with the admissibility of evidence, not merely in this, but in any case where an Act of the legislature is sought to be condemned for lack of proportionality. I would be loathe to decide such a question on a procedural motion such as this, and would only do so if it were necessary. In my view, it is not necessary, having regard to the pleadings.

The whole function of pleadings is to identify the factual matter which is truly in issue between the parties. Evidence should only be lead in order to deal with matters which are in issue. The calling of evidence to deal with matters that are not in issue is a waste of the parties' and the court's time and leads to an unnecessary prolonging of proceedings.

In the course of the argument on the issue of principle, reference was made to a tobacco litigation case in Canada, *McDonald Corp. v. Canada* (102 CRR [2d] 189). I was struck by the fact that witnesses were heard in that case from January to June, 2002. Closing arguments were heard in September, 2002 and judgment was reserved in that month. The hearing generated nearly 10,000 pages of stenographic notes and 988 exhibits, totalling hundreds of thousands of pages. In that case, admissions were made by the plaintiffs, which are detailed at p. 28 of the 88 page judgment. In many respects they are not dissimilar to the admissions made here. I would be slow to replicate a hearing of the dimensions encountered by the Canadian court, unless it is absolutely necessary to do so.

In my view, it is not open to the defendants to seek to lead evidence in respect of facts which have been admitted. Those facts are clearly identified by reference to the defence and the reply delivered thereto. The rejoinder appears to attempt to say that the plaintiffs have not admitted the health effects of smoking and/or exposure to environmental tobacco smoke. I do not believe that the reply can be so construed and, furthermore, it has been confirmed in open court that that is not, and was not, the intention of the plaintiffs. In my view, it would be a waste of public time and money to permit the adducing of unnecessary evidence. It follows, therefore, that the areas which have been specifically admitted in the reply may not be the subject of evidence being led, since the facts in question are not in issue in the proceedings. Such matters specifically include the nature of tobacco and its health effects, the entitlement of the first defendant to propose, and the legislature to enact, legislation based upon its concerns regarding the health consequences of smoking, the entitlement to propose and enact legislation based on the belief that some restrictions on the advertising of tobacco products may achieve a public health objective or protect children and young people, the fact that the Oireachtas acted for the motives alleged at para. 27 of the defence and that it was entitled to have regard to the Joint Committee Reports to the minutes of evidence given to the Joint Committee and to the conclusions on the adoption of the anti-smoking strategy set out in those reports.

Between paras. 32 and 37 of the defence, the defendants deal with restrictions on advertising. At para. 24 of the reply, each of the particulars relied upon by the defendants at paras. 32 to 37, and each and every alleged fact asserted therein as justifying the provisions of s. 33A of the Act, is denied. That denial appears to be inconsistent, to some extent at least, with the approach of the plaintiffs concerning admissions relating to other parts of the defence. That was accepted by counsel on behalf of the plaintiffs, who indicated that an appropriate amendment would be made so as to make admissions of the relevant facts contained between paras. 32 and 37. They would include, *e.g.* the assertion that there were reasonable grounds for the legislature to consider that more comprehensive restrictions on the advertising of tobacco products would better protect children and young people. They would also deal with its entitlements to have regard to the factors set out at paras. 35 (a) through (d), namely the report of the Tobacco Free Policy Groups' conclusions that the tobacco industry exploited the immaturity of young people when marketing their tobacco products; that advertising plays an important role in the promotion of tobacco products to young people; the 1999 Joint Committee Report statement that research demonstrates that 34 % of children in the 15 to 17 year age bracket smoke and that a significant number of children commence smoking at an age when they are not lawfully permitted to be sold cigarettes. On the present state of the pleadings, it appears to me, that the defendants are entitled to adduce evidence in relation to these matters but if an appropriate amendment as outlined by counsel in the course of argument were to be forthcoming, then obviously those facts would be rendered not to be in issue

and evidence would not be permissible on them.

Approved: Kelly J.

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