

## AMICUS CURIAE seminar

For PILA in conjunction with the Bar Council of Ireland

26<sup>th</sup> February 2014

### The NGO as *Amicus Curiae*

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#### **I Introduction**

1. Irish jurisprudence on applicable principles for the appointment of an *amicus curiae* is still at a nascent stage of development. Compared with other common law jurisdictions, *amicus curiae* appointments by the Irish courts are remarkably rare. The presentation will address the role of an *amicus* in light of Irish case-law and will include a number of suggestions as to how an amicus application might be approached.

#### **II Role of an *Amicus Curiae***

2. The role of an *amicus curiae* is to bring to bear on a legal dispute before the courts, concerning an issue of significant public importance, a perspective which might not otherwise be ventilated by the parties to the dispute.

#### **Jurisdiction**

3. The jurisdiction of the court to appoint an *amicus curiae* is well established. The question was addressed by Keane C.J. in *H.I. v. Minister for Justice, Equality and Law Reform*<sup>1</sup>, where the Supreme Court appointed the United Nations High Commissioner of Refugees ("UNHCR") as an amicus in an appeal concerning the constitutionality of the Refugee Act 1996. He stated:

*"While there are no statutory provisions or rules of court providing for the appointment of an amicus curiae, save in the case of the Human Rights Commission, the court is satisfied that it does have an inherent jurisdiction to appoint an amicus curiae where it appears that this might be of assistance in determining an issue before the court. It is an unavoidable disadvantage of the adversarial system of litigation in common law jurisdictions that the courts are, almost invariably, confined in their consideration of the case to the submissions*

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<sup>1</sup> [2003] 3 IR 197

*and other materials, such as relevant authorities, which the parties elect to place before the court. Since the resources of the court itself in this context are necessarily limited, there may be cases in which it would be advantageous to have the written and oral submissions of a party with a bona fide interest in the issue before the court which cannot be characterised as a meddlesome busy body. As the experience in other common law jurisdictions demonstrates, such an intervention is particularly appropriate at the national appellate level in cases with a public law dimension.*<sup>2</sup>

### **Applicable Principles**

4. In the aftermath of the decision of the Supreme Court in *H.I.*, a line of case-law has emerged, which establishes the principles which a court will tend to apply in deciding whether or not to appoint a person or body as an *amicus*.
5. In *O'Brien v. Personal Injuries Assessment Board*<sup>3</sup>, Finnegan P. of the High Court was satisfied that it would be appropriate to appoint the Law Society of Ireland as an *amicus* in proceedings to which it was not a party. Those proceedings arose from the refusal of the Personal Injuries Assessment Board ("PIAB") to deal with the plaintiff's solicitor in relation to an application made by him to PIAB. Finnegan P., having referred to the decision in *H.I.*, identified a number of relevant considerations:
  - (i) The first was that the applicant "*has a bona fide interest and is not just acting as a meddlesome busy body.*"<sup>4</sup>
  - (ii) The second was that the O'Brien case has a "*public law dimension*" and that the Law Society "*has not just a sectional interest, that is the interest of its members, but a general interest which should be respected and to which regard should be had.*"<sup>5</sup>
  - (iii) The third was that the decision would affect a "*great number of persons.*"
6. The issue again arose for consideration in the case of *Doherty v South Dublin County Council*<sup>6</sup> where an application was brought by the Equality Authority to be joined in

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<sup>2</sup> [2003] 3 IR 197, pp. 203-204

<sup>3</sup> [2005] 3. I.R. 328

<sup>4</sup> [2005] 3. I.R. 328, paragraph 22

<sup>5</sup> [2005] 3. I.R. 328, paragraph 23

<sup>6</sup> [2007] 1 IR 246

proceedings taken by members of the travelling community against a local authority and a number of State respondents. A majority of the Supreme Court took the view that the Equality Authority had the statutory authority to act as amicus if permitted to do so by the court in proceedings which relate to its statutory functions. Macken J. dissented but made a number of comments on applicable principles to be applied in the joinder of an amicus, which were drawn upon by Clarke J. in the subsequent High Court case of *Fitzpatrick v. F.K.*<sup>7</sup>

7. In that judgment, Clarke J. considered an application from a society representing Jehovah's witnesses to be joined as an *amicus* in proceedings between the plaintiff hospital and the defendant who was a patient who refused to accept a blood transfusion because of her religious beliefs. Clarke J. refused the application. He summarised the observations of Macken J. in *Doherty* and appears to have identified the following as important factors to be taken into account in determining whether to appoint a body as *amicus*:
  - (i) Whether the proposed amicus might be "*...reasonably said to be partisan or, on the other hand, to be largely neutral and might be in a position to bring to bear expertise in respect of an area which might not otherwise be available to the court.*"<sup>8</sup>
  - (ii) The stage "*...which had been reached in the proceedings with particular reference to a distinction between trial courts and appellate courts*"
  - (iii) The extent to which it may be reasonable to assume that "*...the addition of the party concerned as an amicus curiae might be said to bring to bear on the legal debate before the courts on an issue of significant public importance, perspective which might not otherwise be placed before the court.*"
8. In the more recent unreported judgment in *EMI Records Limited v. UPC Communications Ireland Limited*<sup>9</sup>, Kelly J. considered all of the above case-law in determining whether to appoint as amicus an organisation called Digital Rights Ireland in proceedings concerning an attempt to force internet service providers to block access to a website involved in online piracy. Kelly J. was of the view that the organisation was not neutral<sup>10</sup> and did not have a public role<sup>11</sup>. He found that the applicant had not demonstrated the limited

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<sup>7</sup> [2007] 2 IR 406

<sup>8</sup> [2007] 2 IR 406, p. 415. He proceeded to set out a number of relevant considerations in circumstances where the proposed amicus is not neutral but may nevertheless be considered by the court as suitable.

<sup>9</sup> [2013] IEHC 204

<sup>10</sup> Paragraph 65

<sup>11</sup> Paragraph 62

circumstances which would have warranted its appointment at trial court level. He was also concerned that the applicant might have intended to involve itself in certain factual aspects of the proceedings for which there is no role for amicus<sup>12</sup>. Kelly J. accordingly refused the application.

### **III Application to be appointed as an Amicus**

9. With a few exceptions<sup>13</sup>, there are no statutory provisions or rules of court governing how the amicus is appointed.
10. The types of averments in the affidavit grounding the application, which might be persuasive, would set out the following:
  - The exact parameters of the intervention which is proposed – on what legal issue does the applicant wish to intervene and does it propose to make written or oral submissions or both?
  - Capacity and expertise as a prospective amicus, in particular the organisation’s capacity to bring expertise to the case in an area which might not otherwise be ventilated by the parties.
  - *Bona fide* interest of the organisation.
  - Non-partisanship / independence from the parties / impartial role.
  - Significant public importance of the proceedings.
  - Disinterest in factual aspects of the dispute between the parties.
  - How the organisation will endeavour not to add to the costs of the proceedings eg: that it will endeavour not to duplicate submissions of the parties, that it will be brief and concise, that it will endeavour to avoid prolonging the hearing, that it will undertake to cover all of its own costs incurred and not to seek costs.
11. Engagement with the parties prior to the application is strongly recommended. Although consent from the parties will not guarantee appointment as an amicus, it might help assuage concerns which the court might have as to the prospect of the organisation’s involvement prolonging proceedings.

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<sup>12</sup> Paragraph 69

<sup>13</sup> For example, the IHRC and the European Commission