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THE HIGH COURT
JUDICIAL REVIEW

2007 No. 1542 J.R.

BETWEEN

MARIE MONAHAN

APPLICANT

AND

THE LEGAL AID BOARD, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment delivered by Mr. Justice John Edwards on the 6th day of October, 2008

Factual Background

1. The applicant is a single woman and she was born on the 28th June, 1957. She works as a Sales Assistant employed by Dunnes Stores in the Ilac Centre in Dublin City Centre. She has been working there for thirty-three years. She resides at 89 Oxmanstown Road, Dublin 7, with her sister, Carol, and her nephew, Siva (Carol's adult son). Siva suffers from severe obsessive compulsive disorder and requires care and support on a full-time basis which he receives from his mother.

2. The house at 89 Oxmanstown Road is rented from Folio Homes Limited. It is a protected letting and the current tenants are the applicant and her sister as successors to their parents. Indeed, their parents were in turn successors to the original tenants namely the applicant's and Carol's maternal grandparents, Tim and Margaret Doran, who first came to live in the house in 1928. The applicant and Carol's father, Christopher Monahan, died in October, 1970. Their mother, Una Monahan, died on 22nd September, 2001.

3. Shortly after their mother's death, a representative of Folio Homes Limited telephoned the house. The call was answered by the applicant's sister, Carol. The representative of Folio Homes Limited wanted to know in whose name the rent book should be following their mother's death. Apparently Carol was not sure and may have agreed to a suggestion by the landlord's representative that he should put her name on the book. Carol's sole name now appears on the rent book.

4. On 4th October, 2006 Folio Homes Limited wrote to Carol enclosing a Notice to Quit which was due to expire on 6th November, 2006. It was accompanied by a letter explaining that she might be entitled to a new tenancy and that if she wished to claim a new tenancy she would need to be legally represented and to take proceedings in the Circuit Court. She was advised to bring the enclosed Notice to Quit to the North Brunswick Street Law Centre. On 10th October, 2006 the applicant and her sister, Carol, went along to the North Brunswick Street Law Centre and indicated their wish to apply for civil legal aid for the purpose of claiming a new tenancy in the house at 89 Oxmanstown Road. By a letter of the same date a law clerk at the North Brunswick Street Law Centre wrote to the applicant asking her to attend at the Law Centre on Friday, 10th November, 2006 at a specified time for the purpose of completing an application form and financial assessment forms in respect of her proposed claim for civil legal aid. The applicant was concerned when she received this letter because it meant that her application for civil legal aid would not be assessed before the Notice to Quit was due to expire. Accordingly she and her sister went along to the constituency clinic of Mr. Bertie Ahern, T.D., and explained their problem to him. He wrote on their behalf to FLAC (Free Legal Advice Centres Limited) on 25th October, 2006. FLAC is a voluntary, non-governmental service offering free advice at evening clinics in Dublin and around the country. However, it does not normally provide legal representation. In response to Mr. Ahern's communication the applicant and her sister were given an appointment to attend an evening clinic run by FLAC at North King Street. They duly attended and received reassurance that they were not about to be evicted and they were assisted by a volunteer at the said clinic to complete a Notice of Intention to claim relief for service on the landlord. The applicant and her sister were very grateful to receive this assistance but it was clear to them that they would also require representation in respect of the court application which was to follow, and FLAC would not be able to assist them in relation to that.

5. The applicant kept the Legal Aid Board appointment and attended at the North Brunswick Street Law Centre on 10th November, 2006. She was informed on that morning that the person that she was due to see was in court and was given another appointment for the 14th November, 2006. She attended again on that date and on this occasion filled in an application form. The person that she was dealing with then scrutinised the form and, having done so, informed the applicant that she would not qualify for legal aid. It was suggested to her that if she could get proof that her sister had no income and she could bring that proof to the Law Centre and it might make the difference. The applicant, however, was at a loss to know how she might prove a negative and was unable to produce any documents proving her sister's lack of income.

6. On 15th November, 2006 the applicant received a letter from the North Brunswick Street Law Centre provisionally informing her that she did not satisfy the means criteria to allow her to avail of legal services. It further informed her that she was entitled to have her means verified by Head Office and the letter stated that if she wished to avail of that option she could contact the Law Centre. It was further suggested to her that if she had any further information pertaining to her adult sister's financial dependence on her she should forward it so that it could be included in any request to Head Office to verify her means.

7. On 12th December, 2006 the applicant and her sister called to the FLAC offices on Dorset Street, Dublin, to seek advice in respect of the letter of 15th November, 2006 and it was suggested to them that they should avail of the offer to have the applicant's means verified by the Head Office of the Legal Aid Board. The applicant then contacted the North Brunswick Street Law Centre and asked to have her means assessed by the Head Office of the Legal Aid Board.

8. On 13th November, 2006 FLAC wrote to Folio Homes Limited explaining that it was assisting the applicant and her sister in making an application for legal aid.

9. On 7th February, 2007 the North Brunswick Street Law Centre notified the applicant that her application had been refused because she did not satisfy the financial eligibility criteria in that her income exceeded €18,000 per annum. She was refused on the basis that she exceeded the means test by €217 per annum.

10. Separately, the applicant's sister, Carol, was approved for legal aid and was appointed a solicitor, Mark Graham. She is currently dealing with him. The applicant then returned to the clinic of Mr. Bertie Ahern, T.D., and he wrote again to FLAC noting that the applicant had been refused for being €4.00 per week over the limit and was seeking a review of the decision. On or about 7th March, 2007 FLAC wrote to the first named respondent seeking a copy of the applicant's means test. This was duly furnished and a copy has been exhibited before me. This document assessed the applicant's income as being €18,217.12 per annum. It was apparent from the form that the applicant was being given no allowance for the fact that her sister and her nephew were dependent upon her and that

she was the sole income provider in the house. This was so notwithstanding that a dependent is defined under the regulations as including "persons permanently residing with the applicant, who are supported by the applicant and who do not have available to them independent means of support" – see regulation 16(3) of the Civil Legal Aid Regulations, 1996 (S.I. No 273 of 1996). The applicant has averred in an affidavit before me that her sister and her son have no income at all.

11. On receipt of the means test FLAC prepared and presented an appeal to the Appeals Committee of the Legal Aid Board. Two specific grounds of appeal were raised namely, the failure to allow a dependent relative allowance for the applicant's nephew and the fact that the first named respondent has a residual discretion to grant legal aid notwithstanding the means test. The letter of appeal was dated 13th March, 2007. The Appeals Committee of the first named respondent duly met to consider the applicant's application and apparently adjourned any decision on the appeal pending receipt of an opinion from senior counsel in relation to the contention put forward by FLAC that legal aid could be granted notwithstanding failure to meet the means test and pending the seeking of further information concerning the applicant's dependants. On 15th May, 2007 the applicant was contacted by telephone by the Legal Aid Board Law Centre at North Brunswick Street to say that they needed the further information by the following day. The applicant replied in person by return and her letter to them was in the following terms:-

> "To whom it may concern
>
> I enclose as requested a letter concerning my dependants at the time of my appointment with the Law Society (sic) on Jan 18th 2007. I live with my sister and nephew. My sister is a lone parent and full-time carer for my nephew who has severe OCD. I was the sole earner between July 2004 and October 2006. My nephew had to leave school because of illness, so my sister had no income till he went back to school in October, 2006 and her lone parent allowance resumed. During the two and a half year period I used all my savings to support all three of us. As well as paying a large amount of income on bills at present I also have to pay back a credit union loan which was needed during the two and a half years. I also help with school funds and books for my nephew.
>
> Yours sincerely."

12. By letter dated 22nd May, 2007 the first named respondent wrote to the North Brunswick Street Law Centre to say that its Appeal Committee had upheld the refusal of legal aid on the same grounds as the Executive. Their decision was subsequently communicated to the applicant by a letter dated 25th May, 2007.

13. On 21st June, 2007 the applicant wrote to the first named respondent seeking the reasons for the refusal of the appeal in writing. Under separate cover dated 21st June, 2007 she made a Freedom of Information Request in respect of all papers and documents relating to her application and appeal. By a letter dated 26th June, 2007 the Legal Services Section of the first named respondent wrote to FLAC advising that the applicant's appeal had been unsuccessful but this letter did not provide any reason for the decision beyond stating

> "The Civil Legal Aid Regulations, 1996 as amended by section 3(b) of the Civil Legal Aid Regulations, 2006 states that: "*an applicant whose disposable income exceeds €18,000 per annum shall not be eligible to obtain legal aid or advice*"."

14. By letter dated 2nd July, 2007 the first named respondent wrote again to FLAC stating "the Appeal Committee upheld the refusal of legal aid in this case for the same reasons as the Executive. Please find attached copy of the portion of the Appeal Committee decision dated 18th May, 2007 which refers to Miss Monahan."

15. On 18th July, 2007 FLAC wrote again to the Secretary of the Appeal Committee pointing out that the reasons for the refusal on appeal had still not been provided and seeking an account of how the arguments in the appeal were considered. This letter was acknowledged by the Secretary to the Appeal Committee who wrote by letter dated 13th July, 2007 to advise that she considered it appropriate to refer the matter back to the Appeal Committee which was due to meet in September, 2007 and that she would write again in due course.

16. By a letter dated 23rd July, 2007 the first named respondent's Freedom of Information Officer wrote to the applicant informing her that it had been decided to grant her request save in respect of three records which would be withheld on the grounds of legal professional privilege. She was advised that she could appeal that decision within four weeks of receipt of that letter.

17. The applicant sought further advice from FLAC and by a letter from FLAC to the Freedom of Information Officer of the first named respondent dated 21st August, 2007 the applicant sought to appeal the refusal to grant access to the three records withheld from her. The letter indicating the intention to appeal went on to state:-

> "The appeal is made because Miss Monahan has not been able to establish, from the papers furnished, the grounds of the refusal to her of a legal aid certificate. It appears that the appeal was considered in the light of legal advice taken from counsel. This also appears to have been requested in response to legal submissions which FLAC made on Miss Monahan's behalf (see FLAC letter 13 March 2007). Miss Monahan has not been given a reasoned understanding as to why she was refused legal aid. In particular she has received no information as to how the question of her dependent relative was treated, nor does she have the relevant information as to why section 29(2) of the Civil Legal Aid Act 1995 was not applied so as to grant her legal aid. It appears that the documents withheld will have information which will assist her understanding and assist in vindicating her right to a fair hearing and a reasoned decision in accordance with natural and constitutional justice and the provisions of the European Convention on Human Rights."

18. In the absence of any further communication regarding the request for reasons for the decision, FLAC contacted the first named respondent by telephone in October, 2007 and the Secretary to the Appeal Committee confirmed that she would revert. By a letter dated 23rd October, 2007 the Secretary to the Appeal Committee wrote to FLAC indicating the basis upon which one of the two arguments advanced on behalf of the applicant was refused, namely, that the Board considers that there is no power to grant legal aid without reference to the applicant's financial circumstances in the absence of regulations. However, this letter gave no reasons with regard to the rejection of the second ground of appeal in relation to the applicant's claim for an allowance on the basis of having a dependent relative, namely her nephew.

19. Further correspondence ensued between FLAC and the Secretary to the Appeal Committee threatening High Court litigation unless reasons were provided for the rejection of the applicant's claim for an allowance in respect of her dependent nephew. Ultimately, the Secretary to the Appeal Committee wrote to FLAC on the 14th of November 2007 stating that:

> "An Appeal Committee, having considered all of the information available at its meeting of May 18th 2007, formed the view

that a dependent allowance could not be granted to Ms Monahan in respect of her nephew in accordance with the provisions of the Civil Legal Aid Act and Regulations. The position remained, on the information provided by Ms Monahan to the Appeal Committee, that she was financially ineligible for legal aid."

20. The Applicant complains in her grounding affidavit, with some justification in the Court's view, that this letter left her none the wiser as to the basis for the decision.

21. The Applicant's evidence is that she and her sister Carol are jointly successor tenants in respect of the house at 89 Oxmanstown Road for the purposes of the Housing (Private Rented Dwellings) Act, 1982, because they are members of the original tenants' family who succeeded to the tenancy within twenty years of the commencement of the 1982 Act. However, at the moment only her sister's name is on the rent book and only she was issued with the Notice to Quit. She complains that notwithstanding that she is a party to the application for a new tenancy now pending before the Circuit Court, and the fact that she has a real interest that requires protection, she is not legally represented in those proceedings due to the fact that she has been refused legal aid and cannot afford to fund legal representation herself. Her sister Carol is in fact the only one legally represented in those proceedings. She deposes that she is concerned that if a new lease is granted in Carol's name alone it may affect her rights to her family home and that she may suffer hardship as a consequence.

22. Accordingly, the applicant applied for, and was successful in obtaining, leave to apply for diverse reliefs by way of judicial review against the several respondents to these proceedings. Leave was granted by Mr Justice Peart on Monday the 26th of November, 2007. The leave granted included, *inter alia*, leave to apply for an order of certiorari quashing the decision of the first named respondent made on the 18th of May, 2007 to refuse to grant a certificate of legal aid, and leave to apply for an order of mandamus directing the first named respondent to furnish a statement of its reasons in writing for refusing to give the applicant the benefit of a dependent's allowance when assessing her means. Leave was also granted enabling the applicant to seek various declarations including a declaration of unconstitutionality in respect of the Civil Legal Aid Act, 1995 (in particular, section 29 thereof) and the regulations made thereunder; a declaration pursuant to section 5 of the Human Rights Act, 2003 that the provisions of the Civil Legal Aid Act, 1995 (and in particular, section 29 thereof) and the regulations made thereunder are incompatible with the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the European Convention"); as well as declarations in respect of alleged failures on the part of all of the respondents to vindicate the personal and human rights of the applicant under the Constitution and under the European Convention. The applicant was also granted leave to seek damages for alleged breaches of her constitutional and human rights. The matter was made returnable for the 19th of December, 2007.

23. On the day before the return date, namely the 18th of December, 2007 the first named respondent wrote to FLAC by way of open letter in the following terms:

> "Having reviewed Ms Monahan's application for legal aid again, the Board considers that there were procedural shortcomings in terms of the manner in which the application was processed. The Board now proposes to quash the decision of the 18th May 2007 and the earlier decision at first instance refusing to grant legal aid and to consider Ms Monahan's application anew. The Board is also willing to discharge Ms Monahan's legal costs to date (as agreed or as taxed in default of agreement). If this proposal is acceptable to Ms Monahan, the Board will not be entering a formal appearance to the proceedings or instructing its solicitors and the proceedings can be struck out with an Order for costs in favour of Ms Monahan."

24. Upon the taking of advice the applicant did not agree to the striking out of the proceedings but opted instead to seek an adjournment for some weeks and requested that the reconsideration of her application take place during the period of the adjournment. The proceedings were then adjourned on consent.

25. The applicant then received a letter of the 21st of December 2007 from the first named respondent in the following (partial) terms:

> "I refer to your application for legal aid dated 14th of November 2006. On the basis of the information furnished in relation to your means, the application for legal aid is refused on the grounds that you do not satisfy the financial eligibility criteria specified in Section 29 of the Civil Legal Aid Act 1995. Your disposable income is calculated as being €18, 536.92 and this exceeds the maximum threshold of €18,000 specified by the Civil Legal Aid Regulations 1996 as amended by section 3 (b) of the Civil Legal Aid Regulations 2006.
>
> The Civil Legal Aid Regulations 1996 as amended by section 3 (b) of the Civil Legal Aid Regulations 2006 state that *'An applicant whose disposable income exceeds €18,000 per annum shall not be eligible to obtain legal aid or advice.'*
>
> The Board has no discretion to provide legal aid under the provisions of section 29(2) of the Civil Legal Aid Act 1995."

26. By a letter of 2nd of January 2008 FLAC replied on behalf of the applicant and requested, *inter alia*, a more detailed explanation and posed specific questions as to what information was taken into account. By a letter of the 8th of January, 2008 the first named respondent furnished FLAC with copies of the information considered by the Board in relation to the applicant's means. This material has been exhibited in an affidavit before me. It includes evidence that the Applicant's sister has been in receipt of One-Parent Family Payment since 2nd November 2006. On the 10th of January 2008 FLAC lodged an appeal against the decision of the 21st of December 2007 on behalf of the applicant.

27. On the 1st of February 2007 the applicant received a letter of from the first named respondent in the following terms:

> "I refer to your appeal of the Board's refusal to grant legal aid.
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> The Board's Appeal Committee met on 31st January, 2008. Their decision on your appeal is as follows:
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> > The Appeal Committee considered the grounds of appeal contained in the letter of appeal dated 10/01/2008 and decided:
> >
> > > 1. that it had all of the relevant papers necessary to decide that the applicant was not entitled to a dependent allowance under Regulation 16(1)(b) as the "dependants" referred to do not meet the criteria contained in Regulation 16(3);

2. the refusal of legal aid under section 29(1) (a) of the Civil Legal Aid Act, 1995 and Regulation 13(3) was upheld; and

3. the Board was not in a position to grant legal aid without reference to the applicant's financial resources (Section 29(2) of the Civil Legal Aid Act, 1995)."

28. In the light of this decision the Applicant resolved to press ahead with her judicial review proceedings and sought leave to update her pleadings (which had been somewhat overtaken by events) so as to incorporate challenges to the first named respondent's further decisions of the 21st of December, 2007 and 31st of January, 2008 respectively. Leave to amend the Statement of Grounds was granted by Mr Justice Gilligan on the 10th of March, 2008 and an amended Statement of Grounds was filed on the same date.

The Issues before the Court

29. The grounds upon which the applicant was granted leave to apply for the diverse reliefs that she seeks are fully pleaded and set out in her amended Statement of Grounds. Moreover detailed Statements of Opposition were filed on behalf of the first named respondent on the one hand and on behalf of the second, third and fourth named respondents on the other hand. It is not necessary for me to refer to the pleadings in detail because when the matter came on before me Counsel had very sensibly agreed between them that the applicant's claims as against first named respondent on the one hand and as against the second, third and fourth named respondents on the other hand were really claims in the alternative. The Court was informed that at this stage the case against the first named respondent had resolved itself into two discrete questions of statutory interpretation. Moreover, counsel were in agreement that issues as to the constitutionality of the relevant legislation, or as to compatibility of the legislation with the European Convention, or as to breaches of rights, would only arise if the Court were of the view that the first named respondent was correct in its interpretation of the Civil Legal Aid Act, 1995 and the regulations made thereunder. In the circumstances it was respectfully suggested to the Court that it would make sense to deal with the case against the first named respondent in the first instance. I agreed to do so and indicated that I would hear the case against the first named respondent as a discrete module and give judgment on it. Then in the light of that judgment the Court would consider the other questions raised and whether a further hearing was required.

30. The case against the first named respondent as argued before me was based upon the proposition that the Board had erred in two respects in its interpretation and operation of the Civil Legal Aid Scheme established under the Civil Legal Aid Act, 1995. The alleged errors involve two net issues of statutory interpretation. They are as follows:

(1) Interpretation of Regulation 16(3) of the Civil Legal Aid Regulations 1996

The Applicant contends that the Board erred in its construction of Regulation 16(3) of the Civil Legal Aid Regulations 1996 which provides a definition of 'dependants' and in concluding that the Applicant could not be granted a dependent relatives allowance in respect of her nephew. The Applicant contends that the Board fettered its power under the Regulations to grant an allowance, failed to exercise its power in accordance with the law, and failed to have regard to relevant considerations. In response the Board contends that it does not have discretion to grant an applicant dependent allowances pursuant to Regulation 16(1) (b) of the Act in circumstances where the dependent relatives in question have available to them an independent means of support. Regulation 16(1) (b) expressly provides that it is 'subject to' Regulation 16(3). Regulation 16(3) defines 'dependants' for the purposes of s.16(1)(b) as persons permanently residing with the applicant who are supported by the applicant and do not have available to them independent means of support. In this case, the applicant's sister is in receipt of One-Parent Family Payment, which payment includes a payment for the benefit of her son (the Applicant's nephew). Accordingly, the Board is of the view that the State is providing independent financial support to the applicant's sister who is the person directly responsible for the support of her son.

(2) Interpretation of Section 29(2) of the Civil Legal Aid Act, 1995

The Applicant contends that the Board erred in law in refusing the Applicant's application, notwithstanding the discretion conferred by s.29 (2) of the Act to provide legal aid or advice to an applicant without reference to his or her financial resources. In its letter dated 23rd October 2007, the Board informed the Applicant that it was of the view that it has no power to grant legal aid or advice where a person fails the means test prescribed in the Regulations and where the Board has not been empowered to grant legal aid irrespective of an applicant's resources by the Regulations. The Applicant contends that the Board has erred in law in this regard, and has unlawfully fettered and abdicated its discretion to grant legal aid without reference to financial resources under s.29(2) of the Act.

The first named respondent opposes the Applicant's application for relief on the basis that it can only provide legal aid and advice in accordance with the provisions of the Act and the criteria for the grant of same laid down therein. The Board accepted before me that s.29 (2) of the Act provides that it may, in accordance with the Regulations, provide legal aid or advice without reference to the applicant's financial resources. However, it contends that the power of the Board to provide legal aid or advice to an applicant without reference to the financial resources of the applicant is expressly stated to be subject to the regulations made under s.37, and cannot be exercised otherwise than in accordance with the Regulations. Although the Regulations made pursuant to s.37 of the Act set out detailed requirements that must be satisfied before legal aid may be granted, no provision is made therein for the granting of legal aid or advice without reference to the financial resources of the applicant. The Board contends that it does not have a general discretion to provide legal aid or advice without reference to financial resources in circumstances where the Regulations do not provide for same. Accordingly, the Board is of the view that it had no discretion to provide legal aid in this case under the terms of the Act and the Regulations.

The Law

31. All parties furnished the Court with detailed written submissions which were extremely helpful and for which I must express the Court's appreciation. The views that I have arrived at are based upon general principles of statutory interpretation. While these were comprehensively rehearsed in all of the submissions they were set forth with particular clarity in the submissions of the first named respondent and what follows draws heavily upon them.

Statutory Interpretation at Common Law

32. The default rule of statutory interpretation in Irish law is the literal rule of interpretation. The literal approach was adopted by the Supreme Court, and stated as follows by Hamilton C.J. in *Keane v An Bord Pleanala* [1997] 1 IR 184, at 215

> "In the interpretation of a statute or section thereof, the text of the statute or section thereof is to be regarded as the pre-eminent indication of the legislator's intention and its meaning is to be taken as that which corresponds to the literal meaning."

33. However, it is clear from the case law that the literal rule may be departed from, and a purposive approach adopted, in limited circumstances. The statement of the law governing the interaction of the literal and purposive approaches to statutory interpretation most frequently cited by the Irish courts is the following passage from *Craies on Statute Law*: (7th ed., 1971) at 65

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such case best declare the intention of the lawgiver. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words, it is natural to inquire what is the subject matter which respect to which they are used and the object in view.' [per Lord Blackburn in *Direct United States Cable Co. v Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394]"

34. This passage was cited with approval by Blayney J in *Howard v Commissioners of Public Works,* [1994] 1 I.R. 101, at 151-153, in which case he also cited the following extract from Maxwell on *The Interpretation of Statutes* with approval:

> "The rule of construction is 'to intend the Legislature to have meant what they have actually expressed'… The object of all interpretation is to discover the intent of Parliament, 'but the intent of Parliament must be deduced from the language used'… for 'it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law'…"

35. Blayney J. accepted that the courts may have regard to the object and effect of legislation in interpreting it, and quoted with approval a passage from the judgment of Lord Blackburn in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 app Cas. 394, who stated:

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view."

36. However, Blaney J (at p.153) emphasised the limited application of the purposive rule of statutory interpretation, holding that the existence of some ambiguity as to the meaning of the statutory provision in question is a mandatory precondition for the application of the rule. He said:

> "The rule in regard to construction by implication is stated as follows in *Craies* at p.109:
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> > 'If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions. But the general rule is 'not to import into statutes words which are not to be found there,' [per Patterson J. in *King v Burrell* (1840) 12 Ad. & El. 460, 468] and there are particular purposes for which express language is absolutely indispensable. 'Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.' [per Evershed M.R. in *Tinkham v Perry* [1951] 1 T.L.R. 91, 92]"
>
> It is clear from this that the first condition that has to be satisfied before recourse can be had to construction by implication is that the meaning of the statute should not be plain. It seems to me that that condition is not satisfied here. The meaning is perfectly plain."

37. Thus, Blayney J. made it clear that in departing from the literal approach in order to apply a purposive approach, the intention of the legislature must be derived from the language of the Act itself. He went on to say:

> "In asking the Court to construe s.84 as relieving them from having to apply for planning permission, the Commissioners are asking the Court to speculate as to the intention of the legislature in enacting s.84, something which no court may do. To cite again *Craies on Statute Law* at p. 66:
>
> > 'A general proposition that it is the duty of the Court to find out the intention of Parliament... cannot by any means be supported' said Lord Simonds in 1957. Some fifty years before in *Salomon v Salomon & Co. Ltd* [1987] AC 22, 38 Lord Watson had said: 'Intention of the legislature' is a common but very slippery phrase which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express works or by reasonable and necessary implication.' After expounding the enactment, it only remains to enforce it, notwithstanding that it may be a very generally received opinion that it 'does not produce the effect which the legislature intended', or 'might with advantage be modified'. The meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation: the primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

38. This approach was in accordance with that adopted by Finlay C.J., in the same case who stated (at p.140) that a statute may not be interpreted on the basis of speculation as to the subjective intention of the legislature:

> "I am satisfied that it would not be permissible to interpret a statute on the basis of either speculation, or indeed, even of actual information obtained with regard to the belief of the individuals who either drafted the statute or took part as legislators in its enactment with regard to the question of the appropriate legal principles applicable to matters dealt with in the statute."

39. In her judgment in *Howard* Denham J. adopted a similar approach to that of her colleagues, stating (at pp 162 – 163) that:

> "Statutes should be construed according to the intention expressed in the legislation. The words used in the statute best declare the intent of the Act. Where the language of the statute is clear we must give effect to it, applying the basic meaning of the words. There is well established case law on this aspect of statutory construction.
>
> Thus in In *re. MacManaway* [1951] AC 161 at p. 169, Lord Radcliffe, in dealing with a reference for advice as to a question as to the meaning of certain words which were contained in the House of Commons (Clergy Disqualification) Act, 1801, said – 'The meaning which these words ought to be understood to bear is not to be ascertained by any process akin to speculation. The primary duty of a court of law is to find the natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute.'"

40. This focus on the statutory context while applying the literal rule and trying to ascertain the intention of the legislature is apparent in a number of decisions. For example, *in Rahill v Brady,* [1971] I.R. 69 Budd J. stated:

> "In the absence of some special technical or acquired meaning, the language of a statute should be construed according to its ordinary meaning and in accordance with the rules of grammar. While the literal construction generally has prima facie preference, there is also a further rule that in seeking the true construction of a section of an Act the whole Act must be looked at in order to see what the objects and intention of the legislature were; but the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature."

41. Henchy J. made similar comments in *Inspector of Taxes v Kiernan*, [1981] I.R. 117 where he stated that:

> "A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to the extent that will truly effectuate the particular legislation or a particular definition therein."

42. However, while the court can have regard to the statutory context and the purpose of the provisions being construed, it will only be permitted to depart from the literal meaning of a statutory provision in order to avoid an absurd or unintended result. The status of the literal rule as the primary rule of statutory interpretation is clear from the decision of the Supreme Court in *MO'C v Minister for Health* (unreported, Supreme Court, 31st July 2001). The issue before the court in that case was whether s.5(1) of the Hepatitis C Compensation Tribunal Act 1997 vested jurisdiction in the Tribunal to order interest pursuant to s.22 of the Courts Act 1981 on an award under the Act. Denham J., delivering judgment for the Court, stated (at p.6) that:

> "It is well established that effect should be given to clear and unambiguous words. The words of the statute declare best the purpose of the Act."

43. The decision in *Howard v Commissioner of Public Works* was approved and followed by the Supreme Court in *B(D) v Minister for Health and Children* [2003] 3 I.R. 12, in which the court had to interpret various provisions of the Hepatitis C Compensation Tribunal Act 1997. McGuinness J. quoted at length from the judgment of the Supreme Court in *Howard*, as well as the judgment of Keane J in *Mulcahy v Minister for the Marine* (unreported, High Court, Keane J, 4th November 1994). Having reviewed the various authorities, she summarised them (at pp 49-50) as follows:

> "It may, I think, be safe to sum up the judicial dicta in this way. In the interpretation of statutes the starting point should be the literal approach – the plain ordinary meaning of the words used. The purposive approach may also be of considerable assistance, frequently, but not invariably, where the literal approach leads to ambiguity, lack of clarity, self-contradiction, or even absurdity. In the interpretation of a section it is also necessary to consider the Act as a whole."

44. In *B (D) v Minister for Health and Children*, two alternative versions of the purposive approach to statutory interpretation emerged. In the High Court (unreported, High Court, O'Neill J, 31 July 2002), O'Neill J. applied the broad purposive approach, which looks to the purpose of the legislation and construes the wording in accordance with this:

> "In my view in construing the relevant sections of the Act of 1997 it is appropriate in light of the difficulties of interpretation of Section 5 as a whole, dealt with hereunder, to use the literal and purposive approach. I derive guidance in that regard from the judgment of Denham J. in MOC v The Minister for Health and Children (Supreme Court unreported judgment delivered the 31st day of July 2001)."

45. However, the Supreme Court overturned this decision on appeal, adopting a narrow purposive approach, which looks to the purpose of the legislation only if the wording is ambiguous or if a literal interpretation would give rise to an absurdity. The Court made it clear that the literal approach remains the primary rule of interpretation and that the purposive approach is secondary to this rule. The Court also reaffirmed the general principle that the intention of the legislature must be derived from the words of the statute itself:

> "In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blayney J in Howard v Commissioner of Public Works. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words of the statute are plain and unambiguous they declare best the intention of the legislature. If the meaning of a statute is not clear then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes should be construed according to the intention expressed in the legislation and that the words used in the statute declare best the intent of the Act. I took a similar approach in *M'OC v Minister for Health* (Unreported, Supreme Court, 31st July, 2001) holding that it was well established that in construing statutes effect should be given to clear and unambiguous words, for the words of the statute best declare the purpose of the Act." (Per Denham J [2003] 3 I.R.12 at 21.)

46. The Court concluded that the words of s.5 of the 1997 Act, the provision in question, were clear and unambiguous. Accordingly, a literal approach was taken to their construction and the decision of the High Court was reversed.

47. The rationale for the supremacy of the literal approach, reaffirmed in *B(D)*, was explained as follows by Hardiman J. in *Gooden v St*

> "…in construing the statutory provisions applicable in this case in the way that we have, the Court has gone as far as it possibly could without rewriting or supplementing the statutory provisions. The Court must always be reluctant to appear to be doing either of these things having regard to the requirements of the separation of powers."

48. Thus, the position prior to the enactment of s.5 of the Interpretation Act 2005 was that the literal rule of construction was the primary rule, to be applied unless doing so would result in ambiguity or absurdity.

Section 5 of the Interpretation Act 2005
49. Section 5 of the Interpretation Act 2005 recognises the power of the courts to depart from the literal meaning of a statute where this would undermine the legislative intent behind it. This provision applies to both Acts (section 5(1)) and statutory instruments (section 5(2)). It provides as follows:

> "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –
>
> a. that is obscure of ambiguous, or
>
> b. that on a literal interpretation would be absurd or would fail to reflect the plain intention of –
>
> i. in the case of an Act to which paragraph (a) of the definition of Act in section 2(1) relates, the Oireachtas, or
>
> ii. in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

50. Section 5 implicitly recognises the literal rule as the primary rule of statutory interpretation, and authorises the courts to depart from the literal rule and adopt a purposive approach only in clearly defined circumstances. The language of the Bill is close to that set out in the recommendations of the Law Reform Commission Report on *Statutory Drafting and Interpretation: Plain Language and the Law*, LRC 61-2000, at 21, which was largely derived from the judgment of Keane J. in *Mulcahy v Minister for the Marine* (unreported, High Court, 4th November, 1994) where he stated as follows:

> "While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole."

51. As such, s.5 largely reflects the approach adopted by the courts prior to its enactment in any event. The main departure from the common law position occasioned by s.5 is the creation of an exception to the general rule where a literal interpretation would defeat the intention of the Oireachtas. This exception to the literal rule of interpretation now applies, together with the traditional common law ambiguity and absurdity exceptions.

52. It is important to note that there is an important limitation built into the language of s.5; the purposive rule provided for in s.5 may only be applied where the intention of the Oireachtas "can be ascertained from the Act as a whole." Thus, the wording of the s.5 limits the possibility of reliance on external materials to ascertain the legislative intent behind a particular provision. Interpretation in light of the intention of the enacting body is permissible only "where that intention can be ascertained from the Act as a whole".

53. The 2005 Act applies to all enactments, except where the contrary intention appears in: (i) the Interpretation Act 2005, (ii) the Act itself, or (iii) in the case of secondary legislation, in the Act under which it was made. In s.2 (1) of the 2005 Act, enactment is defined to include all primary and secondary legislation in force in the state (section 2(1)). Therefore, the Interpretation Act 2005 applies to all legislation, i.e. it applies retrospectively to legislation enacted before it entered into force.

Decision
54. The first named respondent is a statutory body established under s.3 of the Civil Legal Aid Act 1995 (the "Act") and exercises the functions conferred on it by that Act in accordance with the provisions thereof and the Civil Legal Aid Regulations 1996 to 2006 (the "Regulations"). Accordingly, it may only provide legal aid in accordance with the provisions of the Act and the Regulations made thereunder. Section 5(1) of the Act provides that:

> "The principal function of the Board shall be to provide, within the Board's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act."

55. The Act lays down a number of requirements that must be met where legal aid is sought. General criteria for the grant of legal aid and advice are laid down in section 24. Specific criteria for obtaining legal advice and legal aid are laid down in sections 26 and 28 of the Act respectively. In this case, an issue arises in relation to the correct interpretation of Regulation 16, which governs the grant of dependent allowances and Section 29(2) of the Act, which deals with financial eligibility. Each of these provisions is considered in turn.

Regulation 16
56. Regulation 16(1) provides that disposable income shall consist of income as assessed in accordance with the Regulations, less a series of allowances. In this case, the Applicant claims an entitlement to a dependent allowance in accordance with Regulation 16(1) (b), which provides as follows:

> "Disposable income shall consist of income as assessed in accordance with these Regulations, less the following allowances: (b) subject to paragraph (3), €1,600 per annum in respect of each of the applicant's dependants."

57. Thus, Regulation 16(1) (b) expressly states that it is 'subject to' Regulation 16(3).

58. Regulation 16(3) defines 'dependants' as follows:

"'Dependants' for the purpose of paragraph (1)(b) shall include ... dependent relatives or other persons permanently residing with the applicant, who are supported by the applicant and *who do not have available to them independent means of support* (emphasis added)."

59. Accordingly, there are three requirements that must be satisfied before an allowance under Regulation 16(1)(b) can be granted: (1) the dependent must be a relative of the applicant, (2) the dependent must be permanently resident with the applicant; and (3) the dependent must have no independent means of support available to him or her. The Board does not have discretion to grant an applicant allowances under Regulation 16(1) (b) unless all three of these requirements are satisfied. Thus, in circumstances where the dependent relative in question has an independent means of support, the Board does not have discretion to grant an applicant a dependent allowance.

60. The evidence before the Appeal Committee led it to conclude that the Applicant's sister and nephew were not 'dependants' within the meaning of Regulation 16(3) because they had an independent means of support. It was clear from the materials considered by the Board that the Applicant's sister has been in receipt of One-Parent Family Payment since 2nd November 2006. This is a payment which is made to men and women who are bringing up a child without the support of a partner. The payment is comprised of a payment for the parent and extra amounts for qualified children. A letter dated 21st November 2006 from the Department of Social Welfare to the Applicant's sister was submitted to the Board, which states that the weekly sum of €185.10 would be paid to her as and from 2nd November 2006 and that the first payment in this regard was made on 24th November 2006. It is noted that Regulation 13(8) defines "income" in relation to an applicant for legal aid as, the income which he or she may reasonable expect to receive from all sources during the year succeeding the date of application. In those circumstances, the Applicant was not entitled to an allowance in the assessment of her means to take account of the dependency of her sister and nephew. Accordingly I find that the first named respondent correctly interpreted and properly sought to apply Regulation 16 (3).

Section 29 of the Act

61. The issue which arises for determination in relation to s.29(2) of the Act is whether the Board may provide legal aid or advice without reference to an applicant's financial resources in circumstances where the Regulations do not address the question of when and under what circumstances the Board may do so.

62. Section 29 deals with financial eligibility and contributions towards the cost of legal aid and advice and provides as follows:

"(1) Subject to sections 24, 26 and 28 and the other provisions of this section, a person shall not qualify for legal aid or advice unless he or she –

(a) satisfies the requirements in respect of financial eligibility specified in this section, and in regulations under section 37, and

(b) pays to the Board a contribution towards the cost of providing the legal aid or advice determined in accordance with regulations under section 37.

(2) The Board may, in accordance with regulations under section 37, provide legal aid or advice to an applicant without reference to his or her financial resources and may waive any contribution payable pursuant to this section and to any other regulations under section 37 or may accept a lower contribution…".

63. Thus, the default position under s.29 of the Act is that an applicant for legal aid must satisfy the requirements in respect of financial eligibility specified in the Act and the Regulations. The power of the Board to provide legal aid or advice without reference to an applicant's financial resources may only be exercised 'in accordance with the regulations'. However, there are no provisions in the Regulations providing for the grant of legal aid without reference to financial resources, or providing any guidance as to when and how this discretion should be exercised.

64. Section 37(1) provides that "[t]he Minister may make such regulations as are necessary for the purpose of giving effect to this Act". Thus, the power to make regulations is conferred on the Minister, rather than on the Board itself. Section 37(2) goes on to set out a series of specific matters in respect of which regulations may be made:

"Without prejudice to the generality of *subsection (1)*, regulations under this section may—

(a) make provision as to the manner of making applications for legal aid or advice under this Act, the consideration and processing of such applications by the Board, the grant of legal advice and the cesser of the grant thereof by the Board and the issue, amendment and revocation of legal aid certificates by the Board (including the issue of emergency certificates);

(b) prescribe the maximum amount of disposable income which a person is entitled to earn and the maximum amount of disposable capital which a person is entitled to possess in order that he or she may be eligible to obtain legal aid or advice;

(c) make provision for the assessment by the Board or its staff of the means, income, disposable income, capital and disposable capital of applicants, the contributions payable by applicants, the waiving of contributions and the acceptance of lower contributions from applicants;

(d) make provision as to the information to be furnished by a person applying for or in receipt of legal aid or advice;

(e) make provision for the establishment, location and management of law centres by the Board;

(f) make provision as to the cases or the circumstances in which an applicant may be refused legal aid or advice by the Board and for the review of decisions by the Board on appeals therefrom;

(g) make provision as to the duties of solicitors of the Board;

(h) make provision as to the refund of costs to persons in receipt of legal aid or advice;

(i) prescribe the conditions under which legal aid and advice shall be available;

(j) make provision for such other matters arising by virtue of this Act as the Minister considers appropriate."

65. The detailed nature of the Regulations contemplated by s.37 is apparent from the language of s.37(2). The Regulations also reflect this level of detail, and set out comprehensively the requirements that must be satisfied before legal aid may be granted. However, the Regulations make no provision whatsoever for the grant of legal aid without reference to an applicant's financial resources.

66. Regulation 13(1) provides that, subject to s.29, a person shall not qualify for legal aid or advice unless they satisfy the financial requirements in respect of financial eligibility specified in Part V of the Regulations. Regulation 13(3), as amended, provides that:

> "An applicant whose disposable income exceeds €18,000 per annum shall not be eligible to obtain legal aid or advice."

67. In this case, the Board calculated the Applicant's disposable income as €18,536.92. Accordingly, the Board concluded that the Applicant was not eligible for legal aid and advice.

68. Counsel for the first named respondent argued strenuously that, adopting a literal interpretation of the Act, the entitlement of the Board to provide legal aid or advice to an applicant without reference to financial resources arises only where this may be done in accordance with the Regulations. In circumstances where the Regulations do not provide for the grant of legal aid without reference to financial resources, it is impossible for the Board to exercise this discretion 'in accordance with the regulations', as required by the express language of s.29(2). As a statutory body, the Board may only do that which it is authorised to do by statute. It has no independent discretion to provide legal aid or advice to an applicant without reference to his or her financial resources. Thus, it was submitted, adopting a literal interpretation of s.29 (2), the Board does not have discretion to grant legal aid or advice without reference to the Applicant's financial resources. I agree completely with these submissions.

69. It was further submitted that, in circumstances where the express language of s.29 (2) is plain and unambiguous, there is no basis for contending that a purposive interpretation of s.29 (2) ought to be adopted. Pursuant to s.5 of the Interpretation Act 2005, the literal meaning of the words used may be departed from only if: (i) the terms of an Act are obscure or ambiguous, (ii) a literal interpretation would be absurd, or (iii) a literal interpretation would fail to reflect the legislative intent. In this case, none of these preconditions are satisfied. Once again, the Court finds itself in complete agreement with the first named respondent.

70. Moreover, I am of the view that even if a purposive approach to the interpretation of the Act were appropriate, in accordance with the provisions of s.5, this would not alter the meaning of s.29(2). Section 5 of the Interpretation Act 2005 provides that a statutory provision must be "given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole." It is clear from this that a purposive interpretation may only be adopted where it is possible to ascertain the legislative intent from the Act as a whole. It is also clear that, where a purposive approach is adopted, the Court is limited to considering the intention of the legislature as ascertained from the provisions of the Act. Extraneous considerations cannot be taken into account.

71. I consider that if a purposive approach to statutory interpretation is adopted in accordance with s.5 of the Interpretation Act 2005, the correct interpretation of s.29(2) is that it confers a power on the Board to grant legal aid without regard to financial resources only where provision is made for this in the Regulations. The primary function of the Board is identified in s.5 as being to provide, within the Board's resources and subject to the other provisions of the Act, legal aid and advice in civil cases to persons who satisfy the requirements of the Act. Thus, in circumstances where a clear precondition is imposed upon the exercise of a power, such as compliance with the regulations, this precondition must be satisfied. The limited nature of the powers conferred upon the Board by the Act is also apparent from s.37 of the Act, which contemplates extremely detailed regulations, and confers the power to make these regulations on the Minister alone. It is clear from this section that it was intended that the inclusion of the words "in accordance with the regulations" in s. 29(2) would act as a limitation on the power conferred on the Board, and ensure that the power would be exercised in accordance with express criteria determined by the Minister.

72. Section 7 of the Interpretation Act 2005 provides that, in cases where s.5 of the 2005 Act applies, the courts may "make use of all matters that accompany and are set out in" the text of the legislation. This authorises the court to consider the long title of an Act in interpreting specific statutory provisions contained in that Act, in accordance with the practice of the courts prior to the enactment of the Interpretation Act 2005. The Long Title of the Civil Legal Aid Act, 1995 provides that it is:

> "An Act to make provision for the grant by the State of legal aid and advice to *persons of insufficient means* in civil cases."

73. It is evident from this that the scheme of legal aid provided for under the Act is clearly directed towards persons who could not afford to pay for and would, thus, be deprived of legal services. This suggests that, absent express authorisation and guidance, the Board cannot provide legal aid or advice to an applicant without considering his or her financial resources.

74. It was also submitted to the Court, and I believe correctly, that the interpretation of s.29 (2) adopted by the Board is supported by the decision of the Supreme Court in *Bakht v The Medical Council*. [1990] 1 I.R. 515. The statutory provision in issue in that case was s.27 (2) (d) of the Medical Practitioners Act 1978, which provided that:

> "Any person who satisfies the Council that he has undergone such courses of training and passed such examinations as are specified for the purposes of this section in rules made by the Council... shall, on making application in the form and manner determined by the Council and on payment of the appropriate fee, be registered in the register."

75. The Medical Council had not made any such rules and, as a result, the plaintiff was unable to obtain registration. The Supreme Court concluded that, until such time as the Council made rules specifying the criteria an applicant had to meet, it had no power to register any applicants pursuant to s.27(2)(d). Similarly, I consider that until such time as the Minister provides for the grant of legal aid irrespective of financial resources by way of regulation, the Legal Aid Board does not have the power to exercise the power provided for in s.29(2) of the Act. In this case, the Board concluded that the Applicant's disposable income exceeded the threshold of €18,000 provided for in Regulation 13(3). Accordingly, the Board did not have any power or discretion to grant legal aid in this case. I therefore hold that the first named respondent correctly interpreted and properly sought to apply section 29(2) of the Civil Legal Aid Act, 1995.

Conclusion

76. In all the circumstances I must dismiss the applicant's claims against the first named respondent. I will hear submissions in due course with respect to the costs of this aspect of the matter. I will also hear submissions with respect to how the balance of the

proceedings is to be progressed.