Neutral Citation [2013] IEHC 301

THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2013 No. 200 J.R.]

BETWEEN

BLOXHAM (IN LIQUIDATION)

APPLICANT

AND

IRISH STOCK EXCHANGE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered the 3rd day of July 2013

1. By order of the Court (Kelly J.) of the 15th March, 2013, the applicant, acting by its liquidator Mr. Kieran Wallace, was granted leave to apply for judicial review of a decision made by the respondent on the 19th December, 2012, purporting to revoke and/or terminate the applicant firm's membership of the Irish Stock Exchange Limited and in particular, for an order of *certiorari* to quash that decision.

2. This is the judgment of the Court upon a preliminary issue directed to be tried in anticipation of the substantive hearing of that application as to whether that impugned decision is susceptible of judicial review.

3. The respondent is a private company limited by guarantee, incorporated under the Companies Acts 1963 - 2006 and the applicant firm was one of its founding subscribers when it was established on the 22nd May, 1995. As explained in greater detail below, the impugned decision of the 19th December, 2012, ("the Contested Decision") was taken by the respondent under Rule 2.15 (Non Active Members) of the "Rules of the Irish Stock Exchange Limited" which provides that: "If a member firm has ceased to carry on business on the ISE for a period of six months or more, its membership may be revoked by the ISE, by notice in writing to such member firm".

4. This preliminary issue raises a question of law which has been considered in a substantial number of judgments in this jurisdiction and elsewhere in recent years namely, whether and in what circumstances a decision which is apparently taken by a private entity based upon a contractual relationship between it and the aggrieved party, can be considered as sufficiently endowed with attributes of public authority character to be amenable to judicial review. As the arguments of counsel on either side of this case have illustrated, it is far easier to identify the legal principles which are relevant to that question than it is to apply them to a specific case.

Background Facts.

5. The background and the events leading up to the taking of the Contested Decision can be briefly summarised. The respondent is the entity which provides the investment securities exchange and clearing house services of the Irish Stock Exchange, an institution which long pre-dates the current corporate entity. Since 1995 it has had a corporate status as a company limited by guarantee, the guarantors at its date of incorporation being the then principal stock broking firms in the State (ten in number), including the Bloxham firm.

6. The applicant firm continued in business as stock brokers and members of the exchange until it ran into difficulties and was directed to suspend its trading activities by the Central Bank as the competent authority in that regard on the 25th May, 2012. Immediately thereafter the applicant's membership of the ISE was suspended on the 28th May, 2012. On the 31st May, 2012, the firm petitioned to be wound up as an unregistered company pursuant to the provisions of Part X of the Companies Act 1963, and Mr. Wallace was appointed official liquidator and administrator on the 25th June, 2012.

7. On the 13th December, 2012, Mr. Daryl Byrne, Head of Regulation of the Irish Stock Exchange wrote to the official liquidator and, after referring to the direction of the Central Bank to cease activities and the subsequent suspension of Bloxham under Rule 2.6.1 of the Rules of the Exchange, informed the liquidator that on the 27th June, 2012, the Board had delegated to him as Head of Regulation: "The powers, duties and functions of the ISE (as defined in the Rules) in relation to any steps to be taken by the ISE under the Rules in relation to Bloxham, whether under Rule 2.6 and/or Rule 2.15. On the 12th December, 2012, the Board of the ISE reaffirmed their delegation and again delegated those powers, duties and functions to me". The letter then stated:

> "As Bloxham has ceased to carry on business on the ISE for a period of more than six months, I am now considering revoking Bloxham's membership of the ISE pursuant to Rule 2.15".

8. The official liquidator was invited to make representations as to why this decision ought not to be taken by 18th December, 2012. This invitation was responded to by letter of the 17th December, 2012, by Messrs Maples, solicitors for the official liquidator which, on a number of grounds, challenged the entitlement of the ISE to revoke membership under Rule 2.15.

9. In the Contested Decision communicated by letter of the 19th December, 2012, Mr. Byrne said that he had carefully considered all the points and arguments advanced by the solicitors in that letter and said that he had: "Nevertheless decided to exercise my power of revocation in relation to Bloxham under Rule 2.15. As Bloxham has ceased to carry on business on the ISE for more than six months, pursuant to Rule 2.15 of the Rules of ISE, by this notice to you in your capacity as official liquidator of Bloxham, I hereby revoke membership of ISE".

10. It is relevant to point out that in addition to initiating the present proceedings by way of judicial review, the official liquidator has

also caused the firm to commence a plenary action against the respondent (2003 No. 2682 P) in which the primary relief sought is a declaration that the removal of the applicant from the register of members of the respondent company was invalid. It is not in dispute, accordingly, that alternative remedies in private law may be available to the applicant in respect of the alleged unlawfulness or invalidity of the purported termination of the applicant's status as a member of the private limited company.

11. In these circumstances the interested bystander might be curious as to why the official liquidator of a stock broking firm which has ceased trading and is being wound up should have any interest in challenging the firm's cessation of membership of the stock exchange let alone in disputing the procedural issue as to whether that claim can be pursued by way of judicial review rather than by way of the civil action which it has commenced.

12. The answer to that query lies in a proposal called "Project Chrysalis". It appears that the ISE had been successful in its operations to the extent that by 2011, it had accumulated significant reserves in excess of €26 million. In common with other stock exchange bodies elsewhere, consideration was given by the Board to a reorganisation which would convert the institution from its mutual basis to a company limited by shares. According to the evidence of the official liquidator, in September, 2011, "non binding heads of terms" were concluded and signed by the then seven members of the ISE including the applicant firm under the title "Project Chrysalis" which would involve the transfer of the business of the exchange to a new company limited by shares with a distribution of the accumulated reserves to existing members. That project has not yet been implemented and the interest of the official liquidator in maintaining the membership of Bloxham in the corporate entity lies in the benefit to creditors of the firm that would accrue from the firm's share of any such distribution of the accumulated reserves.

The Arguments of the Parties

13. It is in that context and against that background that the question posed by the preliminary issue has been argued by the parties. The essential point made by the respondent as moving party is that the power exercised by the respondent in taking the Contested Decision is the purely private contractual power embodied in Rule 2.15 which the applicant firm has undertaken to abide by in applying for and accepting membership of the private limited company. The ISE may well be endowed with powers and obligations by virtue of public law in relation to the listing of securities by public companies and the functioning of the "regulated market" into which the stock exchange has since evolved, but that is irrelevant to the essential question as to the basis of the ISE's authority to make that particular decision as against the firm. In effect, it was the decision of the Central Bank as the relevant competent authority to require Bloxham to cease its trading activities that ended its access to the market regulated under the Regulations referred to below. The Contested Decision which is sought to be impugned is a distinct measure which is based exclusively upon the private contractual relationship between the applicant and the ISE.

14. The applicant in reply does not dispute the existence of a form of contractual relationship with the ISE or the legal fact that by virtue of the Companies Act 1963, the firm has a contractual relationship with the ISE as a subscribing member and signatory of the memorandum of association. The applicant's case, in effect, is that the ISE, although a private entity in its legal origin, has become so extensively endowed with or co-opted for the performance of functions of a public law character that a decision such as the Contested Decision which purports to expel a stock broking firm membership of the entity responsible for operation of a regulated market, must be amenable to judicial review.

The Case Law

15. The judicial remedy of *certiorar*i is, of course, available only against decisions taken by a respondent in the exercise of public authority. The remedies of public law are not available in respect of decisions taken in the context of a purely private law relationship between the aggrieved party and the decision-maker. As is often remarked, from their origins in the steps taken by the courts of the common law to supervise the exercise of jurisdiction by courts and tribunals of inferior jurisdiction, the remedies of *certiorari, mandamus and prohibition* have evolved to be employed in modern judicial review in this jurisdiction under Order 84 of the Rules of the Superior Courts, to control the legality of decisions and activities (including inactivities) of a wide range of tribunals, government departments, local authorities and officers and a variety of semi-state bodies and agencies and other entities which are entitled or purport to be entitled, to exercise functions which affect rights or impose liabilities.

16. As was said by O'Higgins CJ in the frequently cited passage from the State (*Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381 at 392, the purpose of the order of *certiorari* "is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction." Thus, the legal rationale for the continued availability of a set of such distinct remedies is that they are to be addressed to persons and bodies who can be held answerable for the performance of some duty or function which has its origin in, owes its jurisdiction to or derives its source of authority directly or indirectly from the State itself.

17. As the variety of circumstances illustrated by many of the cases which have been opened to the Court demonstrates, the difficulty of applying the legal principles which operate to distinguish the exercise of public authority from a decision-making authority based solely on contract or consent can be seen as arising in two types of situation. The first is that in which the decision sought to be impugned is, on its face, a decision of an entity which is by origin, status and function a purely private body and the aggrieved applicant seeks to establish that it has nevertheless been endowed with or has acquired some public law status or competence which renders the particular decision amenable to judicial review.

18. The case of *Murphy v. The Turf Club* [1989] I.R. 171, is an example of that situation. The respondent was by constitution a purely private entity and its relationship with the applicant (a licensed trainer of race horses), was one based upon contract. The fact that the respondent in regulating the sport of horse racing could be said be carrying out a regulatory function which had an important public dimension was held not to bring the exercise of its powers over the applicant into the domain of public law notwithstanding the fact that the effect of the impugned decision was to exclude the applicant from that commercial activity and livelihood.

19. The second situation is one in which the decision impugned is one made by a body established, either directly or indirectly, by statute and the body is exercising public authority powers conferred on or delegated to it, so that its jurisdiction is clearly derived from a public law source, but as respondent the body seeks to resist the judicial review application by maintaining that the particular decision challenged is based upon a distinct contractual relationship with the applicant.

20. The case of *Beirne v. Commissioner of An Garda Síochána* [1993] I.L.R.M. 1 is an example of that context. The applicant was a trainee garda who sought to quash a decision of the Commissioner of An Garda Síochána which had terminated his assignment as a trainee within the meaning of the Garda Síochána (Admissions and Appointments) Regulations 1988. On the face of it therefore, the impugned decision had been taken by the holder of a public office and in the context of a relationship which had its origins in a statutory instrument made under particular legislation including the Police Forces Amalgamation Act 1925 and the Garda Síochána Act 1958. It had been conceded on behalf of the applicant that the function of the Commissioner in admitting a person to a position as a trainee under those regulations would have been amenable to judicial review. There was, however, additionally a contract and the

respondent sought to resist the reliefs claimed by reliance upon it. Regulation 7 of the Regulations in question provided that the conditions of service of trainees might be governed by contracts and Regulation 8 specifically provided that such a contract could contain a condition enabling the Commissioner at any time to terminate the contract, if he considered that a trainee was not fitted to become an efficient and well conducted member. It was claimed –unsuccessfully - that the decision which was sought to be quashed was based upon that contractual entitlement and therefore properly the subject of a private law remedy rather than judicial review. In other words, that was a case in which the holder of a public office who was undoubtedly equipped with delegated statutory powers sought to exclude judicial review by reference to a contract.

21. In the view of the Court that is why the often quoted passage from the judgment of Finlay C.J. is expressed as follows:

> "The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law by persons or tribunals whose authority derives from contract is, I am quite satisfied, confined to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of the parties affected. Where the duty being carried out by a decision making authority, as occurs in this case, is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be excluded from the reach of jurisdiction in judicial review if it can be shown that it solely and exclusively derived from an individual contract made in private law." (*Emphasis added*.)

22. Thus, in that case and in the several cases in which that statement of principle has been followed in circumstances where a respondent is endowed with at least some indices of public authority but there is also a contractual relationship between the parties, the distinguishing element that is emphasised is that the impugned decision must be one which owes its jurisdiction exclusively and solely to the contractual relationship. It must not have been taken on the basis that its force or effectiveness or enforceability is supported or enhanced by the co-existence of some public law authority of the respondent in relation to the decision in question. Where, as in the *Beirne* case, the contractual relationship is incidental to the public law status and public law authority of the respondent, judicial review remedies will lie.

23. A further example of that situation is to be found in the case of *Eogan v. University College Dublin* [1996] I.R. 390. There the applicant, who was the holder of a statutory professorship in the University sought to quash a decision requiring him to retire at the age of 65 years and abolishing a previous practice under which there had been an entitlement to continue until the age of 70 years. The respondent sought to resist the application for judicial review upon the ground that the University was a private body which did not derive powers from statute and had made its decision on the basis of its private contract of employment with the professor. Shanley J. applied the principle enunciated by Finlay C.J. in the *Beirne* case citing the second part of the passage quoted above and emphasising particularly that a decision which will ordinarily be seen as coming within the public domain will be excluded from judicial review only "if it can be shown that it is solely and exclusively derived from an individual contract made in private law".

24. A further example of the application of that principle is to be found in the judgment of Denham J. in the Supreme Court in *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483. The applicant, a fire station officer, challenged the legality of the procedure by which his employer had dismissed him following an investigation by the County Manager into allegations that he had made fraudulent pay claims. The High Court had held that the dismissal was based upon the contract of employment and was therefore a matter of private law not amenable to judicial review. Although the substantive application did not succeed because the Supreme Court considered that a pending appeal before the Employment Appeals Tribunal was the more appropriate remedy, it reversed the High Court decision on the question of the judicial review remedy. In her judgment Denham J. identified a number of factors as bringing the decision within the public law domain. The applicant was a "station officer" and thus occupied a post as an officer rather than as an employee. That post had a public element in that the County Council was the Fire Authority under the relevant local government law. The seniority and level of responsibility of the applicant as the most senior of the personnel in the fire station in question was also relevant. Because of those public elements, the onus lay with the County Council to demonstrate that judicial review remedies were excluded by the fact that the dismissal was decided upon the basis of a contract of employment. Again, the expression of principle of Finlay C.J. in the *Beirne* case was relied upon.

25. Finally, counsel for the applicant has placed particular reliance upon the analysis of relevant factors identified by Denham J. in her earlier judgment in *Geoghegan v. Institute of Chartered Accountants* [1995] 3 I.R. 86. Although it is accepted that in the particular context of that appeal before the Supreme Court the observations of Denham J. are to be taken as *obiter*, it is argued that they have since been taken as a correct statement of the law having been referred to again by Denham J. in the *O'Donnell* case and cited in subsequent High Court decisions including, for example, Kelly J. in *Bane and Others v. Garda Representative Association* [1997] 2 I.R. 449.

26. The *Geoghegan* case is not, of course, one in which the analysis commences from the premise that lies behind the quoted passage from Finlay C.J. in *Beirne* namely, that the impugned decision would ordinarily come within the public domain and the respondent seeks to exclude it from judicial review. It was a case which came within the first of the two suggested categories above. The respondent Institute was a professional body incorporated by royal charter, endowed with functions of representation of its members and empowered to exercise disciplinary functions over them. It had no monopoly of the entitlement to admit members to the profession of accountancy but membership entitled members to carry out certain statutory functions such as the audit of companies under the Companies Acts. The applicant applied for judicial review in order to quash the proceedings of the Institute's Disciplinary Committee into a complaint of professional misconduct made against him.

27. In the *Geoghegan* case, two main judgments were delivered by O'Flaherty J. and Denham J.: Hamilton C.J. agreed with their overall proposal to dismiss the appeal against the High Court order. O'Flaherty J. and Denham J. expressed differing views on the question as to the amenability of the challenged proceedings to judicial review, the former agreeing with the finding of the High Court that judicial review did not lie. Hamilton C.J., while noting that the difference of opinion, preferred to reserve any decision on the issue until it arose in a case where it was necessary for the determination of the claim. It is for this reason that the observations which do not form the basis of the actual ruling of the Supreme Court in that case have been treated as having been made *obiter*.

28. In her judgment on the point at p. 130 of the report, Denham J. identified as relevant a number of important factors in the case as follows:-

> "In view of the public nature of the source of the Institute, the functions of the Institute, and the nature of the contract between the applicant and the Institute, the subject of judicial review becomes part of the question of constitutional justice of the relationship. There are a number of important factors:
>
> (1) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government in the courts in areas such as receivership, liquidation, examinership, as well as having special auditing

responsibilities.

(2) The original source of the powers of the Institute is the Charter: through that and legislation and the procedure to alter and amend the bye-laws, the Institute has a nexus with two branches of the Government of the State.

(3) The functions of the Institute and its members come within the public domain of the State.

(4) The method by which the contractual relationship between the Institute and the applicant was created is an important factor as it was necessary for the individual to agree in a 'form' contract to the disciplinary process to gain entrance to membership of the Institute.

(5) The consequences of the domestic tribunal's decision may be very serious for a member.

(6) The proceedings before the Disciplinary Committee must be fair and in accordance with the principles of natural justice, it must act judicially.

In these circumstances, I am satisfied that a decision of the Disciplinary Committee may be the subject of judicial review pursuant to O. 84 of the Rules of the Superior Courts, 1986."

The Rules and Regulations.

29. Counsel for the applicant submits that analogous factors are to be found in the status, role and functions of the respondent and that there is a similarity in the relationship between the applicant and the respondent which should compel the Court to the conclusion that judicial review must lie against the respondent's decision to expel the applicant as a member of the Irish Stock Exchange. Particular reliance is placed upon the proposition that the role and functions of the ISE have been materially altered in a manner which endows it with elements of regulatory authority and brings it into the public domain by the enactment of the European Communities (Markets in Financial Instruments) Regulations 2007 (SI No. 60/2007). (The "MIFID Regulations").

30. As already mentioned, it is not in dispute that a relationship of private contract did exist between the applicant firm and the Irish Stock Exchange. In 1995, following upon the de-merger from the International Stock Exchange of Great Britain and Ireland, the Irish Stock Exchange was put upon a corporate footing by registration as a private company limited by guarantee without share capital. The Bloxham firm was one of the subscribers to its memorandum of association and accordingly one of the founding guarantors. As such and in accordance with s. 25 of the Companies Act 1963, the firm became a party to a statutory contract. Furthermore, article 6 of the Articles of Association provided that:

> "Membership of the Company shall be governed by the Articles and the Rules and every member by becoming a member and signing the consent form referred to in Article 5 agrees to comply and to be bound by the Rules and the Articles."

The 'Rules' there referred to are rules of the company "made from time to time under the authority of the Board and approved in accordance with the MIFID Regulations by the Financial Regulator with shall include, where the context so admits any Regulations." (See the definition in Article 1. The "Financial Regulator" is the Irish Financial Services Regulatory Authority under the aegis of the Central Bank.)

31. The Articles of Association at Article 8(a) provide that:

> ". . . a Member of the Company shall cease to be a Member . . . (ii) if it ceases pursuant to the rules to be a Trading Member of the Exchange . . ."

32. On the 6th September, 1995, an application for membership of the Irish Stock Exchange was made by the applicant firm and a declaration signed on its behalf by its partners to the effect:

> "We declare that the information supplied in the business profile is complete and we agree that the applicant will comply with and be bound by the Rules of the Irish Stock Exchange which are or may be in force from time to time."

33. The Rules of the Exchange in force at the times material to the present application are dated the 1st May, 2012 and contain extensive and detailed provisions governing all aspects of the operations and the activities of members including the different categories of members, general trading rules, clearing and settlement and discipline. Amongst the rules relevant for present purposes are the following:-

> Rule 2.1.1 provides that 'a member firm shall agree to be bound and abide by the letter and by the spirit of these Rules, and any requirement, decision or direction of the ISC, including the provisions of any noticed issued by the ISE where relevant to its membership.'
>
> Rule 2.2 defines the different classes of membership which include General Trading member firm; Restricted Trading member firm: Primary Dealer: Settlement Only Member Firm and Clearing Only Member Firm.
>
> Rule 2.5 defines the requirements for membership including the requirement that a member firm must be authorised by its relevant competent authority to engage in the relevant services and activities.

34. Rule 2.6 deals with the powers of the ISE in the event of a member's failure to meet membership requirements including:

> 'If, at any time, a member firm is the subject of an order revoking its authorisation, or is the subject of a direction or other trading order having equivalent effect served by its relevant competent authority, which impacts on the services and activities conducted by a member firm on the ISE, the ISE may:
>
> '(a) Restrict the scope of ISE business conducted by the member firm; or
>
> (b) Suspend the membership of the member firm; or
>
> (c) Terminate the membership of the member firm.

> Action may be taken under this rule without prior notice being given to the member firm concerned.'"

35. As already cited above, the rule which is at the heart of the present claim is that of 2.15, "Non active members" which provides: "If a member firm has ceased to carry on business on the ISE for a period of six months or more, its membership may be revoked by the ISE, by notice in writing to such member firm". It is the decision to exercise this power to revoke the membership of the applicant as a non-active member which is sought to be quashed in this application.

36. Under Rule 2.5.1 a member firm must at all times satisfy the ISE that it is authorised:-

> (i) As an investment firm to engage in the relevant services and activities that it undertakes on the ISE by its relevant competent authority under the provisions of Directive 2004/39/EC (the MIFID Directive transposed by the above MIFID Regulation) as amended from time to time, or . . .
>
> (iii) Where the above requirements are not met, the ISE may at its sole discretion admit as a member firm a person which satisfies the ISE that it has appropriate capital and appropriate GCM arrangements in place and sufficiently meets the suitability requirements of rule 2.5.2. Such a firm may be admitted as a restricted trading member firm. All firms admitted as members must also meet the suitability requirements set out in Rule 2.5.2

Conclusion.

37. As already summarised above, the events which led up to the winding up of the applicant firm and to the Contested Decision originate with a statement issued by the Central Bank on the 28th May, 2012, which stated that it had imposed directions on the applicant firm to cease all regulated activities with effect from 5.00 pm on Friday, 25th May, 2012. On the same day as the statement was issued the trading membership of the applicant was suspended by the respondent under Rule 2.6.1. On the 31st May, 2012, the applicant firm petitioned to be wound up and Mr. Wallace was appointed as liquidator and administrator.

38. On the 27th June, 2012, the respondent's Board delegated to Mr. Daryl Byrne its Head of Regulation, the powers, duties and functions of the ISE in relation to steps to be taken under the rules in respect of the applicant firm including the consideration of terminating its trading membership. On the 12th December, 2012, the Board reconsidered and reaffirmed that delegation decision.

39. By letter of the 13th December, 2012, Mr. Byrne wrote to the liquidator informing him that he was considering revoking the firm's membership under Rule 2.5 and invited him to make any written representations he wished to have considered by the 18th December, 2012.

40. By letter of the 17th December, 2012, the applicant's solicitors Messrs Maples responded to that invitation and put forward a series of reasons of why the membership should not be revoked. The letter also asserted that any revocation decision could be successfully challenged. It asserted that "any such action taken by you to revoke Bloxham's trading membership and the consequent disenfranchisement would constitute oppressive conduct for the purpose of s. 205 of the Companies Act 1963, such conduct being "burdensome, harsh and wrongful".

41. If there were no more to the circumstances and facts of the case than this, it is clear that the Contested Decision could not be characterised in the language of Finlay C.J. as one which "is of a nature which might ordinarily be seen as coming within the public domain . . .". The Contested Decision is one to put an end to the contractual relationship created by the agreement of the applicant firm to become a subscribing guarantor of the private limited company and to be bound by the terms and conditions of the memorandum and Articles of Association and the Rules of the Stock Exchange from time to time in force. Indeed, it must be pointed out that as plaintiff in the plenary action referred to above, the firm has explicitly relied upon the fact that it was, until the taking of the Contested Decision, a member of the company within the meaning of s.31 of the Act of 1963 and that by virtue of the provisions of s. 25 of that Act, there existed a contract between the company and its members and between the members *inter se*.

42. As already indicated, in seeking, as it were, to assimilate the circumstances and functions of the ISE and the nature of its relationship with the applicant firm to the circumstances of the *Geoghegan* case in particular, counsel for the applicant has relied particularly upon the MIFID Regulations. It is submitted that the ISE is the only body in the State authorised to operate a "regulated market" and, as such, it effectively controls access to that market by undertakings seeking to engage in trading activities on it. The existence and efficient operation of that regulated market is of major economic importance to the State and therefore the ISE is an institution with a public dimension. The fact that under the MIFID Regulations, the ISE has acquired a number of specific functions and obligations places it more fully in the public domain than, for example, the situation of the Takeover Panel in the United Kingdom which was the subject of the judgment of the Court of Appeal in that jurisdiction in *Reg v. Takeover Panel ex parte Datafin plc* [1987] 1 Q.B. 815.

43. That case, of course, was notable for the very explicit departure it represented in English administrative law in adapting and extending judicial review remedies to a body which had no statutory status and purported to exercise its disciplinary powers as a function in self regulation dependent only upon the consent of those affected by its decisions. Clearly, the initiative of the Court of Appeal was inspired in large part by a desire to fill a gap in legal protection available to those affected by such decisions because of the seriousness of the potential impact of the Panel's sanctions and the absence of any obvious alternative remedies where there was no clear contractual relationship between the Panel and those likely to be affected. As was pointed out by Sir John Donaldson M.R., the Panel's lack of direct statutory base was a complete anomaly compared with other such markets elsewhere. This was apparently due to the fact that:

> "As an act of government it was decided that, in relation to takeovers, there should be a central self regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non statutory powers and penalties were insufficient or non existent or where EEC requirements called or statutory provisions. No one could have been in the least surprised if the Panel had been instituted and operated under the direct authority of statute law since it operates wholly in the public domain"

44. In effect, the Court of Appeal held that, had it not been for the historical anomaly in the way in which the Panel had evolved, the far-reaching impact of the decisions it purported to implement would have required to be founded in a clear statutory authority. It was to cure that anomaly and prevent the Panel operating entirely outside the law that the Court of Appeal availed of the flexibility of administrative law to fill the gap.

45. In the judgment of the Court, the reliance placed by the applicants upon the connection made between the ISE and the MIFID Regulations is misplaced so far as the amenability of a decision taken under Rule 2.15 to judicial review is concerned.

46. It is important to bear in mind that the MIFID Regulations constitute the transposition into national law of the provisions of Directive 2004/39/EC of the European Parliament and of the Council of the 21st April, 2004, which is a measure adopted in implementing the right of establishment under Articles 43 – 48 of what was then the EC Treaty (now Articles 49 – 55 TFEU). The purpose, as indicated in the recitals to the Directive, was to open up the provision of investment services in the securities field and to establish the conditions under which investment firms and banks might be authorised to provide services and establish branches on an interstate basis. For this purpose the Directive aims to harmonise authorisation and operation requirements for investment firms and the conduct of business rules. It was considered necessary to establish a comprehensive Community wide regulatory regime governing the execution of the transactions in financial instruments and to provide a high level of protection for investors on a common basis.

47. Article 5 of the Directive introduced a requirement for authorisation: "Each Member State shall require that the performance of investment services or activities as a regular occupation or business on a professional basis is subject to prior authorisation in accordance with the provisions of this chapter. Such authorisation shall be granted by the home Member State competent authority as designated in accordance with Article 48".

48. Article 36 required Member States to introduce authorisation requirements for regulated markets: "Authorisation as a regulated market shall be granted only where the competent authority is satisfied that both the market operator and the systems of the regulated market comply at least with the requirements laid down in the title". Article 48 required the Member States to designate competent authorities: - "Each Member State shall designate the competent authorities which are to carry out each of the duties provided for under the different provisions of this Directive".

49. It is in discharge of those obligations, accordingly, that under Regulation 4 of the MIFID Regulations the Central Bank of Ireland has been designated as the competent authority with responsibility for the grant and withdrawal of the authorisations which are required to be obtained for those operating or seeking access to the regulated markets.

50. Under the Regulations the respondent is a "market operator" and stock broking firms such as the applicant are "investment firms" providing the "investment services" as defined in Schedule 1 to the Regulations. It is the Central Bank which is charged with responsibility for keeping a list or register of authorised investment firms (Regulation 9) and of regulated markets (Regulation 71). It is the Central Bank which is responsible to monitor the compliance by investment firms with the obligations imposed by the Regulations (Regulation 72).

51. The entitlement of the ISE to operate the Stock Exchange derives so far as the Regulations are concerned from the authorisation it is required to have (Regulation 43) and which is granted by the Bank under Regulation 47.

52. It is true that under Regulation 45 the respondent as a "market operator of a regulated market" is charged with various obligations in relation to its organisation and the business done on its regulated market and for ensuring that the market is operated in compliance with the regulations. Under Regulation 67 the market operator must establish and maintain effective arrangements and procedures for monitoring compliance by its members and by participants with the rules governing the regulated market. It must monitor transactions by members and participants for breaches of the rules, disorderly trading conditions and market abuse. Regulation 67 does not, however, confer upon the market operator any executory powers of discipline in respect of members or participants: it is required to report any relevant information to the Central Bank.

53. Accordingly, while it might be said that the ISE has been, in a sense, co-opted into the arrangements for the common regime for the regulation of markets and financial instruments under the aegis of the Central Bank, it is solely in its capacity as one of the entities that come within the supervision of the Central Bank as a market operator. As such it is itself subjected to the requirements and obligations of authorisation and is answerable to the Central Bank as the competent authority. The Regulations do not endow it with any public law authority vis-à-vis its own members which replaces, supplements or enhances such authority as it has over them by virtue of its own rules. Contrary to the submissions made on behalf of the applicant, the involvement of the ISE in these regulatory arrangements does not place it in a position analogous to that attributed to the Takeover Panel in the UK in the *Datafin* case or to the position which in the respondent Institute in the *Geoghegan* case was considered to be by Denham J. In the judgment of the Court, therefore, the mere fact that the MIFID Regulations can be viewed as having created a form of nexus (to use Denham J's term) between the ISE and the Central Bank as a public authority does not, in the judgment of the Court, have the administrative law effect of bringing the relationship between the ISE and the applicant as a member of the respondent company into the realm of public law and of involving the exercise by the ISE under the Rules of the Irish Stock Exchange of a power of public authority, at least in respect of a decision to discontinue corporate membership of the ISE as a company limited by guarantee.

54. Furthermore, there is an additional aspect to the present application which is relevant for the purpose of determining whether the relationship between the ISE and the applicant in these circumstances is one of public or private law. It is not in dispute that the only interest of the firm in liquidation and that the sole purpose of the liquidator's initiation of the present proceeding, is the preservation of the possibility of the firm participating in Project Chrysalis and thereby obtaining some share in a possible distribution of the reserves of the existing company in the event of reorganisation. The achievement of that aim is dependent entirely upon the firm retaining its membership of the private limited company as one of the original subscribing guarantors.

55. The decision of the 19th December, 2012, which is sought to be quashed, has involved the exercise by the respondent of the particular power contained in Rule 2.15 to terminate the class of membership within Rule 2.1 which the firm had held on foot of the acceptance of its application for that membership in September 1995. It is the consequence of the loss of that membership that the separate membership of the firm in the private company automatically ceases by virtue of Article 6 of the memorandum. Counsel for the applicant in argument placed emphasis upon the effect of the decision under Rule 2.15 as excluding the firm from its trading membership of the Exchange. Drawing an analogy from the position of the trainee garda in the *Beirne* case where it was conceded that a decision by the Commissioner to refuse admission was amenable to judicial review so that a decision to expel must also be, counsel submitted that if a wrongful refusal of authorisation to operate as a stock broking firm on the regulated market could be challenged by judicial review, a decision to expel the firm must equally be amenable to judicial review.

56. That argument is, in the judgment of the Court, mistaken. It confuses two distinct relationships and two resulting procedures. As already indicated above, authorisation of an investment firm granted by the Central Bank as a competent authority is effectively a pre-requisite to operating as an investment firm in the State. The applicant's authorisation was revoked by the Central Bank on the 25th May, 2012, thereby rendering the applicant inactive as a member firm of the Stock Exchange. The respondent's Contested Decision then ended that membership under Rule 2.15 but it was the revocation by the Central Bank of the authorisation which terminated the firm's ability to continue operating as a trading investment firm.

57. Thus, the real purpose of the two sets of proceedings that have been commenced on behalf of the applicant is concerned with its membership of the private limited company. It is entirely clear that the firm, having been wound up, has no prospect of or interest in, resuming any trading activity. What in reality is sought to be achieved is the preservation of the corporate status of the applicant as a guarantor member of the limited company.

58. That the firm's membership of the private limited company is distinct from its trading membership of the Exchange also highlights another flaw in the argument sought to be advanced on its behalf by reference to the *Geoghegan* case. Emphasis was placed upon the fact that the Irish Stock Exchange is the only regulated market in the State; that it operates throughout the State and therefore represents an economic activity of major public importance. On that basis it was suggested that a stock broking firm is in the same position as an accountant who wishes to provide services as auditor of a company: the firm has no real choice but to obtain membership of the exchange. That analogy is mistaken so far as the real objective of the liquidator is concerned. Bloxham was already a member of the company long before the ISE became a "regulated market". A stock broking firm does not require to become a guarantor member of the Irish Stock Exchange Limited in order to exercise the commercial activity of a stock broker providing investment services in a regulated market. In 1995, there were ten such guarantor members. There are now apparently just seven. But a membership of the Exchange and access to participation in the market operations is available in the various forms of membership identified in Rule 2.1. There are now many participating members in the different membership categories apart from the remaining guarantors. None of those memberships is dependent upon or connected to the status of subscribing guarantor of the limited company.

59. Finally, there is the further consideration that the applicant clearly has available to it and has indeed already availed of, procedural means to obtain alternative remedies by the commencement of the plenary action referred to above. It is possibly correct, as counsel for the applicant suggested, that this consideration goes normally to the substantive consideration of the application and the possible exercise of the Court's discretion to refuse judicial review and to leave the applicant to the pursuit of the private law action. However, in the circumstances of the present case, the consideration is also a relevant factor in assessing the nature of the relationship between the applicant and the respondent for the purpose of determining the legal character of the decision sought to be quashed. In that regard the detailed pleading of the statement of claim in that action places the firm's grievance squarely in the context of a private law contract and particularly the contract created in company law by the firm's status as one of the original subscribing guarantors upon its incorporation. The case as thus pleaded relies explicitly upon the duties of companies and boards of directors in company law towards shareholders and members, thus placing the grievance firmly in the domain of a private relationship created between the plaintiff and the defendant arising out of direct commercial dealings between them.

60. The case thus made clearly illustrates the reality of the objective sought to be pursued by the liquidator as one in the realm of private law and not a claim on the part of an undertaking whose rights have been affected by an exercise of powers of public authority.

61. For all of these reasons the Court is satisfied that the preliminary issue must be determined in favour of the respondent. The Contested Decision is not amenable to judicial review.