

THE HIGH COURT

[2011 No. 2108 SS]

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857, AS EXTENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE HEALTH SERVICE EXECUTIVE

APPELLANT

AND

P.J. CARROLL & COMPANY LIMITED

RESPONDENT

JUDGMENT of Kearns P. delivered the 29th day of March, 2012.

This is an appeal by way of case stated arising from a prosecution taken by the Health Service Executive (hereafter referred to as 'the appellant') in the Dublin Metropolitan District Court against the respondent company which alleges breaches by the latter of s. 36 of the Public Health (Tobacco) Act 2002, as amended by s. 7 of the Public Health (Tobacco) (Amendment) Act 2004 (hereafter referred to as 's. 36 of the Act of 2002, as amended').

Section 36 of the Act of 2002, as amended, provides:-

"(1) A person who engages in sponsorship in contravention of the Directive of 2003 shall be guilty of an offence.

(2) It shall be an offence for a person to give financial or other assistance, or cause financial or other assistance to be given, to or for the benefit of a person, or for or in relation to an event or activity, in consideration of the--

- (a) use, display or advertising by the person, or at the event or activity concerned,
- (b) association with the person, event or activity, or
- (c) promotion,

of a tobacco product, the name of a tobacco manufacturer or importer, the name of a brand of tobacco product or a trademark, emblem, marketing image or logo used in the marketing of a tobacco product.

(3) It shall be an offence for a person to receive financial or other assistance to which subsection (2) applies.

(4) In this section 'sponsorship' has the same meaning as it has in the Directive of 2003."

The long title to the Act of 2002 states *inter alia* that it is:-

"an Act.... to provide for a prohibition on the advertising of tobacco products, a prohibition on sponsorship by manufacturers and importers of tobacco products and prohibitions on certain marketing practices in relation to tobacco products..."

The 'original' section 36 of the Act of 2002 in unamended form provided:-

"(1) It shall be an offence for a person to give financial or other assistance, or cause financial or other assistance to be given, to or for the benefit of a person, or for or in relation to an event or activity, in consideration of the-

- (a) use, display or advertising by the person, or at the event or activity concerned,
- (b) association with the person, event or activity, or
- (c) promotion, of a tobacco product...."

That section was wholly replaced with the 'new' section 36 by section 7 of the Act of 2004 (which, like its predecessor, contained a marginal note to the section which described it as constituting a "prohibition of sponsorship") and was expressed to have been passed to give effect to Directive 2003/33/EC of the European Parliament and of the Council of the 26th May, 2003, on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, O.J.L 152/16 20.6.2003. In reality the substituted section simply grafted on to the old section an express prohibition on sponsorship as defined in the Directive.

"Sponsorship" was not defined in the Act of 2002 but was defined in the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act, 1978 as:-

"...the giving, or the causing to be given, of financial or other assistance to or for a person or for or in relation to an

event or activity, in consideration of the use, display, advertising or association with, or by the person or at or in connection with the event or activity (or with the name or title of the event or activity) of a tobacco product (or of the name of a brand of tobacco product)..."

However, "Sponsorship" was defined quite differently in Article 2 of the Directive as:-

"any form of public or private contribution to any event, activity or individual with the aim or direct or indirect effect of promoting a tobacco product..."

As noted above this definition of sponsorship was imported into Irish law by section 7 of the Act of 2004.

BACKGROUND FACTS

Five summonses alleging breaches of s. 36 of the Act of 2002, as amended, were issued against the respondent. The appellant proceeded with two of these summonses in the Dublin District Court before Judge Bridget Reilly.

The first summons alleged that on a date unknown between the 1st July, 2009, and the 31st August, 2009, the respondent, being a manufacturer and distributor of tobacco products, gave, or caused financial assistance to be given, to Campus Property Limited, trading as Spar in the campus of Dublin City University in consideration of the promotion of a tobacco product, contrary to the said section of the Act of 2002.

The second summons alleged that on a date unknown in July, 2009 the respondent, being a manufacturer and distributor of tobacco products, gave, or caused financial assistance to be given, to Reni Joseph, employee of Campus Property Limited, trading as Spar in the campus of Dublin City University (hereafter referred to as D.C.U.), in consideration of the promotion of a tobacco product, also contrary to the said section.

It emerged at the hearing in the District Court that as a result of information which came into the possession of certain members of the appellant, authorised officers of that body visited the premises of the respondent, where they carried out an examination and requested certain documents. They became satisfied that there was evidence suggesting that the respondent was engaged in a scheme to promote 'Pall Mall' brand cigarettes. This involved encouraging sales assistants in tobacco retail premises, and the owner of such premises, to respond to customers looking for a competing company's products by stating "*We also stock Pall Mall Red King Size, the best value cigarette on the market.*" The respondent engaged a firm (called Promopeople) to provide mystery shoppers who would attend at shops participating in the scheme to test retail assistants. If the assistant gave the appropriate response when visited by a 'mystery shopper' the assistant would thereafter be rewarded with a €30 voucher. The shop itself would also be entered into a draw in which cash prizes from €1,000 to €5,000 would be paid to, or for the benefit of, the retailer's business.

The case stated shows that the prosecution's evidence consisted of five witnesses and certain documentation supplied to Ms. Laura Garvey, an authorised officer of the prosecutor, by servants or agents of the respondent.

The witnesses who gave evidence were the said Laura Garvey, Damien West, C.E.O. of Campus Property Limited, Dave Walsh, manager of Spar D.C.U., Reni Joseph, employee of Campus Property and Norma Cronin, former chairperson of the Board of Tobacco Control.

Ms. Garvey gave evidence that she visited the premises of P.J. Carroll on the 30th August, 2009, the 21st April, 2010 and the 25th June, 2010, where she was given documentation in relation to the marketing of tobacco products by the respondent, including a leaflet, poster and adhesive stickers in relation to the "Pocket a Packet" Pall Mall promotion and a list of retailers who participated in the promotion and became eligible to win cash voucher prizes or be included in draws. The appellant also produced in evidence an internal document from the respondent company referring to the "Pocket a Packet" 'promotion' which was supplied to them by the servants or agents of the respondent. The documentation also included a cheque stub for payment by the respondent of €1,000 to Musgrave Cash & Carry. Ms. Garvey gave evidence to the effect that the promotion was operated so as to provide that when a customer asked for a packet of John Player Blue, Benson & Hedges or Mayfair King Size, the retailer was encouraged to say in response: "*We also stock Pall Mall Red King Size, the best value cigarette on the market.*"

Damien West gave evidence that in September, 2009 a representative from P.J. Carroll called to the shop and informed him that the store had won a voucher to the value of €1,000 for participating in the 'Pocket a Packet' promotion.

David Walsh gave evidence that he was approached by a representative of P.J. Carroll in June, 2009 who informed him about the 'Pocket a Packet' mystery shopper promotion. He said that he was informed that if the cashier gave the correct response he would win a "One 4 All" voucher to the value of €30 and the shop would be entered into a draw for a larger prize. The shop was visited on two occasions and, on the second such occasion in July, 2009 the cashier, Reni Joseph, was successful.

Mr. Reni Joseph gave evidence that he worked in Spar in the D.C.U. campus in 2009. He was aware of the programme that the respondent was operating and that a mystery shopper would come to the shop and ask questions. On the date in question, the mystery shopper came into the shop and a co-worker pointed out that he was the mystery shopper. Mr. Joseph responded to the mystery shopper's question by stating "Pall Mall cigarettes". Mr. Joseph was provided with a cash voucher by the respondent for €30 in consideration for referring to the 'Pall Mall' brand.

The respondent did not call evidence.

Having heard legal submissions from both sides the learned District Judge found that the facts relating to the first summons had not been proven and held as follows in relation to the second summons:

(a) The first object of statutory interpretation is to ascertain the parliamentary and legislative intention of the section. The intention of the legislature can be imputed on the basis of the text of the Act. In the present circumstances there is no legislative definition of 'promotion'. 'Promotion' was a term used by the persons involved in the marketing of the P.J. Carroll scheme and the documentation referred to 'driving awareness of the product'. The intention of the scheme was to increase sales of a tobacco product and significant sums in excess of £200,000 had been used to pursue the scheme. The scheme was not just targeted at mystery shoppers, but the giving of information was targeted at a particular group of smokers to achieve an increase in sales. This constituted a 'promotion'.

(b) There is no definition of 'financial assistance' in the legislation. The Court is entitled to use common sense in construing this term, and the phrase 'assistance' is similar to 'help'. Financial assistance must therefore be money applied

for a particular purpose, event or activity. Examples are government grants or scholarships. The legislature could have defined 'financial assistance' to include a monetary payment. I held that 'financial assistance' does not include a gift, reward or prize. This conclusion was reached having regard to the case law which requires criminal and taxation statutes to be construed strictly so as not to widen the breadth of an offence. Financial assistance did not include a payment or voucher with a financial face value which was in effect a prize or reward."

Having so found and so concluded, the learned District Judge dismissed the prosecution on the basis that 'financial assistance' had not been proven as the voucher did not constitute 'financial assistance'.

The opinion of this Court is now sought by the District Judge on the following questions of law:

"(a) Was I correct in law in holding that the term 'financial assistance' does not include a gift, prize or reward so as to exclude a monetary payment or cash voucher redeemable for money or value worth from the scope of the definition?

(b) Was I correct in law in holding that the 'financial assistance' must assist a particular event or activity?

(c) Was I correct in law in holding that the activity in which the respondent was engaged, the subject-matter of the prosecution, amounted to a 'promotion' for the purposes of Section 36 of the Public Health (Tobacco) Act 2002 as amended?"

SUBMISSIONS OF THE APPELLANT

The appellant argued that there are two distinct concepts in s. 36 of the Act of 2002, as amended, being respectively (i) sponsorship and (ii) the giving of financial or other assistance in exchange for promotion. Sponsorship, it was suggested, was addressed by section 36(1) and other forms of financial contribution were addressed by section 36(2). It was submitted that to conflate or merge the two concepts would do an injustice to the plain meaning of the provision, and that, if the court were to adopt the interpretation of 'financial assistance' proposed by the respondent, it would effectively be ignoring the express amendment of the previous legislation by the insertion of the word 'promotion'.

It was claimed by the appellant that the description of s. 36 as 'sponsorship' in the long title of the Act of 2002, as amended, should not be used to restrict or override the plain meaning of the word 'promotion' in the operative provision.

It was further argued by the appellant that the phrase 'financial assistance' is not a legal term of art and that it does not have a settled meaning in any context, not least within the scheme of the tobacco legislation. The appellant claimed that the term was nonetheless interpreted broadly in the context of company law legislation in this jurisdiction and elsewhere.

The appellant also argued that the "financial assistance" in the case at hand consisted of a voucher for money's worth provided "to or for the benefit of a person", in this case for the benefit of a retail assistant in consideration of his promotion of the Pall Mall brand of cigarettes. It was claimed that the voucher assisted the retail assistant in a personal capacity. The appellant argued that the payment of the cash voucher as part of the overall scheme assisted and would as a normal consequence set in train the promotion of the tobacco brand.

It was argued that it is not necessary for the court to give s. 36 of the Act of 2002, as amended, an extremely wide interpretation in order to convict the respondent, and that a literal interpretation of the wording of the statutory provision would ground a conviction.

SUBMISSIONS OF THE RESPONDENT

The written submissions of the respondent in both the District Court and this Court are of extraordinary length and prolixity so I will simply summarise them briefly. It was submitted that the appeal was largely about two issues: firstly, whether in adding to the Act of 2002 the word 'promotion' to the long-standing definition of sponsorship contained in the Tobacco Products (Control of Advertising, Sponsorship And Sales Promotion) Act 1978 (hereafter referred to as 'the Act of 1978'), the Oireachtas intended to introduce a ban on financing the promotion of tobacco products, even if the legislation does not make the promotion of tobacco products in itself an offence and; secondly, whether the speaking of the words "*Pall Mall cigarettes*" by a retail assistant to an individual whom he knows to be working for the respondent constitutes a promotion of the respondent's brand of cigarettes.

It was submitted that the prosecution in hand was based on a fundamental misunderstanding of the form of activity that s. 36 was intended to regulate. The respondent further claimed that the appellant had failed to analyse clearly and candidly the meaning of the term 'financial assistance'.

The respondent submitted that the appellant's case is predicated on the understanding that the giving of money or money's worth to a person in return for that person promoting a tobacco product is an offence under section 36. It was claimed that it makes very little sense that the Act criminalises payment in return for promotion and that the interpretation suggested by the appellant is not consistent with the language used in the section.

It was argued that the provision is operative where assistance is given which enables an event or activity to take place and that financial assistance is separate and distinct from a financial contribution. It was further argued that monies given to incentivise a person to promote would not be sufficient to trigger the provision. The respondent submitted that it is a critical proof that the assistance must be given in relation to an event or activity and that the finance must assist the event or activity to occur.

The respondent contended that the application of standard principles of statutory interpretation mandates that the interpretation put forward by the respondent was the correct one. It was claimed that firm support for this contention could be derived from the legislative history of the provision, the ordinary and natural meaning of the words used and a consideration of the Act as a whole.

It was argued that the court should have regard to the long title to the Act and that the court should also have some regard to the marginal note to s. 36 of the Act of 2002, as amended, and to the commencement provisions of the Act. The respondent stated that to follow the interpretation of the appellant would lead to extraordinary and anomalous consequences. By way of example, the range of prohibited activities would include payments to staff of a tobacco company who are employed to promote products, payments to public relations companies, payments to designers of packets, payments to third party sales forces, distributors and retail organisations.

The respondent further submitted that the intention behind the programme was not the point and that the appellant had

misunderstood the critical issue in the case. It was claimed that the issue is not whether the materials supplied to retailers in connection with the scheme constituted a 'promotion', but whether the specific event in respect of which Mr. Joseph was given the voucher constituted a 'promotion'. The respondent stated that, taking the appellant's case at its highest, the evidence before the court established that Mr. Joseph was given vouchers in return for uttering the words 'Pall Mall cigarettes' in a private conversation with an employee of a public relations firm hired by the respondent.

The respondent also argued that, insofar as the appellant alleged that the programme involved incentivising retailers to make statements to persons who had identified themselves as smokers and who were over the age of eighteen years and insofar as such statements were made privately and constituted only assertions of fact, it is impossible to see how the Oireachtas could validly impose a restriction on private communications in a manner consistent with the Constitution or the European Convention on Human Rights.

STATUTORY INTERPRETATION

The starting point in any consideration of the rules for the construction of statutes is the judgment of Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. Quoting from Lord Blackburn in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* [1877] 2 App. Cas. 394, and Craies on Statute Law (1971, 7th Ed, at p.65), Blayney J. referred to the 'cardinal rule' for the construction of statutes and described it as follows at p.151:

"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 law giver. The tribunal that has to construe an act of 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."

Denham J., as she then was, stated as follows in the same case at p.162:-

"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 best give effect to it, applying the basic meaning of the words. There is well established case law on this aspect of statutory construction."

This passage has subsequently been approved in the Supreme Court as the cornerstone for the interpretation of statutes in several subsequent decisions including *D.B. v. Minister for Health* [2003] 3 I.R. 12 and *Minister for Health v. Dundon* [2005] 1 I.R. 261.

Kelly J. stated in *Maher v. An Bard Pleanala* (Unreported, High Court, Kelly J., 7th May, 1999) at p.18:-

"[I]t appears to me that the most elementary rule of construction of legislation has been stated by Lord Reid in *Pinner v. Everett* [1969] 1 W.L.R. 1266, 1273 when he said:

'In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute'."

The same test was approved by Hardiman J. in *O'Brien v. Moriarty* (No.2) [2006] 2 I.R. 415.

In *Rahill v. Brady* [1971] I.R. 69, Budd J. held in the Supreme Court at p.86:-

"... 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 the 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."

In the Supreme Court decision in *Crilly v. Farrington* [2001] 3 I.R. 251, at p.295-296, Murray J. observed that regard should be had to the statute as a whole:

"Manifestly, however, what the courts in this country have always sought to ascertain is the *objective* intent or will of the legislature. This is evident for example from the rule of construction according to which when the meaning of the statute is clear and definite and open to one interpretation only in the context of the statute as a whole, that is the meaning to be attributed to it ...

The role of the courts in the interpretation of statutes, as a matter of principle, is summed up with great clarity by Lord Nicholls in *R. v. Secretary of State for the Environment, ex p. Spath Holme Ltd* [2001] 2 W.L.R. 15 at p. 37 when he said:-

'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus when the courts say that such and such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning. As Lord Reid said ... 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used'."

(emphasis in original)

HISTORICAL CONTEXT

It is appropriate at this juncture to refer to the legislative history of the prohibition contained within section 36. Dodd states in *Statutory Interpretation in Ireland* (1st Ed., Bloomsbury, 2008) at p.221:-

"[L]egislative history is a legitimate aid to interpretation... Pre-Act legislation and law allow for objective interpretation. Legislative history does not distort the objective process undertaken by the courts, nor does it distort the law-making process undertaken by the legislature- risks present in the admission of parliamentary history."

In *Crilly v. T. & J Farrington Ltd.* [2001] 3 I.R. 251, Murray J., observed at pp.291-292:-

"As the seventh edition of Craies observes at p. 126 'The cause and necessity of the Act may be discovered, first, by considering the state of the law at the time when the Act was passed. In innumerable cases the Courts, with a view to construing an Act, have considered the existing law and reviewed the history of legislation upon the subject'. Craies also observed that it was hardly necessary to cite authorities for this proposition. This is an approach which permits an Act to be interpreted in the light of its legal historical context and with regard to the provisions of other Acts *in pari materia*. This long established approach of looking at legislative history is entirely distinct from that of parliamentary history where the latter refers to parliamentary debates and what occurred in the passage of a Bill through parliamentary procedures prior to its enactment. It is in this sense that I use these terms."

Denham J., as she then was, made the following observation in the same case at p.283:-

"In this case the Act is clear, there is no ambiguity and the section in issue has been construed in accordance with the traditional canons of construction. *The People (Director of Public Prosecutions) v. McDonagh* [1996] 1 IR 565, decided that even if an Act is not ambiguous, the legislative history, that is the legislative antecedents, may be considered by a court. I agreed then and I agree now with Costello P.'s judgment that such an approach should not be excluded. A court has discretion to consider such a legislative history."

As already noted, the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Act 1978 defined sponsorship in terms of "giving financial or other assistance to or for a person or for or in relation to an event or activity".

The Act of 1978 was repealed by the Public Health (Tobacco) Act 2002. It contained no new definition of "sponsorship" though it would appear that the intended scope of s. 36(2) in the Act of 2002 Act was to capture activities other than 'sponsorship', or at least a wider range of activities than those envisaged by that word alone. It follows that the provision of financial assistance in exchange for promotion was, at least until 2004, capable of being understood as being an activity additional to the provision of financial assistance in the context of sponsorship. However, the meaning of the word "sponsorship" itself appears to have altered in 2004 by virtue of the Directive of 2003 and I will return later to this aspect of the case.

The words 'financial assistance' appeared again in the Act of 2002 and it has not been argued that before 2004 they related to anything other than sponsorship. That was the 'mischief' which, as the marginal note confirms, the Act was designed to counter. While not admissible as to the meaning of individual words in a section, regard can be had to a marginal note to that extent. While the definition of sponsorship changed in 2004 it has not been argued by the appellant that the words 'financial assistance' in section 36 of the Act as amended are now to be construed differently or that they should be interpreted in conformity with the definition of sponsorship contained in Directive 2003/33/E.C.. On the contrary, it was argued that section 36(2) addressed an offence *other* than sponsorship.

DECISION

I will begin by considering whether the District Judge was correct in determining that the activity engaged in by the respondent in this instance constituted a 'promotion' for the purposes of s. 36(2)(c) of the Act of 2002, as amended. The scheme in question involved the expenditure of significant sums of money on a programme designed to increase the sales of a tobacco product. The money was used to encourage retailers to advocate a particular brand of cigarettes to customers. The documentation created within the respondent company for the particular marketing initiative was entitled "Pall Mall Mystery Shopper Promotion".

It would stand common sense on its head in such circumstances to hold that the activity did not constitute a promotion within the natural and ordinary meaning of that term and the District Judge's finding in this regard is, in my view, clearly correct. In fairness to the respondent, the case for any other view was not seriously pressed at the hearing before this Court. I am satisfied that the addition of the word 'promotion' in section 36 may simply be seen as widening the range of activities coming under the prohibition.

At the outset it must be presumed that the legislature did not employ the term 'assistance' superfluously, and that some meaning must be accorded to the term. However, the authorities do not suggest that the words 'financial assistance' may be properly characterised as a term of art. In the context of section 60(1) of the Companies Act 1963, McCracken J. in *C.H (Ireland) Inc. (in liquidation) v. Credit Suisse Canada* [1999] 4 I.R. 542 at pp. 554-555, quoted with approval the dictum of Hoffmann J. in *Charterhouse Investment Trust Ltd v. Tempest Diesels Ltd* (1986) B.C.L.C. 1 at p.10:-

"There is no definition of giving financial assistance in the section, although some examples are given. The words have no technical meaning and their frame of reference is in my judgment the language of ordinary commerce."

In *British and Commonwealth Holdings plc v. Barclays Bank plc* [1996] 1 W.L.R. 1 at p. 14, Aldous L.J. (when considering section 151 of the Companies Act 1985) stated:-

"The words 'financial assistance' are not words which have any recognised legal significance whereas the word 'indemnity' does."

So what does the term mean? The word 'financial' is clear enough but in the statute it is linked with the word 'assistance'. The Oxford English Dictionary, Second Ed., Vol. 1 includes in the definition the following p.715:

"The action of helping or aiding in an undertaking or necessity; furtherance, succour; *also*, the help afforded, aid, support, relief..."

This definition strongly suggests that 'assistance' is normally associated with some activity in the manner suggested to and accepted by the District Court.

It is perhaps even more pertinent to ask why the Oireachtas used the phrase 'financial assistance' if its purpose in 2002 was to prohibit the giving of any form of financial payment or inducement. The relevance of such an inquiry is underscored by the presence of quite contrasting language in regulations designed to control promotion of cigarette sales. Regulation 18 of the Tobacco Products (Control of Advertising, Sponsorship and Sales Promotion) Regulations 1991 (S.I. No. 326 of 1991) provides:-

"A person shall not give financial or other inducements in consideration of being allowed to advertise a tobacco product at a point of retail sale." (emphasis added)

It would have been a straightforward task for the Oireachtas to have framed s. 36(2) in similar terms if the intention had been to catch all payments or inducements. However, the legislative history suggests that the Act of 2004 simply left the wording as it formerly read in the Acts of 1978 and 2002 when they clearly were seen as constituent elements of sponsorship. All that was changed by the creation of an offence of sponsorship (s.36(1)) to be now interpreted by reference to its new definition (s.36(4)).

I am of the view that, at a minimum, the words 'financial assistance' are ambiguous in their meaning in the context of the particular subsection. The creation of criminal offences must be by language which is clear and certain. Where a statutory provision gives rise to a plausible range of constructions, one wide and one narrow, the narrow construction must always be preferred where a penal statute is involved. The very uncertainty surrounding the meaning of the term 'financial assistance' suggests that one could only infer that the Oireachtas intended to create an additional form of criminal offence by interpreting those words as meaning 'any kind of payment' which might assist the promotion of the particular product. That would indeed be a very wide interpretation. If, as contended by the appellant, a separate offence from sponsorship was being created by section 36(2) as amended it is surprising that the legislation itself did not expressly so state. I think the view reached by the learned District Court judge sits comfortably with the immediate scope and object of the Act and the terms of its long title.

I also share her view that the words 'financial assistance' do not sit logically or sensibly with a once-off prize or reward of a small sum, in this case €30. The weekend golfer who tees up his ball in his club's monthly medal may win a prize of a voucher for a small cash sum to be spent in the golf shop. He does not thereby lose his amateur status. He is not in receipt of 'financial assistance'. However, he will lose that status if the reward or prize goes beyond a certain value or is a recurring payment or subvention. It is all a question of degree and the nature and amount of any benefit offered or received.

The appellants have firmly rooted their case in the proposition that an offence separate from that of sponsorship is created by section 36(2) of the Act and I have not been asked to determine whether or not the 'Reni Joseph' prosecution could have proceeded under section 36(1) having regard to the new definition of the word 'sponsorship' as contained in the Directive and as transposed into Irish law by section 36(4) of the Act as amended. I have come to the conclusion, somewhat paradoxically, that the offence with which the respondent could have been charged under the Act as amended on the facts established in the District Court was one of providing sponsorship as that term has now been redefined (*i.e.*, "the giving of any form of public or private contribution to any...individual with the aim or direct or indirect effect of promoting a tobacco product") (Emphasis added) contrary to s.36 (1). It seems to me that section 36(2) addresses both sponsorship (as defined prior to 2004) and the giving of financial assistance for a wider range of promotional activities, but not the kind of once-off reward or prize given to Mr. Joseph.

In all of these circumstances, I would answer the case stated by the District Judge in the following manner:-

- (a) Was I correct in law in holding that the term 'financial assistance' does not include a gift, prize or reward so as to exclude a monetary payment or cash voucher redeemable for money or value worth from the scope of the definition?- Yes
- (b) Was I correct in law in holding that the 'financial assistance' must assist a particular event or activity? - Yes
- (d) Was I correct in law in holding that the activity in which the respondent was engaged, the subject-matter of the prosecution, amounted to a 'promotion' for the purposes of Section 36 of the Public Health (Tobacco) Act 2002 as amended?- Yes.

I will hear counsel on the form of any order following consideration of this judgment.