Neutral Citation [2015] IEHC 481

HIGH COURT

COMMERCIAL

[2015 No. 2530 P]

BETWEEN

JTI IRELAND LIMITED

PLAINTIFF

AND

MINISTER FOR HEALTH, IRELAND

AND

THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Cregan delivered on the 7th day of July, 2015

Introduction

1. The issue which I have to consider in this application is the defendants' application that the Court should refer certain questions to the Court of Justice of the European Union ("CJEU") to give a preliminary ruling on questions raised in these proceedings. This application is opposed by the plaintiff.

Procedural History

2. The plaintiff is a distributor and supplier of tobacco products in the State. The plaintiff is a member of a leading international tobacco group which has operations in over 70 countries, including Ireland. The group employs over 27,000 people worldwide and the plaintiff employs 90 people in Ireland. The group sells its products in over 120 countries, including Ireland, and the plaintiff is the non-exclusive licensee of Irish trademarks and European Community trademarks in respect of several well- known brands of cigarettes, (including Benson & Hedges, Silk Cut, Winston, and Camel) and pipe tobacco.

3. These proceedings concern a challenge brought by the plaintiff to the Public Health (Standardised Packaging of Tobacco) Act 2015. This Act was passed by the Legislature and signed by the President on 10th March, 2015. The stated purpose of the Act is, *inter alia*, "to provide for standardised packaging of tobacco and tobacco products; to give effect in part to Directive No. 2014/40/EU on the manufacture, presentation and sale of tobacco and related products, and to provide for related matters".

4. Section 1 (3) of the Act provides that it will come into operation on such day as the Minister might appoint. Section 6 of the Act contains transitional provisions and provides that the Act shall not apply to the sale of tobacco products manufactured or released for circulation before 20th May, 2016.

5. The plaintiff issued its plenary summons in these proceedings on 30th March, 2015. An appearance was entered for the defendants on 31st March, 2015. On 13th April, 2015 the plaintiff brought an application to admit these proceedings to the Commercial List of the High Court. This order was made. A statement of claim was delivered on 8th April, 2015, the defence was filed on 11th May, 2015 and the reply to the defence was delivered on 25th May, 2015. Thus the pleadings in these proceedings are closed.

6. The defendants brought this motion on 6th May, 2015. It was made returnable to 11th May, 2015. Affidavits and legal submissions were exchanged between the parties and the matter came before the Court on 30th June, 2015 for hearing.

The nature of the plaintiff's claim

7. In order to set the application for a reference to the CJEU in context, it is necessary to understand the nature and extent of the plaintiff's claim in these proceedings. The structure of the statement of claim is as follows:

Section 1 – The Parties.

Section 2 – EU Competence.

Section 3 – The Tobacco Packaging Directive 2 – (TPD2).

Section 4 – Article 24 (2) of TPD2.

Section 5 – Domestic Legislation.

Section 6 – Competence of Member States.

Prayer for relief.

8. Under section 2, on EU competence, the plaintiff in effect pleads that the EU has exclusive competence to legislate in this area of tobacco packaging.

9. Under section 3, the plaintiff sets out the relevant recitals and operative provisions of the Tobacco Packaging Directive (TPD2).

10. Under section 4, the plaintiff sets out the relevant provisions of Article 24 (2) of TPD2. The plaintiff pleads that Article 24 (2)

TPD2 is contrary to the TFEU (Article 114) and also pleads that:

> *24. "The validity of Article 24 (2) is already under challenge before the Court of Justice of the European Union (CJEU). A reference to the CJEU in respect of the validity of TPD2 (and in particular Article 24 (2) thereof) was made on 7th November, 2014 by the High Court of England and Wales…..and a decision on the validity of Article 24 (2) is necessary for the resolution of the within proceedings. Two other group companies are an Interested Party to the reference and claim number CO/2969/2014."*

11. I note, therefore, that the plaintiff itself pleads that a decision on the validity of Article 24 (2) of the TPD2 Directive is necessary for the resolution of these proceedings.

12. At paragraph 25 of the statement of claim, the plaintiff pleads as follows:

> *"The plaintiff claims in these proceedings that Article 24 (2) of TPD2 is invalid as being without legal basis and contrary to the provisions of the TFEU".*

13. The claim made in this section of the Statement of Claim is that Article 24 (2) of TPD2 is invalid because it is contrary to the provisions of the TFEU and in particular, Article 114 of the TFEU. This is the central issue raised in these proceedings. It is clear that where the validity of a Directive is challenged, (having regard to the provisions of the EU Treaties) then that is a matter that can only be decided by the CJEU. It cannot be decided by national courts. Therefore, to the extent that this question is raised in these proceedings, it is clear that a reference is necessary by the national court to the CJEU to decide this question. Indeed both parties are of the view that a decision of the CJEU on the validity of Article 24 (2) is necessary for the resolution of the within proceedings.

14. In section 5 of its statement of claim, the plaintiff sets out a summary of the main provisions of the Public Health (Standardised Packaging of Tobacco) Act, 2015.

15. At paragraph 35 the plaintiff pleads that, apart from faithfully transposing the requirements of TPD2, the defendants do not have the competence to legislate in the field of the labelling and packaging of tobacco products, because the EU has exclusive competence in this area. The plaintiff also pleads that certain sections of the Act go beyond what is required in the Directive and the defendants do not have the competence to so legislate.

16. The defendants have filed a defence, and in addition to the issues raised by the plaintiff, the defendants have also raised an issue that, even if Article 24 (2) of the Directive is found to be invalid by the European Court, there are other provisions in the Treaty under which Member States, including Ireland, have the necessary competence to pass legislation, such as the national legislation in this case.

Summary of the plaintiff's claim

17. Thus, the plaintiff's essential claim can be summarised as follows:

> (a) That Article 24 (2) of TPD2 is invalid, having regard to the EU Treaty (and in particular Article 114 TFEU), in that it permits Member States to take further measures in this area when, as the plaintiff contends, the EU has exclusive competence in this area.
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> (b) If Article 24 (2) TPD2 is invalid, then it follows that Member States have no competence pursuant to Article 24 (2) of the Directive to take any steps in pursuance of TPD2, apart from faithfully transposing the Directive into national law.
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> (c) If Member States have no such competence then the 2015 Act passed by the Irish Legislature is contrary to EU law.

The questions sought to be referred

18. The defendants have sought to refer three questions to the CJEU. In broad terms these questions can be described as follows:-

> (1) The first question is the question of whether Article 24 (2) TPD2 is invalid having regard to Article 114 TFEU. (It is accepted by the defendants that exactly the same question has been referred to the CJEU by the English Courts and will be heard within the next three to four months by the CJEU).
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> (2) The second question relates to whether the Irish Statute complies with the terms of the Directive TPD2. (However, given that the plaintiff has now clarified that the only issue which is raised in these proceedings is that of the competence of the State to enact this legislation (and not also whether, if the State has the competence, the Act is contrary to the Directive) it is accepted by the defendants that this question falls away and does not need to be referred).
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> (3) The third question is, in the event that the CJEU holds that Article 24 (2) TPD2 is invalid (and therefore Member States such as Ireland have no competence to enact legislation in this area under Article 24 (2) of the Directive), whether Member States such as Ireland may derive the necessary competence to enact such legislation from other Articles of the Treaty - including Article 4, Article 6, and Article 36 of the TFEU.

The principles relevant to a decision on whether to refer

19. Article 267 of the Treaty on the Functioning of the European Union provides as follows:-

> *"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
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> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling*

thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."(Emphasis added).

20. Both parties were agreed on the relevant principles to be considered by a court in deciding whether to make a reference. These principles may be summarised as follows:-

(1) The decision to make a reference is one for the National Court to make (see *Rheinmuhlen-Dusseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* Case 166- 73[1974] ECR 33).

(2) Where the validity of an EU measure is challenged there is an obligation to refer (see *Inuit-Tapiriit Kanatami & Others v. Parliament and Council* Case C-583/11 P ECLI:EU:C:1974:3).

(3) A reference may be made at any stage of the national proceedings (see *Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 1453).

(4) A reference may be made by a National Court if it considers that a decision on the question "is necessary to enable it to give judgment".

(5) It is, (as the Court of Justice has stated in its Recommendations to national courts in respect of preliminary ruling proceedings), desirable that a reference for a preliminary ruling should be made when the national proceedings have reached a stage at which the referring court is able to define the legal and factual context of the case so that the Court of Justice has available to it all the information necessary to check that European Union law applies to the proceedings.

Assessment

(i) General
21. The legal test for referring a question to the CJEU, for a court of first instance, is that such a court may, if it considers that a decision on the question is necessary to enable it to give judgment, request the CJEU to give a ruling thereon.

22. Both parties are in fact agreed, that, absent the English Reference, as a matter of law, the national court would have to refer the first question to the CJEU because it relates to a question on the validity or otherwise of a measure of EU law and such a decision can only be made by the CJEU.

23. However, the plaintiff submits that the first question should not be referred because the English courts have already referred exactly the same question to the CJEU. Moreover the answer to that question could entirely determine the outcome of these proceedings.

24. Therefore the decision which I have to make is whether I should refer question one to the CJEU at this stage of the proceedings.

(ii) The issue of admissibility
25. The defendants sought to argue that the English reference might not even be heard by the CJEU because there was a challenge to its admissibility. This admissibility challenge is based on the argument that the English reference was a judicial review taken by Philip Morris Inc. against "Intended Regulations" which the Secretary of State in England intended to bring in, pursuant to the TPD2 Directive. However, these regulations had not been implemented at the time of the English reference. There was therefore no English legislation or implementing regulations which would be before the CJEU, which it could consider in the context of this English reference.

26. However this submission was countered by Mr. Sreenan SC for the plaintiff who indicated that primary legislation had been passed in the UK (namely the Children and Families Act 2014, a copy of which was opened in court). Part 5 of this Act - dealing with the welfare of children - contains a heading entitled "Tobacco nicotine products and smoking". Section 94 of that Act is entitled "Regulation of retail packaging etc of tobacco products". Section 94 (1) provides that the Secretary of State may make regulations under subsection 6 if the Secretary of State considers that regulations may contribute at any time to reducing the risk of harm to, or promoting the health or welfare of, people under the age of 16. At the time of the English reference in November, 2014, these regulations had not been passed. (However, regulations have now been passed in the UK).

27. Mr. Sreenan SC also argued that any challenge to the admissibility of the Philip Morris reference was doomed to failure because in two similar cases the CJEU had rejected pleas of inadmissibility. Thus in *British American Tobacco (Investment) Ltd and Imperial Tobacco Ltd* Case C- 491/01 [2002] ECR I-11453, questions of admissibility were raised in connection with proceedings brought by BAT and Imperial Tobacco seeking permission to apply for judicial review of "the intention and/or obligation" of the UK government to transpose a Directive into national law. The Court held that the questions which were referred were admissible even though the national measures implementing a Directive had not yet been implemented. Likewise in *Gauweiler & Others v. Deutscher Bundestag* Case C- 62/14 ECLI:EU:C:2015:400, the CJEU had considered that a challenge to a decision of the governing council of the European Central Bank on the Euro Systems Outright Monetary Transactions ("OMT") was admissible, even though the decision had not yet been implemented and such implementation would only be possible after further legal acts had been adopted.

28. Obviously the question of admissibility is one for the CJEU alone. Therefore I simply note that there is a challenge to the admissibility of the English reference and I also note that that challenge will be fully opposed. It is therefore, in my view, an issue to which I do not think it is appropriate to attach any weight, one way or the other, in the exercise of my discretion.

(iii) Other considerations
29. It is clear that the Court is entitled to take into account, in the exercise of its discretion, the fact that another preliminary reference has already been made on an identical, or similar issue, or that similar proceedings are pending (or might be taken). (See *Friends of the Irish Environment Ltd. & Anor v. Minister for the Environment* 2007 3 I.R. 459).

30. Moreover, I have also considered the following extract from *Preliminary References to the European Court of Justice* (2nd ed., Oxford Press, 2014), Broberg and Fenberg at page 284:

> *"If an identical or corresponding question is already pending before the Court of Justice, the need for a reference will normally be less obvious. Indeed in cases where a national court has already submitted a question on the same matter, it is quite common for other national courts not to submit a new question but merely to postpone consideration of the case while waiting for the Court of Justice to render its preliminary ruling. The same consideration applies when the Commission has brought infringement proceedings under Article 258 TFEU before the Court of Justice regarding the same matter as the one before the national court or where the national court has already referred a preliminary question another case and now faces a similar issue in the new proceedings." (Emphasis added).*

31. I have also considered the "Recommendations of the CJEU to National Courts and Tribunals in relation to the initiation of preliminary ruling proceedings". Paragraphs 18 and 19 of these CJEU recommendations are entitled "The appropriate stage at which to make a reference for preliminary ruling". Para. 18 states as follows:

> *"A national court or a tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or a validity of European Union law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.*
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> *19. It is however desirable that a decision to make a reference to a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check where appropriate that European Union law applies to the main proceedings. In the interests of the proper administration of justice it may also be desirable for the reference to be made only after both sides have been heard".*

32. Moreover a national court when considering whether and/ or when to refer should also have regard to the proper functioning of the Court of Justice. Thus, as is stated in Broberg and Fenburg, Preliminary Reference to the European Court of Justice (op. cit at page 157):

> *"Whilst the spirit of co-operation which must govern the performance of the duties assigned by Article 267 to the national courts on the one hand and the Court of Justice on the other, requires the latter to have regard to the national courts proper responsibilities, it also implies that, in the use which it makes of Article 267, the national court should equally have regard to the proper functioning of the Court of Justice in this field."*
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> *"Moreover Article 267 does not give the latter jurisdiction to answer hypothetical questions but only to contribute to the solution of actual legal disputes in the member states".* (Emphasis added).

33. The undesirability of multiple references on the same issue before the CJEU was considered by Advocate General Jacobs in his opinion in *Wiener SI GmBH v. Hauptzollamt Emmerich* Case C-338/95 ECR 1997 I-06495, where he stated at para. 15 of his opinion:

> *"Every national court confronted with a dispute turning on the application of Community law can refer a question which, if more or less properly phrased, this Court is bound to answer after the entire proceedings have taken their course. That will be so even where the question is similar in most respects to an earlier question; the referring court (or the parties' lawyers) may always seek to distinguish the facts of the cases. It will also be so even where the question could easily, and with little scope for reasonable doubt, be answered on the basis of the existing case-law; again the facts may be different, or it may be that a particular condition imposed in earlier case-law gives rise to new legal argument and is regarded as needing further clarification. The net result is that the Court could be called upon to intervene in all cases turning on a point of Community law in any court or tribunal in any of the Member States. It is plain that if the Court were to be so called upon it would collapse under its case-load.*
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> *18. It seems to me that the only appropriate solution is a greater measure of self-restraint on the part of both national courts and this Court."*

34. I have also had regard to the decision of Fennelly J. in *Dowling & Ors. v. Minister for Finance* [2013] IESC 58. In this case, the respondent sought to refer questions to the CJEU as to whether, as a matter of EU law, certain parties could be precluded from being joined to the proceedings as notice parties. In the course of his judgment Fennelly J. stated in respect of the Article 267 TFEU mechanism as follows:

> *"64. The mechanism for obtaining preliminary rulings pursuant to Article 267 TFEU is based "on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary." (Case C-2/06 Kempter [2008] ECR I-411). It is true that the Supreme Court, being a court against whose decisions there is no further judicial remedy under national law, may become bound to refer a question of interpretation which it finds necessary to enable it to give judgment in the case before it. However, it is matter for this Court to assess the stage of the proceedings at which any such question should be referred. There may be cases in which a single point of law can be readily identified at an interlocutory stage. More frequently, however, it is appropriate to await any necessary findings of fact and full argument about relevant points of national law, which must be determined before the European Court can conveniently be asked to decide a disputed point of EU law."*(Emphasis added).

35. The defendants seek to rely on *Digital Rights Ireland Ltd v. Minister for Communications* [2010] 3 I.R. 251. However, the significant point of distinction between the Digital Rights case and the present case is that there is an English reference on exactly the same question pending before the CJEU. That was not the case with *Digital Rights*.

36. I also note that Ireland has submitted written observations to the CJEU in the English reference. It is clear therefore that the defendants in these proceedings, will have the opportunity, in the English reference, to make whatever arguments it wishes to make in respect of the invalidity of Article 24 (2). It means that the State is not shut out from making submissions in respect of the English reference. On the contrary, it has filed written submissions and it may have an opportunity to make further submissions to the CJEU in respect of the validity of Article 24 (2).

(iv) Assessment

37. Having considered all of the above, I am of the view that, I should not refer the first question to the CJEU at this stage of the

proceedings for the following reasons:

> 1. The first question on which the defendants seek a reference, is the validity of Article 24 (2) of the TPD2 Directive, having regard to Article 114 TFEU. However, precisely the same question has already been referred to the CJEU by the High Court of England and Wales (Administrative Division) on 7th November, 2014 in proceedings entitled *Philip Morris and Others v. The Secretary of State for Health* [2014] EWHC 3669 ("the English reference").
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> 2. It is clear from Article 267 TFEU that a national court may refer a matter to the CJEU "if it considers that a decision on the question is necessary to enable it to give judgment". However, it is clear that once the CJEU has made its decision on the English reference, then it may not be necessary for this court to refer any question to the CJEU to enable it to give judgment in these proceedings. Once the English reference has been decided by the CJEU, it will have a significant effect on these proceedings and may even dispose of them altogether.
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> 3. There is considerable urgency about the implementation of this Directive in Member States. The Directive itself states, in Article 29, that Member States shall bring into force the laws necessary to comply with this Directive by 20th May, 2016 and also that Member States shall apply those measures from 20th May, 2016.
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> 4. Given this deadline, it is of note that the English reference was made on 7th November, 2014. That reference appears to have been the subject of an expedited hearing procedure within the CJEU. Legal submissions have been exchanged between the parties. Member States who are interested have made their observations. Papers are now being translated. The matter has been given a hearing date before the CJEU in October/November 2015. Although no firm date can be given by which the CJEU will make its decision, it is anticipated that the CJEU will give its decision before May, 2016 given the urgency of these matters
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> 5. The CJEU hearing is therefore only four months away. That will decide the central issue in these proceedings.
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> 6. If a reference is made from the Irish courts to the CJEU, either of two things will happen. The first is that it is possible that this reference might be linked to the UK reference. If that were the case, it could delay the UK reference considerably. It would, for example, be necessary for the Irish reference to be processed, to permit an exchange of legal submissions and to permit all interested Member States to file their observations. In addition, all these documents would have to be translated and prepared for the CJEU. It is of course a matter for the CJEU as to whether it might link the Irish reference with the UK reference. However Mr. Sreenan SC for the plaintiff, submitted that if it were linked, it would significantly delay the UK reference. The second possibility is that if the CJEU decides not to link the Irish reference to the English reference, the English reference will be heard first and the question will be decided by the CJEU. In such a case, the Irish reference would become a moot.
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> 7. Given such a possibility, it would, in my view, be entirely wasteful of costs, both for the plaintiff and for the State – to say nothing of other Member States of the EU, or the Institutions of the EU - to make a reference on question one at this point, when the matter will be decided by the CJEU within a matter of months.
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> 8. In those circumstances I am of the view, that a decision on this question is not necessary - at this point in time - to enable a court to give judgment on this issue. Rather, it is a matter of common sense, and a matter of the appropriate administration of justice - both for this court and the CJEU - that a national court should not make preliminary references which are entirely duplicative and wasteful of time and costs.
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> 9. The third question which the defendants seek to refer, relates to the argument that, even if Article 24 (2) is invalid, Member States retain a competence to legislate in this area under different Articles of the Treaty. Mr. Sreenan SC however submits that it is not appropriate to refer this question at this time because it is, at the moment, hypothetical and speculative. It depends on the Court's answer to the validity of Article 24 (2) of the Directive. I agree with this submission. The only basis upon which the third question would need to be answered is if the CJEU holds that Article 24 (2) TPD2 is invalid. However, that is clearly a hypothetical question at the moment and it is not appropriate that a reference should be made for a hypothetical question.
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> 10. Mr Sreenan SC also submitted that the answer of the CJEU to the Article 24 (2) argument might also address other legal bases for the exercise of the Member States' competence in this area. He submitted that, in such a case, any such argument to be made by the defendants might be unstateable. That may be so but again it is a hypothetical situation and the Court should not refer hypothetical questions at this stage to the CJEU.
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> 11. Thus, I am of the view that it is neither necessary nor appropriate at this stage to refer question three to the CJEU. It is hypothetical and premature.

38. Mr Cush SC submitted that, in respect of these questions, there were no facts in dispute and no issues of domestic law in dispute. Mr Sreenan SC for the plaintiff accepted that this was so in relation to the first question, but that significant issues of fact were in dispute in relation to the third question and that evidence would have to be called on this issue (e.g. in relation to the question of the proportionality of the legislation). Having regard to my conclusions set out above I do not believe that it is necessary for me to resolve this issue at this time.

Conclusion

39. I would therefore conclude that it is neither necessary nor appropriate that I should refer either of the questions to the CJEU at this stage of the proceedings. It would be unnecessary, premature and wasteful of costs. I therefore refuse the application.