[2018] IEHC 85

THE HIGH COURT

2016 No 465 JR

Between:

GREGORY COLCLOUGH

Applicant

– and –

THE ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 21st February, 2018.

I

Key Issue Arising

1. The key issue arising in the within proceedings is whether the Association of Chartered Certified Accountants, a company incorporated by Royal Charter and having its global head-office in London, can properly be the subject of Irish-law judicial review proceedings in Ireland.

II

The Association of Chartered Certified Accountants

(i) Incorporation and Purpose.

2. Although originally established as an unincorporated association in 1904, the Association of Chartered Certified Accountants (ACCA) has, since 1974, had the legal form of a company registered in England and Wales. It was incorporated by Royal Charter, granted by HM Queen Elizabeth II, on 25th November, 1974. ACCA is established as a global body for professional accountants according to the provisions of the Royal Charter. That Charter may only be amended with the consent of the Privy Council. ACCA has its registered office and global head-office in London.

3. ACCA's principal objects and purposes are set out in para.3 of the Royal Charter, which provides as follows:

> *"The principal objects and purposes for which the Association is hereby constituted are to…promote the highest standards of competence, practice and conduct among members of the Association so engaged; to protect and preserve their professional independence and to exercise professional supervision over them; and to do all such things as may advance and protect the character of the profession of accountancy".*

4. Unlike many professional bodies which are organised on a strictly national basis, ACCA has developed an international presence and membership in pursuit of its objects and purposes. The Royal Charter sets out, at para.4, powers which include:

> *"(l) to form…committees…in any part of the world with such powers and subject to such conditions as the Council may from time to time determine…;*
>
> *(m) to procure the Association to be registered or recognised in any overseas country or place and to exercise any of its objects or powers in any part of the world."*

5. An obvious advantage to professional members of an international, rather than a purely national, professional body is that a member's professional qualification will be recognised in other countries without any need to re-qualify; in consequence, it is easier for members to take up employment or practice opportunities outside their home countries.

6. The principal professional qualification offered by ACCA is that of Chartered Certified Accountant which may be awarded following, *inter alia*, completion of relevant professional examinations. The full ACCA qualification is regarded as the equivalent of a taught United Kingdom Master's Degree by the United Kingdom's National Recognition Information Centre (UK NARIC). Likewise, Ireland's Higher Education and Training Awards Council (HETAC) considers qualification as a Chartered Certified Accountant to be a Level 9 qualification akin to postgraduate qualifications such as Master's Degrees. The ACCA qualification is also legally recognised as a qualification to practice as an accountant in all current member states of the European Union and the European Economic Area under the Mutual Recognition Directive, subject to some additional local professional qualification requirements. In many countries outside the European Union, the ACCA qualification is also legally recognised as a qualification to practice as an accountant and to conduct accountancy activities. This is thanks, *inter alia*, to mutual recognition arrangements and strategic partnerships that ACCA has put in place in countries in Europe, Asia, Africa, the Americas, and Oceania. Today, ACCA has about 188,000 members and 480,000 students in 178 countries. As an organisation and as a professional body, ACCA is a remarkable British and international success story.

(ii) The Association of Chartered Certified Accountants in Ireland.

a. In General.

7. ACCA has 20,000 members (including student members) in Ireland. However, it does not have any statutory establishment here. Instead, it has a representative branch office in Dublin (as it does, apparently, in many other countries). The role performed by this representative branch office within the ACCA framework is limited and purely administrative, with all matters relating to the renewal of membership and disciplinary procedures being conducted from ACCA's offices in the United Kingdom. Local offices, it seems, have no function in this regard and are reliant on ACCA's United Kingdom-based offices for direction and decision-making in almost all regards.

b. At Law.

8. ACCA is one of a number of accountancy membership bodies permitted by law in Ireland to authorise members to conduct audit, insolvency and investment business work in Ireland. The entitlement of such accountancy membership bodies (including ACCA) to admit members who are by such membership qualified to perform audits of companies to which the Irish companies code applies has been recognised in Irish law since the enactment of s.162 of the Companies Act 1963, as reinforced by s.187(1) of the Companies Act 1990 (both since superseded). As a condition of such recognition, any such accountancy membership body had to satisfy the Minister for Enterprise, *etc*., under s.191 of the Act of 1990 as to the sufficiency of the standards it applied to its members in the areas of ethics, codes of conduct and practice, independence, and like matters. The effect of the foregoing was that non-Irish accountancy bodies could not be recognised in Ireland as allowed to admit members who (by virtue of such membership) were qualified to perform audit, insolvency and business work in Ireland, unless they first satisfied the Minister that they met whatever standards the Minister considered appropriate in Ireland.

9. The role performed by the Minister for Enterprise, *etc*., passed to the Irish Auditing and Accounting Supervisory Authority (IAASA) under the Companies (Auditing and Accounting) Act 2003. The role of IAASA in this regard is now set out in the Companies Act 2014. One of IAASA's stated objects under the Act of 2014, is per s.904(1)(a), "[to] *supervise how the prescribed accountancy bodies regulate and monitor their members*". IAASA may, per s.905(2)(c), "*require changes to and approve (i) the constitution and bye laws of each prescribed accountancy body, including its investigation and disciplinary procedures and its standards"*. IAASA may, pursuant to s.930 of the Act of 2014, also grant recognition to a body of accountants for the purposes of the European Communities (Statutory Audits) (Directive 2006/43/EC) Regulations 2010, if satisfied, *inter alia*, as to the standards that such body applies to its members in the areas of ethics, codes of conduct and practice, independence, *etc*. ACCA is deemed, by s.930(2) of the Act of 2014, to have been granted such recognition. ACCA apparently has frequent engagements with IAASA to ensure that IAASA's requirements are met and that ACCA therefore retains its prescribed accountancy body status in Ireland, to the benefit and in the interests of ACCA members who choose to practice in Ireland.

10. Under s.933(2) of the Act of 2014, IAASA may, following a complaint or on its own initiative, for the purpose of determining whether a prescribed accountancy body has complied with the approved investigation and disciplinary procedures, enquire into (a) a decision by a prescribed accountancy body not to undertake an investigation into a possible breach of its standards by a member, (b) the conduct of an investigation by a prescribed accountancy body into a possible breach of its standards by a member, or (c) any other decision of a prescribed accountancy body relating to a possible breach of its standards by a member.

11. The provisions of the Act of 2014 which give IAASA rights to approve or require changes to ACCA's disciplinary procedures and the right to intervene after an issue has arisen as to the proper application or effectiveness of an investigative and/or disciplinary procedure by ACCA, do not establish or regulate any right on the part of a recognised accountancy body, such as ACCA, to investigate or discipline its members. These remain matters between a recognised accountancy body (operating in accordance with the laws which govern it) and its members.

(iii) Member Regulation.

12. The Royal Charter empowers ACCA's Council to make bye-laws and regulations to govern ACCA's affairs. ACCA publishes annually a 'Rulebook' comprising the Royal Charter, the Bye-Laws, Regulations and Codes of Ethics, that are notably comprehensive. The Bye-Laws, Regulations and Codes of Ethics rely for their legal status on the Royal Charter. The Charter is an instrument of the law of England and Wales, with the result that the Bye-Laws and Regulations are likewise instruments of the law of England and Wales.

13. The view within ACCA has, it seems, always been that in order for ACCA's system of member supervision to operate effectively, it must operate according to a single system of law, with that system of law being consistently applied. As the Bye-Laws and Regulations are instruments of the law of England and Wales, ACCA has always considered it apparent (and it would seem apparent) that the governing law of the Bye-Laws and Regulations is that of England and Wales. The Regulations, especially as regards disciplinary matters, are principally applied by in-house ACCA committees. However, it seems that it has always been understood within ACCA that insofar as it might be necessary for a court to intervene in an ACCA disciplinary procedure, the courts which are properly empowered so to do are the courts which have jurisdiction over ACCA by virtue, *inter alia*, of its establishment, viz. the courts of England and Wales.

14. Curiously perhaps, given its long history and international reach, ACCA appears never to have been the subject of judicial review or equivalent application in any state outside the United Kingdom. The issue of the proper court to hear claims against ACCA was raised in proceedings before the High Court of Northern Ireland in 2012 (*McAteer v. Association of Chartered Certified Accountants* [2012] NIQB 33). In that case the High Court of Northern Ireland held that it had jurisdiction under the Civil Jurisdiction and Judgments Act 1982 (the United Kingdom enactment which supports the requirements of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. L351, 20.12.2012, 1)) because the claim was essentially one for defamation arising from the publication of materials which formed part of particular disciplinary proceedings. Because of the risk that the judgment of *McAteer* was perceived by ACCA to present as regards the consistency of the application of ACCA's rules, the Council of ACCA determined to put the issue of jurisdiction beyond doubt by way of amendments to the Rulebook. This aspect of the Rulebook falls to be described in some detail hereafter.

(iv) Jurisdiction and Governing Law in Investigative and Disciplinary Procedures.

a. In General.

15. Each ACCA member, as a requirement of membership, submits to ACCA's Bye-Laws. These govern, *inter alia*, the issues of law and jurisdiction arising in the context of the relationship between ACCA and its members. The Bye-Laws form part of the Second Schedule to the Royal Charter. Bye-Laws 7(c) and (d), as amended in 2013 (post-*McAteer*) provide as follows:

> *"7(c) – Disciplinary proceedings under the bye-laws and applicable regulations shall take place in London unless the Association expressly determines to the contrary.*
>
> *7(d) – The relationship between the Association and its members, relevant firms, registered students and all other persons to whom the Charter, bye-laws and applicable regulations apply shall be governed by the law of England and Wales and (subject to bye-law 7(c) above) all disputes shall be subject to the exclusive jurisdiction of the High Court or County Court of England and Wales".*

16. Regulation 25 of the ACCA Complaints and Disciplinary Regulations 2013 elaborates on the effect of Bye-Law 7(c). Such

regulations are enacted by a decision of ACCA at its annual general meeting and approved by the Privy Council, acting pursuant to Bye-Law 9. Regulation 25 of the Complaints and Disciplinary Regulations provides as follows:

> *"25. Hearings*
>
> *(1) Proceedings of the Committee shall take place in London unless a direction is made to the contrary.*
>
> *(2) Where a case is of particular interest to a particular government or government agency, or primarily affects persons resident in a particular country, either the Disciplinary Committee or the Secretary may direct that the hearing before the Disciplinary Committee take place in that country."*

17. Although it is permissible for disciplinary proceedings involving a member who practises in a jurisdiction other than England and Wales to be conducted in such other jurisdiction (in ease of members), and although such hearings have been conducted in Dublin, it apparently remains most common for ACCA members from outside England and Wales (and their legal representatives) to appear via video-conference from their home country or indeed to attend in person in London.

b. In Mr Colclough's Case.

18. The relationship between ACCA and its members appears to be essentially contractual in nature. Mr Colclough originally became a member of ACCA on 17th April, 2001. In becoming a member, and upon each annual renewal of his membership thereafter, Mr Colclough submitted to, and agreed to be bound by, ACCA's Bye-Laws and Regulations, as amended from time, including those pertaining to disciplinary matters. Previous to the within proceedings, Mr Colclough has never at any time taken issue with the provisions on governing law and jurisdiction contained within the Bye-Laws and Regulations or suggested that alternative terms for the purposes of the regulation of ACCA disciplinary procedures should or did apply. ACCA's view that the relationship between it and its members is essentially contractual in nature is supported by views expressed by IAASA in a letter of 26th January, 2016, sent by it to an ACCA member other than Mr Colclough, and which states as follows:

"I refer to your letter dated 21 December 2015, regarding disciplinary proceedings instituted by the Association of Chartered Certified Accountants ('ACCA') against [text redacted].

> *The relationship between an accountancy body, such as the ACCA, and its members is governed by contract law. In this context, it is for the ACCA and [text redacted] to agree upon the law that is to apply to the relationship.*
>
> *As provided for in S905(2)(c) of the Companies Act 2014, IAASA has approved the ACCA Rulebook and is satisfied that Bye-Law 7(d) of the ACCA's Bye-Laws does not impede it in performing its statutory supervisory role, as set out in that Act."*

III

Mr Colclough's Present Difficulties

19. Mr Colclough is a chartered certified accountant who, up to and including 17th December, 2014, was certified by ACCA with an audit qualification, *i.e.* the permission to undertake audit work. His complaints in the within proceedings arise ultimately from a professional standards monitoring visit carried out in May 2012 for ACCA by a London-based employee of ACCA. Such visits are done pursuant to ACCA's Global Practising Regulations and consist of discussions with the relevant practitioner or partners concerned, *inter alia*, with auditing, together with an examination of relevant records, books, documents and files. The visit did not go well. The monitor submitted a report to a regulatory assessor (also an employee of ACCA), and he (the regulatory assessor) issued a number of requirements aimed at improving Mr Colclough's compliance with his professional obligations. These requirements included the requirement that he be subject to an accelerated (further) monitoring visit before 30th September, 2014.

20. Unfortunately, this further visit revealed certain circumstances that ACCA considered to cast doubt as to whether Mr Colclough was a fit and proper person within the meaning of ACCA's General Practice Regulation. As a result, ACCA decided to refer the perceived issues to its Admissions and Licensing Committee. On 17th December, 2014, Mr Colclough attended a hearing of that Committee in London. Perhaps unwisely, he attended without a lawyer, though this was allegedly a course of action that he took after speaking with certain officers of ACCA at its representative branch office in Dublin. Mr Colclough considers that there were various serious legal deficiencies associated with and contaminating the conduct of that hearing and the decision that ensued. Be that as it may (and the court naturally has no view in this regard), in an *ex tempore* decision of the 17th, followed by a written decision on the following day, the Admissions and Licensing Committee unfortunately concluded that Mr Colclough was not a fit and proper person to retain an audit qualification and, *inter alia*, required that Mr Colclough be issued with a practising certificate without audit qualification.

21. Pursuant to ACCA's Appeal Regulations 2014, Mr Colclough subsequently applied to ACCA's Appeal Committee Chairman for permission to appeal the decision aforesaid, identifying various grounds of appeal. On 15th February, 2015, this permission was refused. Mr Colclough contends that this decision was invalid or failed to comply with (Irish) constitutional justice.

22. On 20th February, 2015, consistent with ACCA's Rulebook and in order to exhaust all his procedural remedies, Mr Colclough sought to appeal the decision of the Appeal Committee Chairman. The appeal hearing took place at Dublin Airport on 19th April, 2016. The Appeal Committee determined that there was no basis upon which it would consider the refusal of permission to appeal. The substance of the decision was communicated to Mr Colclough on 19th April; written reasons issued on 6th May, 2016. Mr Colclough contends that the decision of the Appeal Committee was *ultra vires*, irrational, in breach of fair procedures and disproportionate.

23. Following on the effective completion of the above-described Admissions and Licensing process, and in what must seem to Mr Colclough to be something of a near never-ending nightmare, Mr Colclough was informed by one of ACCA's senior investigation officers that an investigation is now under way for and on behalf of ACCA's Professional Conduct Department. This investigation was apparently deferred by ACCA pending the completion of the above-described procedures. This professional conduct investigation is due to examine Mr Colclough's certification as an accountant and whether he is a fit and proper person to practise as an accountant. The re-activation of this investigation came some four years after the initial monitoring visit in May 2012. Mr Colclough complains, *inter alia*, as to the delayed nature of the said investigation and what he claims is the resultant prejudice to him. He also complains of a general want of fair procedures in ACCA's Regulations.

IV

Reliefs Sought by way of Judicial Review

24. As a consequence of the foregoing, Mr Colclough has made application to, and, on 4th July, 2016 (following adjournment of the application from 27th June, 2016) was granted leave by the High Court of Ireland to bring the within judicial review proceedings seeking the following reliefs:

> *"(i) An Order of Certiorari by way of Application for Judicial Review quashing the decision of the Appeal Committee of the Respondent (hereafter, 'ACCA') dated…19 April 2016 (the reasons for which were communicated on 6th May 2016) refusing the Applicant's permission to appeal a decision of the Admissions and Licensing Committee ('the ALC') of 17 December 2014.*
>
> *(ii) An Order of Certiorari by way of Application for Judicial Review quashing the decision of the Chairman of the Appeal Committee of ACCA of 20th February 2015 refusing permission to appeal.*
>
> *(iii) An Order of Certiorari by way of Application for Judicial Review quashing the decision of the ALC of ACCA of 17 December 2014.*
>
> *(iv) A Declaration by way of Application for Judicial Review that the manner in which the inquiry established by the Respondent operates, and the decisions taken by it, infringe principles of constitutional justice, including fair procedures and the principle of proportionality.*
>
> *(v) A Declaration by way of Application for Judicial Review that the Respondent has acted ultra vires and/or in breach of the bye-laws made and provided for under the Respondent's Appeal Regulation 2014 (as amended 1 January 2015).*
>
> *(vi) An Order of Prohibition by way of application for Judicial Review restraining or prohibiting the Respondent from taking any further steps in the implementation of its decision dated 19 April 2016.*
>
> *(vii) A Declaration by way of Application for Judicial Review that the Respondent is guilty of inordinate, excessive and inexcusable delay in and about the performance of its professional functions, in and about the conduct of an investigation, and/or in and about the procedures established pursuant to the provisions of the Charter, and bye-laws [of] 2015 and applicable regulations of the Respondent.*
>
> *(viii) A Declaration by way of Application for Judicial Review that the Respondent failed to conduct any or any adequate or timely investigation into the matters that are now the subject matter of the within proceedings.*
>
> *(ix) An Order of Prohibition by way of application for Judicial Review restraining or prohibiting the Respondent from the implementation of its decision of 19 April 2016 or from the taking of any further steps by reason of the fact that the Respondent and/or the Appeal Committee of the Association of Chartered Certified Accountants as convened by the Respondent has exceeded its authority conferred and/or by reason of the fact that the procedures as they are being adopted are ultra vires the 2015 bye-laws of the Respondent.*
>
> *(x) An injunction restraining the Respondent from taking any steps to deprive the Applicant of his license to practice as an accountant on foot of the decision or decisions referred to herein.*
>
> *(xi) Further or Other Order or Relief."*

25. Although it is not apparent from the face of the order, counsel for Mr Colclough at the hearing of the within application also appeared at the leave stage and indicated to this Court that it was made clear to, and understood by, the judge who granted leave that ACCA is a foreign body, headquartered abroad. On the same date that the application was initially moved, the solicitors for Mr Colclough wrote to ACCA and indicated, *inter alia*, that the application had been made and "*The matter is now adjourned to afford you time to consider the application and indicate your position to the Court*". On 1st July, 2016, a letter issued from ACCA to the solicitors for Mr Colclough (copied to the Registrar of the Irish High Court) indicating that ACCA was taking legal advice, that a substantive response would issue in due course, and that ACCA would not be attending in court on 4th July, 2016. In the event, leave was granted by the Irish High Court on 4th July, the court expressly being conscious of "*there being no appearance for the Respondent* [despite its] *having been put on notice of the within application*". The court sees nothing in the foregoing to prevent ACCA subsequently bringing the within motion contesting jurisdiction.

V

The Respondent's Motion Contesting Jurisdiction

26. On 23rd November, 2016, ACCA issued the notice of motion that is the subject of the within judgment, seeking, *inter alia*, the following reliefs:

> "1. *An Order pursuant to the inherent jurisdiction of this Honourable Court setting aside service on the Respondent of the notice of motion herein and dismissing or staying these proceedings on the grounds that this Honourable Court does not have jurisdiction pursuant to Order 11 or Order 11A of the Rules of this Honourable Court to hear and determine the Applicant's claim against the Respondent* [the '**Order 11/11A Relief**']

2. An Order pursuant to the inherent jurisdiction of this Honourable Court setting aside service on the Respondent of the notice of motion herein and/or dismissing or staying these proceedings on the grounds that exclusive jurisdiction to hear and determine the Applicant's claim against the Respondent herein is conferred on the courts of England and Wales by virtue of the provisions of Article 25 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast) [the 'Brussels Recast Relief'].

> 3. *In the alternative an Order pursuant to the jurisdiction of this Honourable Court setting aside service on the Respondent of the notice of motion herein and/or dismissing or staying these proceedings on the grounds that exclusive jurisdiction to hear and determine the Applicant's claim against the Respondent herein is conferred on the courts of*

England and Wales at common law by virtue of the Applicant's subscription and submission to the regulations, bye-laws and rules of the Respondent [together with Relief 5, the '**Common Law Reliefs'**].

4. *In the further alternative an Order pursuant to the inherent jurisdiction of this Honourable Court setting aside service on the Respondent of the notice of motion herein and/or dismissing or staying these proceedings on the grounds that because the Applicant's claim against the Respondent herein is governed by the law of England, by virtue of the provisions of Article 3 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), it is not amenable to relief by way of judicial review in this Honourable Court* [the '**Rome I Relief'**].

5. In the further alternative an Order pursuant to the inherent jurisdiction of this Honourable Court setting aside service on the Respondent of the notice of motion herein and/or dismissing or staying these proceeding on the grounds that because the Applicant's claim against the Respondent herein is governed by the law of England pursuant to common law principles of conflict of laws, by virtue of the Applicant's subscription and submission to the regulations, bye-laws and rules of the Respondent, it is not amenable to relief by way of judicial review in this Honourable Court [together with Relief 3, the '**Common Law Reliefs'**]."

VI

The Order 11/11A Relief

(i) Order 11.

27. Order 11, rule 1 of the Rules of the Superior Courts 1986, as amended (the 'RSC'), under the heading "*Service out of the Jurisdiction*" states that "Provided *that an originating summons is not a summons to which Order 11A applies, service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the court whenever* – [various grounds are then stated]." Order 11, rule 5 provides as follows:

> *"Every application for leave to serve a summons or notice of a summons on a defendant out of the jurisdiction shall be supported by affidavit, or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not, and where leave is asked to serve a summons or notice thereof under rule 1 stating the particulars necessary for enabling the Court to exercise a due discretion in the manner in rule 2 specified; and no leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction."*

28. None of the just-mentioned requirements has been complied with by Mr Colclough. Nor does the order of 4th July, 2016, make any reference to leave for service out of the jurisdiction having been granted for the purposes of O.11. Yet such 'service out' is precisely what was done. The notice of motion is addressed to "*ACCA UK*" at a London address and the proceedings were served on ACCA at its London office. So there has been non-compliance by Mr Colclough with O.11.

(ii) Order 11A.

29. The requirements of O.11 can only be obviated on the basis that O.11A governs the service of the proceedings. This would necessarily involve acceptance of the applicability of the Brussels Recast Regulation. Order 11A of the RSC, under the heading "*Service out of the Jurisdiction under Regulation (EC) No 1215/2012 or the Lugano Convention (Civil and Commercial Matters)",* provides, *inter alia*, as follows:

> *"1. The provisions of this Order only apply to proceedings which are governed by Article 1 of Regulation No. 1215/2012 or by Article 1 of the Lugano Convention and, so far as practicable and applicable, to any order, motion or notice in any such proceedings.*
>
> *2. Service of an originating summons or notice of an originating summons out of the jurisdiction is permissible without the leave of the Court if, but only if, it complies with the following conditions:*
>
> *(a) in the case of proceedings which are governed by Article 1 of Regulation No 1215/2012 –*
> *(1) the claim made by the summons or other originating document is one which, by virtue of Regulation No 1215/2012, the Court has power to hear and determine, and*
>
> *(2) no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union…*
>
> *…*
> *(10) For the purpose of this Order…*
>
> *'summons' includes, where the context so admits or requires, any further originating document."*

30. Notable too in this regard is O.4, r.1A, which provides as follows:

> *"1A. Where an indorsement of claim on an originating summons concerns a claim which by virtue of Regulation No. 1215/2012, Regulation No. 2201/2003, the 1968 Convention or the Lugano Convention, the Court has power to hear and determine, the following provisions shall apply:*
>
> *(1) The originating summons shall be endorsed before it is issued with a statement that the Court has the power under Regulation No. 1215/2012, Regulation No. 2201/2003, the 1968 Convention or the Lugano Convention to hear and determine the claim and shall specify the particular provision or provisions of Regulation No. 1215/2012, Regulation No. 2201/2003, the 1968 Convention or the Lugano Convention (as the case may be) under which the Court should assume jurisdiction.*

(2) The originating summons shall be endorsed before it is issued with a statement that no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union or in a Contracting State of the Lugano Convention."

31. There has been no compliance by Mr Colclough with O.4, r.1A. Moreover, as will be seen hereafter, whether the court applies Art.2 or Art.25 of the Brussels Recast Regulation, the courts of the United Kingdom have jurisdiction in relation to the proceedings that Mr Colclough seeks to bring.

(iii) Order 124.

32. Notwithstanding the errors described above, counsel for Mr Colclough has sought to pray in aid O.124, r.1 of the RSC which provides as follows:

> *"Non-compliance with these Rules shall not render any proceedings void unless the court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court shall think fit."*

33. Reference was made in this regard, *inter alia*, to the decision of the Court of Appeal in *Abama and ors v. Gama Construction (Ireland) Ltd and anor* [2015] IECA 179. However, neither O.124, r.1 nor the decision in *Abama* offers support for the proposition that such non-compliance as has occurred can somehow be addressed in such manner as to confer jurisdiction on the court where it has none, and as will be seen hereafter, the court has no jurisdiction to hear the within proceedings.

VII

Civil and Commercial Matters

(i) Common Terminology.

34. Article 1(1) of the Brussels Recast Regulation provides as follows:

> *"This Regulation shall apply in **civil and commercial matters** whatever the nature of the court or tribunal. It shall not extend, in particular, to **revenue, customs or administrative matters** or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)". [Emphasis added].*

35. Article 1(1) of the Rome Regulation provides as follows:

> *"This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in **civil and commercial matters**. It shall not apply, in particular, to **revenue, customs or administrative matters**." [Emphasis added].*

36. The commonality of terminology is apparent. Moreover, recital (7) of the Rome I Regulation provides, *inter alia*, that "*The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001*" [which latter measure, the Brussels Regulation, has now been replaced by the Brussels Recast Regulation].

37. The question that immediately arises then for consideration is whether the within proceedings are concerned with "*civil and commercial matters*". To determine that question it is useful to recall certain applicable rules of interpretation that arise from case-law.

(ii) Rules of Interpretation.

38. The following applicable rules of interpretation can be identified from the jurisprudence of the Court of Justice and the helpful judgment of Feeney J. in *Criminal Assets Bureau v. J.W.P.L.* [2009] 4 I.R. 526:

a. Scope of Regulations

(*1) "In order to determine whether a matter falls within the scope of Regulation No 1215/2012, it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action*" (Case C-551/15 Pula Parking d.o.o. v. Tederahn, para.34).

(2) More particularly, "[I]*n order to determine whether an act is an act iure imperii and, therefore, not subject to the Brussels Convention, regard must be had, first, to whether any of the parties to the legal relationship are a public authority, and, second, to the origin and the basis of the action brought, specifically to whether a public authority has exercised powers going beyond those existing, or which have no equivalent, in relationships between private individuals*." (Per AG Colomer in Case C-292/05 *Lechoritou and ors v. Dimosio tis Omospondiakis Dimokratias tis Germanias*, para.46; though not drawn from a judgment of the CJEU the observation appears consistent with the thrust of European Union case-law generally).

(3) "*Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in 'civil matters'*" (Case C-271/00 *Steenbergen v. Baten).*

(4) The concept of 'civil matters' only encompasses an action "*provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law"*. (*Steenbergen*, para.37).

(5) "[A]*ctions between a public authority and a person governed by private law fall outside the scope of the Brussels Convention only in so far as that authority is acting in the exercise of public powers*" (Case C-167/00 *Verein für Konsumenteninformation v. Henkel*, para.26).

b. "[C]ivil and commercial"

(6) The concept of "*civil and commercial*" must be interpreted to ensure that the rights and obligations deriving from the Regulations are "*equal and uniform*"; it must not be interpreted "*as a mere reference to the internal law of one or other of the States concerned*" (Pula Parking, para.33).

(7) The concept of "civil and commercial" must be regarded "*as an autonomous concept to be interpreted by reference, first, to the objectives and scheme of that regulation and, second, to the general principles which stem from the corpus of the national legal systems"* (*Pula* Parking, para.33).

c. "[R]*evenue, customs or administrative matters*"

(8) The concept of "re*venue, customs or administrative matters*" must be assimilated to the concept of a "*public authority…acting in the exercise of its powers*" (see generally *JWPL*; however, the last-quoted text is taken from *Lechoritou*, para.31).

(iii) Application of Principle

39. Re.(1): the legal relationship between Mr Colclough and ACCA is contractual in nature. Mr Colclough has elected to become and remain a member of ACCA and to submit himself to its Bye-Laws, Regulations and Rulebook.

40. Re.(2): ACCA is not exercising any public or statutory powers in respect of Mr Colclough . It is a professional body authorised under Irish law to authorise its members to conduct audit insolvency and investment work. And it is in fact regulated itself by IAASA and subject to the coercive powers of IAASA.

41. Re.(3): see Re.(2). There is no exercise of a "*prerogative*" power by ACCA, within the meaning of that term as deployed in Steenbergen.

42. Re.(4): see Re.(1).

43. Re.(5): see Re.(2).

44. Re.(6) and (7): noted.

45. Re.(8): see Re.(2).

46. It seems to the court to follow inexorably from the foregoing that what are at issue in the within proceedings are "*civil and commercial matters*" and thus that each of the Brussels Regulation and the Rome I Regulation apply.

VIII

The Brussels Recast Relief

(i) Article 4.

47. Article 4(1) of the Brussels Recast Regulation provides that "*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*". In *Ryanair Ltd v. Billigfluege De GmbH/Ticket Point Reiseburo GmbH* [2015] IESC 11, para.16, Charleton J., in his judgment for the Supreme Court, observed of Article 2 of the Brussels I Regulation (the predecessor of Article 4 of the Brussels Recast Regulation) that "*Article 2 is starting point for any choice of jurisdiction in relation to the Brussels I Regulation. Article 2 sets out the general rule that a defendant in proposed litigation should be sued in the country in which that defendant is domiciled*" and, at para. 22, writes of "*the primacy of jurisdiction under Article 2 being with the courts of the defendant to an action*" as something that "*emerges clearly from the text of that article*". In its judgment in Case C-269/95 *Benincasa v. Dentalkit Srl,* para.14, the Court of Justice even suggests of the Brussels Convention, a forerunner of the Brussels Recast Regulation that it (the Convention) "*appears hostile towards the attribution of jurisdiction to the courts of the plaintiff's domicile*".

48. Turning to the facts at hand, ACCA is a company registered in England and Wales where it is incorporated by Royal Charter. So its domicile is patently England and Wales and, strikingly, no alternative jurisdiction is contended for by Mr Colclough by reference to the Brussels Recast Regulation.

(ii) Article 25.

a. The Text of the Provision.

49. Article 25(1) of the Brussels Recast Regulation, under the somewhat cumbersome heading "*Prorogation of jurisdiction*" provides as follows:

> *"1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:*
>
> *(a) in writing or evidenced in writing;*
>
> *(b) in a form which accords with practices which the parties have established between themselves; or*
>
> *(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."*

b. A Consideration of Applicable Principle.

50. Article 25 is mandatory. As de Valera J. observes, in *Microsoft Ireland Operations Ltd v EMI International Electronics Limited and anor* [2010] IEHC 228, referring to the then current edition of Dicey and Morris on The Conflict of Laws, "[T]*he chosen court has no discretion to decline jurisdiction and other courts have no power to override the jurisdiction agreement*." In *Gaffney t/a Art of Fitness v. Life Fitness (UK) Limited* [2015] IEHC 123, para. 24, Peart J. helpfully identifies the relevant principles for the application of Art.25 in the following terms which the court is not free to depart from but which it respectfully adopts as being, in any event, entirely correct:

> "[1] [T]he question of whether there is or is not a consensus between the parties as to jurisdiction is not determined by reference to national law, but rather according to European law in the interests of ensuring consistency of interpretation throughout the European Community….
>
> [2] [T]*he provisions of Article 23 [now Art.25] must be strictly construed in view of the consequences for the parties of such a choice of jurisdiction….*
>
> [3] [W]*hether or not such a consensus exists must be assessed objectively, and in the context of the commercial environment in which the parties were conducting their business….*
>
> [4] [T]*he purpose of the formal requirements in Article 23 [now Art.25] is to ensure that a consensus between the parties is clearly and precisely demonstrated….*
>
> [5] *Article 23* [now Art.25] *can be satisfied where the jurisdiction clause is either in writing or evidenced in writing, but that the signature of a party on any such writing is not required in order that the party be bound by same….*
>
> [6] [T]*he fact that a party may have paid little attention to the jurisdiction clause, or perhaps did not even read a document containing same and therefore was not actually aware of its existence, does not prevent that party being deemed to be aware of it and therefore bound by it….*
>
> [7] [T]*he question whether the requirements of Article 23* [now Art.25] *are met for the purpose of deciding the preliminary issue of jurisdiction is a wholly separate question from the validity or enforceability of the contract in which the clause exists, the latter question being determined at a later stage in the proceedings under national law….*
>
> [8] [I]*t is the moving party seeking to rely upon Article 23 who has the onus of proving any relevant facts on the balance of probability, and who, so far as legal issues are concerned, must satisfy the court as to the correctness of any legal submissions made by them."*

51. Perhaps also of interest, given that the jurisdiction clause at issue in the within proceedings sits within the ACCA Bye-Laws, is the conclusion by the Court of Justice in Case C-214/89 *Powell Duffryn plc v. Petereit* that a jurisdiction clause in the statutes of a company is an agreement "*evidenced in writing*".

c. Application of Principle.

52. The requirements of Art.25 are amply met by the jurisdiction clause in the within proceedings. That clause, it will be recalled, is contained in Bye-Law 7(d), as amended in 2013 (post-*McAteer*). That clause was agreed to by Mr Colclough when he renewed his membership in December 2015 and when he effected any subsequent renewals. It is beyond question that, to use the terminology of Art.25, the clause is an "*agreement conferring jurisdiction*" that is "*in writing or evidenced in writing*". It is also a far-reaching provision, extending to "*all disputes*" between Mr Colclough and ACCA. There can be no doubt that there is, to borrow from the above-quoted wording of Peart J. in *Gaffney*, "*a consensus between the parties as to jurisdiction"*. And, that being so, as was made clear by de Valera J. in *Microsoft*, the court has "*no power to override the jurisdiction agreement"*, not that there is in any event any basis presenting on which the court could conceivably proceed so to do, had it that power (and it does not).

IX

The Rome I Relief

(i) Articles 3(1) and 9.

53. Article 3(1) of the Rome I Convention provides as follows:

> *"A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."*

54. In this regard, it will be recalled that ACCA Bye-Law 7(d) provides for the relationship between ACCA and its members to "*be governed by the law of England and Wales".* It seemed to the court at hearing that perhaps Mr Colclough's greatest trepidation as regards his dealings with ACCA is the applicability of the law of England and Wales to the dealings between him and ACCA. This law, however good (and it is good), will not, Mr Colclough maintains, extend to him certain constitutional and other legal protections that he would enjoy as a matter of Irish law, which protections, not 'to put too fine a tooth on things', Mr Colclough clearly views, rightly or wrongly, would stand him in better stead, so far as concerns his prospects of triumphing in his current legal entanglements with ACCA, than do the provisions and principles of applicable English law. At hearing, counsel for ACCA repeatedly deployed a phrase from the card-table when approaching this aspect of the proceedings, and it is as good a way as any of describing what Mr Colclough is about in making the just-described argument, viz. that he is seeking to 'trump' applicable law by bringing the provisions of the Constitution to bear. Put more formally, Mr Colclough is effectively relying in this regard on Art.9 of the Rome I Regulation which provides, *inter alia*, as follows, under the heading "*Overriding mandatory provisions*":

> *"1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*

…

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

(ii) Applicable Principle.

55. The following observations as to applicable principle might usefully be made:

a. Mandatory Requirements.

(1) "*As a derogating measure, Article 9 of the Rome I Regulation must be interpreted strictly*", *per* the Court of Justice in Case C-135/15 *Republik Griechenland v. Nikofiridis*, para. 44.

(2) That strict interpretation is required because "*to permit the court of the forum to apply overriding mandatory provisions of the legal order of Member States other than those which are expressly referred to in Article 9(2) and (3) of the Rome I Regulation would be liable to jeopardise full achievement of the regulation's general objective, which, as stated in recital 16, is legal certainty in the European area of justice.*" (*Nikoforidis*, para.46).

(3) "[T]*he list, in Article 9 of the Rome I Regulation, of the overriding mandatory provisions to which the court of the forum may give effect is exhaustive*". (*Nikoforidis*, para.49).

(4) "*Article 9 of the Rome I Regulation must…be interpreted as precluding the court of the forum from applying, as legal rules, overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed*". (*Nikoforidis*, para.50).

b. Waiver of Constitutional Rights.

(5) It is long-established, on the highest authority, that constitutional rights may be waived. So, for example, Walsh J. observes *in State (Nicolaou) v. An Bord Uchtála* [1968] 102 I.L.T.R. 1, 41, a decision of the Supreme Court, that "*There is no provision in Article 40 which prohibits or restricts the surrender, abdication, or transfer of any of the rights guaranteed in that Article by the person entitled to them*." As constitutional rights are capable of, to borrow from the wording of Walsh J., "*surrender, abdication or transfer*", it follows inexorably as a matter of logic that constitutional rights cannot operate as "*overriding mandatory requirements*".

c. Amenability to Judicial Review.

(6) A range of factors may determine the availability of judicial review, including, *inter alia*, the source of a body's powers, the functions of such body, the importance of such functions to those affected by the discharge of same, whether the relevant powers arises from a non-negotiable contract and whether there is a duty to act judicially. (See *e.g., Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 I.R.86).

(7) Where decision-making is based on a contractual relationship, that will displace amenability to judicial review. (See *e.g., Murtagh v. Board of Governors of St Emer's National School* [1991] I.L.R.M. 549).

(8) Where the relationship between individuals and their regulatory body is governed by contract, it is not amenable to judicial review. (See *e.g., Rajah v. Royal College of Surgeons in Ireland* [1994] 1 I.L.R.M. 233).

(iii) Application of Principle.

56. When one considers the just-mentioned principles and the 'trumping' argument that Mr Colclough seeks to make *vis-à-vis* the Constitution, it can be seen that this argument does and must fail for at least three reasons. First, it would give a breadth to the concept "*mandatory requirements*" that does not pertain as a matter of law. Second, the 'trumping' argument proceeds on what is, with respect, the mistaken notion that constitutional rights cannot be waived. Third, judicial review simply does not lie against ACCA in this jurisdiction: it does not enjoy a statutory source of power and the relationship between Mr Colclough and ACCA is based on a contract to which Mr Colclough has voluntarily submitted. It follows from the foregoing that the concept of 'overriding mandatory provisions' is of no avail to Mr Colclough in terms of displacing the choice of "*the law of England and Wales"* in ACCA Bye-Law 7(d).

X

The Common Law Reliefs

(i) Overview.

57. If for some reason the Brussels Recast Regulation and the Rome I Regulation did not apply to the within proceedings, and each of the said Regulations does apply, Mr Colclough's application would still fail as a matter of common law. This is because, as a matter of common law, Bye-Law 7(d) is determinative and identifies (i) the exclusive jurisdiction as England and Wales (ii) the choice of the law of England and Wales.

(ii) Jurisdiction.

58. It is clear from the judgment of Lord Bingham in *Donoghue v. Armco Inc* [2001] UKHL 64, para.24, that, as a matter of English law (and the same applies as a matter of Irish law) a court presented with a contract containing a jurisdiction clause will "*ordinarily exercise its discretion (whether by granting a stay of proceedings…or by restraining the prosecution of proceedings in the non-contractual forum abroad., or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum*". Mr Colclough has not sued in contract but it seems to the court that the observations of Lord Bingham apply *mutatis mutandis* in the context of judicial review proceedings. And, for the various reasons outlined in the preceding pages, the court does not see the requisite "*strong reasons*" to present. Nor is there any dilatoriness or unconscionable conduct that brings this

case outside how the court would "*ordinarily exercise its discretion*".

(iii) Choice of Law.

59. When it comes to choice of law, as (i) Lord Reid observes in *Whitworth Street Estates (Manchester) Ltd v. James Miller and Partners Ltd* [1970] AC 583, 603, "*Parties are entitled to agree what is to be the proper law of their contract"*, and (ii) Lord Wright observes in *Vita Food Products Inc v. Unus Shipping Co* [1939] AC 277, 290 that "[W]*here there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy*." So, subject to the to-be-expected exceptions, none of which present on the facts of this case, the law, properly, gives effect to what has been agreed between the parties. And here the current form of Bye-Law 7(d) was freely accepted by Mr Colclough when he renewed his ACCA membership in December 2015 and as part of any subsequent renewals.

XI

Foreign Public Law

60. It should be clear from the foregoing that the court considers that the Brussels Recast Regulation and the Rome I Regulation are applicable. The consequences of the applicability of those Regulations has been examined and various conclusions reached by the court that mean it will accede to the motion brought by ACCA. All that being so, it is not strictly necessary for the court to deal with the consequences of a finding (for it makes no such finding) that (i) the Regulations aforesaid are not applicable (they are applicable), and (ii) Bye-Law 7(d) is not determinative (it is determinative), because (iii) what confronts the court is an "*administrative matter*" (it is not). Nonetheless, the issue having been raised in argument, the court would make the following observations in this regard:

> (1) as indicated above ACCA is not amenable to judicial review in Ireland; by contrast, it is amenable to judicial review in England and Wales.
>
> (2) the Irish courts will not directly or indirectly enforce the penal, revenue or public laws of another jurisdiction (see *Buchanan v. McVey* [1954] 1 I.R. 89), the rationale for this stance, which also pertains under the laws of the neighbouring jurisdiction being succinctly captured by Lord Keith in his judgment in Government of *India v. Taylor* [1955] A.C. 491, 511, where he observed that "[A]*n assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."*
>
> (3) the foregoing manifests in Irish law by way of two legal precepts, *viz*. (i) the Irish courts will not entertain proceedings seeking the enforcement of the public law of another State (see, e.g., *Larkins v. National Union of Mineworkers* [1985] I.R. 671), and (ii) the Irish courts will not entertain proceedings seeking reliefs against officers exercising public law power in another State (see, *e.g.*, *Adams v. Director of Public Prosecutions* [2001] 1 I.R.47 and *Short v. Ireland (No. 2)* [2006] 3 I.R. 297).

61. The effect of the above is that, if Mr Colclough were correct (and he is not) that his relationship with ACCA is other than contractual, that relationship would fall to be determined by reference to the public law of England and Wales. And the Irish courts, as stated above, will not enforce the public law of England and Wales, for to do so, to borrow the terminology of Lord Keith in Taylor, would be contrary to the concept of independent sovereignties on which the national and international systems of governance rest.

XII

Public Policy

62. To the extent that there is contention made that it would be contrary to public policy for the court, by granting the reliefs now sought by ACCA, in effect leaving Mr Colclough to pursue such relief(s) as he may wish to pursue in England and Wales, such contention is respectfully rejected by the court for four reasons:

> (1) ACCA has indicated that it is amenable to judicial review in England and Wales. So judicial review may be sought there.
>
> (2) where an entity is not subject to judicial review in England and Wales (and ACCA is), the courts of England and Wales exercise a supervisory jurisdiction over disciplinary proceedings. (See, e.g., *Nagle v. Feilden* [1966] 2 Q.B. 633, Edwards v. SOGAT [1971] Ch. 354, R. (*Sunspell Ltd (t/a Superlative Travel)) v. Association of British Travel Agents* [2001] ACD 16, *Bradley v. Jockey Club* [2004] EWHC 2164, *Fallon v. Horseracing Regulatory Authority* [2006] EWHC 230, and *McKeown v. British Horseracing Authority* [2010] EWHC 508).
>
> (3) apart from Mr Colclough's contention that it is so, there really is nothing before the court to suggest that Mr Colclough would necessarily receive a lower level of protection under the laws or before the courts of the United Kingdom than he would obtain in Ireland.
>
> (4) so far as any constitutional rights and protections are concerned, Mr Colclough has waived same and any 'trumping' argument that might be raised in this regard proceeds, as the court has indicated above, on the mistaken notion that constitutional rights cannot be waived.

XIII

Conclusion

63. For the reasons set out in the preceding pages, the court will order that the service on ACCA of the notice of motion in the within proceedings be set aside and that the within proceedings be dismissed.