Neutral Citation Number: [2008] IEHC 124

THE HIGH COURT

1997 No. 10802 P

ELAINE FARRELL

PLAINTIFF

AND
ALAN WHITTY, THE MINISTER FOR THE ENVIRONMENT, IRELAND AND THE ATTORNEY GENERAL AND THE MOTOR INSURANCE BUREAU OF IRELAND

DEFENDANTS

Judgment of Mr. Justice Birmingham delivered the 31st day of January, 2008

Factual background to the present proceedings
1.1 On January, 26th, 1996, the plaintiff was travelling in a van driven by the first named defendant when it was involved in an accident. The vehicle was not fitted with seating in the rear; it was in this area that at the time of the accident the plaintiff was seated on the floor. This area was intended not for carrying passengers but for carrying goods.

1.2 It is the plaintiff's case that at or near Cookstown/Fortunestown, Tudor Lane, Tallaght the first named defendant lost control of the vehicle causing it to collide with a wall, as a result of which she suffered personal injuries.

1.3 Subsequent to the accident it transpired that the first named defendant was an uninsured driver. Accordingly, the plaintiff sought to recover compensation from the fifth named defendant, the Motor Insurance Bureau of Ireland ("MIBI"). The plaintiff sought to do so pursuant to the terms of an agreement between the second named defendant, the Minister for the Environment ("the Minister") and the MIBI dated 21st December, 1988.

1.4 The MIBI refused to become involved in the claim and refused to compensate the plaintiff. It did so on the basis that the plaintiff was travelling in a part of the vehicle not fitted with seating and accordingly insurance was not compulsory.

1.5 In July, 2001 the plaintiff obtained judgment by default against the first named defendant. The question of assessment of damages was deferred to the trial of the action.

The legal background to the present proceedings
2.1 It appears convenient to set out the legal background both under Irish domestic law and under EU law. Section 56 of the Road Traffic Act, 1961 (as amended) imposes the general obligation on the user of a motor vehicle to be covered by liability insurance for injury or damage to third parties. The obligation is to be insured in respect of all sums for which the user shall be liable to any person exclusive of "excepted persons".

2.2 The question of who is or who is not an excepted person is thus of critical significance. The question of excepted persons is dealt with at s. 65(1) of the Road Traffic Act, 1961 (as amended). It provides as follows:-

> "In this Part of this Act "excepted persons" means the following persons:
>
> > a) any person claiming in respect of injury to himself sustained while he was in or on a mechanically propelled vehicle (or a vehicle drawn thereby) to which the relevant document relates, other than a mechanically propelled vehicle, or a drawn vehicle, or vehicles forming a combination of vehicles, of a class specified for the purposes of this paragraph by regulations made by the Minister, provided that such regulations shall not extend compulsory insurance in respect of civil liability to passengers to-
> >
> > > (i) any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part of the vehicle is designed and constructed with seating accommodation for passengers..."

2.3 The approach to exemption in s.65 (1) is a somewhat unusual one which was categorised as something of a "reverse definition" by counsel who appeared for the plaintiff in the case of *Delargy v. The Minister for the Environment and Local Government*, [2005] IEHC 94, a case to which I will refer later.

24. In summary, the position would appear to be that one is obliged to be covered by insurance in respect of injuries to any person other than an "excepted person". However, everybody is an "excepted person" unless positively included by a ministerial order. The power of the Minister is constrained by the stipulation that the obligation of compulsory insurance shall not be extended to passengers in any part of a vehicle, unless that part of the vehicle is designed and constructed with seating accommodation.

2.5 Article 7(1) of the European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations, 1992 (S.I. No. 347 of 1992) substituted a new s.65(1)(a) of the Act of 1961 which specified the classes of vehicles to which the section applied. The change effected by the Regulations of 1992 extended the category of vehicle and passengers who were covered with effect from the 20th November 1992, but even under this new more expansive regime the compulsory obligation to insure does not apply to passengers travelling in a part of a vehicle not designed or constructed for passengers.

2.6 Accordingly, passengers in the rear of vehicles not fitted with seating are persons in respect of whose injuries the MIBI would not appear as a matter of domestic law to be obliged to compensate.

The EC Legislative Framework
3.1 A number of directives are relevant. In particular, Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member Sates relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (hereafter known as "the First Directive"); Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles (hereafter known as "the Second Directive"); and Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (hereafter known as "the Third Directive").

The First Directive
3.2 This directive was adopted with the objective of facilitating the free movement of goods and persons. The operative portion of the First Directive was article 3(1) which provides:-

> "Each Member State shall, subject to Article 4, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures"

3.3 Article 1(1) of the First Directive defined vehicles in the following terms:-

> "…any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer, whether or not coupled."

This definition of a vehicle remains in force for the purpose of the Second and Third Directives.

The Second Directive
3.4 The Second Directive required the Member States to make provision for a body to guarantee that the victims of an accident would not remain without compensation where the vehicle which caused the accident was uninsured or unidentified. Article 1(4) is particularly relevant and provides as follows:-

> "Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied. This provision shall be without prejudice to the rights of the Member States to regard compensation by that body as subsidiary or non-subsidiary and the right to make provision for the settlement of claims between that body and the person or persons responsible for the accident and other insurers or social security bodies required to compensate the victim in respect of the same accident."

3.5 It should be noted that the Second Directive did not in any way restrict the Member State's entitlement to derogate as provided by the First Directive and accordingly the Second Directive did not as a matter of European Law affect the legality of the Regulations of 1962. See the decision of the Court of First Instance in *Withers v. Delaney and the Motor Insurance Bureau of Ireland* (Case 158/01)[2002] ECR I-08301.

The Third Directive
The Third Directive was the most ambitious to date. It was designed to fill gaps which were identified as existing in respect of compulsory insurance for passengers in motor vehicles. So, the preamble to the Third Directive states:-

> "Whereas there are, in particular, gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States; whereas, to protect this particularly vulnerable category of potential victims, such gaps shall be filled."

Article 1 of the Third Directive states in unequivocal terms:-

> "…the insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle".

Ireland was obliged to comply with the terms of article 1 and 2 of the Third Directive by the 31st December, 1995, as regards passengers of vehicles exclusive of pillion passengers of motorcycles.

3.6 It will be recalled that the original European Communities (Road Traffic) (Compulsory Insurance) Regulations, 1975 (S.I. No. 178 of 1975) were amended by the Regulations of 1992. These amendments extended the area of compulsory insurance to liability for injury to passengers travelling in vehicles with seating and passengers on motor cycles, but did not appear to extend those requirements to persons sustaining injury when travelling in the part of a vehicle that was not fitted with seating.

The History of the Present Proceedings
4.1 On 18th September, 1997, a plenary summons was issued on behalf of the plaintiff claiming:-

> a) Damages for personal injuries arising out of the negligence, breach of duty including breach of statutory duty of the first named defendant and;
>
> b) A declaration that the plaintiff is entitled to rely upon the provisions of Council Directive 72/166/EEC as amended by Council Directive 90/232/EEC in respect of the matters complained of in the proceedings;
>
> c) A declaration that the European Communities (Road Traffic)
>
> (Compulsory Insurance) (Amendment) Regulations, 1992 failed to implement adequately or at all the relevant provisions of Council Directive 72/166/EEC which was amended by Council Directive 90/232/EEC.

4.2 Defences were filed which, *inter alia*, denied that the plaintiff was entitled to rely on the provisions of Council Directive 72/166/EEC as amended by Council Directive 90/232/EEC and further denied that the European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations, 1992 (S.I. 347 of 1992) failed to implement adequately or at all the relevant provisions of Council Directive 72/166/EEC as amended by Council Directive 90/232/EEC.

4.3. Thereafter, the plaintiffs and defendants agreed to a number of points of law being determined by the High Court as preliminary issues pursuant to Order 25 rule 1 of the Rules of the Superior Courts. These issues were as follows:-

> (1) In so far as s. 65 (1) of the Road Traffic Act, 1961, as amended by article 7 of the European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations ,1992 provide that regulations made by the second named defendant:
>
> > "…..shall not extend compulsory insurance in respect of civil liability to passengers to –
> >
> > > (i) any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part is designed and constructed with seating and accommodation for passengers…"
>
> does s. 65(1) as amended implement EC Council Directives 72/166/EEC, 84/5/EEC and 90/232/EEC in a proper and permissible manner?

(2) If the answer to question (a) is in the negative, are the relevant provisions of EC Council Directives 72/166/EEC, 84/5/EEC and 90/232/EEC directly effective so that the plaintiff is entitled to rely on same in respect of the matters complained of in these proceedings?

(3) If the answer to question (b) is in the affirmative, is the plaintiff entitled to make recovery from the fifth named defendant pursuant to the terms of the agreement between the second named defendant and the fifth named defendant dated the 21st December, 1988?

4.4. When the matter came before the High Court on 30th July, 2004, the Court (Ó'Caoimh J) decided to refer the matter to the European Court of Justice (ECJ) for a preliminary ruling under Article 234 EC Treaty . He did so on the following two questions:

(1) As of December, 31st, 1995, the date by which Ireland was obliged to implement the provisions of the Third Directive in respect of passengers on vehicles other than motor cycles, did article 1 of the Third Directive oblige Ireland to render insurance compulsory in respect of civil liability for injury to individuals travelling in that part of a motor vehicle not designed and constructed with seating accommodation for passengers?

(2) If the answer to question 1 is in the positive, does article 1 of the Third Directive confer rights on individuals that may be relied upon directly before the National Courts?

It can be seen by the reference, Ó'Caoimh J was in effect seeking a preliminary ruling on the points of law 1 and 2 that had been identified.

4.5 However, no such ruling was sought in relation to point 3 as to whether the plaintiff was entitled to recover from the MIBI pursuant to the terms of the agreement between it and the Minister. I have been informed that when the question of a reference was raised, that the MIBI expressed a preference that this third issue should not be the subject of a preliminary reference.

On 19th April, 2007, the ECJ (in *Farrell v. Whitty, Minister for Environment* (Case 356/05) [2007] E.C.R. I-03067) gave the following answers to the questions that had been referred to it:-

"[The Court] (First Chamber) hereby rules:

(1) Article 1 of the Third Council Directive 90/232/EEC of the 14 May, 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles is to be interpreted as precluding national legislation whereby compulsory motor vehicle liability insurance does not cover liability in respect of personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers.

(2) Article 1 of the Third Directive 90/232 satisfies all the conditions necessary for it to produce direct effect and accordingly confers rights upon which individuals may rely directly before the national courts. However, it is for the national court to determine whether that provision may be relied upon against a body such as the Motor Insurers' Bureau of Ireland."

In essence, the ECJ gave clear answers to the two issues that had been referred to it but withheld expressing a view on whether the plaintiff could recover from the MIBI. This of course, was the aspect of the preliminary legal issues on which the High Court decided not to seek a preliminary ruling.

The Net Issues before the Court
5.1 Against this background it is agreed that the net issue now for determination by the court is the following:-

"May a Directive (in this case article 1 of Third Directive 90/232) which confers rights upon which individuals may rely directly before the National Court be relied upon against the Motor Insurance Bureau of Ireland".

It is further agreed this issue can be determined by deciding whether the Motor Insurance Bureau of Ireland is or is not "emanation of the State" as this phrase is understood in European Law.

An overview of the Motor Insurance Bureau of Ireland
6.1 The MIBI is a company set up under the Companies Acts and limited by guarantee. It is a private company set up by the insurance companies who operate in the motor insurance market in the State. The structures of the company are provided for by Memorandum and Articles of Association.

6.2 The Motor Insurance Bureau of Ireland is not State-funded.

6.3 At present the MIBI operates subject to the terms of an agreement made between it and the Minister for the Environment dated 21st December, 1988, ("1988 Agreement"). The 1988 Agreement is one of a series of agreements made between the Minister for the Environment and in the past the Minister for Local Government and the MIBI. The original agreement was entered into in 1955. It should be noted that each agreement stands alone and does not operate as a graft onto what went before.

6.4 Participation in the MIBI is not voluntary but, by virtue of s. 78 of the Road Traffic Act, 1961 (as amended), it is a requirement for carrying on a motor insurance business in the State.

6.5 Aspects of the structure and constitution of the MIBI and its manner of operation have been the subject of comment and debate during the course of the proceedings and I will return to this following a review of the authorities. The significance of the comments will then come into clear focus.

The judgment of the ECJ in the present case
7.1 In summary, the ECJ in *Farrell v. Whitty*, while adverting to the possibility of proceedings against the MIBI, declined to express a concluded view.

7.2 The issues dealt with by the court are to be found at paras. 37 to 44 of the judgment. Insofar as it is the manner of treatment of this issue which has seen this case come back before the High Court, it seems appropriate to quote paras. 37 to 44 in full:-

"37. As regards Question 2, which asks whether individuals may rely directly upon Article 1 of the Third Directive before the national courts, it should be pointed out that it has consistently been held that a provision in a directive has direct effect if it appears, as far as its subject matter is concerned to be unconditional and sufficiently precise (Case 8/81 *Becker* [1982] ECR 53; Joined Cases C-253/96 to C-258/96 *Kempelmann and Others* [1997] ECR I-6907, paragraph 37; and Case C-292/02 *Meiland Azewijn* [2004] ECR I-7905, paragraph 57).

38. It must be held in the present case that, as the Commission argues, those criteria are satisfied by Article 1 of the Third Directive. That article allows both the obligations of the Member State and the beneficiaries to be identified, and its provisions are unconditional and precise. Article 1 of the Third Directive may accordingly be relied upon in order to set aside provisions of national law which exclude from the benefit of the guarantee provided by compulsory insurance cover persons travelling in any part of a vehicle which is not designed and constructed with seating accommodation for passengers.

39. The question remains whether that provision may be relied on against a body such as the MIBI.

40. A Directive cannot be relied on as against individuals, whereas it may be relied on as against a State, regardless of the capacity in which the latter is acting, that is to say, whether as employer or as public authority. The entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and have for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals (Case C-188/89 *Foster and Others* [1990] ECR I-3313 paragraph 20; Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 23; and Case C-157/02 *Rieser Internationale Transporte* [2004] ECR I-1477, paragraph 24).

41. Since the national court has not provided sufficient information regarding the MIBI for it to be possible to determine whether the latter can be assimilated to such a body, it is for the national court to ascertain, taking account, on the basis of the above considerations, of the status of the MIBI and its relationship with the Irish State, whether the directive may be relied upon against it.

42. Should the national court decide that the directive cannot be relied upon against the MIBI, it will be bound, when applying domestic law and, in particular, legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, to interpret national law, so far as possible, in the light of the wording and the purpose of the Directive concerned in order to achieve the results sought by it (Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-12537, paragraph 21, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8834, paragraph 113).

43. In any event the liability of the Member State to make good damage caused by a failure to transpose a Directive, within the meaning of the judgment in Joined Cases C-6/90 and C-9/90 Francovich & Ors. [1991] ECR I-5357, may arise.

44. The answer to Question 2 should therefore be that Article 1 of the Third Directive satisfies all the conditions necessary for it to produce direct effect and accordingly confers rights upon which individuals may rely directly before the national courts. However, it is for the national court to determine whether that provision may be relied upon against a body such as the MIBI."

Paragraph 40 of the ECJ judgment is particularly relevant and at this stage it is sufficient to note the language of the paragraph would appear to have its origin in a case of *Foster & Ors.* (Case C-188/89) [1990] ECR I-3313, at para. 20.

Before moving on from the European Court of Justice's dealings with this case it is appropriate to refer briefly to the opinion of the Advocate General in *Farrell v. Whitty* delivered on 5th October 2006 and the stance taken by the Commission. In para. 69, Advocate General Stix-Hackl opines as follows:-

"With regard to a body governed by private law, the members of which are insurance companies operating on the vehicle insurance market in Ireland, linked to the State by a private law agreement with a view to undertaking the functions of the body provided for in Article 1(4) of the Second Directive, it is to be determined whether the MIBI may be regarded as an emanation of the State for the purposes of the yardsticks referred to in *Foster*. According to the Court, 'unconditional and sufficiently precise provisions of a Directive [can] be relied on against organisations or bodies … subject to the authority or control of the State or [having] special powers beyond those which result from the normal rules applicable to relations between individuals'. It follows that 'a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct affect may be relied upon'."

At para. 71 of her opinion she goes on to say:-

"71. Considering how little information was supplied by the national court concerning the MIBI, it seems difficult to claim at the outset that the latter is subject to the State's authority or control and it is uncertain whether it possesses special powers beyond those which result from the normal rules applicable to relations between individuals. On the other hand, it is not denied that the MIBI performs the functions of a body authorised for the purposes of Article 1(4) of the Second Directive, charged with compensating victims of accidents caused by unidentified or uninsured vehicles. This responsibility is public in nature, for it is provided for by the Second Directive itself, State control being exercised by means of the authorisation – in this case contained in an agreement – of the body in question.

72. In conclusion, it seems to me that the MIBI may, as a body authorised for the purposes of Article 1(4) of the Second Directive responsible for the function entrusted to those bodies by that directive, be put on the same footing as the State, with the result that Article 1 of the Third Directive may be relied upon by individuals before the national courts."

The reasoning of the Advocate General echoes the submissions that had been made by the Commission. This issue was addressed in paragraph 35 and subsequent paragraphs of its submissions. After reciting the information in relation to the MIBI that they gleaned from the written submissions lodged on behalf of the MIBI it nonetheless went on to observe as follows:-

"However, the Commission would emphasise that the MIBI has nevertheless been established as the authorised body for the purpose of Article 1(4) of the Second Directive with the special task for providing compensation for damage to property or personal injuries caused by a non-identified vehicle or a vehicle for which the compulsory insurance obligations have not been satisfied. In the Commission's view such a task merely resembles a specific public function or mission within the meaning of *Foster* and it therefore tends to be of the opinion that the MIBI is to be considered as an emanation of the State."

The jurisprudence of the ECJ

8.1 It is agreed on all sides that the starting point for consideration of the issue is the case of *Foster v. British Gas Plc* (Case 188/89) [1990] E.C.R. I-3313. This case arose from the actions of the pre-privatised British Gas Plc. that required their female employees to retire earlier than their male employees in apparent breach of the provisions of the Equal Treatment Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions). The kernel of the judgment is to be found at para. 16 and subsequent paragraphs and, indeed, much of the debate before me focused on the way in which three paragraphs of the judgment, paras. 16, 18 and 20, are to be interpreted. Paragraph 16 provides as follows:

"16. As the Court has consistently held (see the judgment in case 8/81 *Becker v. Hauptzollamt Muenster-Innenstadt* [1982] ECR 53, paragraphs 23 to 25), where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State…

18. On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals…

20. It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon."

Submissions of the Parties in this Case

8.2 Because of the centrality of the *Foster* case to the arguments, I have deferred until now attempting to set out the basic contentions of the parties. On behalf of the plaintiff, Mr. Eoin McCullough S.C. has submitted that the plaintiff is indeed entitled to pursue compensation from the MIBI and that it is an emanation of the State. In that submission he receives strong support from Mr. James Connolly S.C. on behalf of the State defendants who argues to like effect. It is argued that the jurisprudence of the ECJ takes a very broad approach to the concept of an emanation of the State. Reference is made to Article 1(4) of the Second Directive obliging the Member States to set up or authorise a body with the task of providing compensation. It is said that it is beyond doubt that the MIBI is the body authorised and that the fact that it had an existence prior to any of the directives and, indeed, prior to Ireland's membership of the EEC is quite irrelevant.

8.3 Attention is drawn to the Memorandum which accompanied the 1988 Agreement and the statement therein contained that the 1988 Agreement is being made as part of the implementation of the Second EC Directive on motor insurance – directive 84/5/EEC of 30/12/1983. Attention is also drawn to the fact that the MIBI has accepted responsibility in other areas for the State's extended obligations under the Third Directive and it is asked why the situation should be different now that the situation of persons travelling in vehicles without passenger seats in the rear has been clarified.

8.4 On behalf of the fifth named defendant Mr. Patrick Connolly S.C. stresses the private nature of the MIBI, a company set up under the Companies Act as far back as 1955. It is said that the obligations of the Bureau are obligations voluntarily assumed by the Bureau under the various agreements that it has entered into with numerous Ministers and that therefore the obligations are contractually limited to those to be found in the agreement. With some firmness it is said that no further or other obligations on the part of the Bureau arise at law from any other external source. Mr. Patrick Connolly S.C. stresses that, apart from the entitlement of the Minister to require the Bureau to honour its contractual obligations, the State is not in a position to give any directions to the Bureau in the conduct of its business. In summary, Mr. Patrick Connolly S.C. submits that the tests established by *Foster* are not met in respect of the MIBI. He says this is because the Bureau is manifestly not an organisation or body which is subject to the authority or control of the State. It carries out its obligations which it has voluntarily undertaken entirely of its own accord and is under the authority or control of nobody in so doing. In carrying out the obligations which it has voluntarily assumed under the various agreements, it is not acting "pursuant to a measure adopted by the State". The ordinary meaning of the word 'measure', in the context of the State means, and is always understood to mean, a legal enactment such as either an Act of Parliament or a Statutory Instrument of a Minister. The Bureau is not responsible under any such heading. The Bureau is not providing a public service "under the control of the State". It is under no such control. The Bureau has not been given "special powers beyond those which result from the normal rules applicable in relations between individuals".

The parties join issue in relation to the significance of the *Foster* case. On behalf of the plaintiff and the State defendants it is argued that the matters referred to at para. 20 are not mandatory but are essentially illustrative in nature. As an alternative, it is suggested that if there is a requirement to meet the individual factors referred to at para. 20 in *Foster*, that the MIBI does in any event meet each of those considerations.

On behalf of the fifth named defendant it is submitted that the definition of 'emanation of the State' is to be found within para. 20 of *Foster* and that the MIBI does not meet any of the conditions there referred to.

By way of emphasising how inappropriate it is to regard the MIBI as an "emanation of the State" Mr. Patrick Connolly S.C. draws attention to the dictionary definition of the words 'emanation' and 'emanate'. The Oxford Dictionary of emanation he submitted is "the process of going forth, issuing or proceeding from anything as a source".

Conclusion
9.1 At the outset I should say that I am not significantly influenced by the dictionary definition point. The situation would be quite different if we were considering the phrase "emanation of the State" as a phrase that had appeared in a statute. However, here we are dealing with a situation where it has long been recognised that certain entities fall into a class such that individuals may rely on directives against them. The phrase "emanation of the State" is little more than a convenient label that can be applied once it is decided that a particular entity is one that possesses the characteristics such that an individual should be permitted to proceed against it.

9.2 In those circumstances I propose to review a number of authorities to which I have been referred with a view to identifying how to approach the task of deciding whether the MIBI falls within or without the category under consideration. In arguing for a broad or purposive approach, Mr. McCullough S.C. and Mr. James Connolly S.C. have relied on a number of decisions of the European Court of Justice as well as on the views of a number of commentators in this area. *Kampelmann v. Landschastsverband Westfalen-Lippe* (Case 253/96) [1997] E.C.R. I-4907 appears to move the matter on beyond any rigid interpretation of para. 20 of *Foster*. Paragraph 46 in *Kampelmann* states in these terms:-

> "In addition, it has consistently been held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as against such an individual (see, *inter alia*, Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325, paragraph 20).It may, however, be relied on against organizations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals, such as local or regional authorities or other bodies which, irrespective of their legal form, have been given responsibility, by the public authorities and under their supervision, for providing a public service (Case 103/88 *Fratelli Costanzo v Comune di Milano* [1989] ECR 1839, paragraph 31, and Case C-188/89 *Foster and Others v British Gas* [1990] ECR I-3313, paragraph 19)."

9.3 It will be noted that in this paragraph the ECJ, rather than speaking of the three individual elements of *Foster* para. 20, speaks of organisations or bodies which are subject to the authority or control of the State or have special powers. In effect, the emphasis appears to be on whether the body has been given a responsibility for providing a public service.

9.4 That a broad and purposive approach is appropriate receives the endorsement of a number of commentators. *Tridimas on General Principles of EU Law*, 2nd Edition (Oxford University Press, 2006) at p. 46 observed:

> "It is submitted therefore that, in order to be regarded as an emanation of the State, it suffices for a body to have been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State. This definition seems sufficiently wide to encompass private bodies which have been entrusted with the performance of functions traditionally reserved to the State and over which the State retains residual control."

9.5 Steiner, Woods and Twigg-Flesner (*EU Law*, 9th Ed., (Oxford University Press, 2006)) are of a similar view. Support for that position is also offered by Elaine Fahey in an article entitled "Preliminary Reference from the Circuit Court: The 'Emanation of the State' Doctrine in the Irish Courts" (2004) 1 I.L.T. 6

9.6 The broad approach favoured in *Kampelmann* is to be found in such cases such as *Haim v. Kassenzahnärtzliche Vereinigung Nordrhein* (Case 424/97) [2000] E.C.R. I-5123 and *Konle v. Austrian Republic* (Case 302/97) [1999] E.C.R. I-3099. The ECJ had this to say in *Konle* at para. 62:-

> "It is for each Member State to ensure that individuals obtain reparation for damage caused to them by non-compliance with Community law, whichever public authority is responsible for the breach and whichever public authority is in principle, under the law of the Member State concerned, responsible for making reparation. A Member State cannot, therefore, plead the distribution of powers and responsibilities between the bodies which exist in its national legal order in order to free itself from liability on that basis."

The English Motor Insurers Bureau (MIB) Cases
10.1 Mr. Patrick Connolly S.C. on behalf of the MIBI has relied heavily on a number of cases before the English courts which dealt with the status of the Motor Insurance Bureau ("MIB"). While both Mr. Eoin McCullough S.C. and Mr. James Connolly S.C. point to areas where they say the MIBI diverges from its English counterpart, these cases require careful consideration.

10.2 The first is a bundle of three cases entitled Mi*ghell v. Reading, Evans v. The Motor Insurance Bureau and White v. White* [1999] 1 C.M.L.R. 1251 which were heard together before the Court of Appeal. Mr. Mighell and Mr. White were each injured whilst passengers in cars driven by uninsured defendants. Mr. Mighell knew that his driver was uninsured. On the finding of facts made by the court of first instance, Mr. White did not know that his driver was uninsured but ought to have known it, while Mr. Evans was injured by a hit and run driver and his case was concerned exclusively with the MIB'S liability to pay interest on an award made in his favour. In summary, each of the three judges at first instance had taken the view that, since the Motor Insurance Bureau had in effect been nominated by the State to carry out the task of compensating those injured persons who could not look to an insurance company, therefore the directive could be regarded as having direct effect. In the Court of Appeal the case is noteworthy because of a very strong and clear statement by Hobhouse L.J. Because the approach taken by Hobhouse L.J. is central to the position taken by the MIBI, it is necessary to quote from his judgment in *extenso* wherein he stated at p.1272 that:-

> "In my judgment the correct view to take of the role and status of the Bureau is that it is a private law contractor and no more and as such is not capable of being covered by any direct effect the Directive may have. It cannot be disputed that this was its status prior to the making of the Second Directive. Independently of any intervention of Community law, the Bureau was brought into existence by the insurance companies which were its original members. It provided a vehicle through which these independent insurance companies could enter into private law agreements with the Secretary of State. Their motivation does not alter or affect the nature of the relationship. It was contractual and no more.
>
> This is clearly demonstrated by the position regarding untraced drivers. The United Kingdom Government did not consider that it need take any step in this connection as a result of the making of the Second Directive. It already had in place what it regarded as an adequate and satisfactory contractual arrangement with the Bureau. The Bureau is not

constitutionally an emanation of the State; it is a private law company. It is not functionally an emanation of the State; it acts on its own behalf in the commercial interests of it members, not on behalf of the State or as a delegate of the State. It enters into commercial private law contracts with *inter alia* the Secretary of State. Similarly, when seeking to implement the Second Directive in relation to uninsured drivers the Secretary of State chose to make use of the same private law mechanisms as before.

The only capacity in which the bureau has acted is as a private law entity and the only obligations it has assumed have been private law contractual obligations. This cannot be said to be a situation where any public law relationship has come into existence. Therefore, the argument of the plaintiffs/claimants fails on the character of the relationship. What the United Kingdom did by way of implementation of the Second Directive did not bring into existence any entity or relationship which enabled the Directive to be enforced against anybody (save possibly in the *Frankovich* sense against itself). It follows that in my judgment I would emphasise as the cardinal feature of the present cases the private law status of the Bureau and the private law relationship it had with the Secretary of State and the fact that it only undertook private law obligations. It therefore does not meet the criteria for being treated as an emanation of the State nor does it suffice to satisfy the third criterion of direct effect."

10.3 The statement by Hobhouse L.J. is a very clear, even trenchant one. However, there are some other aspects of the judgment of the Court of Appeal that must be noted. Neither of the two other judges endorsed his views. So, Schiemann L.J. entered this reservation at p.1264 of his judgment:-

"For my part, I accept that there is substantial uncertainty surrounding the concept of 'emanation of the State'

That uncertainty springs in part from the uncertainty of the legal concept and in part from the difficulty of applying that concept to a particular factual situation. The latter is a task which the national courts have to fulfil although they may be helped by a reference. I would not regard it as *acte clair* that the MIB was not an emanation of the State, although that is my current opinion. I do not find it necessary to express a concluded opinion on the point."

Schiemann L.J. was joined in this approach by the third member of the court, Swinton Thomas L.J. Accordingly, it would appear that in expressing the views that he did, Hobhouse L.J. was not speaking for the majority of the court.

10.4. There have been developments since which, if they do not actually undermine the persuasive authority of *Mighell, Evan*s and *White*, certainly do nothing to enhance its authority. One of these three cases, that of Mr. White, sub nom *White v. White* [2001]1 W.L.R. 481, was appealed to the House of Lords which reversed the decision of the Court of Appeal, but the House of Lords decided the case on an entirely different basis relating to how the word 'knew' in the Directive was to be interpreted. Another of the three original plaintiffs, Mr. Evans, launched a collateral attack on the outcome in the Court of Appeal and before the ECJ was in part successful in that the court held, in interpreting the Second Directive, that the compensation awarded for damages must take account of the effluxion of time until actual payment of the sums awarded in order to guarantee adequate compensation in E*vans v. Secretary of State for the Environment, Transport and the Regions & Anor.* (Case 63/01) [2003] E.C.R. I- 14447.

10.5 The most recent of these MIB decisions is the case of *Byrne v. MIB* [2007] 3 All E.R. 499. In the High Court, Flaux J. held that the claimant had no right of direct action against the MIB for breach of the Second Directive. Although the Second Directive was capable, in principle, of having direct effect, the MIB was not an emanation of the State such that the Second Directive could be enforced directly against it. Although it performed a public service, the MIB was not under the control of the State; it did not have special powers and there was nothing else about its activities which pointed to it being an emanation of the State. Flaux J. was of the view that as a matter of Community law, an entity will normally only be regarded as an emanation of the State if it satisfies the three conditions laid down by the European Court of Justice in *Foster v. British Gas*. He was of the opinion that the provision for compensation for victims of accidents involving uninsured or untraced drivers was a public service. However, he concluded that the MIB was not under the control of the State and further concluded that there was a complete absence of special powers.

10.6 However, with all respect to Flaux J., adopting a checklist approach by reference to para. 20 of *Foster* does not accord with the approach taken by the Court of Appeal in other cases. In *The National Union of Teachers v. Governing Body of St. Mary's Church of England (Aided) Junior School* [1997] 3 C.L.M.R. 630 the Court of Appeal was of the view that the concept of emanation of the State for the purposes of the doctrine of vertical effect was very broad and went on to indicate that the tripartite test for what constituted an emanation of the State in *Foster* was indicative rather than a statutory definition. The Court of Appeal was of the view that the Employment Appeals Tribunal erred in failing to fully appreciate the significance of the undoubted fact that the Community case law indicates that a body could be an emanation of the State without being under the control of central government. Interestingly, when for completeness sake and contrary to the views of the Court that this was not necessary, the Court went on to consider the position of the school by reference to the tripartite test, the Court appears to have been of the view that the existence of special powers could not be established. It is significant that the judgment of the Court, with which judgment the other members agreed, was delivered by Schiemann L.J. who was, of course, a member of the Court in *Mighell, White* and *Evans*.

The Irish MIBI cases

11.1 The issue of the status of the MIBI has been addressed in a small number of cases in this jurisdiction. In the case of *Dublin Bus v. The MIBI*, (Unreported, Circuit Court, October 29th, 1999) Judge Bryan McMahon, as he then was, had this to say at p.11 of the judgment:-

"I hold that the M.I.B. of I. must be associated with the State in answering the question who is responsible for the proper implementation of Directive 84/5/EEC. Since an individual affected adversely by an improper implementation can sue the State, so also, in the circumstances of this case, can the individual claim against the State's partner in the implementation process. Furthermore, under the general scheme the M.I.B. of I. is the managing partner which is responsible for the administration and the processing of all claims under the scheme, and as such is the party which carries all litigation contemplated by the scheme. Unlike, ordinary contracts, the 1988 Agreement is also unusual in that not only does it contemplate, but it specifically provides for third parties to have rights under the agreement and for such third parties to take actions against the M.I.B. of I. Clause 2(2) of the 1988 agreement provides as follows: … In these circumstances there can be little argument that the M.I.B. of I. is a public body, an emanation of the State which would make it liable for the failure to properly implement the Directive."

Judge McMahon considered the same issues in *Withers v. Delaney and MIBI* (Unreported, Circuit Court, 9th March, 2001), where, when invited by counsel for the MIBI to revisit the issue of whether the MIBI was an emanation of the State, he declined to reopen the issue observing that he was now even more convinced the MIBI was indeed an emanation of the state.

11.2 The decisions in question are decisions of the Circuit Court and as such are of persuasive authority only. However, the judgments in question which would seem to be reserved judgments, are elaborate and closely reasoned and accordingly, carry considerable weight. It is only right to add that Mr. Patrick Connolly S.C. points out that the *Dublin Bus* judgment does not specifically refer to the *Foster* case and the extent to which the test there set out are relevant and indeed, this is also true of the *Withers* case.

11.3 The matter was also addressed in D*elargy v the Minister for the Environment and Local Government,* [2005] IEHC 94 a decision of Murphy J. Notwithstanding that I have been informed that the case is at present under appeal, I would be very slow indeed not to follow the case if the conclusions in relation to the status of the MIBI formed part of the *ratio decidendi*, in accordance with the approach set out in the judgment of Parke J. in *Irish Trust Bank Limited v. Central Bank of Ireland* [1976-77} I.L.R.M. 50. Murphy J. concluded his judgment with the following paragraph:-

> "Moreover, the Court is not satisfied that there is evidence that the MIBI could be considered an 'emanation of the State'. In M*ighell v. Redding & Anor., Evans v. The Motor Insurance Bureau* and *White v. White* [1999] 1 C.M.L.R. 1251 in the High Court and *White v. White (2)* [2001] 2 All E.R. 42 in the House of Lords, the English MIB was held not to be an emanation of the State. This appears to be more persuasive than the finding in *Dublin Bus v. MIBI*. Accordingly, the MIBI has no duty to indemnify."

11.4 The primary conclusion that the MIBI had no duty to indemnify would seem to have been grounded on the fact that at the time of the accident, when the plaintiff, a pillion passenger, suffered injuries, there was no requirement to have cover for pillion passengers and there was no issue regarding the application of European Community law. The accident in question had occurred in September, 1987 and judgment had been obtained against the uninsured defendant in 1996. Accordingly, the court was of the view that the Third Directive had no relevance of any kind, either against a public body or a private body or individual. In these circumstances it would seem that the comments in relation to the fact that the evidence had not established that the MIBI could be considered as an emanation of the State are *obiter*.

11.5 The case turned principally on the conclusion by Murphy J. that certain provisions of the Road Traffic (Compulsory Insurance) Regulations, 1962 (S.I. 14 of 1962) were invalid, having regard to the provisions of the Constitution and, moreover, that the Minister in making the orders he had, was acting *ultra vires* the powers conferred upon him by the Oireachtas and that the orders were, accordingly, null and void. In these circumstances I will not repeat the views that I have expressed about the significance of *Mighell, Evans* and *White*, as well as the House of Lords case of *White v. White*, to which Murphy J. made reference.

Decision

12.1 I have already indicated that much time was spent during the hearing debating the question of how determinative of the issue was the tripartite approach of the *Foster* case, though all sides had fall back positions in that counsel for the plaintiff and the State while arguing that the tripartite test was not to be approached as if it is was a statutory test argued in the alternative that even if the tripartite test applied that they can establish that the three tests are met by MIBI. In contrast, counsel for the MIBI lays heavy emphasis on the test, arguing that no aspect of the test is applicable to the MIBI but going on to say that any conceivable alternative formulation could not embrace the MIBI as it is purely a private entity.

12.2 I have concluded that the tripartite test is not to be read as if it is a statutory requirement. The *Foster* formula is a guide or illustration and no doubt a useful guide or illustration but no more than that. I take that view primarily as a result of a consideration of the language of the relevant paragraph of the *Foster* judgment itself. Paragraph 20 it will be recalled is in the following terms:-

> "It follows from the forgoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals *is included in any event* among the bodies against which the provisions of a directive capable of having direct effect maybe relied upon." [Emphasis added.]

12.3 I am of the view that reference to "*is included in any event*" is quite inconsistent with any suggestion that what is being offered is a comprehensive, all embracing test. On the contrary it seems to me that the phrase "*is included in any event*" signals that the category of bodies is wider than those that meet the three tests and that bodies that do meet the three tests constitute only a subset of the entire category.

12.4 The opening words of this paragraph "it follows from the foregoing" point in the same direction. What has preceded paragraph 20 are a number of paragraphs setting out general principles. This phrase roots what is to come later in paragraph 20 in what is gone before. The view that I have arrived at that it is not appropriate to apply the tripartite test as though it were a statutory definition accords with the views of the Court of Appeal in England as expressed in *NUT and others v. St. Mary's Church of England Junior School and Others* [1997] 3 C.L.M.R. 630, a judgment of Scheimann L.J.

12.5 The basic principle at issue is put very succinctly in the opinion of Advocate General Van Gervan delivered 8 May 1990 in *Foster*'s case who at para. 21 observed:-

> "As I have already repeatedly emphasized, the point of departure must be the reasoning behind the Marshall and Johnston cases; a Member State, but also any other public body charged with a particular duty by the Member State from which it derives its authority, should not be allowed to benefit from the failure of a Member State to implement the relevant provisions of the Directive in national law".

12.6 The closer the subject matter under consideration to those that were at issue in *Foster*, the more helpful will be the application of the tripartite test. Conversely, if the facts to be considered and the nature of the body to be considered diverge significantly from *Foster*, the value of the test will be undermined. *Foster* concerned a commercial undertaking operating in the market place. A similar situation existed in *Rolls-Royce v. Doughty* [1992] I.C.R. 538. The present situation is quite different in that we are concerned not with a commercial undertaking but with the vehicle by which a long-term social policy is delivered.

12.7 It seems almost beyond dispute that the MIBI performs the functions of a body authorised for the purpose of article 1(4) of the Second Directive. Equally, the responsibility is public in nature for it is a responsibility created by the Second Directive itself. In that connection, the observations of Advocate General Stix – Hackl at para. 71 of her opinion when this case was before the ECJ to which I have already referred to are worth recalling.

12.8 The fact that the MIBI, like its British counterparts was in existence well before either state joined the EEC is of no relevance. At the time the Second Directive came into being, all concerned must have been well aware that there were already in existence in at

least a number of Member States bodies providing compensation and it must have been obvious to all concerned that these existing structures were likely to continue and to be authorised. Neither, do I think it significant that the authorisation took the form of an agreement rather than a statute or statutory instrument.

12.9 While there is no doubt at all that in form the MIBI is private body, a company incorporated by guarantee, I am of the view that in practice there is a considerable degree of state control or influence. The essential nature of the obligation under the 1988 agreement is to be found in Clause 4(1) to the effect that the Bureau shall satisfy judgments in respect of liability for injury to persons or damage to property which is required to be covered by an approved policy of insurance under s. 56 of the Road Traffic Act, 1961, the use of the vehicle was not in fact covered by insurance. It is accepted this encompasses later amendments enacted during the currency of the agreement. If this is so, the State is in a position to expand the scope of the responsibilities of the Bureau. By any standard this has to be regarded as a significant element of control.

12.10 I do of course accept that subject to one qualification, the State, certainly through its executive arm, is not in a position to dictate how the MIBI deals with individuals claims. There is, however, one significant exception to that general position. Clause 3(7) deals with the obligation on a claimant to take all reasonable steps against a person against whom there might be a remedy and goes on to provide that in the event of any dispute as to the reasonableness of the step, the matter is referred to the Minister for the Environment whose decision is final. It is certainly an unusual feature of a contract that it should provide that in the event of a disagreement one party to the contract should determine how the dispute is to be resolved.

13.1 It does seem to me that this provision is of a significantly different character to the provision in the English agreement that an arbitrator chosen from a panel of Queen's Counsel appointed by the Secretary of State hears an appeal when a claimant is dissatisfied with the amount of compensation offered.

13.2 A further indication of the level of public control as a matter of reality, is that amendments to the Memorandum and Articles of Association of the company require the consent of the Minister for Employment and Enterprise.

13.3 There is another area that merits examination as illustrating that the MIBI is not a typical private body entering into obligations on a voluntary basis. By virtue of s. 78 of the Road Traffic Act, 1961 as substituted by article 9 of the European Communities (Compulsory Insurance) (Amendment) Regulations, 1992 (S.I. 347 of 1992), in order for an undertaking to issue an approved policy of insurance it must be a member of the Motor Insurance Bureau of Ireland. Perhaps, even more unusually, before a body can become an exempted person and so be freed of the obligations of compulsory insurance it must provide an undertaking to deal with third party claims in respect of its vehicles on terms similar to those agreed between the Minister and the Motor Insurance Bureau of Ireland.

13.4 All these factors lead me to the view that the MIBI, in substance, if not in form operates as a *quasi*-State claims agency giving effect to an important aspect of public social policy. As such it falls to be identified with the State and is to be regarded as an emanation of the State.

13.5 In seeking to determine whether the MIBI is as a matter of European Law an emanation of the State I have been conscious that European Law in this area is not static. That this is so is illustrated by the decision of the ECJ in *Riksskatteverket v. Gharehveran* (Case 441/99) [2001] E.C.R. I-07687. That case considers the same Directive as had been the issue in two of the very early cases in this area; *Francovich v. Italy* (Cases 6/90 and 9/90) [1991] E.C.R. I-5357 and *Wagner Miret v. Fondo de Garanatia Salarial*(Case 334/92) [1993] E.C.R. I-6911 and proceeded to distinguish the earlier judgments in permitting the claimant to enforce the Directive directly against the Swedish State in the national courts

13.6 I have stated my view that it is not appropriate to apply rigorously the *Foster* tripartite test to establish the status of the MIBI. However, I should, before concluding state briefly that even had I been minded to apply that test more rigidly I believe I would have reached the same conclusion.

13.7 For reasons that will already be apparent I would have had no hesitation in concluding that the Bureau performs a public service. The position in relation to State control and special powers is less clear cut. Nonetheless I am of the view that aspects such as the operation of a veto on the alteration on the memorandum and articles as well as the entitlement of the Minister to give a binding direction in the event of a disagreement between a claimant and the bureau are indicative of a significant level of State control. This is hardly surprising given that it is the State that ultimately controls the scope of the obligations of the Bureau as it is the State that determines the extent of the requirements for compulsory insurance.

The third test, that of "special powers", is obviously the most difficult but here too I would have been prepared to identify special powers particularly in the area of the requirement for membership of the Bureau on the part of those bodies seeking to conduct insurance business.

13.8 In summary, I am of the view that the Motor Insurance Bureau of Ireland is to be regarded as an emanation of the State and that accordingly the plaintiff is entitled to make recovery from the fifth named Defendant pursuant to the terms of an agreement between the second named Defendant and the fifth named Defendant dated 21st December, 1998.