Neutral Citation Number: [2008] IEHC 309

THE HIGH COURT

2006 No. 5705 P

BETWEEN

CENTRAL APPLICATIONS OFFICE LTD.

PLAINTIFF

AND

THE MINISTER FOR COMMUNITY, RURAL AND GAELTACHT AFFAIRS, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice John MacMenamin dated 14th October, 2008

1. On the 10th April, 2006, the plaintiff ('the C.A.O.') was informed by the first named defendant's department that it had been designated as a "public body" by virtue of the Official Languages Act 2003 (Public Bodies) Regulations 2006 ("the 2006 Regulations"). The effect of this designation was to impose certain duties of compliance on the plaintiff in relation to the provision of services in the first national language. These would include the provision of official documents, and the capacity to conduct its activities and functions through the medium of the Irish language. The plaintiff now seeks a declaration that such designation pursuant to those regulations is *ultra vires* the Official Languages Act of 2003 (the Act of 2003). This judgment deals, firstly with the evidence as to the function and activities of the C.A.O., giving rise to the basis of the challenge, secondly, with the provisions of the Act of 2003, and thirdly, with the application of those provisions to the factual context in accordance with authority.

I The Central Applications Office Ltd – functions and activities

2. The C.A.O. is a non-profit company limited by guarantee. It is based in Galway. It was established in 1976. Normally it employs ten people, but this increases at peak examination times. Its principal function is centrally to process and prioritise applications for admission to third level colleges and institutions. It does not now receive public funding although it received seed capital at its establishment. Its revenue base is largely derived from student application fees. The State has no responsibility for its operation.

How the C.A.O. functions

3. The sole witness in the hearing was Mr. Joseph O'Grady, the operations manager of the C.A.O., who has worked there since 1992. He testified that prior to the establishment of that body in 1976, no central application or admission service existed for the third level educational institutions. The distinction between applications and admissions is of importance, in that only educational institutions admit candidates. The C.A.O. does not have this function.

4. Up to 1976, applications for third level places were processed separately by each of the individual admissions offices of the universities. But with the introduction of the points system problems arose. These are described below. The universities decided that it would be best to form a single body to unify the process of applications. These founding universities were the then constituent colleges of the National Universities of Ireland in Dublin, Galway, Cork, Maynooth, together with Trinity College, Dublin.

5. The main problem was that prior to the inception of the C.A.O., duplication of admissions occurred in places in the "high demand" faculties in the universities. At that time each higher education institution separately processed these. No information was shared. Thus, for example, an applicant might submit an application, be considered, and receive a placement for medicine in Trinity College, Dublin in October of an academic year, only for that college to find he/she had already commenced the same course in University College, Dublin. This non-unified regime created obvious administrative difficulties. Often second, third or later choice vacancies were filled late, rather than prior to the commencement of that term.

6. The effect of the new unified system was that in response to one single application, just one offer, prioritised in accordance with State examination results, went out to each applicant. Such applicant would then decide whether or not they wished to accept that offer. A candidate achieving a high level of points was very likely to be given his or her first preference in faculty and university. In turn, each university became aware at an appropriate time as to whether place offers were to be accepted or rejected. This new system expanded to almost all higher educational institutions over succeeding years.

7. The Central Admissions Office does not itself *admit* candidates to any university or other third level institution. Its function is to process the initial offers, as instructed by the higher education institutions. The clear evidence in this case was that the function of *admission* by such institution was reserved to itself. I find the C.A.O. is therefore, essentially a service provider relating to *applications* only. It provides a process of determining applications in accordance with identified criteria, but now on a centralised basis, in accordance with place availability and point attainment.

8. It is now necessary to examine the present procedure in some further detail. One of the issues is the extent to which this differs from that operating prior to 1976.

Further analysis of the C.A.O. procedure

9. The fundamental procedure adopted has not significantly altered since its inception in 1976. But there are now 45 affiliated higher education institutions.

10. Early in the calendar year the C.A.O. receives applications from students intending to sit the Leaving Certificate or other relevant State examinations. These are processed and placed into electronic files. When each candidate's Leaving Certificate results are provided, the office carries out a check as to whether or not such candidate has met the subject entry requirement for the course chosen, calculates his/her points, and places them on a list in order of merit.

11. To summarise therefore:

1) the C.A.O. functions in a single location;

2) it engages in one single placement application procedure for all candidates;

3) it deals with applications only and not admissions;

4) it processes examination results in accordance with grades and points;

5) it allocates places in higher educational institutions in accordance with points attainment;

6) it is a private company.

The "function" of the C.A.O.
12. This case hinges largely on statutory interpretation. A significant issue is whether the process in which the C.A.O. has been engaged since 1976 is a different "function," (as defined in the Act of 2003) from that carried out by the universities previously. In essence function is defined as power or duty. The relevant definitions are outlined in Part II (paragraph 19) of this judgment.

The pre-1976 system
13. The evidence established that:

1) prior to 1976, the individual universities used to receive separate applications and process them internally;

2) they did not engage in a ranking process of the type just described;

3) in the pre- "points" era, university places were allocated simply on the basis of a "pass" in final secondary examinations; and later by the attainment simply of certain grades. There was no need then for a detailed points system involving ranking.

Independent admission procedures
14. Even now, not all third level institutions apply examination results as their sole admission criteria. For example, the National College of Art and Design carries out assessments on the basis of submitted portfolios, the results of which are sent to the C.A.O. for the purposes of offers being made to candidates. Discretionary procedures are applied in relation to mature students in some institutions.

15. Additionally, certain institutions (such as the Royal College of Surgeons in Ireland) themselves receive direct applications from residents inside and outside the European Union. These applications are processed internally.

Affiliated bodies
16. At the time of its inception only the five identified universities or colleges in the State were affiliated to the C.A.O. Subsequently these were followed by the regional technical colleges and institutions in 1991, and other colleges and institutions, including private colleges, in 1997.

The Objects Clause
17. The primary objects of the company as defined in its memorandum and articles of association are:-

"to establish carry on and manage and maintain an establishment or organisation in Ireland for the purpose of regulating, administration, organising or otherwise processing in any manner whatsoever *applications* for admission to courses to all universities, colleges of education, higher technological institutes, teaching colleges and other institutions offering third level education and to carry on in cooperation with all or any of such institutions, all or any administrative procedures to *facilitate* the admission of students to such institutions in any manner whatsoever." (emphasis added.)

Governance
18. Each third level institution is represented on an administrative board of the C.A.O., together with a representative of the Higher Education Authority. Only such higher education institutions which offer third level undergraduate courses validated and approved by recognised universities of the State or by HETAC (that is the Higher Education and Training Awards Council) may become participants in the C.A.O. process for which each candidate pays a stipulated fee. In passing it might be noted that HETAC itself is a designated body in the First Schedule to the Act. So, also, are the universities.

It is now necessary to consider this evidence in the light of the provisions of the Act of 2003.

II Relevant provisions of the Act of 2003
19. In its long title the purpose of the Act is outlined as being:-

"AN ACT TO PROMOTE THE USE OF THE IRISH LANGUAGE FOR OFFICIAL PURPOSES IN THE STATE; TO PROVIDE FOR THE USE OF BOTH OFFICIAL LANGUAGES OF THE STATE IN PARLIAMENTARY PROCEEDINGS, IN ACTS OF THE OIREACHTAS, IN THE ADMINISTRATION OF JUSTICE, IN COMMUNICATING WITH OR PROVIDING SERVICES TO THE PUBLIC AND IN CARRYING OUT THE WORK OF PUBLIC BODIES; TO SET OUT THE DUTIES OF SUCH BODIES WITH RESPECT TO THE OFFICIAL LANGUAGES OF THE STATE; AND FOR THOSE PURPOSES, TO PROVIDE FOR THE ESTABLISHMENT OF OIFIG CHOIMISINÉIR NA dTEANGACHA OIFIGIÚLA…",

20. A number of material definitions are contained in s. 2 of the Act. *Inter alia*, the word "enactment" is defined as "a statute or an instrument made under a power conferred by a statute".

"Functions" are defined as including "powers and duties".

The word 'head' is defined as: "the head of a public body".

The term "the head of a public body" has a lengthy definition, including:-

"(j) in relation to any … public body, (other than those mentioned in paras. (a) to (i) of the definition) the person who holds, or performs the functions of, the office of chief executive officer (by whatever name called) of the body."

21. The public bodies referred to in that definition prior to para. (j) just outlined, refer to what may be seen as emanations of the

State. They include, inter alia, Ministers of Government, the Attorney General, and the Civil Service Commission.

22. The term "public body" "is to be construed in accordance with the First Schedule of the Act. This is considered in detail later.

Regulations
23. Section 4 of the Act empowers the Minister to make regulations under the Act. Insofar as relevant, s. 4(1) provides:-

> "4.– (1) The Minister may, with the consent of the Minister for Finance –
>
> a) by regulations provide, subject to the provisions of this Act, for any matter referred to in this Act as prescribed or to be prescribed,
>
> b) in addition to any other power conferred on him or her to make regulations, make regulations generally for the purposes of, and for the purpose of giving full effect to, this Act …"

24. Section 4(5) provides:-

> "4.– (5) Regulations prescribing a body, organisation or group
>
> ("the body") for the purposes of *paragraph 1(5)* of the *First Schedule* may provide that this Act shall apply to the body only as respects specified functions of the body, and this Act shall apply and have effect in accordance with any such provision."

The First Schedule of the Act
25. As shown earlier, the term "public body" is, by virtue of s. 2, to be construed in accordance with the First Schedule of the Act. In that Schedule, there is contained, at para. 1, a list of each of the Government departments and offices of State which are designated to be public bodies for the purposes of the Act. It is unnecessary to refer to them in detail.

26. Paragraph 2 of the Schedule is both generic and specific. It identifies a list of categories of designated State agencies, Boards and State companies. It also contains a lengthy list of such identified bodies. Most, but not all of these bodies are under State control. Certainly not all of them would, but for the Act, be seen as "public bodies" in the colloquial sense.

27. Paragraph 3 of the Schedule designates generally all local authorities. By para. 4 health boards are designated. Thus far therefore, the Schedule deals with bodies or categories of bodies already designated. Thereafter statutory reference is made to categories of bodies which may be the subject of future designation by the Minister.

Paragraph 1(5) of the First Schedule: Bodies which may be designated
28. It is necessary now to focus on para. 1(5) of the First Schedule. This defines categories which may be designated as:-

> "(5) any body, organisation or group standing prescribed for the time being, with the consent of such other (if any) Minister of the Government as the Minister considers appropriate having regard to the functions of that other Minister of the Government, and being
>
> *a)* a body, organisation or group that receives moneys directly from a Minister of the Government, a Department of State, the Central Fund or a public body specified in *subparagraph (2), (3)* or *(4)* of this paragraph in circumstances where the amount or aggregate of the amounts so received constitutes 50 per cent or more of the current expenditure of that body, organisation or group in a financial year,
>
> *b) a body, organisation or group that at the date of the coming into operation of this Schedule is a public body but subsequently comes under private ownership and control,*
>
> *c) a body, organisation or group performing functions which previously stood vested in a body, organisation or group under public ownership or control, or*
>
> *d) any other body, organisation or group on which functions in relation to the general public or a class of the general public stand conferred or permitted by any enactment or by any licence or authority given under any enactment"* (emphasis added).

These italicised clauses are those particularly in issue.

Because the Act was enacted bilingually, the consequences of which are explained later in this judgement, the Irish text of paragraph 1(5) (c) and (d) of the First Schedule is set out below.

> *"(c) comhlacht, eagraíocht nó grúpa a chomhlíonann feidhmeanna a bhí dílsithe le dlí roimhe sin do chomhlacht, eagraíocht nó grúpa faoi úinéireacht phoiblí nó rialú poiblí, nó*
>
> *(d) aon chomhlacht, eagraíocht nó grúpa eile a bhfuil feidhmeanna i ndáil leis an bpobal i gcoitinne, nó le haicme den phobal i gcoitinne, tugtha nó ceadaithe dó nó di le haon achtachán nó le haon cheadúnas nó údarás arna thabhairt faoi aon achtachán"* (emphasis added).

These will be analysed in more detail.

It is also provided at para. 2 of the First Schedule:-

> "2. A body, organisation or group standing prescribed pursuant to regulations for the purposes of *clause (b)* of *paragraph 1(5)* shall be a public body only as respects functions referred to in that clause."

29. This is a significant provision – prescription as a public body has an effect only in the context of functions as defined under the Act; such procedure has no bearing whatever on any other enactment, or any function carried out under such enactment, an issue which appeared to create difficulties for the plaintiff and in part motivated the bringing of these proceedings. The plaintiff's concerns as to correspondence received *inter alia* from the Comptroller and Auditor General and other State agencies have not been shown to be causally linked to the designation in suit.

30. In general therefore the categories of bodies designated, or liable to designation, are what may be seen as 'emanations of the State'. But whether only emanations of the State can be designated is a question to be considered by reference to paras. 1(5)(c) and (d).

The intent of the Oireachtas
31. I consider that, properly interpreted, the literal meaning of the Act in no way controverts the intent of the Oireachtas as gleaned from the Act as a whole.

32. The long title of the Act of 2003 declares its intention; that is to provide for the Irish language rights of citizens for official purposes in the State; with State institutions (including the legislature and judicial arms); and other public bodies. The legislation places a general legal duty upon bodies designated to ensure that they are in a position to comply with statutory obligations with regard to the Irish language. Members of the public wishing to transact their business through the first national language are to be in no way disadvantaged. Such entities are to be in a position to provide such services, and to comply with statutory functions, through the Irish language in every way as fully as through English.

33. Designation imposes legal duties to provide translations of documents, brochures and publications in both languages to the public. Both official languages are to be used on official stationery and publications. Certain documents are to be published simultaneously in both languages. Designated bodies are to identify to the first named defendant ("The Minister") the services that they propose to provide through the medium of the Irish language. By Part 4 of the Act there is created a specific office, "An Comisinéir Teanga" to supervise and monitor implementation by such bodies.

34. I found it difficult to discern in the evidence any significant degree of "detriment" (other than some administrative inconvenience) sustained by the plaintiff by the designation. The plaintiff had already moved so as to provide documents and materials in both the Irish and English languages to applicants on request. The issue of designation does not affect the "public" or "private" status of the body concerned save only for the purposes of the Act itself. These points should not, of course, be material in themselves to these declaratory proceedings.

III The issues
35. It is accepted by the parties that clauses 1(5)(a) and (b) are not directly germane to the main *vires* issue. But these may aid interpretation of clauses (c) and (d).

36. The Court must ask itself firstly, does the plaintiff, come within clause 1(5)(c) as a body, organisation or group performing functions which previously stood vested in a body organisation or group under public ownership or control; or, secondly, does it come within clause 1(5)(d) as any other body, organisation or group on which functions in relation to the general public or a class of the general public stand conferred or permitted by any enactment or by any licence or authority given under any enactment?

The text of the Act of 2003 – "both official languages"
37. Prior to considering these questions, it is necessary to advert to a feature of the Act of 2003, which is unusual but by no means unique. This Act was passed, promulgated by the President and enrolled by the Registrar of the Supreme Court both in Irish, the first national language and in the English text. Though such Acts were rare in the past, this procedure is now more common.

38. I would respectfully suggest that as a matter of future policy, consideration might be given to including explicit reference to this fact in the official text of statutes. It was necessary that the case was re entered for the purpose of dealing with points of interpretation arising from the way in which the Act was passed.

Interpretation of the Act generally
39. Four interpretative principles are identified below which applies specifically to the construction of these provisions of the Act of 2003. It need hardly be added that these are of course subject to the presumption of constitutionality enjoyed by the Act of 2003 itself, as a post 1937 Statute and also subject to the proposition that all powers conferred by the Act, are to be exercised conformably with the Constitution (cf *East Donegal Cooperative Livestock Mart Limited v. Attorney General* [1970] I.R. Walsh J. at p. 341). A wide scope of discretion granted to a Minister making regulations may be exercised in such a manner as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution.

Is the interpretation of this legislation passed in the Irish and English texts?
40. First therefore the Courts on a number of occasions have had to consider the obligation of the State to comply with its constitutional obligations to provide members of the public with statutory forms and documents in Irish. But the interpretation of statutes of this type (as opposed to the text of the Constitution itself) has not been the subject of extensive judicial authority.

41. Article 25 of the Constitution deals generally with the signature, promulgation and entry into force of such laws. In particular, Article 25.4.6 provides:-

> "In case of conflict between the texts of a law enrolled under this section in both the official languages, the text in the national language shall prevail."

42. It is the constitutional duty of the Court therefore to interpret the text of this Act as passed and promulgated in Irish and English. But the languages are not to be seen as equal. Here the Irish text must take precedence. In the event that there might be an apparent conflict or inconsistency of meaning between the two texts, a Court must seek to reconcile the Irish and English versions, giving precedence to the Irish text – in the words of Article 25.4.6:-

> "…is ag an téacs Gaeilge a bheidh an forlámhas."

43. This constitutional precept is founded on the logical basis that it could not have been the intent of the Oireachtas for the same statutory provisions to have different meanings in the Irish and English languages. The constitutional guidance as to interpretation provided in Article 25.4.6. is so as to reconcile or resolve difficulties if they appear, not to create them. The issue arises only if there

is a conflict, or apparent conflict between the two texts.

Interpretation of an Act which imposes statutory duties
44. Secondly an Act that imposes duties must be interpreted with some rigour. Speaking for the Supreme Court in *Bupa Ireland Ltd. & Anor. v. The Health Insurance Authority & Others* [2008] I.E.S.C. 42, Murray C.J., observed:-

> "…where the Legislature is enacting provisions, however sound the reasons for them may be, which have potentially serious implications for legal rights, including constitutional rights, of persons or corporations, one must expect that the intended ambit or application of such provisions will be expressed in the legislation with reasonable clarity."

I would respectfully adopt and extend this dictum to include not only the ambit of a duty imposed, but also, in this instance, the ambit of Ministerial power to bring an entity within an Act such as that under consideration.

The interpretation of delegated legislation
45. A third principle also applies. In a well-known passage in *East Donegal*, already cited, Walsh J. observed, at p. 341:-

> "The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context. Therefore, words or phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the long title. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous."

46. A court must therefore in summary have regard to the constitutional presumptions outlined and must

> I. observe and ensure conformity of interpretation between the two texts, if necessary giving priority to the Irish language text;
>
> II. have regard to the fact that the Act imposes duties;
>
> III. attend not only to each part of the Act but its objects analysed by a study of the Act as a whole;
>
> IV. have due regard to the canons of interpretation normally arising in the construction of statutes thereof.

It is now necessary to focus on Clauses 1(5)(c) and (d).

Clause 1(5)(c): does the C.A.O. perform functions which previously stood vested in a body organisation or group under public ownership or control?
47. One of the key words, both in clauses 1(5)(c) and 1(5)(d) is, in the English text, 'functions'. The word 'functions' is equivalent in Irish to 'feidhmeanna'. There is no difficulty between the two texts. As outlined earlier the term "functions" is defined in s. 2. as including:-

> "powers and duties and references to the performance of functions include, with respect to powers and duties, references to the exercise of the powers and the carrying out of the duties."

48. On the evidence, I find that each of the individual universities originally carried out a procedure of *separately* processing applications *and* admitting students. Both application and admission may then have been part of one and the same process. Each was performed in and by each educational institution for its own purposes.

49. But in 1976, I consider the function, of processing applications and *admitting* students, were separated, the first thereafter effected by the C.A.O.; the latter reserved to the higher educational institutions themselves.

50. Thus the function of the C.A.O. was by definition of its name a new one. The central processing of applications was its *raison d'être*, devised, in part as a reaction to the increased number of potential candidates for entry to third level institutions in the latter 1970s and 1980s, which in turn led to higher entry levels. This function with the new aspects identified earlier never "stood vested" in the universities.

51. While undoubtedly application and admission processes were previously carried out by the universities, I find the essential *function* thereafter carried out by the plaintiff, was and is, the regulation, administration, organising or processing of applications in courses in all the universities, a function subsequently extended to other higher educational institutions. This was and is performed in a distinct and far more complex way than by the universities. The difference is one of essence not of degree.

"Stood Vested"
52. In clause 1(5)(c) the next part of the phrase after "functions" is "which previously stood vested". Did the functions previously "stand vested" in any body, etc, under public ownership or control?

53. The term 'vested' in the English language in its legal meaning may be defined as "established, secured, or settled in the hands of, or definitely assigned to a certain possessor; *esp*. with *right* or *interest*" (*Shorter Oxford English Dictionary*, 3rd Ed.). It therefore carries with it a connotation that the function in question should be one 'established' or 'secured' in a body by the same means.

54. But, in fact the primary, Irish, text uses the phrase "dílsithe le dlí". This connotes not simply "established" or "secured" but vested *by law*. Thus in its true meaning, the "functions" in question are not simply administrative in nature, but rather they must be in fact vested *by law*. Insofar as there could be a duty of *centrally* processing applications, that resides only in the objects clause of the C.A.O. It was not vested in the universities as matters stood prior to 1976.

55. I interpret "vested by law" in this context as equivalent to the word "conferred". It is not simply an implied power or duty. In the context of clause 1(5)(c), this new function was never actually vested in the universities by any statute regulation or charter to which I have been referred.

56. Having dealt with the term "function" and "vested by law" one must analyse the remainder of the clause.

"Public ownership or control" / "faoi úinéireacht phoiblí nó rialú poiblí"

57. Even if there was such a 'function' was it ever vested in a body, organisation or group under *public ownership or control?*

58. The interpretation of the term úinearacht poiblí/public ownership does not necessitate the application of Article 25.4.6 of the Constitution. The word ownership is synonymous with "úinéireacht".

"Rialú poiblí"
59. But the term "rialú" in the Irish text may have two somewhat varied interpretations, that is to say on the one hand "control", and on the other "regulation". In the context of the clause the difference is more than one of nuance. It goes to the ambit of the clause, and the nature of bodies which may be designated. The meaning must be seen in its context – it cannot be so wide as to do violence to the sense of the provision.

60. In *Ó Dónaill, Foclóir Gaeilge-Béarla* (Dublin, 2005) the author defines as rialú, "m (gs.- laithe). 1. vn of rialigh. 2. rule, regulation; control, government".

61. "Rialú" is defined in Ó Catháin, *Focal sa Chúirt*, (Dublin, 2001) as "control" while in the text "Téarmaí Dlí" (Courts Service Information Office) the word "control" is equated to "rialú" which is given as "ruling". Elsewhere, it is defined as "regulation".

62. But here, assistance may be obtained from within the text of the Act of 2003 itself. Section 22(1)(a) refers to An Coimisinéir Teanga. It provides as follows:-

> "22.– (1)(a) Chun críche a fheidhmeann nó a feidhmeanna faoin Acht seo, féadfaidh an Coimisinéir a cheangal ar aon duine a bhfuil, i dtuairim an Choimisinéar, faisnéis aige nó aici, nó a bhfuil cumhacht nó rialú aige nó aici ar thaifead nó ar rud, ".

63. In the English language text the same provision reads;

> "22. – (1)(a) For the purpose of his or her functions under this Act, the Commission may require any person who, in the opinion of the Commission, is in possession of information, or has a record or a thing in his or her power or *control*," (emphasis added).

64. Thus clearly the use of the word "rialú" in s. 22 of the Act of 2003 translates directly as "control", and not "regulation". I find this reference to be of importance. It is taken from the statutory context of the Act of 2003 itself, where if necessary, in the event of potential inconsistency, the meaning of the term in the Irish text is to take priority over that in the English text. Moreover the interpretation of the word "rialú" as "control"does not strain meaning in either language. "Ownership" and "control" are cognate terms. 'Control' necessitates and connotes a very high degree of supervision consistent often with ownership. By contrast, ownership and regulation are not cognate terms at all.

65. Again by reference to the Act itself, clause 1(5)(b) refers specifically to public bodies, which, subsequent to coming into effect of the provision came under private ownership and *control*. To interpret the word "control" in that context as meaning regulation would be absurd and have no meaning.

66. By application of the principle *noscitur a sociis* to clause 1(5)(c) I cannot interpret the word "rialú" as "regulation"either, although this is a meaning sometimes given to the word elsewhere. A hypothetical interpretation of those words as "under public ownership or regulation" is disjunctive. It would be so broad as might raise constitutional issues touched on later in this judgment. It strains meaning. The words must be seen in their true statutory and linguistic context. The only appropriate interpretation of the words therefore is "public ownership or control".

Absence of evidence
67. There was no evidence that the universities at the time of establishment of the C.A.O. in 1976, were under "public ownership or control". The defendants, understandably, did not seek to adduce any evidence as to this brave assertion. Instead they confined themselves to contending that, by dint of State subventions (on which there was no evidence), or by virtue either of public or domestic statutes, the universities could be so categorised. Neither the founding charters of Trinity College nor the statutes of the other universities provide a basis for this submission.

68. Both those charters and the statutes, both public and private, show the ownership of the universities, then, and now, reside in their governing bodies. The central functions of each university were then, and are now, to be performed by, or under, the directions of their governing authorities.

69. Taking the phrase "public ownership or control" as a whole therefore, I cannot conclude either as a matter of evidence or law that the universities in the State, prior to the establishment of the plaintiff, could in any sense have been publicly owned or controlled within the meaning of the clause.

70. On a true interpretation of the terms of clause 1(5)(c) therefore, I find that the Central Applications Office is not performing: (i) 'a function', which (ii) previously 'stood vested in a body…' etc, or (iii) was under public ownership or control. The defendant's arguments therefore fails on all those three enumerated points.

Clause 1(5)(d): does the C.A.O. perform functions in relation to the general public, or a class of the general public which stand conferred or permitted by any enactment or by any licence or authority given under any enactment?
71. It is now necessary to consider the succeeding clause 1(5)(d) quoted in full at para. 27 of this judgment. The interpretation of this clause presents some difficulty. While one is not permitted to look to the legislative history of this Act, it is difficult to avoid the conclusion that the phraseology of this clause came at a later stage in the legislative process.

72. It is to be noted that the words in Clause 1(5)(d) are preceded by the word "or". In general this word may take an entity thereafter identified outside a range of previously identified categories in a statute. In the present case it distinguishes those entities identified in clause 1(5)(d) from those in the previous clauses 1(5)(a), (b) and (c). It is difficult to say that the clause is phrased either with great clarity but it is highly significant as it outlines the ambit of delegated Ministerial power. As observed earlier, it is to be read as conformable with Article 15.2 of the Constitution.

Functions/Feidhmeanna
73. In the context of clause 1(5)(c), the meaning of the term "functions" has already been considered. But the word arises in a different statutory and linguistic context in the latter clause. The terms of clause 1(5)(d) are phrased in the present tense. Thus the question relates to the *present day* powers and duties of the C.A.O., not the prior functions of the universities discussed earlier. The

question therefore is does the plaintiff now perform functions in relation to the general public which fall within the terms of the clause?

74. Seen in that light I must accept that, looking at the totality of the clause, the C.A.O. does now perform such functions, that is to say powers or duties, in relation to a class of the general public, those persons making applications for third level places.

"Stand conferred or permitted by any enactment or by any licence or authority given under any enactment"
75. This phrase should be given a common sense and literal meaning. There is no inconsistency between the Irish language and English texts.

76. The universities are governed by enactments or charters. "Enactment" is defined in s.2 as meaning a statute or an instrument made under a power conferred by a statute. But it must be recollected that the true question is not as to whether the C.A.O. is the subject of enactment, licence or authority but whether its functions are so subject, or whether they are so *permitted*.

Public Statutes governing higher educational institutions
77. It is now necessary to deal with numbers of statutes which govern administration of higher educational institutions generally. I have been referred to s. 13(1) of the Universities Act 1997. There, a university is empowered "to do all things necessary and expedient in accordance with this Act and its charter, if any, to further the objects and development of the university".

78. Under s. 13(1)(c), of that Act, universities may establish "trading, research or other corporations…for the purpose of promoting or assisting, *or in connection with the functions of*, [a] university". The functions of a university undoubtedly include the administration of applications and admissions. Thus by logical extension, universities are undoubtedly permitted to create subsidiary companies which deal with one of their functions, that is to say the administration of applications and admissions.

79. Paragraph 14 of the Second Schedule to the Regional Technical Colleges Act 1992 deals with the power of admission of students into a college. A governing body of such college is empowered to control and conduct the affairs of the college and to determine admissions policy as well as entering into relationships or cooperate with other institutional authority or body for any purpose of a college.

80. Thus regional technical colleges and any other higher educational institution coming under that description are permitted on foot of that statute to enter into relationships or cooperate with a body for any such purpose. It is clear that the purposes of such college may include applications and admissions. This too, is a permitted function under that enactment. There is no prohibition on institutes of higher education as originally defined in the Higher Education Authority Act s. (1) engaging in such relationships or engaging in such co-operation either.

81. Can it then be said that by virtue of any of these provisions, that the *functions* of the C.A.O. are statutorily encompassed? I conclude that they are.

82. Despite the infelicitous phraseology of the clause I am persuaded that it is sufficiently broad to empower the Minister to make this designation in the light of the enactments to which reference has just been made. My reasons are as follows. A perusal of the Act of 2003, shows clearly that while its predominant focus is undoubtedly on public bodies which are emanations of the State, the categories identified are not by any means so confined. As referred to earlier, clause 1(5)(b) specifically refers to bodies which were formerly owned by the State but which now fall under *private* ownership or control. These come within the range of entities which may be designated.

83. A careful perusal of the First Schedule shows that while the preponderance of the bodies designated therein fall under State ownership or control, this is not universally so. Bodies specifically identified in para. 2 include "a university or other third level institution" and include also Aer Lingus (a corporate body formerly, but not now under State ownership and control); various hospital boards and authorities, as well as a number of bodies specifically identified as being independent of State ownership and control.

84. But it is ultimately the express terms of this clause which are determinative of the issue. These are to be seen by reference to the powers and duties vested in higher educational institutions by *inter alia* the statutes referred to above. Thus, excluding other irrelevant words, the key terms in clause 1(5)(d) are "permitted by… any … authority given under any enactment". It must be recollected again that these words refer to the *functions* of the C.A.O. not to the corporate legal basis of that body itself.

85. The case could not be made that in the functioning of the C.A.O. the universities were acting *ultra vires* or in excess of their statutory powers whether express or implied. There is nothing in the clause to suggest that the power or duty vested should be an express power. It is sufficient only that they should be permitted.

86. It cannot be suggested that any of the members of the governing authority of the C.A.O. which represent each of the higher education institutions affiliated to that body are acting *ultra vires* the statutory authority vested in their parent bodies. An irony of the situation is that the universities and third level institutions themselves are specifically identified and designated in the First Schedule. It might be seen as incongruous were these bodies to come within the ambit of the Act but the plaintiff not. It may well be that the C.A.O. even as a private company is to be seen as a mere co-operative "service provider" to the universities. But that does not prevent it coming within the four walls of the clause. Its corporate status does not immunise it from designation. What is at issue here is not what other type of body *might* be designated, but what actually was; is a body whose functions involve the co-operation between universities and institutes of higher education in a manner not prohibited by any enactment. Even though the "application" function is now carried out in a different manner by the C.A.O. all the affiliated institutes are co-operating in the function. The word "permitted" is to be seen in the context of the active participation of the institutions in the function of the C.A.O.

87. There is no "grey area" here between permission and prohibition. The logical conclusion of the plaintiff's case here is that the C.A.O. is now exercising functions which are not permitted by any authority given under any enactment. I do not think this is a tenable position. It is not justified by any statutory prohibition to which I have been referred. To the contrary there is a permission for such functions as outlined in the statutes.

88. I find that the plaintiff comes within the category of any other body on which functions in relation to a class of the general public stand *permitted* by the enactment relating to such institutions or by an authority given under those enactments. It has never been suggested the "functions" are unauthorised. The issue is not whether the C.A.O. itself is permitted under any enactment but whether that body is permitted to exercise powers and duties by virtue of an implied or express authority under an enactment.

89. I would re-emphasise that the clause in question is phrased in a manner which allows for the "functions" to be interpreted as the

powers and duties *now exercised* by the C.A.O. It does not necessitate a distinction between the process of application and admission discussed in reference to clause 1(5)(c).

A constitutional issue?
90. In the course of argument I have been referred to a number of authorities on delegated legislation. These include those which raise questions as to the range and ambit of the power which may be delegated by the Oireachtas (cf. *O'Neill v. The Minister for Agriculture* [1988] 1 I.R., and the judgment of Murphy J. therein; *City View Press v. An Chomhairle Oiliúna* [1980] I.R. 381.

91. It is suggested that clause 1(5)(d) is over broad, and perhaps may be constitutionally frail in that it might permit a range of delegation, so wide as to be not within the contemplation of the Oireachtas. I cannot conclude this question arises on the facts of this particular case. The designation is within the terms and objects of this Act as outlined. It is unnecessary to address a chimera of constitutional issues that might arise in a different situation. The Act and the designation are subject to the constitutional principles of conformity referred to earlier in this judgment. There is no challenge to the constitutionality of any provision of the Act in these proceedings.

92. Issues may possibly arise as to how the terms of the Act might be interpreted, in the case of some hypothetical designation, having regard to provisions of s. 5 of the Interpretation Act 2005. They do not fall for consideration here. The only question which this court must address is whether *this designation* is an appropriately limited one having regard to Article 15.2 of the Constitution of Ireland. I conclude that it is, and that it falls within the terms of clause 1(5)(d) of the Act of 2003.

For the reasons outlined the plaintiff's application must fail.