Neutral Citation Number: [2009] IEHC 516

THE HIGH COURT

2008 3377 P

BETWEEN

PATRICK O'DOHERTY

PLAINTIFF

AND

THE ATTORNEY GENERAL, IRELAND

AND LIMERICK COUNTY COUNCIL – BY ORDER

DEFENDANTS

AND

FIANNA FÁIL

NOTICE PARTY

JUDGMENT of Mr. Justice Birmingham delivered on the 23rd day of November, 2009

1. This case involves a challenge to the constitutionality of s. 19 of the Local Government Act 2001, a section which deals with the manner in which casual vacancies in the membership of local authorities are to be filled. Before dealing with the details of the challenge, it is perhaps appropriate to say a little about the background to the present proceedings.

2. The plaintiff is a citizen of Ireland and he is qualified to, and does in fact, appear on the electoral register for the Rathkeale electoral area, which is one of the five local electoral areas that comprise Limerick County Council. Of note in the context of the present proceedings is that in the local elections held in June 2004, the last to be held before the commencement of the present proceedings, the Rathkeale electoral area returned five members, three Fine Gael and two Fianna Fáil.

3. On the 31st March, 2008, Councillor John Griffin, one of the Fianna Fáil councillors that had been elected from the Rathkeale electoral area at the previous election resigned. As we shall see in due course, if the procedure set out in the Local Government Act 2001, was followed, Limerick County Council would co-opt a person to fill the vacancy that arose on his resignation, and having regard to the terms of the Act the vacancy was required to be filled by the co-option of a Fianna Fáil nominee.

4. By notice of motion dated 16th May, 2008, the plaintiff sought an interlocutory injunction to restrain the filling of the vacancy. At that stage Limerick County Council was added as a co-defendant and Fianna Fáil as a notice party. The plaintiff's application for an interlocutory injunction was refused in the High Court on the 10th June, 2008, and an appeal to the Supreme Court was dismissed on the 13th June, 2008.

5. On the 16th June, 2008, the casual vacancy that had arisen following the resignation of Councillor Griffin was filled by Mr. Michael Mulcair on the nomination of the Fianna Fáil party. Following the co-option of Councillor Mulcair, the pattern of representation for the Rathkeale electoral area was restored to that which had been put in place by the results of the 2004 local elections, i.e. three Fine Gael and two Fianna Fáil.

6. For completeness, I should indicate that in the local elections held in June, 2009 the Rathkeale electoral area was reduced from a five seater to four seater, and returned three Fine Gael and one Fianna Fáil candidate. Mr. Michael Mulcair was an unsuccessful Fianna Fáil candidate in this election. The plaintiff also contested the election unsuccessfully.

7. The present proceedings have given rise to a number of issues including whether the plaintiff enjoys *locus standi* either at all, or in respect of certain arguments that he wishes to advance and whether the proceedings are moot.

8. Turning first to the question of *locus standi* which as Hardiman J. pointed out in *G. v. Collins & Others* [2005] 1 I.L.R.M. 1, falls to be addressed at the time when the proceedings are commenced as distinct from the question of mootness which falls to be considered when the matter actually comes before the court, I note that the issue has already attracted the attention of the Supreme Court. Delivering the judgment of the Supreme Court on the interlocutory application on the 13th June, 2008, Macken J. stated:-

> "The first thing to be said is that the court is satisfied he has locus standi to commence the proceedings and to bring the present application, but he very fairly accepts that he does not have a direct interest in the co-option to the council in the sense of not himself being a person either seeking to be co-opted or in any other way closely attached to that co-option."

The views of the Supreme Court, in effect, dispose of the issue of *locus standi*, but I should make clear that even if the Supreme Court had not specifically addressed the issue, I would have been of the view that as an elector in the Rathkeale area where a vacancy was about to be filled, and as someone anxious to serve on Limerick County Council as a councillor for the Rathkeale electoral area, as evidenced by his candidature in the 2009 local elections, the plaintiff enjoyed the necessary standing to commence the present proceedings. It does not, of course, follow that the plaintiff is entitled to advance all and every argument that might conceivably be made, and the plaintiff must present his challenge against the factual background which has provoked the proceedings, as distinct from a notional set of facts which might

arise on some other occasion.

9. The question of mootness is less straightforward. The State defendants have placed heavy emphasis on their arguments that the present proceedings are moot, pointing out that whatever happened in 2008 has been overtaken by the election of June, 2009 and that there is not at present any co-opted councillor serving for the Rathkeale electoral area or, indeed, serving on Limerick County Council.

10. It is the long established practice that our courts do not deliver advisory judgments or opinions. This has a particular resonance in relation to constitutional issues where the jurisprudence establishes that courts will address and pronounce on constitutional issues only where this is necessary.

11. In this case the plaintiff as a citizen and local elector and as someone clearly interested in public affairs had a legitimate interest in how vacancies in his local electoral area are to be filled. He showed his interest by seeking interlocutory relief but was refused, essentially on a balance of convenience assessment. It seems to me harsh to suggest that an individual who seeks to intervene before an action to which he objects occurs but is unsuccessful should, despite being told by the Supreme Court, as Mr. O'Doherty was, that he had raised a substantial issue then be denied an opportunity to have that issue determined because, despite his best efforts matters have proceeded.

12. In the course of his judgment in *G. v. Collins*, Hardiman J. observed that in the United States, an issue is not deemed moot if it is "capable of repetition, yet evading review". He went on to comment "as might be expected from that formulation, such cases have tended to focus on time limited events such as election campaigns, pregnancy, (as in *Roe v. Wade*) and time limited court orders especially in the domestic violence area". I regard the reference to election campaigns as highly significant. This is not strictly an election campaign issue, but it is in some respects analogous. In that regard s. 19(4)(a) of the Local Government Act 2001, provides as follows:-

> "A co-option shall be made, after due notice, at the next meeting of the local authority after the expiration of 14 days from the occurrence of the vacancy or as soon after the expiration of the 14 days as circumstances permit."

While not setting an absolute time limit this provision is likely to present difficulties for anyone who would want to mount a challenge to the filling of any casual vacancy that might arise in the future. Certainly, it would be difficult to conclude a successful constitutional action between a vacancy arising and a vacancy being filled in the ordinary course of events.

In the course of their written submissions the State have pointed out that given that local elections occur at five yearly intervals and that vacancies will arise from time to time during that period, opportunities would arise to have the question of constitutionality finally determined. However, that is of limited comfort to Mr. O'Doherty or, indeed, others who may feel that the system of co-option is a blot on the democratic electoral system. Their ability to ever have the issue addressed would simply be a matter of chance. Refusing to consider the present challenge might well mean the issue identified will never be addressed, an issue that had been categorised by the Supreme Court as a fair issue to be tried, and as perhaps an extremely important issue to be tried.

Again, it seems to me of significance that the plaintiff has no direct personal interest, save that he unsuccessfully contested the 2009 elections. His role was as a citizen seeking to raise an issue in the public interest. His situation is to be contrasted with the situation in G., where the applicant had initially faced prosecution for breach of a protection order, at which stage she had a very direct personal interest but the complaints against her were withdrawn and the charges were dismissed, bringing her personal interest to an end. In all the circumstances it seems to me that the interests of justice are served by considering the challenge.

13. Section 19 of the Local Government Act 2001, provides as follows:-

> "—(1) A casual vacancy in the membership of a local authority occurs—
>
> (a) where *section 16 (1)* applies, [where a councillor becomes for one of a number of reasons disqualified from membership]
>
> (b) upon the death or resignation (including deemed resignation by virtue of *section 18 (4))* of a member of a local authority, [deemed to have resigned by reason of continuous absence from attendance at meetings]
>
> (c) in such circumstances as are set out in Articles 25, 28 and 124 of the Local Elections Regulations, 1995 (S.I. No. 297 of 1995), [less candidates nominated than there are vacancies, candidates dying following nomination, candidates being elected for more than one local authority electoral area]
>
> (d) in such circumstances as may be prescribed by regulations made by the Minister under *section 27* , or [local elections to be held in accordance with regulations made by the Minister]
>
> (e) in such circumstances as are referred to in *section 15(1)* of the *Local Elections (Petitions and Disqualifications) Act, 1974* [court orders relating to a petition]
>
> (2) It is the duty of the meetings administrator to notify the members of the local authority in writing on becoming aware that a casual vacancy has or may have occurred.
>
> (3) (a) A casual vacancy shall be filled by the co-option by the local authority of a person to fill the vacancy and except where *paragraph (c)* or *(d)* or *(e)* of *subsection (1)* apply, subject to such person being nominated by the same registered political party who nominated for election or co-option the member who caused the casual vacancy.
>
> (b) Where the person causing the casual vacancy was a non-party candidate at his or her election to the local authority, the vacancy shall be filled by the co-option by the local authority of a person to fill the vacancy (except where *paragraph (c)* or *(d)* or *(e)* of *subsection (1)* apply) in accordance with such requirements and procedures as

may be set out in its standing orders.

(c) A local authority shall in making standing orders consider the inclusion of provisions for the purposes of *paragraph (b).*

(4) (a) A co-option shall be made, after due notice, at the next meeting of the local authority after the expiration of 14 days from the occurrence of the vacancy or as soon after the expiration of the 14 days as circumstances permit.

(b) In this subsection "due notice" means not less than 3 clear days' notice given in writing to every member of the local authority.

(5) A person is not to be proposed at a meeting of the local authority for co-option without his or her prior written consent.

(6) A person co-opted to fill a casual vacancy shall be a member of the local authority until the next ordinary day of retirement of members of that local authority unless he or she sooner ceases to be a member."

14. In summary the plaintiff contends a system of filling casual vacancies by co-option is unconstitutional. In that regard, he relies in particular on the provisions of Article 28A of the Constitution inserted by Referendum of the 11th June, 1999. I will, for ease of reference, set out the provisions of that Article at this stage.

Local Government
15. Article 28A:-

"1. The State recognises the role of local government in providing a forum for the democratic representation of local communities, exercising and performing at local level powers and functions conferred by law and in promoting by its initiatives the interest of such communities.

2. There shall be such directly elected local authorities as may be determined by law and their powers and functions shall, subject to the provisions of this Constitution, be so determined and shall be exercised and performed in accordance with law.

3. Elections for members of such local authorities shall be held in accordance with law not later than the end of the fifth year after the year in which they were last held.

4. Every citizen who has the right to vote at an election for members of Dáil Éireann and such other persons as may be determined by law shall have the right to vote at an election for members of such of the local authorities referred to in section 2 of this Article as shall be determined by law.

5. Casual vacancies in the membership of local authorities referred to in section 2 of this Article shall be filled in accordance with law."

In essence, Mr. O'Doherty argues that the Constitution mandates that there should be directly elected local authorities, and says that a local authority to which co-options can take place is not a directly elected local authority. In response, the defendants point to the specific terms of s. 5 of the Article, and say that what s. 19 of the 2001 Act does is to provide how casual vacancies are to be filled and that s. 19 is the law contemplated by Article 28A.5.

16. The Local Government Act 2001, does, of course, enjoy a presumption of constitutionality which means that when a court is called on to address the question of constitutionality it must be presumed constitutional unless the contrary is clearly established. Murray C.J. in *King v. Minster for the Environment (No. 2)* [2007] 1 I.R. 296, another case dealing with elections and the political system in that it dealt with the obligation for non-party general election candidates to present 30 assentors, which requirement was waived in the case of candidates from registered political parties, put it this way:-

"…as this Court has in a succession of cases found the onus is on the claimant to clearly establish a claim that an Act is incompatible with the Constitution."

Murray C.J. returned to the same theme in *Iqbal v. Minister for Justice* [2008] 4 I.R. 263, a case dealing with the European Arrest Warrant regime, where he quoted from the Supreme Court decision in *Curtin v. Dáil Éireann* [2006] 2 I.R. 556, at p. 627, as follows:-

"The courts must, in accordance with the principle of the separation of powers, exercise a significant level of judicial restraint when considering the exercise of that power."

In *Iqbal*, the Chief Justice went on to state that the courts should not intervene in the actions of another organ of State unless that organ acted in clear disregard of its constitutional obligations. The general presumption of constitutionality that applies, is perhaps reinforced when one considers that Article 28A was inserted by the people in 1999, and the legislation under consideration was enacted just two years later. It must be the case that the Oireachtas in enacting the 2001 Act and in particular, in enacting s. 19, was fully aware of the provisions of Article 28A, given that it had so recently facilitated the putting of the proposal to insert the Article before the people.

17. It would appear that Article 28A is of such recent origin that it has been considered in detail in only one case, that of *Ring v. the Attorney General* [2004] 1 I.R. 185, a case which dealt with the prohibition contained in the Local Government Act 2001, on members of the Oireachtas serving on local authorities. I find the approach of Laffoy J. of very considerable assistance. At paragraph 38 of her judgment she commented as follows:-

"38. In my view, whether there is a constitutionally protected right of election to membership of a local authority turns on the proper construction of Article 28A in the context of all of the provisions of the Constitution. An analysis of Article 28A indicates limited constitutional protection for local government and local representative assemblies. The role of local government is recognised rather than guaranteed. Significantly, insofar as the role of local government is recognised in exercising and performing at local level powers and functions, section 1 stipulates that such powers and functions are "conferred by law". While the constitutional protection is limited, nonetheless, Article 28A contains the following mandatory provisions which are fundamental in ensuring that the democratic representation of local communities is safeguarded; (a) that local authorities exist; (b) that they should be directly elected; (c) that elections shall be held at five yearly intervals; and (d) that, as regards a core element of the electorate, eligibility to vote at such elections shall correspond with eligibility to vote at elections for the Dáil."

"39. That the function of defining the parameters of the role of local government and how it operates in certain respects is left to the Oireachtas, is clear on the face of Article 28A. As I have already mentioned, the powers and functions of local authorities are to be determined by the Oireachtas (Article 28A.1). Even in relation to the mandatory provisions a vast area of regulation is left to the Oireachtas. The number, the territorial extent and the demographic features of the local authority areas are matters for the Oireachtas, as are their powers and functions (Article 28A.2). The elections which are to be held at five yearly intervals are to be regulated by law. The right to vote, even in relation to the core element of the electorate, is to be regulated by law (Article 28A.4). Other matters which Article 28A expressly leaves for regulation by the Oireachtas are the expansion of the core element of the electorate (Article 28A.4) and the filling of casual vacancies in membership of local authorities (Article 28A.5)."

18. Having conducted that analysis Laffoy J. then observed:-

"In my view, it must be assumed that where Article 28A is silent as to the regulation of local government and local authority elections, including the criteria for eligibility for membership of a local authority, such regulation has been left to, and is within the competence of, the Oireachtas… the whole thrust of Article 28A is that constitutional regulation of local government is minimal and that regulation is to be by statute."

19. It will be appreciated that Laffoy J. was dealing with a claim on behalf of a citizen who was a Dáil Deputy that he had the same right to be a member of a local authority as every other citizen. Laffoy J. was of the view that where Article 28A was silent, as it was, in relation to eligibility for membership of a local authority, that this meant that such regulation has been left to and is within the competence of the Oireachtas. In contrast, in the present case in relation to the filling of casual vacancies, it is not merely a question of the Article being silent, leading to a conclusion that the matter has been left to the Oireachtas, but rather that the Article expressly and in terms entrusts that issue to the Oireachtas.

20. The views of Laffoy J. in *Ring* that the Constitution offers limited constitutional protection for local government and local representative assemblies accords with the approach that had been recommended by the Constitution Review Group and The All Party Oireachtas Committee on the Constitution. The Constitution Review Group recommended that the Constitution should contain some explicit recognition for the role of local government but also expressed some concerns about the potential impact of any new provision which assigned definite powers to local authorities. The approach of the All Party Oireachtas Committee was similar and it recommended that while the Constitution should not assign any specific functions to local authorities, it should contain recognition of the general local government system, together with a guarantee that local elections must be held every five years.

21. Against that background the observations in *Kelly* on the Irish Constitution at para. 5.2.03 that Article 28A.1 merely recognises the role of local government in providing a forum "for the democratic representation of local communities" and in exercising and performing "at the local level powers and functions conferred by law" implies a fairly low level of constitutional protection with a minimum legal content, seems fully justified.

22. In essence, on behalf of the plaintiff, it is argued that because Article 28A.2 provides that there shall be directly elected local authorities, that the entitlement of the Oireachtas to provide by law as to how casual vacancies are to be filled is limited to providing by law as to how, by means of direct election the vacancies are to be filled. The contention is that Article 28A.5 is to be interpreted as if it read "casual vacancies in the membership of local authorities referred to in s. 2 of this Article shall be filled by *direct elections* in accordance with law". The question then is, does Article 28A support that contention.

23. The authors of *J.M. Kelly: The Irish Constitution* identify five different approaches to the interpretation of the Constitution which are to be found in the case-law characterising these as literal interpretation, the doctrine of harmonious interpretation, the "broad" approach, the historical approach and the natural law approach, commenting that the "broad" and "harmonious" interpretation approaches are in the ascendancy. They then go on to comment "indeed, it may well be that any attempted segmentation of these different constitutional approaches is otiose because each of these words connotes an aspect of interpretation which legitimately forms part but only part of every exercise in constitutional construction", quoting in that regard from the judgment of Hardiman J. in *Sinnott v. Minister for Education* [2001] 2 I.R. 545 at 688.

24. It seems to me which ever of these approaches or which ever combination is adopted in the present case produces the same result:-

25.

Literal:

• a literal interpretation of Article 28A.5 leads to the conclusion that the Oireachtas is entrusted with a largely unfettered discretion as to how to legislate. It is true that arguments that Mr. O'Doherty advanced might be seen as an application of the literal approach. He says that because of the reference in Article 28A.2 to directly elected local authorities, that a local authority, any one of the members of which has not been directly elected, literally ceases to be a directly elected local authority. While the argument he makes is not without attraction, it does seem

to me to be an excessively literal approach and somewhat artificial.

Broad:

• A broad interpretation would reject the excessive literalism involved in the total focus on the words "directly elected" to be found in Article 28A.2. What this requires is that the Article would be read in a broad, purposeful manner which best gives effect to the intention of the framers of the constitutional amendment and the purpose and objective of the people in enacting it. It would see the view being taken that an authority elected every five years by universal franchise is a directly elected authority. Such an approach would involve asking what was Article 28A.5 intended to achieve? Some assistance in that regard is to be found in *Kelly* which at para. 5.2.10 commented:-

> "Local Government Act, 2001, s. 19 provides that such casual vacancies are to be filled with co-option rather than by means of a bi-election and Article 28A.5 **was apparently intended to give constitutional validation to the this practice.** *[Emphasis added]*

Historical:

• The fact that the impugned legislation was enacted within two years of the Constitution being amended seems to me of particular significance. The time frame involved here is not dissimilar to that which was under consideration in *Re Article 26 and The Offences Against The State (Amendment) Bill* 1940 [1940] I.R. 470, where the relevance of this consideration was first asserted. There the Supreme Court said:-

> "Before dealing [with the relevant articles] we desire to point out that several Acts authorising the detention of persons had been passed by the Oireachtas of the Irish Free State prior to the enactment of the Constitution which we are now considering. The existence and affect of these Acts must have been within the knowledge of the framers of the Constitution and, nevertheless, there is no express prohibition in the Constitution against such legislation. This is a matter to which we are bound to attach a considerable weight in view of the fact that many articles of the Constitution prohibit the Oireachtas in plain and unambiguous language, from passing certain laws therein specified."

That passage was cited to Budd J. in *O'Donovan v. Attorney General* [1961] I.R. 114 when his attention was drawn to the fact that two Electoral Acts passed under the 1922 Constitution had affected divergences in ratio of population to Dáil seats. Budd J. was firm in his view that there was no analogy between the two situations making the point that the existence of laws providing for detention under the former Constitution, was well known but that the detailed statistical information in relation to the size of the electorates would never have been in the minds of those that enacted the Constitution. It seems, therefore, that the question of how well known was the system that prevailed prior to the adoption of the Constitution is a very relevant consideration.

24. Article 28A and in particular Article 28A.5 was submitted to the people against a background of over one hundred years of co-options to fill casual local authority vacancies. That co-option was the traditional method of filling vacancies, and must have been known to all of the legislators who agreed to put the proposal before the people. They must have known that, as persons involved in the political system but also must have known it as the Oireachtas had legislated in that regard as recently as the Local Government Act 1994, s. 11. Neither, does it seem to me there can be any basis for the suggestion that the public, who voted to insert Article 28A into the Constitution, would be in any way surprised to learn that the measures that they had voted for permitted co-options to occur. Co-options have not been unusual over the years but when they occur will often receive media attention and it is reasonable to assume that councillors once they have been co-opted will take steps to inform the electorate of the area for which they have been co-opted of their new status.

25. There is an amount of evidence available that prior to referendum day the intention of those who framed the amendment and of the people who enacted it was to permit the existing practice to continue and that they believed the amendment would have this effect. Prior to polling day, the Referendum Commission, a body created by statute, in accordance with its statutory mandate prepared an explanation of the subject matter of the proposal and distributed it widely. The Referendum Commission which on this occasion was chaired by a former Chief Justice commented in relation to s. 28A.5.

> "This section would appear to permit the continuation of the present position whereby a local authority may fill a casual vacancy in its membership such as one caused by death, resignation etc, without holding a by-election".

While, it might be suggested that the reference to appearing to permit is not as emphatic and unequivocal as it might have been, it does not seem possible to interpret the document as meaning that, in the view of the Referendum Commission that the section, while appearing to permit the continuation of the present position in fact precluded it. Thus, in deciding to insert the new Article the people had available to them, the considered view of the Referendum Commission that the existing system would be permitted to continue.

• Harmonious.

The contrast between Article 28A.5 which on its face, certainly taken in isolation, leaves the Oireachtas free to determine by what manner casual vacancies are to be filled and Article 16.7 which deals with filling of vacancies in Dáil Éireann is striking. Article 16.7 clearly envisages that a filling of casual vacancies will be by election. It provides as follows:-

> "Subject to the foregoing provisions of this article, *elections* for membership of Dáil Éireann **including the filling of casual vacancies** shall be regulated in accordance with law." *[Emphasis added]*

Thus, Article 16.7 does not envisage that vacancies can be filled by any method other than election.

26. The filling of casual vacancies in Seanad Éireann also received specific attention in the Constitution. Article 18.10.2 provides casual vacancies in the number of the elected members of Seanad Éireann shall be filled in the manner provided by law. It is of interest that the law in question, provides that in the case of casual vacancies arising on the panels that while by-elections are held the electorate is a restricted electorate, confined to members of the Oireachtas and excluding from participation County Councillors who constitute the majority of the electorate in a Seanad general election. It seems to me that this is yet a further indication that by 1999 when Article 28A was inserted, that the idea that different approaches were sometimes taken to filling casual vacancies on different bodies must have been widely known. I have already referred to observations in para. 5.2.10 in *Kelly: The Irish Constitution*. However, it is true that the authors there go on to raise a doubt about the appropriateness of the provision and suggest that it might be contended that a

procedure which allows for the filling of vacancies by way of co-option violates constitutional norms. In a footnote the comment is made:-

> "It could scarcely be contended that it would be constitutionally permissible for a law to provide that casual vacancies in the membership of the Dáil could be filled by means of co-option."

However, as we have seen the wording of Article 16.7 appears to specifically and directly envisage filling casual vacancies in Dáil Éireann by election and by implication at least to exclude other possible methods. The authors question whether s. 19 could survive constitutional challenge, commenting that any law dealing with the filling of casual vacancies must comply with "the fundamental norms of the legal order postulated by the Constitution". This gives rise to the question whether co-option fails to comply with the fundamental norms of the legal order postulated by the Constitution.

27. There is no doubt at all, but that the Oireachtas could have provided for the filling of casual vacancies by direct election, i.e. the holding of by-elections, but the question really is whether they were constitutionally mandated to do so and precluded from adopting any other approach. While stressing that he was not being prescriptive, Mr. O'Doherty suggested three possible approaches that were open and might have been taken namely (1) leaving the vacancy vacant, (2) having an entirely fresh election in the local electoral area where the vacancy arose thereby filling the same number of seats as were available to be filled in the general local election or, (3) holding a by-election to fill the vacant seat.

28. Leaving a vacant seat unfilled might be thought undesirable because it would mean that the local electoral area in question would be under represented. More fundamentally, it appears that the option of leaving the seat vacant, even if regarded as desirable for some reason, is precluded by the terms of Article 28A.5 which specifically states that casual vacancies **shall** be filled.

29. The suggestion of a complete re-run would have little to recommend it. It would mean that the term of office of any sitting councillor could be brought to a sudden and premature end by one of the other councillors from the local electoral area choosing to resign. Such uncertainty as to the term of office of councillors, which would leave any councillor subject to the whim of the others elected to the same local electoral area on the same day, would constitute a significant disincentive to participation in local government and would be destructive of the desire to have an effective participatory local democratic system. It would serve as a real discouragement to involvement in elected local government.

30. That such a suggestion would be even mentioned at all is because there are difficulties associated with holding a by-election to fill a single vacancy that had arisen. Surveys conducted by both parties to the present proceedings, which while incomplete certainly seem to have been representative, suggest that in the period between any two local elections, approximately 10% of the seats fall vacant. Given that there are 1,627 council positions in the State and if one makes the assumption, which may not be entirely accurate, that vacancies arise at regular intervals over the five year term, this would mean that by-elections would be taking place somewhere or other pretty much constantly. That gives rise to legitimate concern that this would result in voter fatigue carrying with it the risk of very low turn outs with all the dangers associated with that. It seems to me that it is an understandable concern.

31. It must also be appreciated that any by-election to fill a single vacancy will involve an electoral contest which will be of an entirely different character to that which took place in the electoral area on general local election polling day. The general election involves electing members to a multi seat constituency. In the most recent general local election, county council local electoral areas varied from three seaters to seven seaters and in the case of the second tier local authorities there were a number of nine seat constituencies and twelve seat constituencies. One of the advantages of the multi seat system is that it facilitates the election of minorities which gives rise to the prospect that a number of different view points will be represented in the council chamber. In the case of a three seat constituency, the quota required is 1/4 plus one of those who cast votes, and in the case of a seven seater the quota is only 1/8 plus one. Many candidates will of course be elected who do not secure a quota on the first count, so that in practice the level of support required to achieve election is even less than this. This means that there is a very real prospect that different view points, including minority view points, will be represented in the Council Chamber.

32. However, if a by-election was to be held to fill a single seat the quota would be 50% plus one, thereby radically altering the nature of the contest. In general, I think it is fair to say that minority party and non-party candidates are advantaged by a multi-seat constituency, and placed at a disadvantage if there is only one seat to be filled. Having regard to the position of non party candidates would seem to have been a matter that was regarded as significant by the Oireachtas which in the legislation provided that when the vacancy arises involves a councillor of a registered political party, that his or her successor will be a nominee of that party and dealt with the situation of non-party candidates by providing that the co-option will be by the local authority and that a local authority in making standing orders shall consider the inclusion of provisions in this regard. The effect of these provisions is to increase the likelihood that the political balance that resulted from the fully contested general local election will not be altered by chance vacancies that may arise later. In the case of a local electoral area like Rathkeale which in both 2004 and 2009 did not elect any non-party candidate, it guarantees the maintenance of the political balance. The seats achieved by the parties in 2004 broadly reflected the votes achieved. Fine Gael with 57.49% of the vote secured three seats and Fianna Fáil with 33.95% secured two. Had a by-election taken place following the retirement of Councillor Griffin and if the votes at that by-election followed the same general pattern as 2004, the seat would have been won by Fine Gael which would then have held four out of five seats which would not have been a true reflection of the level of its support, in that local government area.

33. It does seem to me that maintaining the balance decided upon by the voters in a multi seat constituency is a legitimate objective and one which the Oireachtas was entitled to take into account.

34. Of course, the Oireachtas could have decided otherwise and indeed, even if setting its face against by-elections might have approached the matter somewhat differently. There might, for example be thought to be merit in a provision similar to that which applies in the case of election to the European Parliament requiring candidates contesting the general election to identify substitutes who would then take their place if for any reason they did not see out their term. This might be seen as particularly advantageous in the case of non-party candidates, where it may not be clear who has the greatest claim on a seat that falls vacant.

35. However, the question is not whether the Oireachtas could have done it differently or even whether the system decided upon by the Oireachtas could be improved upon. The question rather is whether the decision made by the

Oireachtas was one that was open to it. Particularly, in a situation where the Constitution specifically entrusts the making of decisions in a particular area to the Oireachtas, a considerable margin of appreciation must be afforded.

36. The matter is very well put by Dr. Brian Foley in *Deference and the Presumption of Constitutionality* (IPA 2008) at p. 166 where he comments:-

> "The logic of this approach is that where the Constitution specifically provides for a general state role in a particular area, the court should respect its action in that field because it operates, in a sense under a constitutional license."

37. I am, therefore, very clearly of the view that providing for co-option does not fail to comply with the fundamental norms of the legal order in a democracy postulated by the Constitution.

38. I am reinforced in that view by the fact that the international picture is quite a mixed one, and certainly lends no support to the suggestion that it is an essential hallmark of a democracy that casual vacancies on any body must be filled by direct election. Professor Richard Sinnott, the distinguished political scientist, who was called to give evidence on behalf of the defendants, referred to the practice in Germany and New Zealand, those being mixed systems, falling somewhere between list systems and single member plurality systems, and also the situation in Australia where the question of filling vacancies in the various upper houses of the Australian legislative system has been addressed by the Electoral Council of Australia which had argued that, under multi member PR systems, it is generally considered unfair to fill casual vacancies by holding by-elections because the vacating member was elected to represent a proportion of the electorate, not a majority of the electorate.

39. In Germany the general rule for filling vacancies is that "the vacant seat shall be filled by an appointment from the Land list of that party for which the departed member stood at the election. The German electoral law goes on to state "that if the list is exhausted, the seat shall remain vacant". The only circumstance in which an election is held to fill a vacancy, is when the departing member has been elected as the constituency member for a group of voters or a party which had not been allowed to submit a Land list in the Land. Only in these very limited circumstances is a further election held. In New Zealand, list vacancies are filled in a manner very similar to that which obtains in Germany, although vacancies arising due to the departure of a constituency member of Parliament is, filled by holding a by-election.

40. The situation in the United States is of some interest. As we know that is a society that places enormous significance on direct elections and many positions in public life which in other jurisdictions would be filled by appointment are elected, including in some States, judges. However, when vacancies arise in the United States Senate, which of course occupies a central position in the United States legislative and political system, the holding of a special election is not mandatory. It does occur in some States but in others the vacancy is filled by the State Governor nominating someone to fill the vacancy. Even there, the situation is not uniform because on some occasions the Governor is at large and in the case of some states he is required to select a nominee from the same political party as the former Senator who had vacated the seat.

41. It seems to me that even this very brief overview of international practice refutes the suggestion that democratic norms mandate holding by-elections in all circumstances. On the contrary, it shows that the practice followed varies widely from situation to situation. In all the circumstances I am satisfied that the plaintiff has failed to discharge the onus on him to establish the unconstitutionality of the relevant provisions of the Local Government Act 2001, and I refuse the reliefs sought.