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REDEFINING THE TERMS AND LIMITS OF JUDICIAL REVIEW, PARTICULARLY IN RELATION TO DISPUTES OF A HIGHLY TECHNICAL NATURE

RESPONSE FROM THE

SUPREME COURT OF IRELAND

QUESTIONNAIRE

The prohibition of denial of justice or - as its twin principle - the right of access to justice put courts under an obligation to hear and assess the facts of a case and to rightfully apply the law to the facts established. In some cases this is easier said than done. Especially cases of a highly technical nature may pose extraordinary challenges to the court: challenges in understanding the facts and challenges in understanding scientific or technical answers to problems. This may occur in many fields of law the administrative judge works in, such as environmental law, telecommunications law, planning law, public procurement law etc.

In order to prevent a denial of justice courts will have to deal with such questions even though their answers may lie outside of the field of competence of the administrative judge. The seminar is designed to serve as a point of comparison and a point of best practice in order to facilitate the administrative judge with more knowledge and skills in this part of his and her work. Therefore, the seminar addresses questions of gathering technical and scientific knowhow, involving experts in the procedure, evaluating technical standards and measuring the binding authority of technical documents and publications - be it legal norms or scientific standards. The seminar will also have to address questions regarding margins of appreciation of authorities in technical evaluations.

Part 1: Jurisdiction in fields of law typically producing disputes of a highly technical nature

1. Is your court competent to answer:
   - Questions of fact and questions of law
   - Only questions of law
   - **Questions of law and partly questions of fact**
   - In case your answer was " Questions of law and partly questions of fact", please explain:

The Supreme Court of Ireland is competent to answer questions of law and partly questions of fact. The following is outlined in Practice Direction SC 19: Conduct of Proceedings in Supreme Court:

> 20(e)- The appellant or moving party should include a chronology whether as part of the introduction, or in a separate appendix (which appendix will not form part of the submissions for the purpose of the word limit set out at paragraph (c)(v) above). The respondent should state if the chronology is agreed. Where it is not agreed, the respondent should produce his or her own chronology identifying clearly the points of difference. **Parties are reminded that they are not entitled to revisit findings of fact made by the trial judge and/or upheld by the**

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Court of Appeal, unless permitted to do so by a ground or grounds upon which leave has been granted. In such case parties should address the basis in law upon which such findings are contested.

In civil appeals concerning findings of fact, appellate courts apply different principles depending on whether the evidence was oral or affidavit-based. Where findings are based on oral evidence, the leading authority is *Hay v O'Grady* [1992] 1 IR 210 which states that appellate courts should not overturn findings supported by credible evidence (1), should be slow to overturn inferences from oral evidence (2), but may reconsider inferences from circumstantial evidence more freely (3). These principles were upheld in *O'Connor v Dublin Bus O'Connor v Dublin Bus* [2003] 4 IR 459 (credibility findings rarely disturbed) and *McDonagh v Independent Newspapers* [2017] IESC 46 (appellate courts must not substitute their own fact findings for those of juries or trial judges). In *Leopardstown Club Ltd v Templeville Developments Ltd* [2017] IESC 50, the Supreme Court per MacMenamin J outlined the following at paragraph 8:

> 'Non-engagement' with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to, *and* where what was omitted with went to the very core, or the essential validity of his findings. There is, therefore, a high threshold. In effect, an appeal court must conclude that the judge's conclusion is so flawed, to the extent that it is not properly 'reasoned' at all. This would arise only in circumstances where findings of primary fact could not 'in all reason' be held to be supported by the evidence. (See Henchy J. In *M v. An Bord Uchtala*, cited earlier, quoting his earlier judgment in *Northern Bank Finance Corporation v. Charlton* [1979] I.R. 149). 'Non-engagement' will not, therefore, be established by a process of identifying other parts of the evidence which might support a conclusion, other than that of the trial judge, when there are primary facts, such as here. Each of the principles in *Hay v. O'Grady* are to be applied.

Conversely, when findings are based on affidavit evidence, *Ryanair v Billigfluege* [2015] IESC 11 and *O'Donnell v Bank of Ireland* [2015] IESC 14 confirm that appellate courts are in as good a position as the trial judge to evaluate facts, but must show appropriate deference to the trial judge's evaluative analysis, only intervening if findings are untenable or clearly erroneous.

The Supreme Court is therefore competent to answer questions of law and partly questions of fact. The Court primarily functions as a court of final appeal dealing with questions of law, but its competence extends to certain factual matters in specific circumstances. However, the Court's primary role remains the determination of legal questions, and it typically will not engage in extensive fact-finding. When factual disputes arise, the Court generally expects these to be resolved at trial level before legal questions come before it on appeal.

2. Is your court competent in the following fields of law:

- Environmental law
- Health law
- Urban planning and building law and/or spatial planning law
- Telecommunications law
- Public Procurement law

Please provide other fields of law, which bear a technical challenge to your court:

Yes, the Supreme Court is competent in all these areas. Other areas include:

- EU Law and Data Protection
- Insurance Law

- Social Welfare Law
- Corporate and Commercial Law
- Employment and Industrial Relations Law
- Personal Injuries Assessment

3. Give an estimate or - if possible - a number as to how many legal disputes of a highly technical nature your court is faced with on an annual basis
   - In percentage of all disputes:
   - In absolute numbers:

It is not possible to give an estimate of how many legal disputes are of a highly technical nature as most cases the Court faces are of a highly technical nature. However, statistics on the type of cases heard by the Court can be found in the Supreme Court Annual Report 2024.

4. In what field of law, in which kind of cases do you specifically see technical challenges to the judges of your court?
Please explain:

The Supreme Court addresses particularly technical challenges in environmental and planning cases, where issues pertaining to scientific, engineering, and economic concepts must be understood and applied. However, in Irish case law, disputes involving technical and scientific judgments are typically approached with judicial deference to expert bodies, unless there is a clear legal error, irrationality, or procedural flaw. The case of *Energia v The Commission for Regulation of Utilities and GR Windfarms* [2025] IESC 1 is an example of this. The technical issues in this case centered on electrical grid management, EU energy regulation, and financial compensation mechanisms within Ireland's electricity market. The courts do not attempt to resolve scientific disagreements themselves but instead focus on whether the decision-making body had jurisdiction to make the decision, followed fair procedures, took relevant considerations into account, and made a reasoned decision based on appropriate expert evidence.

Part 2: Facing modern challenges in disputes of a highly technical nature

5. Does your court employ technical staff in order to help the judges better understand technical questions?
   - As research assistants
   - As additional judges
   - In another function (e.g. as a separate panel etc.).
     Please explain:

No specialised technical staff is employed to help judges in this regard. However, Irish judges have several specific tools at their disposal to exercise control over disputes involving complex scientific and technical issues, including those related to climate change. Judges can draw on their judicial assistant for research support and expert witnesses presented by the parties but may also consult or request reports from specialist scientists or technical advisors. Courts often rely on reports, government scientific assessments, and other official expert sources as part of the evidentiary record. Courts may invite or allow third parties with relevant expertise, such as environmental NGOs, academic institutions, or government bodies, to participate as amicus curiae. These submissions provide impartial perspectives, highlight technical or policy contexts, and assist the court in understanding scientific complexities.

6. In case your answer was yes:

a) How many persons of the technical staff are employed at your court?
- In percentage of all staff involved in decision-making:
- In absolute numbers of all staff involved in decision-making:

b) How are these persons involved in the decision-making process? Please explain:

c) How does the transfer of knowledge take place? Please explain (e.g. preparation of reports, discussions in session etc.):

Not applicable

7. How does your court cope with technical questions, which need to be understood to solve the case?
- **Judges have to understand the technical questions/have to acquire the necessary knowledge themselves**
- **Judges may rely on external experts**
- Judges may rely on internal experts
- Other (please provide a method):

Please explain your answer:

Judges must inform themselves of technical issues which come before them in cases. Materials are supplied by barristers in books provided which may be of assistance, and it is likely that certain materials will be requested at case management such as chronologies of events or maps of areas of interest in order to aid understanding. Barristers are also expected to be well-equipped to answer any outstanding queries judges may have, as they will have more than likely represented the client previously, and will be well-versed in the technical matters in question.

8. If judges may rely on external experts: Are these experts
- **Chosen by the court**
- **Recommended by one of the parties**
- Recommended by a public authority
- Other (please provide a method):
-

Please explain your answer:

Judges in the Supreme Court of Ireland can rely on external experts as part of submissions made by counsel for their parties, as well as appoint an expert directly by way of *Amicus Curiae*.

9. To answer technical questions: May the court rely on technical expertise as laid down in:
- Regulations
- Other government documents or documents by public bodies
- Documents published by the EU Commission
- Documents published by experts or groups of experts
- Other (please provide a means of technical expertise):

Please explain your answer:

All of the above can be considered.

10. If your answer was yes regarding any of the criteria of question 9: To what extent does this technical expertise have a binding effect.

- The judges are bound by these documents
- **The judges may rely on these documents without being bound**
- The judges are not formally, but factually bound by these documents
- Other (please provide the extent of binding effect):

Please explain your answer:

Judges can consult and consider technical materials such as regulations, government documents, EU Commission publications, and expert reports to understand specialised subject matter that goes beyond traditional legal knowledge. While judges can use these materials as aids to understand technical concepts and industry practices, they are not obligated to accept the conclusions, recommendations, or interpretations contained within them. They can serve as a persuasive, but not a binding authority.

11. How does the court react if technical questions relevant to the case cannot be answered, not even with expert help?
Please explain:

This situation has not yet arisen in Irish case law.

12. Do these criteria described in part 2 of the questionnaire also apply to proceedings granting temporary relief?

- Yes, without modification
- **No.**

Please explain the modifications:

The standard criteria for addressing technical questions requires modification when applied to proceedings seeking temporary relief, due to the different procedural context and objectives of such applications. Speed requirements inherent in expedited temporary relief procedures necessarily limit the time available for extensive technical analysis that would normally be conducted in substantive proceedings.
Lower evidentiary thresholds apply, as temporary relief decisions typically proceed on limited technical evidence rather than the material available at full hearings. This means that conclusions reached are preliminary rather than definitive, designed to preserve the status quo pending full adjudication rather than to resolve complex technical disputes conclusively. Following the decision in *Merck Sharp & Dohme v Clonmel Healthcare* [2019] IESC 65 eight factors were outlined which a court may follow in determining whether to grant an injunction. The most important of these are the second and third factors, set out at paragraph 64 by O'Donnell J (as he then was) as follows:

> (2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the *American Cyanimid* and *Campus Oil* approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;

Most significantly, the test set out in *Campus Oil v Minister for Industry and Energy* [1983] IESC 2 for interlocutory relief focuses on whether there is a "serious issue to be tried" rather than requiring full technical resolution of disputed matters. As demonstrated in cases like *MD v Board of Management* [2024] IESC 11, temporary relief decisions prioritise procedural fairness and immediate harm prevention over technical analysis, with detailed technical evaluation reserved for substantive hearings where adequate time, evidence, and expert input are available to support such determinations.

Part 3: Principles determining the assessment of a case's factual basis

13. : Which constitutional or other general principle of law determines the obligation of the court to assess the case on a factual basis:

- The prohibition of the denial of justice
- Human rights
- Aarhus Convention
- Other.

Please explain:

There are various overlapping obligations requiring courts to ensure proper factual assessment in judicial proceedings. Article 38.1's guarantee of trial "in due course of law" serves as the primary constitutional imperative. This intersects with Article 34.1's exclusive vesting of judicial power in courts, requiring proper determination of factual disputes, and Article 40.3's protection of constitutional rights. It is implicit within these rules that a correct factual analysis be made. Natural justice and fair procedure requirements, though not explicitly enumerated, mandate that parties can present their case and have evidence properly evaluated. These constitutional obligations are reinforced by human rights instruments, including, the Aarhus Convention, Article 6 fair trial requirements under the European Convention on Human Rights Act 2003, and the EU Charter of Fundamental Rights. The prohibition against denial of justice operates as an overarching principle ensuring access to effective judicial determination, deriving from this broader constitutional framework rather than standing as an independent principle, collectively requiring courts to conduct thorough factual analysis at all times, and in technically complex cases.

14. In your jurisprudence, does the legislature and/or the competent public authority dispose of a margin of appreciation when addressing technical questions?

Please explain:

The Supreme Court does have regard to principles of deference to the Oireachtas in technical areas. In matters concerning climate change for example, the role of the Irish courts is confined to assessing the legality of a decision, policy, or omission. The judiciary does not engage in balancing contradictory interests, such as environmental protection versus economic development, nor does it evaluate the political choices made by the legislature or the executive. These matters are considered to fall within the exclusive domain of the Oireachtas. The court's function is limited to ensuring that the relevant authorities act within the scope of their legal powers, comply with statutory and constitutional obligations, and adhere to procedural requirements. For instance, in *O'Meara v Minister for Social Protection*, the Court found that the impugned provisions did not meet the rest of rationality and proportionality which gave rise to an unconstitutional discrimination contrary to Article 40.1 of the Constitution, but it was noted that "the principle of deference

to the Oireachtas in matters of social welfare" still applied in arriving at this conclusion. It is therefore recognised that the legislature has the responsibility of policy choices involving technical assessments.

15. Is there any (legal) procedure established to remedy shortcomings in the assessment of the case's factual basis?
Please explain:

The Supreme Court of Ireland is shaped by the Court's constitutional role as a court of final appeal, rather than a fact-finding body. Accordingly, the Supreme Court does not re-hear evidence or reassess the factual record. Its function is primarily to resolve questions of law. The court of original jurisdiction (and, on appeal, the Court of Appeal or High Court if applicable) is the proper forum for factual determinations.
Typically, the Supreme Court may decide a case based on the facts as agreed between the parties, as submitted in the Statement of Case, bypassing the need for further factual inquiry.
If shortcomings in fact-finding at lower levels are identified, where the factual record is inadequate to resolve the legal question, the Court can remit the matter back to the High Court or the Court of Appeal for further consideration or fresh findings of fact.

A statement of case is aimed at addressing shortcomings in the assessment of a case's factual basis. The following provided for in Practice Direction SC19 Conduct of the Proceedings in the Supreme Court explains the function of the statement of case:

> **20. Statement of Case**
>
> (a) In advance of the hearing a document (hereinafter referred to as the "statement of case") may be issued by the Court to the parties.
>
> (b) The statement of case will set out the Court's understanding as to the following matters:-
>
> a. The relevant facts insofar as they have been determined by the court or courts below or appear to have been accepted at the trial of the action;
> b. The essential elements of the decisions of the courts below insofar as they are material to the issues which arise on the appeal;
> c. The issues which appear to the Court to require determination on the appeal having regard to the determination granting leave to appeal, any refinement of the issues determined by the case management judge and the submissions of the parties; and
> d. The position of the parties on those issues.
>
> (c) In addition, or as an alternative procedure, the Court may issue a second document ("a clarification request") seeking clarification from the parties in respect of any matters on which the Court considers that additional information would be useful in advance of the hearing in order that the hearing itself can be conducted in the most efficient manner. In particular, clarification concerning matters of fact or the position of the parties on any issues properly arising on the appeal may be the subject of such a request.
>
> (d) It is envisaged that a statement of case and/or a clarification request, if required, will issue to the parties approximately two weeks before the date fixed for the hearing of the appeal but in any event not later than ten days before that date. The parties should reply to any queries raised not less than three days before the date fixed for hearing. In the event that parties consider that there are material elements of the statement of case which they consider

to be incorrect or incomplete then parties should also file a document specifying any such matters. It should be strongly emphasised that the facility for filing such a document should not be used for the purposes of engaging in a second round of written submissions. The statement of case is not intended to convey even a preliminary view on the part of the Court on the merits of the appeal but is rather designed to establish such common ground as may appear from the papers. For example, a party may consider that, on its case, certain facts are not relevant. The relevance or otherwise of any facts may be the subject of submissions during the oral hearing but it will be unnecessary, and inappropriate, to file an additional document designed simply to reiterate a party's position in that regard. It should also be emphasised that parties are strongly discouraged from filing such a document unless there are real issues of substance to be raised concerning the statement of case.

Part 4: Case study

16. Can you name any cases your court has had to answer which are of special relevance to the questions asked in this questionnaire?
Please give a brief description of the case and your court's solution to it:

One case which is of particular relevance to this questionnaire is that of *RGRE Grafton Limited v Bewley's Café Grafton Street Ltd,* which is a decision currently being deliberated by the Supreme Court. This case concerns a dispute over the ownership of six ornamental Harry Clarke stained glass panels at the historic Bewley's Café on Grafton Street, Dublin. RGRE Ltd acquired the freehold interest in 2015, while Bewley's Café Grafton Street Limited has occupied the premises under lease since 1927, nearly a century of continuous possession. The building was constructed by the original landlord circa 1926-1927 with six window openings, and the renowned early 20th century artist Harry Clarke's stained glass panels were installed in April 1928. In December 2020, the tenant transferred and licensed all six panels to Bewley's Limited (the second respondent). The central legal issue was determining beneficial ownership: the High Court ruled that the Four Orders panels formed part of the premises (belonging to the landlord), while the Swan Yard panels constituted tenant's fixtures (owned by the licensee), leading to cross-appeals by both parties challenging different aspects of this split determination.

The factual findings in this case were complicated by the passage of nearly a century since the 1928 installation, creating what the Supreme Court termed "evidential uncertainties" that fundamentally undermined reliable fact-finding. As the Court of Appeal noted, "Given the effluxion in time since the installation of the panels in 1928, there were no witnesses to provide direct evidence of key contemporaneous events, including the nature of the glazing originally in situ at the date of completion of the building in 1927 or the manner in which the panels were initially installed." This led to a heavy reliance on inferences from circumstantial evidence, historical documents, and expert architectural analysis rather than direct testimony. The 2-1 split in the Court of Appeal, with Whelan J reaching opposite conclusions from Costello J on both the assessment of facts and legal principles, demonstrates the issues which come with technical interpretations. The Supreme Court's grant of leave in its determination [2025] IESCDET 15 specifically referenced concerns about "the assessment of the evidence" and noted that while "some of that complexity arises from the evidential uncertainties highlighted in the judgments," the case nonetheless raised important legal issues requiring final determination, illustrating how factual uncertainty in historically remote cases can create appellate review challenges.

END

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