EU ECONOMIC GOVERNANCE AND THE CHARTER OF FUNDAMENTAL RIGHTS PROJECT WORKSHOP – A PRACTITIONER'S PERSPECTIVE

INTRODUCTION

Having been asked to contribute at this workshop from the perspective of a practitioner, I began by looking over some of the work of Dr. Padraic Kenna including a lecture he gave at a professional seminar last year.[1] In that document, I notice Padraic's charitable opening where he stated: -

> "*However, awareness of its existence [the Charter] among the Irish public and legal profession is patchy…..*"

I thought to myself that this was a particularly charitable remark when describing the awareness of Irish lawyers and Judges about the Charter, whatever about members of the public!

I noted in that paper that there was even a 'Ladybird version' of the Charter available, as pointed out by Dr. Kenna, in the nature of a guidance document which no doubt he quite correctly identified would be required for the benefit of practitioners.

I then noticed that familiarity with the Charter in Ireland was measured at 8% which seemed high until I thought to myself that the survey company probably didn't bother ringing any lawyers or Judges. I would love to see the breakdown of that awareness survey as to what sectors had most knowledge and I wouldn't be surprised if it was farmers!

I then thought about setting out in great detail a paper about the looks of bewilderment I have seen on the faces of Judges and colleagues whenever I have mentioned the Charter in Court but I thought that might be too depressing for everyone present.

Instead, it struck me that perhaps the best thing to do would be to pick two or three areas of the law where citizens, at present, do not have an effective remedy or where the common law is

[1] Open Society Justice Initiative – NUI Galway, Centre for European Law – Professional Seminars, 'A New Approach to Personal Debt Litigation: The Role of the EU Charter of Fundamental Rights'

flawed or where the Oireachtas has not intervened to fix the problem and where people are suffering as a result.

Given that I have been warned that I will be limited to a very short period on air, I thought it might be better to stick to two or three areas.

AREA 1 - REPOSSESSIONS

This presently involves a slow and fairly laborious process under the Circuit Court Rules 2001 as amended and mainly the Land and Conveyancing Law Reform Act, 2009 as amended in 2013.
Cases start out life as a Civil Bill for Possession under Form 2R of the CCR. They must be supported by a verifying affidavit sworn by the bank deponent. They then appear before the County Registrar who holds a repossession list which is a long list. Typically, they are adjourned on the first and perhaps second occasion even if there is no appearance by the borrower. If the borrower appears (often in person) they will get adjourned on many occasions usually to put in replying affidavits. Borrower will often put together their own affidavits which may have good points and terrible points all in a big mixed bag. This often affects overall credibility. In my experience a borrower will be represented in only perhaps one out of every 8 or 9 cases called.

Often times the borrower may be represented by a solicitor known to a family but perhaps not that interested and doing it as a favour and may appear but later come off record. On other occasions the duty Solicitor appointed under a sort of pretend legal aid scheme will appear and he or she will usually be better informed and focussed but still is often overwhelmed with work and it looks like a 'loaves and fishes' operation. MABS will also be in attendance and can offer very useful guidance and support.

The banks will usually be represented by a big firm of solicitors but by quite junior barristers who when taken on are often not that sure of their ground.

After 9 or 10 adjournments the case will then be moved to the Judges list. It then gets serious in that a Judge might grant one further adjournment and a borrower might get lucky on a busy day and get a second but the motion for Judgement will be heard. In Dublin they will stick closely to

the affidavits whereas on Circuit it's a bit more relaxed and the possibility of oral evidence should not be excluded if the affidavits are poor.

If the Borrower can show the issues are not simple and clear and there issues either of fact or law which need to be resolved by oral evidence then the matter should be referred to plenary hearing(a full oral hearing). The case-law on this is now fairly established in a litany of cases. The case of *Danske Bank trading as National Irish Bank v. Durcan New Homes and Ors* [2010] IESC 22 where Denham J. in dealing with an appeal from Kelly J. in the Commercial Court in a case about personal guarantees reiterated the low threshold the Defendant has to pass. Reiterating the dicta of Hardiman J. in *Aer Rianta v. Ryanair Limited* [2001] 4 I.R. 607 at 623, 'in my own view, the fundamental question to be posed on an application for possession remain is it 'very clear' that the Defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the Defendant's Affidavits fail to disclose even an arguable Defence?'

Further quotes from the position of Clarke J. in *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203 state: -

> "*Insofar as questions of law or construction are concerned, the Court can, on a Motion for Summary Judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a Motion for Summary Judgment.*"

Denham J. made it clear at Paragraph 20 that while a Court may resolve questions of law on a Motion for Summary Judgment, there is no obligation to do so. The test remains whether the Defendant has an arguable Defence. Noting that there was a factual matrix in the particular case before her the Supreme Court overturned the decision of Kelly J. It is noteworthy that the learned Supreme Court Judge furthermore reiterated that the jurisdiction was exercised 'as a matter of justice'. The interests of justice test, which has been developed in the case law in this area, is reiterated and was previously set out by McKechnie J. in *Harrisrange Limited v. Duncan.* [2003] 4 I.R.

The final leg of McKechnie J.'s test 'the overriding determinate factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter Judgment or leave defend, as the case may be.' Of course, McKechnie J. had also emphasised that leave to defend should be granted unless it was very clear that there is no Defence. It is worth noting that in the *Aer Rianta v. Ryanair* case it was conceded by Counsel for the Plaintiff that the Defendant's factual contentions were neither 'logically impossible nor capable of outright contradiction by evidence, which was itself unimpeachable.' Hardiman J. went on to say 'the length, complexity and subtly of the competing arguments, factual and legal, on Affidavit will be important.

The question then arises whether the EU Charter can be of any assistance. It appears to me that if the right to an effective remedy and fair trial means anything under Article 47, then there must be some obligation to:-

a) Provide a proper system of civil legal aid whereby private solicitors and counsel on a legal aid panel can be accessed similar to what presently happens for criminal legal aid and in a different but also reasonable system for family law cases;

b) Whilst delay can be beneficial for borrowers it is not clear to me that creating a blizzard of affidavits is doing anything to make the remedy effective for either side. People are reporting that their lives are constantly on hold, they cannot move on and are living more than a decade in some cases not knowing when they are going to lose their homes. The effects of this are being seen in other areas of the Court system including in family law.

c) I would be keen to see the charter developed if possible to support the idea that before anyone loses their home witnesses are heard from both sides, examined and cross examined. This is so that the banks do not get away with any shoddy paper work or concealment. I am aware of one case at the moment where a bank and their lawyers have asked the Court for possession of a family home of a lay litigant where the security is only over a small portion of the garden. As such they have failed (until challenged by other lawyers) to tell the Court that there is in fact no security over the house. This is very worrying. It is very important to test the evidence and for Courts to get stricter about the provenance of documents. I have another case where the family home security being

proffered as signed in 2006 recites in the same hand writing a dealing number from the Land Registry from 2010!

d) Likewise, if the right to good administration means anything under Article 41, it cannot be right that a person is left waiting for years wondering what is going to happen with their home.

e) The repossession process has to become more solution focused and if the charter can help that would be most welcome. In practical terms no judge wants to make someone homeless if there is any alternative. The internal bank solutions are often bonkers and too form based and too off putting. Many of these borrowers cannot bring themselves to deal effectively with all of the forms they are asked to fill sometimes repeatedly by a bank in an attempt to show some kind of compliance.

f) A more useful approach in my view would be to give MABS a statutory role along the way before repossession can be ordered. MABS would also need to be properly resourced and would need to be able to also have access to a panel of private small accountancy firms and together MABS and a panel accountant or indeed a PIP could and should be coming up with the likes of an examinership for the indebted householder which seeks to put a person back on a solid footing. In the end this will be more cost effective than dealing with a tsunami of homelessness.

g) The time spent in the County Registrars Court is presently time spent in limbo. It could be better used devising and road-testing insolvency solutions which aim to avoid homelessness. Then it could be sent to the Judge for approval.

AREA 2 – RESIDENTIAL TENANCIES

Part 6 of the Residential Tenancies Act, 2004 vested in the new Board the power to determine disagreements between landlords and tenants concerning compliance with any issue between the parties with regard to their obligations and also any matter with regard to the legal relations between landlord and tenant which required determination.[2]

The Act went on to provide at Section 83 that the Board should not deal with a reference if the fee paid for a new tenancy had not been paid or where the tenancy was not registered. The Act

[2] See Section 75.

also provided that an Arbitration Agreement was not effective to oust the Board's jurisdiction unless the tenant agreed to arbitration (not at the time of signing the Lease) but at a time on or after when the dispute arose.

This Act was part of a general inclination to outsource Court functions to quangos which became popular during the Fianna Fáil / Progressive Democrat governments and which, it must be said, has remained popular with most governments ever since.

I think it is fair to say that nobody foresaw at the time (and indeed I recall there being little discussion) just what an effect this piece of legislation would have on people's right of access to the Courts.

What transpired in the years afterwards was a lot of what can only be described as 'messing' by both sides with landlords not registering their tenancies and therefore managing to delay the entire dispute resolution process, ineffectual and poor use of mediation provided for in the Act and huge backlogs and delays for genuine landlords who wanted to collect rent arrears or secure possession where tenants were not paying rent or indeed were engaged in anti-social behaviour.

It is true to say that the situation has gradually improved as this quango now has a period of fourteen years institutional learning under its belt. However, the total exclusion of the Court's jurisdiction save and except for jurisdiction to enforce awards under Section 124 where the Circuit Court, at the end of the day, became involved anyway, was, in my view, a significant example of denial of right to effective remedies to both landlords and tenants in the intervening periods and, to some extent, is still ongoing.

According to the Residential Tenancies Board's own website, their work in 2016 covered 325,372 tenancies with 175,000 landlords approximately on their books and most of these appear to be small landlords who had but one property registered (70%).
One would not have to be a genius to surmise that some of these small landlords were themselves in difficulties and facing Court action on an aggressive scale by Banks and vulture funds for repayments when in fact their right of access to the Court had been stymied. Likewise, a genuine tenant who was well behaved and paid their rent found it difficult to get any disputes

resolved with landlords, particularly those who failed to register their tenancies and therefore were beyond the scope (for at least significant periods) of the Residential Tenancies Board. Acknowledging its own role as a 'quasi-judicial body', the RTB, in their 2016 report, noted 4,837 new applications for dispute resolution in that year with the most common disputes being rent arrears, overholding, invalid Notice of Termination and deposit retention.

The report tells us that in 2014 the waiting time was twenty-six weeks or six months and it is claimed that this has been gradually reduced to twelve weeks in 2016.

By the time of the 2017 report, there were 340,000 tenancies registered with 714,000 occupants (close to three quarters of a million people). The number of small landlords had begun to drop slightly (313,000). The Board had received 170,000 calls in 2017 which was a 30% increase and there were now 6,000 applications for dispute resolution which was a 20% increase. However, the Board congratulated itself saying: -

> "*However, it is important to note that the majority of landlord/tenant relationships are working well, with only one to two per cent of tenancies accessing our dispute resolution service*."

It appears that 63% of cases were taken by tenants and 35% by landlords with neighbours or affected third-parties accounting for only 2%.

Although there were nearly 6,000 applications for dispute resolution, there were only 457 tribunal hearings which was a decrease on the year before when there was 513.

The amount of applications marked 'withdrawn' or 'settled' was 2,527 and 627 people applied for a tribunal application but the hearings amount to 457. According to the 2017 figures, the waiting time for a hearing is fourteen weeks which is still in excess of three months from the time an application is made and it is unclear whether this covers the period when they are attempting mediation. It is to be noted that in 2008 the waiting time was seventy-two weeks, in 2009 it was fifty weeks, in 2011 it was forty-four weeks and in 2012 it was back up to fifty-two weeks before declining since then.

One could parse these figures over and over but what is clear is that over the last ten years people in some years have had to wait well over a year for adjudication hearings and even still have to wait a period of three and a half months.
What the figures don't show is the amount of people who have found the whole tenancy tribunal architecture so off-putting that they would not go near it.

The lack of an effective remedy for either side

This practitioner was called to the Bar in 1996 and between that time and the date of the introduction of the Act, there were occasions when solicitors came to me with briefs whereby a tenant or a landlord was behaving in a completely unreasonable or anti-social manner, where there were unremitting complaints from neighbours, late night parties on a regular basis, anti-social behaviour to the extent of nudity and adult behaviour in full view of neighbouring property occupants and, in some cases, their children. Likewise, there were landlords who thought they could just evict tenants for no reason or flimsy reasons and they sometimes did just that. In those cases, we generally did not utilise the summary landlord and tenant procedures which then formed part of the Circuit Court Rules but simply applied to Court urgently for an injunction where the case was of sufficient urgency. This generally led to a very effective resolution of the situation within a period of days, not weeks or months or years, and the tenant or landlord as the case may be had no option but to act properly.

I still get these types of queries on a fairly regular basis but no longer feel that there is any remedy I can offer somebody in that position other than to pay their registration fees, if they have not already done so, and to queue up in the RTB system, hope for the best and, at the end of it all, they end up back in the Circuit Court anyway, in many cases for enforcement, typically where arrears are not paid or where a landlord has kept a deposit or damaged the goods of a tenant.

Bizarrely, the RTB send their own barristers and solicitors around the country enforcing Orders for landlords and/or for tenants at the expense of the State when in fact in the case of landlords at least, they generally could afford to do it themselves.
In my view, what has gone on in the Residential Tenancies Board for fourteen years amounts to a denial of the right to an effective remedy under Article 47 for both landlord and tenant and, furthermore appears to amount to a denial of the right to good administration under Article 41.

It is important to note that this has improved and waiting times have declined. It is also heartening to note that mediation appears to be starting to be used more productively including with telephone mediators ringing landlords and tenants to try and find a solution. However, the continued denial of any right of access to a Court, particularly for an injunction where there is an real urgency is a denial of a right to an effective remedy and again I will leave this to the European lawyers here to analyse and decide what case law might be brought to bear on this area.

CONCLUSION

The above are just two brief areas in what is really a whistle-stop look at areas where I believe the Charter may have a role to play. There are many other areas which may be fruitful and, indeed I have tried to introduce the Charter in many cases and some of these areas are areas where Dr. Kenna and others have written extensively including:-

(a) The Repossession Courts before a Circuit Court Judge.

(b) The County Registrar when dealing with repossession in their Courts.

(c) The High Court when defending borrowers against Banks.

(d) A Standards in Public Office Commission inquiry (where a key witness was not produced for cross-examination).

I can foresee many other areas where the Charter can be raised, however I think it is extremely important that there is ongoing contact and liaison between academics and practitioners so that valuable litigation opportunities are not lost to establish and promote the Charter in order to protect the rights of citizens.

I also believe that there is an ongoing need to educate both practitioners and Judges on the developing case law.

There is a very significant inclination among the judiciary, particularly in the higher Courts, to adopt the following kinds of positions when defending citizens against Banks: -

(a) The very crude observation that is often made early in a case – '*Did your client not get the money?*'

(b) The observation that a Judge will often make in a case that the client was advised by a solicitor and, in this regard, see for instance *Permanent TSB Plc (formerly Irish Life & Permanent Plc) v. Fox*.[3]

(c) An overall notion that borrowers will look for any '*pie in the sky*' answer to try and avoid the evil day.

(d) The notion that the Court is somehow doing the borrower or homeowner a favour by bringing things to a close, either by evicting them or entering judgment against them, or both.

The feeling among Judges that all of these cases have gone on for far too long and that from a policy point of view there is no point in promoting any '*snake oil salesman*' solutions.

A problem has arisen in that there have been many *charlatans* who have sold very many snake oil solutions to unsuspecting borrowers, often gathering in large groups in hotels where people paid at the door to go in to listen to some semi-motivational speaker advise them on what kind of letters to write to Banks.

In my view, many of the self-help groups and/or support groups, while on many occasions well intentioned, did little in reality to help the position of their own members because the Judges ended up thinking that there was no logic to any argument being offered and therefore even when a good argument, perhaps based on the Charter or on the European Convention on Human Rights or on some constitutional point, was raised, Judges sometimes appeared to think that it was more 'hot air'.

[3] [2018] IEHC 292.

In my period practicing during the recession and the rebound of the economy again, I have seen: -

(a) One group who claimed that they could put encumbered assets magically into a trust which would defeat the rights of the secured creditor (which as far as I am concerned was total nonsense).

(b) Another group who sought to rely on some papal bull to defeat the rights of Banks and secured creditors.

(c) Other groups who wrote letters 'cancelling the Bank's mortgage contract' which on some occasions only served to acknowledge a debt which otherwise might have been statute barred.

(d) Many groups who raised points which, at a macro level, were reasonable but failed to in any way slot them into an individual borrower's circumstances or make them relevant to that borrower. One interesting point revolves around the use of international accounting standards by banks are their ability to use historic asset values whilst the borrower was denied such a facility.

It is my belief that many, but not all, of the support groups have done a considerable disservice to the defence of borrowers in the Courts and have taken away from the credibility of useful legal arguments based on the Charter and otherwise. It is also my view that the legal professions have not covered themselves in glory at all and that, in particular, young barristers and solicitors have not put their shoulder to the wheel in terms of trying to gain experience on a *pro bono* basis and in terms of trying to take on the ever more robotic applications on behalf of Banks. Likewise, the Legal Aid Boards have not been given the resources, either directly or through hiring panel solicitors, in the same way that criminal legal aid has been a success. Civil legal aid remains a 'Cinderella' and some of the sticking plasters we have seen are totally inadequate.

In conclusion, education of the professions on the Charter and other solutions is key. It is important to target younger members of the professions to try and spread the word. However, without some level of funding, however modest for young barristers and solicitors to take on this

kind of work, the figures recorded in previous studies of huge numbers of lay litigants are likely to continue and thus good legal points will continue to be lost.

Many thanks for listening to me this afternoon.

Michael C. O'Connor