Judgment Title: Mc Nally & Anor -v- Ireland & Ors

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THE HIGH COURT 2009 7844 P

BETWEEN/THOMAS McNALLY AND MARIE REILLY

PLAINTIFFS

AND

IRELAND, THE ATTORNEY GENERAL, MINISTER OF STATE FOR COMMUNITY, RURAL AND GAELTACHT AFFAIRS AND THE GARDA COMMISSIONER

RESPONDENTS

JUDGMENT of Mr. Justice John MacMenamin dated 17th day of December, 2009.

1. On 28th July, 2009, the third defendant ("the Minister") promulgated the Charities Act 2009 (Commencement) Order 2009 [S.I. No. 284 of 2009]. This commenced in effect the provisions of ss. 2, 5, 10 and 99 of the Charities Act 2009 ("The 2009 Act" or "The Act") as from 1st September, 2009.

2. As identified in the preamble, the 2009 Act was introduced for the purpose of better regulating charitable organisations. The Act provides for the establishment of a body known as An tÚdarás Rialála Carthanas (The Charities Regulatory Authority) to fulfil a regulatory and supervisory role to achieve this aim. The intent of the legislature is, ***inter alia***, to ensure that charitable donations from the public are devoted to their intended objects, and to counteract the activities of bogus charitable organisations.

3. Section 99 of the Act is impugned in these proceedings. The effect of that section is to render it an offence to sell Mass cards which are not the subject of an "arrangement" made with a bishop or the provincial of an order of priests of the Roman Catholic Church. A Mass card conveys the message that a Mass will be celebrated by a Roman Catholic priest for an intention stipulated by the purchaser or donor. The section is best seen as being intended for the protection of consumers.

The plaintiffs
4. Thomas McNally, the first named plaintiff, is engaged in the business of the distribution and sale of Mass cards. He buys these wholesale from printers. He trades under the name "MCC". He sells cards of various descriptions to retailers such as newsagents, grocery shops and supermarkets. He is one of the major commercial distributors of Mass cards in the State. He contends that the effect of section 99 will be detrimental to his business. He says there has already been adverse publicity with regard to the effect of this provision, and that a number of his customers are no longer ordering cards from him. He asserts that his business is entirely legitimate, and that his cards are authentic. He says the s. 99 requirement for there to be a statutory "arrangement" of the type envisaged, will prevent him from selling at least one category of Mass cards, namely those which are said to be "pre-signed" – a term explained below.

5. The second-named plaintiff is a sister of the plaintiff. She swore an affidavit for the purposes of an interlocutory application to which reference will be briefly made later. She did not testify. No submissions were made as to her role in the proceedings. Her claim will therefore be dismissed at the conclusion of this judgment. Henceforth references to "the plaintiff" will be to Mr. McNally only unless otherwise indicated.

The impugned provision
6. It is first necessary to outline the provision which is now challenged. Section 99 of the Act provides:

"99 - (1) A person who sells a Mass card other than pursuant to an arrangement with a recognised person shall be guilty of an offence.
(2) In proceedings for an offence under this section it shall be presumed, until the contrary is proved on the balance of probabilities, that the sale of the Mass card to which the alleged offence relates was not done pursuant to an arrangement with a recognised person.

(3) In this section-

'Church' means the Holy Catholic Apostolic and Roman Church;

'Mass card' means a card or other printed material that indicates, or purports to indicate, that the Holy Sacrifice of the Mass (howsoever described) will be offered for –

(a) the intention specified therein, or

(b) such intentions as will include the intentions specified therein;

'priest' means a priest ordained according to the rites of the Church;

'recognised person' means –

(a) a bishop of the Church, or

(b) a provincial of an order of priests established under the authority of, and recognised by, the Church;

'sell' includes, in relation to a Mass card, offer or expose the card for sale or invite the making by a person of an offer to purchase the card."

7. Coupled with the constitutional challenge to s. 99, Mr. McNally also asserts that s. 10 of the Act, which lays down maximum penalties, on indictment, of €300,000 and ten years imprisonment, is disproportionate and inconsistent with Article 38 of the Constitution.

The denominational aspect of the claim
8. The purchase of Mass cards is a Roman Catholic practice, governed by canon law and the regulation of that faith. This case involves no religious denomination other than Roman Catholicism. Accordingly, references to clerical offices such as "priest" "bishop" or "provincial" should be read as referring to persons holding that status in the Roman Catholic faith. As will be seen, certain questions as to "authenticity", which do not usually fall within the ambit of courts established under the Constitution of Ireland, have been put in issue by the plaintiff.

The plaintiff's claims
9. At the outset, the attack on the legislation was three pronged.

a) **The competition claim**

The plaintiff claimed, first, that s. 99 offended against EC competition law, in particular articles 81, 82 and 86 of the EC Treaty (as then designated). This claim was not pursued either in evidence or submissions. It is dealt with briefly.

b) **The "product" claim**

Second, it is contended the section concerns changes to the nature and specification of Mass cards which are to be regarded under E.C. law as "industrially manufactured products". Consequently, it is claimed, the section offends against the terms of a number of Council directives governing such products.

c) **The constitutional claims**

Third, Mr. McNally maintains the section is inconsistent with Articles 38, 40.3, 40.6 and 44 of the Constitution of Ireland.

10. This judgment will deal with the non-constitutional issues first. The constitutional claims are dealt with finally. (As to sequence see ***Carmody v. Minister for Justice and Others***, (Supreme Court, Murray C.J., 23rd October, 2009).

The evidence
11. Thomas McNally operates his business MCC from premises in New Street in Longford. He has engaged in this commercial activity for fourteen years. Nowadays, the printed messages on Mass cards cover a range of requirements, and may include messages for the sick, those undertaking examinations, and for the deceased. The focus in this case is on Mass cards for deceased persons.

Mass cards for the deceased
In general cards for deceased persons fall into two categories.

"Unsigned" cards
12. The first of these are what are called "unsigned" Mass cards. Here, the identity of the purchaser or donor, and the nature of the intention is inserted in handwriting at the time of sale. On payment of a "stipend", generally a sum in the region of €15 to €20, the card is signed by a Roman Catholic priest identified as the celebrant. The card is then sent to the family of the deceased. The Mass is celebrated by the celebrant who has signed the card. The sale of these cards forms part of the plaintiff's business.

"Pre-signed" cards
13. In the last two decades there has evolved another practice, the sale of what are termed "pre-signed" cards. These contain a "pre-printed" signature of an identified priest as celebrant. Some types of these cards are sold at about one quarter of the price of unsigned cards.

14. The plaintiff and other commercial distributors are not the only vendors or distributors of pre-signed cards. Religious orders and societies also engage in this practice.

15. There is no evidence that any consumer issue has arisen in relation to the cards sold by religious orders. The issues that are addressed here concern pre-signed Mass cards sold by commercial distributors. There was no evidence of any impropriety by religious orders or societies in the arrangements which they make regarding pre-signed cards.

The "market"
16. It is difficult to define the size of the market in Mass cards. It is significant in size. MCC's unaudited profit and loss accounts for the year 2008 show its sales were in the region of €250,000 subject to certain overheads. One newspaper estimate put the total size of the Irish market as being in the region of €4 million. The plaintiff himself says that he orders and distributes between 90,000 and 120,000 Mass cards per annum. He says that there are approximately 800 customers on his books.

17. The plaintiff contended, in evidence and indeed pleaded specifically, that his business is entirely legitimate and compliant with the law of the State and Roman Catholic governance.

18. But a series of abuses have been revealed in the sale of pre-signed Mass cards. The evidence disclosed that there have been a number of instances where purchasers have been misled into buying Mass cards which were simply bogus. These cards purported to be "pre-signed". Some contained "signatures" which were illegible; other signatures were difficult to read. It emerged that one company (-not MCC-) was selling Mass cards where the purported "pre-signed" celebrant had been dead for a number of years. In another case, the "pre-signature" which appeared on the card was said to be a "Fr. Joseph Carroll". In fact, on investigation, it transpired that this "signatory" was a Monsignor José Carolo, an Italian priest stationed in Quito, Ecuador.

19. It became clear that, in the absence of some method of verification, the chance of a Mass being celebrated in accordance with the purchaser's intentions was minimal or otherwise could not be ascertained. Innocent consumers who

bought and sent such cards, and the bereaved who received them, were being deceived.

20. In fact, when the 2009 Act was introduced as a Bill, the plaintiff welcomed it as a legislative endeavour to address accepted abuses in the market. Mr. McNally acknowledged in evidence, and said in a press release on MCC's website, that it was entirely legitimate for the State to seek to address the sale of bogus Mass cards through legislation. His concern however was in relation to the manner in which s. 99 was to operate.

The plaintiff's efforts to put an "arrangement" in place
21. Mr. McNally took legal advice on the intended legislation. He says he was advised that, for statutory compliance with the forthcoming legislation, the sale of his ***pre-signed*** Mass cards would be subject to an "arrangement". He testified that when he sought to make an arrangement with a bishop in Tanzania, such efforts proved unavailing. He claimed that members of the Irish Roman Catholic hierarchy intervened, and as a result his efforts to put an "arrangement" in place came to nothing. He contends he is thus placed in a situation where the sale of his "pre-signed" cards may be rendered unlawful.

22. To fully understand the reasons for this, it is necessary to analyse the plaintiff's present business arrangement. Prior to doing this and in order fully to comprehend the background it is necessary to briefly outline certain historical and regulatory aspects of Mass offerings.

Historical background
23. For many centuries the issue of "simony" has been a matter of religious controversy. One who practises simony is defined as "a buyer or seller of benefices, ecclesiastical preferments, or other spiritual things" (Oxford English Dictionary, 2nd Ed.). The derivation of the word comes from the Acts of the Apostles, Ch. 8, verses 9 - 24, ***King James Bible*** (Collins 1957), where Simon, a sorcerer, having been baptised a Christian, was condemned by Peter for seeking to buy knowledge from the apostles as to their spiritual powers:

At Chapter 8, verse 20, Acts of the Apostles:

"But Peter said unto him, thy money perish with thee, because thou hast thought that the gift of God may be purchased with money.

21. Thou hast neither part nor lot in this matter; for thy heart is not right in the sight of God."

24. Accusations of simony formed one aspect of the religious divisions at the time of the Reformation. It is unnecessary to go further than to say that by way of governance the Roman Catholic Church has sought to lay down clear guidelines as to the manner in which offerings for Masses are regulated. This takes the form both of specific provisions of canon law and also other church regulation.

The evidence as to canon law and Roman Catholic church regulation
25. Fr. Edwin Grimes is a member of the Holy Ghost Order. He is a qualified canon lawyer. He testified as to Roman Catholic Church regulation on Mass cards. He is also national director of the Pontifical Mission Society, a body which exercises an oversight role in relation to a number of Roman Catholic organisations and which acts as liaison and support to mission orders abroad. His

expert evidence as to Church governance on this question was not controverted by any other expert. However there was dispute as to how such Church regulation affected the plaintiff's business, as Mr. McNally contended his business actually complies with Roman Catholic Church law. This claim formed a central part of the plaintiff's own case.

Canon law

26. The relevant provisions of canon law relating to Mass cards may be summarised as follows.

27. It is lawful, (***i.e***. in accordance with canon law), for any priest celebrating or concelebrating Mass to receive an offering to apply the Mass according to a definite intention (canon 945 of the 1983 code of canon law.) Separate Masses are to be applied for the intentions of those for each of whom an offering, even if small, has been made and accepted (canon 948). It is not lawful for a priest to accept more stipends for Masses to be applied by himself than he can justify within a year (canon 953). A priest who is unable to celebrate Mass must transmit the entire stipend (***i.e.*** the donation for the Mass) to the celebrant unless it is established with certainty that the excess, over the appropriate amount, was given for personal reasons (canon 955). A priest who entrusts the celebration of Masses to a fellow priest is to note in a book without delay both the Masses received and those sent to others as well as their stipends. Every priest must accurately note Masses which he has accepted to celebrate and those which have been satisfied (also canon 955). The parish priest or rector is to maintain a special book recording the number, intention and the offering of the Masses to be celebrated and the fact of their celebration (canon 958).

28. Two specific canons deal with commercial activities. The first of these stipulates that even the "***semblance*** of trafficking or trading in Mass offerings is to be entirely excluded" (canon 947). Additionally a person who trafficks for profit in Mass offerings is to be punished with a censure or other just penalty (canon 1385).

Church regulation other than through canon law – Masses for "collective intentions"

29. The Congregation for the Clergy of the Roman Catholic Church is an administrative body which governs certain day to day activities of Roman Catholic clergy. It is based in Rome. The decrees of this institution are of equivalent regulatory status to canon law and supplement its provisions.

30. One of the Congregation's decrees, entitled ***Mos Jugitier Obtinuit*** was promulgated on 22nd February, 1991. This statement, equally binding as canon law on Roman Catholic clergy, explicitly condemned any general "proposition" that the gathering of offerings by the faithful and their accumulation in a single offering could be satisfied by one single Mass, even if such Mass was claimed by a celebrant to be in accordance with a "collective" intention. The decree denounced any arguments in favour of such a generalised practice as "specious and pretentious". The provisions of this decree bore out Fr. Grimes own testimony, to the effect that, if it was the intention of a priest to celebrate a Mass for collective intentions, this could be done only where the donor had already been previously "explicitly informed" and "freely consented" to the combination of their offerings in a single celebration of the Mass. A failure to inform on this issue would therefore be a contravention of Church law.

31. This information forms the backdrop for an assessment of how the plaintiff's firm operates.

MCC's advertising and its administration of Mass card procedure

Advertising
32. By way of notices, signs and advertisements MCC makes every effort to convey the impression that their pre-signed Mass cards are "authentic", that is, in accordance with Roman Catholic Church teaching. Its commissioned agents distribute advertisements and display signs to be placed on stands in retail shops to this effect. These convey slogans such as "MCC cards ensure your Gesture is authentic" (***sic***). The commissioned agents are provided with a "Letter of Authorisation". This document has every appearance of solemnity, having the appearance of a certificate or licence. It "authorises" retailers to engage in the sale of MCC's Mass cards. Up to the time of this case the "letter of authorisation" identified a Fr. Bernard Latus as the celebrant whose "signature" was on MCC's Mass cards. The letter confirms the retail outlet has been "approved" to stock and sell MCC's signed Mass cards, and that the retailer in turn has agreed to adhere to the "correct procedures" involved. Imprinted on the letter is what is said to be MCC's "official stamp".

33. A consumer who actively resorted to MCC's website would find there a "home page" where it was stated, accurately, that the organisation is not a religious order or group, and was not engaged in a charitable function. In fact, it frankly states to the contrary, acknowledging that the business is a commercial entity whose cards "carry the facility of being pre-signed". There is reference there to a "verification" process by an "officer of the court" (presumably meaning a solicitor) who is said to confirm each part of the procedure on an "ongoing basis". The website contains a reference to MCC's "code of practice 566".

34. A reasonable consumer might be forgiven for concluding that the reference to the code there is to something compendious and far-reaching. It transpired in evidence that this reference was in fact to a ***pricing bar code*** maintained for the purposes of identification in retail outlets. This reference therefore on the website and on one specification of MCC cards has nothing whatever to do with compliance with a "code of practice" in a normally understood ethical sense.

35. A user of the website could also read a press release from MCC about the legislation. In a "robust" statement released in 2009, there was recorded a welcome for the Act (now challenged), and an affirmation that MCC's Mass cards would "continue to fulfil all legal requirements". The release stated that the firm had for many years advocated proper statutory regulation of the sale of Mass cards. However to this there was one proviso, to the effect that while s. 99 had been intended to stamp out the selling of Mass cards by "rogue traders", it had been unfortunately "hurriedly drafted", and that certain "pressure groups or organisations" might possibly have had an "unhealthy influence" on the framing of the section. These groups were not identified.

Administration
36. Mr. McNally testified that each commissioned agent regularly provided retail outlets with a form. On this, the names of the purchasers of Mass cards were to be inscribed, and thereafter, this was to be forwarded to MCC either by the retailer or, alternatively, by the agent.

37. From the level of the plaintiff's business one would infer that, at any one time, there should be a very significant numbers of these forms in existence, and many in MCC's possession or power. The plaintiff made discovery in this case. By inference one might have expected many such forms would have been disclosed. But none was referred to in affidavit form. While MCC may temporarily have received such forms, it transpired that in any case they were routinely disposed of after a period of two or three weeks. To ensure compliance with Roman Catholic governance as outlined, one would expect that the forms would have been forwarded to the nominated celebrant, Fr. Latus.

The "stipend" paid to Fr. Latus

38. The evidence about the arrangement as regards celebration of Masses was yet more surprising.

39. Mr. McNally testified that he met Fr. Latus on the island of St. Kitts in the Caribbean while on holiday some years ago. The plaintiff testified that he had entered into an arrangement whereby the priest was paid a monthly €300 "stipend" to celebrate Masses for the intentions of purchasers of MCC cards. This was calculated on the basis of €100 contribution for each of three identified categories, the deceased, the living and the sick.

40. It will be recollected that the turnover of Mr. McNally's business is said to be in the region of €250,000 per annum. By contrast, Fr. Latus received €3,600 yearly, the annual stipend for the period of this arrangement. This sum was predicated on the basis that the priest would celebrate just three Masses for MCC per month, being one for each of the three categories just identified. These corresponded with the three general categories of Mass cards sold by the business.

41. Mr. McNally testified that on a yearly basis he sold between 90 and 120,000 Mass cards at a wholesale price of €1.75. These retailed for approximately €4.50. To take the example of deceased persons therefore, each of the twelve Masses for the deceased celebrated by Fr. Latus in each year must have been, on behalf of literally hundreds, if not thousands of intentions. The "stipend" paid by MCC to Fr. Latus was a tiny fraction of the turnover of the business. It amounted to no more than 1 or 2%. On one occasion Mr. McNally sent Fr. Latus an extra €3,000 on account of hurricane damage in St. Kitts.

42. If one looks carefully at the website and the cards it is true that MCC disavowed being a charitable organisation. The business incurs significant overheads. But quite clearly MCC traded for profit. These arrangements were all for the purposes of commercial gain.

43. Remarkably Fr. Latus never even had the slightest information either as to the identity of the donors, or the nature of their intentions. No identifying forms were ever forwarded to him. When this matter was put to Mr. McNally in cross-examination he replied that Fr. Latus "doesn't need to" have this information, apparently on the basis that this information was unnecessary to the celebrant as a matter of canon law or Church teaching.

44. MCC's Mass cards generally correspond in appearance to those sold in what are termed "religious shops" attached to Roman Catholic churches. To the reasonable consumer these "pre-signed" MCC cards are almost indistinguishable from some of those produced by religious orders.

45. However there are distinctions. One such difference is in presentation. The plaintiff's cards contain clear statements in bold type to the effect that "the holy sacrifice of the Mass will be offered for the repose of the soul of …. (the named person)". The fact that the celebrant (Fr. Latus) might offer one Mass, but only to include the intention of the person named, is printed in significantly smaller typeface on the same page. A casual purchaser or a recipient might very well miss the small print.

46. On the bottom of the back of a more recent range of cards, there is a statement that a personal stipend is sent to the Catholic priest celebrant each month. It says, (it might be said quite accurately), "our stipend is not dependent upon or related to the sale of our cards".

47. At the back of one range of cards, MCC claimed, in conclusive terms, that "the Provenance and Governance as to the distribution of this document is ***fully compliant*** with Canon law and The Charities Act 2009 respectively" (***sic*** but with emphasis in italics added). This same card was also claimed to be in conformity with the MCC "Code of practice" previously referred to. The pre-printed "signature" on all these cards, printed to resemble a facsimile of handwriting, did not in fact resemble Fr. Latus' own true signature.

48. It emerged as a result of cross-examination that since the month of July, 2009, Fr. Latus had been endeavouring to terminate the arrangement which he had with Mr. McNally and has now done so. In fairness it may well be that Mr. McNally was unaware of this fact until the time of this hearing in October 2009.

MCC's previous signatory, Fr. Oscar Mkondana
49. Further information also emerged as to MCC's arrangement between the years 2003 and 2007.

50. During this period MCC's sole signatory was a Fr. Oskar Mkondana, said to be a priest in the diocese of Mangochi in Malawi. It transpired that, during that same four years, that priest had in fact been suspended from all faculties of the priesthood by the bishop of his diocese. Yet throughout this time the plaintiff contended that the priest had been entitled to say Mass ***privately***.

51. Relevant correspondence was admitted in evidence. It showed that, on 5th November 2003, Bishop Assolari of Mangochi diocese wrote to Mr. McNally saying that Fr. Mkondana was a "***presbyter fugitivus***", that is, a priest who had abandoned both his parish and liturgical duties. In this correspondence, Bishop Assolari very severely criticised Mr. McNally for having deceived both himself, and perhaps Fr. Mkondana, about the Mass arrangements. The bishop indicated his total lack of approval for "this sacrilegious activity". He condemned Mr. McNally for having "taken advantage of the simplicity and need of the local clergy in order to net them". He requested Mr. McNally not to use the name of his diocese, the name of his priests, or even his own name to advertise Mr. McNally's business which he typified as a "dirty activity". Bishop Assolari died in 2005. His successors maintained the same position up to the end of 2007.

52. To support the claim as to Fr. Mkondana's status at this time, Mr. McNally engaged in a "to and fro" correspondence with Fr. Grimes in the latter's oversight role over the Roman Catholic mission authorities in Ireland. The plaintiff wrote back and forth to the church authorities in Malawi. He procured an opinion on canon law from a Fr. John Hadley of the diocese of Nottingham in England. This document contained just four paragraphs, three of which referred to the

provisions of canon law as to the possible entitlement of a priest to say Mass, even when under suspension. The final paragraph of the opinion opined, narrowly, that a bishop might prohibit a priest from administering the sacraments without specifying that this prohibition included the private celebration of the sacrifice of the Mass. On a theoretical "strict" interpretation, such decree would not deprive the priest of a right privately to celebrate Mass in the absence of members of the faithful. But there was no reference to the facts or to the broad terms of Fr. Mkondana's suspension.

53. It was unclear if any factual background material was provided to Fr. Hadley. That canon lawyer made no reference to any correspondence between Mr. McNally and the Roman Catholic authorities in Malawi who had repeatedly affirmed that Fr. Mkondana was under suspension from ***all*** faculties. Yet in the face of authoritative views to the contrary, Mr. McNally continued to assert that Fr. Mkondana was entitled as a matter of canon law to say Mass in private and thus sign MCC's Mass cards. There was no indication that checks were carried out through the diocese in which Mr. McNally works.

54. His stance regarding Fr. Mkondana is also to be seen in the context of evidence in this case from a member of An Garda Síochána, Detective Sergeant James McCarthy. He testified that in 2003 he had been asked to investigate the issue of bogus Mass cards. He interviewed Mr. McNally then. The investigation concerned not only MCC's activities but other businesses. The detective indicated that in September 2003 he received a letter from the plaintiff outlining details of his business. Mr. McNally there refuted public statements which had been made questioning Fr. Mkondana's clerical status.

55. Fr. Mkondana travelled to Ireland in 2003. He went to Longford Garda Station with the plaintiff. He showed Detective Sergeant McCarthy a valid Malawian passport. The Detective Sergeant took a written statement from him, but was not made aware that the priest had been suspended in his diocese. The Detective Sergeant testified that Fr. Mkondana merely told him he had encountered "difficulties with other priests in the parish" and had resigned the previous February. He told the detective he was still a priest, and still signing Mass cards. MCC issued press releases then and subsequently, seeking to refute what it claimed were "false" allegations which had been made against the authenticity of MCC cards and Fr. Mkondana's status.

56. None of this evidence was seriously contested. There is no indication that Mr. McNally stepped in to correct any false or misleading impression which the priest's statement might have created.

57. The detective subsequently furnished a file to the Director of Public Prosecutions. In response, he received a communication on 26th May, 2004. The director's officer dealing with the matter said that a prosecution for any offence would present significant evidential difficulties, particularly in establishing that Masses had or had not been said by the named priest, and also with regard to the status of that priest.

58. The full relevance of these concerns is now more evident in the light of what emerged in this hearing.

Consideration of the evidence

59. I make the following findings under a number of headings:

The nature of the evidential problems in a prosecution
60. This is a secular issue of public order albeit having a religious aspect. Bogus and unverifiable Mass cards have been on general sale to consumers. This is not disputed at all. To seek to prosecute an offender under common law or any statute for an alleged offence other that under s. 99 of the 2009 Act might clearly present insuperable difficulties as to onus and standard of proof and the availability of positive, and perhaps negative evidence. Fr. Grimes testified that there are approximately 250,000 priests in the world. There was no evidence as to any additional internal measure within the Roman Catholic Church itself (other than those identified) to address the manner in which the members of that faith could be misled. No civil law remedy was identified that would eliminate the "mischief". No mode of authentication or certification for the protection of consumers has been suggested, other than an "arrangement" between a priest and a bishop or provincial. Self-evidently, on the material identified the simple presence of a priest's "signature" is no assurance of authenticity or verification.

The potential for consumers to be misled or deceived
61. A central issue at stake here is whether consumers are potentially being misled as a result of activities such as those described.

62. The entire configuration of MCC's Mass cards, the assurances as to "authenticity"; the references to "verification" and to the nature of the ostensible arrangements, were such as would lead a casual purchaser into believing that they were buying authentic Roman Catholic Mass cards which accorded with the precepts of that faith. The plaintiff maintained at all stages that his conduct was in accordance with canon law. This case was made both in his own pleadings, in his testimony, and by cross-examination of Fr. Grimes. However, Mr. McNally produced no expert testimony that all or any arrangements which he set up were in accordance with canon law or Church teaching. The only authoritative evidence on these matters was that of Fr. Grimes. The Court may act on that evidence as a matter of fact. In fact the authoritative evidence was only one way. While the plaintiff gave evidence as to his compliance with canon law, he is in no way qualified to do so by any expertise in the area. It follows that I accept Fr. Grimes' evidence in its entirety.

63. For the purpose of addressing issues of proportionality it is necessary only to find that there was ample material to show that certain of the activities of MCC and other businesses could mislead ordinary Roman Catholic consumers or purchasers as to the "authenticity" of their Mass cards and their compliance with canon law and other Roman Catholic teaching. I specifically refrain from making any finding as to the plaintiff's compliance or otherwise with the terms of s. 99 of the Act of 2009. That is not the purpose of this case which is to consider the lawfulness and constitutionality of the impugned section.

Constitutional issues
64. Article 44 of the Constitution deals with the issue of religion. It guarantees freedom of conscience and the free practice of religion (Art. 44.2.1o). It prohibits any disabilities or the making of any discrimination on the grounds of religious profession belief or status (Art. 44.2.3o). The plaintiff's own religious beliefs did not arise in evidence at all. It was not contended that the practice of his faith or the faith of anyone else would be affected by the provisions of s. 99 of the 2009 Act.

65. The second plaintiff's case, as pleaded, might have been based on freedom of religious practice. It apparently was to have been based on the proposition that

she purchased the cards "in the ***conviction and belief*** that the provision of such cards would bring solace and spiritual comfort to the recipient". In an affidavit sworn for the purposes of an interlocutory injunction she deposed that ***irrespective of whether MCC's cards accorded with the precepts of the Roman Catholic Church or not,*** the cards provided solace and spiritual comfort to the recipients. I refrain from any comment only because these matters were not put in issue in the plenary proceedings.

The assertion of "equivalence"
66. I would also comment that, at the heart of the plaintiff's case, lay an endeavour to assert a doctrinal or theological "equivalence" between the status of his arrangements and those made by certain Roman Catholic religious orders or societies in the sale of their pre-signed Mass cards for collective intentions. The assertion was advanced in his own evidence and on cross-examination of Fr. Grimes. It was made in the absence of any evidence of any misconduct on the part of these Roman Catholic religious societies in relation to the sale of pre-signed Mass cards. The claim based on "moral equivalence" is in any case simply non-justiciable.

Accordance with church law
67. The plaintiff's own evidence as to Roman Catholic Church law was, to put it charitably, tendentious. His business arrangements plainly do not accord with canon law. He is engaged in a business of selling Mass offerings for profit, an activity specifically prohibited under canon law. His activities are neither charitable nor religious. The entire set of "arrangements" which he made do not accord with canon law or the decree of 1991. Ordinary consumers could well be misled by the configuration or "set-up" of the Mass cards into thinking what they were buying at a reduced price was an authentic "traditional" Mass card.

68. These general findings under this subheading and no more are what is necessary to identify the type of issues addressed in the legislation.

69. What is remarkable is that the plaintiff personally saw fit to actively pursue these claims of "authenticity" and "equivalence". He implicitly invited the Court to draw inferences and make conclusions on these matters. Not only are his claims ill-founded. They were non-justiciable. Even if these points were justiciable they ran counter to the entire basis of the constitutional claim made later to the effect that the section offends against what is termed in United States constitutional law a "wall of separation" between Church and State. The paradox is remarkable and unresolved.

The plaintiff's claims in law
70. It is necessary now to address the various headings of the plaintiff's claim, in the light of the evidence and findings. These are: a) the case in competition law; b) the "product" claim; c) the constitutional challenges.

a) The case in competition law
71. The first claim advanced was under EC Competition law. It was contended that the section impugned was in breach of articles 81, 82 and 86 of the EC Treaty as then enumerated. There was no substantive evidence under this heading. None of the issues normally engaged in competition law challenge arose: no "market" was defined, no "distortion of competition" identified. It was not suggested that s. 99 would have an "effect on trade between Member States": that there had been an "abuse of dominant position" by one or more undertakings; or that the section gave to any "undertaking" any "special or

exclusive rights". For these reasons the claims under Article 81, 82 and 86 will be dismissed.

b) EC Regulations 98/34 and 98/48 – the "product" claim

72. What may best be termed the "product claim" is a little more complex. It is based on the proposition that a Mass card falls within the definition of an "industrially manufactured product", which classification is now governed by two associated Directives, that of 98/34/EC of 22nd June, 1998; and an amending Directive, 98/48/EC of 20th July, 1998. But it is necessary at all times to have regard to the statutory definition of a Mass card. As a result of the actions of the ***consumer*** it is adapted on each occasion to identify the intention. It is not a standardised product at all. Without the intention being identified by the consumer it is not a "Mass card" at all.

73. The purpose of the two Directives is to lay down procedures for the provision of information in the field of ***technical standards and regulations*** and rules for ***products*** for "Information Society" services.

74. The plaintiff says that a "Mass card" is an "industrially manufactured product", in that it is produced on a ***mass basis by a printer***. He asserts that as a matter of E.C. law, Member States are under an obligation to communicate to the Commission any draft technical regulation having the effect of changing a specification of such product, except where such regulation in fact transposes the full text of an international or European standard. In the latter case, mere information regarding the relevant standard would suffice. It is true there has been no evidence of communication to the Commission. The question is whether it was necessary at all.

75. For the reason identified earlier I reject the assertion that a Mass card as defined in the statute could be classified as an industrially manufactured product. It is the "input" of the consumer or vendor that constitutes or adapts the card so as to render it a "Mass card". Furthermore, the section does not lay down a specification for Mass cards but for those who sell them.

76. The issue here is whether these directives could ever be applicable to s. 99 of the Act of 2009 which renders it an offence to ***sell*** Mass cards absent an arrangement. The section focuses on ***the seller*** of Mass cards. At the very outset the plaintiff poses the problem that this argument is based on an effort to "shoe horn" the issue into an area of definition where the legislative purpose of the directives is entirely different. The directives deal generally with ***product*** specification – the thing sold, and not the person selling it. It must be remembered that the E.C. provisions deal with industrially manufactured products. What is in issue here is a card which becomes a "Mass card" because of the actions of the consumer or vendor specifying an intention. This has nothing to do with "industrial production".

77. By virtue of the two Directives taken together, it is said the term "product" is to be understood as "any industrially manufactured product and any agricultural product including fish products" (article 1 (1) of 98/34).

78. A "technical specification" is broadly defined as a:

"Specification contained in a document which lays down the ***characteristics required of a product*** such as levels of ***quality, performance, safety or dimensions*** including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures. The term 'technical specification' also covers production methods and processes used in respect of 'agricultural products or products intended for human and animal consumption or medicinal products'. The term 'other requirements' is defined as a requirement 'other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, re-use or disposal where such conditions can significantly influence the composition or nature of the product or its marketing." (article 1 (3)). (Emphasis added).

What is in question here can be seen broadly as changes in ***quality assurance measures*** – but of ***industrial products*** not Mass cards as defined.

79. Similar observations apply to other definitions relied on. Under article 9 "technical regulation" is defined as being understood as "technical specifications and other requirements including the relevant administrative provisions, the observance of which is compulsory, ***de jure*** or ***de facto***, in the case of marketing or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States except those provided for in article 10 prohibiting the manufacture, importation, marketing or use of a product. The definition relates to the product only.

80. ***De facto*** technical regulations are said to include:

"Laws, regulations or administrative provisions of a Member State which refer either to technical specifications or other requirements or to professional codes or codes of practice which in turn refer to technical specifications or other requirements and compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions." (Emphasis added).

Under article 2 (1), it is provided that the Commission and Standardisation bodies referred to at Annexes 1 and 2 shall be informed of the new subjects for which the national bodies referred to in Annex 2 have decided, by including them in their standards programme, to prepare or amend a standard unless it is an identical or equivalent transposition of an international or European standard. The two national standardisation bodies identified in Annex 2 are the National Standards Authority of Ireland and the Electro-Technical Council of Ireland. One can hardly see such bodies being involved in who may lawfully sell Mass cards.

81. Counsel for the plaintiff, relied on two decisions of the Court of Justice concerning the earlier version of the two 1998 Directives, that is Directive 83/189/EEC, which laid down a procedure for the provision of information in the field of technical standards and regulations.

82. The first of these decisions is that of C-317/92 Commission ***of the European Communities v. Federal Republic of Germany*** – Medicinal Products and Medical Instruments ECR [1994] I - 02039. ("***Germany***").

83. In that case the Federal Republic introduced a new administrative practice which limited to two years the expiry dates which might be indicated on the packaging of ***medicinal products*** and non-reusable sterile medical instruments. The effect of the administrative practice was to de-limit the "selling period" of such products or instruments to a two year time span. This stipulation was held to come within the definition of a technical regulation in article 1.5 of the then applicable Directive. The Court observed (at para. 25):

"The German Regulation in question constitutes a new technical specification within the meaning of Article 1 since non-usable sterile medical instruments may henceforth be marketed or used in Germany only if certain obligations are fulfilled the application of which was formerly confined to the labelling of medicinal products. The application, to given products, of a rule which previously only affected other products, constitutes, with regard to the former, a new regulation and must therefore be notified in accordance with the directive."

84. The second decision is C-52/93 ***Commission v. Kingdom of the Netherlands*** – Failure of Member States to fulfil obligations [1994] ECR I - 103591 ("***Netherlands***"); concerned an amendment to administrative rules and the quality standards for ***flower bulbs*** introduced by the government of the Netherlands. Before the Court of Justice the Dutch authorities conceded the regulation to be a "technical regulation" and therefore accepted there had been a failure of notification.

85. I am not persuaded that the Directives or these decisions are in any way relevant.

86. In my view the provisions of s. 99 are quite distinct in range from those measures held to be governed by the Directives. The points of distinction are fundamental. To reiterate what is in question in the Directives and in the two decided authorities made is an industrial alteration in the specification of an industrial ***product***, something standardised. Section 99 does not do this.

87. ***Per contra Germany***, there is no de-limitation on the marketing life-cycle of the product. Section 99 is not a technical regulation governing the marketing of Mass cards but those who may market them. There is no alteration as to any labelling, packaging or the condition in which the product is marketed to the public. Instead the section identified who may be a lawful ***seller*** of the card. The true question under s. 99 therefore is ***who*** may lawfully sell and who may not.

88. One further observation applies in relation to the "***Germany*** case". Although s. 99 can be seen as a consumer protection measure, as explained earlier there is no effect on the life cycle of the product ***after*** it is placed on the market. Rather the effect of the section ***pre-dates*** market placement. The Mass cards, the "product" here remains the same: the market is unaltered.

89. The Directives identify what can occur to a particular industrial product ***after*** it has been placed on the market. Section 99 does not affect "the product" itself but who may sell it, - and only when it is adapted or modified individually by the consumer or vendor.

90. In ***Netherlands*** there was an alteration in the ***quality standards*** for flower bulbs. But, there is no alteration in a Mass card pre, or post, the enactment of s. 99 of the Act of 2009.

91. The inapplicability of these Directives is further illustrated also by the provisions of article 1 (3), outlining a "technical specification", (defined earlier), as being a document which lays down the characteristics ***required*** of a product, such as levels of quality, performance, safety or dimensions. None of this is applicable in the case of pre-signed Mass cards. Article 1 (3) also includes requirements applicable to the product as regards "***the name under which the product is sold, terminology, symbols, testing and test methods, packing and marketing or label and conformity assessment procedures***". None of these tests or classifications could conceivably arise under the section, applying a purposive interpretation.

92. A simple illustration illuminates the fundamental flaw in the submission.

93. It is common case that pre-signed Mass cards are sold not only by commercial distributors but by religious orders. Were the plaintiff's submission correct, both categories would be captured by the Directive, despite the fact that under s. 99 one Mass card might be lawful and the other not. Yet in each case the "product" itself would remain unaltered.

94. These points all illustrate that what is in question here is a form of licensing of a ***seller*** (See case C-267/03 ***Lindberg*** [2005] ECR 1-3247, which concerned a Swedish law which restricted the use of a certain type of gaming machine. While s. 99 identifies for the protection of consumers; it imposes a pre-condition. It does not affect the pre-qualification product itself.

95. At para. 59 of ***Lindberg*** the Court of Justice observed in relation to a licensing arrangement:

"Such a measure is therefore intended to regulate the ***activity of undertakings operating in the area of providing services in connection with gaming machines***. Thus the Court has held that national provisions which merely lay down ***conditions*** governing the establishment of undertakings, such as provisions making the exercise of an activity **subject to prior authorisation**, do not constitute technical specifications. (See, to that effect, case C-194/94 ***CIA Security International*** [1996] ECR I-2201, para. 25)." (Emphasis added)

The distinction made is to my mind conclusive.

96. A "prior authorisation" requirement of an "activity", such as that involved in s. 99 is not to be viewed as a technical specification. ***Selling*** Mass cards is not a specification – it is an activity.

97. In ***Lindberg*** the court identified a critical test as being whether the scope of the prohibition at issue leaves room for any use which can reasonably be expected ***of the product*** concerned other than a purely marginal one. Section 99 does not come within this test for the same reason. It is a ***prior authorisation regime*** which relates not to the specification of the product but to the authorisation of the seller. The section does not prohibit or affect manufacture, importation marketing or use.

98. At risk of repetition, even if Mr. McNally were prohibited from selling a card pre-signed by Fr. Latus this would not mean that another seller could not lawfully sell that same card provided an arrangement was in place. Thus the card could still have a use which might reasonably be expected of it. To conclude I think the "produce claim" relies on a series of strained definitions, is inapt, and applies the wrong test in the wrong circumstance. I must reject it.

c) The constitutional challenge

99. It remains then to deal with the third, and by far the most substantive aspect of the plaintiff's case, that is the constitutional challenge. The main emphasis here lay in the attack on s. 99 made relying on Article 44 of the Constitution. It is appropriate to deal with that first among the constitutional issues. Thereafter the judgment deals with questions raised under Article 38, and finally briefly those under Article 40.

100. By of preface it should be said at the outset that the section enjoys the presumption of constitutionality. The onus of proving otherwise lies on the plaintiff. If the provision is open to differing constructions, the Court must giver preference to the construction which is in accordance with the Constitution.

I. The challenge under article 44 of the Constitution

101. The Article 44 submission is elegant in conception. For the plaintiff, Mr. Gerard Hogan, S.C., suggests that s. 99 interferes with the plaintiff's free profession and practice of religion as guaranteed in Article 44.2.1. He submits that the impugned provision interferes with the prohibition on discrimination on the grounds of religious profession or belief or status under Article 44.2.3; and that, in effect the provision creates what is termed a "quasi-establishment" of the Roman Catholic Church contrary to Article 44.2.3.

102. The argument relies very heavily on the assertion that the provisions of the Constitution relating to freedom of conscience and the free profession and practice of religion (Art. 44.2.1o); and Article 44.2.3o closely reflect the provisions of the First Amendment of the United States Constitution which prevents Congress from making any law respecting an "establishment of religion; (the Establishment clause proper) or prohibiting the free exercise thereof (the "free practice clause"). In this judgment the focus will be on the former. In view of this heavy reliance the judgment deals with United States law in greater detail than might otherwise be warranted.

103. Article 44 of the Constitution of Ireland is headed "Religion". It provides then:

"1. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

2. 1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2° The State guarantees not to endow any religion.

3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

5° Every religious ***denomination*** shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes…."

104. The question the Court must determine is whether an analogy can truly be drawn between the provisions of what is termed the "Establishment Clause" of the United States Constitution and, what Counsel termed the "secular" provisions of Article 44, referring there to Article 44.2.1 and those of Article 44.2.3. The Court must decide whether these authorities are persuasive on the question.

105. It would do scant justice were the judgment to simply apply or disapply these authorities without reasons. However for both counsel and judge, submissions and observations as to foreign law should be approached with an appropriate level of diffidence and care, especially so in light of the complexity of U.S. authorities in this area. A Court must be fully apprised as to context and place which a cited foreign authority holds in its own jurisprudence by reference to texts or other decided cases. Insofar as passages are cited here from United States decisions, the objective is not to express any view on the substantive issues considered, but rather to seek to identify the extent to which statements of law, relied on in this case, can be taken as representative, well established and identifying a consensus view.

106. The citation of such authorities cannot be dispositive. Our Constitution can only be interpreted in accordance with the understandings of those who enacted it, that is the people of Ireland. Foreign authority cannot take precedence over national – the contrary is true. Reference to foreign case law (no matter how eminent the provenance) must have due regard to the institutional and contextual distinctions which exist between all states. I turn now to the Establishment clause jurisprudence.

The Establishment Clause and free practice of religion
107. The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

108. Thomas Jefferson was not in fact the author of the first clause of this provision, although he famously referred to it in an 1802 letter as creating "a wall of separation" between church and State. It ultimately led to the striking down of Federal and later State laws perceived to sanction any State aid to religion or the "establishment" of any one church. The clause has been sometimes portrayed as a symbol of the eighteenth century Enlightenment, as seen by the framers of the Constitution of the United States. It reflected a powerful Erastian current of belief in some of the post-Reformation churches which regarded any state aid to religion as repugnant to the nature of Christianity. (See Keane J. in ***The***

Campaign to Separate Church and State in Ireland v. The Minister for Education and Others [1998] 3 I.R. 321.

109. The First Amendment, and the United States Constitution as a whole, has on occasion been referred to as being "agnostic" in the sense that its Preamble and text makes no mention of a deity, still less any religious denomination. By way of contrast to the Constitution of Ireland, there is no mention of any religious denomination or a deity in any part of the United States founding document. The oath and affirmation of the President of the United States on assuming office contains no reference to a deity. The religious prohibition on State recognition of any or all established religion and any identified denomination of religion is said to extend throughout that historic document. Whether it required religious neutrality is a matter of some debate (see opinion of Rehnquist J. in ***Wallace v. Jaffree*** [1985] 472 U.S. 38.

110. The intent of the Clause was to distinguish the constitutional position of religion in the infant Federal state from that which had existed in the nations of old Europe where Church, State, and ruler were closely interconnected, and occasionally still are.

111. But the issues posed for the United States Federal Courts in reconciling a strict construction of the Clause on the one hand, with, on the other, the major part played by religion in life in the United States have been vividly illustrated in the many decisions wherein the clause has had to be interpreted and applied, replete as they often are with vigorously argued dissents. Even the meaning of the Jeffersonian term "wall of separation" has, presented challenges both with regard to the identification and categorisation of "religion", and in the light of the broad permeation of religion in the United States.

112. By way of illustration, in a dissenting opinion in ***Wallace v. Jaffree*** Renhquist J. referred to the phrase as a "misleading metaphor". He pointed out that the phrase was coined in a letter fourteen years after the First Amendment passed through Congress, and that Jefferson was in France at the time the amendment was adopted. Rehnquist J. observed:

"He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clause of the first Amendment."

113. The historicist debate as to interpretation continued (see ***Lee v. Weissman*** 505 U.S. 1992, Souter J.; ***Rosenberger v. Rectors and Visitors of the University of Virginia*** 515 U.S. 19 (1995), Thomas and Souter JJ. dissenting; by way of contrast the more purposive in ***Abington School District v. Schempp*** 374 U.S. 203 (1963), Brennan J.. There is a vast range of academic literature describing schools of interpretation labelled with identifying names such as "neutralism", "non-coercion", "voluntarism" and "pluralism", all applied to the clause.

114. Our jurisprudence has been enriched by the citation, where appropriate, of United States precedents of persuasive authority. (In the context of Article 44, see ***Quinn Supermarket v. Attorney General*** [1972] 1 I.R. where Walsh J. makes numerous references to United States authorities illustrative of the term "discrimination" in the context of freedom of exercise of religion). But a court considering foreign authority is entitled to enquire whether the decision is in fact

"authoritative" in representing well settled law. In law context is all important. A United States authority, even if representing well settled law on a fundamental issue such as the constitutional separation of church and state may be of persuasive force and assistance only where the relevant provisions of the constitutions of the two states are akin textually ***and*** in their application in established jurisprudence. If the tests applied in the application of the First Amendment actually run counter to the provisions of the Constitution of Ireland, then clearly such decisions cannot assist an Irish Court. One must start from the fundamental premise that it is the task of judges in Ireland who make the declaration of office under the Constitution to uphold and apply the provisions of ***that*** Constitution of 1937 and no other one. This case cannot concern an "issue" of whether s. 99 of the Act of 2009 runs counter to the terms of the First Amendment clause. The task which the plaintiff takes on therefore, must be to establish that any jurisprudence sought to be "transplanted" is not to be "rejected" at the outset because it is in its terms inimical to what was enacted by the people of Ireland and the manner in which these have been interpreted.

115. In ***Curtin v. Dáil Éireann*** [2006] 2 I.R. 556 at p. 623 Murray C.J. speaking for the Supreme Court referred to decisions of the United States Supreme Court having:

"… persuasive value only to the extent that they relate to the interpretation of analogous provisions of our Constitution and are consistent with the approach of our courts to issues of interpretation."

In ***The People (Director of Public Prosecutions) v. Kelly*** [2006] 3 I.R. 115 at 141, Fennelly J. remarked on the need to be careful that the constitutional provisions are "sufficiently comparable".

The United States citations

116. Three U.S. Federal authorities are very specifically relied on: ***Larkin v. Grendel's Den Inc.***, 459 U.S. 116 (1982); a decision of the United States Supreme Court; and ***Barghout v. Bureau of Kosher Meat*** 66 F. 3rd 1337 (4th Cir. 1995); and ***Commack Self-Service Kosher Meats, Inc. v. Weiss*** 294 F. 3rd 415 (2nd Cir. 2002).

117. All were "Establishment clause" cases. They related to the issues of the actual or symbolic recognition of religious beliefs, and what is termed Federal "entanglement" in religious matters. Each of these applies the tri-fold test as to establishment first outlined in the case of ***Lemon v. Kurtzman***, (403 U.S. 602 (1971)).

Lemon v. Kurtzman

118. In *Lemon* the Supreme Court of the United States held that the government violated the establishment clause of the United States Constitution: (i) if it acted for a non-secular motive – a statute must have a secular purpose; (ii) if its actions produced non-secular primary effects – the primary effect must neither advance nor inhibit religion, or (iii) if its actions would produce excessive government entanglement with religion.

Larkin **and** ***Barghout***

119. For comparison here it will be sufficient to take the first two cases, *Larkin* and *Barghout.*

120. *Larkin* was a case where a Massachusetts statute vested in the governing bodies of schools and churches the power to prevent the issuing of liquor licenses for premises within a 500 foot radius of a church or school by objecting to the license applications. The defendant, the operator of a restaurant in Cambridge, Massachusetts challenged the decision of a church to object to such a licence, that church being situated close to the restaurant. The Massachusetts statute was found to be unconstitutional by the Supreme Court of the United States. Burger C.J. relied explicitly on the *Lemon* criteria, as the test to be applied

121. *Barghout* concerned a Baltimore ordinance rendering it a misdemeanour to, with "intent to defraud", offer for sale any food labelled as Kosher or indicating a compliance with "orthodox Hebrew religious rules or requirements" and/or "dietary laws" when the food did not in fact comply with such laws. The ordinance provided that persons dealing with kosher meat were obliged to adhere to, and abide by the orthodox Hebrew religious rules and regulations and dietary laws or, otherwise be guilty of an offence. The impugned ordinance created a Bureau of Kosher Meat and Food Control comprising of six members, being duly ordained orthodox rabbis and three laymen selected from a list submitted from the Council of Orthodox Rabbis of Baltimore.

122. Relying on *Larkin* the Federal Appeals Court impugned the statute as creating an excessive entanglement of religious and secular affairs. Applying the first leg of the *Lemon* test, the Federal Court accepted that the purpose of the legislation was primarily to protect consumers from fraud in the sale of kosher food and thus satisfied that part of the test. However it held that the Maryland statute fell foul of the other aspects of the test identified in *Lemon* and also applied in *Larkin*.

123. Were one to engage in a free-standing exercise it is true that there are some factual resonances between *Barghout* and the instant case. In *Barghout* the issue to be determined was, in a sense, "delegated" to the Bureau of Kosher Meats and Food Control. In fact, even on its own terms, the extent of the control in *Barghout* was far more wide-ranging than a s. 99 "arrangement". The Bureau was to report violators. It had an investigatory role. The inspector retained by the Bureau had the power of writing up violation warnings. The degree of engagement between religion and State therefore was significantly deeper in that case than arises in the case of section 99. The issues in *Commack* are similar and require no further analysis.

124. But this would be to engage in an otiose analysis. The task here is not to assess whether s. 99 is "compatible" with the Establishment clause, but with the Constitution of Ireland.

Consideration

125. A consideration of United States texts on constitutional law indicates that the *Lemon* test has been sharply criticised over the last three decades. Several justices of the United States Supreme Court have called for its express repudiation. In other cases it has been suggested that quite a different test should be applied (see *Lynch v. Donnelly* 465 U.S. 668 [1984]; *County of Allegheny v. ACLU* 492 U.S. 573 [1989].

126. The case has been criticised by being vague, subjective and setting a "standardless" test. It has been criticised in one text on the grounds that:

"(1) the 'purpose' requirements taken literally would invalidate all deliberate government accommodation of religion even though such accommodation is sometimes required under the free exercise clause …

(2) the legislative purpose is difficult to identify in a multi-member body, and

(3) the 'entanglement' prong contradicts the previous two – some administrative 'entanglement' is essential to ensure that government does not excessively promote religious purposes.

Faced with these criticisms the Court has not formally renounced the *Lemon* test, "but has relied on it less and less in recent cases …" Sullivan and Gunter, *Constitutional Law*, 15th Ed., (Foundation Press, New York, 2004, pp. 1546-1547). The criticism of the *Lemon* tests has not come from one scholarly source. The judicial reservations do not come from one single source either. Even accepting that his voice does not always reflect the consensus view of the Supreme Court of the United States, it is impossible to resist quoting Justice Scalia's reference to the survival of the *Lemon* test as resembling:

"a ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again; frightening little children" …(*Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). (See *Constitutional Law*, 4th Ed., Stone Seidman Sunstein Tushnet, Aspen Publishers Inc. 2001, p. 1426)

American scholars who do not subscribe at all to the doctrines of constitutional "textualism" or originalism acknowledge that the intermittent use of the test in *Lemon* has, as Justice Scalia described it illustrated:

"The strange Establishment Clause geometry of crooked lines and wavering shapes."

Scalia J. there referred to a number of decisions of the Court when he considered the "*Lemon*" test had been avoided or undermined, and to opinions of six of the then members of the court which tended to repudiate the tests in ten other decisions of that court.

127. The quotations are not simply the colourful expression of a single view on this question. They illustrate a view widely held, if not by a majority of that court. At the very minimum the application or non-application of *Lemon* has given rise to a rather fluid and uncertain jurisprudence. I think this goes very much to the weight to be given to the United States authorities, relied on here.

Distinguishing features

128. But the issues of distinction are much more profound. I now consider (i) the differing mode of expression of freedom of religious practice as identified in decided Irish case law; (ii) the issue of non-establishment of any religion; (iii) the contrasting provisions as to the recognition of religious denominations and the

Article 44 jurisprudence; (iv) the value of freedom of religious practice under Article 44.

(i) Differing modes of expression as to freedom of religion

129. The constitutional provisions of the two states as to religion, while sharing some common concepts such as the value of freedom of religious practice, differ in significant ways as to the modes of achievement of these legal objectives.

130. The associated question of religious endowment under Article 44.2.2o arose in *Campaign to Separate Church and State v. Minister for Education* [1998] 2 I.L.R.M. 81. There a point was reached where the Supreme Court held the explicit terms of Article 44 itself and its application in our jurisprudence differed to such a degree that United States authority on endowment was found to be of no assistance. While *Church and State* concerned, in particular, the Article 44.2.2 prohibition on "endowment" of religion, Keane J. extensively considered the question of "establishment" under the Irish and U.S. Constitutions. He observed at p. 361:

"…While there is no express provision in the Constitution prohibiting the establishment in that sense of a church by law, it is obvious that any such law will be impossible to reconcile with the prohibition of religious discrimination in Article 44.2.3.

But then he added:

In contrast, the First Amendment to the Constitution of the United States of America expressly prohibits Congress making any law "respecting an establishment of religion …"

Having commented on the tension between freedom of practice and the separation of Church and State that judge concluded:

"*The provisions of our Constitution are however so markedly different*, that as Costello P. found these authorities are not of assistance in the construction of Article 44.2.2 of the Constitution."

131. It will be noted that the term "provisions" was used in the plural. Keane J. was clearly referring to the entire framework of Article 44, from which Article 44.2.2 could neither be divorced nor isolated. This important and authoritative observation cannot be simply ignored or glossed over. At the minimum therefore one can conclude the provisions are "markedly different": but the distinction goes further.

(ii) The issue of "non-establishment" of any religion

132. An underlying tenet of the United States jurisprudence in the application of the "wall of separation" jurisprudence is the prohibition not only in actual preference of one religious denomination to any other, but even the *appearance* of symbolic State support for *any* religion or denomination of religion. It is true that the drafters of the Constitution of Ireland specifically rejected a proposal that there should be an established religion. (See the judgment of Barrington J. in *Campaign to Separate Church and State* and the discussion therein of a proposed draft, specifically intended to bring about true establishment of the Roman

Catholic Church. (See also Keogh and McCarthy, *The Making of the Irish Constitution* Mercier Press, 2007, Ch. 6). But this does not ipso facto render the constitutional provisions or the jurisprudence "analogous". The absence of denominational "establishment" in the Irish Constitution does not mean it is devoid of support for denominational religion as will be explained.

133. United States Constitutional jurisprudence frequently concerns either statutes or even displays implying a symbolic state recognition of religion such as Christmas cribs in city property (*Lynch v. Donnelly*). This is in contrast with the Constitution of Ireland preamble, where Article 6, and the specific terms of Article 44 acknowledge a monotheistic Christian ethos later considered in *Corway v. Independent Newspapers (Ireland) Ltd.* [1999] 4 I.R. 484.

(iii) Contrasting provisions as to recognition of religious denominations, and Article 44 jurisprudence.

134. Article 44 in its original form sought to reflect both eighteenth-century United Irish ideals of uniting Protestant, Catholic, and Dissenter, and also the close nineteenth century relationship which evolved between Irish nationalism and Roman Catholicism. (See: Enda McDonagh *Philosophical-Theological Reflections on the Constitution*; Frank Litton *The Constitution of Ireland 1937-1987* (Institute of Public Administration, 1988)). Explicit constitutional recognition of certain specified denominations of faith extant in the State in 1937 was removed by the Fifth Amendment to the Constitution in 1972. But this deletion did not remove the recognition of the subsisting *concept of religious denominations* from the Constitution. That recognition can be found in Article 44.2.4, which prohibits discrimination between schools under the management of different religious *denominations*; Article 44.2.5 which vests in every religious *denomination* the "right to manage its own affairs…"; and the terms of Article 44.2.6 which provide that the property of any religious *denomination* or any educational institution shall not be diverted save for necessary works of public utility.

135. Thus where the terms of the Establishment Clause are neutral, or "blind" as to religion, the Constitution of Ireland actively recognises the existence of diverse religious denominations and guarantees them certain rights. It might be said that in United States jurisprudence there is a wall of separation; under the Constitution of Ireland there is a constitutional "domain" of religious recognition. The distinction between the two constitutional regimes; as will be seen, leads to fundamentally distinct conclusions in the context of Article 44.2.5 explained below.

136. Article 44.2.1 and Article 44.2.3 taken together, guarantee freedom of conscience, and profession and practice in religion albeit subject to public order and morality, and also prohibit disabilities or discrimination on the grounds of religious belief or status. As counsel for the defendants Mr. Donal O'Donnell, S.C., pointed out, both these provisions must be seen within the context of the terms of Article 44.1. As identified by Walsh J. in *Quinn's Supermarket*, Article 44.1 contains what are acknowledgments of the monotheistic, Christian, pluralist nature of a State, which, nonetheless recognises rights which inhere in many denominations and also in those citizens who belong to no denomination.

137. The First Amendment to the United States Constitution is distinct in this regard. No recognition is given there to *any* faith or denomination. The State and

its institutions are to refrain from any "entanglement" which would amount to the recognition that religious denominations enjoy a constitutional status.

138. The extent of religious recognition under the Constitution of Ireland has been further explained by Barrington J. who commented in *Corway v. Independent Newspapers (Ireland) Ltd.* [1999] 4 I.R. 484 that:

"the tenet of any one religion do not enjoy greater protection than those of any other….".

139. In *Corway* Barrington J., speaking for the Supreme Court, specifically pointed out that the provisions of Article 44 as well as being interpreted harmoniously within the terms of that Article, may also be seen through the prism of the Article 40.1 guarantee of equality before the law to all citizens as human persons. He expressed himself in this way:

"The effect of these various guarantees is that the State acknowledges that the homage of public worship is due to Almighty God. It promises to hold his name in reverence and to respect and honour religion. At the same time it guarantees freedom of conscience, the free profession and practice of religion and equality before the law to all citizens, be they Roman Catholics, Protestants, Jews, Muslims, Agnostics or Atheists. But article 44 goes further and places the duty on the State to respect and honour religion as such. At the same time the State is not placed in the position of an arbiter of religious truth. Its only function is to protect public order and morality."

140. A further and even more conclusive point of distinction lies in the consequences which flow from United States jurisprudence designed to avoid any state "entanglement", (that is to say any engagement by the State in religious matters), or, conduct by the State which might even symbolically constitute official acknowledgment or endorsement of religious values. The *core rationale* has been identified as being to prevent "a fusion of governmental and religious functions" (*Abington School District v. Schempp* 374 U.S. 203 (1963)).

141. For the purposes of this case however, a critical distinction which separates the Establishment Clause and our Constitution is best illustrated by the terms of Article 44.2.5, and by the manner in which Henchy J. relied on that sub-Article in *McGrath and Ó Ruairc v. Trustees of the College of Maynooth,* [1979] I.L.R.M. 166, where it was contended that the statutes of Maynooth College discriminated between priests and laypersons on the college staff, imposing greater obligations on the former. It was claimed that these statutes offended against the Article 44.2.3 guarantee of no discrimination on the grounds of religious profession belief or status. Henchy J. found the Article as a whole was to be interpreted in terms of its constitutional purpose that is to support religion; if necessary by actually recognising or "buttressing" autonomous denominational rights, Henchy J. expressed himself in this way:

"Article 44.2.3 must be construed in terms of its purpose. In prescribing disabilities and discriminations at the hands of the State on the ground of religious profession, belief or status, the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion. To construe the provision literally, without due regard to its underlying objective, would lead to sapping and debilitation of the freedom and independence given by the constitution to the doctrinal and organisational requirement and proscriptions

which are inherent in all organised religions. *Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasion recognise and buttress them.* For such disabilities and discriminations do not derive from the State; it cannot be said that it is the State that imposed or made them; they are part of the texture and essence of the particular religion; so, the State, in order to comply with the spirit and purpose inherent in this constitutional guarantee, may justifiably lend its weight to what may be thought to be disabilities and discriminations *deriving from within a particular religion*." (Emphasis added.)

142. The passage resonates with Hamilton C.J.'s observation in *Re Article 26 and Employment Equality Bill 1996* [1997] 2 I.R. 321 where the Supreme Court found assistance in United States authority on the issue of religious discrimination in the context of such discrimination in the context of employment. (*Corporation of Presiding Bishops v. Amos* 483 U.S. 327). But the Supreme Court went on to observe that it was constitutionally permissible to make distinctions or discriminations on grounds of religious profession belief or status, insofar, but only insofar as this may be necessary *to give life and reality to the guarantee of free profession and practice of religion contained in the Constitution* (at p. 358). The resonance with McGrath is plainly discernible in the reference to the extent of the constitutional guarantee to give vitality, independence and freedom to religion. But taken together the two emphasised quotations demonstrate that in our jurisprudence there may arise circumstances which are by no means analogous, but may run entirely counter to the idea of State avoidance of any "entanglement". The expression of priorities in Article 44.2.5 finds no reflection in the ideas of Paine, Jefferson or Madison. Subject to the proviso identified by Hamilton C.J., the State may lend its weight to disability or discriminations which derive from *within* a denomination but only insofar as it is necessary to give life and reality to the constitutional guarantee of freedom of religion. This support may be manifest even in recognition of religious distinctions or disabilities. Henchy J. added (at p. 187):

"Even if it be said that the statutes (of Maynooth) are, by recognition or support, an emanation of the State, the distinctions drawn in them between priest and layman, in terms of disabilities or discriminations, are no part of what is prohibited by article 44.2.3. They represent no prejudicial State intrusion where priest is advanced unjustifiably over layman, or vice versa as was the case in *Molloy v. Minister for Education* [1975] I.R. 88. *On the contrary, they amount to an implementation of the guarantee that is to be found in subs. 5 of the same section that "every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, moveable and immovable and maintain institutions for religious or charitable purposes*."

143. The reference to *Molloy v. The Minister for Education* [1975] I.R. 88, is of some importance. *Molloy* established that, in order to implement or permit the free exercise of religion, the law may find it necessary to distinguish between ministers of religion, or other persons occupying a particular status on the one hand, and members of a particular denomination, or other members of the population as a whole, on the other. If the issue of religious distinction arises at all, such distinctions can apply here, but not in support of the plaintiff's position but as *McGrath* shows, that of the defendants.

(iv) The acknowledgment of value of freedom of religious practice as a constitutional value under Article 44.

144. These authoritative identifications of the range and depth of recognition under our Constitution identifies yet further the distinction between Article 44 and the Establishment Clause. The provisions are distinct in their respective religious (and non-religious) provenances and application. The difference can be seen in the acknowledgment accorded to freedom of religious practice under Article 44.

145. In *Quinn's Supermarket v. The Attorney General* [1972] 1 I.R., the plaintiff was stated to have acted in contravention of a ministerial order restricting the opening hours of butcher shops but kosher butcher shops were exempt from the prosecution. The plaintiff sought to have the order declared constitutionally invalid because it discriminated on religious grounds contrary to Article 44.2.3.

146. In the Supreme Court, this potential crux was resolved by reference to an assessment and analysis of the overall purpose of Article 44, identified as the guarantee of the free practice of religion. If a legislative distinction was necessary in order to achieve this end it would not be constitutional. But it would however be contrary to the spirit and intention of Article 44.2.3 to render its provisions a method restricting the free practice of religion.

147. Walsh J. put the matter this way:

"Our Constitution reflects a firm conviction that we are a religious people. The preamble to the Constitution acknowledges that we are a Christian people and article 44 (1)(1) acknowledges that the homage of public worship is due to Almighty God but does so in terms which do not confine the benefit of that acknowledgment to members of the Christian faith…."

148. The judge pointed out that on the facts in *Quinn* there existed a potential conflict between Article 44.2.1 (the guarantee of freedom of conscience and free profession and practice of religion), by contrast with Article 44.2.3 (the prohibition on the imposition of any disability or discrimination on the grounds of religious profession belief or status on the other. Having cited Article 44.1.1 as a starting point, he held that the effect of Article 44.2.3 necessitated that the State not be permitted to make any distinction between persons on the grounds of religious belief profession or status, be it either beneficial or detrimental. As the Ministerial order has the effect it was held to be *prima facie* unconstitutional. However as it did not make some allowance for the special circumstances of members of the Jewish faith, their religious freedom would be interfered with in contravention of Article 44.2.1. The conflict was resolved therefore by reference to the overall purpose of Article 44, that is the guarantee of free practice. A *distinction* for that purpose was held to be constitutional (See Brady *Constitutional Law in Ireland*, 3rd Ed., Round Hall 2000 at pp. 692-693.)

149. It would be easier then to identify dissimilarities than any similarity with *Larkin* or *Barghout*, where the *Lemon* lines of demarcation would have prevented any detailed analysis of tenets of faith such as occurred in *Quinn's Supermarket*, still less the invocation in Article 44.2.5 and reliance thereon in *McGrath*. The distinction between the quoted passages and the First Amendment jurisprudence requires no reiteration, or further explanation.

150. In summary therefore it is true that Article 44.2.1 guarantees freedom of conscience, profession and practice of religion but subject to public order and morality. Article 44.2.3 prohibits any disabilities or discrimination on the grounds of religious belief or status. But these provisions must be seen as being

embedded within the overall constitutional framework of Article 44, informed by its pluralistic Christian values, but to be interpreted harmoniously *inter alia* by reference to the Article 44.2.5 guarantee of religious autonomy, which, far from eschewing internal disabilities and discriminations which flow from the tenets of a particular religion, may on occasion actually allow for support subject to other constitutional rights guarantees. In this way the State may on occasion justifiably "lend its weight" to the support of one denomination in autonomous affairs. This is entirely at variance with United States authority and the terms of that constitution. Here engagement may be permitted in the United States it is to be entirely avoided actually or symbolically. At its height what is in question here is, as pointed out below not a support or "buttress" but a mere identification for statutory purposes involving a matter of where public order and morality is concerned.

151. For the reasons outlined therefore, I do not think United States constitutional authority is of assistance on this issue.

The claim based on the provisions of Article 44 of the Constitution
152. It is now necessary to consider specific aspects of the plaintiff's claim insofar as it arises under Article 44.2.1 and Article 44.2.3.

153. I find that even if the plaintiff had in fact established any validity of the arguments by analogy to our constitutional provisions, the case faces further insuperable obstacles. This lies in the matter of what is termed "issue-specific" *locus standi*.

No *locus standi* under Article 44.2.1
154. Article 44.2.1 guarantees freedom of conscience, profession and practice of religion *subject to public order and morality*. As found earlier the plaintiff did not even mention any of these constitutional values in evidence. The point did not arise.

155. In fact per contra *Quinn's Supermarket* the issue of public order and morality is involved here. What is in question is a statute creating a criminal offence for the protection of members of the public. Member of the public could be misled.

156. But the evidential difficulty which the plaintiff now faces is that the entire issue of profession and practice of religion cannot now be considered. It is not engaged because the plaintiff himself did not mention either his religious profession or belief, or the question of any denominational belief. There was no evidence that, in selling pre-signed Mass cards, Mr. McNally was engaged in the profession or practice of his religion. There was, and is no identified religious group or denomination which seeks to engage in a practice which would be criminalised by the section. The sole interest that may be placed at risk is a commercial activity, albeit with a religious dimension. But this is not a religious practice or belief.

157. In *Cahill v. Sutton* [1980] I.R. 269 Henchy J. observes that a plaintiff in a constitutional action is not permitted to "conjure up, invoke and champion the putative constitutional rights of a hypothetical third party…"

158. The plaintiff here is not entitled therefore to seek a declaration of inconsistency with the Constitution on the basis of the rights of a constitutional *jus tertii*. It has not been in issue, that by reason of the business which he

operates, the plaintiff has *locus standi* to bring the proceedings. However this is not to say that he has established evidentially a *locus standi* under Article 44.2.1. On its face the plaintiff's claim cannot succeed under Article 44.2.1. Insofar as the Article is concerned it is under the rubric of public order and morality.

Article 44.2.3
159. The issues as to Article 44.2.3 go to both the application of the terms "discrimination" and, again, locus standi.

160. Counsel for the plaintiff places reliance on the fact that the Irish text of Article 44.2.3 refers to discrimination using the words "ná aon idirdhealú a dhéanamh". In *Quinn's Supermarket* Walsh J. commented on this:

"To discriminate, in that sense, is to create a difference between persons or bodies or to distinguish between them on the ground of religious profession, belief or status; it follows, therefore, that the religious profession, belief or status does not have to be that of the person who feels he has suffered by reason of the distinction created."

A discrimination may be preferential or detrimental therefore. It is not necessary to establish a constitutional religious detriment. The plaintiff's case is that the impugned section creates what must be a preferential distinction in favour of the Roman Catholic church in the sense identified in *Quinn's Supermarket*.

Negative discrimination not established
161. There is no evidence of negative discrimination contrary to Article 44.2.3. The terms "disability" and "discrimination" identified in the Constitution are, in their negative sense to be seen to some extent in terms of their historical provenance. They are dealt with extensively by Walsh J. in *Quinn's Supermarket*. But, however interpreted, it is entirely self-evident that there can be no comparison between any discrimination or disability as derived from the legislative background and what is at stake here.

162. The question which immediately arises is against whom, or what denomination does the section discriminate *in a religious way*? That has not been answered. The plaintiff and his business are not a religious denomination, group, or even a sect.

Is there positive discrimination contrary to Article 44.2.3?
163. The plaintiff's case reaches its high watermark in the contention that the section constitutes a positive or "preferential" discrimination in the sense identified in *Quinn's Supermarket*. It is submitted that there is here a positive discrimination as to religious status amounting to "quasi establishment in granting to the Roman Catholic Church the position of religious arbiter". Here one must analyse the statutory role given to the bishop or the provincial of the Roman Catholic Church. This in turn must be interpreted harmoniously with the terms of Article 44.2.5

The support which may be given to religious denominations
164. Any question of preferential discrimination must be seen against the background of Article 44.2.5 pertaining to denominational autonomy, and the general free practice guarantee in Article 44.1.1o.

165. Insofar as any true religious issue exists in the case it must be seen in the context of the fact that it is the plaintiff who instructed his legal advisers to plead the case claiming "authenticity" for his cards. Insofar as that might arise, I consider that the observations of Henchy J. in *McGrath* would be applicable, that is to say that this may be seen as an "occasion" where the State may recognise and buttress the tenets of a particular religion, insofar as it does not in any way impinge on the beliefs of other denominations or citizens.

166. The State may thus justifiably even lend its weight to what might possibly be portrayed as a discrimination of status deriving from within Roman Catholicism. But such limited support (if there be such) does not constitute any prejudicial State intrusion or "discrimination" where the status of a priest or in organised religion is advanced justifiably over a lay person or a business.

167. *A fortiori*, it does not arise in a situation where a particular, secular commercial activity, albeit with a religious dimension is to be regulated by *identifying,* a bishop or provincial, a simple evidential proof. Such identification or differentiation do not constitute a discrimination. It was submitted that s. 99 is "unique" in its recognition in statutory form of one particular Roman Catholic denomination. In fact this is not so. (See for example, s. 49 of the Civil Registration Act 2004 which recognises a certificate furnished under s. 11 of the Registration of Marriages (Ireland) Act 1863 in relation to a marriage solemnised in accordance with the rites and ceremonies of the Roman Catholic Church). Other private statutes give recognition to religious office holders on hospital boards.

***Locus standi* under Article 44.2.3**

168. But before the plaintiff even reaches the starting point of legal discussion of an unconstitutional discrimination, he faces a *locus standi* issue. There has been no answer, implicit to questions one must pose, as to whether there is evidence as to a difference or distinction made, as a result of the section, between persons, or any evidence of *status which is preferentially discriminatory* on the grounds of religious profession or belief? The plaintiff fails in the preliminary issue of evidential standing.

169. Even if some evidential *locus standi* were shown, mere description in the legislation of a particular religious denomination or identification of religious office does not *ex facie* amount to an unconstitutional discrimination. To designate the evidential route by which it is proved that a medical doctor is registered with the Medical Council is not to discriminate in favour of the Medical Council, or of doctors. Insofar as the matter is characterised as a religious issue, in order to permit the free exercise of religion the law may find it necessary to distinguish between ministers of religion or persons holding a religious status and other members of the population. (*Molloy v. Minister for Education*; *McGrath and Anor. v. Trustees of Maynooth College*.) This would be a permissible distinction.

170. Characterising the issue as a religious question, even if Mass cards were not part of what Henchy J. called the "essence" of one denomination, they are part of its "texture" and thus may permissibly come with Article 44.2.5.

171. In fact the concession made by the plaintiff that the entire question of Mass cards requires statutory regulation undermines these contentions. In what other form could there be statutory regulation? In fact it is impossible to envisage a regulation dealing with the authenticity issue of Mass cards without specific

reference to the Roman Catholic Church, in some form. No less intrusive mode of proof has been identified.

172. I do not think that what is in question here is a form of "quasi establishment". The State need not always be entirely neutral and these are matters in which it may engage to the limited degree permissible, provided such process does not discriminate or impose a religious disability.

173. When one considers of the issue at stake, the means deployed, and the statutory objective, I conclude that the manner which is identified in s. 99, is that which is most consistent with the ethos of Article 44, as a whole, and complies with the principle of harmonious interpretation.

174. I find the plaintiff's submissions under Article 44 fail on all the grounds identified.

II. The challenge under Article 38 of the Constitution

175. The challenge raised by the plaintiff under this article has three facets. The plaintiff objects that the section containing a) the reversal of onus of proof; b) alleged vagueness or arbitrariness in standard, and c) (as advanced in oral argument) a claimed disproportionality in penalty.

a) The reverse onus of proof

176. It is well established that the presumption of innocence is a constitutionally enshrined value implicit in the requirements of article 38 (*O'Leary v. Attorney General* [1993] 1 I.R. 102.

177. In *O'Leary* the plaintiff sought a declaration that the provisions of s. 24 of the 1939 Offences Against the State Act (the Act of 1939) infringed his constitutional right to a trial in due course of law and, in particular, put in peril the presumption of innocence by placing upon an accused the burden of disproving his guilt.

178. Under s. 21 of the Offences Against the State Act 1939 (as amended) membership of an unlawful organisation was constituted as a criminal offence. Section 12 of the Act of 1939 created the offence of possession of an incriminating document. Section 24 of the Act of 1939 provided that if an incriminating document was found on a person or in his possession, such possession should be evidence until the contrary was proved that the person was a member of an illegal organisation at the time of the charge.

179. The Supreme Court (O'Flaherty J.) held that, construing this section constitutionally, possession of an incriminating document amounted to evidence rather than proof of membership of an unlawful organisation, so that the probative value of such possession might be shaken by cross-examination or, evidence of the mental capacity of the accused or, of the circumstances in which he came to be in such possession. Thus, while the evidentiary burden was undoubtedly shifted to an accused; the legal or persuasive burden was not, nor was the presumption of innocence displaced (see the judgment of O'Flaherty J. at p. 265 of the report).

180. Furthermore, it has been held that rights under article 38.1 are not absolute and a proportionality analysis may be applied to asses the legitimacy of restrictions on such rights.

Proportionality

181. The well established framework of the proportionality tests was most recently summarised in *Montemuino v. Minister for Communications & Ors*. [2008] IEHC 157 (High Court, Feeney J., 30th May, 2008). That court referred to the consideration of proportionality by the Supreme Court in *The Employment Equality Bill 1996* (1997) 2 I.R. 321). There Hamilton C.J. stated:

"In effect a form of proportionality test must be applied to the proposed section.
(a) Is it rationally designed to meet the objective of the legislation?

(b) Does it intrude into constitutional rights as little as reasonably possible?

(c) Is there a proportionality between the Section and the right to trial in due course of law and the objective of the legislation …..?"

182. This same issue was also discussed by Irvine J. in *Whelan v. Minister for Justice, Equality and Law Reform & Ors*. [2007] IEHC 374, (Irvine J.)

183. I would identify the following principles as being applicable to the applicable test of proportionality: (a) the necessity to establish whether the means it employs to achieve its aim correspond to the importance of the aim; (b) whether the means adopted are necessary for the achievement of the objective; (c) whether the means actually becomes the end in itself; (d) whether the objective can be attained by other methods which may be more conveniently applied; (e) whether the method chosen is the least restrictive and the disadvantage caused is least disproportionate to the aim; (f) whether the means may be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations.

Application of proportionality criteria

184. In the context of the present case it is not disputed that reasonable consumers could be deluded by misrepresentations and by bogus Mass cards. Furthermore as is evident, the existence of an arrangement whereby Mass cards may be validated or authenticated by a priest alone has proved unsatisfactory. Such a process is not susceptible to verification and would not be in the number of cases identified earlier. The evidence before the Court was that there are approximately 250,000 members of the clergy in the Roman Catholic Church who might potentially sign a Mass card. It has been demonstrated that there are circumstances in which a signature or a purported signature provides no assurance whatever to consumers or purchasers that the intention which they have identified in a pre-signed Mass card would be necessarily reflected in a Mass.

185. Moreover there is the additional difficulty as to potential misapprehensions as to whether a Mass card purchased is for a dedicated Mass, for a specified intention or, alternatively for collective intentions. No other mode of authenticity or verification has been proposed in the course of the case. Such a process of authentication or verification is one designed to ensure for the consumer that the relationship between that consumer as purchaser, the intention contained in the Mass card, the celebrant, and the dedication of the Mass is preserved. For Roman

Catholic believers, qua consumers of Mass cards, the overall issue of authenticity, verification and charitable object of the donation, are fundamental. Whether or not an arrangement to ensure these requisites is in existence is a matter which would, in the event of a prosecution, be peculiarly in the knowledge of an accused person. It would be easily provable for an accused.

186. By contrast an onus placed upon a prosecutor to demonstrate the non-existence of such an arrangement with any one of more than 7,000 bishops or provincials would be an impossibility.

The reverse onus as a proportionate response

187. Accordingly, it may be seen that there is a rational connection between the means and the objective of the legislation. It is minimally intrusive into the constitutional rights of a potential accused. It is an attenuated intrusion into the right to trial in due course of law. No other means have been suggested to attain the object. The subsection does not "create" guilt. It provides a framework within which the existence of the offence may be proved or disproved. Absent such a legislative framework the existence of an offence would be simply not susceptible to proof in any practical sense, as an onus would lie on the prosecution to negative literally thousands of possible avenues which might be called in aid as constituting "validation" or "authentication".

188. Insofar as the plaintiff also claims that s. 99 is, in its terms, vague, I do not think this is so. In fact, on consideration, the section contains no more ambiguity than would arise in the normal use of language in a provision of that type. Were ambiguities shown to exist they would require to be construed in favour of the accused.

Prematurity on the issue of penalty

189. The third aspect of the plaintiff's claim under article 38 relates to the question of penalty. The issue of penalties is dealt with under s. 10 of the Act of 2009. As a matter of fact the constitutionality of that section was not impugned in these proceedings. However, quite properly, no point is taken on this issue. Furthermore, s.10 does not necessarily provide for trial on indictment. In fact it specifically provides that (on summary conviction) an accused person will be liable to a fine not exceeding €5,000 or to imprisonment for a term not exceeding twelve months. True, on conviction on indictment an accused person may be liable to a fine not exceeding €300,000 or to imprisonment for a term not exceeding ten years – but the plaintiff is not in that position. No prosecution has been taken against him at all. Whether or not he would be prosecuted lies in the hands of others. Were he prosecuted it would be entirely premature to speculate that such prosecution would be on indictment. Nor for the same reason should it be assumed that on conviction a court would necessarily impose the maximum penalty purely *ipso facto* by virtue of a breach of s. 99 being demonstrated. In the event of a prosecution being brought against the plaintiff on indictment for breach of the section and such a high penalty being then imposed it might then, but only then, be open to the plaintiff to advance these arguments. But that is not the case here. By way of contrast were he prosecuted summarily the argument would not be open to him. In circumstances where there is no prosecution in existence the argument is simply premature.

190. Furthermore the nature of offences under the Act may well vary. It is the maximum penalty which is provided for under section 10. One can well imagine that penalties of that type should or ought to be available in certain cases of the operation of bogus charities. The operation of a bogus charity or the

misrepresentation of a service as being charitable is one which, it may be thought, is particularly reprehensible and where on proof significant penalties might well be appropriate. I find the challenge fails.

The plaintiff's challenges under Articles 40.3 and 40.6

191. In the pleadings the plaintiff sought to rely on the constitutional right to earn a livelihood and the right to freedom of expression. (Article 40.3 and 40.6 of the Constitution). Invocation or reliance on these provisions was touched on only in the context of the discussion of Article 44 rights. These questions were not otherwise part of the written submissions made. The issues were not pursued during the course of oral argument. It is unnecessary to deal with these further.

Conclusion

192. I should express my thanks to counsel - the presentation of the case on both sides illustrated the art and craft of advocacy, and legal exposition, to a very high degree. However both on the facts and law, I find the plaintiff's challenge must fail under all headings.