

THE LABOUR COURT

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CD/09/158

DETERMINATION NO. REP091

INDUSTRIAL RELATIONS ACTS, 1946 TO 2004
SECTION 28(1) and SECTION 29(2) INDUSTRIAL RELATIONS ACT, 1946

PARTIES:

In the application to vary the Agreement: -

Technical Engineering and Electrical Union

Applicant

And

**Electrical Contractors Association
Association of Electrical Contractors (Ireland)
National Electrical Contractors of Ireland
Unaligned Group of Named Electrical Contractors
Opposing of the Application**

In the application to cancel the registration of the Agreement: -

**National Electrical Contractors of Ireland
Unaligned Group of Named Electrical Contractors**

Applicants

And

**Technical Engineering and Electrical Union
Electrical Contractors Association
Association of Electrical Contractors (Ireland)
Opposing of the Application**

Appearances

For TEEU, Mr Daniel C. Miller

For ECA, Ms Jean Winters

For AECEI, Mr Jim Waters, Waters and Associates, Solicitors; Mr Jack Hegarty

For NECI, Mr Roddy Horan S.C, Ms Mairead McKenna B.L. Instructed by

Lawlor Partners, Solicitors

***For Unaligned Group, Ms Helen Callanan B.L. Instructed by Sheehan Ryan
& Co. Solicitors.***

DIVISION:

Chairman: Mr Duffy
Employer Member: Mr Grier
Worker Member: Mr O'Neill

SUBJECT:

Registered Employment Agreement for the Electrical
Contracting Industry.

1. Application made pursuant to Section 28(1) of the Industrial Relations Act 1946 to vary an agreement registered in the Register of Employment Agreements on 24th September 1990 made between the Electrical Contractors Association, the Association of Electrical Contractors (Ireland) and the Technical Engineering and Electrical Union.
2. Application to cancel the registration of the said Employment Agreement pursuant to Section 29(2) of the Industrial Relations Act 1946.

BACKGROUND:

The Labour Court heard these applications in Dublin on 12th, 13th, 14th, 15th, 16th, 20th, 21st, 22nd, 23rd, 26th January and 4th February 2009.

The following is the Determination of the Court.

DETERMINATION:

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Part I

Application to Vary the Registered Employment Agreement for the Electrical Contracting Industry

1 Introduction

1.1 The Court has considered the application to vary the Employment Agreement for the Electrical Contracting Industry so as to give effect to adjustments agreed in the hourly rates prescribed by the Agreement. The application is supported by the TEEU and it is opposed by the Electrical Contractors Association and the Association of Electrical Contractors Ireland, all of which bodies are parties to the said Agreement. The application is further opposed by a body described as the National Electrical Contractors Ireland and a group of unaligned individuals who applied to the Court to be heard on the application.

1.2 Conclusion

In the circumstances in which the application to vary the agreement does not have support from the employer bodies which are party to the Agreement the Court does not consider it appropriate to make an order varying the Agreement. Accordingly the application is refused.

Part II

Application to Cancel the Registration of the Registered Employment Agreement for the Electrical Contracting Industry.

2. Introduction

2.1 The Court was asked to cancel the registration of an employment agreement made between the Electrical Trade Union and the National Engineering and Electrical Trade Union (now Technical Engineering and Electrical Union), The Electrical Contractors Association and the Association of Electrical Contractors of Ireland, which was entered in the Register of Employment Agreements on 24th September 1990 (referred to hereafter as the “REA”). The applicants are a body known as the National Electrical Contractors of Ireland and an identified unaligned body of 541 named persons who claim to carry on business as electrical contractors.

2.2 The application was considered by the Court pursuant to s.29 (2) of the Industrial Relations Act 1946, as amended. This subsection provides: -
(2) The Court may cancel the registration of an employment agreement if satisfied that there has been such substantial change in the circumstances of the trade or business to which it relates since the registration of the agreement that it is undesirable to maintain registration..

2.3 The application was opposed by each of the parties to the REA. The application was heard by the Court over 11 days in January/February 2009.

3. The Proceedings

3.1 The Court heard oral evidence from 24 witnesses over 10 days. This was followed by a further half-day in which the Court heard closing submissions. Following the hearing the Court received submissions in writing on the legal issues arising in the case. Affidavits filed by the parties in related Judicial Review proceedings entitled *Sullivan and*

Others v The Labour Court, Ireland and the Attorney General; record number 686/JR/2008 were furnished to the Court and were relied upon in the proceedings. The averments contained in these Affidavits were considered by the Court and taken into account in its consideration of the case.

3.2 The first named applicant is an unincorporated body comprising 594 individuals or companies described as electrical contractors. There was no evidence as to the number of workers employed by these individuals or companies. The second named applicants are a group of 541 individuals or companies who are unaligned and who are similarly described as electrical contractors. Again no evidence was tendered as to the number of persons employed by this group.

3.3 Those opposing the application are: -

- The Technical Engineering and Electrical Union, (TEEU) which is an Authorised Trade Union and the holder of a Negotiation Licence. The TEEU represents 40,000 members, upwards of 10,000 of who are employed in electrical contracting.
- The Electrical Contractors Association, (ECA) which is a trade association, affiliated to the Construction Industry Federation. The Construction Industry Federation is an Authorised Trade Union and the holder of a Negotiation Licence. The ECA comprises 50 member –firms who normally employ, in aggregate, some 5,000 electricians and apprentice electricians.
- The Association of Electrical Contractors (Ireland), which is an unincorporated body comprising 369 members who carry on business as electrical contractors. The evidence before the Court is that these firms normally employ between 3,000 and 4,000 electricians and electrical apprentices.

4. The Evidence

4.1 Evidence was tendered by 18 witnesses called on behalf of the applicants. 15 of these witnesses are electrical contractors, some of whom are currently employers and some of whom have no employees,

but are former employers. One witness is the wife of an electrical contractor and is a former employee of AECI. Two witnesses, Dr Moore McDowell and Dr Alan Ahearne gave expert evidence on the economic circumstances affecting the electrical contracting industry.

4.2 The witnesses who gave evidence for the applicants, in addition to Dr McDowell and Dr Ahearne, were: -

- Mr Michael Marshall. Mr Marshall is Technical Manager of the Electrical Contractors Safety and Standards Association (Ireland) Limited (ECSSA), which is a body involved in certifying the standard of electrical installation work. Between 1970 and 2004 Mr Marshall ran his own electrical contracting business. Mr Marshall gave evidence in his personal capacity based on his experience of the sector and on information obtained by him in his dealings with electrical contractors.
- Mr Dermot Troy. Mr Troy is an electrical contractor who carries on business in the Tullamore area. He employs two employees and carries on business mainly in house wiring.
- Mr P.J Salmon. Mr Salmon has been a self-employed electrical contractor since 1971. He is based in Louisburg, Co. Mayo. He employed up to 8 electricians in the 1990's but now has no employees.
- Mr Brian Kelly. Mr Kelly carries on business as an electrical contractor in the Rathmore area of Co. Kerry. He commenced business as a self-employed contractor in 1985. In 2003/2004 he employed two electricians and two apprentices. His principal business was in domestic wiring. He has since gone into the fast food business but carries on business as a self employed electrician on two or three days per week. He now has no employees.
- Mr Denis Judge. Mr Judge is an electrical contractor operating from Ballinasloe, Co. Galway. He started as a contractor in or about 1990. At various times he employed up to ten electricians

and two apprentices. He engages in all types of electrical work. Mr Judge still carries on business as an electrical contractor but now has no employees. Mr Judge is a founder member of NECI.

- Mr David Butler. Mr Butler is an electrical contractor who carries on business in the Co. Kildare area. He has traded as DB Electrical since 1992. Mr Butler carries out a variety of work including large and small domestic contracts. Up to three years ago Mr Butler employed 25 electricians and 5 apprentices. He now employs five electricians and 10-12 sub-contractors. Mr Butler is also a founder member of NECI.
- Mr Patrick Breslin. Mr Breslin is an electrical contractor based in Killybegs, Co. Donegal. He employs two apprentices. Up to 2007 he employed three electricians.
- Ms Clair Tunston. Ms Tunston is a director of Charles Lough Limited, which carries on business as an electrical contractor. The other director of the company is Ms Tunston's husband. The company carries out small contracts and employs one electrician.
- Mr Eamon Barry. Mr Barry carries on a family business as an electrical contractor and is based in Skibbereen, Co. Cork. Mr Barry has been in business since 1975. He employs five electricians and two apprentices. Two of the electricians are his sons.
- Mr George Wilkins. Mr Wilkins is an electrical contractor based in Bray, Co Wicklow. He described himself as a medium sized contractor. He has been running his own business for approximately 30 years. Between 2003 and 2006 Mr Wilkins employed up to 30 electricians as well as sub-contractors. At present Mr Wilkins employs two full-time employees.

- Mr Paul Lynch. Mr Lynch is an electrical contractor and carries on business from a base in Oldcastle, Co. Meath. He is mostly involved in commercial work. Between 2000 and 2003 he had nine employees. He now has no employees and uses the services of sub-contractors.
- Mr Peadar Leddy. Mr Leddy is based in Butlersbridge, Co Cavan. He has been in business as an electrical contractor since 1985. He employed 3 electricians up to 2006. He now employs one apprentice. He undertakes small contracts.
- Mr John Smith. Mr Smith is based in Arklow Co. Wicklow. He returned to Ireland from the US in 1999 and went into business with his brothers. He had employed 17 electricians and one apprentice. He currently runs a franchise engaged in electrical work and employs ten people.
- Mr Nick Murphy. He commenced business as a sole trader in or about 1998. He is based in Bunclody, Co. Wexford. He later became incorporated as a company. He had employed 17 electricians and four office staff. He deals mostly in commercial and industrial work. He now employs ten electricians and four apprentices.
- Mr Kieran Marshall. Mr Marshall commenced in business in 2004. He is based in Killarney, Co. Kerry. He took over his business from his father and had employed 8/9 employees and is involved mostly in industrial maintenance. He now employs two electricians and two apprentices.
- Ms Dolores Rogers. Ms Rogers is the wife of an electrical contractor. Ms Rogers had worked for AECI as its operations manager. Her husband had commenced working as a sub-contractor in 2002. Ms Rogers gave evidence in relation to her

experience while working with AECI and of her involvement with EPACE during that period.

- A statement and affidavit by Mr Ben McGowan was put in evidence and accepted by the Court. Mr McGowan was available for questioning but was not required. Mr McGowan is Managing Director of Camlin Electric Limited, which is an electrical contracting Company based in Longford. The Company was the subject of a criminal prosecution in the District Court for alleged failure to comply with the REA. That matter is currently the subject of a consultative case stated to the High Court.

4.3 In addition to the oral evidence tendered the Court accepted in evidence outline statements made in writing by 146 individuals associated with the NECI.

4.4 Five witnesses gave evidence on behalf of the proponents of the REA.

- Mr David Begg. Mr Begg is General Secretary of the Irish Congress of Trade Unions.
- Mr Paul Sweeney is an economist employed by the Irish Congress of Trade Unions. He was formally a tax inspector, a privately employed economist and an economist with SIPTU.
- Mr Owen Wills. Mr Wills is General Secretary of TEEU. He previously worked as an electrician and has been a branch secretary and assistant general secretary of his Union.
- Mr Eddie Keenan. Mr Keenan is Director of the Construction Industry Federation, of which the ECA is an affiliate.

- Mr Liam Redmond. Mr Redmond is principal of L. Redmond Electrical Limited. His Company has been a member of ECA since 1980. Mr Redmond was involved in the negotiation of the REA. He started in business in 1969 and employed 50 employees up to 2007. His company now employs 14 electricians and seven apprentices.
- Ms Rebecca Vega. Ms Vega is administrator of EPACE. She was tendered by ECA to answer questions in relation to certain records of inspections carried out by that body.

4.5 The evidence adduced during the hearing was wide-ranging and dealt with a range of matters, some of which were of peripheral relevance to the facts in issue. The Court in its deliberations on the case has considered all of this evidence. However what follows is intended to encapsulate the salient points made in the evidence tendered and does not purport to record the verbatim content of the evidence.

Position of the Parties

5. The Applicants

- 5.1 The Court was told in evidence that there is widespread concern at the effects of the REA on small contractors in the industry. Witnesses for the applicants told the Court that the REA has imposed undue costs on small contractors, which they find impossible to meet. They claim that, following its registration, the REA was not applied to small contractors and most small contractors did not know of its existence. While many of those who gave evidence told the Court that they paid their employees rates of pay which they described as the “*union rate*” they did not pay additional allowances prescribed by the REA such as travelling time and subsistence allowance or country money.
- 5.2 The REA also requires employers to whom it relates to enter employees between the ages of 20 and 65 in a pension, sick pay and mortality scheme providing benefits not less favourable than those provided for by a scheme known as the Construction Workers Pension

Scheme (CWPS). Many of the witnesses told the Court that they were required in practice to enter employees in the CWPS, which they regard as expensive and providing poor value for money. The Court was also told that employers were required some time ago to provide a facility whereby employees could contribute to a PRSA scheme and many electricians opted to avail of this facility. They are now being required to contribute to the CWPS at additional cost. Many electricians, the Court was told, resent this.

- 5.3 Evidence was given by Mr Michael Marshall that wage costs associated with the REA had increased by 96% in the period 1997 to 2005 whereas average industrial wages had increased by 40% in the same period.
- 5.4 Mr Michael Marshall also told the Court that the profile of the industry has changed since 1990 in that there has been significant growth in the number of entities operating as electrical contractors. This witness estimated that in 1992 the number of electrical contractors operating within the State stood at between 2500 and 3000. By the end of 2008 the number had grown to 4898. These figures were estimated by reference to the number of firms and individuals registered as electrical contractors with two safety standard regulatory bodies (RECI and ECSSA). It is obligatory for firms or persons wishing to carry on business as electrical contractors to register as such with one of these bodies.
- 5.5 Evidence was given that the growth in the number of contractors has intensified competition in the sector amongst small firms. Evidence was given that in order to comply fully with the REA it would be necessary to apply a charge out rate of €43.29 per hour. The Court was told that this rate is unobtainable for such work as wiring houses.
- 5.6 Many of those who appeared as witnesses told the Court that they had effectively been forced out of business because they could not obtain work at the rates, which they would have to charge in order to comply with the terms of the REA. Mr Judge told the Court that he only became aware of the REA in 2005 and commenced to apply its terms. He said that work which was previously available to him then dried up.

He said that before that time his success rate in tendering for work was of the order of 75%. He told the Court that it is now approximately 10%.

- 5.7 Others told the Court that they had been obliged to cut employment or engage sub-contractors or apprentices, rather than directly employed qualified electricians, in order to remain competitive. Witnesses on behalf of the applicants told the Court that individual sole traders without employees are unaffected by the REA and can, in consequence, tender for work at significantly lower rates than firms who employ electricians to whom the REA relates. Mr Barry told the Court that he was the only contractor operating in his area who employs other electricians. His evidence was to the effect that if he complied with the REA he would have to charge rates of up to €50 per hour. This, he said, would force him out of business because his clients would not pay rates of that magnitude.
- 5.8 It was also contended that firms, which engage individual sub-contractors on a contract for services, similarly enjoy a cost advantage over those who directly employ electricians under the terms of the REA. Mr Butler told the Court that up to three years ago he employed 25 electricians and five apprentices. He now has five directly employed electricians and 10 – 12 sub-contractors. Mr Butler told the Court that once an electrician supplies some cable or a few screws they can be properly classified as a self-employed subcontractor to whom the REA has no application. This, the Court was told, was a new development in the sector, which has occurred since the REA was registered in 1990.
- 5.9 The Court heard evidence that the competitiveness of contractors bound by the REA was further eroded by the entry into the market of firms from outside the jurisdiction, principally contractors from Northern Ireland and the UK, whose cost base is significantly lower than that of contractors who comply with the REA. The Court was told that the influx of such contractors had increased significantly since the commencement of the peace process in Northern Ireland. Mr Breslin, Mr Lynch and Mr Leddy each told the Court that their businesses had

been adversely affected by contractors coming into the State from Northern Ireland who were able to tender for work at significantly lower rates than they would be obliged to charge. They said that this was a particular problem in the border counties. Mr Marshall told the Court that many workers had come to Ireland in recent years from other EU Member States and they were willing to work for rates of pay significantly lower than those prescribed by the REA.

5.10 A further issue of concern amongst the applicants, which was referred to in the course of evidence, relates to the introduction by the Government of a requirement that public contracts be tendered for on the basis of a fixed-price which cannot be varied to take account of subsequent increases in costs, including increases in wages. The Court was told that, in addition to external costs, which cannot be controlled, the likelihood of annual wage increases, under the terms of the REA, is a further burden on contractors, which they cannot meet. Mr Judge, who highlighted this problem, accepted that the duration of contracts, for which smaller contractors might tender, would not normally extend beyond a few months.

5.11 The Court was referred in evidence to a report of the Oireachtas Joint Committee on Enterprise and Small Business, which met with a delegation from AECI in October 2005. The import of submissions made by the AECI delegation on that occasion was that its members should be relieved from the obligation to comply with the REA so as to allow them to compete at the lower end of the electrical contracting sector. According to the report the AECI delegation highlighted, in particular, the problems encountered by contractors who comply with the REA in meeting competition from non-compliant contractors.

5.12 The Court was also told that in 2004 the AECI applied to the Labour Court for a six-month pause in the application of the REA because of the rate of non-compliance with its terms. This application was unsuccessful. This, it was contended, confirms that the difficulties with the REA, which are now relied upon by the applicants, were acknowledged by the members of the AECI who purport to now support the maintenance of the REA.

- 5.13 Evidence was also adduced concerning additional costs incurred by electrical contractors, which have come about since the registration of the REA in 1990. It was pointed out that the introduction of technical regulation of the sector had resulted in additional outlay by contractors for testing and inspection of their work as well as mandatory attendance at training courses. The enactment of the Private Security Act 2004 was also referred to as having contributed to additional costs. This, the Court was told, has further restricted the work opportunities available to small contractors who can no longer install intruder alarms in private dwellings or other premises unless they hold a licence from the Private Security Authority. The cost of such a licence was given as up to €3,000 for a small operator.
- 5.14 Witnesses on behalf of the applicants gave evidence that in or about 2004 they became aware of the existence of the REA through the activities of a body known as EPACE. This is a body incorporated in 2003 as a private company sponsored by TEEU, ECA and AECI. Its stated objective is to enforce compliance with the terms of the REA. The Court heard evidence from contractors who were approached by EPACE and asked to open their employment records to inspection by that body. The witnesses said that if they did not facilitate such inspection they were threatened with being brought before the Labour Court by way of a complaint under the Industrial Relations Acts 1946 to 2004. They said that they were further informed that if they failed to comply with an order of the Labour Court to pay arrears due under the REA they would face criminal prosecution.
- 5.15 A number of witnesses told the Court that, having agreed to inspection, they received demands for substantial arrears of wages and pension contributions, which they could not meet. Mr Troy told the Court that he was subjected to an inspection by the Department of Enterprise Trade and Employment and was told that his affairs were in order. He said that he subsequently received an order from the Labour Court requiring payment of €50,000 in arrears of monies allegedly due under the REA. On advice from the Court he contacted TEEU and received a

revised demand for €12,000. He was subsequently brought before the District Court for failure to comply with the original Order.

- 5.16 Ms Rogers gave evidence to the effect that during her employment with AECI she was required to provide secretarial services to EPACE. She said that she encountered a case in which a member of AECI had submitted a list of contractors for inspection who were his direct competitors in the area in which his business operated. Ms Rogers also gave details of payments, which, she claimed, were made to TEEU, by EPACE for inspections, which TEEU carried out on behalf of EPACE.
- 5.17 The Court heard extensive evidence regarding particular requirements of the REA, which the witnesses regarded as onerous and unfair having, regard to the nature of their businesses. Many of the witnesses told the Court that they were required to pay electricians country money or subsistence allowances in the amount of €168 per week if they were sent to work more than 11 miles from their base. Those based in rural areas found this prohibitively expensive since practically all of their work would attract the payment. The evidence adduced was that clients of these contractors were unwilling to pay the rates necessary to sustain these payments. The Court was also told that the REA required payment of allowances known as travelling time to cover costs involved in travelling to work locations. A number of witnesses gave evidence that they were required to make these payments even where they provided vans in which employees travelled to work.
- 5.18 A concern of many of those who gave evidence was in relation to the requirement to provide employees with a pension scheme. Some of those who gave evidence had provided employees with a PRSA scheme and considered that sufficient. Others said that they were willing to provide their employees with a pension scheme but felt aggrieved at being required to join a particular pension scheme, namely the Construction Workers Pension Scheme (CWPS). In that regard a number of witnesses told the Court that they had set up pension plans through private providers but were told that they were

unacceptable to EPACE. They were then required to join the CWPS at additional cost.

- 5.19 Ms Rogers gave evidence to the effect that part of what was considered to be the pension contribution by employers and employees was in respect of other bodies, including a 39c. per week contribution to EPACE. Many witnesses told the Court that their employees objected to contributing to the CWPS pension scheme as they regarded it as poor value for money. Ms Rogers said that she had tried to acquire alternative pension cover but found that the requirement to include provision for sick pay was an impediment to obtaining equivalent benefits. She said that this was only available at additional cost to that of the CWPS scheme. Ms Rogers also told the Court that she had examined the accounts of the CWPS and found that substantial payments were made to trustees and that further substantial expenses were incurred by the scheme in renovating its offices. The witness said that she objected to this expenditure and had raised the matter, together with what she regarded as harassment of individual contractors by EPACE, with various authorities including NERA, the management of the scheme, the Pensions Ombudsman, the Pensions Board, the Department of Enterprise and a former Taoiseach. The witness said that she did not receive a satisfactory response from any of these authorities.
- 5.20 The Court was told that all workers over the age of 20 had to be entered in the pension scheme. Many apprentices are now over 20 and the cost of the pension contribution was a disproportionate cost relative to their wages. Evidence was also given that this requirement resulted in many apprentices being dismissed and replaced with younger apprentices on reaching age 20.
- 5.21 A number of witnesses gave evidence in relation to the tools which electricians were required to provide under the REA. Many witnesses testified that the tools specified were out-dated and irrelevant to the type of work now undertaken. In consequence employers had to provide expensive tools and equipment, including in some cases, laptop computers.

- 5.22 A number of witnesses complained that an excessive number of apprentices were being allowed into the industry by FAS and that they were being used as a form of cheap labour by some contractors.
- 5.23 The Court was also told that new regulations in relation to public contracts required contractors to have a turnover of the order of €2m annually before they could tender for publicly funded work. This, the Court was told, had the affect of excluding small contractors from this segment of the industry.
- 5.24 In relation to wage rates a number of those who gave evidence said that they did not object to the rate of pay prescribed in the REA, *per se*. Their principal objection was to what they described as “add-ons” (i.e. travel allowances, subsistence and pensions). Other witnesses referred to the wage structure, which linked pay with service within the contracting industry rather than experience in the electrical trade. This, the Court was told, resulted in electricians who had gained experience in other industries being paid at the lowest rates whereas others with less experience and skills were paid at the higher rates.
- 5.25 Some of those who gave evidence also complained at the rigidity of the wage structure. A number of witnesses told the Court that they wished to determine pay by reference to the skills and productivity of the individual. However this was not permissible under the REA. In that regard Mr Judge told the Court that his employees had elected to take a pay cut so as to facilitate his firm in obtaining work. The witness said that he could not accept that offer because it would involve a contravention of the REA.
- 5.26 A number of witnesses were asked what approach they would adopt to pay determination if the REA were to be revoked. Most said that they would negotiate with their staff and pay a rate commensurate with the skills of their employees. However many of those who gave evidence accepted that the instances of pensions cover would probably decline.

6. Expert Evidence

- 6.1 Dr Moore McDowell gave expert evidence regarding matters relating to economic developments and competitiveness affecting the electrical contracting sector. Dr McDowell is a member of the School of Economics in UCD and a director of ECU Ltd, Economics Consultants.
- 6.2 Dr McDowell presented a report, which had been prepared for the assistance of the Court. The salient points in this report are as follows: -
- After 1987 the Irish economy (measured by GNP in constant prices) grew at an average of 5.5% for the following 20 years. This period of growth ended in the first half of 2007 and the economy has been flat to negative since then. Current estimates place the decline in 2008 at 2% while the forecast for 2009 is for a further decline of 4%. Current estimates suggest that a return to growth in output and employment is unlikely to occur before 2011 and could be delayed even further.
 - The most obvious consequence of the period of expansion during the last ten years was the contribution of construction to GNP. While many commentators argued that this level of activity in the construction sector was not sustainable in the longer term, it nevertheless provided labour market background to developments in wage structures within the sector during the last years of economic boom.
 - In April 1990 employment in construction stood at 76,000, by March –May 2000 it had risen to 166,200 and by March –May 2008 it had further increased to 255,000.
 - The construction sector is already contracting more rapidly than the economy as a whole in the opening phase of the recession.
 - In March –May 2000 the workforce stood at 1,745,900. 1,671,400 were in employment and 74,000 were unemployed. The

unemployment rate then stood at 4.3% of which 1.6% was long term unemployed. By June – August 2008 the labour force increased to 2,281,400 of which 2,129,800 were in employment and 160,600 were unemployed. There was thus an unemployment rate of 7% of which 1.6% was long term unemployed.

- Dr McDowell highlighted several features of this data. He suggested that a good reference point was in the March-May 2000 period, when the economy was fully employed. Firstly he pointed out that in the earlier period the unemployment rate was well above the 4.3% recorded in 2000. It was also pointed out that long-term unemployment had fallen from 8.3% in 1990 to 1.6% in March-May 2000. After 2000 the rate of unemployment remained low and it was only in 2006 that it began to increase sharply.
- Secondly, it was pointed out that total employment had significantly increased from April 1990 to March –May 2000 by 44.1%. Employment continued to rise by a further 26.2% to March-May 2008. Thirdly, the rise in employment was greater than the fall in unemployment as the labour force itself grew.
- In 1990 the numbers employed in construction was 76,000. This increased to 166,200 in 2000 and to 255,000 by 2008. Figures furnished to the Court indicate that in June –August 2004 there were 15,700 workers in construction classified as non-Irish. This figure had increased to 40,300 by June –August 2008. It was further pointed out that of the 227,700 increases in employment in the labour force as a whole, between 2004 and 2008, 180,600 or 80% were migrants.
- Average hourly earnings in industry were €6.90 in 1990 and this had risen to €19.55 in 2008. This represents an increase of 183.3% over the period, or 70.5% in real terms. In July 1990 the REA craft rate for the construction industry was €5.30 per hour which represented 76.8% of earnings in industry. The corresponding rate under the REA for construction in January 2008 was €18.60 or 95.5% of average earnings in Industry (an increase of 251%).

- The hourly rate for electricians, set out in the REA, in 1990 was €5.75 per hour, which was above that of construction craft workers but below the average earnings in industry. From April 2007 the REA rate for an electrician with five years service is €21.49 per hour. This represents an increase of 373.7% over the period.
- Dr McDowell went on to describe the changes in the state of the public finances since the recovery began in 1987. He said that at that time the exchequer deficit was 9.1% of GNP. By 1990 this had been reduced to 1.9% of GNP and remained at that level until 1998 when an overall surplus of 1.4% was recorded. The driving force behind the surplus was a sizeable current budget surplus of 3.95% of GNP. Through most of the 2000's the overall budget was either in slight surplus or had a slight deficit but the situation deteriorated rapidly in 2008. The overall deficit in 2008, at 7.8% of GNP, was the highest since 1987.
- The prospects for the economy as a whole and the construction sector within the economy are seriously dependant on the balance of public finances. The current position is that the forecast deficit for 2009 is so large that the Government has no choice but to cut spending on both capital and current accounts. This will deepen the recession rather than ameliorating it.
- With regard to the external environment, the Court was told that, since the completion of the Single Market, electrical contractors, in common with other service sector firms, have found themselves facing increasing competition from service providers from outside the State. In these circumstances the domestic regulatory environment has the potential to seriously affect the competitive position of service sector firms. Enforceable minimum wage standards in the sector that are not reflective of labour costs elsewhere (particularly in Northern Ireland) are a major problem for service sector firms and for smaller firms in the electrical contracting segment of the services market.
- High volatility of the real exchange rate as a consequence of adhering to the Euro-zone is also a relevant factor. Fixed minimum

nominal wages in a labour intensive sector results in a weakened ability to respond to adverse changes in the competitive environment when the country experiences a rise in the real exchange rate, as at present.

- The impact of the Single Market is also a relevant factor. Procurement regulations coupled with the right of establishment, free movement of labour and interpretation of markets have meant that what were hitherto regarded as local nation markets have become part of a larger European market. This greatly intensifies competition for construction and electrical contracting firms.
- While internal regulation may formally affect all firms equally the potential for what was described as “hit and run” entry makes it possible for competitors to enter a market without observing the local regulations. The single market impact affected construction firms differently depending on their size with small firms being less affected. However Dr McDowell told the Court that from discussions with his clients (NECI), it is apparent that the existence of a land frontier with Northern Ireland has meant that cross border competition is now a serious matter for small firms.
- Exchange rate volatility has affected the competitive position of electrical contractors in the Republic of Ireland vis-à-vis Northern Ireland contractors. Prior to Irelands entry into the common currency a loss in competitiveness relative to sterling could be offset by devaluation, as was the case in 1986 and again in 1993. This facility is no longer available. Thus a loss in value of sterling relative to the Euro places contractors in the Republic at a competitive disadvantage relative to contractors from the UK, which cannot be corrected by exchange rate manipulation.

6.3 By way of conclusion Dr McDowell told the Court that the Euro rose post 2003, with a consequent rise in the trade weighted exchange rate. This rise was exacerbated by a further rise caused by the surge in wages as the economy over-heated due to pro-cyclical fiscal expansion in the period 2002-2007 accompanied by falling interest rates. This, it was asserted, coupled with regulatory changes that increased labour

costs even further in Ireland, resulted in a drift into a competitiveness crisis.

- 6.4 Dr McDowell gave as his opinion that the only way that the real exchange rates can be reduced is by what is euphemistically described as nominal wage flexibility plus regulatory repeal. This, he said, is the exact opposite to what the JLC and registered employment agreement regime are designed to achieve. Dr McDowell opined that the implications for a continuation of the current arrangements under the REA have to be a fall in competitiveness and employment in the affected sectors.
- 6.5 Dr Alan Ahearne gave evidence. Dr Ahearne is a lecturer in economics at NUI Galway.
- 6.6 Dr Ahearne's evidence corroborated that given by Dr McDowell. He made the following additional points: -
- Consensus projections for growth here over the next couple of years imply that, with one possible exception, this country will record the largest cumulative drop in national income in an advanced economy since the Second World War.
 - The unemployment rate will return to levels last seen in the 1980's. National insolvency along the lines of what happened in Iceland, although still unlikely, is a non-trivial and growing risk.
 - Flexibility will be required to reverse the loss of international competitiveness that the country experienced during the housing bubble. It is difficult to see a rebound in sterling and the dollar. Along with Ireland's membership of the single currency, this means that the necessary real exchange rate adjustment can only be brought about through falls in domestic prices and wages.
 - Productivity in Ireland is distorted by the operation of multinationals. Some large sectors are dominated by such enterprises, which record extraordinary high levels of value added per worker.
 - Irish productivity can be expected to increase over time. However, it is not clear that Irish productivity will rise faster than in other countries. Moreover, even if we can recover some competitiveness

through productivity improvements, the gains achieved via that channel will not happen quickly enough. Wages and prices will have to fall.

7. TEEU and ECA

7.1 The evidence lead on behalf of TEEU and ECA in opposition to cancelling the registration of the REA can be summarised as follows: -

7.2 The Court was told that a collective agreement for the electrical contracting industry had existed in one form or another since 1922. Evidence was also given to the effect that during the late 1980s, a time of high inflation and low demand for electrical contracting work, there was significant unrest amongst electricians in relation to wage rates. This, the Court was told, was coupled with difficulties associated with contractors from outside the State competing for work within the State.

7.3 The Court was told that significant difficulties emerged within the sector at that time relating to Northern Ireland contractors operating outside the terms of the REA within the State. The Court was referred to one particular case involving a Northern Ireland contracting company, which had carried out work on a number of sites around the country but had refused to abide by the terms of the then National Agreement. The Court was told that a dispute ensued between this contractor and the predecessor of TEEU and union members picketed a number of sites on which this contractor was engaged. Evidence was given that the matter was ultimately brought before the High Court by way of an interlocutory application for an injunction to prevent the picketing. The application was unsuccessful and the High Court

refused the relief sought. The Court was told that this case highlighted the difficulties caused by contractors who refused to abide by the then National Agreement.

7.4 There was a discussion within the National Joint Industrial Council (NJIC) (which is the negotiating body for the industry) in relation to these matters. The Court was told that the members of the NJIC came to the view that the registration of the Agreement would bring about stability and ensure the uniform application of the negotiated wage rates and conditions of employment. It was against that background that an application was made to the Labour Court to register the agreement. Mr Wills of TEEU told the Court in his evidence that shortly after the Agreement was registered a pay determination system was put in place to regulate wage adjustments and this had contributed to industrial peace and stability within the sector. Mr Wills also expressed the view that the decision to register the REA was fortuitous because shortly afterwards the “Posting Directive” was adopted which, in the union’s opinion, underpinned the applicability of the REA to contractors from outside the State carrying out contract work here. Mr Keenan agreed with Mr Wills on this point. Mr Keenan told the Court that, in the absence of an REA, contractors from other EU States, where wage rates were significantly lower than in Ireland, would enjoy a considerable competitive advantage over Irish contractors. This, he said, was a matter of great concern to members of ECA. Both Mr Wills and Mr Keenan gave it as their opinion that a major advantage of the REA was that it preserved what they described as “a level playing field” amongst contractors tendering for work.

- 7.5 The Court was told that a further consideration in maintaining the REA was the desire of both the employer bodies and the Union to provide good pay and conditions of employment so as to attract what Mr Redmond described as bright and good quality people to the industry.
- 7.6 Mr Keenan's evidence was also to the effect that the REA has introduced stability in the sector in that it provided a means for the orderly resolution of industrial relations disputes. Mr Keenan was of the opinion that it introduced certainty by providing common rates for all contractors competing in the sector. On that point it was put to Mr Keenan in cross-examination that in the construction industry the existence of an REA had not prevented significant industrial unrest in recent years. Mr Keenan gave it as his opinion that the disputes to which Counsel referred were caused by one Union and were not related solely to industrial relations issues. Mr Keenan also told the Court that the employers relied upon the REA for the construction industry to obtain injunctive relief in Court proceedings involving these disputes, which might not have been available if the industry was not regulated by an REA.
- 7.7 In relation to changes in the industry since the registration of REA the Court was told that the number of contractors operating in the sector had grown in response to the increased level of activity in the broad construction sector. The evidence given by Mr Wills confirmed that Northern Ireland contractors are still operating in this jurisdiction and are putting pressure on wages. He said, however, that this was not a new development. In relation to activity in the industry the evidence tendered was to the effect that while the collapse in the construction industry had

a profound effect on the level of activity in electrical contracting there were other areas, such as energy conservation and maintenance, where there had been growth in demand.

7.8 It was suggested by those opposing the application that the membership list of RECI and ECSSA is not a reliable indicator of the number of contractors operating in the sector. The Court was told that individual electricians carrying out what were described as “nixers” was always a feature of the industry. It was said that the numbers are distorted by the fact that individual electricians, who may be ordinary employees who undertake private work in their own time, can register with these regulatory bodies for the purpose of having their work certified as complying with safety standards.

7.9 As to the effects of individual sub-contractors, the Court was told that this too is a long-standing issue within the sector. It was Mr Keenan’s evidence that, following a decision of the High Court in 2005, the view of the CIF is that individuals who provide their services personally under a contract for services are covered by the terms of the REA. Mr Wills referred the Court to the Code of Practice for Determining Employment or Self-Employment Status of Individuals compiled by the Employment Status Group set up under the Programme for Prosperity and Fairness (a copy of which was handed into the Court). This Code of Practice, which was approved by NERA, Department of Social and Family Affairs, Department of the Taoiseach, ICTU, IBEC, SFA, CIF and the Revenue Commissioners, sets out the criteria against which an individual should be characterised as employed or self-employed. According to Mr Wills the mere provision of cable or a few screws (as suggested by Mr Butler in his evidence) would

not be sufficient to classify an individual as genuinely self-employed.

- 7.10 Mr Keenan also disputed the evidence previously given concerning the growth in the number of self-employed electricians in the sector. He said that CSO figures indicated that in 2003 15.2% of the workforce in the broad construction industry was classified as self-employed. By 2008 this had only risen to 15.6%.
- 7.11 Evidence was given that upwards of 10,000 electricians, who are members of TEEU, normally work in electrical contracting. Mr Wills estimated that there are a further 2,000 electricians in the sector who are not members of the Union. Mr Keenan told the Court that 50 electrical contracting firms are in membership of ECA and those firms normally employ approximately 5000 electricians between them. The Court was told that member firms of AECI normally employ, in aggregate, between 3,000 and 4,000 electricians. The Court was told by Mr Wills and Mr Keenan that their respective organisations were strongly supportive of the REA and believed that its cancellation would have a negative effect on the interests of both employers and workers and would lead to erosion in the quality of employment conditions in the sector. This, they said, would lead to what was described as a “race to the bottom”.
- 7.12 Mr Redmond told the Court that there has been a significant change in the tendering arrangements in the sector in recent times. The Court was told that previously electrical contractors were appointed directly by clients (or the Architect acting for the client) on a procedure known as nominated contractors. Under

that system electrical contractors tendered directly to the client. That has now been changed and the principal contractor, usually the building contractor, tenders for the entire works, including electrical work. Electrical contractors then tender to the principal contractor. The Court was told that this system has resulted in electrical contractors being put under pressure by principal contractors to reduce their prices and they are often pitted against each other in that regard. This the Court was told, has intensified competition between contractors.

7.13 Mr Keenan told the Court that the members of ECA carry out the bulk of electrical contracting work in the State. He said that ECA members carried out 80% of all publicly funded contracts in the State. The Court was told that all public contracts contain a stipulation, known as a “*fair wages clause*”, that the terms of the REA must be observed by the contractor.

7.14 The witnesses who gave evidence in support of the REA did not accept that a reduction in wages would lead to an increase in employment. Mr Redmond told the Court that employment levels in the industry are determined by the level of work available and that employers would not employ more workers than were needed regardless of their rate of pay.

7.15 In relation to the purported rigidity of the REA the Court was told both by Mr Wills and Mr Keenan that they were not averse to renegotiation of any provision of the REA if that was considered necessary. They said that procedures existed whereby any issue relating to the agreement could be raised and changes introduced by way of a variation of the REA. In that regard the Court was told that the ECA is seeking a 10% wage reduction in the sector.

Both Mr Wills and Mr Keenan told the Court that they would not be opposed in principle to an extension of representation on the NJIC to include representatives of employers who are not members of either ECA or AECl.

7.16 Evidence was given concerning the establishment of EPACE and its role within the industry. The Court was told that this body was established in 2003 by the NJIC to promote compliance with the REA. Its sponsors are TEEU, ECA and AECl. It now operates as an independent body although its management committee is made up of representatives of the sponsoring bodies. According to Mr Wills the promotion of compliance is the primary function of EPACE. The Court was told that, shortly after its inception in 2003, EPACE wrote to all electrical contractors registered with either RECI or ECSSA. A copy of a circular letter, which the Court had been told was sent by that body to all registered electrical contractors, date 8th September 2003 was furnished to the Court.

7.17 This circular letter explained the role of EPACE, drew attention to the existence of the REA and enclosed a copy of that agreement. The Court was told that a questionnaire was enclosed with this circular on which recipients were asked to indicate if their employees were covered by the REA and if its terms were being applied to those employees. This questionnaire also asked respondents to confirm that they were prepared to facilitate EPACE or its representatives to verify compliance in any reasonable manner. The Court was told that an advertisement had been placed in The Irish Independent on 19th September 2003, the Sun Newspaper on 22nd September 2003 and the Sunday World

on 21st September 2003, drawing attention to the REA and its contents.

7.18 There was no evidence as to the response rate to the circular sent by EPACE. The Court was, however, told that Mr Judge responded to this circular and completed a questionnaire dated 29th September 2003 in which he confirmed that his firm was compliant with the REA. A copy of this completed questionnaire was furnished to the Court. Mr Judge was recalled and questioned by the Court on this point. He said that he had no recollection of having received this questionnaire but confirmed that he had completed and signed it. He said that he did not understand the import of the questions contained in the questionnaire. Mr Judge also told the Court that he did not receive the other documentation, which, it had been claimed, was enclosed with this questionnaire.

7.19 Evidence was given that firms were selected at random for inspection by EPACE. A list of inspections conducted by EPACE of ECA member firms was furnished to the Court and Ms Vega was tendered by ECA to explain this list. It was put to Ms Vega that there was no record relating to the inspections conducted of a number of major contractors named on this list nor was the outcome of those inspections given. It was also pointed out that there was no record of inspections carried out on Northern Ireland firms. Ms Vega said that she had only been asked to supply records of inspection of ECA members. She accepted that the record relating to those firms was incomplete.

7.20 In his evidence Mr Keenan told the Court that an agreement reached in conjunction with the Towards 2016 Partnership

Agreement provided for the role of EPACE to be taken over by NERA. Mr Wills gave evidence to similar effect.

7.21 In relation to pensions Mr Wills said that the Construction Workers Pension Scheme (CWPS) was independently judged to be the best pension scheme in Ireland and was regarded as coming first in Europe for a scheme of its type. He said that the scheme had been wrongly described in earlier evidence as a defined benefit scheme. It was a defined contribution scheme with a hybrid element, which adequately catered for the needs of workers in the industry. He said that it also provided the best value for money in the industry. Mr Wills said that independent statistics of pension schemes showed that 95% of pension funds within the State are not fully funded. This pension scheme is 100% funded. Mr Wills also said that the scheme was a non-profit scheme, and any surplus made was put back into the scheme.

7.22 Mr Keenan said that the REA merely prescribed that electrical contractors should enter employees in a pension, sick pay and assurance scheme, which provided benefits, equal to those of the CWPS but did not require employers to enrol in that scheme *per se*. He said that he was aware of at least one other scheme, which had been accepted as meeting the requirements of the REA. He did not know if the contribution rates of this scheme were higher than those of the CWPS.

7.23 In relation to compliance with the REA the Court was told that, while there was a high level of compliance, the situation was far from perfect. Mr Wills said that when he was a Branch Official he regularly received complaints from contractors, principally in

circumstances where they had failed to obtain contracts, alleging non-compliance with the Agreement by their competitors. In many instances when these complaints were investigated they were found to be without substance. The witness told the Court that there was considerable emphasis on enforcement and this has intensified in recent years with the establishment of EPACE. He was, however, satisfied that overall there was a good rate of compliance with the Agreement.

7.24 The witness also referred to evidence given earlier in the hearing in relation to the application of various provisions of the REA. In particular, Mr Wills referred to evidence given by the opponents of the REA in relation to the payment of travel time and subsistence. Mr Wills considered these interpretations as incorrect. He said that where electricians are provided with a van and travel in the employer's vehicle and on the employer's time then travel time is not payable. He also said subsistence is not payable where the employee returns from his or her place of work each day. The witness said there was no basis for many of the assertions to the contrary made during the course of earlier evidence. Mr Redmond also told the Court that subsistence was only paid when employees were required to remain away from home and report directly to their place of work.

7.25 In relation to apprenticeships, Mr Wills rejected the evidence tendered to the effect that there was widespread abuse of apprentices in the sector. He said that the number of apprentices is regulated within the industry and it is incorrect to say that apprentices were let go at 20 years of age as a matter of course. He said that there was no evidence of this and if it came to the Union's attention it would be dealt with. Mr Redmond gave

evidence that in consequence of the downturn in the sector many employers had to make qualified electricians redundant. This witness said that employers had a moral responsibility to retain apprentices so as to allow them to complete their apprenticeship and in so doing distorted the ratio of apprentices to qualified electricians. Mr Redmond also disputed the evidence previously given that apprentices who failed their final exams were nonetheless entitled to progress on the wage scale. He said that apprentices were allowed three attempts at the final exams. They did not progress on the pay scale until they passed the exams. If an apprentice failed on his or her third attempt he or she could not qualify and was let go.

8. Expert Evidence

- 8.1 Mr David Begg, General Secretary of the Irish Congress of Trade Unions gave evidence. The witness referred the Court to various provisions of the current social partnership agreement which provide for the strengthening of registered employment agreements and employment regulation orders as a means of ensuring that the social rights of workers are not eroded by the opening up of global markets. He said that this system of pay determination and regulation has worked well since 1946 and ensures that a “level playing field” is maintained with regard to wage costs in sectors, which are characterised by a high level of competition and labour mobility.
- 8.2 Mr Begg said that trade unions were concerned at a recent trend in the jurisprudence of the ECJ, which appeared to favour the right of establishment over the social rights of workers. He referred to the decisions in four recent cases in which the right of employers, established within the Community, to post workers in other Member States on rates of pay established within their country of origin had been upheld. The Court was told that the implications of these decisions had been raised by Congress with Government. He said that

the Government had assured Congress that rates of pay and conditions of employment prescribed in Registered Employment Agreements and Employment Regulation Orders could be enforced against foreign contractors operating in Ireland because of their legally binding character in domestic law.

- 8.3 The Court was told that surveys conducted on the reasons for the rejection of the referendum on the Lisbon Treaty indicated that concerns surrounding the possible erosion of Irish labour standards as a result of the ECJ's decision in the cases referred to was a major factor in influencing those who voted against the Treaty. Mr Begg said that most of the other factors identified had been addressed but if the registered agreement system were to be undermined it would heighten concerns that the interest of workers would be off set by the right of establishment within the Community. He said that the REA protected the rights of workers in Ireland and protected good employers from unfair competition by transnational enterprises based in low wage economies.
- 8.4 Mr Begg said that the current and previous national partnership agreements recognised the need for improved competitiveness and the need for ongoing flexibility and change. It also recognised the need for stability in the labour market. He said that if there was a need for change in the terms of the REA it should be brought about by negotiation between employers and unions in the sector.
- 8.5 Mr Paul Sweeney gave evidence on economic and labour market issues arising in the case. Mr Sweeney is an economist with the Irish Congress of Trade Unions. His evidence can be summarised as follows: -
- The Irish economy has changed considerably since 1990 and while it is now in recession, our overall economy is far better balanced. It was pointed out that in 1990 inflation was at 18% whereas it is now at 1.1%. Unemployment was then at 12.9% and now, although rapidly rising, is at 7%.
 - In 1990 the number at work within the economy was 1.1 million compared to 2 million now. He further pointed out that 56,000

people emigrated in 1990. There were 77,000 workers employed in construction in 1990 compared to 255,000 at peak in 2008.

- Mr Sweeney disagreed with the proposition that regulation is bad for economic performance. He contended that good regulation can contribute to positive economic performance. Relying on a report from the National Competitive Council Mr Sweeney said that the overall level of regulation in Ireland is amongst the lowest in the OECD. Quoting from that report Mr Sweeney said that contrary to the opinion of some economists the NCC explicitly stated that *“well designed and efficiently enforced regulation helps achieve policy goals (social, health and safety, environmental and economic policy)”*.
- In the current agreement with the social partners the Government made it clear that there should be firm labour market regulation, which should be vigorously enforced.
- The tax wedge in Ireland is one of the lowest in the world. This means that the cost for employers of employing workers in Ireland has substantially reduced. Social security costs in Ireland are low and total labour costs in Ireland are 22nd of the 30 OECD rich countries.
- According to the US Bureau of Labour Statistics, which compiles a massive data base on workers remuneration in the US and internationally, the hourly pay rate of production workers in Ireland in 2006 was €25.96 which is favourable compared to many other countries.
- The focus on the level of catch-up has neglected to take into account the fact that the basic cost of employing a worker here is still well below that of most of our competitor countries.
- Irish productivity is amongst the highest in the world. While the rate of catch –up in wage costs have not been accompanied by improved productivity it had not disimproved- it has simply stood still.
- There was a rapid rise in productivity in the latter half of 2008 because the two sectors with low productivity, construction and

services, are in decline. The paradox is that this means that overall productivity is rising.

- Overall competitiveness is not determined by wages or even unit labour costs. This matrix covers many complex areas. But in the area of cost competitiveness, which has disimproved in recent years, the main cost is the rise in the Euro relative to sterling and the dollar.
- Price levels in Ireland are very high compared to other countries. Only Denmark has higher price levels. Prices for services in Ireland are 23% above the EU15 average and for goods it is 14% higher.

8.6 Mr Sweeney accepted that Ireland was experiencing a deep recession and that growth is unlikely to return until at least 2011. He gave it as his opinion that regulation such as that contained in the REA is particularly necessary in circumstances where more firms are competing for fewer contracts so as to avoid retrenchment of pay and conditions as a means of improving the competitive position of individual contractors.

Conclusions of the Court

9. The approach of the Court

9.1 The Court has considered the very considerable body of evidence adduced in this case. It has also taken account of the helpful submissions made by the parties.

9.2 The test to be applied by the Court in considering if the registration of the REA should be cancelled is set out in s.29 (2) of the Act. There are three parts to this test. Firstly, the Court must be satisfied that there have been changes in the circumstances of the electrical contracting industry since 1990. Secondly, the Court must be satisfied that any such changes are substantial. Thirdly, the Court must conclude that any such substantial changes make it undesirable to maintain the registration of the REA. This necessarily involves a comparison of the

circumstances of the industry in 1990 as against the circumstances now existing.

- 9.3 The Act gives no guidance as to how the provisions of s.29 (2) may be brought into play. Section 29(1) makes it clear that an REA may be cancelled by the Court on the joint application of the parties thereto. Section 29(3) makes provision for the cancellation of an REA on the application of either the worker or employer parties to the Agreement. Thus both subsections deal with who can have *locus standi* to bring an application before the Court for the purpose of having an REA cancelled. It is noteworthy that s.29 (2) makes no such provision.
- 9.4 In its submission to the Court, TEEU contends that a harmonious interpretation of s.29 as a whole suggests that subsection (2) could only be invoked by a party to an REA in order to seek the cancellation of the REA. The Court does not accept that submission.
- 9.5 It appears that s.29 of the Act allows the Court, on its own motion, to consider if the maintenance of an REA on the register is no longer desirable. This could arise, for example, where the Court undertakes a review of REAs for the purpose of considering their continued relevance in light of changed circumstances or where the existence of such changed circumstances is brought to the Court's attention. In such cases the Court could, having satisfied itself as to the facts of the case, cancel the registration of the agreement on its own initiative.
- 9.6 There is nothing in s.29 (2) of the Act, which would preclude the Court from considering if the circumstances referred to in the subsection exist on the application of a person or body who is affected by an REA but who is not a party to the agreement. In the instant case the applicants herein are affected by the agreement and there is nothing to prevent them from asking the Court to review the continued registration of the REA and urging it to exercise its statutory power, pursuant to s.29 (2) of the Act, to cancel its registration. Accordingly the Court is satisfied that the application to cancel the registration of the REA is properly before the Court and that the applicants herein, in so far as they are employers affected by the agreement, have *locus standi* to maintain the application.

- 9.7 The Court must be satisfied that change has occurred and that it is substantial. The meaning to be ascribed to that term was addressed by the applicants in their written submissions to the Court. The Court was referred to a line of authorities in which the expression “substantial grounds” was judicially considered. These cases concerned the standard necessary to ground an application to apply for leave for special judicial review. These authorities indicate that the word substantial, in that context, means that the ground relied upon must be “reasonable”, “weighty” not “trivial or tenuous” (see McNamara v An Bord Pleanala [1995] 1.ILRM 125 and more recently Re Art 26 and the Immigrants (Trafficking) Bill 1999 [2000] 2.IR 360.
- 9.8 The Court finds these authorities helpful and instructive. However the concept of “substantial change” is somewhat different to that of “substantial grounds”. It seem to the Court that the expression used in s.29 (2) of the Act is not a term of art but an ordinary expression which should be given its ordinary and colloquial meaning. This suggests that in order to be substantial change must be real and tangible and not imaginary (see Oxford Dictionary of English 2nd ed. 2003). In the context in which the expression is used in the Act it should be understood in contra distinction to ordinary or ongoing change, which is a normal feature of all industry and employment.
- 9.9 The applicant parties submitted that the Court must deal with the case solely by reliance on the evidence adduced in the course of the hearing. This, as a general proposition, is of course correct. In fulfilling its fact-finding role the Court cannot go outside the evidence adduced. However, the Court is an expert tribunal and it must be free to take account of the experience and expert knowledge of its members, in the field of industrial relations, in evaluating that evidence and drawing conclusions. The scope available to an expert tribunal in relying on its own expertise was considered in Ashford Castle Ltd v SIPTU, High Court, Unreported, Clarke

J. 21st June 2006. Having reviewed the different types of expert tribunal the Judge stated the following:-

- At the other end of the spectrum, expert bodies may be required to bring to bear upon a situation a great deal of their own expertise in relation to matters which involve the exercise of an expert judgment. Bodies charged with, for example, roles in the planning process are required to exercise a judgment as to what might be the proper planning and development of an area. Obviously in coming to such a view the relevant bodies are required to have regard to the matters, which the law specifies (such as, for example, a development plan). However a great deal of the expertise of the body will be concerned with exercising a planning judgment independent of questions of disputed fact. In such cases the underlying facts are normally not in dispute. Questions of expert opinion (such as the likely effect of a proposed development) may well be in dispute and may be resolved, in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However above and beyond the resolution of any such issue of expert fact, the authority concerned will also have to bring to bear its own expertise on what is the proper planning and development of an area.

Later, in relation to this Court the Clark J. had this to say: -

In those circumstances it seems to me that the Labour Court, when exercising its role under the Act, is very much towards the end of the spectrum where it is required to bring to bear its own expert view on the overall approach to the issues. It, correctly in my view, identified that its decision must be one, which is fair and reasonable to both sides. Precisely what is fair and reasonable in the context of terms and conditions of employment is a matter upon which the Labour Court has great expertise and, in my view, the Labour Court is more than entitled to bring its expertise to bear on the sort of issues, which arise in this case.

9.10 The comments of Mr Justice Clarke echo those of the Court of Appeal for England and Wales in London Underground v Edwards (No.2) [1999] IRLR 364 where it was acknowledged that Industrial Tribunals do not sit in blinkers and are entitled to make use of their own knowledge and experience in the industrial field. Similarly in the

Northern Ireland case of Briggs v North Eastern Education and Library Board [1990] IRLR 181, the Court of Appeal held that Tribunals are not debarred from taking account of their own knowledge and experience.

10. Burden of proof

10.1 The relevant statutory provision requires that the Court be satisfied that the conditions specified in the subsection are met before it can have jurisdiction to exercise the power, which the sub-section confers. This suggests that a positive case must be made to the Court in that behalf. The Act is silent on the distribution of the onus of proof. However, as in the present case, where the existence of a state of affairs in which the Court can exercise its power to cancel the registration of the agreement is in contention, the general principle is that a party seeking to advance a case bears the burden of ensuring that it is made out. (see Joseph Constanine Steamship Line Ltd. v Imperial Smelting Corp Ltd [1942] AC 154).

10.2 Broad support for this proposition may be found in the decision of the High Court in South Dublin County Council v Fallowvale Ltd. [2005] IEHC 408. Here the respondent sought to resist the applicants' arguments that they bore the onus of proof of establishing that they came within the categories of exempted development, which had been created by the law. As McKechnie J. explained: -

“In my opinion the stage presently reached is that there is clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either s. 4 of the Act of 2000 or under the exempted developments provisions in the Regulations then the onus of establishing this point is upon he who asserts.”

10.3 Although that case was decided in the specific context of the planning code, it does provide authority in support of the proposition that a party

who seeks to advance a particular case bears in law the onus of proving that case on the normal civil standard. Accordingly the Court is of the view that the applicants must establish, as a matter of probability, that there has been change in the sector, that the change is substantial and that in light of that change it is undesirable to maintain the registration of the REA.

11. The Level of Support for the REA

- 11.1 In the course of the hearings and in their final submissions the applicants have advanced the argument that the employer parties to the REA, namely the AECI and ECA, cannot be said to be fully supportive of the continuance of the Agreement. They pointed out that the position of the AECI is that they are seeking a root and branch review of the REA as is evident from information contained in a newsletter issued by that Association to its members while the case was at hearing.
- 11.2 The AECI was represented by Mr Waters, of Waters and Associates, Solicitors, on the opening day of the hearings and it was made clear to the Court that the Association was opposed to the application to vary the REA but that it supported its continued registration. The Court was referred to a written submission filed by AECI in connection with the application to vary the agreement and the concomitant application to cancel its registration in June 2008. In that submission the AECI were supportive of the continuance of the REA but indicated its belief that a renegotiation of its provisions was warranted.
- 11.3 Various members of AECI represented the Organisation at the subsequent hearings although they took little active part in the proceedings. However, nothing was indicated to the Court by AECI from which it could be concluded that it had resiled from its earlier position of supporting the continued registration of the REA.
- 11.4 In the case of the ECA the argument was advanced that its stated position in seeking a 10% pay cut in the sector is inconsistent with the REA and amounts to a repudiation of the Agreement. The ECA fully participated in the hearings and actively opposed the application to

cancel the registration both in its submissions and in adducing evidence.

11.5 It is clear that both AECI and ECA wish to renegotiate aspects of the REA to one degree or another. It is also noted that the stated position of TEEU is that it is willing to enter into discussions on any matter that the employers wish to raise but without making any concession as to what might be agreed. However their stated position is that they wish to do so within the parameters of the Agreement itself. No employment agreement is immutable for all time and any party is entitled to seek its renegotiation. Such a request could not amount to a repudiation of an agreement in the industrial relations sense.

11.6 The applicants have also suggested that the position put before the Court by TEEU should not be taken as representing the views of electricians in the sector in circumstances in which the Union has not conducted a ballot of its members on continued support of the REA. No evidence whatsoever was adduced by the applicants who could cast any doubt on the veracity of evidence given on behalf of TEEU to the effect that its members are supportive of the REA. The Court is further satisfied that if the situation were otherwise that would be known to the Union.

12. The case made

12.1 The applicants contend that there has been substantial change in the circumstances of the electrical contracting industry since 1990. In advancing that argument they rely on a combination of what they say are the following changes: -

- The Growth in the sector
- The Increase in the number of Electrical Contractors
- Changes in employment levels
- The unrepresentative nature of the parties to the REA
- The growth in self-employment and sub-contracting
- The activities of EPACE in enforcement
- The terms of the REA
- Rates of pay

- Technological change
- Competition from outside the jurisdiction
- Current economic circumstances

12.2 The applicants say that the combined effect of these changes is to discourage employment in favour of sub-contracting, to cause a loss of competitiveness resulting in more workers being made redundant and more firms being forced out of business. This, the applicants contend, renders the maintenance of the REA on the register undesirable.

12.3 The case put by the proponents of the REA is, essentially, a traverse of that put by the applicants. In addition they say that the REA is necessary to ensure adequate social protection of workers and to avoid unfair competition within the sector from those observing unreasonable employment standards.

13. Change in the sector.

13.1 The Court must first consider if there has been change in the circumstances of the electrical contracting industry since 1990. That question can be quickly disposed of. Every facet of business has changed, and must change, over time. Electrical contracting is no exception. Some of the change has been positive. Other changes have been less so. The question for the Court is whether that change, either in its individual manifestations or cumulative effect, constitutes substantial change.

14. Growth in the Industry

14.1 It seems clear that the electrical contractual industry has grown significantly since 1990. It is part of the broader construction sector and the evidence before the Court is that the numbers employed in construction went from 76,000 in 1990 to 255,000 in 2008. Undoubtedly that number has fallen dramatically since, but no up-to-date figures were given to the Court. Nor is it clear whether or not the current employment levels are at or above the 1990 levels.

15. Number of Electrical Contractors

- 15.1 There has also been a significant increase in the number of firms and individuals describing themselves as electrical contractors. There was some controversy as to the extent of the increase in that regard. The applicants relied on the figures obtained from the safety standards regulatory authorities (RECI and ECSSA) in contending that the numbers have doubled.
- 15.2 The proponents of the REA have argued that these figures are inherently unreliable because they include individual electricians who register for the purpose of undertaking private work outside their normal employment (nixers). It is said that such individuals cannot be regarded as electrical contractors in any real sense. Whatever the position in that regard, neither side could give any reliable indication of the numbers on these lists who are employers, self-employed individuals undertaking contracting work on their own account, or individual employees who register for the purpose of doing nixers.
- 15.3 It would seem, however, that having regard to the unprecedented growth in the level of activity within the broad construction sector, it could reasonably be accepted that there was a corresponding growth in the number of electrical contractors, even if the numbers of new firms cannot be accurately ascertained. It is also reasonable to conclude that many new entrants into the sector were relatively small firms competing in a particular segment of the industry, which was largely outside the sphere of interest of larger firms. Notwithstanding the buoyancy within the sector as a whole, this development must have intensified competition between these relatively small-scale operators, particularly as the sector began to contract.

16. Employment in the Industry

- 16.1 There is also an absence of reliable evidence concerning the number of electricians employed in the industry. Mr Wills told the Court that TEEU represents upwards of 10,000 electricians within the sector. He

estimates that the total number of electricians in electrical contracting to be of the order of 12,000.

- 16.2 In the course of cross-examination Mr Keenan was referred to a report prepared by DKM consultants entitled Review of the Construction Industry 2006 and Outlook 2007-2009. This report was prepared for the Department of Environment, Heritage and Local Government and was published in September 2007. Paragraph 3.2.2 of this report deals with the growth in construction related employment for craft workers between 2002 and 2007. It records that in the first quarter of 2007 there were 185,000 craft workers in Ireland. The authors estimated that 90% of that number was employed in construction. The report went on to say that electricians and electrical maintenance fitters were the largest construction trade numbering 31,200.
- 16.3 Mr Keenan did not accept that this figure accurately reflects the number of electricians employed in electrical contracting. It is noted that the source of this figure is not given although it appears that much of the data contained in the report is based on CSO figures. The Court finds it difficult to reconcile this figure with the evidence given in the course of the hearing. The Court was told that the member firms of ECA undertake the majority of contracts measured by value and volume. The Court was also told that these firms undertake 80% of publicly funded projects. The uncontested evidence received by the Court was that ECA member firms normally employ 5,000 electricians. The members of AECI normally employ between 3,000 and 4,000 electricians. That accounts for between 8,000 and 9,000 workers. If the figure given in the report relates to electricians in the electrical contracting industry it would mean that between 22,000 and 23,000 electricians are employed by small firms that are not involved in large projects in the mainstream of the sector. That could not be correct.

- 16.4 Those who gave evidence before the Court on behalf of the NECI grouping and the unaligned group were either sole traders without employees or small employers. Of the 16 contractors who gave evidence two employed 10 electricians and the remainder employ 17 electricians between them. If these witnesses are typical of firms outside the main employer bodies in the industry it is impossible to accept that somewhere in excess of 20,000 electricians could be employed by such firms.
- 16.5 The figures produced in this report include electrical maintenance fitters. The Court was not guided as to the activities to which this occupation relates. It is clear, however, that those to whom this classification applies are not covered by the REA. It is also apparent that the figures contained in the report in relation to numbers employed relate to the entire construction sector and not to electrical contracting as defined by the REA. It is possible that this figure includes employees engaged in construction related activities that are outside the ambit of the REA.
- 16.6 While the matter is by no means certain the Court is inclined to accept that the figure of 12,000 electricians in the sector given by Mr Wills, while probably conservative, is nearer the reality. In that regard it is noted that all parties accept that TEEU is representative of electricians within the sector.
- 16.7 Further, while there was evidence of a significant growth in the number of entities carrying on business in the sector, there was no evidence to indicate any material shift in the distribution of employment amongst contracting firms. It appears from the evidence that employment has tended to be concentrated in a relative small number of firms, represented by ECA and AECl, which undertake the bulk of contracting activity and that this has been a constant feature of the industry.

17. Representativeness

- 17.1 It was submitted that the number of contractors now operating in the sector demonstrates that the employer parties to the REA are not substantially representative of the industry. The Court notes that separate proceedings are in being in which an Order quashing the original decision to register the REA is being sought in the High Court. That application is grounded, *inter alia*, on an assertion that at the time of its registration the parties to the REA were not substantially representative of the industry.
- 17.2 In addressing that ground it will be necessary to consider the point at which particular employer groupings can be regarded as representative of the industry. In particular it will fall to be decided if the number of employees engaged by a particular employer or group of employers is a relevant consideration in determining questions of representativeness. In these circumstances it would be inappropriate for the Court to express a concluded view on that question. It would appear, however, that in a sector, such as electrical contracting, where employment tends to be concentrated within a relatively small number of large firms the number of workers for whom the relevant employer groups are responsible is a relevant consideration. That, however, is a matter, which will fall to be determined in the judicial review proceedings.

18. Self-employment and sub-contracting

- 18.1 Evidence was also given to the effect that the sector has experienced a growth in self-employment and in the use of individual sub-contractors. It was said that small firms employing workers on the REA terms cannot compete with self-employed sole traders for whom the Agreement has no relevance. It was also asserted that employers were avoiding the costs associated with employment under the REA by engaging workers as sub-contractors on contracts for services.
- 18.2 The evidence concerning this practice was largely anecdotal and much of it based on hearsay, although there was some direct testimony on the

point. Mr Butler said that he now uses sub-contractors instead of direct employees because of the costs of employing electricians under the REA. He believes that if an individual supplies rudimentary materials such as a few screws or a few feet of cable they are properly classifiable as self-employed. Mr Butler is, of course, mistaken in his belief. The classification of a contract as one of service or for services cannot be reduced to that level of simplicity.

18.3 Mr Wills said that sub-contracting was always a problem and he did not accept that it is a new phenomenon. He said that the problem had been addressed by the social partners and the relevant authorities in the Code of Practice on Employment and Self-employment. It seems to the Court that on the application of the criteria in the Code of Practice many of the sub-contracting arrangements described to the Court could not properly be classified as amounting to self-employment. Mr Keenan told the Court that since the decision of the High Court in *BATU v The Labour Court* [2005] IEHC 109 his organisation has taken the view that sub-contractors who provided services personally are within the ambit of the REA.

18.4 The evidence before the Court does not go so far as to establish that the issues of sub-contracting and self-employment, whatever its current extent, is a substantial change in the circumstances of the sector since 1990.

19. Compliance and enforcement

19.1 The most important change affecting the industry since 1990 is that brought about by the registration of the REA itself. This introduced legally enforceable regulation in the fixing of wages and conditions of employment throughout the Industry. It also provided a mechanism, in s.32 of the 1946 Act, by which the terms of the REA could be enforced leading to the possibility of criminal sanctions against those who failed to comply. While this was undoubtedly a significant change in the circumstances of the industry it is the very object which registration was intended to achieve.

- 19.2 On the evidence the Court accepts that the decision to register the agreement in the first place was taken to prevent unfair competition by contractors who did not observe the then national agreement for the sector. However, the level of enforcement at the lower ends of the sector appears to have been modest for some time after the REA was registered. It would further appear that enforcement was largely a matter for the trade unions who did seek to apply its terms where complaints of non-compliance were received, either from union members or from disgruntled contractors who lost work to non-compliant firms. Mr Wills told the Court, and the Court accepts, that compliance levels are good but could be better. Public authorities also promoted compliance by contractually obliging contractors engaged in public contracts to observe the terms of the REA in respect to workers employed on those contracts.
- 19.3 It would appear, however, that for many years after the REA was registered its writ did not in practice run amongst small operators in certain segments of the sector and certain geographical areas. Many of those who gave evidence for the applicants testified that they either never knew of the REA or believed that it did not apply to them. The Court accepts that the experience of those witnesses is probably typical of many similar operators in the sector. It is also clear that the apparent competitive advantage enjoyed by those who operated outside the REA became a matter of concern to those compliant contractors whose business activities extended into what was described as the lower end of the market. This is apparent from the submissions made by the AECI delegation to the Oireachtas Joint Committee in 2005.
- 19.4 Witnesses told the Court that they could not obtain work at the rates necessary to comply with the REA. Mr Judge told the Court that his success rate in tendering fell from 75% to 10% after he became compliant with the REA. The majority of those who gave evidence on behalf of the applicants were not compliant with the REA but nonetheless suffered a contraction in their business. Moreover, Mr Judge, who said that his business suffered a serious contraction after he

- started to observe the agreement, could not say whether or not the firms against which he tendered unsuccessfully observed its terms.
- 19.5 There appears to be somewhat of a vicious circle around the question of compliance. Firms which comply with the REA say that their competitive position is being undermined by firms that are not compliant. This was the thrust of the arguments advanced by the AECI delegation that attended before the Oireachtas Committee. Those witnesses who gave evidence before the Court who are non-compliant believe that if they observed the terms of the REA they would be put out of business, presumably because work could be undertaken at lower cost by those who do not observe the prescribed rates.
- 19.6 Because of the difficulties caused by non-compliance the parties to the REA decided, in or about 2003, to introduce a form of internal industry monitoring and enforcement regime. To this end it established EPACE, and charged it with the responsibility of promoting adherence to the REA and monitoring compliance with its terms. It would appear that the vigour with which EPACE has since sought to discharge its role has contributed in no small part to many of the complaints that were ventilated in the course of this hearing.
- 19.7 The activities of EPACE since its inception have had the effect of bringing or seeking to bring a significant number of contractors into compliance with the REA, many of whom had previously been untroubled by it. The Court was told that on its inception EPACE caused a circular letter to be sent to all electrical contractors advising them of the existence and content of the REA. The recipients of this circular were also asked to complete a questionnaire indicating whether or not they complied with the REA. None of the witnesses who gave evidence for the applicants recalled receiving this circular. Except in the case of Mr Judge no evidence was adduced concerning the responses received to this circular. While Mr Judge's recollection in relation to this matter was deficient, it is clear that he did receive this circular and responded to it in September 2003, confirming his compliance with the REA.

- 19.8 As a result of the enforcement activities of EPACE many contractors received substantial demands for arrears of pay and pension contributions for periods when they were non-compliant with the REA. It seems likely that many of these contractors would not have made provision in their charge out rate to cover the rates and other benefits prescribed by the REA. Hence it could reasonably be accepted that the demands which they received constituted a real burden on their business since they could not hope to recover the additional costs involved. Others chose to ignore EPACE or to refuse to provide it with facilities to conduct inspections of their business records. Many of those who adopted this course were the subject of complaints under s32 of the Act alleging non-compliance with the REA.
- 19.9 There appears to be disquiet amongst some contractors that EPACE presents itself as if it had some legal or statutory mandate to inspect employers' business records. There is also concern that this body is acting in collaboration with TEEU and the larger employer bodies. This is a source of considerable disgruntlement amongst those who gave evidence.
- 19.10 Both the TEEU and ECA support EPACE and see it as an important instrument of self-regulation within the industry. Unfair competition by non-compliant contractors is seen as a serious threat to the competitiveness of compliant firms and they see EPACE as a necessary response to that threat. It is also apparent that the future role and structure of EPACE has been the subject of discussion not only amongst the TEEU and the employer parties to the REA, but it has also been discussed by the social partners at national level in the context of promoting improved compliance with labour standards.
- 19.11 The Government has now established the National Employment Rights Authority (NERA) for the purpose of promoting and enforcing the statutory social rights of workers, including those derived from registered agreements. The Court was told that EPACE is to be brought within the general supervision and control of NERA on the enactment of the Employment Law Compliance Bill 2008, which is currently before the Oireachtas.

- 19.12 Having regard to the competitive nature of the industry it is clear to the Court that firms that comply with the REA would be at a serious commercial disadvantage if they were required to compete against firms which do not comply. A central objective of the REA is to provide a so called “level playing field” in which common labour costs apply to all contractors and competition is based on efficiencies and other modes of cost saving. This objective would clearly be subverted if significant levels of non-compliance were to be experienced.
- 19.13 The advent of EPACE is seen by many of those who gave evidence for the applicants as having brought about a de facto extension of the REA’s ambit so as to encompass many firms to which it did not previously relate in practice. The Court accepts that for those firms this is a reasonable characterisation of what occurred. For them it clearly constitutes a substantial change in their circumstances. It could also be reasonably classified as a substantial change in the circumstances of the industry.

20. The Terms of the REA

- 20.1 The disgruntlement of those who have been required to comply with the REA must be considered in the context of other developments within the sector of which they complain. Many told the Court that the terms of the REA are unreasonable, oppressive or unfair. There was much criticism of what many witnesses believed were the requirements of the REA in relation to travel and subsistence payments to workers. For some witnesses the dominant reason for their opposition to the REA appeared to relate to what they believe is a liability to pay travel time even where the employer provides transport. They also appear to believe that where a worker is sent more than 11 miles to work the employer is automatically liable to pay subsistence in the amount of €168 per week.
- 20.2 Mr Wills of TEEU took issue with the construction placed on the REA in that regard. He said that there is no obligation to pay travel time where the employer provides transport. He also said that the obligation

to pay subsistence only arises where the worker cannot commute to and from the work location. From an ordinary reading of the relevant provisions it is hard to see how those who gave evidence on these points could be correct in their assessment of what the REA requires. The Court is, accordingly, satisfied that criticisms of the REA in relation to travel time and substance are based on a misunderstanding of what the REA actually requires.

- 20.3 Complaint was made by many witnesses concerning the requirement to provide workers with pension cover and the costs associated with its provision. There was no evidence that this is a new requirement and it appears to have been a feature of the REA at the time of its registration. On that basis alone it could not be regarded as a substantial change in the circumstances of the industry since the REA was registered. Nonetheless the Court believes that it should address these criticisms.
- 20.4 A number of witnesses took issue, in principle, with the obligation to provide employees with pension and mortality cover. Others believed that they are being forced to obtain pension cover from a particular provider, namely the CWPS. The evidence given by Mr Keenan was to the effect that pension cover can be sourced anywhere provided the benefits are not less favourable than those of the CWPS scheme.
- 20.5 This Court has neither the jurisdiction nor the expertise to form a fair view on whether or not the CWPS is good or bad value for money. Nor can the Court form a view on the administrative issues raised in relation to the scheme, including the serious allegations made by one witness concerning the use of the trust fund to support EPACE and other bodies. If there are issues around these matters they should be dealt with by the appropriate authorities.
- 20.6 The Court does believe, however, that it is incumbent on all parties to avoid any suggestion that a particular pension provider is to be preferred over another. It would be far preferable if the REA were to specify the level of benefits employers are required to provide and make it clear that it matters not where those benefits are sourced provided they conform to the required standard. But it is abundantly

clear that even if all the criticisms of the CWPS could be regarded as totally correct this in itself could not amount to substantial change in the circumstances of the sector.

21. Rates of pay

- 21.1 The Court was told that the rate of pay prescribed by the REA has increased significantly since its registration. There was also criticism of the salary structure under the REA whereby pay is determined by reference to service within the electrical contracting industry rather than in the broader electrical sector overall. Again this is not a new development. It appears that pay in the sector has been determined in this way at least since the REA was registered.
- 21.2 Evidence was given concerning the extent of increases in pay rates agreed over the past number of years. The evidence revealed that pay under the REA has increased at a significantly greater rate than pay in manufacturing industry. The Court was told that pay is determined in the industry by reference to the pay of similar craft workers in a range of analogous employments. Thus the rate of pay increases in the sector is intended to reflect the rate of increase in the analogous employments. All of the wage adjustments implemented in the REA since 1990 were the subject of a variation order made by the Court. A public hearing before the Court at which all interested parties had an opportunity to object to what was proposed preceded the making of these variation orders.
- 21.3 There was no evidence that any of the applicant parties objected to previous variations. It is also noted that most of those who gave evidence before the Court did not identify the rate of pay as a source of major difficulty. The Court does not believe that the increases in pay since the registration of the REA have been shown to constitute a substantial change in the circumstances of the industry.

22. Technological change

22.1 Evidence was given in relation to the extent of technological change in the industry. Mr Judge and Mr Butler, in particular, referred to technical changes in the nature of the industry, which has rendered many of the tools which electricians are required to provide under the REA obsolete. What was described to the Court seems to be typical of what has occurred in many trades and industries over the past 20 years. It is normal ongoing change in the sense that it involves doing the same job using different materials, tools or equipment. When considered in the context of the level and pace of change experienced by industry generally, what was described to the Court could not be regarded as substantial change.

23. Apprentices

23.1 Evidence was also given concerning what was described as an abuse of apprentices in the industry. It was said that a practice has developed amongst some employers of employing an excessive number of apprentices, as an alternative to employing craft workers, because of the lower wage costs involved. It was said that as apprentices reach 20 years of age, and an obligation arises to enrol them in the pension scheme, they are let go and replaced with younger apprentices. Mr Wills denied that such abuse is taking place. He said that FAS control the intake of apprentices and that employers who let apprentices go without justification would not be permitted to register a replacement. The Court was told that a ratio of one apprentice to two electricians is operated within the industry.

23.2 The evidence on this point was again anecdotal and largely based on hearsay. Based on this evidence the Court could not properly conclude that there is a concerted practice within the industry of exploiting apprentices in the manner alleged.

24. Competition from outside the jurisdiction

- 24.1 It would appear that all parties see competition from contractors based outside the jurisdiction as having a significant impact on the industry. Those who gave evidence in support of the application to cancel the registration of the REA see the main problem as coming from contractors based in Northern Ireland. While no tangible data was provided on the number of such contractors carrying out work in the State, anecdotal evidence suggests that it has increased in recent years and that it is now a major issue particularly in the border regions. The Court was told that rates of pay are lower in Northern Ireland and with the current weakness in Sterling relative to the Euro, it is now economically viable for firms to send workers across the border to undertake work at considerably lower rates than those which contractors within the jurisdiction would have to charge.
- 24.2 Mr Keenan and Mr Redmond told the Court that contractors from other European Member States are presenting a competitive challenge to domestically based firms. However they see the REA as an essential safeguard in ensuring that these firms do not undercut Irish contractors by engaging labour for contracts in the State on rates applicable to their country of origin.
- 24.3 Both Mr Wills and Mr Redmond told the Court that the problems associated with Northern Ireland contractors working in the State are not new. They recalled that competition from this source, which was then regarded as unfair, was a factor, which influenced the decision to register the REA in the first place.
- 24.4 While it is clear that the difficulties highlighted in evidence are not in themselves new, it is reasonable to assume that the incidents and degree of competition from outside the State had increased in recent years. This is due to a number of factors. Firstly, the completion of the internal market and the right of Community based enterprises to move within that market must be a factor which influences competition. In the case of Northern Ireland, the absence of hostilities and the advent of the peace process undoubtedly made cross border trade easier to

undertake. The difference in the exchange rate between Sterling and the Euro is also a major factor. The Court was told that the industry hourly rate for an electrician in Northern Ireland is £14.65 per hour compared to between €20.74 and €21.49 under the REA. There is no doubt that the current weakness in sterling relative to the Euro is a factor which has exacerbated the competitive difficulties for southern contractors in border regions. However a cost advantage would only accrue to contractors from the sterling area if the exchange rate were at 70p or above. It is only in relatively recent times that the exchange rate has gone above that level. It also appears to be the case that electricians in Northern Ireland do not have an entitlement to travel time or country money similar to those prescribed in the REA. It could, however, be reasonably assumed that contractors sending workers to work within the State would have to bear some of the costs associated with either commuting or staying away from home.

24.5 In any event, the proponents of the REA have argued trenchantly that its terms are equally applicable to contractors from inside or outside the State. The correctness of this line of argument will be addressed in considering the desirability of maintaining the registration of the REA. Suffice it to say that the opening of the domestic market to external competition is a substantial change affecting the industry.

25 Changes in tendering arrangements

25.1 It was submitted that changes made in tendering arrangements constitute a significant change in the circumstances of the sector. The changes highlighted were in relation to fixed-price contracts and the threshold for public works which confines competition to contractors having a minimum annual turnover in an amount above the turnover of most small firms. With regard to the former practice it was submitted that this makes annual pay increases under the REA unfair since the increased cost cannot be recovered from the client. With regard to the latter point, it is suggested that this arrangement precludes small firms from access to the more lucrative segments of the industry.

25.2 It seems to the Court that there is little substance in the complaint regarding the effects of fixed-price contracts on smaller firms. The evidence of Mr Judge was that contracts of the type normally undertaken by the firms associated with the application are of relatively short duration. It would seem that in these circumstances the system of fixed price contracts would have relative little impact on this segment of the sector and that any impact, which it does have, would be felt more by large contractors. With regard to the impact of the threshold for public contracts, the evidence before the Court was that the larger contractors, who are members of ECA, undertake 80% of these contracts. While the Court can readily understand that the threshold could operate as a barrier to small contractors entering this end of the market, there was no evidence to indicate that the proportion of public works contracts undertaken by firms associated with the application has changed since the registration of the REA in 1990. Consequently the Court does not accept that these arrangements constitute substantial change in the circumstances of the sector.

26. Current Economic Circumstances

26.1 The fact that Ireland is experiencing a deep economic recession is clear beyond argument. Its effects are particularly pronounced in construction, including electrical contracting. According to the evidence tendered to the Court there were 76,000 workers employed in construction (which includes electrical contracting) in 1990 when the REA was registered. This figure rose exponentially to 255,000 by 2008. More up to date figures were not provided but it is to be expected that the numbers employed will have fallen dramatically since and will continue to fall over the next two years at least.

26.2 The Court accepts that current economic circumstances will put further downward pressure on the prices available for electrical work. This will arise from customers and clients seeking better value for money and expecting savings in the rates previously charged. It will also cause a far greater intensity in competition amongst contractors for available work. Given that labour costs are the dominant component of overall

costs, contractors will have to strive to reduce their labour costs so as to improve their competitive position. Individual firms can reduce their labour costs either by a more efficient use of labour and improved productivity, or by reducing the amount paid to their workers relative to that paid by their competitors. The REA is no impediment to the former approach but it is designed to prevent the latter.

- 26.3 It became apparent in the course of the hearing that the ECA have come to the view that the core pay rates in the industry should be reduced in response to the current economic circumstances. This is in line with the publicly stated position of its parent organisation, the CIF. However the ECA believe that their aspiration should be negotiated with the trade unions through established industrial relations processes.
- 26.4 Dr McDowell and Dr Ahearne believe that real wages must be reduced as part of a series of measures designed to restore national competitiveness. They see wage regulation as an impediment to achieving this necessary adjustment. While their opinion was expressed in the context of the electrical contracting industry their analysis clearly has broader relevance. While Mr Sweeney did not disagree with either Dr McDowell or Dr Ahearne on their analysis of the extent of the recession and its likely duration, he fundamentally disagreed with the proposition that reducing wages was either a necessary or desirable response.
- 26.5 It is, however, abundantly clear that, whatever the reason, the decline in the level of activity and the corresponding rise in unemployment is a substantial change in the circumstances of the sector.
- 26.6 The Court is now charged with deciding whether, in light of the provisions of s.29 (2) of the Act, the changes identified are such as to render the continuance of the REA undesirable.

Desirability of Maintaining the REA

27. General Considerations

- 27.1 The concept of registered agreements was enshrined in the Industrial Relations Act 1946 as part of a coordinated approach to the promotion

of pay determination by collective bargaining and ensuring industrial relations stability within a voluntary framework. It allowed representative trade unions and the employers of their members to negotiate collectively for an entire trade or industry and provided that the rates and conditions thus agreed would have normative effect. For trade unions this system allowed for the establishment of legally enforceable common rates of pay and conditions of employment across the trade or sector to which the agreement relates.

27.2 The rates and conditions so established are not dependant on the size or capacity of individual firms. It thus gave legal effect to a previous system of fixing wages for particular trades or occupations, whether formally or informally, at what was referred to as the “union rate”. The quid-pro-quo for employers was that it brought stability in industrial relations by precluding trade unions from seeking to enforce more favourable terms than those prescribed by the agreement. Moreover, industrial relation disputes had to be referred to third party adjudication, usually through the Labour Court, before a trade union could support a strike. A further advantage for employers was that it prevented firms, which would otherwise have paid lower rates than those agreed with the trade unions from gaining a competitive advantage over firms who observed the agreed rates and conditions of employment. This is the so-called “*level playing field*” argument, which was extensively advanced by the proponents of the REA in the course of the hearing.

27.3 The system of registered employment agreements has been sparsely used in industry overall. They are now most common in sectors, which are characterised by internal competition amongst a large number of employers. They are regarded as particularly apt in labour intensive sectors where labour costs are a high proportion of overall costs, and where firms compete against each other for available work through competitive tender. These characteristics are most prevalent in construction and electrical contracting, both of which are covered by registered employment agreements. In other labour intensive services sectors which have similar characteristics, such as contract cleaning

and security services, the parallel system of Employment Regulation Orders applies.

- 27.4 Both registered employment agreements and employment regulation orders are part of the labour market regulatory system of the State. As such their continued operation is a matter of national labour market policy. The determination of labour market policy is a function of Government and the legislature. While this Court has been given responsibility under statute for aspects of its application, it has no role in the determination of the broad policy framework within which it exists.
- 27.5 It is apparent from pronouncements by Government contained in the Social Partnership Agreement, Towards 2016, that the maintenance and strengthening of the registered employment agreement system is an important part of public policy. This was elaborated upon by Mr Begg in his evidence to the Court.
- 27.6 The Court has been given the arbitral role, under s.29 of the Act of 1946, in determining if a particular agreement should be removed from the register. The Court must exercise that function in accordance with the statutory criteria prescribed by the section unfettered by considerations of public policy. But the Court cannot arrogate to itself the role of determining whether the continuance of this mode of labour market regulation is desirable or undesirable in the current economic circumstances.
- 27.7 These observations are made in the context of the arguments advanced by way of expert evidence to the effect that regulation of wages *per se* contributes to a loss of competitiveness and higher unemployment. If that is so (and the Court expresses no view on that proposition) it is a matter within the province of Government and is outside the purview of this Court.
- 27.8 Thus, as the Court understands its role under s.29 (2) of the Act of 1946, it is confined to a consideration of whether, in the light of substantially changed circumstances in the electrical contracting industry, the maintenance of this particular REA is undesirable.

28. Substantial Change

28.1 The Court has concluded that the sector has experienced substantial change since the REA was registered. The principle manifestations of that change are in respect of the number of entities carrying on business to some degree in electrical contracting, the extent to which the REA is now enforced, the extent of external competition and the decline in activity in consequence of the current recession.

29. The question in issue

29.1 The question in issue before the Court is whether, in light of this substantial change, it is undesirable to maintain the registration of the REA. No legal test has been suggested by which the Court should determine if the continued registration of an agreement has become undesirable. It is, however, noteworthy that the relevant subsection is expressed in negative terms (the Court must be satisfied that the continued registration is *undesirable*). This suggests that there must be evidence of some weight to indicate that, because of changed circumstances, the overall or dominant effect of the agreement has become deleterious to the interests of all parties in the sector or that some other compelling reason exists as to why the registration of the agreement should be cancelled. It further appears to the Court that it is for those who assert that it is undesirable to maintain registration to make out a positive case that the greater good of the sector would be advanced by cancelling the registration of the agreement.

29.2 In approaching these questions the Court must first consider the likely consequences of cancelling the registration of the REA. It must then decide, in light of that consideration, whether the balance of advantage lies in cancelling or maintaining registration.

30. Consequence of cancellation – pay determination

30.1 In the course of the hearing a number of those who gave evidence on behalf of the applicants were asked if they would negotiate with

individuals on pay and conditions of employment in the event of the REA being cancelled. They replied in the affirmative. Many witnesses proffered the view that electricians would not work for low rates of pay and that this would prevent any diminution in pay levels within the sector. Nonetheless the Court is satisfied, as a matter of strong probability, that in the absence of regulation there would be significant retrenchment in pay and conditions of employment within the sector.

30.2 The regulatory effect of the REA on pay and conditions of employment is greater in times of recession than in times of economic buoyancy. During good times labour shortages will serve to keep wages high. During bad times workers have little bargaining power and will often accept work at rates substantially lower than those to which they would otherwise aspire. This is likely to be particularly so in smaller employments or amongst workers who are not in a trade union. Moreover, in his evidence to the Court Mr Michael Marshall made the point that there are now significant numbers of electricians from other EU Member States who are willing to work for less than the REA rates. An averment to similar effect is contained at par.22 (vii) of the Affidavit sworn by Mr Marshall on 8th July 2008 in the Judicial Review proceedings previously referred to. In his evidence to the Court Mr Judge said that electricians had offered to work for him at 10% less than the REA rate. An averment to similar effect is contained at par 7 of the Affidavit sworn by Mr Judge in the Judicial Review proceedings dated 24th July 2008.

30.3 The general tenor of the evidence given by the expert witnesses called on behalf of the applicants, and that of many other witnesses, was that in the absence of the REA market forces would be the ultimate determinant of wage rates. The Applicants stated that in the construction industry the operation of the REA had effectively been put into a state of suspension for some years because of judicial review proceedings instituted by a Trade Union and that this had not affected wage rates. The situation in the construction industry was somewhat different than what is contended for here. In the construction industry the REA remained extant and both the employers bodies and the trade

unions continued to negotiate and apply wage increases. Furthermore, the stay on varying the construction REA was in place during a time of unprecedented buoyancy in the industry when market forces would have driven wages up rather than down.

30.4 The Court has no doubt that, in the absence of an REA, the trade unions will continue to negotiate with employers either individually or collectively. However, obvious difficulties would arise for employers who could not realistically be expected to agree rates of pay in circumstances where they could have no idea of whether or not their competitors would agree similar rates. This, in all likelihood, would lead to significantly greater incidence of industrial disputes.

30.5 On balance, the Court is satisfied as a matter of probability that rates of pay would decline in the sector in the absence of the REA. It is further probable that orderly systems of pay determination and dispute resolution, which currently exist within the industry, would be greatly impaired.

31. Conditions of Employment- Pension Cover

31.1 Many of those who gave evidence on behalf of the applicants were highly critical of the requirement to provide employees with pension and mortality cover. While much of the criticism was directed at the CWPS scheme it was also clear from the evidence that many of those associated with the application to cancel the agreement believed that the provision of PRSA cover was a sufficient discharge of an employer's responsibility. There is little doubt that in the absence of the REA the incidences of pension and mortality cover would decline, or at best, the level and quality of cover would deteriorate significantly.

32. Competition

32.1 The cancellation of the REA would likely impact on competition in two ways. In terms of internal competition employers would be free, in theory at least, to determine their own wage costs. In practice they

would negotiate with trade unions or with individuals in most but not all cases. It is accepted that wage costs in the sector are a major component of overall costs. Hence employers who secure lower wage and related costs would have a significant competitive advantage over those whose labour costs are higher. It is self-evident that employers who continued to observe current rates and conditions of employment would find it increasingly difficult to obtain work. In times of recession, in particular, it is probable that deregulation will intensify competition between contractors for available work, with an untrammelled concentration on reducing wage and related costs as a means of enhancing competitiveness.

- 32.2 On this point the evidence of Mr Redmond concerning the effect of the move away from the nominated contractor system is noteworthy. This indicates the emergence of a practice in which principal contractors go back to electrical contractors, after the tendering process, and ask them to reduce their previous estimate for work. It seems likely that, in the absence of regulation, contractors and their employees would be pressurised into reducing the labour cost component in the tender price in order to obtain work. This would put further downward pressure on wages within the sector.
- 32.3 With regard to external competition, there are currently a number of measures in place to ensure that contractors from outside the jurisdiction do not obtain an advantage over local contractors in terms of wage costs. Firstly, the fair wages clause in public contracts applies equally to all contractors regardless of their place of origin. This clause stipulates that the contractor must observe rates of pay and conditions of employment no less favourable than those prescribed in the REA. The rationale for this provision is that those who undertake work out of public funds should be required to comply with their legal obligations in respect of that work. In the absence of an REA it is difficult to conceive of any basis upon which the practice of applying a fair wages clause could continue.
- 32.4 A second and more troubling consequence of cancellation, which was canvassed by both ECA and TEEU, concerns the difficulty that would

arise in seeking to enforce locally agreed rates against contractors from other EU Member States. This was a matter on which the Court received extensive and helpful submissions from the parties.

32.5 In a recent decision of the European Court of Justice in Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2008] IRLR 160, it was held that Articles 12 and 49 of the Treaty EC and Directive 96/71/EC prevented a trade union from attempting to apply, by means of collective action, the terms of a collective agreement which had not been declared universally applicable, against a foreign undertaking which had posted workers to Sweden. This case was concerned principally with the application of Directive 96/71/EC on the Posting of Workers in the Framework for the Provision of Services. Article 3 of this Directive provides, in effect, that Member States must ensure that posted workers are afforded the same conditions of employment as workers in the host State, where those conditions are laid down, *inter alia*, in collective agreements or arbitration awards which have been declared universally applicable. Article 3 (8) of the Directive provides that a collective agreement is to be regarded as universally applicable if it must be observed by all undertakings in the geographical area and in the profession or industry concerned. In the case of Laval the agreement, which the Swedish trade unions sought to enforce, was not universally applicable within that meaning.

32.6 The Directive was transposed in Irish Law by s.20 of the Protection of Employees (Part-Time Work) Act 2001, which provides as follows: -

20. —(1) In this section, the “Directive” means Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(2) For the avoidance of doubt, every enactment referred to in subsection (3) that confers rights or entitlements on an employee applies and shall be deemed always to have applied to—

(a) a posted worker (within the meaning of the Directive), and

(b) a person, irrespective of his or her nationality or place of residence, who—

(i) has entered into a contract of employment that provides for his or her being employed in the State,

(ii) works in the State under a contract of employment, or

(iii) where the employment has ceased, entered into a contract of employment referred to in subparagraph (i) or worked in the State under a contract of employment,

in the same manner, and subject to the like exceptions not inconsistent with this subsection, as it applies and applied to any other type of employee.

(3) The enactment mentioned in subsection (2) is one the principal functions under which are vested (disregarding functions vested in the Labour Court, the Employment Appeals Tribunal or any other person who is not a Minister of the Government or a Minister of State) in—

(a) the Minister or a Minister of State at the Department of Enterprise, Trade and Employment, or

(b) the Minister for Justice, Equality and Law Reform or a Minister of State at the Department of Justice, Equality and Law Reform.

32.7 At the request of the Court the parties made very helpful submissions on the construction of this provision and the ambit of its applicability. It was submitted on behalf of the applicants that s.20 (3) of the Act of 2001 specifically excludes enactments which have their genesis in a power vested in the Labour Court. On that account, it was submitted, the REA is not enforceable against an employer of a posted worker.

32.8 The Court does not accept that this construction of the Section is correct. It appears that the combined effect of subsections (2) and (3)

of the Section is intended to refer to an enactment which (a) confers rights on employees and (b) the principal functions under the enactment, when the functions of the Labour Court, the EAT etc, are disregarded, are vested in the Minister for Enterprise, Trade and Employment or the Minister for Justice, Equality and Law Reform.

- 32.9 In the case of the Industrial Relations Acts 1946 to 2004 when one disregards the functions of this Court and those of Rights Commissioners, Joint Labour Committees and the Labour Relations Commission, the remaining principal functions are exercisable by the Minister for Enterprise, Trade and Employment. Section 30(2) and 30(3) of the Act of 1946 confers a right on workers to whom a registered employment agreement applies to the rates of pay and conditions of employment prescribed by the agreement. It would appear to follow that the Industrial Relations Acts 1946 to 2004 are enactments, which are within the ambit of the Section.
- 32.10 Section 30 of the Industrial Relations Act 1946 confers a right on workers of a type or class to which a registered employment agreement is expressed to apply to the rate of pay and conditions of employment specified in the agreement. It would appear to follow that by virtue of s.20 of the Act of 2001, the terms of the REA are applicable to, and can be enforced against, contractors based outside the State. It also seems clear to the Court that nothing in the decision of the Court of Justice in *Laval* would call into question the compatibility of this provision, which renders the terms of the REA universally applicable in domestic law, with any provision of Community law.
- 32.11 Conversely, it seems reasonably if not absolutely clear to the Court that in the absence of an REA contractors from other Member States could exercise their freedom to provide services in this jurisdiction under the EC Treaty at the same rates and conditions of employment as apply in their country of origin. Depending on the country of origin this could seriously undermine the competitive position of Irish contractors.

32.12 The point was made in the course of the hearing that it is difficult to enforce the REA against firms from Northern Ireland, which undertake short-term assignments in this jurisdiction. There is considerable validity in that contention. However, the extent to which cancellation of the REA could detrimentally expose the industry as a whole to external competition from contractors established in low wage Member States would, in the Court's view, far outweigh any benefit that might accrue to contractors who could more easily compete in the cross border segment of the market.

33. Employment Levels

33.1 The applicants for the cancellation of the REA contend that in a free market the cost of electrical work will decrease and that this will lead to an increase in employment and a fall in unemployment. It is further propounded that a decrease in the cost of direct employment will impact positively on the trend towards the use of sub-contractors as an alternative to employment.

33.2 With regard to the first point, this is based on the general economic proposition that when prices fall demand will increase. That is, however, an argument of more general application across the economy than it is to the specific circumstances of the electrical contracting sector. It seems to the Court that to a significant degree the level of activity within electrical contracting is closely aligned to the level of demand within the broader construction sector. No evidence of any weight was adduced to indicate any tangible correlation between reduced labour costs and increased demand for the services of electrical contractors. While the Court accepts that there may well be some connection between prices and demand in the sector, it would be a somewhat tenuous and uncertain basis upon which to conclude that the continued registration of the REA is undesirable.

33.3 With regard to the second point, the Court is not convinced on the evidence that the practice of engaging sub-contractors in substitution for direct employees is a problem of such magnitude as to warrant cancellation of the REA. Nor is the Court convinced that even if the

REA were to be cancelled it would necessarily ameliorate that problem where it exists. It is clear from the evidence that the commercial advantages derived from the use of sub-contract labour go beyond the difference in wage costs. There are additional savings in PRSI contributions and, more importantly, the commercial risk in tendering is often transferred from the contractor to the sub-contractor. These attractions would not be affected to any significant extent by the cancellation of the REA.

33.4 The Court is also conscious of the decision of the High Court in *Building and Allied Trades Union v the Labour Court and Ors* [2005] IEHC 109 in which Mr Justice Murphy explained that an REA is applicable to workers as defined by s. 23 of the Industrial Relations Act 1990 and that the statutory definition is wide enough to include a person who provides services personally under a contract for services.

33.5 The Court was told that the decision in *Building and Allied Trades Union v the Labour Court and Ors* is under appeal to the Supreme Court. However, this is a decision of the High Court and this Court is bound to apply the *ratio* of that case to any case coming before it in which that decision is relevant, unless and until it is set aside by the Supreme Court. It was also pointed out that the decision was given in the context of the Construction Industry REA, which, unlike the REA at issue in this case, expressly deals with the engagement of sub-contractors.

33.6 The relevant *dicta* of Murphy J relates to the ambit to be ascribed to the expression worker for the purposes of the Industrial Relations Act 1946. Section 30(1) of the Act provides: -

30. —(1) *A registered employment agreement shall, so long as it continues to be registered, apply, for the purposes of this section, to every worker of the class, type or group to which it is expressed to apply, and his employer, notwithstanding that such worker or employer is not a party to the agreement or would not, apart from this subsection, be bound thereby.*

The class, type or group of workers to which the REA relates is electricians and apprentices engaged in general electrical contracting. It makes no distinction between an electrician employed on a contract of service and one employed on a contract for services. It would appear to follow that, on the authority of *Building and Allied Trades Union v the Labour Court and Ors* that a sub-contractor, provided he or she comes within the statutory definition of a “worker”, and is engaged in general electrical contracting, is covered by the REA.

33.7 The Court is further satisfied that measures are in place to deal with any inappropriate designation of workers as sub-contractors where their real classification is that of employee.

34. Capacity of small firms to comply

34.1 It was argued with considerable force on behalf of the applicants that the REA places an intolerable burden on small firms, particularly those operating in what was described as the lower end of the sector. Many of those who gave evidence told the Court that their main contracting activity is concentrated in domestic wiring and rewiring. Those involved in this type of activity typically depend on private householders for work or sub-contract to small builders engaged in renovation or home extensions. They often compete against self-employed individuals who are not encumbered by the REA.

34.2 The Court was told that those operating in this segment of the market cannot obtain the type of charge out rates necessary to meet the terms of the REA. It was contended that whatever advantage the REA may have for larger contractors its net effect is to drive smaller contractors out of business. It was suggested that in the event of the REA being cancelled a new arrangement could be put in place, which could suit the circumstances of such firms.

- 34.3 The Court accepts that there is validity in the arguments advanced on this point. However, in deciding the question before it the Court must seek to balance the interest of all parties involved in the sector. The Court is satisfied, on the balance of probabilities, that the cancellation of the agreement would bring considerable disadvantage to workers in the sector, of which there are at least 12,000 and to the employers who employ a significant body of these workers. There is no mechanism by which the Court could exempt certain categories of employer from the scope of the agreement, even if it were to conclude that such a course was either desirable or necessary. The Court must either conclude that the continued registration of the agreement is desirable or undesirable. In so doing it must be guided by where the balance of advantage lies between conflicting interests, not just between workers and employers but also between different classes of employer.
- 34.4 It has been suggested that if the REA is cancelled in its present form a new agreement could be concluded which takes account of the particular needs of small business. Nothing tangible has been put forward to suggest how a new agreement might be negotiated between disparate and in some cases unassociated employers and the Trade Union. Nor were any firm proposals put forward as to how a new agreement might be structured so as to accommodate the different interests within the sector. It is theoretically possible that arrangements could be put in place whereby small firms, measured on employment levels, would not have the same obligations to their employees as larger firms or that small firms could be exempted from the scope of any agreement.

34.5 Such an approach would present clear difficulties in practice and in principle. There would be obvious difficulties in defining a small firm and even if those difficulties could be overcome there would be practical problems arising from the fluctuation in employment levels within firms depending on the type of work and the volume of work in hand at a particular time. There would be problems in principle in that it is difficult to conceive of a situation in which workers would accept that their pay and conditions of employment should be determined, not by the work that they do, but by the number of others employed by the employer for whom they perform that work. The TEEU also made the valid point that if firms were to be exempt from the scope of the REA based on size or employment levels, this would encourage a practice of sub-dividing significant projects into small contract units to be undertaken by a multiplicity of small firms legitimately operating outside the scope of the REA. This would result in the REA having minimal effect in the industry. Finally, it seems clear to the Court from the evidence adduced on the point that this approach is unlikely to find favour with either the TEEU or the employers of the majority of its members in the sector.

34.6 While the Court accepts that small firms operating in the domestic and related segments of the sector have particular difficulties in meeting the terms of the REA, the cancellation of the registration of the agreement on that account alone would be a disproportionate response.

35. Conclusion

35.1 Having regard to all the circumstances of this case the Court has come to the view that the changes in the electrical contracting industry since the registration of the REA have not made it undesirable to maintain its registration. Accordingly the Court does not propose to cancel the registration of the Agreement.

Part III

Recommendations

While the case was at hearing the Court indicated that it might consider it desirable to make recommendation on how certain matters of an industrial relations nature, which were raised in the course of the hearings, could usefully be addressed. None of the parties objected this approach.

What follows are recommendations intended to be for the guidance and assistance of the parties. They do not form part of the Court's decisions on either of the applications before it.

Rates of Pay

The Court recommends that the parties to the Agreement resume negotiation at the NJIC on rates of pay, having regard to all relevant considerations, including the terms of the pay agreement associated with Towards 2016 Transitional Agreement 2008-2009, the provisions of the REA itself and the current economic circumstances of the Industry.

Review of the REA

It is noted that in the course of the hearing all parties to the REA expressed a willingness to review its terms in light of changed circumstances. The Court recommends that such a review should be undertaken as a matter of urgency. Should any issues arise in the course of the review upon which agreement cannot be reached they should be referred to the Court for investigation and recommendation.

Clarification of the terms of the Agreement

As part of the review of the REA referred to above, the parties should specify with greater clarity than at present the precise circumstances in which travel and subsistence payments fall due. Any difference on this point should be referred to the Court for interpretation under s. 33 of the Industrial Relations Act 1946.

Representation

Arising from the hearings it is clear that the question of representation of employers in negotiation on the REA is a matter of some controversy. It is noted that negotiations are currently conducted through the NJIC for the Industry. This is not a registered NJIC within the meaning of Part V of the Act of 1946. Its composition appears to have been established prior to the registration of the REA.

The Court recommends that the parties consider applying to the Court, pursuant to s.61 of the Act, to register the Council. Since s.65 of the Act provides that a Registered Joint Industrial Council is an excepted body for the purposes of the Trade Union Act 1941, as amended, registration of the Council would overcome any difficulties which might otherwise arise by the participation in negotiations of bodies which are not the holder of an negotiation licence.

The current parties to the Council should also consider affording representational rights to any permanent body, which is representative of employer interest in the

sector. Should any issue arise as to the extent to which any body is representative, that issue should be referred to the Court for final adjudication.

Pensions

The parties to the agreement should make it clear that the obligation imposed on an employer under the Agreement is to provide pension, assurance and sick pay cover up to the specified minimum level of benefits and to ensure that the entitlements under the scheme are transferable within the sector. It should also be made clear that employers are free to obtain cover for these benefits from any source of their choosing provided that benefits and other conditions meet the requirements of the Agreement.

Enforcement

The Court notes the proposals in the Employment Law Compliance Bill 2008 to place EPACE on a statutory footing under the general aegis of NERA. The Court recommends that all parties cooperate fully with the implementation of this provision.

Signed on behalf of the Labour Court

Kevin Duffy

Chairman

26th February, 2009

MOD

NOTE

Enquiries concerning this Determination should be addressed to Maura O'Donoghue, Court Secretary.