

# Standing in Public Interest Litigation

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## Key Principles

- standing/*locus standi*: set of rules that determine whether a person who starts legal proceedings is proper person
- may pose a significant obstacle for litigants in public interest matters: NGOs and other “entities”
- cost and convenience may favour determination as preliminary issue
- balancing act: principles of access to justice versus judicial efficiency
- 3 major concerns:
  - (i) proper allocation of judicial resources:
  - (ii) prevention of vexatious suits brought by “busybodies”
  - (iii) particular requirements of the adversary system e.g. “justiciability”
- questions of policy, but also rights: access to court-Constitution and Articles 6 and 13 ECHR
- wider constitutional dimension: differing approach depending on whether litigant’s challenge raises constitutional issues
- interplay with concept of “sufficient interest” for leave for JR proceedings (Order 84, r. 20(4) RSC)
- standing distinct from question of whether a right in question can be invoked by a plaintiff, but wider factual context may be important

## 1. Traditional *Locus Standi* Principles

### ➤ ***Cahill v Sutton* [1980] 1 IR 269**

- Henchy J’s primary rule as to standing in constitutional matters: person challenging the constitutionality of the statute must be able to assert that his interests have been adversely affected
- rule subject to qualification when the justice of the case requires
- paramount consideration for courts to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it
- want of the normal *locus standi* may be overlooked if transcendent need to assert against the statute the constitutional provision that has been invoked
- relaxation: where those prejudicially affected may not be in a position to assert their rights adequately, or in time, or if the impugned provision is directed at or operable against a group, which includes the challenger, or with

whom the challenger may be said to have a common interest.

➤ **Crotty v An Taoiseach [1987] 1 IR 713**

- challenge brought in relation to the constitutionality of enacting the provisions of the Single European Act without a referendum.
- plaintiff unable to show that he would be more affected by the statute than any other citizen who could bring the action.
- Supreme Court: where the impugned legislation ... will if made operative affect every citizen, the plaintiff has *locus standi* to challenge the Act notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other citizen.
- liberal approach

**2. Standing of Corporate Entities**

➤ **S.P.U.C v Coogan [1989] 1 IR 734**

- plaintiff was limited company-sole object of protecting human life
- sought injunction restraining publication of abortion information
- Supreme Court: standing afforded to SPUC
- plaintiff could not acquire a *locus standi* merely by reason of the terms of its articles and memorandum of association
- general test:

*"[T]hat of a bona fide concern and interest, interest being used in the sense of proximity or objective interest. To ascertain whether such bona fide concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected."* (Finlay CJ)

➤ **Lancefort Ltd. v An Bord Pleanála (No. 2) [1999] 2 IR 270**

- applicant incorporated after the grant of planning permission
- sought leave to issue JR proceedings-contended that *An BP* was required to consider environmental impact of certain developments
- Supreme Court majority: a company which came into being after the decision which it was sought to challenge might be in a position to assert that it had *locus standi*
- company could have *locus standi* to bring proceedings even if it was unable to point to any proprietary or economic interest in the impugned decision
- *bona fides* of the company relevant: lift corporate veil
- If *bona fides* established, consider company in light of the public interest.

*"Here we find a tension between the public interest as represented by public bodies established for that benefit by the State....balanced against the right of persons (incorporated or not) to have access to court to litigate the issue as to whether the public interest, indeed the common good, is being protected. It is a fundamental right in a democracy that there be access to the courts."* (Denham J)

- majority: the company lacked a “sufficient interest”

### **3. European Dimension to Standing**

- former “common market” → “ever closer union”

*“Membership of the Union involves radical transfer of regulatory competence to the organs of the Community from the Member States .... the far-reaching effects of this hand-over of power to the institutions is balanced by the guarantee that the legal order of the Treaty will protect the individual against the excessive and oppressive exercise of that power in a manner which is incompatible with the explicit provisions of the Treaty or, moreover, incompatible with superior rules of law and of fundamental human rights which the European Court will imply into the legal Order of the Community for the purpose.”( Cooke J, 2005)*

- **Marguerite Johnston v Chief Constable of the RUC [1986] ECR 1651**
  - **Factortame I [1990] ECR I-2433**
  - **Verholen & Ors. v Sociale Verzekeringsbank [1991] ECR I- 3757**
- development of principle of effective judicial protection of rights derived from Community law-certain duties placed on national courts
  - **Unibet (London) Ltd & Unibet (Int’l) v Justitiekanslern [2007] ECR I-2271**
  - principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR
  - principle of cooperation laid down in Article 10 EC- it is for the Member States to ensure judicial protection of an individual’s rights under Community law
  - in the absence of Community rules...it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law
- “Thus, while it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection.”*
- the detailed procedural rules governing actions for safeguarding an individual’s rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)
  - it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable

those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law.

#### **4. Recent Caselaw**

- ***Construction Industry Federation v Dublin City Council [2005] 2 IR 496***
- applicant was an unincorporated association representing the interest of parties involved in the construction industry
  - challenge to draft development contribution scheme
  - Supreme Court reversed decision of High Court and refused standing to the applicant
  - general principle, by virtue of which it was not appropriate for any citizen, regardless of personal interest or injury, to argue the case of another did not amount to an absolute rule-circumstances in which it was appropriate for a representative body to be entitled to bring judicial review proceedings
  - consideration of this question must depend largely on the circumstances of the individual case.
  - applicant claimed to have a sufficient interest on the basis that the proposed scheme affected all or almost all of its members in the functional area of the respondent and, therefore, the applicant had a "common interest" with its members.
  - to allow the applicant to argue the point without pointing to any damage to itself would be to ask the court to deal with a hypothetical question

*"This is a challenge which could be brought by any of the members of the applicant who are affected and would then be related to the particular circumstances of that member. The members themselves are, in many cases, very large and financially substantial companies, which are unlikely to be deterred by the financial consequences of mounting a challenge such as this. ... there is no evidence before the court that, in the absence of the purported challenge by the applicant, there would have been no other challenger..."*  
(McCracken J)

- ***Irish Penal Reform Trust v Governor of Mountjoy Prison [2005] IEHC 305***
- IPRT formed by individuals who were concerned with conditions in the prison system: NGO and charitable status
  - Sought declaratory reliefs upon the basis of failure in constitutional obligation to provide adequate psychiatric treatment, facilities and services for prisoners in Mountjoy Men's and Women's Prisons declaration that the treatment of certain prisoners was a breach of their constitutional rights
  - High Court granted standing-broad interpretation of *Cahill v Sutton*

*"If a person is incapable of adequately asserting his constitutional rights for whatever reason, I am of the view that Cahill v Sutton would support a relaxation of the personal standing rules, provided the relevant person or body is genuine, acting in a bona fide manner, and has a defined interest in the*

*matter in question.*” (Gilligan J)

- recognition of special plight of prisoners
  - special expertise, financial ability and *bona fides* of the IPRT was relevant
  - primarily matter of discretion
- ***Digital Rights Ireland Ltd v The Minister For Communication, Marine and Natural Resources & Ors [2010] IEHC 221***
- plaintiff a limited liability company, object:  
“promotion and protection of civil and human rights, particularly those arising in the context of modern communication technologies”
  - IHRC *amicus curiae*
  - proceedings concerned validity of acts and measures designed to ensure that telecommunications service providers retain data in respect of mobile phone, internet and e-mail communications of all persons who use such services, for access and use by State authorities, for a period of 3 years (in the case of present domestic law) or for a period of up to 2 years (under Directive 2006/24/EC).
  - defendants claimed that a company cannot have a right to private life or privacy, a right to family life, a right to travel (and to confidentiality of travel) and a right to communicate. It was also claimed there was an over abundance of potential litigants who would have full standing to advance all aspects of the Plaintiff’s claim e.g. any natural person who uses a mobile phone
  - High Court:  
“*..in principle, a company should not be prevented from bringing proceedings to protect the rights of others where, without otherwise being disentitled, it has a bona fide concern and interest, taking into account the nature of the right which it seeks to protect or invoke* (McKechnie J)
  - standing depends largely on the circumstances of the case
  - although there may be some overlap between the company’s and its members’ interests, this in no way precludes the company from relying on an interest it holds in its own right
  - relied extensively on case law demonstrating “more flexible approach where questions of European law raised”
  - considered which rights, if any, a company may have

*The Plaintiff is the owner of a mobile phone, and as such can be affected by issues relating to privacy and communications in relation thereto.*

*Such privacy in the carrying out of business transactions, etc., is important for any company. Indeed these rights are not merely important to businesses, but, it must be thought, of great importance to the public at large. There is thus a significant element of public interest concern with regards to the retention of personal telecommunications data, and how this could affect persons’ right of privacy and communication.*

*Further...from a pragmatic point of view, were the Plaintiff debarred from continuing these proceedings it is unlikely that any given mobile communications user, although specifically affected by the impugned legislation, would bring the case; given the costs that would be associated with any such challenge.*

- significance attached to the involvement of the amicus-IHRC
- granted the plaintiff *locus standi* to bring an *actio popularis* in respect of whether the impugned provisions violate citizens' rights to privacy and communications, but not with regards to family and marital privacy or travel;
- granted the Plaintiff's motion for a reference to the Court of Justice under Article 267 TFEU.