THE DOCTRINE OF CURIAL DEFERENCE IN IRELAND

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> "[T]he Irish Courts have no appetite to review decisions of regulatory bodies. The remarks of the Superior Courts understate in many ways how unsuited the Irish judiciary believe themselves to be in resolving such [regulatory] matters…"[1]

INTRODUCTION

The above quotation accurately describes the general attitude of the Superior Courts when asked to interfere, by way of Judicial Review, with the decisions of regulatory or statutorily "independent"[2] expert bodies. The term adopted to describe this doctrine is known as "curial deference", being the courts' deference or the judicial attitude of restraint shown as regards the decisions of such bodies. The term carries with it a sense of old-fashioned and dignified humility and forms part of a wider doctrine of judicial restraint shown by the courts in the context of Judicial Review; in the judicial review of decisions of statutory expert bodies, the Superior Courts will accord to such bodies a certain latitude or margin of appreciation evidencing the Court's respect for the role and expertise of such bodies.

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[1] Excerpt from *Bar Council of Ireland Submission on Regulatory Appeals*, 31 October 2006, prepared for the purposes of the Consultation Paper on Regulatory Appeals focusing on appeals relating to major economic and sectoral regulatory Authorities. Further information on both the consultation paper and the submissions made for the purpose of the Consultation Paper *c.f.* www.betterregulation.ie, a website managed by the Department of An Taoiseach.

[2] It is not at all suggested that such bodies are systemically biased but neither are they truly independent; their appointments are often political ones, their budgets are often determined by the relevant Government department, sectoral policy may statutorily be subject to the direction of the relevant Government and the political appointees may be removed by the relevant Minister.

The doctrine of curial deference is self-imposed. There is no *express* statutory or constitutional basis for its operation. Although, as will be seen later in this article, the basis of curial deference is judicially expressed to derive from the doctrine of the separation of powers. In the United Kingdom, it has been held by the House of Lords to be the determination of a question of law as to the proper allocation of powers between the executive, legislative and judicial branches of Government.[3] From a reading of the Irish jurisprudence on curial deference, it is clear that the basis of the doctrine of curial defence is also allocational, based, perhaps, upon the proper separation of powers. That is to say, once the Executive or the Oireachtas have decided that certain expert sectoral issues are to be weighed, considered and determined by expert bodies, the courts should be slow to trespass upon what is effectively a delegated function of the Oireachtas. In light of the constitutionally mandated separation of powers, it could be argued that the doctrine of curial deference itself is a doctrine of constitutional origin.

The aim of this article is to examine recent Irish jurisprudence in respect of curial deference and on this examination, to pose the question as to whether application of the doctrine of curial deference to the decisions of regulatory or expert statutory bodies constitutes an unnecessary, self-imposed "brake" upon proper review of such decisions. It will also be argued that the application of curial deference should not result in the abdication of judicial responsibility because of a presumption that the independent or expert body blindly and singularly follows its own expertise and skill in reaching the decision under review.

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[3] *Per* Lord Hoffman in *R. (Pro-Life Alliance) v. British Broadcasting Corporation* [2004] 1 A.C. 185, at paras. 75 and 76:

> …75. In a society based upon a rule of law and the separation of powers, it is necessary to decide which branch of government has, in any particular instance, a decision-making power and what the limits of that power are. That is a question of law and must therefore be decided by the Courts.
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> ...76. This means that the Courts themselves must often have to decide the limits of their own decision-making power. That is inevitable, but it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference.

Finally, it will be argued with the increase of EU-wide regulated industries and the possibility for structural change to the manner in which the decisions of expert regulators are challenged, that a re-examination of the role of curial deference within such challenges will occur.

I. THE CURRENT IRISH CONTEXT FOR THE APPLICATION OF CURIAL DEFERENCE

The doctrine of curial deference has assumed and will continue to assume greater importance arising from the growth of, and the increase in the expertise of, sectoral regulators.[4] These are normally statutorily established regulators with specific and particular expertise available to them in the sector which they seek to regulate.[5] Formerly, the functions of such regulators were undertaken by government departments with specific responsibility for the regulated sector. However, as markets grew and liberalised throughout the 1990s, it was no longer appropriate for Government to involve itself directly in the three distinct roles of policy setter, service provider and sectoral regulator. The model then adopted in Ireland was to allow the State to direct policy and to privatise or divest itself of State-owned industries. Once these latter steps were taken, a statutory regulator would then be established[6] with responsibility for exercising the

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[4] In a paper prepared published by the Better Regulation Unit of the Department of An Taoiseach in February 2007, it was found that there were 213 regulatory bodies in Ireland, including 114 local authorities and a small number of private regulatory bodies, such as the Law Society and the Bar Council,. *cf.* www.betterregulation.ie

[5] Examples of such regulators are the Commission for Energy Regulation (CER), The Commission for Aviation Regulation (CAR), the Commission for Communications Regulation (CommReg), the Irish Financial Services Regulatory Authority (IFSRA), the Health Insurance Authority (HIA), the Competition Authority, the Broadcasting Commission of Ireland (BCI), the Private Security Authority, (PSA), the Health and Information Equality Authority (HIQA), the Commission for Taxi Regulation (CTR) and the proposed Property Services Commission.

[6] This is the model described in the paper prepared by the then Department of Public Enterprise entitled "Government and Accountability in the Regulatory Process", published in 2000. Subsequently and at the request of the Irish Government, the OECD involved Ireland in a peer-group analysis of its

regulatory function within the policy set by the Minister. Furthermore, EU legislation providing for liberalisation of certain markets and for approximation of regulation throughout the EU itself provides industry-specific regulation. Accordingly, the Irish regulatory model is often an amalgam of the fact of maturity of Irish economic sectors and the EU regulatory model. The success of this regulatory model in respect of the telecommunications, electricity and aviation industries has spawned its adoption in a broad range of industries such as health insurance, financial services, private security services and it is proposed by the current Government for both the property services and transport sectors.

Despite the fact that such decentralisation of decision-making was recently criticised by a Government Minister,[7] the growth of such regulators, in a maturing economy and within the EU, is an unavoidable fact. Accordingly, the Superior Courts will be called upon, with increasing frequency, to examine the decisions of sectoral regulators and expert statutory bodies. This will, in turn, lead to greater pressure on the rationale and limits of the doctrine of curial deference.

III. CURIAL DEFERENCE: THE IRISH JURISPRUDENCE

A. The Road to Excessive Deference?

Irish Courts have traditionally shown judicial restraint when asked to interfere with the decisions of expert Executive-appointed bodies. The Supreme Court in two cases in the 1990s took the opportunity to clarify the basis for the operation of curial deference in Ireland. Firstly, in the case of *O'Keeffe v. An Bord Pleanála*,[8] Chief Justice Finlay stated broadly, in respect of

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regulatory procedures. Ultimately, this analysis gave rise to what is entitled "The Better Regulation Agenda" which in turn led to a Government White Paper published in 2004 entitled "Regulating Better". For more on this *cf.* www.betterregulation.ie.

[7] Mr. Brian Lenihan TD, Minister for Justice Equality and Law Reform at the 2007 McGill Summer School, Glenties, Co. Donegal, expressed concern about the extent to which Government was hiving off responsibilities to agencies of State thereby allowing government to "abdicate responsibility" in respect of decision-making.

[8] [1993] 1 I.R. 39 (S.C.).

requests of the Superior Courts to interfere with decisions of An Bord Pleanála, as follows:

> Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board, which are expected to have special skill, competence and experience in planning matters.[9]

From these *dicta,* a twin foundation for the principle of curial deference may be seen; the courts will respect the delegation by the legislature or Executive to the expert body of the task or function of determining the sectoral or regulatory issue. In this way, the doctrine of curial deference can readily be located within the separation of powers doctrine. Secondly, the courts will recognise the special skill and confidence which the delegated body has in the area in which that body has been called upon to regulate (and which, by implication, skill and expertise the Court does not have at its disposal).

The next Supreme Court Decision on the issue was delivered four years later.[10] The substantive judgment of the Court was given by Keane J. (as he then was). However, Chief Justice Hamilton delivered a short judgment dealing exclusively with the approach which the courts should adopt when asked to interfere with decisions of expert administrative tribunals. He stated as follows:

> … I believe it would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise, it should be recognised that tribunals which have been given statutory tasks to perform and exercise

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[9] [1993] 1 I.R. 39, at 71 (S.C.).

[10] *Henry Denny & Sons (Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 I.R. 34 (S.C).

> their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review.[11]

Accordingly, absent identifiable error of law or the presence of an unsustainable finding of fact, interference by the courts with decisions of expert tribunals was found to be unwarranted. This was so, at least in part, because the legislature had delegated specific tasks to such tribunals and that in the modern context at least, they performed such tasks with the "highest degree of competence". In the writer's opinion, the terse manner in which the application of curial deference was expressed by Chief Justice Hamilton begged a number of basic questions as to the proper application of the doctrine of curial deference. Does a presumption of superior institutional competence arise once a tribunal or regulator has been statutorily delegated to perform a specialist task? Should the court thoroughly examine the statutory basis for the tribunal? Alternatively, before according such tribunal or regulator the benefit of curial deference, should a court assess the degree of skill and expertise which the administrative or regulatory body in fact has? Allied to the third question above, does the degree of curial deference or restraint applied by the court vary according to the specific expertise of the expert regulatory body?

In *M. & J. Gleeson & Co. & Others v. The Competition Authority*[12] some answers to the above questions are provided within the judgment of Mr. Justice Kearns. The proceedings concerned an appeal pursuant to section 9 of the Competition Act 1991. The appeal was made from a decision taken by the Competition Authority[13] to grant a licence to an agreement made

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[11] *Henry Denny & Sons (Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 I.R. 34, at 37 (S.C.).

[12] [1999] 1 I.L.R.M 401 (H.C.).

[13] The decision of the Authority was taken pursuant to section 4 of the Competition Act 1991, which permitted the authority to grant a licence for any agreement or category of agreements which, in the opinion of the authority, having regard to all relevant market conditions, contributed to improving the production or distribution of goods or provision of services or to promoting

by Guinness Ireland with a number of drinks distributors permitting Guinness Ireland Limited to acquire the outstanding shareholding which Guinness Ireland Limited held in those distributors. Four competing wholesalers had commenced appeals pursuant to section 9 of the Competition Act 1991 against the decision of the Competition Authority and it was ordered that the appeals be heard together.

The scope of the section 9 appeal was argued as a preliminary issue. The applicants argued for an appeal on the merits upon which oral evidence would be admissible. The respondents argued for a more limited form of appeal. Kearns J. delivered his "working decision" on this preliminary issue on 26 January, 1999. In reaching his "working decision"; Mr. Justice Kearns drew heavily on an authority of the Canadian Supreme Court.[14] Mr. Justice Kearns determined that a *de novo* hearing by the court would be inappropriate as that would involve the Court in the same exercise as the Competition Authority with the important distinction that the Court did not have the expertise of the Competition Authority. Secondly, it was held that, in reviewing the decision of an expert body, a court should exhibit curial deference. Furthermore, the greater the level of expertise and specialised knowledge which a particular body has, the greater the reluctance there should be on the part of the court to substitute its own view for that of the Authority. Mr. Justice Kearns held that when considering the standard of review applicable to a decision of the Competition Authority, the Court should, among other things, examine the statutory basis for the Competition Authority, the legislative context of the statutory appeal from the decision of the Competition Authority and the expertise available to the Competition Authority.

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technical or economic progress, while allowing consumers a fair share of the resulting benefit and which did not impose on the undertakings concerned terms which were not indispensable to the attainment of those objectives or afforded undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

[14] *Canada (Director of Investigation and Research) v. Southam* [1997] 1 S.C.R. 748.

From the decision in *M. & J. Gleeson & Co.*,[15] a useful roadmap for the application of the doctrine of curial deference was created: the court applying curial deference to the decision of an expert body should look to the statutory or other basis for that body; it should consider the types of deliberation undertaken by the body; it should consider the legislative context of the decision taken by the body and it should examine the expertise available to the body.

On the face of it at least, there is no presumption of superior institutional competence accorded by the courts to regulatory bodies in general and that the degree of curial deference applied by the courts is geared according to the skill and expertise available to the body in question. Exactly how a court should assess the skill and expertise of the regulatory body is, however, unclear. This problem becomes a conundrum when one considers that a large part of the expressed rationale of curial deference is that the expert body has available to it, in its decision-making, industry-specific skill and expertise which the Court does not have. In a later High Court judgment,[16] concerning a decision of the then Refugee Appeals Authority,[17] the Court did not carry out any real examination of the specific expertise available to the Authority, nor did it examine the statutory foundation for the Authority. The Court, however, found that as the Authority dealt on a daily basis with the assessment of claims for refugee status, it was, *ipso facto*, a body of particular experience and expertise and that the Court would take cognisance of that experience and expertise within the context of curial deference.

In *Orange Communications Ltd. v. The Office of the Director of Telecommunications Regulations*,[18] the Supreme Court was asked to consider the decision of another sectoral regulator (the then Office of the Director of Telecommunications Regulations, (ODTR)). The proceedings involved a challenge by

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[15] [1999] 1 I.L.R.M 401 (H.C.).

[16] *S.Camara v. The Minister for Justice Equality and Law Reform, The Refugee Appeals Authority, Ireland and The Attorney General*, High Court, unreported, Kelly J., 26 July 2000.

[17] Now the Refugee Appeals Tribunal.

[18] [2000] 4 I.R. 159 (S.C.).

a third party to the award by the ODTR of the third mobile phone licence in Ireland. The challenge made in the High Court was made pursuant to a statutory appeal procedure and was successful. In the Supreme Court (reversing the decision of the High Court), the Chief Justice, having considered the terms of the statutory appeal and having received the consent of the parties as to the standard of review applicable, decided that the High Court, in the exercise of curial deference, ought to first consider the EU legislation introducing the regulatory framework, the manner of appeal provided for and must then bear in mind the above mentioned twin foundation of curial deference.[19] It is abundantly clear from the judgment of Chief Justice Keane that the doctrine of curial deference is an allocational one with particular emphasis placed upon delegation by the Oireachtas of certain functions to the regulator in question and the degree of skill and experience residing with the regulator (and by implication, not with the Court).

In a concurring judgment delivered in the same case, Mr. Justice Geoghegan highlighted the Court's lack of industry-specific knowledge by stating as follows:

> [I]t would not make sense that a court of amateurs should have the right to reverse courts of experts in matters pertaining to their expertise.[20]

Whilst it is entirely accepted that the above quotation from the judgment of Mr. Justice Geoghegan is selective, it is, in the author's view, evidence of excessive deference shown by the Irish courts to decisions of regulatory bodies. In a loose sense, it attributes to such regulators the attributes of a court with an Executive-based mandate. A later judgment of the Supreme Court confirms this generous approach taken in respect of the decisions

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[19] Keane C.J. stated at p. 184 that "the High Court in considering such an appeal must bear in mind that the Oireachtas has entrusted to the first defendant a decision of a nature which requires the deployment of knowledge and expertise available to her, her staff and consultants retained by her but not available to the court."

[20] [2000] 4 I.R. 159, at 266 (S.C.).

of industry-specific regulators[21] and a recent judgment of the High Court in seeking to ensure consistency in the standard of review by the courts on statutory appeals from regulators' decisions, again incorporates the generous doctrine of curial deference within such reviews.[22]

B. Curial Deference – No Magical Incantation?

A less deferential approach was taken by Mr. Justice Smyth to a decision of the then Refugee Appeals Authority in the High Court Decision of *Mohsen v. The Minister for Justice Equality and Law Reform and the Refugee Appeals Authority*.[23] Mr. Justice Smyth refreshingly said the following about the doctrine of Curial Deference:

> Without the necessity of seeking to categorise the nature of decisions which are reviewable, it is sufficient for the present purpose to note that the expression "Curial Deference" is no magical incantation, it means very simply that a Court in judicial review proceedings will have due and proper regard to and appreciation of the expertise of the deciding body whose decision is being considered.
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> The Courts will not stand in awe of or accord undue deference to any authority however distinguished.[24]

V. CURIAL DEFERENCE: A SPECIES OF CONSTRUCTIVE BLINDNESS?

An overly generous doctrine of curial deference can lead to standard of review of regulators' decisions which operates as a

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[21] *Scrollside Limited Trading as Zed FM v. The Broadcasting Commission of Ireland*, Supreme Court, unreported, 6 April 2006, at internal para. 8 of the judgment of Denham J.

[22] *Per* Finnegan P. (as he then was) in *Ulster Bank Investment Funds Ltd v. The Financial Services Ombudsman and Ors*., High Court, unreported, 1 November 2006.

[23] High Court, unreported, Smyth J., 12 March 2002. [2002] W.J.S.C.-H.C. 8970.

[24] [2002] W.J.S.C.-H.C. 8970, at 8980.

veiled doctrine of non-justiciability. This is so as the courts' express reluctance to trespass into zones of regulator-occupied knowledge makes it extremely difficult to make a reasoned and expert-confirmed challenge to a regulator's decision. It may be that curial deference is properly founded within the constitutional separation of powers but it should not operate as a form of dogma preventing a proper analysis of both the statutory basis for the regulator's functions and of the actual skill and expertise residing within such regulator. Often, regulators operating within a statutory regime are, in reality, reaching a conclusion on a mixed question of law and fact as to the proper application the statutory regime to a particular set of factual circumstances within the regulated sector. This is a task which a court is equally qualified to carry out. In the writer's view, curial deference afforded to expert regulators has the potential to cause constructive blindness in the proper determination as to the correctness of a regulator's decision.

The generous application of curial deference by the Irish courts to decisions made by expert sectoral regulators labours under overly benign assumptions in respect of such regulatory bodies That is to say, that such a regulator or body is simply the expert conveyor-belt for the wishes of the Oireachtas, that such regulators are monastically dedicated to the public interest and would never subordinate the public interest to either their own or other political interests. The reality is, however, that regulators, unlike the courts, are motivated by a mixture of interests, including the public interest, the pressures of the regulator's constituents, the future employment of the regulator and its staff and the political exigencies which derive from policy direction.

VI. CONCLUSION: THE FUTURE FOR CURIAL DEFERENCE: WILL NEW DISPUTE RESOLUTION MECHANISMS CHANGE ITS SHAPE?

The current regulatory appeals framework is being considered by an expert Group within the Department of An Taoiseach.[25] In its Consultation Paper,[26] which self-confessedly

[25] The Better Regulation Group.

considers only the main regulated sectors, the various types of existing and potential appeal mechanisms are considered.[27] A number of dominant themes arise both from this Consultation Paper and from the submissions invited to be made to the paper.[28] The first of these themes is that of the need for an appropriate balance to be struck between sectoral expertise and judicial oversight in the Appeals process.

The second of these themes is consistency of decision-making throughout the appeal processes. Presently, there are a number of avenues of appeal from various regulators' decisions. Given the multiplicity of these appeals, the establishment of a single or streamlined appeals process can readily be advocated. For example, there is often a statutory appeals board populated largely by industry expertise but chaired by experienced lawyers who may undertake a merits-based appeal. There is then a statutory right of appeal from the decision of such appeals process.[29] However, occasionally, applicants first seek judicial review of the regulator's decision or alternatively may seek to have the matter admitted to the Commercial List of the High Court.[30] In competition law cases, there is no intermediate

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[26] *Consultation Paper on Regulatory Appeals.* Available at: http://betterregulation.ie/index.asp?locID=18&docID=-1.

[27] Appeal to an industry specific appeals panel (*e.g.* The Electronic Communications Appeals Panel (ECAP) established pursuant to the European Communities (Electronic Communication Networks and Services) (Framework) Regulation S.I. No. 307 of 2003. A single appeals body (along the lines of the Australian Appeals Tribunal (AAT)). Appeal by way of Judicial Review. Appeal to a specialist Court or Appeal to a Court assisted by expert opinion

[28] Submissions were made by the 31st of October 2006 by regulators, industry participants and private solictors' practices. *cf.* www.betterregulation.ie.

[29] By Rules of the Superior Courts S.I. No. 14 of 2007, Order 84 of the Rules of the Superior Courts has been amended to include Order 84C; "Procedure in Statutory Appeals". This Rule standardises the manner in which such statutory appeals are taken and formally managed by the Court.

[30] This occurred in *Smart Mobile Limited v. The Commission for Telecommunications Regulation*, High Court, unreported, Kelly J., 13 March 2006. In this matter appeal was made by Smart Ltd. from a decision of CommReg directly by way of appeal to the Commercial Court. On the 13th of March 2006, Mr. Justice Kelly found that such appeal as opposed to an application for Judicial Review did not constitute an abuse of process. Furthermore, it could strongly argued that such an appeal or challenge from a

process; rather, there is an appeal to the Competition Court established pursuant to Order 63B of the Rules of the Superior Courts. The Competition Court may appoint its own expert(s) for the purpose of assisting the Court in its determination. Other themes present in the Consultation Paper are equality of regulatory process between the various regulated sectors and timeliness of the appeal decision.

A number of alternative models are examined in the Consultation Paper such as the Australian Administrative Appeals Tribunal[31] (AAT) and The United Kingdom Competition Appeals Tribunal.[32] The latter of the two is a standing court which may hear appeals from competition and regulatory decisions. It may hear merits-based appeals from such decisions and it may review in the traditional sense such decisions and it may hear actions for damages under the UK Competition Act 1998. The Court sits as a three-member panel of which the chairman is a judge and the two remaining members are likely to have industry-specific knowledge. In this way, the concerns expressed that a court does not have sufficient or equal expertise available to it to be in a position to thoroughly examine the correctness or otherwise of a regulator's decision are met.

There is scope within the judicial system to accommodate a consistent method of appeal from regulatory decisions.[33] If a bias towards any particular mechanism can be detected, it is towards the model of the highly successful Commercial Court established by Order 63A of the Rules of the Superior Courts. The mechanisms of court-directed statements, timescales, court-directed mediation and arbitration would prove useful in the code for a single Regulatory Appeals Court which might potentially be established as a division of the High Court. The advantages of such a system would be transparency, consistency and the availability of a trained, well-experienced clerical staff.

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statutory regulator's decision falls easily within Order 63A 1(g) of the Rules of the Superior Courts relating to the Commercial Court.

[31] Established by the Administrative Appeals Tribunal Act 1975.

[32] Established by section 12 and Schedule 2 of the Enterprise Act 2003.

[33] Further development of the judicial review of regulatory decisions has been made in the United Kingdom arising from the far-reaching changes made by the Tribunals Courts and Enforcement Act 2007.

Furthermore, from the model and record of the Commercial Court, timeliness of decision-making can be well maintained within such a code.

However, the biggest challenge to such a Regulatory Appeals Court and the one by which the doctrine of curial deference is most likely to be affected, is the first theme mentioned above; the appropriate balance between sectoral expertise and judicial oversight. The above-mentioned lack of judicial appetite to interfere with decisions of regulatory bodies and by extension the application of the doctrine of curial deference arises from the deficit in technical sectoral expertise available exclusively to the court (as opposed to the expertise specifically engaged by the parties). Should it be possible to engage properly qualified expertise for the purpose of advising and informing the court on industry-specific issues, a large part of the rationale for rigorous application of curial deference would no longer exist.

From this utopian viewpoint, one can see the gradual extinction as opposed to expansion of the doctrine of curial deference. Experience has shown, however, that such change never comes quickly and it is more likely than not that the doctrine of curial deference will continue to operate until such time as the courts are sufficiently technically equipped to fully determine regulatory issues.