



REFLECTIONS OF AN IRISH COMMON LAW NOTARY

ON

THE NOTARIAL PROFESSION

(The Notary and the European Union)

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Introduction

Few ‘regulated’ professions in the world can claim a more ancient and prestigious ancestry than that of the notary. The notaries of to-day are the successors of the notaries appointed by the early Popes of Christendom and the Emperors of Rome. Notaries in the world everywhere have a common root of title – a common ancestry.

In the early days, notaries (under several descriptions) had various functions. The archives of Pope Gregory 1 (r. 590-604 AD) refer to notaries with responsibility for correspondence, ordinations and synodal decisions. Notaries also served as papal advisers, diplomats and envoys.¹ Ecclesiastical notaries inevitably led to a demand for lay notaries and the lay notariate flourished in time.

This paper considers the thesis that the profession of common law notary and the civil law notary is being gradually re-unified within the European Union.

The Profession of Notary

Notaries were among the first to be associated with the word ‘profession’ - a word with significant connotations. We talk of the ‘profession of faith’ in the Nicene Creed and those in religious orders as ‘professed members’. Professor James Brundage in his book, *The Medieval Origins of the Legal Profession*,² referred in this context to ‘profession’ in terms of promoting the interests of the whole community as well as the individual provider of the service. Brundage noted:

‘A profession [in addition to promoting the interests of the whole community as well as the individual service provider] requires mastery of a substantial body of esoteric knowledge through a lengthy period of study and carries with it a high degree of social prestige. When an individual enters a profession, moreover, they pledge that they will

¹ See generally Janet Levarie Smarr, ‘Notaries’ in Christopher Kleinhenz, (Ed), *Medieval Italy :An Encyclopaedia*, vol . 2, p 782.

² James A Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians and Courts*, Chicago (2008) p 2.

observe a body of ethical rules different from and more demanding than those incumbent on all respectable members of the community in which they live.’

In the context of the development of the notarial profession, the notaries of medieval times regarded themselves with pride and as an intellectual elite with the notaries and lawyers entitled to the same rights and privileges as the men of the sword.³

Pride in one’s profession, pride in the quality of the services that are rendered to others, pride in one’s heritage – when these coalesce in the public interest they become important characteristics of a learned profession.

Few members of a learned profession - as distinct from those associated with the sword - can claim to have affected the course of history. One commentator wrote:⁴

‘Nearly all the earliest civic chronicles were begun and maintained by notaries who had the requisite verbal skills and access to the highest levels of government and society. This advanced the civic identity and pride that led directly to the ‘civic humanism’ of the late fourteenth century and its foundation in accurate historical reconstructions.’

One of the reasons why scholars and historians refer to the eminent role played by notaries in civilisation was not because, per se, notaries were more honest or persons of greater integrity than others but, principally, because notaries were ‘professional’ writers. The notary recorded history - from the minor events of everyday life to matters associated with statecraft. In this regard, in medieval times, the notary’s early exposure to

‘and continual use of classical rhetoric sometimes developed into literary interests in Roman writers ... The emphasis on facts rather than fantasy, on lay civic culture rather than courtly or ecclesiastical culture, and on classical rhetoric rather than scholastic philosophy led directly to the renaissance.’⁵

Out of all of this, the notary has grown into a significant profession today.

³ Above, pp.3-4..

⁴ Christopher Kleinhenz (ed) *Medieval Italy: An Encyclopaedia*, (2004) Vol 2, 782.

⁵ Above, p. 783.

The functions of the Common Law and Civil Law Notary

In another paper⁶ the present writer has set out the functions of the common law notary in Ireland. The notary is authorised to carry out all the functions of a barrister or solicitor with the exception of contentious business. In effect the notary in Ireland can carry out all legal functions of any lawyer with the exception of the actual conduct of cases in court as an advocate.

The fundamental characteristics of the civil law notary have been summarised by the International Union of [Latin] Notaries. The Latin Notary is described as a professional lawyer and public official appointed by the State to confer authenticity on legal deeds and contracts drafted by the notary and to advise persons who call upon his or her services.⁷ The notarial function extends to all legal (sometimes described as judicial) activities in non-contentious matters ‘affording legal certainty to clients thus averting disputes and litigation’. In a general sense, these characteristics also sit comfortably with the common law notary.

The re-unification of the Profession of Notary The EU Notary Cases

Within the EU, the profession of notary is being gradually re-unified. A significant milestone in this process of re-unification was the decision of the Court of Justice of the European Union of 24 May 2011 in *Commission v Belgium, France, Luxembourg, Austria, Germany, Greece and Portugal* – referred to in this paper as the EU Notary cases.

The *Treaty on the Functioning of the European Union* (as consolidated) (originally signed in Rome in 1958 as the Treaty establishing the European Economic Community) prohibits ‘restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State’.⁸ Freedom of establishment includes the ‘right to take up and pursue activities as self-employed persons and to set up and manage undertakings ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected’.⁹

⁶ E G Hall, ‘The Office of Notary Public in Ireland: History, Functions and Powers’, www.ehall.ie

⁷ See www.uinl.org

⁸ Article 49 of the *Treaty on the Functioning of the European Union* (ex Article 43 *Treaty of European Economic Community*).

⁹ Article 43 *TEC* now Article 49 of *Treaty on the Functioning of the European Union*.

In several Member States of the European Union – the subject of legal action by the European Commission – the profession of notary was reserved for nationals of the Member State in question. The European Commission instituted action against the relevant Member States on the basis that this restriction to one's own nationals was prohibited by the EC Treaty.¹⁰

The notaries on the continent of Europe and their governments strenuously defended the nationality requirement. This defence, however, was incidental to the main argument of the governments in question that the notaries exercised 'official authority' within the meaning of Article 45 of the Treaty (now Article 51 of the Treaty on the Functioning of the European Union (TFEU)). Article 45 of the Treaty (now Article 51 TFEU) provides that the free movement relating to persons, services and capital should not apply to 'activities which in that state are connected, even occasionally with the exercise of official authority'. The European Court of Justice held in those cases that nationality requirements cannot be imposed within the European Union on notaries and that the notaries in question were not connected with 'the exercise of official authority' within the meaning of Article 45 of the EC Treaty¹¹ (now Article 51 TFEU).

In the EU notary cases, the Court of Justice 'demystified' the legal functions of the civil law notaries. The Court did so skilfully by summarising the legal submissions of the European Commission in the proceedings in relation to the civil law notaries of Belgium (similar to notaries in other civil law countries). The Court utilised the well-known literary 'device' that when one does not wish to say something definitively oneself, one quotes the views or statements of another – preferably a distinguished authority. You may wish to agree with the learned statement or you may wish to remain silent on the issue. By not saying if you agree or disagree with the statement quoted, one is almost inviting the reader or listener to infer that you are agreeing with the quoted authority. Bear this literary 'device' in mind as I recount how the Court of Justice considered the various functions of the civil law notary in the guise of summarising the submissions of the European Commission in the cases.

- (a) In relation to the authentication of documents and agreements, the notary 'merely' (the precise word used by the Court of Justice was 'merely') attests the wishes of the parties, after advising them and gives legal effect to their wishes. The Commission in the EU notary cases submitted that disputes that may arise in relation to the enforceability of notarial acts are decided by the court and not by the notary.

¹⁰ See note 9

¹¹ *Cases C-47/08, C-50/08, C-51/08, C-53/08, C-54/08, C-61/08 and C-52/08.*

- (b) In the context of the attachment of immovable property, ‘the notary does no more than implement the decisions taken by the court’.
- (c) The notary’s part in drawing up the inventory of a deceased person’s estate or of property in joint ownership was (according to the Commission) ‘limited to preparing that inventory under the supervision of the court’. The notary’s involvement in the ‘judicial division of estates’ was also submitted to be ‘circumscribed by decisions of the court’.
- (d) In relation to other matters such as legal transactions pertaining to gifts, marriage contracts, statutory cohabitation agreements, wills, company law and the law of associations, ‘the notary does no more than endorse the wishes of the parties in accordance with law’ - according to the European Commission submissions.

Neither the European Commission nor the Court of Justice was ‘overawed’ by the functions of the civil law notary.

In the context of the substance of the EU notary cases, the Court of Justice stated that Article 43 EC (right of establishment of nationals of a Member State in the territory of another Member State) (now Article 49 of the Treaty on the Functioning of the European Union (‘TFEU)) was one of the fundamental provisions of European Union law.

The Court of Justice noted that the freedom of establishment (Article 43 EC) (Now Article 49 TFEU) was intended to ensure that all nationals of all Member States who establish themselves in another Member State for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State. Citing case law, the Court of Justice determined that Article 43 of the EC Treaty (now Article 49 TFEU) prohibited as a restriction on freedom of establishment, any discrimination on grounds of nationality, resulting from national legislation. Accordingly, by imposing a nationality condition on access to the profession of notary, the Member States in question had failed to fulfil their obligations under Article 43 EC (now Article 49 TFEU).

European Union Mutual Recognition of Professional Qualifications

A further potential milestone in the gradual process of reunification of the profession of notary in the European Union related to proposed amendments to the existing EU law on recognition of professional qualifications – which initially included the notary.

The European Commission published a proposal for a ‘*Directive of the European Parliament and the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System*’ (COM(2011) 883 final) on 19 December 2011. For the purposes of this paper, the proposal will be described as ‘the proposed EC Directive’.

The proposed EC Directive was drafted in the context of the European Commission’s stated policy to promote, inter alia, intra-European Union mobility of professional persons. Recognition of professional qualifications is considered to be essential to making the fundamental ‘Internal Market’ freedoms work effectively for EU citizens. The proposed EC Directive sought to amend *Directive 2005/36/EC* on the recognition of professional qualifications as a modernisation and up-dating measure.

The EU authorities stated that the decision of the Court of Justice in the EU Notary Cases¹² made it possible for the European Commission to proceed to open up the profession of notary in one Member State to nationals from another Member State. The Court of Justice had held, inter alia, in the EU notary cases that the Member States concerned could not reasonably be expected to consider that the relevant existing Directive on recognition of professional qualifications should have been transposed for notaries before the institution of relevant proceedings. Although the Court of Justice did not rule out there was an obligation on Member States to implement the relevant [existing] recognition of professional qualifications Directive in regard to the profession of notary, it considered that the obligation was not sufficiently clear at the time of the infringement proceedings. Accordingly, the Commission was of the view that the scope of the relevant Directive on the recognition of professional qualifications (including a specific reference to the profession of the notary) required to be reviewed.

The profession of notary was specifically mentioned in early versions of the proposed EC Directive. The stated objective of the proposed Directive included, among many others, a specific measure of ‘offering a legal framework ... for notaries’.¹³

There are two principal ‘rights’ provided for by European Union law in relation to a professional person in one State providing a relevant professional service in another Member State (the host Member State). One regime of EU law on recognition of professional qualifications relates to the provision of professional services on a temporary and occasional basis. The

¹² See note 11 above.

¹³ Para 1.2 of the Explanatory Memorandum of the proposed Directive.

other is the law governing a right of establishment for professional persons of one EU Member State in a host Member State.

The first regime of EU law relates to the temporary provision of professional services by a qualified person from one Member State in another Member State (the host Member State). Title 11 of *Directive 2005/36/EC*, Article 5, 'Principle of the free provision of services' which was being amended by the proposed EC Directive, related to the situation 'where the service provider moves to the territory of the host Member State to pursue on a temporary or occasional basis' his or her profession. It was intended to include the temporary or occasional provision of services by a notary established in a Member State in a host Member State.

Pursuant to Article 7 of the existing *Directive 2005/36/EC*, Member States may require a written declaration in advance from the service provider to the host Member State concerning certain information, for example, details relating to evidence of professional qualifications and professional indemnity insurance.

Significantly, Article 5 of *Directive 2005/36/EC* was to be amended by the insertion of the following paragraph 4 which, if enacted, would constitute a constraint on EU notaries providing a temporary or occasional notarial service in a host Member State.

'4. In the case of notaries, the authentic instruments and other activities of authentication which require the seal of the host Member State shall be excluded from the provision of services.'

It is submitted that the general principles of law in relation to the right of establishment apply, in general, also to the EU law on freedom of services. In particular, it is submitted that the notary from an 'established' Member State would appreciate fully the legal requirements of a host Member State before he or she engaged in a notarial activity in a host Member State. Otherwise, such a notary would risk incurring civil liability if he or she were negligent.

It is important to state that all notaries in common law jurisdictions within the European Union are qualified lawyers at postgraduate level. In England and Wales, for example, a candidate notary must be a qualified solicitor of the Supreme Court, a barrister or the holder of a degree who must pursue a course of legal and notarial studies before admission as a notary. In Ireland, a candidate notary must be a solicitor or barrister with five years post-qualification experience and have passed an examination on notarial law and practice at post-graduate level before being admitted as a notary.

The UK and Ireland Notarial Forum considered that the proposed restriction on notaries (in the context of the temporary or occasional provision of notarial services) in relation to the drawing up of authentic instruments and other activities of authentication which required the seal of the host Member State was not justified by European law and contravened the jurisprudence of the European Court of Justice as set out in the EU Notary Cases. Accordingly, the UK and Ireland Notarial Forum submitted that paragraph 4 of the proposed amendment to Article 5 of *Directive 2005/36/EC* ought to be deleted from the then proposed EC Directive.

In relation to a right of establishment (in the nature of the provision of notarial services, for example), which is not of an occasional or temporary basis, *Directive 2005/36* would entitle Member States to impose ‘aptitude tests’ (to be held twice a year) or impose an ‘adaptation period’ of up to three years on the notary seeking to establish himself/herself in the host Member State.

An ‘adaptation period’ (pursuant to Article 3 of *Directive 2005/36/EC*) means a period of up to three years of ‘supervised practice possibly being accompanied by further training’.

An ‘aptitude test’ (pursuant to Article 3 of *Directive 2005/36/EC*) means a test (examination) of the professional knowledge of the applicant with the objective of assessing the ability of the applicant to pursue a regulated profession in a host Member State. The aptitude test must take account of the fact that the applicant is a qualified professional (for example, a notary) in the home Member State or the Member state from which he or she comes.

The proposed small measure of ‘liberalisation’ – bringing the notaries within the United Kingdom and Ireland closer to their mainland continental colleagues met with opposition from some notaries on the continent of Europe. Following representations, the European Parliament and the Council reached agreement on what I describe as ‘contentious’ issues in relation to the notarial profession. The notary was to be excluded altogether from the proposed Directive. Commissioner Michel Barnier announced the broad agreement in a press release on 12 June 2013. [See *Commissioner Michel Barnier welcomes the trilogue agreement on the modernisation of the Professional Qualifications Directive*, Brussels, 12 June 2013.]¹⁴ Subsequently the European Parliament amended the then proposed Directive by providing that the Directive was not to

¹⁴ www.europa.eu Press Release Database.

apply to notaries who are appointed by ‘an official act of government’ and the justification for this exclusion of the notary from the *Recognition of Professional Qualifications Directive* was ‘in view of the specific and differing regimes applicable to [notaries] in individual Member States for accessing and pursuing the [Notarial] profession’.¹⁵ This justification lacks credibility and if taken to its logical conclusion would prevent the Union’s institutions from making progress on many matters affecting the citizens of the Union because of the (understandable) ‘differing’ legal ‘regimes’ ‘in individual Member States’.

Subsequently in 2014, José Freitas, a Notary from Portugal instituted proceedings against the Council of the European Union and the European Parliament.¹⁶ Notary Freitas claimed the Court should annul Article 1(2)(b) of Directive 2013/55/EU of the European Parliament and the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’). He did so alleging infringement of Article 49 TFEU (ex Article 43 TEC) on the basis the profession of notary falls within the scope of the application of Article 49 TFEU (ex Article 43 TEC) regarding freedom of establishment and does not fall within the exercise of official authority within the meaning of Article 51 TFEU (ex Article 45 TEC). Notary Freitas also alleged breach of the principle of proportionality as notaries were being excluded in a general and absolute manner from the scope of Directive 2005/36/EC on the recognition of professional qualifications.

Conclusion

As stated earlier, the notaries of to-day have a noble ancestry. Brundage in his delightful history¹⁷ observed that notaries had become indispensable to the functioning of medieval ecclesiastical courts and administration everywhere in Western Christendom by around 1250. He noted that the services of notaries were also vital to the working of royal and municipal administration and legal systems in many parts of Europe. The notaries of Great Britain and Ireland in medieval times took some more time to flourish.

¹⁵ *European Parliament Legislative Resolution of 9 October 2013*; Recital 3 and Article 2(b) 4 being amendments .

¹⁶ *José Freitas v Council of the European Union and European Parliament* (Case T-185/14)

¹⁷ James A Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians and Courts*, Chigago (2008)

The notaries of today in Great Britain and Ireland and the common law notaries in general play a significant role in cross-border commerce. The common law notaries of Great Britain and Ireland as well as notaries in common law jurisdictions further afield in Australia and New Zealand are witnessing an 'intellectual renaissance' in terms of academic and practical training for candidate notaries - who are already qualified and practising lawyers. [There is the description 'Notary-at-Law' for a notary who is a qualified lawyer as notaries are in Great Britain and Ireland.]

In this paper, I have argued that the decision of the European Court of Justice in the EU Notary Cases represented a significant milestone in the journey towards re-unification of the profession of the common law notary and the civil law notary. Sadly, this was not followed up in the EU Directive amending *Directive 2005/36 EC* on the mutual recognition of professional qualifications.

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