



## THE COURT OF APPEAL

**UNAPPROVED**

**JUDICIAL REVIEW**

**Neutral Citation Number [2021] IECA 250  
Record No. 2020/269**

**Whelan J.  
Ní Raifeartaigh J.  
Murray J.**

**BETWEEN/**

**ARTHUR CONNELL NUGENT**

**APPELLANT**

**- AND -**

**THE PROPERTY SERVICES REGULATORY AUTHORITY**

**RESPONDENT**

**JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 5<sup>th</sup> day of October, 2021**

1. This is an appeal from the decision of Barr J. refusing to grant the appellant an order of prohibition and other declaratory reliefs in respect of a prosecution which is pending against him in the District Court for offences contrary to section 28 of the Property Services Regulation Act 2011 (“the 2011 Act”). The prosecution was initiated by the Property Services Regulation Authority (“the Authority”). Further details will be given below but essentially the offences charged against him relate to trading as an auctioneer (including holding a mart) without a licence from the Authority.

2. The issues raised are: (1) whether or not the appellant requires and/or should be given an extension of time for bringing judicial review proceedings; (2) whether or not the matter is suitable for judicial review given the points raised by the appellant, being (a) a question of whether a statutory precondition to prosecution under the relevant legislation has been satisfied; (b) the terms of the caution given to the appellant on the occasion of the respondent's inspectors' visit to the appellant's premises; and (c) the destruction of handwritten notes of a question-and-answer exchange with the appellant on the occasion of the same visit.

3. Central to the appellant's arguments concerning (a) and (b) above is the fact that, at the time of the investigation, it was the company of which the appellant was director that was under investigation, whereas the prosecution now pending is as against the appellant personally. That company has, since the date of inspection of the premises, gone into liquidation and a decision was made by the Authority to prosecute the appellant personally on the basis of the same evidence.

### **Relevant provisions of the Property Services Regulation Act 2011**

4. Under section 28 of the 2011 Act, a person "shall not" provide a property service, or hold himself or herself out as available to provide a property service, or represent himself by advertisement or card or other object purporting to indicate that he or she is a licensee, as available to provide a property service, unless the person is the holder of a licence which is in force in respect of that property service. It is an offence to do so, punishable on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years or both.

5. Under section 27 of the Act, the Authority may appoint members of its staff to act as inspectors and it provides for warrants of appointment. Section 66 deals with powers of entry and inspection of premises. An inspector may require that certain information or documents be provided, and any information so provided is not admissible against the person in criminal proceedings (other than certain specified offences under the section such as, for example, obstruction of the inspectors or withholding or destroying documents).

6. Section 89(1) provides that the Authority may cause such investigation as it thinks fit to be carried out in relation to any person who, not being a licensee, is suspected of having contravened or contravening section 28(1). The term “non-licensee” is used throughout the section. For the purposes of an investigation of a non-licensee, the Authority shall appoint an inspector, subject to such terms as it thinks fit (a) to carry out the investigation and (b) to submit to it an investigation report following the completion of the investigation. More than one inspector may be appointed in this regard. Subsection (5) provides that where an inspector has completed an investigation, he or she shall prepare an investigation report and submit it to the Authority, as soon as is practicable after having considered, in so far as they are relevant to the investigation of the non-licensee, any information or records, books or accounts (whether kept in manual form or otherwise) or other documents provided to the inspector pursuant to any requirement under section 66 as read with subsection (4), any statement or admission made by any person pursuant to any requirement under that section as so read, any submissions made and any evidence presented (whether at an oral hearing referred to in section 66(15) or otherwise).

7. Section 94(7) of the Act provides that the Authority may bring and prosecute summary proceedings for an offence under the Act (including an offence under section 28). One of the points of contention as between the parties in this case is the relationship (if any) between an investigation under section 89 and the power to prosecute under section 94(7).

### **Statement of Grounds**

8. As well as seeking prohibition of a District Court prosecution of two summonses under the 2011 Act, the appellant also seeks a number of declarations:

- that the investigation and prosecution is unlawful and in breach of the 2011 Act;
- that the manner in which the respondent instituted and progressed the proceedings was contrary to Article 38.1 of the Constitution and contrary to his constitutional right to a fair trial;
- that the institution and continuance of the proceedings is an abuse of process, oppressive and unfair and contrary to his rights under the European Convention on Human Rights Act 2003 as well as under the Constitution; and
- that the totality of evidence obtained under s.89 was unlawfully obtained in breach of the 2011 Act and or natural/constitutional justice.

9. The appellant also seeks “if necessary” an extension of time pursuant to Order 84 Rule 21(3) of the Rules of the Superior Courts within which to bring the proceedings.

10. The grounds upon which the reliefs are sought are as follows. I have paraphrased them slightly here and substituted the term “appellant” for “applicant”. What emerges is that some grounds arise out the fact that the *company* was investigated whereas the appellants was prosecuted as an *individual*; and others relate to the destruction by the inspectors of

contemporaneous handwritten notes taken on the day of their inspection. The grounds are that the Authority:

- Arrived at its decision to prosecute the applicant in reliance on irrelevant considerations and/or failing to advert to relevant considerations. Specifically, the decision to prosecute was grounded upon the Inspectors' report which was prepared otherwise than in accordance with the terms of section 89 and in excess of the powers of the investigators and did not require the preparation of a fresh report or initiate an investigation into the appellant personally.
- Failed to act in accordance with its statutory duties and/or acted in excess of jurisdiction and/or contrary to natural and constitutional justice insofar as its decision to prosecute was unreasonable, irrational and unsupported by evidence and in so doing created a real risk of an unfair trial.
- Acted in excess of jurisdiction in the manner in which it exercised its discretion to prosecute the applicant and in so doing created a real risk of an unfair trial.
- Acted in excess of jurisdiction and/or contrary to the terms of the 2011 Act and the requirements of natural and constitutional justice in the manner in which it instituted its criminal prosecution against the applicant insofar as it instituted a prosecution against him despite the fact that he was never properly the subject of investigation under the 2011 Act and on the strength of an improperly prepared section 89 report.
- Failed to ensure that all probative evidence in particular the original hand-written notes of the onsite inspection of the premises were preserved for inspection, examination and for the trial of the offence alleged. This failure is alleged to have created a real and serious risk of an unfair trial which cannot now be remedied either by the respondent or the trial judge. The typed version of the

notes of the onsite inspection were prepared almost two months after the original site visit and no clear distinction was made in the typed version of the notes between the legal entity (Edward Paul Nugent Limited/ Castleblayney Livestock Sales) and the human person (the applicant), the absence of a proper record of the administration of a caution in respect of the possibility of prosecution in respect of the applicant personally as distinct from the entity, the absence of any proper notes of the alleged admissions made by the applicant to offences charged and the fact that the destruction of the notes was voluntary, occurred before the institution of the criminal proceedings and before the decision was taken to prosecute.

- That the respondent in deliberately destroying evidence central to its case against the applicant acted in breach of Article 38.1 of the Constitution denied the applicant his constitutional right to a fair trial.
- Failed to give effect to the applicant's legitimate expectation that the respondent was acting in compliance with the 2011 Act and in compliance with fair procedures.
- Failed to act in accordance with fair procedures including its duty to give reasons when seeking to prosecute the applicant and failing to indicate his legitimate expectation that it would act *intra vires* with the 2011 Act and in compliance with the fair procedures and having a regard to the destruction of the hand written notes and its failure to provide any reasons or explanation for the same, the nature of the caution, the nature of the appointment of the inspectors and certificate of the respondent's Chief Executive and the significant time lag from the inspection visit to the subsequent alleged transcription of the notes.

### **The Statement of Opposition**

**11.** The Authority says that the claims of the appellant that its decision to prosecute is *ultra vires* its statutory powers are manifestly incorrect having regard to the provisions of the 2011 Act. It pleads that the decision to prosecute the appellant is not amenable to judicial review and that the appellant has failed to identify any evidence providing a recognised lawful basis for interfering with a decision to prosecute by way of judicial review. It says that the application sets out certain legal arguments and defences upon which the appellant may rely at trial and that it is manifestly inappropriate to deal with any such issues by way of judicial review, these being matters to be dealt with by the trial judge.

**12.** The Authority pleads that the appellant has failed to identify how his entitlement to fair procedures has been impaired by reason of the non-availability of the original handwritten notes of the inspectors, and has failed to identify any meaningful disputes as to the underlying facts which turn on or are materially affected by the non-availability of those notes. Thus he has failed to engage with the underlying facts and failed to set out any stateable evidential basis for the contention that his right to a fair trial will be impaired.

**13.** The Authority also pleads that the proceedings were not instituted within the time limit prescribed by Order 84 of the Rules of the Superior Courts and that the appellant was aware of the relevant facts and circumstances since at least the 26 February 2019. He has failed to explain the delay of almost five months before bringing the proceedings.

**14.** In addition to a denial of any breaches of the statute or of natural and constitutional justice, the Authority pleads:

- that it was perfectly entitled to have regard to the investigation conducted by the inspectors;
- that there was sufficient evidence to justify a prosecution;
- that the 2011 Act does not require that the subject of a prosecution be the subject of a prior section 89 investigation or report;
- that the respondent was not under any obligation to preserve the original handwritten notes which are not evidence;
- that there is no risk that the appellant would be subjected to an unfair trial and it will be for the trial judge to determine the significance or otherwise of the original handwritten notes being unavailable;
- that the respondent did not deliberately destroy evidence;
- that the respondent is not required to give reasons for a decision to prosecute under the Act and that in any event the appellant never sought such reasons; and
- that the appellant is mistaken insofar as he suggests that the Authority intends to rely on the section 89 report of the trial of the action.

**15.** It is also pleaded that the arguments concerning the caution are classically matters for the trial judge and not the High Court by way of judicial review and that the matters raised by the applicant are substantive matters relating to his trial.

### **The Evidence**

**16.** The appellant swore an affidavit verifying the material set out in the Statement of Grounds and exhibiting a large number of documents, including the Summonses, the correspondence, and the section 89 investigation report.



**17.** A replying affidavit was sworn by Maeve Hogan, the Chief Executive Officer of the Authority. She explains that the respondent is a statutory body established under the 2011 Act. Its principal function is to regulate the provision of property services in the State and it is responsible for issuing and renewing licences permitting persons to engage in property services and has a Register of all such licences. She refers to the company, Edward Paul Nugent Limited, which was a private company limited by shares incorporated within the jurisdiction in 1980. It went into liquidation on or about the 9 April 2018. Prior to its liquidation, the applicant was a director of the company while Ms. Elizabeth Nugent was the company secretary. The address of the directors was a particular address in Castleblayney, County Monaghan.

**18.** The company was a licensee under the Act and provided auctioneering and other property services in Castleblayney. It had licences between 2013 and 2015, and between 2016 and the 19 February 2017. On the 21 February 2017, a letter was issued to the appellant to inform him that the company's licence had expired as no application to renew it had been received. The employees of the company including the appellant applied to renew their individual licences but their applications were deemed withdrawn following the failure of the company, being their employer, to renew its licence. They were informed of this by correspondence from the respondent in June and July 2017.

**19.** By letter of appointment dated the 19 February 2018, the Authority appointed William O'Gorman and Antoinette Gavin as inspectors to carry out an investigation into the activities of the company and Castleblayney Livestock Sales which carried on business from Muckno Street, Castleblayney, Co. Monaghan. The letter of appointment was exhibited.

**20.** The inspectors attended at the premises on the morning of the 9 March 2018 and following their investigation they prepared a report dated the 29 August 2018, which is exhibited.

**21.** They record that they entered the premises at 10:50am and requested to speak with the appellant. Having been advised that he was not present, they spoke initially with one Maura Nugent who was working in the premises. She confirmed to the inspectors that an estate agent business and mart were being run from the premises without a licence. According to the report, the appellant arrived at the premises at 11:23am and under caution confirmed that he was an auctioneer and principal of the company and that an active estate agent and mart business was being run from the premises. The report records that the inspectors gathered certain documentation including advertisements for properties that were for sale or rent and information in relation to sales that had been concluded. The appellant is recorded as having confirmed that he would be conducting a mart at 1:00pm that day despite having been advised that he would be contravening the Act in so doing.

**22.** The report states that the inspectors returned to the premises at 1:00pm and that they observed the appellant acting as auctioneer as livestock was sold at the auction. They recorded their view that section 28 of the Act had been contravened.

**23.** Having considered the inspectors' report, the Authority was satisfied that there was sufficient evidence to suggest a contravention of section 28 of the Act and decided to bring summary proceedings against the appellant. A certificate prepared in this regard was exhibited.

**24.** The Authority applied to the District Court Office for the District Area of Carrickmacross for the issue of a summons against the appellant alleging that he had committed two offences: (1) that he provided property services by conducting an auction of livestock and at the time of so doing was not the holder of a licence and, (2) that he held himself out in person as being available to provide property services within the meaning of the Act and at the time was not a holder of a licence. The summons duly issued from the District Court Office on the 14 December 2018 and this is exhibited.

**25.** The summons was returnable to 27 February 2019 and was served on the appellant by the Authority's solicitors by letter dated the 20 December 2018. No response having been received, the Authority's solicitor sent a further letter on the 25 January 2019. By letter dated the 29 January 2019, the appellant notified them that he had instructed Branigan Feddis Solicitors to represent him. On the 18 February 2019, the Authority's solicitors provided disclosure documentation to the appellant's solicitors including the report together with the appendices thereto and the CEO's certificate.

**26.** By letter dated the 26 February 2019, which was also sent by email, the appellant's solicitors sought further disclosure. In particular they sought the original notes taken by the inspectors during the investigation. The Authority's solicitors replied on the 26 February 2019 that the typed on-site inspection notes that had already been disclosed had been transcribed directly from the inspectors' handwritten notes and that thereafter the handwritten notes had been destroyed.

**27.** The parties appeared before the District Court on the 27 February 2019. Counsel for the appellant indicated that no plea was being entered and that they were seeking formal

confirmation that there were no contemporaneous notes available for the site visit made by the inspectors. This was confirmed to the court. The matter was listed for hearing on the 17 July 2019.

**28.** On the 6 March 2019, the appellant's solicitors wrote to the Authority's solicitors noting that the disclosure was complete, that the prosecution intended to rely on the material already disclosed and that the handwritten notes had been destroyed.

**29.** On the 24 May 2019, the appellant's solicitors wrote and requested that the Authority dismiss the prosecution on the basis that the handwritten notes had been destroyed. By letter dated the 28 May 2019 they advised that if the prosecution was not withdrawn by close of business on the 31 May 2019, they would seek prohibition in the High Court. The Authority's solicitors replied on the 30 May 2019 that the prosecution would not be withdrawn and advising that they would oppose any application to have it dismissed.

**30.** No leave was sought at this point to bring judicial review proceedings. Some four weeks lapsed before the next step on the part of the appellant. The appellant's solicitors wrote to the Authority's solicitors on the 28 June 2019 repeating their concern regarding the notes and proposing that the District Court deal with the application to dismiss the prosecution on a preliminary basis on the 17 July 2019 to avoid the unnecessary costs of the attendance of all witnesses. The Authority's solicitors replied on the 3 July 2019 saying they were not agreeable to the hearing being limited to the preliminary issue on the 17 July 2019. They confirmed that they would not object to the preliminary application being made but that they would be opposing the application.

**31.** The appellant sought leave to issue judicial review proceedings from the High Court on the 15 July 2019.

**32.** Each of the two inspectors swore an affidavit for the purpose of the judicial review proceedings. Ms. Gavin says that on Monday 12 March 2018 she directly transcribed the handwritten contemporaneous notes that she had taken on 9 March 2018 into a typed record of the notes. She transcribed anything she had written in short-hand into long hand. Once this was completed she printed out the typed note and signed it and it was also signed by Mr. O’Gorman. She says she then placed the signed, typed record of the handwritten notes onto the file and destroyed the handwritten contemporaneous notes by shredding them. Mr. O’Gorman confirms that these matters occurred as described by her also. In fact, the typewritten version of the notes is dated the 2 May 2018.

### **The High Court judgment**

**33.** The judgment of the High Court was delivered electronically on the 17 September 2020 and the High Court Order perfected on the 18 November 2020. The reliefs were refused on the grounds that:

- (1) The proceedings were instituted out of time and/or in the alternative,
- (2) The appellant was not entitled to an extension of time because no evidence or submissions had been offered in support of such an application and/or
- (3) The case involved issues concerning the admissibility of evidence which were quintessentially issues which fell within the jurisdiction of the District Court judge.

**34.** In respect of the time issue, the trial judge distinguished between the part of the case which related to the power of the Authority to investigate the appellant and to institute criminal proceedings, and the part of the case based on grounds relating to the destruction of the handwritten notes of the site visit and the caution. In respect of the former, the trial judge determined that time began to run from the date of the service of summons (20 December 2018) or, at the latest, from the date when disclosure was made (18 February 2019) at the latest. Accordingly, the time limits had expired either on the 19 March 2019 or on the 17 May 2019.

**35.** In respect of the remainder of the case, the trial judge took the view that the period might have commenced a little later, on the 26 February 2019, when it was confirmed to the appellant that the original handwritten notes had been destroyed. This would mean that the period for bringing the application expired on the 25 May 2019. This however left a period of some eight weeks within which no leave to bring judicial review proceedings was sought on the 15 July 2019 some two days before the District Court hearing date.

**36.** The trial judge said that the matter of time had been clearly raised in the statement of opposition and yet no affidavit was sworn to explain the delay. The Rules were clear that affidavit evidence was required to ground an application for an extension of time. The appellant had simply failed to adduce any evidence to satisfy the court of the relevant matters. The trial judge concluded that the appellant was therefore out of time and had provided no basis to the court to enable it to extend time.

**37.** The trial judge also went on to say that he would in any event have refused the reliefs sought because all of the matters being raised on behalf of the appellant were

“quintessentially matters that fall within the jurisdiction of the judge presiding over the trial”. He said that where the primary object of the proceedings was to render inadmissible all or a portion of the prosecution evidence, the preferable course was to allow such issues to be ventilated before the District Judge, citing *inter alia* *Byrne v. Grey*<sup>1</sup> and *Blanchfield v. Harnett*.<sup>2</sup> He declined to express any view on the merits of the arguments raised by the applicant as these were more properly matters for the District Judge.

### **The Submissions of the parties**

#### *The appellant’s submissions*

**38.** *The Time issue* - Regarding the time limit for bringing judicial review proceeding, the appellant contends in the first instance that no extension of time was or is required. Reference is made to *Vattekaden v. DPP* where this Court<sup>3</sup> upheld the decision of the trial judge<sup>4</sup> that time did not begin to run in circumstances where the defendant in a sexual offence prosecution had been in correspondence with the prosecutor (the DPP); he had sought access to the names of other parties against whom the complainant had previously made allegations of a sexual nature. The appellant submits that there is a parallel with his case insofar as he had corresponded with the Authority seeking to have the prosecution dropped and seeking to have a preliminary issued dealt with in order to save costs.

**39.** Counsel also relies on *Murphy v. District Judge Wallace*,<sup>5</sup> in which the High Court held that the applicant in that case was entitled to delay his application for judicial review

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<sup>1</sup> [1988] IR 31

<sup>2</sup> [2002] 3 IR 207

<sup>3</sup> [2016] IECA 205

<sup>4</sup> [2015] IEHC 494

<sup>5</sup> [1993] I.R. 138

pending a decision of the prosecutor as to how it was proposing to proceed after judgment was delivered in another relevant case.

**40.** Counsel also cited *McDonough v. Irish Water*,<sup>6</sup> which concerned waste and water charges levied against the operator of a private caravan park. An argument was raised that the applicants were out of time to bring judicial review proceedings, given the dates of the last invoice and/or disconnect notice. There was extensive correspondence between the applicants' solicitors and the local authority, during which the latter promised not to disconnect the water and urged the applicant not to seek leave for judicial review proceedings, arguing that there was no order to be reviewed. Baker J. said that if the relevant date ran from the invoice, she would be willing to extend time. She said that the delay was caused in large part by the correspondence, which was "fulsome and frank on the part of both parties and it was clear that it was hoped that the matter would resolve". She said that the applicants were "lulled into a false sense of security" that a time point would not be taken, and she held that she would allow an extension of time.

**41.** Counsel contends, in the alternative and in the event that the Court considers that an application for an extension of time was/is necessary, that the appellant has satisfied the *O'S* test. She seeks to counter the respondent's contention, which was accepted by the trial judge, that there was 'no evidence' before the court on the issue of time, saying that the evidence consisted of the correspondence exhibited to the Court. This correspondence, she says, showed that the appellant had been agitating the issues now raised from an early stage and that he had sought to find a reasonable way forward by asking for determination of a preliminary issue in a manner which would have saved costs if it had been accepted. She

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<sup>6</sup> [2014] IEHC 646 (Unreported, High Court Baker J., 17th December 2014)



also submits that there would be no prejudice to the respondent if the extension of time were given.

**42.** *The vires issue/jurisdiction point* - The appellant submits that the Authority was not entitled to prosecute because the power to prosecute in section 94(7) was contingent upon there having been a valid section 89 investigation report, and that this link was missing in the present case because the investigation had been authorised in respect of *the company* only whereas the prosecution was brought against the applicant as *an individual*. Complaint is made that the inspectors' report (which post-dated the liquidation of the company) wrongfully added the name of the appellant as an individual alongside the company name. The appellant contends that this is a matter which is appropriate to be determined in judicial review proceedings and that he should not be put "at risk" in having to deal with a criminal prosecution in the District Court when there is a clear absence of compliance by the prosecutor with the statutory precondition to bringing a prosecution, which goes to the jurisdiction of the Court to hear the case.

**43.** *Caution* - The appellant makes complaint about the caution on the basis that he was not told that he, as distinct from the company, was personally at risk of prosecution. A pre-prepared written caution was read out to the appellant. It stated that the inspector(s) had been given authority to investigate *the company* and then follows with the usual formula that "you are not obliged to say anything unless you wish to do so but anything you do say will be taken down in writing and may be given in evidence". Counsel submits that the appellant interacted with the investigators on the assumption that the company and not himself was under investigation, because that was what he was told. He was never warned of the possibility that he might be prosecuted in his own personal or individual capacity. The

applicant relies upon *DPP v. Breen*,<sup>7</sup> in which a criminal conviction was quashed on appeal on the ground of a failure to give a caution; and *McMahon v. Law Society*,<sup>8</sup> in which the High Court quashed a decision of the Complaint and Client Relations Committee of the Law Society to apply to the Solicitors Disciplinary Tribunal for an inquiry into alleged misconduct of the applicant (a solicitor) on the basis of a breach of fair procedures consisting of the failure to properly inform the applicant as to the scope of the investigation. She also cites in *re National Irish Bank (No.1)*<sup>9</sup> and *DPP v. Finnerty*,<sup>10</sup> *People (DPP) v. McCowan*,<sup>11</sup> and section 66 of the 2011 Act, regarding the importance of the right to silence, cautions, the inadmissibility of involuntary statements and the importance of maintaining a comprehensive and accurate note of admissions. The appellant submits that the issue raised goes beyond the admissibility of evidence and raises questions of fundamental fair procedures.

**44. Missing evidence** - The appellant also submits that the deliberate destruction of the original notes of the inspection at the premises renders it impossible to have a fair trial, citing decisions from the *Braddish*<sup>12</sup> or “missing evidence” line of authority (*Savage v. DPP*,<sup>13</sup> *Wall v. DPP*,<sup>14</sup> *Stirling v. DPP*,<sup>15</sup> *Sirbu v. DPP*,<sup>16</sup> *O’Brien v. DPP*.<sup>17</sup>). Counsel submits that, contrary to the submission of the Authority that the inspectors can give oral evidence about the original notes, the appellant is put at risk of an unfair trial and the possibility of being found guilty in the absence of documents which may have supported his position. It is

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<sup>7</sup> (Unreported, Court of Criminal Appeal, 13th March, 1995)

<sup>8</sup> [2009] IEHC 33 (Unreported, High Court, Herbert J., 10th July, 2009)

<sup>9</sup> [1999] 3 I.R. 145

<sup>10</sup> [1999] 4 I.R. 364

<sup>11</sup> [2003] 4 I.R. 349

<sup>12</sup> [2001] 3 I.R. 127

<sup>13</sup> [2009] 1 I.R. 185

<sup>14</sup> [2013] 4 I.R. 309

<sup>15</sup> [2014] 1 I.R. 602

<sup>16</sup> [2015] IECA 238 (Unreported, Court of Appeal, Hogan J., November 9, 2015)

<sup>17</sup> [2016] IEHC 3 (Unreported, High Court O'Malley J., 12th January 2016)

submitted that the handwritten notes would have provided critical evidence concerning the fundamental problem in the case which is (according to the appellant) that the prosecution seeks to “arrogate onto the appellant the status of non-licensee and thereafter to be the subject of prosecution when the statutory process of investigation (non-licensee) referred to [the company] as non-licensee” (paragraph 65 of the appellant’s written submissions). The appellant submits that the typed notes and the section 89 report are “internally conflicting” and there is a lack of clarity as between the appellant individually and the company as non-licensee. He submits that the absence of the original handwritten notes of his responses creates a real risk of an unfair trial that cannot be remedied by any action of the trial judge.

**45.** In general terms, the appellant complains that both the respondent and the trial judge wrongly characterised the case as one concerning the admissibility of evidence for the trial judge, when in fact the issues are much more fundamental than that and go to the question of a statutory body exceeding its statutory powers and failing to comply with preconditions to prosecution under a specific statutory regime. Criticising the alteration of focus from the company to the appellant individually, he speaks of the “incremental redefining of the boundaries of the investigation” which “crystallised” once it became clear the company was going into liquidation.

*The Authority’s submissions*

**46.** *The time issue* – The Authority places considerable emphasis upon the time limit issue and urges the Court to decide the case solely on this issue. The Authority is critical in the first instance of the failure of the appellant to commit to identifying any starting point for time running for the purpose of the time limit, and of the appellant’s failure to accept

definitively that an extension of time application, supported by proper evidence on affidavit, was in fact required.

**47.** The Authority submits that even taking a view of the dates from the point of view most favourable to the appellant (the 18 February 2019 and the 26 February 2019 respectively), as did the trial judge, there still remains a period of time of approximately 7 or 8 weeks for which an extension of time is required. Counsel criticised the argument of the appellant that time did not start running by reason of the appellant's correspondence requesting the prosecution be dropped, saying that this would enable any appellant to decide when the time starts to run, contrary to the purpose of Order 84, Rule 21(1) which provides for an objective criterion in this regard ("within three months from the date when grounds for the application first arose"). Further, even if the appellant were correct, time would have started to run when the letter was responded to, in early June 2019.

**48.** Counsel submits that, unlike the *Vattedkan* case, no clarification was awaited as to a question of fact or disclosure of relevant material. All of the information that was available on the 27 February was in precisely the same state on the date when the appellant sought leave.

**49.** As to the suggestion that the appellant was seeking to achieve a reasonable accommodation by having a preliminary issue dealt with in isolation, the Authority submits that there is no affidavit evidence to support the view that this was indeed the appellants state of mind. On the contrary, the correspondence supports the view that the appellant engaged in a U-turn in his thinking. His solicitors in their letters of May 2019 had threatened to bring judicial review proceedings if the prosecution were not withdrawn, which showed that such

proceedings were at the forefront of their mind, as was the issue of time, since they demanded a reply “by return”. However, upon receiving a reply that the prosecution would not be dropped, they did not in fact bring such proceedings. Some time later, they wrote a letter containing the suggestion of the trial of a preliminary issue by the District Judge. The Authority contends that this shows that by this date, in fact the appellant’s state of mind was that putting matters before the District Judge was the appropriate course (and not judicial review proceedings), a position with which the Authority agrees. However, while the Authority was agreeable to the ventilating of a preliminary issue before the District Judge, it was not agreeable to postponing the trial proper to another date. This was the point of dispute which had been reached at the time the appellant decided to seek leave for these proceedings. The Authority describes the position as a *volte face* on the part of the applicant and certainly not consistent with the proposition that the appellant was going to great lengths to reach a reasonable accommodation. The Authority submits that this is indeed an “eve of trial” application of the type which was deprecated in cases such as *Scully v. DPP*.<sup>18</sup>

**50.** The Authority is highly critical of the appellant for failing to deal on affidavit specifically with the issue of why an extension of time should be granted, citing the precise provisions of Order 84 Rule 1(3), (4) and (5). The Authority does not accept that simply exhibiting the correspondence is evidence of the type envisaged by the Rule in this regard (and in any event contends, as described above, that the correspondence is not supportive of the position advocated by the applicant).

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<sup>18</sup> [2005] IESC 11, [2005] 2 ILRM 203

**51.** The Authority submits that the case should be dealt with on the “time” issue alone, but submits in the alternative that the remaining arguments are clearly matters for the trial judge in any event and should not be dealt with by the High Court in its judicial review jurisdiction.

**52.** *The missing evidence argument* - It is accepted by the Authority that the fact that the destruction of the contemporaneous handwritten notes is “unsatisfactory” but the Authority contends that this is an issue suitable for submissions and decisions at the trial. Importantly, even if the issue as to the notes were to be decided in favour of the applicant and the admissions were to be ruled inadmissible, that would not be the end of the prosecution case. The inspectors saw the applicant conducting a mart with their own eyes and this aspect of the case is not dependent upon his admissions.

**53.** Further, the Authority contends, the missing item in the present case is not on a par with the items of real evidence missing in cases such as *Braddish and Dunne*<sup>19</sup> (CCTV footage), *Wall* (failure to conduct forensic tests on a vehicle), or *McFarlane* (items on which fingerprints found).<sup>20</sup> Here, the inspectors would be able to give oral evidence of what the applicant said in response to questions (as well as of their observations, for example, of the mart taking place later that day), and they can be cross-examined in a *voir dire* before the trial judge on the issue of the question they posed and the answers they were given. The Authority contends that while the applicant makes generic references to inconsistencies and ambiguities as between and in the typed-up notes and the section 89 report, he has failed to engage with how precisely he is prejudiced by the loss of the original handwritten notes nor has he suggested what particular relevant facts are in dispute. The Authority also points out

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<sup>19</sup> [2002] 2 I.R. 305

<sup>20</sup> [2008] 4 I.R. 117

that the District Judge not only has the power to rule the evidence in admissible but to dismiss the case if he considers that to be appropriate.

**54.** *The caution issue* - Regarding the caution issue, the Authority submits that it is not at all beyond argument that the caution was invalid or the evidence inadmissible simply because the company and not the individual was stated to be under investigation at the time. Various arguments could be made in that regard on behalf of the Authority and it could not be said that the prosecution was “fundamentally flawed” because of what had occurred.

**55.** Counsel also points out that since the decision of the Supreme Court in *DPP v. JC*<sup>21</sup> the question of admitting unconstitutionally obtained evidence falls to be determined as a matter of discretion. This renders such issues all the more inappropriate to be dealt with on judicial review rather than by decision of the trial judge.

**56.** *The vires issue* – The Authority submits that it is well established that a trial judge is entitled to rule on issues of statutory interpretation and not merely issues relating to the admissibility of evidence. It presents in outline form what it proposes to argue in front of the trial judge on this issue. Essentially, its argument before this Court is that as a matter of statutory interpretation, the power to prosecution under section 94(7) is independent and free-standing, and does not depend upon the person who is prosecuted having been the subject of a prior section 89 investigation. It elaborates further upon this argument in a number of ways but I do not consider it necessary to set out the sub-strands of the submission here.

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<sup>21</sup> [2015] IESC 31

57. *Test for prohibiting trial* –The Authority submits that Barr J.'s conclusion that the issues raised by the appellant under this heading were matters for the District Court was entirely consistent with the shift in the attitude of the Superior Courts to applications for prohibition over the past decade or so. It has been stressed repeatedly by the courts in recent times that the court of trial is best placed to ensure that a fair trial is conducted in due course of law (see for example the detailed consideration of the authorities in the decision of Whelan J. in *HS v. DPP*).<sup>22</sup> The applicant did not propose to reproduce quotations from the various cases that were relied upon by Barr J. in those submissions and it suffices simply to note that Barr J.'s decision accorded with the sentiments expressed by, to give just a few examples, Fennelly J. in *Blanchfield v. Harnett* and *CD v. DPP*,<sup>23</sup> Twomey J. in *Foley and D2 v. Workplace Relations Commission*,<sup>24</sup> Ní Raifeartaigh J. in *Silvergrove Nursing Home Limited v. Chief Inspector of Social Services*<sup>25</sup> and Charleton J. in *Nash v. DPP*.<sup>26</sup> In the last mentioned case, Charleton J. summarised the rationale for the present state of the law, so far as prohibition is concerned, thus (at para.23):-

*“An application to stop a trial before the trial judge may best be decided upon a consideration of all of the evidence and how the alleged defect, be it delay or missing evidence or unavailable witnesses, impacts on the overall case. Whether the real risk of an unfair trial that cannot be otherwise avoided exists is, in such cases of any argument that justice has been diminished, often best seen in the context of such live evidence as had been presented and not through the contest on affidavit that*

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<sup>22</sup> [2019] IECA 266

<sup>23</sup> [2009] IESC 70

<sup>24</sup> [2016] IEHC 585

<sup>25</sup> [2019] IEHC 774

<sup>26</sup> [2015] IESC 32



*characterises these cases on judicial review seeking prohibition in the High Court or on appeal.”*

## **Decision**

*Whether the appellant requires an extension of time*

**58.** The first question is whether the appellant was out of time and therefore required an extension of time.

**59.** Order 84, Rule 21(1) provides: “An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose”. It is not necessary for this Court to grapple in this particular appeal with the question of whether time started to run from the date when the grounds arose (objectively speaking) or when the applicant became *aware* that they arose. This matter which was discussed at some length by Clarke J. (as he then was) in *Veolia Water UK Plc v. Fingal County Council (No.1)*<sup>27</sup> at paragraphs 28-57 of his judgment, in the context of Order 84A rule 4 and the judicial review time limit in cases concerning public procurement (in which he concluded that the correct position was that time ran from when the grounds arose objectively speaking). However, in the present case, while the respondent had made an argument in the High Court about this issue, relying upon *Irish Skydiving Club Limited v. An Bord Pleanála*,<sup>28</sup> this was not pressed on appeal. The High Court judge did not accept the respondent’s argument and distinguished between a planning decision (such as was in issue in that case) and a case such as the present, where a party would not have notice of the issue of the summons until it was served. In this Court, the applicant simply argued that even if

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<sup>27</sup> [2006] IEHC 137

<sup>28</sup> [2016] IEHC 448

one took the approach of the High Court judge to the running of time which was the most favourable approach from the applicant's point of view, the applicant was still out of time. From the date upon which all the necessary information was available to the applicant to the date upon which leave was sought was a period of 7 or 8 weeks, and an explanation was required as to why leave was not sought during this time. I am of the view that it is correct to say that the applicant was out of time no matter which view one takes of when time started to run.

**60.** I do not accept the applicant's argument about the correspondence if and insofar this argument is intended to suggest that time did not run while he was waiting for an answer from the prosecution to his request that the case be discontinued. Nor do I do not accept that seeking to persuade the prosecution to consent to a hearing involving a preliminary trial prevented time from running in the case. These matters would at most be relevant to whether or not an extension of time should be given.

**61.** Accordingly, in the first instance, I agree with the trial judge that the three-month time limit for bringing judicial review proceedings had expired and that an application for extension of time was required.

*Whether the appellant was/is entitled to obtain an extension of time*

**62.** Order 84 Rule 21 provides that the court shall only extend the period if "(a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either:(i) were outside the control of, or (ii) could not reasonably have been anticipated by the applicant for such extension."

**63.** Subparagraph 4 provides that “the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.”

**64.** Subparagraph 5 provides that “An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant’s failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.”

**65.** In *O’S v. Residential Institutions Redress Board*,<sup>29</sup> Finlay Geoghegan J. delivering the judgment on behalf of the majority of the Supreme Court described the jurisdiction to extend time in the following terms at paragraph 60 of her judgment:

*“I have concluded that the case law cited above, insofar as it applies to the extension of the time specified under O.84 for the bringing of judicial review proceedings, makes clear that the jurisdiction which the Court is to exercise on an application to extend time is a discretionary jurisdiction which must be exercised in accordance with the relevant principles in the interests of justice. It clearly requires an applicant to satisfy the Court of the reasons for which the application was not brought both within the time specified in the rule and also during any subsequent period up to the date upon which the application for leave was brought. It also requires the Court to consider whether the reasons proffered by an applicant objectively explain and justify the failure to apply within the time specified and any subsequent period prior to the application and are sufficient to justify the Court exercising its*

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<sup>29</sup> [2018] IESC 61, [2019] 1 ILRM 149

*discretion to extend time. The inclusion of sub-rule (4) indicates expressly that the Court may have regard to the impact of an extension of time on any respondent or notice party. The case law makes clear that the Court must also have regard to all the relevant facts and circumstances, which include the decision sought to be challenged, the nature of the claim made that it is invalid or unlawful and any relevant facts and circumstances pertaining to the parties, and must ultimately determine in accordance with the interests of justice whether or not the extension should be granted. The decision may require the Court to balance rights of an applicant with those of a respondent or notice party. The judgments cited do not, in my view, admit of a bright line principle which precludes a court taking into account a relevant change in the jurisprudence of the courts when deciding whether an applicant has established a good and sufficient reason for an extension of time. Further, the judgments cited above do not envisage any absolute rule in relation to what may or may not be taken into account or constitute a good reason or a good and sufficient reason. The Court, in an application for an extension of time, is exercising a discretionary jurisdiction and in the words of Denham J. in de Roiste, '[t]here are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion. The exercise of a discretion is the balancing of factors - a judgment.'*"

**66.** I agree with the trial judge that the appellant failed to comply with Order 84 Rule 21(4) insofar as no affidavit was sworn either by the appellant or his solicitor containing an explanation as to why he was out of time in seeking leave to bring judicial review proceedings. The appellant has contended that the evidence requirement was satisfied by means of the correspondence exhibited. However, even leaving aside the fact that no affidavit was sworn as is envisaged by the Rules, the correspondence on its face does not

support the explanation now advanced by the appellant through the submission of counsel, namely that the appellant was simply advancing a reasonable accommodation by suggesting the trial of a preliminary issue and that this was a reasonable explanation for the failure to issue proceedings until this discussion had been brought to a conclusion.

**67.** On the contrary, the correspondence suggests that there was a tactical U-turn shortly before the District Court date of the 17 July 2019. It appears that, initially, the appellant and his legal advisers were contemplating judicial review proceedings, because they asked for the prosecution to be dropped and threatened to bring such proceedings if this was not forthcoming. However, when told that the prosecution would not be dropped, they then decided to try to persuade the Authority to agree to a self-contained preliminary trial date before the District Judge, thus implicitly accepting that the relevant matters were within the jurisdiction of the District Court. However, when consent to the proposed course of action *on their terms* was not forthcoming (the Authority was prepared only to agree to a preliminary issue followed by the trial itself if the Authority won on the preliminary issue), they changed tack and brought the leave application very shortly before the District Court hearing date.

**68.** Contrary to the submission on behalf of the appellant, I do not see any meaningful parallel with the facts of *Vattekadan v. DPP*, where information relevant to the trial was still awaited by the defendant/applicant (i.e. the names of the other men against whom similar allegations had been made and/or whether or not the complainant would disclose those names). No information was still awaited in the present case by way of disclosure once the appellant had been given all the documents and told that the contemporaneous handwritten notes had been destroyed.

**69.** Nor do I think the case is similar to *Murphy v. District Judge Wallace*; in that case, another judgment had been handed down (*Graham v. District Judge Connell*),<sup>30</sup> which involved an important legal development concerning the validity of distress warrants (warrants authorizing distraint), and the prosecutor needed time to consider its position in light of that judgment. In the present case, there was no new information or change in the law which required to be considered; instead, the appellant in correspondence was simply asserting that his view of the law was correct and that the prosecution should be dropped and/or that a preliminary issue should be heard first.

**70.** Nor is the case similar to *McDonough* where Baker J. extended time because she held that the correspondence between the parties had lulled the applicant into a false sense of security that a time point would not be taken, given the stance adopted by the local authority in their correspondence. There had been extensive correspondence in which the local authority had urged the applicant not to bring judicial review proceedings, suggested that there was no decision yet in being which was amenable to review, and Baker J. commented that the whole tenor of the correspondence suggested that the matter was likely to reach a satisfactory agreed outcome. There is nothing in the correspondence between the parties in the present case which suggests that the appellant was in some way led into thinking that a time point would not be taken or that there was a reasonable possibility that the case would not proceed.

**71.** Accordingly, I agree with the trial judge that there was no evidence before the court sufficient to ground an application for extension of time or to show that the conditions for

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<sup>30</sup> unreported High Court, 9 December 1987

granting an extension, as set out in Order 84 Rule 21(3) and as described in *O'S*, had been fulfilled.

**72.** The trial judge also stated that he did not think the matters raised were suitable in any event for judicial review, and likewise I will deal with that in the next section.

*Whether the remaining matters are suitable for judicial review or whether they should be left to the trial judge for determination*

**73.** As regards the “caution issue”, I have no hesitation in reaching the conclusion that this is a matter which should be determined by the trial judge. The question of the admissibility of answers to questions posed under caution by an investigating officer is clearly an evidential matter. Issues relating to the terms of a caution given to an accused person, and other circumstances concerning cautions, are regularly and routinely dealt with by trial judges, whether in summary trials or trials on indictment. The fact that the investigation and prosecution arise under a particular statutory framework such as the 2011 Act does not alter the fact that the underlying question is whether the answers given by the appellant when questioned under caution should be admitted into evidence at the trial. It may be noted that some of the decisions cited by the appellant, such as *DPP v. Breen* and *DPP v. McCowan*, are in fact decisions on appeal against conviction. As to the decision in *McMahon*, what was under review was a decision of one committee of the Law Society to initiate an inquiry before another committee; in this sense, it was the final decision of the first committee that was under review and, absent a decision of the High Court, there would be no further review of its decision. This is a very different situation to that arising here, where there will be a trial of the issues before a District Judge who has full power to rule the evidence inadmissible (or to dismiss the case) if he or she considers it necessary or appropriate to do so.

**74.** Further, the prosecution evidence in the present case is not limited to the answers given by the appellant during the relevant question-and-answer exchange. The inspectors say (and will give evidence) that they observed a mart taking place on the date of the inspection. This has not been disputed by the applicant on affidavit. Clearly this is not a case suitable for prohibition or other relief bringing the prosecution to a halt even if the appellant was to be proved to be correct in his argument about the caution.

**75.** As to the “missing evidence” issue, I agree with counsel for the Authority when he concedes that it is unsatisfactory that the original handwritten contemporaneous notes were deliberately destroyed by the inspectors on a date subsequent to the inspection, albeit after the inspectors had (on their account) accurately transcribed the notes into typewritten form. The equivalent in the typical criminal case is the Garda notebook, and the handwritten entries in Garda notebooks are always (or should be) retained even if the notes are typed up after the event.

**76.** However, I cannot agree with the appellant that this act of destruction elevates the case into one in respect of which prohibition should be granted. The missing evidence must be such that there is a real risk of an unfair trial which cannot be remedied by direction or decision of the trial judge. The appellant must also engage with the precise role of the missing evidence within the matrix of the evidence that remains in the case. The appellant has made generalised assertions about inconsistencies between the section 89 report and the typed-up notes of the question-and-answer exchange, but has failed to engage sufficiently with the evidence or to point to a particular factual dispute upon which the missing notes might have shed light. Further, he fails to advert at all to the other evidence in the



prosecution. The threshold for the Superior Courts to intervene and prohibit the case from proceeding is a high one and has not been reached in this case. The trial judge can deal with the consequence of the destruction of the notes. If he or she considers it appropriate to rule the appellant's responses to the inspectors' questions inadmissible, this ruling can be made. Alternatively, the District Judge can exercise the *PO'C* jurisdiction, having heard the evidence, to dismiss the case in its entirety; see paragraphs 9.2-9.4 of the judgment of the Chief Justice in the relatively recent Supreme Court decision in *DPP v. C.Ce*,<sup>31</sup> where he set out the principles concerning this jurisdiction, which can be easily adapted to cases of missing evidence as distinct from delay. The applicant is not without remedy or at risk of an unfair trial simply because he has not reached the threshold for intervention by the Superior Courts to obtain prohibition.

**77.** On the issue of the relationship between an investigation under section 89 and section 94(7), this again appears to me to be a matter which falls to be determined by the trial judge. It is not unusual for a criminal trial judge to interpret statutes for the purpose of deciding whether a statutory precondition to prosecution has been satisfied. It is not appropriate for the Superior Courts to intervene to pre-empt the decision of a trial judge in that regard.

**78.** Like the High Court judge, I propose to make no comment with regard to the merits or otherwise of the appellant's arguments in this regard and have merely noted the outline arguments of the parties on the issue without entering into the more detailed nuances of the sub-arguments in that regard.

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<sup>31</sup> [2019] IESC 94

**79.** In summary, I agree with each of the conclusions of the High Court Judge and consider that the appeal should be dismissed.

**80.** As the respondent has been successful in this appeal, my provisional view is that the respondent is entitled to the costs of the appeal. If the applicant wishes to contend for a different order, he has liberty to apply to the Court of Appeal Office within 14 days for a brief hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, he may be liable for the additional costs of that hearing. In default of receipt of such application within 14 days, an order in the terms proposed will be made.

**81.** As this judgment is being delivered electronically, I wish to record that both Whelan and Murray JJ. have indicated their agreement with it.