Neutral Citation Number: [2010] IEHC 323

The High Court

2005 834 P

Between:

G.V.M. Exports Limited (In Voluntary Liquidation)

Plaintiff

-and-

Ireland, The Attorney General and

The Minister for Agriculture, Food and Rural Development

Defendants

2003 745 JR

Between:

G.V.M. Exports Limited (In Voluntary Liquidation)

Applicant

-and-

The Minister for Agriculture, Food and Rural Development

Respondent

-and-

District Judge Mary O'Halloran

Notice Party

Judgment of Justice William M. McKechnie delivered on the 28th day of July 2010

1. This judgment is given in respect of the above-named cases, which were consolidated by Order of Quirke J. on the 12th April 2005. These were heard by this Court, at the same time as the associated case of *Clement Hayes v. Ireland, The Attorney General, the Minister for Agriculture and Food* (Record No.: 2007 / 322 JR), in respect of which a separate judgment has already been delivered.

Background:

2. The plaintiff ("GVM") is a cattle export company, incorporated on the 17th February 1999, and now in voluntary liquidation. Its main customers were in Italy and Spain. A price *per* kilo would be agreed between GVM and the customer; the cattle would be brought to a GVM mart, where the animals would be weighed, their tag numbers recorded, their passports checked, and the documents required for the purchase of the animal by the mart issued. It was a condition of purchase, *inter alia*, that animals would be tested for Bovine Tuberculosis ("TB") and brucellosis. Cattle would go directly to the plaintiff's facilities for processing, on lands rented at Kilmacow, Co. Kilkenny, approximately four miles from Waterford port. These lands comprised approximately 60 acres which were fenced and controlled, and which had penning, a crush for selecting animals, and sheds for feeding and holding. Animals arriving at the centre would be sorted into groups for separate export markets. Animals which did not have export licences were required, under certain export regulations, to be 30 day TB tested and 30 day brucellosis tested.

3. The general practice in relation to testing was that blood samples taken for the brucellosis test would be couriered to a laboratory in Cork so that the results would be back for the second limb of the TB testing, which involved taking readings from the animals 72 hours later. The tested animals were then transported to Waterford port, where, upon presentation of export certificates, cards and tags, checked by Department of Agriculture, Food and Rural Development ("the Department") officers, they would be issued with a Health certificate, allowing the animals to board the boat.

4. On or about the 6th August 1999, 250 cattle belonging to the plaintiff were tested for TB and brucellosis at the Kilmacow holding facility. Resulting from this, the Department claimed that there were five reactors, which had tested positive for brucellosis. On foot of this, two "Notifications Regarding Restriction on Holding" dated the 12th August 1999 were issued under the Brucellosis in Cattle (General Provisions) Order 1991 (S.I. 114/1991), and addressed to the plaintiff at Kilmallock, Co. Limerick, referring to Herd Nos. M146240 and M188139 "of holding at Kilmacow, Co. Kilkenny & elsewhere" ("the Restriction Notices").

5. The passports for the animals in question were returned to a Mr. John Fleury, a shareholder of the plaintiff, on the 10th August 1999. On or about the same day, 60 animals from those herds were exported to Italy, where, according to the plaintiff, no effort was made to restrict the animals. Similarly, 27 of the animals were sold to a Mr. Ivor Gettings in Tullamore; without Department disapproval.

6. The relevant Veterinary Inspector considered that GVM's "holdings" in the herd numbers identified in the Restriction Notices,

including all lands that they used for farming purposes, either solely or jointly with any other persons, were covered by the Restriction Notices, so that, as prohibited thereunder, all female animals and bulls aged 12 months or more could not be moved into or out of such holdings. On the 13th August 1999 the plaintiff received the Restriction Notices, but agents of the plaintiff continued to purchase cattle. The Veterinary Inspector considered that the company was entitled to do this provided that those animals, being either female, or male over 12 months of age, went direct to an approved export lairage or to a port. The plaintiff claims that the five reactors were later re-bled and retested; testing negative for brucellosis.

7. However a large number of GVM owned cattle did not go direct to export following purchase, but were instead placed on holding farms which, the plaintiff claims, had no association with Herd Nos. M146240 and M188139. On the 19th October 1999, the Department also restricted holdings belonging to a Mr. Sean Hanley and Mr. Clement Hayes which contained GVM cattle, alleging that they contained brucellosis reactors.

The District Court Proceedings:

8. Arising out of events occurring prior to those above-mentioned, the plaintiff was served with five summonses alleging that on the 31st July 1999 at Sixmilebrige, Co. Clare, the plaintiff had moved into a holding, known as GVM Sixmilebridge Mart, a bovine animal being aged more that 12 months (being an 'eligible animal' within the meaning of Article 2 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 1991, as amended), identified by specified tag number, which had not passed a blood test for brucellosis within the period of 30 days prior to the 31st July 1999, in contravention of Article 18 of the said Order of 1991, as amended by Article 2 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 1998, contrary to section 48(1)(a) of the Diseases of Animals Act 1966, as amended, and contrary to such statute then in force and of effect. These charges were heard before Ennis District Court from the 19th December 2001 to the 20th December 2001 by Judge Mangan. The plaintiff was convicted on all counts and ordered to pay a fine of IR£1,500 in respect of each summons plus costs ("the Ennis prosecution").

9. The plaintiff was also charged with a number of offences which were alleged to have arisen over the course of August to October 1999; for example, *inter alia*, in summonses nos. 115, 116 and 117, for the alleged movement on the 28th September 1999 of animals into a farm in Rathkeale, Co. Limerick, which operated under Herd No. M188139. It is these later summons which are more particularly at issue in this case.

10. The plaintiff sought to challenge 123 summonses, out of the total received and set out in full *infra.*, ("the Kilmallock summonses"), before the District Court on the 15th October 2003. The summonses fell under three broad headings, relating, *inter alia*, to the following:

<u>Offences under the Brucellosis Orders:</u>

(i) Movement of an eligible animal into a restricted holding other than under and in accordance with a movement permit (24 charges);

(ii) Movement of an eligible animal out of a restricted holding other than under and in accordance with a movement permit (28 charges);

(iii) Movement of an animal into a holding which has not passed a blood test for brucellosis within the period of 30 days prior to the date on which it was moved (37 charges);

(iv) Altering or making a false entry on a cattle identity card relating to a bovine animal, particularly, altering or making a false entry as to the date on which TB or brucellosis testing had been carried out (8 charges).

<u>Offences under the TB Orders:</u>

(i) Altering or making a false entry on a cattle identity card relating to a bovine animal, particularly, altering or making a false entry as to the date on which TB or brucellosis testing had been carried out (8 charges);

(ii) When required to make a declaration in writing in the form specified in the first schedule, failing to give information within its knowledge or wilfully or negligently giving false or misleading information (1 charge);

(iii) Prior to the commencement of a TB test, failing to surrender the cattle identity card to the veterinary surgeon who was to carry out the test (5 charges);

(iv) Omitting to present for testing, all animals for the time being on the holding on which the test was to be carried out (1 charge);

(v) Altering or making a false or unauthorised entry on an identity card of a bovine animal (1 charge).

<u>Offences under the European Communities (Identification and Registration of Bovine Animals) Regulations 1999 (S.I. 276/1999):</u>

(i) Offering or uttering an instrument in respect of an animal, in particular a cattle identity passport, knowing it to be altered or falsely made, anti-dated or counterfeit (2 charges);

(ii) Having in its possession a cattle identity passport in respect of an animal which was altered, effaced or obliterated, or had a false or unauthorised entry (2 charges);

(iii) Possession of a passport relating to an animal which had an unauthorised entry as to the date on which the brucellosis test was carried (1 charge)

(iv) Failing to maintain / enter appropriate details on the herd register (10 charges).

11. The Kilmallock summonses, having been adjourned from time to time in the course of the prosecution, ultimately returned before Kilmallock District Court on the 17th October 2003 for a ruling in relation to their validity. Judge O'Halloran made certain alleged rulings in respect thereof, and in respect of which, on the 20th October 2003, the plaintiff herein brought the within judicial review

proceedings. Issue was initially taken in respect of access to a transcript taken in unusual circumstances that day, however it has since been produced to the defendants/respondent (hereinafter "the defendants") and no issue relevant to these proceedings currently arises.

12. On the said 17th October 2003, together with two other accused (Mr. John Fleury and Mr. Liam Egan), the plaintiff, as stated, appeared before Judge O'Halloran in Kilmallock District Court, where Counsel on its behalf moved to have the prosecution dismissed on the grounds of delay and abuse of process. Judge O'Halloran expressly noted that she would not be hearing the full trial of the action: notwithstanding this she made a finding that the plaintiff was aware of the Restriction Notices and made a ruling deeming service on the plaintiff good, even though, the plaintiff contends, there was no evidence of service in accordance with s. 379 of the Companies Act 1963. At that point Counsel for the plaintiff indicated that he was seeking to have a consultative case stated, before such rulings could become effective, and argued that as his submission was not frivolous, the plaintiff was entitled not to have a ruling made against it at that stage. Counsel for the defendants also submitted that a decision on the Restriction Notices was a matter for the trial and trial Judge, and asked that no ruling on the Restriction Notices be made until all the evidence was heard. Judge O'Halloran rejected the submissions of both Counsel in this regard.

13. On that date, sometime after 4 p.m., by the defendants' account around six-thirty, Counsel for the plaintiff submitted that it was unlikely that the issue of delay would be completed within that hearing day. However, without submissions being made or any evidence being called on any of the preliminary points relied upon to dismiss the summonses on the ground of delay, Judge O'Halloran, the plaintiff alleges, ruled against it on the delay issue. The matter was then put back for mention on the 21st November 2003 to fix a date for hearing by another judge. Judge O'Halloran, at the same time, refused the plaintiff liberty to make an application to dismiss on the ground of delay in the future. She did however indicate that she would sign an appeal by way of case stated, but not the transcript.

The Judicial Review Proceedings:

14. On the 20th October 2003, the plaintiff applied to O'Donovan J. in the High Court *ex parte* for leave to seek judicial review and to allow amendment to its Statement of Grounds. It should be noted that Judge O'Halloran was joined in the judicial review proceedings as a Notice Party. Ultimately the plaintiff sought an order of *certiorari* quashing the rulings of Judge O'Halloran on the 17th October 2003 and an order that the criminal proceedings against the plaintiff be discontinued. The grounds sought in the amended Statement of Grounds were that:

> (i) The validity of the Restriction Notices was a fact in issue in the defence of every summons;
>
> (ii) The decision of Judge O'Halloran to hear evidence and make rulings on the facts in issue in criminal proceedings, and then to send the case for trial in front of another judge, was a decision in excess of jurisdiction;
>
> (iii) The decision of Judge O'Halloran to rule against the application of the plaintiff for dismissal of the summonses on a preliminary ground of delay without allowing evidence to be called or submissions made, was a decision in excess of jurisdiction.

The plaintiff also made mention of the issues relating to the production of the transcript, however this is no longer in issue. The defendants have also accepted that it will not be used in any way in the prosecution of the offences against the plaintiff.

The Plenary Proceedings:

15. Following several adjournments in relation to the judicial review and the appeal by way of case stated, plenary proceedings were issued, with the Plenary Summons and Statement of Claim being delivered on the 7th March 2005. As stated, the two sets of proceedings were consolidated on the 12th April 2005 by Quirke J.

16. The Plenary Summons alleged several matters relating to the validity of various statutory instruments based, it is contended by the plaintiff, on European legislation, and upon which its prosecution depended. In particular it is contended that:

> (i) The summonses in respect of purported offences alleged to have occurred on or after the 13th September 1999 are contingent, *inter alia*, on the correct transposition of the words "holding" or "holdings" contained in Council Regulation (EC) No. 820/97, of the 21st April 1997 'establishing a system for the identification and registration of bovine animals regarding the labelling of beef and beef products' into domestic law by the European Communities (Identification and Registration of Bovine Animals) Regulations 1999 (S.I. 276/1999) ("EC(IRBA) Regulations 1999");
>
> (ii) Article 2 of the EC(IRBA) Regulations 1999 is *ultra vires* the powers of the Minister insofar as it purports to restrict the definition of "holding" or "holdings" to exclude any place in the State in which animals are held or handled;
>
> (iii) With regards to offences allegedly committed prior to the 13th September 1999, the summonses grounding those offences are contingent, *inter alia*, on the correct transposition of the words "holding" and "holdings" as contained in Council Regulation No. 820/97 into domestic law (which had not been done), and are in breach of that Regulation, and are *ultra vires* the powers of the Minister;
>
> (iv) In circumstances where the plaintiff has been convicted of and faces further criminal charges which are either contingent on or affected by the incorrect or wrongful transposition of the relevant provisions of Articles 2 and 4 of Council Regulation 820/97 into domestic law, the said charges and offences are void for uncertainty and/or lack of precision.

In those circumstances the plaintiff is entitled to a declaration that the relevant provisions of the Bovine Tuberculosis (Attestation of the State and General Provisions) Order 1989 (S.I. 308/89) ("TB Order 1989"), the Brucellosis in Cattle (General Provisions) Order 1991 (S.I. 114/91) as amended ("Brucellosis Order 1991"), and the European Communities (Registration of Bovine Animals) Regulations 1996 (S.I. 104/96), as amended, ("Registration Regulations 1996") and the EC(IRBA) Regulations 1999 are *ultra vires* council Regulation No. 820/97.

17. The plaintiff notes that it is facing criminal charges under the provisions of the TB Order 1989 and has been convicted of and is facing further charges under the Brucellosis Orders 1989 – 1998 as amended. These constitute orders of the Minister within the meaning of ss. 48 and 49 of the Diseases of Animals Act 1966 ("DAA 1966") which, by virtue of s. 23(b) of the Bovine Diseases

(Levies) (Amendment) Act 1979 as amended by s. 7(1)(b) of the Bovine Diseases (Levies) (Amendment) Act 1996 are indictable offences. Since s. 3(3) of the European Communities Act 1972 ("ECA 1972") provides that regulations made under this section shall not create indictable offences, insofar as the provisions of ss. 48 and 49 of the DAA 1966 were amended or extended or provided for by the EC(IRBA) Regulations 1999 to provide for the creation or amendment or provision(s) of indictable offences under the said Act of 1966, the Regulations are *ultra vires* the provisions of s. 3(2) ECA 1972 (as amended).

18. Furthermore, the summonses alleging offences on or after the 13th September 1999 are contingent, *inter alia*, on the amendments to the Registration Regulations 1996 contained in the generality of the EC(IRBA) Regulations 1999, and in particular at Regulations 2, 23 and 28. The effect of the provisions of s. 4(1)(a) of ECA 1972 (as inserted by the European Communities (Amendment) Act 1973 ("EC(Am.)A 1973")), is that the Registration Regulations 1996, made under s. 3 of the ECA 1972, have statutory effect and can therefore only be amended by primary legislation. Consequently the EC(IRBA) Regulations 1999 constitute Ministerial amendments to Regulations made under s. 3 of the ECA 1972, and are in breach of s. 4(1)(a) thereof, and therefore are invalid and of no effect.

19. In the alternative, s. 4(1)(a) of ECA 1972, as stated, provides that regulations made under s. 3 of the Act shall have statutory effect. The plaintiff contends that whilst it would be permissible for statutory effect to be given to secondary or European legislation which was in existence at the time of the creation of this section, it is not possible for the section to give power to the Minister to create orders/regulations which have statutory effect after this time. Such regulations having statutory effect, it is argued, cannot undergo parliamentary consideration, amendment or decision in accordance with the provisions of the Constitution and the standing orders of the Houses of the Oireachtas. Nor are they subject to the constitutional controls involved in submission by the Taoiseach of the Bill, as passed by the Oireachtas, to the President for her signature and for promulgation by her as law in accordance with Article 25 of the Constitution. Nor is a regulation made under s. 3 of ECA 1972 capable of being referred by the President under Article 26 of the Constitution for a decision on whether such might be, in whole or part, unconstitutional. Section 4, nonetheless, seeks to confer the force of statute on such regulations and to treat them as if they were in law legislation passed by the Oireachtas. Thus insofar as this section purports to give statutory effect to regulations subsequently made by the Minister under the ECA 1972, it is unconstitutional. The Oireachtas cannot, through this mechanism, clothe such regulations with the force of statute. Furthermore, s. 4 ECA 1972 is not necessitated by the obligations of Community membership, for the purposes of Article 29.4.10° of the Constitution.

20. In summary, therefore, the plaintiff seeks declarations that the following Orders and/or Regulations are contrary to European law, particularly Council Regulation No. 820/97, and are thus invalid:

> (a) Articles 2, 10, 11, 12, 19 (particularly 19(b)), 20 (particularly 20(1)(b)), 29 (particularly 29(1)) of EC(IRBA) Regulations 1999 (S.I. 276/99);
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> (b) Articles 4 and 8 of the Registration Regulations 1996;
>
> (c) Sections 48 and 49 (particularly 48(1)(a),(d),(e) and (h) and 49(1)(d) and (e)) of DAA 1966, as amended by the Bovine Diseases (Levies) Act 1979 and the Bovine Diseases (Levies) Amendment Act 1996, as amended by the application of the EC(IRBA) Regulations 1999;
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> (d) Articles 2, 7(1), 7(3), 27, 28 and 31(1) of the Brucellosis Order 1991 and Article 18(2) of the Brucellosis Order 1991 as substituted by Article 2 of the Brucellosis in Cattle (General Provisions) (Amendment) Order 1998, and s. 48(1)(a), (d) and (e) of DAA 1966 as amended;
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> (e) Articles 5(2), 6(1), 32 and 35 of the TB Order 1989.

It is also contended that the application of the EC(IRBA) Regulations 1999 to s. 49(1)(d) and (e) of DAA 1966, as amended by the Bovine Diseases (Levies) Act 1979 and the Bovine Diseases (Levies) Amendment Act 1996, are *ultra vires* the DAA 1966. Prior to the coming into effect of the EC(IRBA) Regulations 1999 on the 13th September 1999, ss. 48 and 49 DAA 1966 were contrary to Council Regulation No. 820/97. Insofar as ss. 48 and 49 of DAA 1966 were amended, extended, or provided for by the EC(IRBA) Regulations 1999 to provide for the creation, amendment or provision of indictable offences under the DAA 1966, the 1999 Regulations are *ultra vires* the provisions of s. 3(2) of ECA 1972, as amended.

21. Finally, the plaintiff contends that any and all of the above-mentioned statutory provisions, amended by the EC(IRBA) Regulations 1999 in respect of offences alleged to have been committed on or after the 13th September 1999, are in breach of s. 4(1)(a) of ECA 1972 (as inserted by EC(Am)A 1973), are invalid and have no effect, and in any event, that s. 4 ECA 1972 as amended is in itself unconstitutional.

22. By way of preliminary objection, the defendants claim that the plaintiff's challenge must be assessed by reference to the judicial review proceedings. In those circumstances it was under an obligation, pursuant to Order 84, rule 21 of the Rules of the Superior Courts 1986, to bring these proceedings promptly and, in any event, within the time limits set by that rule. In the circumstances, the plaintiff has manifestly failed to do so; the plenary proceedings not being issued until 2005, eighteen months after the impugned decision of the District Court, and it has not offered any good reason to the Court for this failure. Accordingly these proceedings ought to be dismissed *in limine*. In the alternative, if the provisions of O. 84, r. 21 do not apply to these proceedings, either consolidated or individually, the plaintiff was nonetheless under an obligation to bring these proceedings promptly and without undue delay. Further, in the alternative, the plaintiff has been guilty of laches such that it is not entitled to any of the reliefs sought in the plenary proceedings.

23. With regards to the alleged invalidity of the various Orders and Regulations, as outlined *supra*, the defendants categorically deny that they are invalid in the ways alleged or at all. It is denied that the national Regulations/Order have failed to properly transpose Council Regulation No. 820/97. It is also denied that the Regulations/Orders were in any way *ultra vires* the powers of the Minister, either under the DAA 1966, or Council Regulation No. 820/97, or at all.

24. With regards to the alleged creation of indictable offences by the TB and Brucellosis Orders, or the EC(IRBA) Regulations 1999, the defendants deny that this is the case. Alternatively, even if it was to be found that indictable offences have in fact been created, the plaintiff lacks standing in this regard since it has not, in fact, been prosecuted on indictment in relation to any of the charges, and therefore lacks *"sufficient interest"* within the meaning of O. 84 of RSC 1986.

25. With regards to the amendment of orders created under s. 3 ECA 1972 having statutory effect, pursuant to s. 4(1) ECA 1972, it is denied that they may only be amended by primary legislation. They may also be amended by another such order made under s.3 ECA 1972. Further, it is emphatically denied that s. 4 of ECA 1972 is unconstitutional on the grounds set out, or at all. Without prejudice

to the generality of the foregoing, the defendants deny that s. 4 is unconstitutional insofar as it provides that regulations made by a Minister of State under the ECA 1972 have "statutory effect". The defendants note that all orders made under the ECA 1972 are made "subsequently". Furthermore the defendants deny that s. 4 of the ECA 1972 is not necessitated by obligations of community membership for the purposes of Article 29.4.10° of the Constitution.

National and European Legislation:
26. In light of my ruling in *Hayes v. Ireland & Ors.*, it is unnecessary to set out the provisions of national and European legislation at issue herein or my consideration of the parties' submissions thereto. I am satisfied that no material difference exists between the arguments advanced on behalf of the plaintiff presently in this regard. That judgment therefore, insofar as it relates to the validity of the various impugned ministerial Regulations/Orders and to the constitutionality of s. 4 ECA 1972, applies *mutatis mutandis* to this case. As stated therein, I am satisfied that the plaintiff's arguments are not well-founded. I would therefore not grant reliefs sought in relation thereto. Nonetheless, there still stand to be considered further judicial grounds upon which the plaintiff seeks relief. I shall now turn to dealt with those.

Excess of Jurisdiction in the District Court:
27. The history of the District Court proceedings before Judge O'Halloran have been extensively set out above (see paras. 9 – 13 *supra*). There are essentially two grounds upon which the plaintiff contends that the District Judge exceeded her jurisdiction:

> (i) She heard evidence and made rulings on facts in issue in criminal proceedings not to be heard before her;
>
> (ii) She ruled against the plaintiff's application for dismissal without hearing the parties.

The plaintiff therefore alleges that the District Judge exceeded her jurisdiction and breached fair procedures.

28. In relation to the District Judge's alleged excess of jurisdiction, the first thing which must be noted is the unitary and self-contained nature of a criminal trial. As a general statement the comments of Henchy J. in *Corporation of Dublin v. Flynn* [1980] ILRM 357 at 365 should be noted:

> *"It is of the essence of a criminal trial that it be unitary and self-contained, to the extent that proof of the ingredients of the offence may not be established as a result of a dispersal of the issues between the court of trial and another tribunal."*

However, that case related to a situation where the prosecution had sought to circumvent the furnishing of necessary proofs for a conviction by referring to a previous conviction in which such necessary proofs had been put in evidence. Such an approach was impermissible. Despite its distinguishing facts, Dunne J. in *D.P.P. v. Doyle* [2006] IEHC 155 did support the proposition deducible from it that *"a trial is a unitary process".*

29. *Doyle*, a case stated, was submitted by Judge Haughton, who asked: *"Where an issue has been ventilated and decided by a Judge of the District Court, am I, a Judge of District Court, precluded from embarking on a rehearing of that issue?"* The Court ultimately determined that the answer was no, Dunne J. stating:

> "I find it hard to contemplate how an accused is precluded from relying upon a defence because of a ruling in the earlier trial which collapsed or terminated prematurely in absence of clear authority that issue estoppel arises against an accused in respect of a defence which may be open to them."

30. In *D.P.P. v. District Judge Windle* [1999] 4 IR 280, although in the course of preliminary examination under s. 7 of the Criminal Procedure Act 1967, McCracken J. considered whether the determination of the validity of search warrants at the preliminary stage was within the District Judge's jurisdiction. He considered the case of *D.P.P. v. Owens* [1999] 2 IR 16, which, in his opinion, decided that a search warrant is a document which may affect constitutional rights and does not speak for itself in a criminal trial. In those circumstances McCracken J. was:

> "quite satisfied that it is not for a judge conducting a preliminary investigation to determine the validity or otherwise of a search warrant. This is a matter purely for the trial judge, to be determined by him on the evidence before him. If there had been no search warrant in the present case, then certainly the District Judge would have been justified in refusing to send the second respondent forward for trial, as there would have been no evidence to justify the search of his premises, but once a search warrant existed, in my view the question of its validity was one for the trial and not one for a preliminary investigation."

31. The decision in *Windle* was recently considered by the Supreme Court in *Cruise v. District Judge O'Donnell* [2008] 2 ILRM 187 where Fennelly J., distinguishing it on its facts as to its application in that case, considered that:

> "It does, however, highlight the distinction between the decision that there is no sufficient case … to put a person on trial and a decision at the trial itself on the hearing of evidence."

32. I am quite satisfied, that in the case at hand, the decision of Judge O'Halloran made relative to the Restriction Notices was a matter which would be at issue in the defence of the prosecution at trial. In those circumstances it can be seen to be analogous to the issues in relation to the validity of search warrants raised in *Windle*. In this case, the validity of the Restriction Notices was clearly a matter which both sides felt should more properly be left over for consideration by the trial judge having heard the entirety of the evidence; even had the parties not agreed on this matter, I am satisfied that it was such. Had this case proceeded to trial following the ruling of Judge O'Halloran on this matter, I am satisfied that it would be such that the accused ought not be prevented from asserting as part of their defence the invalidity of such Notices, unaffected by this ruling. In those circumstances, the ruling of Judge O'Halloran in this regard was in excess of jurisdiction and thus void.

33. Turning to the decision of Judge O'Halloran in relation to prosecutorial delay raised by the plaintiff, this is a question of fair procedures. It is beyond question that a District Judge must adopt fair procedures (see *e.g. People (D.P.P.) v. McGuiness* [1978] IR 189). It would appear from affidavits sworn in the within proceedings that, having heard Counsel for both parties in relation to an application to dismiss on grounds of abuse of process, it then being after four o'clock, around six-thirty by the account of the defendants, Counsel for the plaintiff indicated that it would appear that the Court would not have sufficient time to hear submissions on his application to dismiss on grounds of delay. However, it is alleged, the District Judge, without hearing any submissions or evidence in relation to this application made a "blanket ruling" against the plaintiff, including the delay application.

34. It is a fundamental principle that rulings should not be made where submissions have not been received. I have no doubt that during the course of the District Court hearing before Judge O'Halloran, a significant amount of evidence was put forth in relation to the abuse application. Some of this, by the plaintiff's admission, related to delay as part of that application. However, further arguments, in particular with regards to the delay causing the liquidation of the plaintiff, were not fully advanced at the hearing. It was indicated by Judge O'Halloran that she felt that although there certainly was some question of delay, she did not feel that she was best placed to deal with this matter, and that she *"would not be in a position to indicate as to why the delays occurred over a period of time"* and, in her opinion, the matter was one which should be left to a trial; as opposed to being dealt with at a preliminary hearing. In this sense, it is argued, she rejected the plaintiff's application to dismiss on grounds of delay.

35. On this point I would say that, although it may have been more prudent for the Judge to have heard this application the following day, having read the transcript of her ruling I am satisfied that she did not in fact rule on the issue of delay; in fact expressly leaving it over for the trial judge to deal with. In those circumstances it could not said that fair procedures were breached, since she did not hear substantive argument on this point from either side, nor, as I have stated, did she rule in relation to it. In those circumstances this application could not be said to be *res judicata* and the plaintiff is therefore not precluded from raising these points at a further juncture.

36. I would only note finally, for the purposes of clarity only, that the District Judge's decision in relation to abuse of process, having been fully and lengthily argued before her, stands; there being no complaint in relation to same with regards to fair procedures or otherwise.

Conclusion:
37. In summary I therefore find that:

> (i) Those grounds which were also advanced in *Hayes* apply to this case *mutatis mutandis*, and I reject the plaintiff's arguments in this regard;
>
> (ii) The decision of Judge O'Halloran should be quashed in relation to her findings as to the validity of the Restriction Notices and would grant an order of *certiorari* in relation thereto; and
>
> (iii) The issue of delay in prosecution was not ruled on by Judge O'Halloran and is not *res judicata* – in those circumstances it would be open to the plaintiff to argue this before the Trial Judge or on motion before the District Court in such manner as might be available.