Neutral Citation [2013] IEHC 149

THE HIGH COURT

[2012 No. 45 MCA]

BETWEEN

The Commissioner for Communication Regulation

Applicant

V.

An Post

Respondent

Judgment of Mr. Justice Hedigan delivered on the 8th of day of March 2013.

Application
1. The main issue in this case is the extent to which a statutory instrument, the European Communities (Postal Services) Regulations 2002 as amended by the European Communities (Postal Services) (Amendment) Regulations (S.I 135/2008), hereinafter "the regulations", still continues to have effect notwithstanding its repeal due to the provisions of the Interpretation Act 2005.

Two questions have been referred to the court by the respondent for determination as a preliminary issue:

1.Whether s. 27(1) and/or (2) of the Interpretation Act 2005 applies so as to permit the applicant (hereinafter "Comreg") to maintain proceedings as pleaded or at all under regulation 18(4)(a) of the European Communities (Postal Services) Regulations 2002,("the 2002 Regulations") as substituted by regulation 2(b) of the European Communities (Postal Services)(Amendment) Regulations 2008 ("the 2008 Regulations") as revoked by the Communications Regulation (Postal Services) Act 2011.

2.Whether s.27(2) of the Interpretation Act 2005 applies so as to permit the applicant to maintain proceedings as pleaded or at all under regulation 18(3) of the 2002 regulations as substituted by regulation 2(b) of the 2008 regulations as revoked by the Communications Regulation (Postal Services) Act 2011.

Parties
2. The respondent's address is General Post Office, O'Connell Street Lower, Dublin. The applicant's address is Block DEF, Abbey Court, Irish Life Centre, Lower Abbey Street, Dublin 1. The respondent is designated as a universal service provider with the obligation to provide a universal service by virtue of Regulation 4(2) of the European Communities (Postal Regulations) Act 2002. The applicant is designated as the national regulatory authority for the postal sector by virtue of Regulation 3(1) of the same act.

Factual background
3.1. It appears that there is little dispute between the parties in relation to the factual background.

3.2 Part of the applicant's regulatory function is to impose quality standards in respect of the provision of postal services and maintain compliance with those standards. The applicant has a general power to issue directions in relation to the quality of service generally.

3.3 Such a direction was issued by the applicant to the respondent under Regulation 4(1)(b) of 2002 regulations on the 1st June, 2004, in a letter entitled "Direction on the quality of the universal postal services to be provided by An Post" and was published in Iris Oifigiúil. The direction was to have immediate effect. The direction required An Post to comply with minimum quality of service standards in terms of transit time for end to end service for single piece priority mail posted in the state for delivery in the state. Specifically, the direction required An Post to achieve next day delivery in relation to 94% of such items. The direction did not set a date by which these minimum quality of service standards were to be achieved.

3.4. The direction further required the respondent to submit to the applicant within 60 days thereof a copy of its timetabled implementation plan showing the date by which it expected to achieve the target. The direction did not define the term "target". On the 1st July 2004, An Post responded by letter to the direction setting out its concerns about the next day delivery target of 94%.Further correspondence was exchanged between the parties over the following years in relation to the target set

3.5. On the 8th July, 2009, the applicant issued a notification to An Post indicating that it was not satisfied with An Post's progress in respect of the 94% target, having monitored its performance since the issuing of the direction. Under regulation 18(2), the respondent was given the opportunity to remedy its non-compliance by achieving 94% no later than the 31st of December 2010.

3.6 The applicant indicated it would continue to monitor the respondent and could take any action it considered necessary before the 31st December, 2010.If it was of the view that the respondent was attempting to make progress to comply it could at any time until the 31st December, 2010, amend its notification in accordance with regulation 18(2)(b) by either extending the final date for compliance or making such other amendment as it deemed appropriate. However, if An Post was not seen to be making progress the applicant could amend or revoke the notification pursuant to regulation 18(2)(b) and take such further action as it deemed appropriate including applying to court for orders in accordance with regulation 18(3) and 18(4) of the regulations.

3.7. An Post provided an update on its progress to Comreg on the 7th December, 2010.In its presentation it stated that in the third quarter of 2010 quality of service performance was at 90.3% according to its own monitoring conducted by PWC. This compared to 85% as independently monitored by IPSOS MRBI for Comreg. Consequently there existed a discrepancy in the monitoring figures. An Post wrote to Comreg on the 14th December, 2010, outlining its concerns as to the deviations between these monitoring results.

3.8. On the 2nd August, 2011, the statutory instrument under which the direction had been issued i.e. the 2002 and 2008 regulations was repealed, and a new 2011 act (The Communication Regulations (Postal Services) Act 2011) was introduced. The 2011 act designated An Post as universal provider for seven years. It also revised and restated Comreg's responsibilities and powers. The

powers it had held under the regulations were now elevated into primary legislation.

3.9. On the 8th December, 2011, a special meeting of the applicant's three commissioners took place .This was for the purpose of deciding whether the applicant should form an opinion under Regulation 18(3) of the 2002 regulations that An Post had failed to remedy its non-compliance with the direction and had not met the 31st December, 2010, deadline, this being the end of the period given by the applicant to An Post in the notification.

3.10. Such an opinion was formed and was a formal decision by the applicant on foot of which it decided to apply to the High Court under regulation 18(3) of the 2002 regulations for an order directing An Post to comply with the direction. It also decided to apply under regulation 18(4) of the 2002 regulations for an order that An Post pay a financial penalty of €11,964,680 for 2010 and 2011. This figure is suggested by the applicant to the court although the court is not obliged to impose this amount of penalty or indeed any penalty. The amount suggested operates as a ceiling to the figure which the court can impose.

3.11. On the 2nd February, 2012, the commissioners were asked by the applicant to decide if they wished to confirm the opinion of the 8th December, 2011, and the two separate decisions which were made consequent on that same opinion. The commissioners confirmed that under regulation 18(3) as of the 31st December, 2010, An Post had not complied with the direction. They also confirmed the decision pursuant to regulation 18(4) to apply to the High Court.

3.12. The respondent argues that because the statutory instrument under which the direction was made i.e. the 2002 and 2008 regulations has been repealed, the applicant no longer has any entitlement to proceed with its application to court. The applicant relies on s.27 of the Interpretation Act 2005.

Respondent's Submissions
4.1 The Repeal Issue;

The reliefs sought by the applicant are sought exclusively pursuant to regulation 18.In 2008 the Postal Services Regulations were amended by S.I No 135/2008.The 2008 regulations inserted a new regulation 18 dealing with directions and compliance orders. Unlike the previous provision, whereby the applicant could apply directly to court, the regulator was now obliged to notify the respondent, give it an opportunity to express its views and give it a chance to remedy any non-compliance. This is what was done in the notification that the applicant issued where it gave the respondent until the 31st December, 2010, to comply with its direction.

Regulations 18(3) and (4) are the critical provisions to these proceedings. Regulation 18(3) says:-

> "Where, at the end of the period referred to in paragraph 2(a), the Regulator is of the opinion that a universal service provider has not complied with a direction under these Regulations, the Regulator may apply to the High Court for an order to direct the universal service provider to comply with such direction."

Regulation 18(4)(a) says:-

> "An application for an order under paragraph (3) may include an application for an order to pay such amount, by way of financial penalty, as the Regulator may propose as appropriate in light of the non-compliance."

On the 2nd August, 2011, the Communications Regulation (Postal Services) Act 2011 came into force and by virtue of s.4 (2) of the act, the 2002 and 2008 regulations were revoked in their entirety. At the end of the period, i.e. the 31st December, 2010, the regulator was of the opinion that the respondent had not complied with the direction. The applicant formed this opinion on the 8th December, 2011. Therefore, the applicant could and did resolve to apply to the High Court for an order to direct the respondent to comply. In order to bring the application to court, the regulator must form such an opinion.

The repeal of the 2002 and 2008 regulations took effect on the 2nd August, 2011.The applicant issued proceedings on the 8th February, 2012. In the respondent's argument no regulation 18 then existed on foot of which the applicant could issue proceedings, unless, as the applicant contends, the Interpretation Act 2005 s.27 (1) saved the regulation.

The respondent submits there is no explicit saving clause or transitional provision in the 2011 Act for the Postal Service Regulations. Nowhere in the act is there any saving provision for any of the directions which have been issued by the applicant under the previous regulations nor any steps that have been taken in relation to it. This contrasts with the fact that there were saving provisions therein for some other matters e.g. ss.70 and 72 of the Postal and Telecommunications Services Act, 1983. This is relevant regarding the overall legislative intention as to what was and was not intended to be carried over.

The respondent argues it was open to the Oireachtas to adopt, or the applicant to propose, a saving provision but they did not do so therefore the act changes the enforcement mechanisms prospectively from the 2nd August, 2011.

4.2 The opinion formed by the commissioners;

Regulation 18(3) specifically requires that the regulator may only apply to the High Court for an order directing compliance where the regulator is of the opinion that the respondent has not complied with a direction and it must have first formed the opinion that the universal service provider has not so complied before it can apply to court.

The respondent submits therefore that the forming of such an opinion is an essential ingredient of the accrual of the cause of action. The regulations were revoked on the 2nd August, 2011. Both the form of action and the right or power of action is entirely a creature of statutory instrument and without the formation of that opinion no entitlement to apply to the High Court exists. The opinion of the commissioners was formed on the 8th December, 2011, at a time when regulation 18(3) no longer existed. Therefore, the applicant argues, there was no legal basis for the formation of the opinion which is thus invalid. As the formation of the opinion is an essential pre-requisite to the bringing of proceedings, where no legal basis exists for its formation then the bringing of the proceedings is equally invalid. The Interpretation Act 2005 makes no provision for this situation.

The respondent further argues that the applicant must assert that its right to act accrued before repeal of the enactment and not a mere right to take advantage of the enactment. If a right is to be treated as accrued the ingredients must be there to enable the party to launch their cause of action. It is only rights accrued before the repeal of the act that carry on past the repeal of the act. One must take all the steps that one has to, to be enabled to start proceedings before the court.

It is submitted that paragraph 17 of the applicant's submissions is unsustainable. The applicant argues there that it is entitled to take

the proceedings because of the failure by the respondent to comply with the direction by the 31st December, 2010, and at that date the applicant acquired a right to take the proceedings and the respondent accrued a corresponding liability. It argues that the right and liability are continued by s.27(1) (c) of the Interpretation Act 2005 and therefore pursuant to s.27(2) of the act the applicant is entitled to constitute proceedings as if the enactment had not been repealed. On the applicant's own case it must have acquired the right to take the proceedings by the 31st December, 2010.If it had not acquired the right by that date then it has no entitlement to take the proceedings. The applicant says it formed the opinion before the repeal of the regulation and it relies on a reminder letter of May, 2011 but that is not a letter that can be relied on for that purpose. The statutory provision clearly provides that it is the commissioners who must form the opinion, not some officer of the commissioners.

The applicant has relied on Dunne J. in *Start Mortgages v. Gunn & Ors* [2011] IEHC 275.Dunne J. concluded that a right must become vested by the date of repeal in order to survive the repeal and to be enforceable notwithstanding the repeal of the particular statutory provision. She held that once the right had been acquired before the repeal, proceedings could be instituted. The applicant draws an analogy with this case arguing that the right to bring an enforcement action was acquired by the applicant on the 31st December, 2010.The applicant argues the right was acquired and not only capable of being acquired. The respondent disputes this as it seems the formation of the opinion is an essential part of the right to bring the enforcement action.

The applicant argues the formation of an opinion is only an "internal precondition" of Comreg but the respondent contends this is not the case. It is not an internal procedure that the applicant has devised for itself but is a requirement laid down in the statutory scheme in the regulation which is the sole basis on which the regulator can ask the court for orders. The applicant did not comply with the procedure before the repeal therefore it had no right vested in it .Consequently it does not come within the provisions of the Interpretation Act and more specifically s.27 thereof.

4.3 Interpreting S.27 of the Interpretation Act 2005;

The applicant argues that the obligations/liabilities arising under the direction continue to have legal effect after repeal of the Postal Services Regulations pursuant to s. 27(1) (b) and/or (c) and therefore it is entitled to seek to enforce the direction and seek a penalty for its alleged breach.

The respondent contends that neither s.27(1) (b) nor (c) keep alive the direction or obligations under it. They merely ensure the repeal does not affect the legal effects of the direction up to the date of the repeal. The respondent argues that the ordinary meaning of the words in s.27(1) suggest it does not allow the maintaining in force of the direction so as to permit its continuing enforcement. Section 27(1) (b) and (c) provides:-

> "Where an enactment is repealed the repeal does not-
>
> (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment;
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment."

Therefore s. 27(1) does not mean that the direction and the obligations thereunder remain in full force and effect despite the repeal of the regulations pursuant to which they are created. The subsections only preserve the effects of the direction up to the repeal but not beyond.

If the direction is a thing "duly done or suffered" under the enactment the respondent argues that s. 27(b) intends to refer to past events under the enactment so as to ensure same are not undone by the repeal. There is a difference between an obligation already acquired and a continuing obligation. The use of the past tense in the section e.g. acquired, shows that it was intended to maintain the accrual of obligations up to the date of the repeal but not thereafter.

It must first be decided what the term "enactment" signifies. It is defined in s.2 (1) of the Interpretation Act as "…an Act or a statutory instrument or any portion of an Act or statutory instrument". So to be an enactment it must be an act or a Statutory Instrument. If the applicant relies on the Interpretation Act which only deals with enactments it can only be referring to the repeal of the two statutory instruments. The direction itself was not repealed or revoked in any formal sense. The statutory instrument says nothing in relation to attaining 94% next day delivery of post. It is the direction created under the statutory instrument that creates that obligation. The applicant is trying to enforce the direction,however the direction is not an enactment within the meaning of the Interpretation Act and is not made under the act but is merely made under the statutory instrument. It is the statutory instrument itself under the 2002 regulations which gives the applicant the power to issue directions. The applicant accepts in its submissions that it is not a form of delegated legislation. So, argues the respondent, it cannot be a statutory instrument as a statutory instrument is delegated legislation.

In para.2-94-2.95 of Administrative law in Ireland, 4th ed.Hogan & Morgan, the learned authors state that :-

> "One significant practical point which arises concerning the continuing validity of delegated legislation made under a parent statute when that parent statute has itself been repealed. Despite the general statutory saving clause contained in s.27 (1) of the Interpretation Act 2005, it would seem that, in the event of repeal, as might be expected, the delegated legislation will also lapse: the branch falls with the tree, unless some statute expressly provides to the contrary… There is no general doctrine of "implicit survivorship". The exception, already alluded to, is where the delegated legislation is thrown a statutory life-line."

In the case of *Watts v. Winch* [1916] 1 KB 688 a byelaw prohibited persons riding a machine on any footpath set apart for pedestrians. In a prosecution the appellant argued the bye-law had been repealed by s.85 of the Local Government Act 1888.Lord Reading C.J. observed that a bye-law made under a repealed act ceases to have any validity unless the repealing act contains some provision preserving the validity of the byelaw notwithstanding the repeal. Sankey J. concurred and said there are two reasons for this position,

> "First because otherwise there might be two inconsistent codes in relation to the same matter. The present case is an instance of this. The legislation under the Highway Acts is inconsistent with the byelaws made under the Norwich Improvement Act. Secondly, because the usual practice is to insert in the later statute a section expressly preserving previously made byelaws if it is intended that they shall remain in force."

The respondent is not asserting the Postal Services Regulations are akin to parent statute or that the direction is akin to a statutory instrument. However, the principle set out by Hogan and Morgan cited above and the case of *Watts* are helpful, they claim, as they

demonstrate that where a measure is created pursuant to a legal instrument, repeal will automatically end that measure unless it is specifically kept alive.

4.4 Entitlement to Institute proceedings in respect of Obligation/Liability;

The respondent submits that the applicant requires the continued existence of regulation 18(3) to bring these proceedings as it is that provision that entitles it to bring proceedings and equally gives this court jurisdiction to direct compliance. The respondent argues that s.27(2) of the Interpretation Act 2005 does not operate so as to continue the repealed enactment in its totality but only so as to keep alive an obligation/liability accrued under the enactment.

Therefore, assuming the direction imposes an enforceable obligation of next day delivery of 94% and assuming that obligation is kept alive (which the respondent disputes) that is all that is protected by s.27(2).Therefore, although potentially proceedings could be brought the mechanism by which they may be brought must exist independently of the revoked enactment.

If the Oireachtas had intended that the Interpretation Act would operate to continue the repealed enactment in its totality it would have inserted a saver in the 2011 act.

The respondent relies on the case of *Crown Prosecution Services v.Inegbu* [2008] EWHC 3242 where bye-laws had been made under the repealed s. 219 of the Transport Act 2000.Schedule 20 paragraph 7 of the Transport Act provided for the manner in which bye-laws were to be provided and had also been repealed. Section 46 of the Railways Act 2005 provided, *interalia*, that bye-laws made under s.219 of the 2000 act and enforced immediately before the repeal of s.219 by the 2005 act, would continue to have effect after the coming into force of that repeal as if every reference in these bye-laws to that authority were a reference to the Secretary of State.

S.17 of the English Interpretation Act 1978 provided:-

> "(2) Where an act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears-
>
> (b) insofar as any subordinated legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision."

In that case the respondent was charged with the offence of using abusive language contrary to railway byelaws. The byelaws had been made under s.219 of the 2000 act and continued to have effect despite repeal of the section by the Railways Act 2005 by virtue of s. 46(a) of the 2005 act. The respondent submitted that while the effect of the byelaws had been preserved by s.46 (a) of the 2005 act, the mechanism by which they could be proved had not been preserved. The court observed that the general rule that a penal statute should be read restrictively did not require that the court construe a statutory provision senselessly:-

> "If there was a lacuna in s.46 (a) of the 2005 act, it could be filled by the court construing it in accordance with the intention of parliament. That could be gleaned from the structure of the 2005 act which envisaged that byelaws made under the 2000 act would continue in force .This could only be effective if they continued together with the procedural provisions in schedule 20 of the 2000 act by which they could be proved. Where there is no intention to the contrary in a period by virtue of the 2005 act, section 17(2) (b) of the Interpretation Act, 1978 provided a clear solution to the problem."

The respondent relies on this case to submit that the current proceedings cannot be maintained as the enforcement mechanisms of regulation 18 have not been continued. This case shows there is a problem regarding the mechanism required to enforce a substantive obligation where the substantive obligation may have continued in some form despite repeal but the mechanism to enable it to be enforced has not. The respondent believes the applicant cannot get help from the 2011 act and there is no basis on which proceedings can be brought on foot of regulation 18.

4.5. Entitlement to Institute Proceedings in respect of a Penalty;

On the plain wording of S.27(2) it is submitted that it does not permit the applicant to institute proceedings in relation to a penalty. Section 27(2) provides that where an enactment is repealed, any civil legal proceedings in respect of a contravention of the enactment may be instituted and a penalty may be imposed in respect of such contravention and carried out as if the enactment had not been repealed. Enactment is defined as an act or statutory instrument or any portion of an act or statutory instrument. Statutory instrument includes a regulation and direction made, issued, granted or otherwise created by or under the act.

The relevant enactment must be the Postal Services Regulations as it is only this that has been repealed. It is only the enactment (Regulation 18(4)) that provides for the institution of legal proceedings to seek a penalty and the direction, which was made pursuant to the powers contained in the now repealed enactment, does not provide for this. Even if the direction is treated as a statutory instrument for the purposes of s.27(2), proceedings cannot be brought seeking a penalty for its breach without the provisions of the Postal Services Regulations. Section 27(2) does not operate to permit those regulations to be treated as if they were still in force in respect of the application for a penalty since the proceedings are not in respect of a contravention of the Postal Services Regulations i.e. "enactment" in s.27(2) can only mean the Postal Services Regulations and the applicant cannot treat that reference to enactments as a reference to the direction for the purposes of establishing a contravention of the enactment.

The applicant has no right to impose a penalty itself and has no entitlement to require as of right that a penalty be imposed. What it can do is come to court and point out what it says are breaches of the direction. If it can show a breach, jurisdiction is vested in the court to decide if a penalty is appropriate and the quantum thereof.Thus, the applicant has no entitlement to a penalty even if it had commenced proceedings before the repeal of the act. It had not done so nor had the commissioners formed the necessary opinion on all of the relevant matters that they had to address their minds to before the repeal of the act.

The respondent denies it is guilty of breaching the Postal Services Regulations. This case does not concern their breach. The proceedings merely attempt to use the mechanism set up by those regulations i.e. Regulation 18(4) to seek a penalty regarding the alleged contravention of a direction.

Applicant's submissions
5.1 The Repeal issue;

The basis of the substantive proceedings is the non-compliance by the respondents with the direction given to it by the applicant by the 31st December, 2010. This non-compliance took place seven months before the 2002 regulations were revoked by the 2011 act on the 2nd August, 2011.

The rights, liabilities and obligations at issue in the 2002 regulations relate to the quality of postal services. The 2002 and 2008 regulations and the 2011 act all derive from Directive 97/67/EC (as amended).The 2002 regulations and 2011 act have a similar and continuing identifiable purpose which is to guarantee a postal service of a specified enforceable quality.

The respondent argues that for the provisions of the 2002 regulations to be continued express saving provisions should have been provided for in the 2011 act. The applicant argues that this is incorrect. It contends that if the legislature had wanted to exclude the effect of s.27 on the revocation of the 2002 regulations it would have provided clear wording to this effect in the 2011 act.

Section 4(1) of the Interpretation Act provides:-

> "A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the act under which the enactment is made".

The applicant submits that in order for the respondent to oust the applicability of s.27 it needs to show that the contrary intention is in the 2011 act. No such contrary intention has been shown.

The respondent's argument is clearly inconsistent with a literal interpretation of s.27(2).The legislature provided in s.27 (2) that regardless of a repeal "any legal proceedings…. may be instituted, continued or enforced and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out as if the enactment had not been repealed". This provision would be neutered if the respondent was correct and each repealing act would have to specifically "save" the enforcement mechanism in order for s.27 (2) to have effect.

The respondent's argument is also inconsistent with the case law in this area. The applicant relies on a number of cases;

In *B v.B* [1995]1 WLR 440 in which the court held that, where a revoked statute is being relied on, the appropriate course of action is to utilise the procedures in the revoked statute.

In *DPP v.Devins* [2009] IEHC 23 there was no express saving provision but nevertheless the court held that s.27 alone was sufficient to justify prosecuting under the old regime. This related to prosecution in respect of an alleged buggery under a repealed act for offences that were committed prior to the repeal. The decision was affirmed by the Supreme Court in 2012 IESC 7 where the court held it was permissible to prosecute in respect of an alleged buggery under a repealed act for offences that were committed prior to the repeal.

In *Quinlivan v.Governor of Portlaoise Prison* [1998] 2 IR 113, the court refused to halt the prosecution against Mr. Quinlivan in circumstances where the common law offence with which he was charged had been abolished and there were no transitional provisions contained in the abolishing act. The court held that where a statute abolishing a common law offence failed to include transitional provisions the court had a duty to draw such inferences in respect of these transitional provisions as parliament intended.

5.2 The opinion formed pursuant to regulation 18(3);

The respondent argues that as the opinion of the applicant under regulation 18(3) of the 2002 regulations was formed following the revocation of the 2002 regulations the right to take proceedings had not accrued before revocation and since the formation of an opinion is a necessary ingredient of the accrual of the cause of action, the right to take proceedings cannot therefore have been continued by s.27 of the Interpretation Act 2005 .Thus, they contend the court lacks jurisdiction to hear the matter. The applicant submits this in incorrect. It refers the court to Murdoch's Dictionary of Irish Law which defines a cause of action as;

> "The facts which give rise to a right of action in a court of law. Every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse: Cook v.Gill [1873] LR 8 CP 107." (Murdoch's Dictionary of Irish Law-Tottel Publishing, (5th Ed.)p. 157.

Therefore, the applicant submits the regulation 18(3) opinion is not a component of the cause of action as it is not a material fact which the applicant has to prove to succeed.

The respondent's view ignores the fact that the regulation 18(3) opinion only relates to the decision to initiate proceedings. Regulation 18(3) states:-

> "Where, at the end of the period referred to in paragraph 2(a), the Regulator is of the opinion that a universal service provider has not complied with a direction under these Regulations, the Regulator may apply to the High Court for an order to direct the universal service provider to comply with such direction" .

It is clear from this regulation that an opinion is merely an internal pre-requisite before making a High Court application. It is thus erroneous to describe the opinion as being an essential "proof" in the proceedings. If the respondent believes proceedings were unlawfully instituted the correct form of challenge is for certiorari to quash the decision to initiate, and /or an injunction restraining the proceedings. The respondent has not applied for these . As the matter has now progressed and is before the court any alleged difficulties with the regulation 18(3) opinion are irrelevant and the validity of its jurisdiction is no longer an issue capable of being raised by the respondent.

When the wording of s.27 is utilised it is clear that in order to make the case which it is attempting to make the respondent must establish:-

1) that the time of making the regulation 18(3) opinion is the point in time at which the "right, privilege, obligation or liability is acquired, accrued or incurred";

2) that the contravention had not occurred until the regulation 18(3) opinion had been formed.

Section 27 does not provide that all steps before initiating legal proceedings must have been taken in order for the section to apply following the repeal of any provision. It focuses instead on whether a right or liability has been acquired or accrued and whether the

contravention has accrued. The respondent's argument ignores the fact of the direction and notification- both of which issued before the repeal of the 2002 regulations. The applicant contends it also ignores that on the 31st December 2010, the applicant acquired a "right " to bring proceedings and the respondent incurred a corresponding "liability". This right and liability is continued by sections 27(1)(b) and 27(1)(c) and therefore pursuant to s.27 (2) the applicant is entitled to institute proceedings as if the enactment had not been repealed.

The respondent argues that the right to take these proceedings did not become "vested" for the purposes of s.27 as that term is used by Dunne J. in *Start Mortgages v Gunn & Ors* , until the regulation 18(3) opinion was formed. Dunne J. concluded that "liabilities" were "incurred" when the respective debtors committed an act of bankruptcy or the act of default. By analogy here the liability was incurred when the respondent became non-complaint with the notification on the 31st December, 2010, and the equal right of the applicant to take a case became "vested " in the applicant at the same time and not when the regulation 18(3) opinion was formed.

The question of when the right is "vested" is considered in the Supreme Court decision of *Minister for Justice, Equality and Law Reform v.Tobin* [2012] IESC 37 regarding the threatened surrender of Mr. Tobin to Hungary. The court considered whether the previous decision not to surrender Mr. Tobin made in Tobin No.1 case (which was decided under then repealed legislation) had the effect of preventing his surrender under the amended provisions of the same legislation. It was held that the previous decision not to surrender Mr. Tobin did have the effect of preventing his surrender under the amended provisions of the same legislation. Section 27 was relied on by O'Donnell J. and Hardiman J. The analysis by O'Donnell J of the law in relation to s. 27 and in particular when rights become "vested" is useful in this case. He distinguished between two different scenarios namely i) where nothing had happened during the currency of the repealed legislation to give the individuals concerned any vested right. The example given was the Minister for Justice v. Bailey [2012] IESC 16, where Mr. Bailey's right during the currency of the repealed enactment was "a mere right to take advantage of a repealed enactment" and "nothing had been done to cause a particular right to accrue under that enactment" and ii) Where "something" had happened during the currency of the repealed legislation to give the individuals concerned a vested right.

O'Donnell J. held that in ii) there was a "vested" right for the purposes of s.27 whereas in i) there was not.

The applicant submits that the right in question in the instant case is more like Tobin than Bailey as clearly "something" was done under the repealed enactment prior to it being repealed (i.e. the applicant had issued the direction and notification and the respondent had not remedied its non-compliance set by the direction as of the 31st December, 2010). The facts of the case show that the requisite regulation 18(3) opinion had also actually been made before repeal of the 2002 regulations. A letter sent by Mr.George Merrigan on behalf of the applicant to the respondent dated the 11th May, 2011, records that the applicant was at that stage of the opinion that the respondent had not complied with the direction of the 31st December, 2010. Therefore, the applicant at the time of the repeal had more than a "mere right to take advantage" of the repealed enactment but had actually "taken advantage" of the enactment on the issuing of the direction and notification and the respondent's non-compliance therewith as of the 31st December, 2010 amounted to "something".

Even if the respondent is correct in its argument that the right to take the proceedings did not accrue until the commissioners had formed the opinion of non-compliance, the applicant argues that it is not necessary that the right had accrued in order for s.27 (2) to be applicable-it is sufficient that it has been acquired. The applicant argues that as of the 31st December, 2010, the right to take proceedings was acquired. therefore the applicant is entitled to rely on s.27 (2).

In *Start Mortgages*, Dunne J. considered the law regarding the distinction between the terms "accrue" and "acquire" in the context of the Interpretation Act 2005. She cited with approval Simon Brown L.J. in *Chief Adjudication Officer v.Maguire* [1999]1 WLR 1778 at page 1788 .

> "What to my mind all these cases establish is essentially this: that whether or not there is an acquired right depends on whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefit receivable by him, provided only that he takes all appropriate steps by way of notices and /or claims thereafter...In my judgment Mr.Maguire's right accrued on 1 April 1985, when W.V.F. (a disease from which he already suffered) was first prescribed. It matters not that he claimed only after repeal."

5.3 Interpreting S.27 of the Interpretation Act 2005;

The proceedings were brought by the applicant pursuant to the 2002 regulations which had been already revoked. The applicant relies on s.27 of the Interpretation Act 2005 and argues that this section keeps alive the rights of postal service users pursuant to regulation 4(1)(a), the direction and the notification.

There is clearly a dispute regarding how s.27 should be interpreted. The applicant is relying on the straightforward literal interpretation of s.27, unlike the convoluted and strained interpretation which the respondent has advanced. The narrow interpretation of s.27 put forward by the respondent is inappropriate as it is attempting to usurp the plain literal meaning and indeed the intention of the Oireachtas. The respondent's interpretation would restrict the section to such an extent as to render it almost meaningless. The applicant relies on the maxim "*ut res magis valeat quam pereat*" i.e. it is better for a thing to have effect than to be void.

The respondent's interpretation of the act is inappropriate as it attempts to rely on case law to avoid a literal interpretation of s.27.Usually reference to case law should be avoided in interpreting statutes-Lord Warrington of Clyffe said in *Barrel v.Fordree* [1932] AC 676

> "….the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."

The literal approach is described by Dodd as taking a "…a pre-eminent position and is applied first and foremost to the interpretation of any enactment". In *Howard v Commissioners of Public Works* [1993] 1 IR 101 the Supreme Court emphasised the importance of the literal approach and Denham J. said

> "The correct conclusion to be drawn is that the plain language of the act must not be extended beyond its natural meaning so as to supply omissions or remedy defects…if there is a plain intention expressed by the words of a statute then the court should not speculate but rather construe the Act as enacted."

If the construction of s.27 is approached in this light the only reasonable conclusion to be reached is that it applies to continue rights, obligations and liabilities acquired, accrued or incurred in, or in respect of Regulation 4(1)(a), including the direction and the

notification and therefore permits the bringing of the proceedings.

The applicant relies particularly on s.27(1)(b) and (c) and s.27(2) of the Act. Section 27(2) caters for the situation which arises in the instant proceedings. The applicant contends that even though the 2002 regulations were revoked by the 2011 act, proceedings "may be instituted, continued or enforced" in respect of regulation 4(1)(a), including the direction and notification. Section 27 means that there was no need for the 2011 act to contain saving provisions in order that the 2002 regulations be saved. The section further provides that "any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out as if the enactment had not been repealed" i.e. the penalty under the 2002 regulations can be imposed as if the 2002 regulations were still in force.

The respondent attempts to rely on the fact that there is provision in the 2011 act to "save" certain schemes made by the respondent under the Postal and Telecommunications Services Act, 1983 to demonstrate that the legislature did not intend to "save" the obligations under the 2002 regulations. This argument ignores the fact that the obligations at issue in these proceedings were not imposed by delegated legislation in contrast to the identified schemes which were made by statutory instrument. Because of the provisions of s.27 of the Interpretation Act no saving provision was necessary to preserve the obligations under the 2002 regulations, and this is the very reason why no saving provision is present. The applicant submits that were the court to find that a saving provision was necessary it would frustrate the effect of s.27 and the clear intention of the legislature in enacting that provision.

5.4 Entitlement to issue proceedings in respect of obligation & Liability;

The notification was issued under regulation 18(2)(a) of the regulations and is a right of the applicant to utilise the regulation 18 compliance procedure and imposes an "obligation" and a "liability" on the respondent to achieve compliance with the direction within the period specified therein.

The applicant maintains that as at the 31st December, 2010, the applicant acquired a right to take these proceedings and the respondent accrued a corresponding liability. The right and liability are continued by s.27(1)(c) of the Interpretation Act. Section 27(2) of the Interpretation Act permits the initiation of proceedings in respect of an obligation incurred under, or in contravention of, a repealed statute, where at the time of incurring the obligation or contravening the enactment or omission or act, the obligation or contravention was on the statute book, albeit that the proceedings were not initiated until after the revocation. Therefore, pursuant to s.27 (2) of the act the applicant argues it is entitled to institute proceedings as if the enactment had not been repealed and neither the notification nor the direction are affected by the revocation of the 2002 regulations.

The respondent in contrast attempts to make the case that the obligation to comply with the quality of service standard set by the direction was not acquired, accrued or incurred "under" the 2002 regulations and therefore s.27 (1)(c) of The Interpretation Act does not continue that obligation and that proceedings cannot be issued pursuant to the 2002 regulations in reliance on s.27 2) of The Interpretation Act. .The respondent attempts to distinguish between obligations imposed "under" the 2002 regulations and "directly under" the 2002 regulations.

The applicant relies on Dunne's decision in *Start Mortgages v. Gunn & Ors* [2011] IEHC 275 in which she considered s.27 of the Interpretation Act. She concluded a right must become in some way vested by the date of repeal in order to survive the repeal and to be enforceable notwithstanding the repeal of the particular statutory provision. She accepted that the right to apply for an order of possession was a right within the meaning of the Interpretation Act and that once the right was acquired prior to the repeal, proceedings could be instituted in reliance on s.62(7).

An analogy between that case and this can be drawn in that the right to bring the enforcement action was acquired by the applicant on the 31st December, 2010, when the respondent failed to reach the specific quality of service target, which date was before revocation of the 2002 regulations. The right had been acquired and was not merely capable of being acquired. Thus, all necessary events occurred before repeal .Similarly one could argue that the "liability" of the respondent accrued on the 31st December, 2010.The applicant contends that *Aitken v.South Hams District Council* [1995]1 AC provides authority for its argument that it can rely on s.27 to bring proceedings. The respondent's reliance on *Watson v. Wench* is incorrect argues the applicant because it deals with a bye-law. This is a form of delegated legislation. The directive is not a bye-law. In *Watson* an attempt was made to prosecute for an act that occurred 32 years after the revocation of the bye-law. In *Aitken* the relevant acts occurred prior to the revocation and steps had been taken in the enforcement procedure before the revocation and repeal. *Watson* was decided 79 years prior to A*itken* and does not appear to have been followed since. *Aitken* has been recently followed in English courts in Bv.B [1995]1 WCR 440 and in *Regina v. HG* [2007] EWCA crim 3222.The respondent argues that s.16 (1) of the Interpretation Act 1978 is different to s.27, however s.16 (1) has practically the same wording as s.27 and the key points in these proceedings are fully dealt with by the House of Lords.

5.5 Entitlement to issue proceedings in respect of a Penalty;

The applicant is perfectly entitled to institute proceedings pursuant to regulation 18 of 2002 regulations, seeking a penalty. The applicant relies on the plain and literal meaning of s.27 (2) and also on case law which demonstrates that this interpretation is correct.

The applicant refers the court to the case of *Regina v.HG* [2007] EWCA crim 3222 where the court of appeal imposed a penalty even though the provision containing the penalty had been repealed years previously. The court relied on s.16 (1) of the English Interpretation Act 1978. Lord Justice Keane stated:-

> "The words we have there quoted certainly seem to this court to be wide enough to cover the availability of a penalty and indeed it has been held by the House of Lords that these provisions apply in the criminal field as well as in the civil; see decision in *Aitken v.South Hams District Council* [1995]Ac 1 262 at 271 D to G….the mere fact of repeal without transitional provision will not normally amount to such an indication."

Decision

6.1 The Court is asked to answer two questions set out at paragraph 1. To do this it is necessary first to consider the relevant provisions of the Interpretation Act 2005; s. 4 thereof provides as follows:

> "4.—(1) A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made.
>
> (2) The provisions of this Act which relate to other Acts also apply to this Act unless the contrary intention appears in

this Act."

Section 27(1) and (2) provides further;

> "27.—(1) Where an enactment is repealed, the repeal does not—
>
> (a) revive anything not in force or not existing immediately before the repeal,
>
> (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal, or
>
> (e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention.
>
> (2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

6.2 A number of issues have arisen in this case. I have set them out in the summary above of the parties' submissions and I propose to deal with them under the headings I set out there.

6.3 The Repeal issue;

It is accepted that if s. 27(1) is applicable to Regulation 18 then the applicant is entitled to maintain the proceedings herein. It is also accepted that the new 2011 Act contained no saving clause in respect of proceedings issued prior to the new Act, directions issued or any steps taken in relation to it. In interpreting the meaning of an Act, the Court must firstly adopt a literal approach. I accept the submissions made in this regard by the applicant at paragraph 5.3 above. The literal interpretation of the Interpretation Act seems to me to be clear. In the context relevant in this application, proceedings under an enactment repealed may be instituted and any penalty imposed in respect thereof may be imposed as though the enactment had not been repealed. In *DPP v. Devins* [2012] IESC 7, O'Keeffe J. at para.70 held that s. 27 of the Interpretation Act provided that a prosecution could be brought for an offence under an Act that had been repealed for acts committed before the repeal. He noted:-

> "Section 27 of the Interpretation Act 2005, provides that where a statutory offence has been repealed, a person who commits an offence under the Act can still be prosecuted with that offence even if such person's conduct only comes to light after the Act has been repealed. In my opinion, the offence of buggery contrary to Section 61 is a statutory offence and it is permissible to prosecute in respect of an alleged breach."

There appears no ambiguity that demands resolution. I would have thought that were the respondent's argument correct, then either the Oireachtas did not know what it was doing when it repealed the pre-existing regime or it intended to wipe clean the slate in relation to regulation of the postal service which would have been in violation of the European Communities Directive. Either scenario is untenable. The first involves an assumption the Court ought not to make, the second is highly improbable and a course of action not to be lightly assumed by any court. Had the Oireachtas intended to wipe the slate clean then in my judgment it would have done so in language that was clear. Thus the regime established prior to the 2011 Act seems one that was continued for the purposes of enforcement in relation to any actions duly done or suffered under the Act nor does the repeal affect any obligation or liability accrued or incurred under the pre-existing enactment.

6.4 The opinion formed pursuant to Regulation 18(3);

The formation of an opinion by the Regulator of non-compliance with a direction is necessary under the Act before it can apply to the High Court. The respondent argues that it is an essential ingredient of the accrual of the cause of action. It is accepted that when this opinion was formed on the 8th December, 2011, the former regime under which the direction had been made was repealed. The question is whether by reason of the non-compliance with that direction, any obligation or liability had accrued under the pre-existing enactment prior to the repeal and, crucially for the respondent's case, whether the formation of the opinion under 18(3) was an essential ingredient in the accrual to the applicant of the right of action. When does a right of action accrue? Addressing this question *Murdoch's Dictionary of Irish Law* (5th Ed.) at p. 157 defines a cause of action as;

> "The facts which give rise to a right of action in a court of law. Every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse."

It cites *Cooke v. Gill* [1873] LR 8 CP 107 as authority for this.

Clearly the learned author lays heavy emphasis on the factual elements as constituting the right of action. It is also noteworthy that the wording of Regulation 18(3) does imply a clear distinction between non-compliance with a direction and the formation of the regulator's opinion. It seems to me that a body such as the respondent would have incurred a liability to action even were the opinion never formed because the factual ingredient of non-compliance having been met, it lay entirely in the hands of the regulator as to whether he would initiate court proceedings. Moreover, I have been referred by the respondent in its supplementary submissions to the recent Supreme Court judgment in the *Minister of Justice, Equality and Law Reform v. Tobin* [2012] IESC 37. I note the key analysis of the judgment as to when rights under s. 27 of the Interpretation Act vest. O'Donnell J. finds that where something has happened during the currency of the repealed legislation there was a vested right under s. 27. Clearly in this case "something" did happen. A direction was issued and the respondent failed to comply therewith. As a result of that failure, a right to sue was acquired by the applicant. Moreover, it seems to me that the forming of the opinion is not a fact or necessary ingredient involved in the right to sue, but is a procedural step to be taken by the regulator once he is of opinion there has been a non-compliance.

In any event, I am impressed by the applicant's submission on the Court's jurisdiction to rule on this point. Were the action commenced in the High Court on foot of an opinion invalidly made, the correct form of action would have been to apply for judicial review seeking an order of *certiorari*. This has not been done and the time for doing so having long expired, this Court has no

jurisdiction to impugn the opinion formed.

6.5 The entitlement to institute proceedings in respect of the obligation and liability;

As noted immediately above, on the 31st December, 2010 due to its failure to comply with the direction given, the applicant acquired a right to take proceedings and the respondent incurred a liability to be sued. I have been referred by the applicant and the respondent to the decision of Dunne J. in *Start Mortgages v. Gunn & Ors.* [2011] IEHC 275. Considering s. 27 of the Interpretation Act, the learned Judge concluded that a right must become in some way vested by the date of repeal in order to survive repeal and be enforceable under the repealed provision notwithstanding its repeal.

Applying that conclusion here, the case clearly favours the applicant. The right to issue proceedings in respect of non-compliance had accrued or become vested in the applicant by the 3rd December, 2010 prior to the repeal and was carried over by s. 27 of the Interpretation Act. The applicant thus was entitled to institute proceedings in respect of the obligation and liability.

Entitlement to institute proceedings in respect of a penalty;

6.6 I cannot accept the argument of the respondent in this regard. The wording of the Interpretation Act in relation to the imposition of a penalty could scarcely be clearer. It states at s.27 (2):-

> " Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

Regulation 18(4)(a) provides:-

> "An application for an order under paragraph (3) may include an application for an order to pay such amount, by way of financial penalty, as the Regulator may propose as appropriate in light of the non-compliance."

Thus on the plain and literal meaning of these two provisions, the applicant is entitled to include in any application in regard to non-compliance, an application for an order to pay a penalty.

6.7 I find therefore that the answer to the two questions framed for the Court is in the affirmative.