Neutral Citation Number: [2007] IEHC 321

THE HIGH COURT

JUDICIAL REVIEW

2007 No. 16 J.R.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND
JUDGE AINGEAL NÍ CHONDUIN

RESPONDENT

AND
BERNARD McKENNA AND STEPHEN JONES

NOTICE PARTIES

Judgment of Mr. Justice John MacMenamin dated the 31st day of July, 2007.

1. On 15th January, 2007 Peart J. granted leave to the applicant (the Director of Public Prosecutions) to seek judicial review by way of *certiorari* quashing an order made by the respondent on 5th September, 2006, dismissing prosecutions against the first and second named notice parties. These prosecutions concerned offences contrary to s. 49(4) and (6)(a) of the Road Traffic Act, 1961 as amended. In the summons against the first named notice party, Bernard McKenna, it was alleged that the offence took place on 25th October, 2005. The offence alleged against the second named notice party related to events stated to have occurred on 17th March, 2006.

2. The case made by the Director was first; that the decisions by the District Judge to dismiss these prosecutions for want of prosecution were irrational in light of the short elapse of time between the date of the offences and the date of hearing.

It is said there was no delay sufficient to warrant a dismissal.

3. The second challenge on fair procedure grounds relates to a contention that the prosecution solicitor was afforded insufficient opportunity to address the District Judge on a matter of law, that is upon the form of her order.

4. As these proceedings were brought by way of judicial review, the court at the leave stage was reliant on the affidavit evidence adduced, and did not have the benefit of the views of the respondent on what transpired in the District Court, or her view of the grounds for the application to adjourn, or the submissions made. This procedural issue will be considered later in the judgment with regard to the applicant's decision to abandon an appeal by way of case stated, and instead to proceed by way of judicial review, now challenging the 'reasonableness' of the decision made by the respondent as opposed to the nature and form of the order.

Dismissal because of 'delay'.

Chronology in relation to Bernard McKenna, first notice party

5. Insofar as this is a 'delay' case, the following are the relevant dates in relation to the offence alleged against the first named notice party:

> 25th October, 2005 - Date of alleged offence
>
> 30th November, 2005 - Date of application for summons
>
> 6th April, 2006 - Return date for summons. Case set down for hearing on 13th June, 2006.
>
> 13th June, 2006 - The prosecution sought an adjournment as the prosecuting garda had to attend a family funeral on that day. It is asserted by hearsay, but denied on oath, that the defence solicitor had been advised of the adjournment application in advance. A colleague of the prosecuting garda made the adjournment application before the District Court. While reference is made to Judge Coughlan as having dealt with the matter, it is clear the relevant order was made by District Judge O'Donnell. The garda who made the application allegedly did not recall there being any objection to it. He is said to have stated that he had 'no recollection' of the adjournment being made peremptorily against the State. This averment was both incorrect and hearsay. No affidavit by a member of An Garda Síochána was adduced in these proceedings as to what occurred prior to the hearing date of 5th September, 2006. This too is an issue to which it will be necessary to revert later.

Chronology in relation to Stephen Jones, second notice party:

6. The chronology in relation to Stephen Jones is as follows:

> 17th March, 2006 - Date of alleged offence. Charge sheet issued. Accused remanded on station bail to appear in court on 6th April, 2006.
>
> 6th April, 2006 - Case set down for hearing on 16th June, 2006.
>
> 16th June, 2006 - Case appeared before Judge Hugh O'Donnell and was adjourned at the request of the prosecution because the garda who operated the Intoxilyzer machine was stated to be on sick leave due to a broken arm. The case was adjourned to 5th September, 2006 peremptorily against the State. No affidavit by any garda was adduced in these judicial review proceedings on these events either.

7. Were these sequences of dates in these cases the sole grounds for a dismiss on the grounds of delay, a question might properly arise as to the propriety of the decisions made. However, it is necessary to consider in true context the events that took place before the respondent, at a special sitting of the District Court in Dublin on 5th September, 2006, and the manner in which this material was ultimately placed before this Court.

The hearings on 5th September, 2006

Stephen Jones, the second named notice party's case
8. Of the two cases, the first called was that relating to Stephen Jones, the second named notice party. Ms. Harkin, solicitor attached to the Office of the Chief Prosecution Solicitor, told the respondent that the garda who had operated the intoxilyzer was again not available. He was stated still to be on sick leave, because of a broken arm. This reason had been advanced on 16th June, 2006, two and a half months earlier. The prosecuting garda (a different member of the Force) had apparently only heard of this situation on the previous Saturday evening, on which date he had telephoned the accused's home and spoken with his mother to tell her that the prosecution would be seeking an adjournment. The date set for hearing, 5th September, 2006, was the following Tuesday.

9. Ms. Harkin sought an adjournment. It is not suggested that there was any actual evidence in court to support the grounds relied on. Counsel on behalf of Stephen Jones, the notice party, acknowledged that contact had been made in the manner described, but stated that she was seeking a strike-out of the case as this was the second occasion her client had come to court to find the prosecution had not been able to proceed and where the defence had been given very little notice.

10. The learned District Judge indicated that she was 'not impressed' with the situation and was minded to dismiss the prosecution "for want of prosecution". Ms. Harkin submitted that if she was inclined not to grant the adjournment application, then the appropriate order was a 'strike-out' as no evidence had been heard.

11. The learned respondent stated that this was a special sitting to address a list backlog and she "wanted the matter to end here". Ms. Harkin stated that she appreciated that the respondent wished to express the court's disapproval at what had occurred, and was doing so by refusing the adjournment application. However, she submitted that settled case law was predominantly against the idea that a District Judge could dismiss a case without having heard evidence. She contended that the appropriate order was a strike-out where no evidence was heard, and the prosecution could not proceed, and that the District Court Rules made no provision for an order of dismissal "for want of prosecution". The effect of such an order would be to prevent the re-prosecution of the accused. Ms. Harkin stated that the authority for this proposition was the case of *Eugene Dixon v. The D.P.P.* The High Court, Geoghegan J., 1st December, 1997, Unreported.

12. The respondent reiterated that she wished matters to end there. She said that this had been a special sitting to address a backlog in the court lists. Ms. Harkin indicated that she appreciated this, but was obliged to point out that, jurisdictionally, a dismissal 'for want of prosecution' was not the appropriate order in circumstances where no evidence had been heard and thus was not a dismissal on the merits. Ms. Harkin stated she did not have the case law to hand but if the respondent would let the matter stand she would appreciate an opportunity to open the law to her and would try to get a person from the Chief Prosecution Solicitor's Office to bring it down.

13. Ms. Harkin avers that the respondent briefly acceded to this request, but then heard the application in the following case.

Bernard McKenna, the first named notice party's case
15. The next case called was that against the first named notice party, Bernard McKenna. The District Judge was informed that the garda who had operated the intoxilyzer, Garda Manton, had contacted the prosecuting garda that morning to say he had a family emergency and could not attend. Ms. Harkin told the court that the roof of Garda Manton's house had fallen in during the night. She sought an adjournment on that basis and this was resisted by the defence. A similar debate took place to that earlier outlined. The respondent thereupon ruled that she was dismissing both this and the former case "for want of prosecution".

16. In an affidavit grounding the application for leave, subsequent to the events of 5th September, Ms. Harkin says there was some delay in obtaining copies of the orders from the District Court. These were finally received in the judicial review section of her office only just before Christmas, 2006. She states that her office had been advised by counsel that the best practice in judicial review was to exhibit a copy of the order. For this reason no application for leave was made prior to Christmas 2006.

17. A perusal of the orders made in each case indicates that whatever may have been said in court by the learned District Court judge, the orders as actually recorded, merely indicate that the complaints "be dismissed" and no more.

The events as narrated by Mr. O'Hanrahan, Mr. McKenna's solicitor
18. The first named notice party's solicitor, Mr. Noel O'Hanrahan, swore a replying affidavit. He states that he first attended the District Court with his client, Bernard McKenna, on 6th April, 2006. A plea of not guilty was entered on his behalf.

19. However, contrary to what is stated in Ms. Harkin's affidavits of 15th January, 2007, the District Judge on 13th June, 2006 in fact adjourned the proceedings peremptorily as against the State. Mr. O'Hanrahan personally inspected the relevant minute books of the District Court. The relevant minutes recorded that the matter had been listed before Judge O'Donnell in the District Court on 13th June, 2006 and was adjourned to a different court on 5th September, 2006, marked and initialled by the presiding judge "peremptory v. State HO'D". Mr. O'Hanrahan says the reason for the peremptory adjournment was precisely because the defence had received no advance notice of such application.

20. Contrary to what is stated in Ms. Harkin's affidavit, Mr. O'Hanrahan says there was no notice given to the accused that there was any intention on the part of the Gardaí to adjourn the matter on 13th June, 2006.

21. The account in Ms. Harkin's affidavit as to the events of 13th June, 2006 was hearsay. No direct evidence was adduced on behalf of the applicant as to what transpired. No explanation for this has been given to the court. The account as now can be seen was incomplete. Mr. O'Hanrahan states that when the matter came on for hearing again on 5th September, 2006 and the prosecution once again applied for an adjournment, there was no prior notice whatever, and for the second time his client, who is asthmatic, was subjected to stress in appearing in court fully expecting to defend the proceedings and having fully instructed him for the purpose.

22. It is now undisputed that the sitting of 5th September, 2006 was for the express purpose of clearing a backlog of cases in the District Court. A number of such cases had been transferred from other courts for hearing on that date. Mr. O'Hanrahan says that had the matter again been adjourned or struck out, it is probable that any subsequent hearing date would have taken place more than a year after the date of the alleged offence, where the first named notice party would have borne no responsibility for any such delay.

23. He avers that the District Court is often faced with applications for adjournments by the prosecution, which are made on grounds which effectively cannot be scrutinised, verified or challenged by the accused as they are made with no, or insufficient notice, sometimes when the grounds for such application may lack supporting evidence.

Relevant facts common to both cases not outlined on leave application

24. A practice direction of the President of the District Court, *inter alia*, specifically provided that applications for adjournment, once a date is fixed, be made to court at least seven days prior to the hearing date on 48 hours notice to the other party. It is designed to avoid adjournments on the hearing day and in the interest of case management.

25. This direction was not referred to in the grounding affidavit although referred to in the application for leave. It was brought to light in Mr. O'Hanrahan's reply. There was no mention at the leave stage of correspondence and background material now outlined, of an application for appeal by way of case stated under the Summary Jurisdiction Act, 1857, or to the fact (as is now clear) that the adjournments had been peremptory in both the case of Stephen Jones and Bernard McKenna.

Correspondence in the McKenna case
26. Five days after the case, on 11th September, 2006, Ms. Harkin sent a letter to Messrs. O'Hanrahan Lally, solicitors acting for Mr. McKenna. This letter refers to the case having been dismissed 'for want of prosecution' by the respondent. The letter also enclosed a copy notice of appeal by way of case stated.

27. In response Mr. O'Hanrahan's firm wrote on 13th September, 2006:

> We wish to be quite emphatic in this matter which is that when this case originally came up for hearing on the previous occasion, previous to the 5/09/2006 Garda Cian Daly was unavailable because he had to attend a family bereavement. On that occasion the judge fixed the case for peremptory hearing on the 5/09/2006. Please note the position and acknowledge receipt of this letter."

28. The letter was not acknowledged. No reference to this exchange of correspondence was made in the grounding affidavit upon which leave was granted by Peart J. on 15th January, 2007. It will be recollected the issue of the peremptory adjournment was, briefly, touched on in Ms. Harkin's grounding affidavit for reasons not therein explained but not in the context of any correspondence. The question was however specifically raised in Mr. O'Hanrahan's letter of 13th September, 2006 enclosing a photostatic copy of the notice of application to state a case, and drawing attention to the fact that the adjournment had been peremptory.

29. In fact, no response at all was made to this letter until 25th January, 2007 when Ms. Loftus, Chief Prosecution Solicitor, enclosed, by way of service, judicial review papers returnable for 6th February, 2006, after leave had been granted. The letter stated that the judicial review related to the same District Court proceeding in relation to which a notice of application to state a case was lodged and served on Mr. O'Hanrahan's firm on 11th September, 2006. Ms. Loftus simply added:-

> Please note that the Director does not now wish to pursue an appeal by way of case stated and is proceeding by way of judicial review instead."

30. By this time leave to seek judicial review had already been granted on 13th January, 2007, on the basis of Ms. Harkin's affidavit exhibiting only the summonses and orders in question but not this correspondence.

31. No full explanation was given in affidavit form as to why a decision was made to proceed by way of judicial review. It was said that the decision was on the advices of counsel. Counsel for the Director has admitted candidly that, while two options were open, the ultimate decision was for tactical reasons in both cases. It was not suggested that the choice was based on any procedural consideration. The result was that in addition to the omitted material, the primary narrator of events was Ms. Harkin who swore the grounding affidavit, and not the District Judge.

32. Subsequent to 6th September, 2006, Mr. Jones' solicitors also received a notice of application to appeal by way of case stated pursuant to s. 2 of the Summary Jurisdiction Act, 1857.

33. Nothing further was heard in relation to this appeal. Mr. Jones states that he is not aware if the applicant ever formally abandoned the appeal by way of case stated. Again no explanation other than tactical reasons has been forthcoming from the applicant as to why the appeal by way of case stated was abandoned, or why it was formally decided not to proceed expeditiously with that procedure when the issue in question was actually a point of law, that is the appropriate form of the order. Ms. Harkin's affidavit while seeking to excuse the delay in the commencement of these proceedings, made no reference was to the abandoned appeal by way of case stated which either caused or contributed to the delay.

Prejudice
34. Insofar as delay is an issue, the question of prejudice is dealt with in affidavits sworn herein. Stephen Jones, the second named notice party, states that he was prejudiced, firstly by being required to discharge further legal expenses in respect of the summary proceedings which had already been disposed of in the District Court. Further, he suffers from a hereditary disease knows as Ulcerative Colitis. He states that these symptoms were aggravated by the summary proceedings which had already been disposed of in the District Court. He states that he was hospitalised in St. James's Hospital for seven days in November, 2006. He alleges stress and anxiety derived from 'delay' in the proceedings.

35. Medical reports were obtained from St. James's and Dr. Keogh, his G.P.

Stress and anxiety
36. It is said that there was a flare up in the applicant's colitis in November, 2006. He was eventually admitted to hospital for five days. An erroneous finding was made by a Registrar. It is irrelevant. An entry in the G.P. records shows a request on 20th February, 2007 from Mr. Jones' solicitor, enquiring whether his medical condition could be exacerbated by stress. A further entry (8th June, 2007) records the notice party was in court over a traffic offence and wanted his records in order to show that he had stress due to his illness. Dr. Keogh remarks: "our records do not show that anyway". While the applicant undoubtedly had a recurrence of his medical condition, neither the hospital records nor those of Dr. Keogh show that symptoms which occurred in November, 2006 were attributable to the District Court proceedings. Indeed, it might be observed that at the particular time when the symptoms became acute, the applicant was unaware of anything other that there had been additional correspondence in relation to the case stated two months before in September, 2006. He did not become aware of the judicial review proceedings until the following year. It is also stated that he bought a car for €10,000, by implication after the case, in the legitimate expectation that his driving licence was safe. This latter point cannot be considered prejudice.

37. With regard to the first named notice party, Bernard McKenna, it is stated that he is asthmatic and that he has been subject to the stress of being in court. There was no other evidence of prejudice.

38. As pointed out by Denham J. in *J.B. v. D.P.P.* (Supreme Court, Unreported, 29th November, 2006) there is an element of stress

and anxiety inherent in any criminal charge. Their mere existence cannot be a ground for preventing a trial.

39. I do not consider there was 'delay' as recognised in the proceedings in the District Court. I am not convinced that there is anything in the allegations of stress in either case beyond the fact that, in the case of Mr. Jones, he bought a car, he was hospitalised in late 2006, but made no complaints of anxiety or then of any relationship between his symptoms and his trial. The medical evidence is not probative.

40. In the case of Mr. McKenna, the first named notice party, the complaint is simply of his having asthma. While either condition might be aggravated by stress the evidence does not establish that this is occurred or was attributable to delay.

41. The evidence of stress or prejudice is not of probative value in either case. It has certainly not been sufficiently connected to the matters in issue by any substantive evidence. But delay, stress or anxiety are not the gravamen of these cases for reasons discussed below.

The procedural steps taken by Ms. Harkin.

The issue of delay
42. Following upon the decision of the respondent to dismiss the prosecution, Ms. Harkin filed and served a notice of application to state a case on behalf of the applicant. She wrote to the notice parties to this effect. She wrote to counsel seeking advices and she says specifically, *to draft a case stated*.

43. On 25th September she received advices from counsel to the effect that the appropriate way to proceed would be by way of judicial review rather than by way of case stated. Counsel provided draft judicial review papers and advised that it would be best practice to exhibit a copy of the District Court order which the applicant is seeking to quash.

44. On 28th September Ms. Harkin wrote to the computer summons section of the Courts Service seeking certified copies of the District Court orders. On the same date she forwarded papers, including counsel's advices, actually given on 18th September, 2006, to the Deputy Director of Public Prosecutions. On 24th October, 2006 Ms. Harkin received a direction to proceed by way of judicial review and forwarded the District Court section files and other relevant papers to the judicial review section.

45. Ms. Harkin says that from late October, 2006 to early December, 2006 she contacted the computer summons section by telephone on a number of occasions in relation to her request for copies of the District Court orders. On 24th October, 2006 she was informed that a request form should have been forwarded to her. At that point she had not received this form. She says that no request form was received by her despite a number of messages left with the Courts Service requesting the form.

46. Ultimately, three months after the dismiss order and during the week beginning 11th December, 2006, Ms. Harkin received copies of the District Court orders from the Courts Service, and immediately forwarded them to Mr. Padraig Taylor, solicitor in the judicial review section of the Office of the Director of Public Prosecutions.

The role of Mr. Taylor
47. Mr. Taylor states that the matter was assigned to him on 2nd November, 2006. He says that on reading the file he noted that counsel had advised it was best practice to exhibit copies of the District Court orders. He enquired of Ms. Harkin as to whether copies of the orders had become available and was told she was in contact with the Courts Service and endeavouring to obtain a copy of the orders.

48. During the week beginning 11th December, 2006 Ms. Harkin forwarded copies of the orders which she had received from the Courts Service.

onday, 18th December, 2006 was the last day in the Michaelmas Term on which an *ex parte* application for judicial review could be made. Mr. Taylor says that as he was preparing for three important hearings listed for the last week of term, he knew that he would not be available to deal with an application on Monday, 18th December, 2006. He therefore made plans for the papers to be filed in time for an application to be made on the first Monday of the Hilary Term, that is 15th January, 2007, more than four months after the impugned order. Mr. Taylor states that he noted that an application made on the first Monday of Hilary Term would still be well within the time limits laid down by rule 21 of Order 84 of the Rules of the Superior Courts, 1986. Having filed the papers on 12th January the application for leave was made before Peart J. on 15th January, 2007 and leave was granted.

49. On 6th February, 2007 Mr. Taylor received a letter from the solicitors for the first named notice party alleging delay in the commencement of the within proceedings. To this he replied on 14th February, 2007. Mr. Taylor replied that the District Court orders were certified on 8th December, 2006. He states that there was no delay in commencing the judicial review proceedings caused by the application for a case stated.

50. All this must be seen in light of the question as to whether judicial review was an appropriate remedy or even if it was, whether it was appropriately sought. Whether or not judicial review was the correct procedure sought, relevant material was not disclosed at the leave application. The delay would not have been of the same nature if the applicant had simply processed the appeal by way of case stated on a point of law. Tactical advantage should not be sought in judicial review at the cost of the duty to ensure that a court is fully apprised of all facts relevant to the application and within the procurement of an applicant. This observation applies in the context of this case, albeit I am satisfied the failure to set out all the facts here was in no way attributable to *mala fides*. The choice of remedy may be attributable to a number of causes, not one. But it was not suggested that the case stated procedure would have been, for any reason, inappropriate.

The grounds upon which the applicant relies
51. The applicant contends that the respondent erred in law and was 'irrational' in dismissing the cases 'for want of prosecution'. Counsel submitted in this context that the appropriate order where the prosecution seeks an adjournment due to unavailability of witnesses and the district judge refuses to grant an adjournment is to strike out, especially where no evidence has been heard in a case. It is contended that the respondent acted 'irrationally' and without proper legal basis in purporting to "end" both prosecutions in circumstances where no such application had been made by either notice party, where there was no evidence before the respondent of any prejudice to the notice parties and where there was a relatively short time between offence and prosecution as outlined earlier. It is said that the respondent failed to conduct any proper enquiry as to whether there was a proper basis for purporting to "end" the prosecutions. It is unclear how she could have in the absence of the garda witnesses. While Ms. Harkin and Mr. Taylor swore affidavits as to their part in the events, none of the gardaí involved swore any affidavit on matters central to the issues in these proceedings, both as to the 5th September or earlier hearings.

52. An explanation has been frankly given to this Court as to why it was decided to proceed by way of judicial review. One effect of this tactical decision was to preclude the respondent from engaging in drafting the case stated. This is relevant in the instant case where this Court was furnished only with abridged evidence as to what transpired in the hearing and the considerations which led to the decision and order. This is of particular significance in light of the fact that one element of the applicant's case is that the decision now made by the respondent was "irrational" in the *Keegan* sense.

53. A further consequence is that, as a result of the way in which the proceedings have been brought before this Court, the applicant now frames it as a case where the respondent's decision was wrong in law because, what was before her was a "delay case", i.e. delay in prosecution, where no significant delay had occurred between initiation of proceedings and hearing, and where the notice parties were unable to show prejudice. This prejudice issue was not raised before the respondent.

The response by the notice parties
54. Counsel for the notice parties respond that this is not a "delay" decision at all. Instead, Mr. Alan Doherty Barrister at Law, on behalf of the first, and Mr. Roderick O'Hanlon, senior counsel on behalf of the second named notice party, submit that what was at issue here ultimately, was a simple point of law, the form of the order and a decision made by the District Judge in her capacity as a presiding judge who must determine procedure and consequence in the circumstance where the prosecution was not in a position to proceed with the case simply because its witnesses were not in attendance. Thus, rather than the case being one of 'delay', it is in fact one where the prosecution simply did not have their witnesses in court. The matter being before the District Judge for hearing, the notice parties were entitled to a dismiss because the prosecution could not proceed, the District Judge having referred to the fact that the adjournments had been peremptory, and that no sufficient or proper reason had been properly put before her why the matter should not proceed. Furthermore, it may be inferred this occurred in circumstances, where she considered that the excuses for the absences of witnesses inadequate, unsupported as they were by evidence.

What is the true issue?
55. The fundamental question to pose is: what is the real issue in this judicial review? Is it to do with irrationality – or does it concern the jurisdiction of a District Judge when the prosecution can not proceed?

56. As a preliminary to the answer we must first consider the true effect of the orders made on 5th September, 2006.

The District Court orders
57. The first point here is that dismissal 'for want of prosecution' is not what these orders of the District Court recited at all. In fact they record that the prosecutions shall be "dismissed" *simpliciter*. There are no added words. While the District Judge may have expressed a reason as being "for want of prosecution", such expression is, of course, ambiguous. It might be interpreted as being applicable in a case of delay, as asserted by the applicant. Alternatively it may be interpreted as meaning that the prosecution did not or could not proceed, or 'prosecute' their case.

58. It never was suggested that the respondent gave as a reason that the case would not proceed simply because of delay between the time of complaint and hearing. It has not been suggested by counsel for the applicant that the issue of 'delay' as understood by the prosecution was canvassed before the learned District Judge at all.

59. I am of the view that the applicant has post hoc and with ingenuity, sought to 'recast' the decision of the District Judge into a new mould so as to render it amenable to a judicial review. This was not a 'delay' case at all, properly interpreted. It was one where the prosecution did not have their witnesses in court on the date when that court had determined that the case should proceed. Furthermore, it is not open to the applicant to look behind the orders themselves to ascertain their true legal effect. It cannot be said that there were disputed issues of fact. The facts were clear. It is unnecessary for this Court to determine any issue of fact (see *DPP v. Nangle* [1984] I.L.R.M; *Fitzgerald v. DPP* (Unreported, Supreme Court, 25th, July, 2003).

Legal principles applicable to interpretation of the District Court order
50. Section 13 of the Courts Act, 1971 provided the District Court should be a "court of record".

61. Section 14 of the Act of 1971 (as amended by s. 20(b) of the Criminal Justice (Miscellaneous Provisions) Act, 1997) provides:-

> "(1) *In any legal proceedings regard shall not be had to any record relating to a decision of the District Court in any case of summary jurisdiction other than an order which when an order is required* shall be drawn up by the District Court Clerk and either:
>
> (a) signed by the judge who made the order, or
>
> (b) affixed with the seal of the District Court in respect of the district area in which the order was made or
>
> (c) where the order was made by a judge in the District Court sitting in the Dublin Metropolitan District affixed with the seal of that district or
>
> (d) a copy thereof certified in accordance with the Rules of Court. …" (emphasis added)

62. Delaney "The Courts Acts 1974-1997" Round Hall, 2nd Edition, 2000 at p. 338, observes that s. 14:-

> … effectively provided that the only record of a decision of the District Court should be the formal order of the District Judge."

63. Prior to the enactment of s. 14, full particulars of a decision of the District Court had primarily been entered into a minute book at the time of hearing. Such a procedure led occasionally to a decision, otherwise valid, being subsequently overturned due to a minor textual error appearing on the face of the record. As a result of the provisions of s. 14 it is clear that, for example, a note of the evidence before the District Court could not be used to question the correctness of the court's decision. The order itself is the sole record. (See also *Friel v. MacMenamin* [1990] I.L.R.M. 761, Barron J., where it was held that the District Justice's note of the evidence could not be used to question the sufficiency of a District Court decision as evidenced by a formal order of the court.

The meaning of 'dismiss'
64. It is necessary next to consider the meaning of the order here, viz. 'dismiss' in accordance with decided authority.

65. In *R. (Wilbord) v. Armagh Justices* [1918] 2 I.R. 347, Gibson J. held that under s. 21 of the Petty Sessions (Ireland) 1851 an order

is not invalid if such order of dismissal did not state whether the dismissal was without prejudice or on the merits:

> If the word 'dismiss' standing alone is ambiguous, it would seem to suggest rather a final adjudication than a decision which would enable the complainant to begin afresh – an exceptional privilege."

66. In a situation of ambiguity, there is a duty upon a prosecutor to require the court explicitly to state the nature of the dismiss in a criminal case. In this context it was hardly necessary. The learned District Judge had stated that she wanted the prosecution to 'end there' i.e. to simply dismiss the proceedings. This is what she did. Even looking to the surrounding circumstances I do not consider that any other interpretation is open. The proceeding were to be dismissed finally.

The jurisdiction of the District Judge

67. It is now necessary to address the next aspect of the case, that is whether the order made was within jurisdiction. This is an issue which may also be determined by appeal by way of case stated (see *DPP v. Nolan* [1990] 2. I.R. 526). In *Dixon v. Hogan & Anor.* Geoghegan J., the High Court, Unreported, 1st December, 1997, a District Judge having made an order of dismiss, was asked for clarification and used the expression that the case was dismissed 'for want of prosecution'. As pointed out by Geoghegan J., this expression did not appear in the District Court Rules then in force. He observed:-

> In the District Court Rules it is confined to a dismissal on the merits or a dismissal without prejudice. I have to look at the circumstances surrounding the making of the order to see [what] the effect of the order was. It was quite simple. *The prosecuting guard was without his witnesses*. He applied for an adjournment and Judge Hogan refused to grant the adjournment. The case could not go on. The case was then dismissed. It does not matter that the expression 'dismissed for want of prosecution' was used as it comes to the same thing. *In those circumstances the State does not have the right to come again. It had nothing to do with delay.* The order made was effectively a dismiss on the merits." (emphasis added)

The italicised observations are clearly as applicable in the instant case. A judge may, within jurisdiction reasonably exercised, dismiss a case finally if the prosecution cannot proceed.

68. In *Dixon* reference is made to the decision, subsequently reported, *Shannon v. District Judge Oliver McGuinness and the Director of Public Prosecutions* [1999] 3 I.R. 274, Kelly J..

69. *Shannon* is of assistance in that it establishes that a court order which recited that a complaint had been heard, does not of necessity imply that a full hearing has taken place with evidence tendered. It is further authority for the proposition that in any case involving a summary offence, where a District Judge did not convict the defendant, such judge had jurisdiction to dismiss the complaint either on the merits or without prejudice to its being made again. (Carpenter v. District Judge Kirby [1990] I.L.R.M. 764 approved). In the course of his judgment in Shannon Kelly J. stated:

> "It appears to me that on 4th September, 1995, all of the relevant parties were assembled before the District Judge and he was addressed by the representative of the Director of Public Prosecutions concerning the two summonses in question. What took place was undoubtedly a hearing and it was a hearing relating to the complaints of the Director of Public Prosecutions against John Shannon. Whilst evidence was not called, it was, in my view, nonetheless a hearing and one concerning the complaints which had been made by the Director of Public Prosecutions. It does not appear to me that when orders complained of use the expression 'a complaint was heard' that that necessarily carries with it the implication suggested by counsel to the effect that there was a full hearing with evidence being tendered. I am of the view that the orders do not misstate the position insofar as they recite that a complaint was heard. Even if they did, it does not appear to me that that of itself would entitle the applicant to an order quashing the orders of the District Court still less the declaratory relief which is now sought."

70. Thus, the jurisdiction of a District Court judge may include a dismiss in circumstances where there has not been a formal adjudication on the merits. *Shannon* was a decision under the previous Rules of the District Court of 1948.

71. Rule 66 of those Rules provided:-

> "Order to dismiss or strike out in cases of summary jurisdiction
>
> 66. In any case of an offence punishable on summary conviction where the justice does not convict the defendant, he may dismiss the complaint either on the merits of [*a misprint for* 'or'] without prejudice to its being again made. If he is not satisfied that the appropriate provisions of these rules have been complied with, or is of the opinion that the complaint before him discloses no offence at law, or if neither complainant nor defendant appears, he may if he thinks fit strike out the complaint without awarding costs, but this order shall not debar the complainant from bringing fresh proceedings in the same matter."

Kelly J. commented on the provision in *Shannon*:

> "It does not appear to me that this rule materially assists the applicants in their submission. The first sentence of this rule makes it clear that in any case involving a summary offence where the judge does not convict the defendant he may dismiss the complaint either on the merits or without prejudice to its being again made. The present case was one involving offences punishable on summary conviction and the District Judge did not convict the defendant. He was, therefore, entitled to dismiss the complaint either on the merits or without prejudice. This is clear from the reading of the first sentence of rule 66. As to the second sentence, it does not appear to me that it has any relevance at all. There is here no question of the appropriate provisions of the rule not having been complied with, nor is there any suggestion that the District Judge was of opinion that the complaint before him disclosed no offence at law nor can it be said that neither the complainant nor the defendant appeared." (At p. 282 of the report)

72. While *Shannon* was decided in the context of the District Court Rules, 1948, similar observations may be made on O. 23, r. 3 of the Consolidated District Court Rules promulgated in 1997.

73. This rule, which appears to be the only analogous rule, does not reproduce the provisions of r. 66 of the 1948 Rules.

74. Instead, O. 23, r. 3 provides:

> "3. Where a prosecutor does not appear where the accused (or his or her representative) is present at the required time and place and the prosecutor (or his or her representative) is not present, the court may strike out, dismiss without prejudice or adjourn the hearing of the complaint."

75. In the instant cases, it is undisputed that the accused and their legal representatives were present at the required time. But so too was the representative of the prosecutor, the Director of Public Prosecutions. It was the prosecutor's *witnesses* who were absent. Thus the provisions of O. 23, r. 3 do not appear to be in any way applicable or apposite in the instant cases and do not appear to affect the power of the District Judge to make an order of dismiss within jurisdiction.

76. *The Director of Public Prosecutions v. Martin*, the High Court, Unreported, Kinlen J., May 19th, 2000, is also authority for the proposition that the effect of an order of "dismiss" *simpliciter* is to dismiss the complaint on the merits so as to bar further proceedings in the matter.

Jurisdiction of District Court to ensure fair trial and fair procedures
77. In *Whelan v. Judge Brian Kirby and the Director of Public Prosecutions*, the Supreme Court, Unreported, 1st March, 2004, Geoghegan J. pointed out that the common law principle that a court of summary jurisdiction is a creature of statute and may only make orders permitted by statute must be subject to the overriding requirement of fair procedures under the Constitution. He observed:

> "There is jurisdiction in the District Court to make any order that will be necessary for the fulfilment of the constitutional obligations of a fair trial and fair procedures …"

78. These observations are a reiteration of the views expressed by Denham J. in *Coughlan v. Judge Patwell* [1993] 1 I.R. 31 that:

> "While the District Court is a court of limited statutory power it remains at all times a court which must protect the individual constitutional rights of the person."

Denham J. went on to quote Walsh J. in *Ellis v. O'Dea* [1989] I.R. 530 to the following effect:

> "The District Court has a duty to act constitutionally and to act in such a manner as to preserve an individual's constitutional rights. If an individual as here alleges that his constitutional rights have been infringed in procedures adopted … the District Court justice has jurisdiction to and indeed should hear the submission and take such steps as it considers proper."

79. The fact that the District Court may exercise jurisdiction so as to protect the rights of an accused is demonstrated by the fact that that court has, with the approval of the Supreme Court in *Whelan*, allowed for the disclosure of witness statements or other material necessary to safeguard fair procedures, and also in making orders for inspection. The fact that the District Court Rules do not confer any power to make such orders does not diminish or detract from a constitutional duty to observe fair procedures. Such jurisdiction must include a power to dismiss, as established in *Dixon* and *Shannon*.

80. I do not consider the adoption of the Rules of 1997 affects the situation. Certainly, were there to be a new order or rule purporting to circumscribe or reduce the jurisdiction of a District Judge it would require to be expressed explicitly, even were it in accordance with the Constitution. No such order or rule is contained in the Rules of the District Court, 1997.

81. I am satisfied therefore, that a District judge may lawfully exercise such power to dismiss a claim in the circumstances of the instant cases. The fact that an order of "strike out" might also in certain circumstances be an appropriate order is not relevant. The matter was one of judicial discretion applied within jurisdiction, in a particular situation where there had been previously a peremptory adjournment and prosecution witnesses were not present to testify in cases listed for hearing.

The peremptory adjournment
82. While it cannot be said that a 'peremptory' adjournment is an irrevocable indication that a case will proceed on a particular date, it is nonetheless one of the factors which must also be borne in mind here, as must be the circumstances of the prior adjournments which took place in June of 2006 to 5th September, 2006. In a situation where a number of adjournments had already taken place at the instance of the prosecution, and where a District Judge may reasonably infer that the basis for any further adjournment application is inadequate, there must surely lie within the jurisdiction of that court, within the constitutional duty of fairness, the power to ensure that justice is administered expeditiously and finally. The public interest in ensuring that crime is prosecuted, must be balanced by the public interest in ensuring that justice is concluded.

The fair procedures issue
83. A second contention made by the applicant is that there was a want of fair procedures in refusing to adjourn so as to permit the prosecution to obtain relevant case law. In general, it is the duty of a judge to ensure that a reasonable opportunity is granted to the parties to present the entirety of their cases.

84. However, judicial review will not be granted if such order would be futile or otiose. What was the case law which the prosecution wished to cite? Here one must recollect precisely what "the issue" was. It was on the form that the District Court judge's order should take, that is whether it ought to be a strike out or a dismiss. That is the precise issue described in *Dixon* referred to earlier. It was not suggested that the prosecution were seeking to cite any of the authorities relating to "delay" jurisprudence. This in itself undermines the "irrationality" case made by the applicant. Such authorities were simply not seen as *ad rem* in the context. Because it was not a 'delay' case no one had these authorities in mind.

85. But the matter is surely concluded by the precise terms of Ms. Harkin's affidavit. She stated, accurately, that the District Court Rules contains no scope for dismissal for want of prosecution. Equally, she added that the effect of the order contemplated would be to prevent the re-prosecution of the accused. In support of that proposition she herself had submitted that the relevant authority was that of *Eugene Dixon v. The Director of Public Prosecutions*, Geoghegan J., 1st December, 1997. This is precisely the authority which establishes that the statement of a District Judge that a case was being dismissed "for want of prosecution" is tantamount simply to an order to dismiss the claim on the merits. While it has been argued in this Court that an adjournment might have allowed for the opportunity of citing of other authority on the issue of delay this submission would appear to be also controverted by the terms of Ms. Harkin's own affidavit and the precise and single authority which she fairly stated that wished to cite. It was *Dixon*. This was against the prosecution. Delay was not the issue under construction: the form of the order was. Thus, I do not consider that the fair procedures argument can succeed. Even had *Dixon* been cited I cannot see how it would have assisted the prosecution. The decision to proceed must be seen with this in mind. It was reasonable for the judge to decline to adjourn the cases and proceed to

make her orders in the circumstances which obtained.

Delay cases in the District Court
86. Notwithstanding the absence of evidence of prejudice, either actual or presumptive, a District Judge is obliged to prevent an invasion of the constitutional rights of an accused and may in certain circumstances accede to a request not to allow a trial to proceed. (See *D.P.P. v. Arthurs* [2000] 2 I.L.R.M. 363)

87. The court has been referred to authorities concerning the application of 'delay' jurisprudence in the District Court (*Fennell v. D.P.P.*, 26th April, 2005, Dunne J.; *D.P.P. and Colin O'Sullivan*, The High Court, Dunne J. 11th October, 2005). But both these cases involved a consideration, and application of the delay principles of the superior courts to situations arising in the District Court. This was not the situation here.

88. The decision of Feeney J. in *D.P.P. v. Sheridan & Anor.*, The High Court, 2nd March, 2007, applies to its own facts and an entirely different circumstance where the accused sought to invoke the delay jurisprudence of the courts and a decision was made to dismiss in circumstances where all of the prosecution witnesses were actually present in court. On these facts the decision was considered to be irrational. That is precisely the situation which did not obtain in the instant case. It was because the prosecution witnesses were not in court, for the second time, that the respondent decided to "end" it. These authorities are not relevant therefore.

Conclusion
89. For the reasons outlined, I do consider that the applicant has established grounds for judicial review.

Discretion and delay
90. Even if I had concluded otherwise, I consider that in the circumstances the remedy of judicial review should be declined on discretionary grounds and for delay, even though brought within six months of the decision.

91. In *Gill v. Connellan* [1988] I.L.R.M. 448 Lynch J. pointed out:

> "An application for certiorari by way of judicial review is not to be regarded as a readily available alternative to an appeal by way of re-hearing to the Circuit Court. The ordinary remedy for a person who is dissatisfied with a District Court decision is to appeal to the Circuit Court where a complete re-hearing will take place. *Alternatively, if the facts of the case are not in issue but a point of law arises then appeal by way of case stated to the High Court is appropriate*."

The essential issue in this case was the point of law as identified earlier, that is the form of the order. The fair procedures issue arises only because the applicant sought to proceed by way of judicial review.

92. It is not controverted that in the instant case an appeal by way of case stated was in the contemplation of the prosecutor. The judicial review procedure as actually followed had the following results: (1) the respondent was effectively precluded from a statutory role in preparing and framing and transmitting the terms of an appeal by way of case stated (s. 3 Summary Jurisdiction Act, 1857). This might have included inferences and further factual evidence as to previous peremptory adjournments, now latterly adduced and the circumstances in which her decision was made. Whether the judge would have wished to consult with the parties as to the form of the draft would have been a matter within her discretion. (2) As a matter of fact, a delay of four months occurred until 15th January, 2007 before the application for leave was moved. (3) The appeal by way of case stated would have afforded an appropriate and speedy procedure, within the confines of the case itself, for the determination of what was effectively a point of law, that is the form of the intended order which the district judge was permitted to make. It would also have eliminated any fair procedure argument from the parameters of the case. (4) Insofar as the applicant chose to proceed by way of judicial review, there was no mention in the grounding affidavit of the correspondence which referred specifically to an appeal by way of case stated and the other material facts identified earlier.

93. Thus, by way of contrast to the facts in *The Director of Public Prosecutions v. Hamill*, the High Court, Unreported, 7th April, 1995, Geoghegan J., the judge who granted leave in this case was not on notice of the request for the case stated. In *Hamill* Geoghegan J. observed of the procedure adopted there:

> "Counsel for the notice party … argues that there was a lack of *uberrimae* fides in the main grounding affidavit [of the applicant] in not informing the court as to what was done or not done following on and in pursuance of the request I do not consider that there is any validity in this argument. *It might have been a different matter if the affidavit had made no reference at all to the case stated but the judge granting leave was on full notice of the request for the case stated and indeed may well have asked about it*. In my opinion the applicant quite properly changed his mind and chose the route of judicial review rather than the case stated. Having regard to the fact that the proceedings were apparently struck out on foot of a preliminary objection I think that this is clearly the correct procedure." (emphasis added)

This was not the situation here however. The judge was not put on notice of the case stated at the application for leave, whether or not that was the appropriate procedure.

94. This is of particular importance by reason of the provisions of O. 84, r. 20(5) of the Rules of the Superior Courts which provides:-

> "Where leave is sought to apply for an order of *certiorari* to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject to appeal and a time is limited for the bringing of the appeal, the court may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

95. While it might be thought that this rule pertains to an appeal to a higher court as opposed to an appeal by way of case stated, it is nonetheless relevant in the context of there having been available an alternative remedy which would have been both more appropriate and expeditious and would have provided the court with greater contextual material as to the true nature of the issue, both at the leave stage and at full hearing.

96. In *The State (at the prosecution of Conlon Construction Ltd.) applicants v. The County Council for the County of Cork*, Butler J., the High Court, 31st July, 1975, that judge observed in relation to an order of mandamus under the former State Side regime that:

> "An order of *mandamus* is made like all State Side orders in the nature of former prerogative writs to secure that rights are protected, justice done and injustice prevented where no equally effective remedy exists. The making of the order is within the discretion of the court. The court must consider all the circumstances of the case including the conduct of the parties and, unless coerced by the manifest requirements of justice to exercise the discretion to make the order, may

> refuse it on judicial grounds. Where *mandamus* is sought to secure a right, the right must be promptly claimed and the claim pursued vigorously without being abandoned. Among well recognised grounds for refusing the remedy is delay on the part of the applicant in pursuing the claim and the abandonment of the claim in favour of alternative remedies. Where such delay and abandonment was deliberate because the claimant may have thought such a course to be in his better interests he cannot repent his decision and ask for the discretion of the court to be exercised in his favour by the making of the order."

These observations are applicable equally to this judicial review sought by way of *certiorari*.

97. In the instant case I am satisfied that, not only did an effective but an appropriate alternative remedy existed which might have been availed of more effectively and without delay. Equally, insofar as the applicant chose judicial review, I must observe that I am satisfied there was no *mala fides*, but the application for appeal by way of case stated, the correspondence and the material identified above ought to have been brought to the attention of the court at the leave stage. While it cannot accurately be said that the matter was "pending before an appeal court" the application for the appeal by way of case stated was a material fact had certain legal effects on the order and was still in being. The time within which such procedure might have been availed of had not expired even at the time when the leave application was brought.

98. In these particular circumstances therefore, I consider that the elapse of time which occurred constitutes unjustified delay in bringing this application, not only because of the delay until the application for leave on 15th January, 2007, but because of insufficient compliance with the obligations in judicial review. The delay in seeking the court orders occurred for this same reason. The further, unjustified delay occurred until 15th January. It was unjustified because it need not have occurred at all. Insofar as the applicant chose judicial review the material and relevant facts above were not disclosed.

99. I conclude, therefore, that the application should be declined by reason of delay in the circumstances, and on simple discretionary grounds by reason of the inappropriate invocation of the form of relief, that relevant facts were not disclosed at the leave stage as to the context of the case, as to what transpired thereafter, and the absence of relevant correspondence in the grounding affidavit. This arose in a context where appeal by way of case stated was an available and appropriate remedy.

100. It will be noted that I am explicitly refraining from using the term 'want of candour'. I do not consider there was an intended lack of *bona fides* in the application. The fact is that the insufficient compliance with the requirements of the remedy actually invoked is amply demonstrated by the facts as they ultimately emerged.

101. The application is therefore declined on all grounds.