[2017] IEHC 263

THE HIGH COURT

2016 No.429JR

Between:

SIMONA CIRPACI

Applicant

– and –

ELECTRICITY SUPPLY BOARD NETWORKS LIMITED

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 5th May, 2017.

I: Background

1. Ms Cirpaci was issued with a summons dated 6th May, 2015, charging her with two offences under the Energy (Miscellaneous Provisions) Act 1995, as amended, viz. unlawful interference with an ESB meter contrary to s.15(3) of that Act, and failing to take all reasonable steps to ensure that interference with an ESB meter was discontinued, contrary to s.15(6) of the Act. The detail of those provisions is considered later below. The content of the summons that issued to Ms Cirpaci is set out overleaf.

2. As can be seen from the substance of the summons, despite blank spaces being left in the standard template, at no point does the summons state which District Court office it issues from. Notably, the summons also states the date on which the first offence of unlawful interference occurred as being 28th April, 2014.

3. Ms Cirpaci attended Court 8 of the Four Courts as required on 22nd June, 2015, and as required thereafter. By letter of 30th June, 2015, the prosecution furnished disclosure to Ms Cirpaci's solicitor. This included (1) a "*Customer Visit Discrepancy Report*" that listed the date of detection of interference with the meter as 28th April, 2014, and (2) a "*Units Undercharge Calculator*" that identifies the time-period of undercharge as being from 6th May, 2011, to 27th April, 2014.

4. The matter was set down for hearing on 30th November, 2015. On that date the prosecution sought an adjournment as the defence had raised a preliminary jurisdictional argument which required to be clarified. This adjournment was granted, the learned District Justice requesting that both parties furnish brief written submissions on the jurisdictional argument in advance of the next hearing-date. Following a further adjournment, the matter came to be heard on 4th April, 2016.

Content of the Summons.

"AN CHUIRT DUICHE THE DISTRICT COURT

No. 15.2 SCHEDULE B

O. 15, r.2(1)

Courts (No. 3) Act, 1986

Section 1

SUMMONS

DUBLIN METROPOLITAN DISTRICT

ESB NETWORKS LIMITED PROSECUTOR

of Clanwilliam House, Clanwilliam Place, Dublin 2

(a Limited Liability Company)

SIMONA CIRPACI ACCUSED

of [Address Stated in Original], County Dublin

WHEREAS on the 6 day of May 2015, an application was made to this office by Vincent M. O'Reilly, State Solicitor, Navan, County Meath *(on behalf of) the above named Prosecutor for the issue of a Summons to you, the above named Accused of [Address Stated in Original] *(in Court Area and District aforesaid) alleging the following offence(s):-

OFFENCE 1

THAT YOU the said Simona Carpaci did on the 28th day of April 2014 at [Address Stated in Original], County Dublin in the Court Area and District aforesaid unlawfully interfere with an article owned by or under the control of the Electricity Supply Board contrary to Section 15(3) of the Energy (Miscellaneous Provisions) Act, 1995, as amended by Section 5 of the Energy (Miscellaneous Provisions) Act 2012.

OFFENCE 2

AND FURTHER THAT YOU the said Simona Carpaci being a registered consumer of the electricity supply at [Address Stated in Original], County Dublin on the 28th day of April 2014 having reasonable grounds for believing that a meter to which Subsection 15(6)(a) of the Energy (Miscellaneous Provisions) Act, 1995 as amended by Section 5 of the Energy (Miscellaneous Provisions) Act 2012 applies was not duly registering or causing to be registered a quantity of electricity being supplied to the premises by reason of the meter being interfered with, failed to take all reasonable steps to ensure the interference was discontinued, contrary to Section 15(6)(c) of the Energy (Miscellaneous Provisions) Act, 1995 as amended by Section 5 of the Energy (Miscellaneous Provisions) Act 2012.

THIS IS TO NOTIFY YOU that you will be accused of the said Offence(s) at a sitting of the District Court for the court area and district aforesaid to be held at Court No. 8 Four Courts, Inns Quay, Dublin 7 on the 22 June 2015 at 10.30.am.

AND TO REQUIRE YOU to appear at the said sitting to answer the said accusations.

The appropriate District Court Clerk specified in relation to this Summons is Gabriel O'Gorman

of the District Court Office at oooooooooooooooooooooooooo District Court Clerk

* Issued out of the District Court Office at oooooooooooooooooooooooooo

An office of the Courts Service designated for the purpose of receiving applications under section 1(3) of the Courts (No 3) Act 1986.

To: Simona Carpaci

Of: [Address Stated in Original], County Dublin."

5. On 4th April, 2016, the learned District Judge heard submissions as to whether the District Court had jurisdiction in the matter and decided that (i) the District Court had jurisdiction, and (ii) the fact that the summons did not specify the location of the District Court Office to which the application for the summons had been made did not act to deny the District Court jurisdiction over the matter. It is worth quoting from a couple of portions of the transcript of the District Court hearing which demonstrate that the learned District Judge expressly concerned himself with the argument made before him as to procedural versus jurisdictional deficiencies and the related consequences of each (the judgment of Clarke J. in *Payne v. Brophy* [2006] IR 560 being perhaps the definitive case on this dichotomy of deficiencies). Per the transcript of the District Court proceedings (at pp.13–16):

> "JUDGE: …[I]n your submissions, you refer to the attendance of the defendant curing all defects.
>
> COUNSEL (ESB): Yes, Judge.
>
> JUDGE: You seem to suggest that once the Defendant is in court, that's it?
>
> COUNSEL: Yes, Judge.
>
> JUDGE: Counsel [for Ms Cirpaci] has made the point that in relation to the law opened by her…there is reference to defects which go to the jurisdiction of the court and defects which are purely procedural. Purely procedural defects can be dealt with, but defects going to the jurisdiction of the Court cannot so easily be dealt with.
>
> [Counsel for ESB addresses the query raised.]
>
> […]
>
> JUDGE: What do you say to the specific matter referred to by counsel [for Ms Cirpaci] as to the – at the end of the summons – the appropriate District Court Clerk specified in relation to this summons is 'so and so'…of the District Court Office at 'blank'?...Is that a defect which is purely procedural in nature or is it a defect which…goes to the jurisdiction?
>
> [Counsel for ESB argues that the said deficiency is procedural. Counsel for Ms Cirpaci then argues that it is a deficiency which goes to jurisdiction. The learned District Judge then gives a short ruling on the matter]
>
> […]
>
> JUDGE: [To Counsel for Ms Cirpaci]…Counsel, I don't agree with you. I don't hold with your submission."

6. The learned District Judge then proceeded to hear the case. Following the prosecution evidence, an application was made on Ms Cirpaci's behalf for a direction that the case against her be dismissed as a prima facie case had not been established. One of the submissions made at this point was that the prosecution had not proven the facts as alleged in the summons in relation to the alleged contravention of s.15(3). This submission was made on the basis that it had been accepted in the cross-examination of the prosecution witnesses that the interference with the ESB meter must have occurred in or about 6th May, 2011; yet the summons stated 28th April, 2014 (the date of the fateful inspection) as the date on which the offence was committed. The prosecution did not make any application to amend the summons in this respect. The learned District Judge refused this application for a direction and the defence then went into evidence. After the cross-examination ended, the following exchange ensued between the learned District Judge and counsel for Ms Cirpaci:

"JUDGE: Thank you. I am satisfied that the ESB have proved their case, counsel. [The learned judge then identifies certain monies that are owed by Ms Cirpaci to ESB and continues]….[To Counsel for Defence] Counsel, it would be to your client's advantage if those monies were paid. However, if you want me to make my order today and you may have instructions to appeal, I don't know, I can finalise my order today.

COUNSEL (MS CIRPACI): Perhaps, Judge, it would be best to try and – she seems to be

doing well in paying off the arrears to date, so perhaps if we could adjourn it to try and clear her arrears….

JUDGE: Okay, I will put it back and if I am told on the next occasion that maybe the arrears might have been cleared and the replacement of the installation value was only outstanding, that would be to your client's advantage, if I was told that. But I don't want you to feel that your client must do that. You are quite entitled to have me make my order today and you can appeal it if you wish?"

[Following some further exchanges, the learned District Judge adjourned matters to a hearing-date next July, without objection being made.]

II: Reliefs Now Sought

7. Arising from the foregoing, Ms Cirpaci has brought the within judicial review application seeking the following reliefs:

> (1) an order of *certiorari* quashing the order of the learned District Court Judge made on 4th April, 2016 in relation to the above-described proceedings, being proceedings entitled ESB Networks Limited v. Simona Cirpaci;
>
> (2) a declaration that the learned District Judge erred in law in failing to conduct an inquiry into whether or not the application for the summons on which the said proceedings were based was made to the correct District Court Office in the absence of this information on the face of the summons;
>
> (3) a declaration that the learned District Judge acted ultra vires in convicting the applicant where the jurisdictional basis of the summons had not been established and where no application to amend the said summons had been made by the respondent;
>
> (4) a declaration that the learned District Judge erred in law and/or acted in breach of constitutional justice and fair procedures in convicting the applicant on the basis of a summons specifying the incorrect date and/or insufficiently particularised dates for the offence alleged under s.15(3) of the Act of 1995, as amended;
>
> (5) a stay on any further steps being taken in the above-named proceedings; and
>
> (6) certain ancillary reliefs.

III: Premature Application

8. The court must regretfully conclude that the within application is premature and without basis, especially in circumstances where Ms Cirpaci has not yet been convicted; in fact it may be that she will not be the subject of any order of conviction. At this point in time, all that has happened is that the learned District Judge has stated that "*I am satisfied that the ESB have proved their case*", made no order, and adjourned matters to next July with a view to allowing certain outstanding monies to be repaid by Ms Cirpaci (which repayment the learned District Judge has indicated will be to Ms Cirpaci's advantage), this being an approach to matters which counsel for Ms Cirpaci effectively sought, and to which she raised no objection.

9. As the court noted last year in *Ledwidge v. DPP* [2016] IEHC 726, para. 12, "*It goes without mention, though it is perhaps worth mentioning anyway, that the court cannot quash an order that was never made*". Of course, there is the power open to the court under O.84, r.27(2) of the Rules of the Superior Courts 1986, as amended, to direct that a record be made of a judgment, conviction or decision of which complaint is made; and, of course, there was recognition by the Supreme Court in *SPUC v. Grogan* [1989] IR 753, that a ruling without a formal order can be a decision for the purposes of Art. 34.4.3° of the Constitution – though, notably, in that case what was in issue was a ruling to defer consideration of an application for an interlocutory injunction, which deferral effectively decided, in the circumstances presenting, that there would be no interlocutory injunction. A like situation does not present in the within application. Here, as indeed was the case in Ledwidge, the court is not treating with something that was done but not formalised, or the true character of which falls now to be recognised; it is dealing, when it comes to the order of conviction, with a non-occurrence, with an order that, to borrow from the language of Ledwidge, was simply never made. The court does not have the power to breathe contemporary substance into a historical vacuum. There is no order of conviction in this case. As to the conduct otherwise of the District Court proceedings, as matters have yet to reach their conclusion in what are criminal proceedings, the court is mindful of the historical aversion that the courts have manifested as regards conducting judicial review in respect of such proceedings prior to the trial court completing its work. So, for example, in *CC v. Ireland* [2006] 4 I.R. 1, the Supreme Court doubted the propriety of seeking a declaration by means of judicial review as to the interpretation, and ultimately the constitutionality of s.1(1) of the Criminal Law (Amendment) Act 1935. Exceptionally, however, the Supreme Court proceeded to rule on those questions in the very particular circumstances presenting in that case. Here, no like or other exceptional circumstances appear to present, and the court is heedful of the rightly cautious note struck by the late Carney J., a distinguished criminal law judge, in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, and which can be applied by analogy to the circumstances of the within proceedings, when he observed, at 69-70, consistent with the logic in CC, that:

> "*It cannot be emphasised strongly enough that an expedition to the judicial review court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial. I am undertaking this application for a judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases it would be appropriate that any question of judicial review be left over until after the conclusion of the trial.*"

10. The court considers that this case belongs, to borrow from the just-quoted text, to "*the overwhelming majority of cases*".

IV: Conclusion

11. For the various reasons stated above, the court considers that this application must fail at this time and declines to grant any of the reliefs now sought.