



**THE COURT OF APPEAL**

Neutral Citation Number: [2018] IECA 237

**[2017 347]**

**Birmingham P.  
Edwards J.  
Hedigan J.**

**BETWEEN**

**STEPHEN BENNETT**

**APPELLANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of the Court delivered on the 9th day of July 2018 by Birmingham P.**

1. This is an appeal from a decision of the High Court (White J.) of 20th May 2017 rejecting a challenge by the appellant to the decision and power of the Director of Public Prosecutions to prosecute him summarily for breaches of s. 12 of the Water Services Act 2007. This section that makes it an offence to obstruct a water services authority when exercising its statutory powers. It is agreed that the case raises a net point of statutory interpretation. The point arises in these circumstances.

2. Section 9(1) of the Water Services Act 2007 provides as follows:

"Summary proceedings for an offence under this Act may be brought by a water services authority (whether or not the offence is committed in its functional area)."

The appellant submits that this is a case where the well-known Latin legal maxim *expressio unius exclusio alterius* – to express one thing is to exclude another – applies. The appellant suggests that the force of that argument emerges with particular clarity if regard is had to the provisions of s. 9(2) of the Act as originally enacted, though now subsequently repealed. This section had provided:

"Notwithstanding subsection (1), the Minister may, by regulations, provide that summary proceedings for an offence specified in the regulations may be brought by such person (including the Minister) as is so specified."

Section 9(2) was deleted by s. 45(1) of the Water Services (No 2.) Act 2013.

3. The appellant contends that the plain and ordinary meaning of the Act was that the Oireachtas was stipulating that summary proceedings could be brought by water services authorities and also, prior to repeal of s. 9(2), by individuals specified by the Minister. The appellant argues that if, contrary to his submission, the view is taken that the section does not, by its plain and ordinary language, support the interpretation contended for, then the same result would be achieved by a holistic interpretation. Attention is drawn to s. 11 which provides as follows:

"(1) Where a court imposes a fine or affirms or varies a fine imposed by another court for an offence under this Act, it shall, on the application of the water services authority which brought the prosecution, or person specified under regulations made under section 9(2) as the case may be (made before the time of such imposition, affirmation or variation), provide by order for the payment of the amount of the fine to the water services authority or other person.

(2) Payment to be paid under subsection (1) may be enforced by the water services authority or person specified under regulations made under section 9(2) as if it were due on foot of a decree or order made by the court in civil proceedings."

The appellant submits that the language of the section clearly suggests that the prosecutor will either be a water service authority or a person designated under s. 9(2) of the Act. The appellant submits that further support is to be found in s. 10(a) which provides:

"(1) Where a person is convicted of an offence under this Act, the court shall, unless it is satisfied that there are special and substantial reasons for not doing so, order the person to pay to—

(a) a water services authority, or

(b) another person,

the costs and expenses, measured by the court, incurred by the water services authority or other person in relation to the investigation, detection or prosecution of the offence."

It is suggested that, had it been envisaged that the DPP could prosecute summarily, then s. 11 would not have been enacted in the form that it was.

4. Moreover, it is submitted that the height of the argument that can be made in favour of permitting the DPP to prosecute is to say that the matter is ambiguous and not beyond doubt. If that is so, as the appellant argues, then the statute, as a penal provision, should be construed in the manner most favourable to the accused.

5. On behalf of the DPP, it is argued that she has the power to prosecute and that the usual rules apply. She submits that absent a specific statutory provision ousting the power of the DPP to prosecute summarily then the DPP has a general power to prosecute. She argues that it is clear that the legislation states that a water authority, which is now Irish Water, may also prosecute such offences, but that there is no ouster of the jurisdiction of the DPP whatever. She further submits that there is a well-established line of authority dating back to the decision of a divisional High Court in *Attorney General v. Healy* [1928] 1 IR 460, which makes clear that the Attorney General, now the Director of Public Prosecutions, retains the general power to prosecute even when power is bestowed on additional entities.

#### Decision in the High Court

6. White J. commented:

"I cannot see any ambiguity in s. 9 of the Water Services Act 2007, either in its original or in its amended form. Summary proceedings for an offence under the Act may be brought by a Water Services Authority. There is no suggestion in the Act that the Water Authority is the only legal person who can bring a prosecution.

The long standing jurisprudence and statute laws has been set out comprehensively in the written submissions of the Director of Public Prosecutions . . ."

White J. proceeded to set out those submissions, referring to the provisions of the Ministers and Secretaries Act 1924 and the Criminal Justice (Administration) Act of the same year, referring to the transfer of powers from the Attorney General to the DPP by the Prosecution of Offences Act 1974. The judge said as follows:

". . . the correct interpretation of Section 9(2) of the 1924 Act is that in all instances where a person authorized by law to prosecute does not initiate a prosecution, then the DPP has the power to prosecute such offence."

He referred to the decision to that effect of a divisional Court in *Attorney General v. Healy*. White J. pointed out that the reasoning in *Healy* was followed in *Attorney General v. Dillon* [1959] Ir Jur Rep 53, and had also been addressed to some extent in *Wedick v. Osmond* [1935] 1 IR 820, and that the line of authority received the endorsement of the Supreme Court in *DPP v. Roddy* [1977] IR 1 p. 177. He was of the view that the *Healy* case was properly decided. Both in the High Court, and before this Court, the appellant has indicated a willingness to argue that *Healy* was wrongly decided and should not now be followed.

7. For my part, I find myself in complete agreement with the approach taken by White J. in the High Court. Like him, I can find no ambiguity whatsoever. Section 9(1) permits a water service authority to bring summary proceedings, the wording is summary proceedings may be brought. I can find no hint of a suggestion that the normal jurisdiction of the Director of Public Prosecutions is ousted. I do not see this as a case where the maxim *expressio unius exclusion alterius* has any real relevance. Rather, it seems to me that at this stage, the general responsibility of the Director of Public Prosecutions to initiate prosecutions in respect of crimes committed within the State is so well-established that it would require very clear language indeed to oust the jurisdiction of the Director. Clear language of this kind is totally absent.

8. Even if the area was free of authority, I would have no real doubts about the entitlement of the Director to prosecute. However, there is a long and unbroken line of authority dating back to the early years of the State.

9. Such an approach is also supported by distinguished academic authority. Professor James Casey, in his book on the 'Irish Law Officers' at p. 282, having discussed the case of *Attorney General v. Healy* and what it had to say about the role of the Attorney General, commented:

"[s]ince the DPP inherits this power, it will always be competent for him to institute proceedings in respect of summary offences, save where another authorised person has acted first. The Director may consequently be regarded as having a reserve power to bring a prosecution if, for whatever reason, any other authorised complainant fails to do so. Given the independent status of the Director (on which see Chapter 7), this may be seen as a safeguard against possible abuses of power by other competent prosecutors."

White J., at para. 30 of his judgment, made a point of strongly endorsing the comments made by James Casey in his text.

10. Further support for the view that the Director of Public Prosecutions has not been excluded from having a role is to be found in the Water Services (No. 2) Act 2013. Section 9 of the Act of 2007 is amended by this section, first by deleting the words "whether or not the offence is committed in its functional area", and secondly, by the deletion of subsection (2). Section 11 of the Act is amended in subsection (1) by deleting "which brought the prosecution, or persons specified under regulations made under section 9(2) as the case may be" and also deletes the words "or other person".

11. Significantly, though, subsection 10(1) is not amended which means that the court hearing the matter still, unless it is satisfied that there are special and substantial reasons for not doing so, orders the convicted person to pay to the water services authority, or another person the costs and expenses, measured by that court, incurred by the water service authority or other person in relation to the investigation, detection or prosecution of the offence. In a situation where the provision that had once been there for other persons being designated by the Minister as permitted to prosecute, it seems likely that this is in fact a reference to the Director of Public Prosecutions. At the very least, it cannot be said that it excludes the DPP as an entity being referred to.

12. In summary, I am satisfied that the Director of Public Prosecutions was entitled to commence summary proceedings.

13. Accordingly, I would dismiss the appeal.