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THE HIGH COURT

JUDICIAL REVIEW

2008 No. 489 J.R.

BETWEEN

REALM COMMUNICATIONS LIMITED

APPLICANT

AND

THE DATA PROTECTION COMMISSIONER

RESPONDENT

JUDGMENT delivered by Mr. Justice McCarthy on the 9th day of January 2009

1. Pursuant to the European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003, made, pursuant to s. 3 of the European Communities Act 1972, by Statutory Instrument No. 535 of 2003 ("The Regulations") and in particular Regulation 13(1)(b):-

> "A person shall not use or cause to be used any publicly available electronic communications service to send an unsolicited communication for the purpose of direct marketing by means of electronic mail, to a subscriber, who is a natural person, unless the person has been notified by that subscriber that for the time being he or she consents to the receipt of such communication".

and by the provisions of Regulation 13(9)(a):-

> "A person who fails to comply with paragraph (1) ... shall be guilty of an offence"

and, in turn, by s. 31(1A) of the Data Protection Act 1988 (as amended by the Regulations):-

> "A person guilty of an offence under the … regulations … shall be liable on summary conviction to a fine not exceeding €3,000 …"

2. There are pending before Dublin Metropolitan District Court some 60 summonses charging the applicant ("Realm") with offences contrary to Regulation 13(9(a) although they are perhaps infelicitously worded, to put it no further, in as much as the offence is one contrary to Regulation 13(1)(b) of using or causing to be used an electronic communications service contrary to the prohibition in s. 13(1)(a) of the Regulations, the penalty provision being s. 31(1A) of the Act.

3. On the 28th April, 2008, my colleague Peart J. afforded leave to Realm to seek certain relief to restrain the continuance of those proceedings by the Data Protection Commissioner ("the Commissioner") (and of course they are stayed pending the outcome hereof). That relief (so far as it is substantive and relevant at this juncture) is set out in the statement grounding application for leave to apply for judicial review ("Realm's Statement") at paragraphs 1 to 5 inclusive, as follows:-

> "(1)A declaration that the respondent acted unlawfully in issuing summonses for alleged contraventions of Regulations 13(1)(b) and Regulation 13(9)(a) of the European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations, 2003 (S.I. No. 535/2003) ("the 2003 Regulations") and section 31(A) of the Data Protection Acts, 1988 and 2003 ("the Acts") (as inserted by Regulation 17(1) of the 2003 Regulations) in circumstances where the respondent has failed in his statutory obligation to arrange within a reasonable time for the amicable resolution between the Applicants and the complainants of complaints in relation to the alleged contraventions the subject of summonses.
>
> (2) A declaration that the Respondent can only lawfully exercise his power under the Acts to summarily prosecute on foot of complaints of contraventions of the 2003 Regulations if section 10(1) of the Acts has been complied with.
>
> (3) A declaration that the Respondent has failed to satisfy the statutory precondition to the exercise of his power to prosecute a contravention of the said Acts and/or the 2003 Regulations, that section 10(1) of the Acts be complied with.
>
> (4) An Order by way of Certiorari quashing the Respondent's decisions to institute the summary prosecutions instituted by the respondent against the Applicant, as set out in the Schedule to this Statement of Grounds.
>
> (5) An Order by way of prohibition preventing the Respondent from further prosecuting the said summonses."

4. The grounds upon which leave was granted are those set out at paragraphs 1 to 7 inclusive of para. E of Realm's Statement, as follows:-

"(1) The Respondent is a statutory officer who is appointed by the provisions of the Data Protection Act 1988, as amended to be the supervisory authority in the State for the purposes of enforcing the State's obligations to its citizens in respect of data protection matters.

(2) Under the terms of the Data Protection Act 1988, as amended the Respondent is given a range of civil and criminal enforcement powers, including the powers to issue enforcement notices and prohibition notices and to institute summary prosecutions, in respect of contraventions of the Acts and the 2003 regulations.

(3) Regulation 17(1) of the 2003 Regulations (which give effect to Directive 2002/58/EC) ("the Directive") provides, inter alia, that section 10 of the 1988 Act as amended (including the provisions of section 10(1) in relation to complaints) shall apply to the 2003 Regulations. The provisions of section 10(1) of the 1988 Act as amended accordingly apply to a complaint made to the Respondent that there has been a contravention of, inter alia, Regulations 13 of the 2003 Regulations.

(4) The Respondent asserts that he has received a number of complaints from consumers that they have received unsolicited communications from the Applicant in contravention of Regulations 13(1)(b) and 13(9)(a) of the 2003 Regulations.

(5) Despite the clear obligation on the Respondent, pursuant to section 10(1) of the 1988 Act as amended, to arrange within a reasonable time for the amicable resolution by the parties concerned of the matter a subject of the complaint before deciding to take any enforcement steps (including summary prosecution) the Respondent unlawfully and/or irrationally and/or in excess of jurisdiction failed to make any attempt at all for the amicable resolution by the parties of the complaints concerning alleged contraventions of the 2003 Regulations, before deciding to prosecute same.

(6) The Respondent has acted unlawfully and/or irrationally and/or in excess of jurisdiction in deciding to prosecute the Applicant for alleged contraventions of Regulation 13 of the 2003 Regulations without complying with a necessary statutory precondition of the commencement of such proceedings and/or in failing to arrange for amicable resolution for the said complaints before instituting the summary prosecutions.

(7) The Respondent has acted in breach of the Applicants' rights to fair procedures and natural justice, including its rights pursuant to Article 40 of the Constitution and Article 8 of the European Convention on Human Rights and its rights under the Acts and 2003 Regulations.

5. Reference is made, both in the grounding affidavit sworn on behalf of Realm and at para. 37 of Realm's outline (legal) submissions to certain guidelines published on the Commissioner's website under the heading "Complaint Outcome" and to a subsequent "Guidance Document", apparently also published on such website, the tenor of the first of which is that all complaints do not necessarily result in prosecutions but that in the first instance the Commissioner attempts to resolve matters amicably. The second is, apparently, a bald statement to the effect that the Commissioner is obliged to seek an amicable resolution of complaints. It is not contended on behalf of the applicant that anything in the nature of an estoppel or legitimate expectation could give rise to an inhibition of prosecution here, and in my view, rightly. The core basis, accordingly, for seeking to inhibit prosecution is that summarised in para. 1 under the heading of "the Relief Sought" in Realm's statement and, accordingly, amounts to the proposition that it is a condition precedent to a prosecution in respect of the offences now pending that an attempt be made to seek amicable resolution of the complaints giving rise to the charges. This arises because of the provisions of s. 10(1) of the Acts which is as follows:-

"10.(1)(a) The Commissioner may investigate, or cause to be investigated, whether any of the provisions of this Act have been, are being or are likely to be contravened by a data controller or a data processor in relation to an individual either where the individual complains to him of a contravention of any of those provisions or he is otherwise of opinion that there may be such a contravention.

(b) Where a complaint is made to the Commissioner under paragraph (a) of this subsection, the Commissioner shall

(i) investigate the complaint or cause it to be investigated, unless he is of opinion that it is frivolous or vexatious, and

(ii) as soon as may be, notify the individual concerned in writing of his decision in relation to the complaint and that the individual may, if aggrieved by his decision, appeal against it to the Court under section 26 of this Act within 21 days from the receipt by him of the notification."

6. I have herein referred to the Data Protection Acts 1988 – 2003 and the Regulations for convenience sake as "the Acts" unless otherwise appears: this is so notwithstanding the fact that they were amended by the Regulations. These, transposed into Irish law the Directive.

7. The Statement of Opposition of the 3rd June, 2008 ("the Commissioner's Statement") is extensive and I accordingly do not propose to set the grounds therein out in full but merely to summarise the substantive elements, as follows:-

"(a) That (of course) the power of the Commissioner to investigate compliance with, or a possible contravention of, the provisions of the Acts provides the "necessary underpinning" for the exercise of his powers of enforcement and he asserts that there are three separate bases for investigation, firstly, being that arising under s. 10(1) aforesaid, secondly s. 10(1A), which provides that:

'The Commissioner may carry out or cause to be carried out such investigations as he or she considers appropriate in order to ensure compliance with the provisions of this Act and the … Regulations … and to identify any contravention thereof"

and, thirdly, pursuant to s. 10(1B) which provides that:-

"The Commissioner may carry out or cause to be carried out such investigations as he or she considers appropriate in order to ensure compliance with (*inter alia* Regulation 13) and to identify any contravention thereof"

(b) That an unsuccessful attempt by the Commissioner to arrange for amicable resolution is "solely and exclusively a condition precedent" to a decision (and the notification to a complainant of a decision) under s. 10(1)(b) of the Act and not a condition precedent to the exercise of any of his investigation powers or to the exercise of any of his enforcement powers or, most importantly in the present context, his capacity to prosecute.

(c) That the requirements of s. 10(1)(b) in respect of complaints by natural persons do not displace the Commissioner's entitlement to conduct a separate investigation (whether related or distinct) pursuant to other investigatory powers even if such investigation is the subject of an individual complaint.

(d) That the term "reasonable time", referred to in s. 10(1)(b)(ii) is to be construed by reference to all of the surrounding circumstances (including the fact that the Commissioner might have conducted an extensive investigation into the complaints with all due expedition).

(e) That in as much as the Regulations transpose the Directive, and such Directive does not contemplate a "prior requirement to mediate" (whereby any such requirement would be outside the terms of the Directive) no such construction of the power of prosecution is permissible and, in addition, "would not be required or necessitated by the terms of the Directive".

(f) That the Commission has not acted in breach of the applicant's right to fair procedure and natural justice or of its rights under the Acts or the Regulations or, in the, any breach of its rights under the Constitution or Article 8 of the European Convention on Human Rights and Fundamental Freedoms."

The allegation of breach of rights under Article 40 or Article 8 aforesaid has not been pursued, nor has an assertion of a breach of natural justice or fair procedures. I think that this was the correct course in as much as if there is, as a matter of law, a capacity to prosecute without a condition precedent, I know of no rule of law which imposes any obligation on the prosecutor to hear the putative accused before deciding upon, and commencing, a prosecution.

8. The relevant affidavits for the purpose of this judgment are those of Mr. Higgins (Realm's Managing Director) of the 25th April, 2008, and of Mr. Davis (Deputy Data Protection Commissioner) dated the 3rd June, 2008. I have, of course, to a degree, referred to the facts of the matter above. So far as material, as to further relevant facts deposed to therein, Mr. Higgins says that disclosure of documents took place at Realm's request, by the Commissioner *qua* prosecutor (as ordinarily occurs in the case of prosecutions on indictment but, exceptionally, only, in the case of summary prosecution) (and rightly disclosed in the present case if only because it avoided the necessity for discovery herein) and that the prosecutions were based on the complaints of fourteen complainants. This term is not used in this context as a term of art and there is no such term in the Acts. He says that there was a good working relationship between Realm and the Commissioner, that there was co-operation in respect of a number of individual instances of alleged contraventions of the Acts or Regulations and that Realm welcomed the introduction of the regulatory procedure. He refers to a so called "dawn raid" and to the fact that during such raid a journalist contacted him and that subsequently, before service of summonses, a journalist also communicated with him in relation thereto. I am not required to address whether or not these enquiries resulted from "leaks", or, if they did, what the legal consequences (if any) thereof might happen to be. I accordingly ignore this aspect of the matter.

9. It would appear from Mr. Davis's affidavit that the Commissioner seeks to deal with enforcement issues without recourse to prosecution whilst remaining "fully entitled to adopt the latter course", that so called mediation in respect of individual complaints would not be effective so far as repeated offenders are concerned, that a small portion of recipients of unsolicited texts make complaints and that the proportion of those who do so is in the order of one in ten thousand whereby, he asserts, if the condition precedent alleged exists the remedy (presumably of prosecution) would be ineffective. He further asserts that any obligation to mediate successive complaints would mean that the respondent, whilst engaged in mediation in respect of some complaints, might be in receipt of further complaints against the same person to the point of a course of conduct and that the Commissioner treats the handling of complaints that might or might not result in a decision by him (under s. 10(1)) as an entirely separate activity to the function of prosecuting breaches: apparently, these are dealt with by separate units in the Commissioner's office. Mr. Davis refers to the so called dawn raids and to the fact that they occurred against a background of "significant concern" regarding the sending of so called SMS messages (being unsolicited mobile telephone text messages) for marketing purposes without the consent of the recipient.

10. The applicant has set out a conspectus of the Directives giving rise to the present law in the State and it is submitted that the proper construction of s. 10 of the Acts "in light of the scheme of the Communications Data Protection Directive, the 2003 Regulations and the Acts as a whole" gives rise to the condition precedent to the taking of enforcement actions, including prosecutions. The proposition advanced, based upon Bell and Ray in *EU Electronic Communications Law*, that the Directive aims to harmonise the law in this field and to thereby encourage free movement of data, electronic communications equipment and services seems uncontroversial as do the recitals (6, 40, 41 and 47) in the Directive, which are quoted.

11. The first of these recitals, *inter alia*, is to the effect that the "Internet is overturning traditional market structures" and that "publicly available electronic communications services over the Internet opened up new possibilities for users and also new risks for their personal data and privacy", that, (as set out in recital 40) "safeguards should be provided for subscribers against intrusion of their privacy by unsolicited communications for direct marketing purposes, in particular by means of automated calling machines, telefaxes, and e-mails, including SMS messages" and that "where the electronic contract details are obtained, customers should be informed about their further use for direct marketing and be given the opportunity to refuse such usage…" (as appears from recital 41). As appears from recital 47, penalties must be imposed for failure to comply with national measures taken under the Directive. There is nothing in these recitals or in any other part of the Directive, either quoted by Realm or otherwise which supports a contention that attempted amicable resolution is a condition precedent to enforcement, whether by prosecution or otherwise (in the case of complaints by natural persons). There seems to me to be no difference between the scheme of the domestic law implementing the Directive or any sufficient distinction between the Directive and the Acts or Regulations to assist in respect of the proposition advanced and therefore it suffices to have regard only to the national provisions.

12. Reference is made to a schematic or teleological approach to the interpretation of the Directives' provisions but even if it was necessary to have regard to the Directive for the purpose of gaining a true understanding, or properly

interpreting or construing our legislation (which it is not) it might, firstly, be arguable that such schematic or teleological interpretation is unnecessary but if it was, it seems to me that there is nothing in the application of that principle of interpretation (as summarised in the passage from Dodd on *Statutory Interpretation in Ireland*, quoted in the applicant's submissions), which adds anything to Irish law since the Directive is fully and properly transposed into it (and no proposition is advanced here to the effect that it is not), or having regard to Irish law only.

13. Further in the European context reference is made by Realm to Article 13 of the Directive ("unsolicited communications") and it is suggested that having regard to its provisions "out of court resolution of complaints" is "entirely consistent with this scheme". I do not doubt that this is so but that is not the point. What is in issue is not whether or not it is consistent with but whether or not it is a condition precedent to prosecution, involving, as it does, in the event of conviction, the imposition of penal sanctions as required by the Directive. I do not understand on what basis it is submitted that, by reference to that Article of the Directive, (as at paragraph 32 of the applicant's submissions) that "in the event that there is a complaint as to the manner in which such texts are received or whether they comply with the Regulations, an attempt to amicably resolve is a sensible precondition to any more serious enforcement measures" – it may be but, again, it tells us nothing as to whether or not such a condition precedent arises; such a proposition does not follow directly or indirectly from Article 13, in any event: it is simply a bald assertion, unsupported by a chain of reasoning.

14. It is undoubtedly the position, as pointed out by the parties, that the Directive imposes no explicit obligation on the State, in implementing it, to provide for an attempted amicable resolution as a condition precedent to enforcement. Realm points out that the Directive as implemented in Irish law seeks to strike a balance between the legitimate interests of businesses in using electronic communications networks, on the one hand, and privacy and data protection rights of persons in respect of information confidential to them. There is no reason to suppose that it must follow therefrom that Irish law, in implementing the Directive, must include the inhibition on prosecution for which Realm contends. One cannot but say that it would be permissible to do so (unless of course it was to undermine the scheme of protection or other *desiderata*, such as the free movement of services) but that is a far cry from saying that on any view of the Directive it is essential in order to strike an appropriate balance between those competing interests.

15. It is further submitted that the existence of a provision pertaining to amicable resolution as a condition precedent to prosecution is consistent with the wording of s. 10 of the Acts; one can understand, of course, why the statutory scheme might direct the Regulator, in certain instances, to attempt to amicably resolve complaints, but, again, one can understand why it might not, for example, because of the difficulty of addressing egregious and repeated breaches by the same party with respect to the same complainant, thus giving rise to a situation where an amicable resolution had to be attempted in respect of each or any complaint received no matter how ineffective or time consuming that might be as a matter of practice. I cannot see why the Oireachtas should be taken to have intended this, when it does not say it.

16. At the end of the day one only tool of interpretation is required, namely, consideration of the Statute, as amended, in accordance with the natural and ordinary meaning of the words used therein. This form of interpretation is itself relied upon by Realm. Realm make the point that its interpretation is consistent with the Commissioner's published material. This may be so but the Commissioner's published material may or may not, in a given case, correctly express his legal powers or duties. I do not think that it is an aid to interpretation by a court that a party has, on some previous occasion, taken a given view of the interpretation of a Statue, but now takes a different view. Any prior erroneous view as to, say, the powers or duties of an entity such as the Commissioner are of no assistance to a court in deciding the correct view in law. There may, of course, from time to time, be other consequences of error and they are not relevant in this action. I need hardly say that one considers the provisions of s. 10 only in their statutory context as a whole. Such an approach could give no different a result by reference to the Directive itself as I have said above.

17. The natural and ordinary meaning of the words of the Statute seem to me to give rise to investigatory powers under the three heads pleaded in the Statement of Opposition, i.e. pursuant to s. 10(1), pursuant to s. 10 (1)(a) and s. 10(1)(b). These powers are undoubtedly overlapping: all three afford a general power of investigation but the difference between s. 10(1) and the others is an obligation in certain circumstances to attempt to arrange an amicable resolution concerning the matter in complaint. There is no suggestion here but that such complaints have been made: it is said at para. 21 of Mr. Higgins's affidavit that "it seems clear" that these prosecutions were commenced "on the basis of complaints received by (the Commissioner)" from (presumably) the persons named in the summonses. One would have thought, however, that the process of investigation would extend beyond the mere mechanical receipt of a complaint. The very use of the term poses difficulties because presumably a complaint will be of greater or lesser substance (in terms of the detail afforded and the capacity to address such complaint without further or more extensive investigation). One would have thought that in every case investigation beyond mere receipt of the complaint would be required if the investigation was to be competent, if only by verification of some technical detail (e.g. a telephone number) furnished by a complainant.

18. In any event, under s. 10(1)(a) the Commissioner is afforded power to investigate, i*nter alia*, in the case of an individual complaint and if one proceeds to s. 10(1)(b)(i) one sees that there is an obligation to investigate (i.e. to exercise that power) where such individual complaint is received, unless it is frivolous or vexatious. Thereafter, in default of an amicable resolution "by the parties concerned" the Commissioner must make a decision and notify the same to the complainant, informing him that if he is aggrieved he may appeal to the Circuit Court pursuant to s. 26 of the 1988 Act. It seems reasonable to conclude, that the term "may" in s. 10(1)(a) affords authority or power to investigate with mandatory investigation only of a complaint by a natural person which it is neither frivolous or vexatious. Of course, as pointed out by Kelleher "the Commissioner, by undertaking the level of investigation necessary to determine whether a complaint is frivolous or vexatious will thereby have discharged any duty to investigate (see 16/08 "Privacy and Data Protection Law in Ireland"). There is nothing in the provision, or elsewhere in the Acts, of course, which in any way inhibits the capacity to prosecute whether on foot of an individual's complaint or otherwise, and whether the provisions of s. 10(1) are invoked or applicable or not. The proposition must accordingly be that notwithstanding the absence of any explicit inhibition in s. 10 or elsewhere the fact of an obligation to attempt to arrange, within a reasonable time, an amicable resolution in the case of complaints made by natural persons, must be interpreted as importing a limitation on the power of prosecution or a prohibition thereon unless resolution has been attempted and failed.

19. I cannot see any warrant for a court to add to the section or otherwise to the Acts. Accordingly it may well be that in tandem with the preparation of, and the ultimate commencement of, criminal proceedings an attempt at amicable resolution might take place and *prima facie* there is nothing to inhibit such a course. It would, however, if adopted, be an outcome potentially beneficial to the complainant who of course would have no role in the criminal proceedings except

perhaps as a witness and the outcome whereof might not satisfy him in terms of the complaint beyond, perhaps, a moral vindication of his position. I see no absurdity, ambiguity, obscurity or capacity for advancing the proposition that a literal interpretation would fail to reflect the plain intention of the Oireachtas. Hence, I do not think that s. 5 of the Interpretation Act 2005, permits anything other than the normal rule of interpretation. In this regard reliance has been placed by the Commissioner on the judgment of Denham J. in *D.B. v. The Minister for Health and Children and the Hepatitis C Compensation Tribunal* (Unreported, Supreme Court, 26th March, 2003). Denham J. repeated the approach she took in *M. O'C. v. Minister for Health* (Unreported, Supreme Court, 31st July, 2001) when she held that:-

> "It was well established that in construing statutes effect should be given to clear and unambiguous words, for the words of the statute best declare the purpose of the Act …".

It seems to me that little more need be said in respect of the manner in which one must approach the interpretation of the statutes or of s. 10.

20. Further, let us suppose an amicable resolution took place. The breach would still exist. There is nothing in the Act which in some sense would "expunge" or render inadmissible evidence of the breach, such that a prosecution could not be maintained. The facts would remain as they always had been whether the complainant was satisfied with his lot or not. The Commissioner has strongly emphasised the nature of the criminal prosecution in the common law which is, as we know, an issue between the State (or the community) and an alleged wrongdoer and that the private interest of any party injured or aggrieved by that wrongdoing constituting the offence (which might, of course, be a civil wrong as well) is irrelevant in point of law. Thus, I accept the proposition that the erection of the condition precedent here would uniquely fetter the prosecutor in the exercise of his discretion and would thus thereby introduce, in point of law, a question of private interest into the community's right to enforce the law. Of course in the event of an amicable resolution a complainant might prove to be indifferent to the prosecution but that is of no moment. Nor do I think that it could have been in the contemplation of the Oireachtas to place in the hands of a criminal (I speak generally, of course) the capacity to delay and perhaps undermine a prosecution by merely ostensibly engaging in an attempt at amicable resolution whilst, to a greater or lesser extent, placing obstacles in the way of a prospective prosecution for any number of commercial or other reasons. Such things are not unknown in the enforcement of the criminal law! Such a provision would introduce an entirely new phenomenon at variance with the nature of criminal prosecutions. I cannot believe that the Oireachtas would have intended to introduce such drastic change into the administration of criminal justice without explicitly saying so.

21. Of course, in truth, Realm fails to answer the question which must arise, *ipso facto*, if its assertion about the existence of a condition precedent is correct. This is the issue of what might occur if the attempt was successful. One would have thought that on any view of the Acts nobody could contend that there is a prohibition or bar on prosecution in the event of successful mediation. Presumably it might be the hope of a party such as Realm that no prosecution would be commenced but I cannot see how the Oireachtas would have merely imposed an obligation to attempt to mediate, when such attempt, even if successful, had no bearing on whether or not a prosecution could be initiated. I think that this is explicable only on the basis that the statutory obligation to seek an amicable resolution is unrelated to prosecution. One might see some logic, perhaps, to the proposition that a prosecution was barred in the event of a resolution. Again I do not propose to rewrite the Acts in this respect.

22. We know, also, that pursuant to the Acts a summary prosecution must be commenced within twelve months of the date of the offence and it is presumably possible that the fact of an offence could be brought to the attention of the Commissioner by a complaint within perhaps days of the expiry of the relevant period. The relevant provision is s.30(2) of the Act and the period is an extended period to that ordinarily contemplated pursuant to s. 10(4) of the Petty Sessions (Ireland) Act 1851. Whilst I accept that the term "reasonable time" could only, by definition, be reasonable in relation to the surrounding circumstances (including the time limit applicable for the commencement of a prosecution) there would be cases where there was no reality to attempted amicable resolution within days only and the Oireachtas cannot have intended that some form of charade or merely nominal attempted resolution should be attempted. The position might be different if, of course, the Oireachtas had, say, provided for a suspension of the running of the time during a period of attempted mediation (something which in the event that the unprecedented concept of a condition precedent were to be introduced, might not be irrational).

23. Further, I cannot see how the Oireachtas might have conceived that there could be an effective enforcement of the provisions of the Acts by the criminal law if, in every case where a natural person had complained, whether or not the Commissioner had other sufficient evidence prior to such complaint or garnered it directly or indirectly as a result thereof, the Commissioner might be required not merely to prove the fact of the crime but also the fact that there had been an attempt at amicable resolution being, of course, a real or meaningful attempt rather than something that could be stigmatised as a mere colourable device.

I therefore refuse the reliefs sought.