Neutral Citation [2014] IEHC 413

HIGH COURT

JUDICIAL REVIEW

[2014 No. 42 JR]

BETWEEN

McPARTLAND OILS LIMITED

APPLICANT

AND

THE REVENUE COMMISSIONERS

RESPONDENT

JUDGMENT of Mr. Justice Keane delivered on the 14th August 2014

Introduction
1. In these judicial review proceedings, the applicant is a company engaged in the business of oil sales and distribution. For that purpose, it operates from premises at Deep Water Quay, Finisklin, Sligo ("the Sligo premises").

2. Under s. 101 of the Finance Act 1999, as substituted by s. 78 of the Finance Act 2012, every person who trades in "auto-fuel" must hold a licence granted by the Revenue Commissioners ("the Commissioners") for that purpose. The same section imposes a similar requirement upon every person who trades in "marked fuel". Marked fuel, often colloquially referred to as "agricultural diesel" or "green diesel", is permitted for use as home heating oil, for agricultural use, and for certain industrial uses. Marked oil attracts a much lower excise rate than that applicable to auto fuel, and a significantly lower rate of VAT. A separate licence of the appropriate kind must be obtained in respect of each premises used for the purpose of the trade in "auto-fuel" or "marked fuel."

3. The Commissioners refused to grant the applicant a marked fuel trader's licence ("MFT licence") on the 4th June 2013, and refused to renew the applicant's auto-fuel trader's licence ("AFT licence") on the 5th July 2013. Those refusals precipitated judicial review proceedings between the parties that were subsequently compromised, resulting in a consent order of the High Court made on the 11th October 2013, whereby the Commissioners agreed to consider afresh an application for both an AFT licence and an MFT licence in respect of the Sligo premises.

4. On the 16th January 2014, the Commissioners refused both applications.

5. By order made on the 21st January 2014, the President of the High Court granted the applicant leave to apply by way of judicial review for two reliefs: an order of *certiorari* quashing the decision of the Commissioners to refuse the said licences; and a declaration that the Commissioners have failed to give any, or any satisfactory, reason(s) for refusing the applicant the said licences.

The issues
6. The applicant contends that the refusal by the Commissioners to grant the licences sought is unlawful or void for three reasons: first, that it is beyond the powers conferred on the commissioners under s. 101, subs. 1–8 of the Finance Act 1999, as substituted by s. 78 of the Finance Act 1999 ("the 1999 Act"); second, that it was made in breach of the obligation to give reasons; and third, that it fails to meet the requirement of proportionality inherent in the test of reasonableness. The Commissioners deny each of these assertions. In order to consider the arguments on those issues in context, it is necessary first to describe the complicated history of the relevant dealings between the parties.

Background
7. The Commissioners commenced an audit of the applicant on the 6th June 2012. That audit was upgraded to the status of an investigation on or about the 26th or 27th November 2012, following the detection by the Commissioners of an alleged offence by the applicant of trading in mineral oil without a licence at certain premises at Manorhamilton, County Leitrim on or about those dates.

8. In the course of that investigation, the Commissioners wrote to the applicant's accountants (copying the applicant) on the 18th September 2013. In that letter, they stated that their investigation was, at that time, concerned primarily with: (i) the destination of certain marked mineral oil identified in the applicant's sales records, in particular, cash sales recorded (at reduced excise and VAT rates) in respect of three identified counterparties; and (ii) the source of certain purchases of diesel identified in the applicant's purchase records, in particular purchases from two identified vendors of diesel at the full rate of excise and VAT, against which the applicant had deducted input VAT. The Commissioners made a number of requests for records, information and explanations to assist their investigation. In doing so, they specifically drew to the applicant's attention the record keeping requirements stipulated under the following legal instruments: the Mineral Oil Tax Regulations 2001 (S.I. 442 of 2001); the Mineral Oil Tax Regulations 2012 (S.I. 231 of 2012); s. 886 of the Taxes Consolidation Act 1997; and s. 84 of the Value Added Tax Act 2010.

9. The said letter of the 18th September 2013 sought the provision of documents within various categories itemised over several pages of text. It also sought the provision of an explanation for fluctuations in sales figures over recent years; particulars of collection or delivery arrangements with certain identified customers and suppliers; submissions on the asserted absence of documentation evidencing certain transactions; and an explanation for certain payments received by the applicant which the Commissioners asserted were irregular.

10. The said letter concluded in the following terms:

> "In relation to the above mentioned transaction chains (supplies of diesel, liable at the high rates of Excise and VAT, invoiced from [certain suppliers] to the company), Investigations are continuing into all related matters, and, in particular:

(i) Whether there was fraudulent evasion of VAT in the transaction chain/s.

(ii) Whether purchases by the company were connected with the fraudulent evasion of VAT.

(iii) Whether the company/its directors knew, or ought to have known, of such fraudulent evasion.

Subject to completion of these investigations, an issue arises as to whether the company was entitled to deduct input VAT in respect of the purchases in question."

11. The Commissioners wrote again on the 21st October 2013. That letter concluded in the following terms:

"Based on investigations to date (and in the absence of full replies to correspondence), [the Commissioners] position in relation to the above matters is:

(i) There was fraudulent evasion of VAT in the transaction chain/s.

(ii) Purchases by [the applicant] were connected with the fraudulent evasion in question.

(iii) [The applicant]/its directors knew, or ought to have known, of the fraudulent evasion.

In order to protect the interests of the Commissioners, VAT assessments have now been entered on [the applicant], the effect of which is to disallow VAT input credits deducted in the company's 2011 and 2012 VAT returns, in respect of the purchases in question."

12. On the 20th November 2013, the Commissioners raised a notice of assessment in respect of V.A.T. against the applicant in a sum in excess of €800,000. That assessment is currently under appeal.

13. On the 14th November 2013, the Commissioners instituted criminal proceedings against the applicant and against one Damien McPartland, a director and secretary of the applicant, for an alleged offence of dealing in auto-fuel without a licence at a premises in Manorhamilton, County Leitrim on or about the 26th or 27th November 2012, contrary to s. 102, subs. 1(d) of the Finance Act 1999. The applicant and Mr. McPartland deny the charges against them. Those proceedings had not yet been determined when the present application was heard.

14. The Commissioners seized a fuel tanker truck (and the cargo of fuel oil it contained) in the course of a search conducted at the applicant's Manorhamilton premises on or about the 26th and 27th November 2012. That vehicle and its cargo are to be the subject of forfeiture and condemnation proceedings that the Commissioners anticipate commencing after the determination of the criminal proceedings against the applicant. While it appears to be common case that the vehicle concerned is the property of a third party, the applicant asserts ownership of the cargo of oil that it contains.

15. As noted earlier in this judgment, the Commissioners refused to grant the applicant an MFT licence on the 4th June 2013, and refused to renew the applicant's AFT licence on the 5th July 2013, in each case on the ground that the applicant's Sligo premises were not in compliance with the applicable planning permission and that, in consequence, the Commissioners were not satisfied that those premises were secure and suitable for the sale or delivery of mineral oil. That refusal was the subject of the first set of judicial review proceedings between the parties, the outcome of which has already been described. The relevant licensing powers of the Commissioners, which are the subject of the present proceedings, are considered in more detail below.

The licensing power

16. Section 101, subs. 6-8 of the 1999 Act deal with the circumstances in which AFT and MFT licenses may be granted. Those provisions provide as follows:

"(6) The Commissioners may, subject to subsections (7) and (8), grant to a person an autofuel trader's licence or a marked fuel trader's licence –

(a) on application to the Commissioners in writing and on receipt by them of such information as they may reasonably require, and

(b) where the appropriate excise duty under subsection (10) has been paid.

(7) (a) The particular activity or activities referred to in subsections (1) and (2) for which a person is licensed may be specified by the Commissioners in relation to each auto-fuel trader's license or marked fuel trader's licence, as the case may be.

(b) An auto-fuel trader's licence and a marked fuel trader's licence –

(i) shall be subject to conditions specified in relation to the licence, concerning the security and suitability, to the satisfaction of the Commissioners, of any premises or place concerned and of all tanks and other equipment used for mineral oils on that premises or place, and

(ii) may be subject to such other conditions as the Commissioners may so specify.

(c) Different conditions may be specified under paragraph (b), having regard to the activity or activities to which the licence relates, the mineral oil concerned and the circumstances of each particular case.

(d) The Commissioners may at any time vary the conditions referred to in paragraph (b).

(8) An auto-fuel trader's licence or a marked fuel trader's licence shall not be granted –

(a) where the applicant (or, where the applicant is a company, any director or person having control of that company within the meaning of section 11 of the Taxes Consolidation Act 1997) has, in the 10 years before the

application, been convicted of any indictable offence under the Acts referred to in section 1078(1) of the Taxes Consolidation Act 1997, or any corresponding offence under the law of another Member State,

(b) where the applicant does not hold a current tax clearance certificate issued under section 1094 of the Taxes Consolidation Act 1997, or

(c) where the applicant does not, when required, show to the satisfaction of the Commissioners that the applicant, and the premises or place concerned, can satisfy such conditions as may be imposed by the Commissioners."

17. Section 101, subs. 10 of the 1999 Act provides that an excise duty of €250 applies to every AFT licence or MFT licence granted under the section.

The information required

18. The question at the very heart of these proceedings is, what information may the Commissioners reasonably require in connection with an application for an AFT licence or an MFT licence?

19. On the 30th October 2013, the Commissioners wrote to the applicant in reference to its application for an AFT licence and an MFT licence. That letter expressly invokes s. 101 subs. 6(a) of the 1999 Act, whereby the Commissioners are empowered to grant either of the relevant licences *"on receipt by them of such information as they may reasonably require."* The said letter then refers to the Commissioners earlier letter of the 18th September 2013 concerning its investigation into the fraudulent evasion of VAT, before stating:

> "Having considered the content of that letter I am of the opinion that the documents and information requested in that letter are matters directly relevant to your licence applications. [The author of that letter] has requested information and records which should be readily available to you as a mineral oil trader and which you are legally obliged to maintain 'at the premises or place where…mineral oil…is sold, dealt in, or kept for sale or delivery, by the mineral oil trader'."

20. The said letter then substantially (though not entirely) repeats the request for the provision of the various categories of documentation, and of the various particulars and explanations, sought in the Commissioners' earlier VAT evasion investigation letter of the 18th September 2013, before concluding:

> "As set out above, Section 101(6)(a) of the Finance Act 1999, as inserted by section 78 of the Finance Act, 2012, provides that the Revenue Commissioners may grant to a person a licence on receipt by them of such information as they may reasonably require. To date you have failed to provide such information.
>
> It is reasonable for the Revenue Commissioners to seek the information referred to above and they now require you to provide same within 7 days of the date hereof.
>
> Failure to provide this information may result in your licence being refused."

21. Accordingly, the position of the Commissioners for the purpose of these proceedings can be shortly summarised. It is that the information the Commissioners may reasonably require for the purpose of exercising their Customs and Excise licensing power or function in respect of mineral oil trading under Chapter 1 of Part 2 of the Finance Act 1999, as amended, extends to include any information that the Commissioners may wish to acquire in the exercise of any of the Commissioners' other powers or functions in general, and in the exercise of their investigative powers in relation to the suspected fraudulent evasion of VAT in particular in this case.

22. On the 1st November 2013, the applicant wrote in reply to Commissioners' request of the 30th of October. Under cover of that letter, the applicant purported to reply over several pages to the Commissioners' request for various particulars and explanations, and purported to furnish the documentation requested, insofar as it was within the applicant's possession.

23. The Commissioners wrote to the applicant again on the 13th November 2013, stating that they were not satisfied that the applicant's "submissions of the 1st November 2013" contained a full response, as regards documents and information that the Commissioners considered relevant to the applicant's licence application on the basis already described. The deficiencies identified by the Commissioners in that regard are set out over several pages and it is instructive to consider certain of them in the context of the competing arguments of the parties concerning the information that the Commissioners can reasonably require in considering an application for a mineral oil trader's licence. For example, the Commissioners point to their own conclusion, reached by reference to information available to them, that a named supplier - from whom the applicant's records indicate it purchased mineral oil in the past - is not, in fact, engaged in the supply of fuel, and they then state that: "No submissions or explanations have been received in relation to this matter." Another example is the Commissioners' assertion that the applicant has not addressed another named supplier's denial that it made supplies of oil that are recorded in the applicant's VAT purchase records. By way of a further example, the said letter contains a number of assertions that certain records are missing, that relevant information is omitted from certain records provided, and that certain records provided contain information that appears to be incorrect.

24. The applicant replied at some length by letter dated the 25th November 2013, enclosing further documentation. In essence, the applicant asserted that it had engaged in the transactions concerned with the suppliers concerned, as evidenced by the documentation it had already provided. The applicant raised a discrete issue that remains in dispute between the parties concerning whether certain of the documentation sought by the Commissioners had, in fact, already been seized by the Commissioners in the context of a search (or searches) of the applicant's premises that customs officers had conducted on the 26th or 27th November 2012. The applicant also offered explanations for various deficiencies that were perceived by the Commissioners in respect of the records that had already been provided.

25. The Commissioners wrote once more on the 9th December 2013. That letter runs to 17 closely typed pages. Referring to information that the applicant had provided concerning payment arrangements with certain suppliers, it states:

> "The above payment arrangements raise concerns in relation to the source of the fuel in question, whether the proper rate of Excise duty has been applied at all stages of the supply chain, and the authenticity of the VAT invoices furnished to and accepted by [the applicant]."

26. The said letter goes on to assert a failure to provide certain documents comprising records – specifically, movement records - that a mineral oil trader is obliged to retain under Regulation 31 of the Mineral Oil Tax Regulations 2001. The said letter calls on the

applicant to make submissions on a number of issues raised, before stating: "Any failure to adequately address these issues may have adverse consequences for your client's AFTL and MFTL applications."

27. The applicant's solicitors replied to the said letter on the applicant's behalf, in a 9-page letter dated the 13th December 2013, together with further enclosures. In that letter they addressed, and purported to refute, the various assertions made by the Commissioners that the information so far provided by the applicant was inadequate or incomplete.

28. On the 16th January 2014, the Commissioners wrote to the applicant informing it of the refusal of both its application for an AFT licence and its application for an MFT licence. The reason provided was as follows:

> "Having reviewed all of the information provided in the context of the request made of you, you still have not provided all of the outstanding information. In addition, in the case of some of the information provided it has, on review, been found to be incomplete and/or incorrect. For ease of reference I attach hereto copies of the [preceding] correspondence. I am also setting out in the enclosed schedule examples of your failure to provide the information sought."

29. The examples of information not provided set out in the accompanying schedule run to four enumerated instances. The relevant conclusion in each instance is based, amongst other matters, on the following propositions. First, the Commissioners have taken the view that the applicant failed to retain certain "movement documentation" relevant to the Commissioners' VAT evasion investigation as part of the records that the applicant is obliged to retain under Regulation 31 of the Mineral Oil Tax Regulations 2001. Second, the Commissioners rely on the contents of a statement made by a haulier in the course of a cautioned interview in support of their conclusion that the alleged absence of the relevant records is significant. The applicant has had no opportunity to test the evidence of that haulier, if evidence it be. Third, the Commissioners rely on a statement ascribed to the representative of a particular purported supplier of mineral oil to the applicant that the supplier concerned had not done the amount of business with the applicant claimed by the applicant. Needless to say, the applicant has not had the opportunity to challenge the veracity of that statement in any meaningful way, other than to deny it.

30. The said schedule also contains a list of four enumerated instances of the provision of incomplete information. I do not propose to address those matters at any length, save to note that the alleged deficiencies are, in each instance, acknowledged to be, to some extent at least, in controversy between the parties, and to observe that it is also the Commissioners' case that these disputed omissions or inconsistencies amount to a failure to provide information reasonably required for the purpose of the mineral oil trader licensing process under s. 101, subs. 6(a) of the 1999 Act, as amended.

31. The exchange of correspondence between the parties just described, clearly evidences a continuing investigation by the Commissioners into suspected fraudulent VAT or excise duty evasion (whether on the part of the applicant or on the part of certain persons with whom the applicant has traded in the past, or both), culminating in the conclusion by the Commissioners that the applicant has failed to co-operate with that investigation to their satisfaction (or that it has failed to dispel the suspicions that triggered it). The conduct of such an investigation in general is, of course, perfectly properly within the lawful remit of the Commissioners. Indeed, a whole panoply of investigative and prosecutorial powers have been conferred upon that body for precisely that purpose. The question that I must address in these proceedings is whether it is *intra vires* the Commissioners to operate the Customs and Excise mineral oil trader licensing regime established under Chapter 1 of Part 2 of the Finance Act 1999, as amended, as an ancillary investigative tool in respect of suspected fraudulent VAT or excise duty evasion, and whether the appropriate sanction for failure to co-operate with such an investigation (or to dispel any suspicion that arises in that regard) to the satisfaction of the Commissioners is the refusal of a licence under that regime.

Analysis

32. The first argument raised by the applicant is that the refusal by the Commissioners to grant the licences sought is unlawful or void because the information required by the Commissioners in correspondence between the 30th October and the 9th December 2013 does not fall within the definition of "such information as [the Commissioners] may reasonably require" under s. 101, subs. 6(a) of the 1999 Act, on the proper construction of that provision.

33. The applicant's submission on that point is that any information reasonably required under s. 101, subs 6(a) of the 1999 Act must relate to the matters addressed at s. 101, subs. 7-8 of that Act, and to those matters solely. This construction would permit the Commissioners to require the provision of information reasonably required: to assist them in specifying licensed activities (under s. 101, subs 7(a)); to assist them in specifying licence conditions concerning the suitability and security of the premises concerned for the relevant activities (under s. 101, subs. 7(b)(i)); and in considering what other licence conditions should be specified (under s. 101, subs. 7(b)(ii)). It would also permit the Commissioners to require the provision of information reasonably required to establish whether the applicant is precluded from obtaining a licence on the basis either: that it has been convicted of an indictable offence under the Acts referred to in s. 1078, subs. 1 of the Taxes Consolidation Act 1997 or any corresponding offence under the law of another Member State (under s. 101, subs. 8(a)); that it does not have a current tax clearance certificate (under s. 101, subs. 8(b)); or that it is not able, when required, to show to the satisfaction of the Commissioners that either the applicant itself, or the premises or place concerned, can satisfy a condition imposed by the Commissioners (under s. 101, subs. 8(c)). On the applicant's case, there is no other information that the Commissioners may reasonably require for the purpose of considering an application for a mineral oil trader's licence and that the Commissioners act *ultra vires* in interpreting that provision as enabling them to engage in a roving enquiry into the applicant's affairs in general, or its involvement in the suspected fraudulent evasion of VAT in particular.

34. The Commissioners contend that there is no requirement that the information that may be reasonably required under s. 101, subs. 6(a) must be information related to the matters set out at s. 101, subs. 7-8. They contend that, under s. 101, subs. 6(a), a licence applicant is obliged to provide any information that the Commissioners reasonably require for any purpose whatsoever, presumably limited only by the requirement that it be relevant in some way to the discharge by the Commissioners of their broad statutory remit. The Commissioners refer to the power to grant a licence under s. 101, subs. 6 as a permissive power and contend that the only relevance of s. 101, subs. 6(a) is in providing another ground of mandatory refusal of a licence (in addition to those stipulated under s. 101, subs. 8) in the event that information reasonably required is not provided.

35. It is very difficult to reconcile the Commissioner's analysis with the effect of the decision of the Supreme Court in *Application of Dunne* [1968] I.R. 105, relied upon by the applicant. At issue in that case was a licensing statute employing the words "may order' to confer on a court a jurisdiction to make an order extinguishing a liquor licence, subject to the fulfilment by an applicant of certain statutory conditions precedent. The High Court had interpreted that provision as purely permissive, in the sense of conferring a discretion on the court to make an order once the conditions precedent were fulfilled. The Supreme Court (*per* Walsh J, Ó Dálaigh C.J. and Fitzgerald J concurring) found that, where such words are used to confer a jurisdiction to make a decision or order which would result in an applicant acquiring a right or benefit by the provisions of the relevant statute, the said words should be construed as imposing an obligation on the court to make such order once satisfied that those conditions have been satisfied by that applicant.

36. In this case, the applicant contends that the conditions it has to satisfy in order to impose an obligation on the Commissioners to grant each of the licences that it seeks are: that it has made the necessary application in writing; that it has provided such information as the Commissioners reasonably require for the purposes of the licensing section of the 1999 Act and for those purposes only; that it has paid the relevant excise duty in respect of the grant of such licence (being, at present, €250 in each case); that neither it nor any director having control of it has been convicted of any relevant criminal offence within the 10 years immediately preceding the application; that it holds a current tax clearance certificate; and that it can, if required, demonstrate to the satisfaction of the Commissioners that it can satisfy such conditions as the Commissioners may impose upon the licence to be granted.

37. Of course, whether or not the licensing power is permissive in the sense contended for by the Commissioners (and I do not believe that it is), the Commissioners submit that they are in any event at large in relation to the information that they may reasonably require as a condition precedent to the grant of a mineral oil trader's licence.

38. The Commissioners submit that this is necessarily so by reference to a number of matters set out in an affidavit sworn on the 12th February 2014 by Donnchadh Breathnach, an officer in the Customs and Excise section of the Commissioners with specific responsibility for policy and procedures directed towards combating the illicit fuel trade in Ireland. Mr. Breathnach avers to the significant percentage of the annual exchequer return represented by the excise duty on sales of auto-fuel and the significant percentage of total annual VAT receipts represented by the VAT element on such sales. Mr. Breathnach concludes that the only way that the industry can be properly supervised is through a fully functional licensing and monitoring scheme.

39. The Commissioners rely on those averments to ground their submission that the important public policy considerations so described strongly militate in favour of the widest possible interpretation of the term "information reasonably required" under s. 101, subs. 6(a) of the 1999 Act. There can be no doubt that the elimination of any distortion of trade within the fuel distribution industry; the protection of the revenues of the State; and the prevention of criminality are important, indeed vital, public policy objectives.

40. However, what is strikingly absent from the conspectus provided by Mr. Breathnach and relied upon by the Commissioners is any acknowledgment, much less description, of the wide array of measures already in place to address those matters. For example, s. 102 of the 1999 Act, as amended, makes it a criminal offence to engage in a wide range of conduct including: the sale, delivery, storage, purchase, receipt or use of mineral oil upon which the appropriate tax has not been paid (under s. 102, subs. 1(b)); or the production, sale, dealing in, or storage for sale or delivery of, any mineral oil without an appropriate licence (under s. 102, subs. 1(d) and (e)).

41. In addition, s. 102, subs. 1(a) of the 1999 Act makes it an offence to contravene any of the provisions of Chapter 1 of Part 2 of the 1999 Act or of any regulation made thereunder. Regulations 23 and 31(2) of the Mineral Oil Tax Regulations 2001 (S.I. No. 442 of 2001) imposed an obligation upon every mineral oil trader to keep a wide range of specified records, including documents received by him of her and copies of all documents that are issued by him or her. With effect from the 1st July 2012, those regulations have been replaced by the Mineral Oil Tax Regulations 2012 (S.I. No. 231 of 2012), Parts 5 and 10 of which impose broadly equivalent record keeping obligations on mineral oil traders.

42. I pause here to note that a significant portion of the "information reasonably required" under s. 101, subs. 6(a) of the 1999 Act, as identified by the Commissioners in their letters to the applicant of the 30th October, 13th November and 9th December 2014, is expressed by the Commissioners themselves to comprise records that the applicant is required to keep under either the 2001 or 2012 Regulations. Insofar as the Commissioners contend that the applicant has failed to keep the records that it is required to under those Regulations and that it has, in consequence, failed to provide certain information that should be contained in such records, as information reasonably required by the Commissioners as part of the license application process under s. 101, subs. 6(a) of the 1999 Act, the Commissioners defeat their own argument *i.e.* that an appropriately broad interpretation of the term "information reasonably required" is necessary on public policy grounds if the trade in mineral oil is to be properly regulated. That submission ignores the fact that the Commissioners already have a variety of potent regulatory tools at their disposal for that purpose, including the power to prosecute for an offence or offences of breach of the Regulations, contrary to s. 102, subs. 1(a) of the 1999 Act. Under s. 102, subs. 2 of the 1999 Act, as amended, any such offence attracts a penalty of a fine of up to €5,000 on summary conviction without prejudice to any other penalty to which a person may be liable.

43. Section 102, subs. 5-7 of the 1999 Act, as amended, establish that, where a person is convicted of an offence under the section, any mineral oil in respect of which the offence was committed is liable to forfeiture, as are any pumps, vessels or other equipment used at that premises for supplying the mineral oil concerned, and, in certain circumstances, any vehicle, conveyance or container used for the carriage, storage or concealment of the mineral oil concerned.

44. In placing in context the extremely wide scope of the condition precedent to the grant of a licence that the Commissioners assert, by reference to the broad interpretation of s. 101, subs. 6(a) for which they contend, it is useful to very briefly consider the scope of the provisions of the 1999 Act dealing with the revocation of a licence granted under s. 101. Under s. 101, subs. 9 of the 1999 Act, the Commissioners may revoke a licence in one of two circumstances: first, where the licence holder, or the premises or place concerned, contravenes or fails to satisfy a condition contained in the licence; and second, where the holder is convicted of a relevant tax offence or contravenes a requirement of excise law in relation to trading in mineral oil. Under s. 102A, subs. 8, where a licence holder is convicted of the particular offence of failing to comply with a temporary prohibition of trade order under that section, or where a licence holder is convicted of a third or subsequent offence under s. 102A, subs. 1, then the Court concerned must revoke any licence granted to that person under s. 101 and no licence under that section can be granted to that person thereafter. It will at once be evident that these are procedures attended by some procedural rigour (either the conduct of a criminal trial or a requirement to make a quasi-judicial determination plainly subject to the entitlement of a licence holder to natural and constitutional justice and fair procedures). They contrast very sharply with the suggestion that, under s. 101, subs. 6(a) of the 1999 Act, the Commissioners are at large in specifying the information they reasonably require and in adjudicating upon whether the information they have received is sufficient for the purpose of that provision.

45. Moving from the particular back to the more general, it cannot seriously be argued that the powers of the Commissioners in relation to the investigation of offences, whether under the Customs Consolidation Act 1876, the Customs Act 1956, the Customs and Excise (Miscellaneous Provisions) Act 1988, the Taxes Consolidation Act 1997 or various relevant Finance Acts are so limited or constrained that an expansive interpretation of s. 101, subs. 6(a) of the 1999 Act is somehow necessary in order to properly regulate the conduct of the trade in mineral oil. It is generally accepted that the powers available to the Commissioners are remarkable in both their breadth and vigour, going far beyond those available to most other regulatory bodies.

46. Moreover, insofar as Mr. Breathnach's averments might inadvertently create the impression that s. 101, subs. 6(a) of the 1999 Act, as inserted by the Finance Act 2012, should be construed as a necessary response to a novel or recently accentuated problem of criminality in the conduct of the trade in mineral oil, it is perhaps worth noting that the relevant provision, as substituted by the

2012 Act, is a substantial re-enactment of s. 101, subs. 3 of the 1999 Act as it originally stood.

Conclusion

47. In determining the proper construction of s. 101, subs. 6(a) of the 1999 Act, I derive considerable assistance from the decision of the Supreme Court in *Fuller v. Minister for Agriculture* [2005] 1 IR 529. The applicants in that case were civil servants. A dispute had arisen between the applicants and their employer, which ultimately led the applicants to engage in industrial action. The form of action the applicants adopted consisted of attending at their place of work but refusing to deal with telephone and fax queries both in the mornings and afternoons and refusing to deal with counter queries in the afternoons. The question before the Court was whether the applicants' refusal to perform their core duties in the manner described was encompassed by the term "absence from duty", such as to justify their removal from the payroll of the respondent on that basis pursuant to the terms of s. 16 of the Civil Service Regulation Act 1956. The Supreme Court (per McGuinness J., Murray C.J. and Hardiman J concurring) found as follows (at 548):-

> "51 …. It appears to me that this contextual approach is of considerable assistance in the present case. In the earlier part of the Act of 1956 there are a series of sections (ss. 5 to 12) which deal with the tenure of office of civil servants, their retirement (including, in the original form of the Act, the provision that female civil servants had to retire on marriage) and related provisions. At s. 13 the Act turns to a different subject matter. While the Act of 1956 is not formally divided into parts as is the case in many statutes, it is clear that ss. 13 to 16 stand together in a coherent and interrelated scheme which deals with general discipline in the civil service. Section 13 provides for the sanction of suspension where grave misconduct or grave irregularity appear to have occurred, where it seems that the public interest might be prejudiced, or where a charge against a civil servant is being investigated. Section 14 deals in considerable detail with the remuneration of a civil servant who is under suspension. Section 15 goes on to set out, again in detail, the disciplinary measures that can be taken against a civil servant who has been guilty of misconduct, irregularity, neglect or unsatisfactory behaviour in relation to his official duties. Prominent among the graded penalties which may be imposed on the defaulting civil servant is a reduction of the rate of remuneration of the civil servant concerned. These three sections, therefore, deal with the situation where a civil servant is in default of his or her duty. In this statutory context, it seems to me, the legislature goes on to provide for what might be described as the ultimate default - the situation where the civil servant simply fails to come to work at all. In that case the sanction is the ultimate one of complete deprivation of remuneration.
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> 52 It is the duty of the court to construe s. 16 in the light of the plain meaning of the words used and also in the contextual light of the surrounding provisions of the statute. Taking this approach my view is that "absence from duty" bears the literal meaning, as held by the trial judge, of physical absence from the place of work."

48. It seems to me that I should apply the contextual approach to the provision at issue in this case. The Finance Act 1999 is formally divided into parts. Section 101 appears in Chapter 1 of Part 2 of the Act. Part 2 deals with Customs & Excise matters and Chapter 1 of that part deals with Mineral Oil Tax. It is in that context that s. 101 deals with the licensing of persons who trade in "auto-fuel" or "marked fuel." Accordingly, I am satisfied that the condition precedent whereby the grant of either such licence under s. 101, subs. 6(a) is contingent upon, *inter alia*, "receipt by [the Commissioners] of such information as they may reasonably require," can only be construed as an obligation to provide information reasonably required by the Revenue Commissioners in the context of the coherent and interrelated statutory scheme governing mineral oil tax under Chapter 2 of Part 1 of the Finance Act 1999, as amended.

49. It follows that the Commissioners acted *ultra vires* in requiring information sought for the purpose of an investigation into whether there had been a fraudulent evasion of VAT in connection with certain transactions in which the applicant was involved, and whether the applicant or any of its directors knew, or ought to have known, of such evasion if it did occur, as information reasonably required for the purpose of considering whether to grant the applicant an auto-fuel trader's licence or a marked fuel trader's licence under s. 101 of the 1999 Act, as amended.

50. The Commissioners argue that relief by way of *certiorari* is not required in any event because the applicant has a right of appeal against the refusal of the licences concerned to the Appeal Commissioners under s. 146, subs. 1A(f) of the Finance Act 2001, as substituted by s. 50(c) of the Finance (No. 2) Act 2013. There is nothing in the evidence before me to suggest that the applicant has instituted such an appeal, and some reason to doubt whether it could now do so in light of the requirement under s. 146, subs. 2 to notify the Commissioners in writing of an intention to do so within 30 days of the notification of the relevant refusal in each case.

51. Barron J. described the test whether the discretionary remedy of certiorari should be refused (by reference to the asserted adequacy of an alternative remedy) in the following terms in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 (at p. 509 of the report):-

> "The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities referred to shows that this is in effect the real consideration."

52. Applying that test to the circumstances of the present case, I am satisfied that the dictates of common sense and the applicable principles of fairness demand that the applicant should not be required to appeal a decision reached by the Commissioners in reliance on the imposition of a requirement that I have found to be *ultra vires*. Differently put, I conclude that it would be unfair to deprive the applicant of a proper determination of its licence applications at first instance.

53. I will therefore grant the applicant an Order of *certiorari* in respect of the decision of the Commissioners to refuse the applicant an auto-fuel trader's licence and a marked fuel trader's licences, which refusals were each made on the 16th January 2014.

54. In the circumstances, it is inappropriate to consider whether there was a failure by the Commissioners to give any, or any proper, reason for their decision that the applicant had failed to provide information reasonably required by the Commissioners under s. 101, subs. 6(a) of the 1999 Act and was not entitled, therefore, to either an AFT licence or an MFT licence. Accordingly, the question of whether the applicant is entitled to a declaration in that regard does not arise.

55. Lest I am mistaken in my conclusion concerning the proper construction of s. 101, subs. 6(a) of the 1999 Act, as amended, I believe it is appropriate to address the third issue raised by the applicant – specifically, whether the decision of the Commissioners to refuse to grant either of the two licences sought by the applicant (on the ground that the applicant had failed to provide information reasonably required by the Commissioners under s. 101, subs. 6(a) of the 1999 Act) itself fails to meet the requirement of

proportionality inherent in the test of reasonableness upon which the validity of each of those refusals rests.

56. In *Meadows v. Minister for Justice* [2010] 2 I.R. 701, Denham J. held (at pp. 741-3 of the report):-

> **"*[134]*** While the test of reasonableness as described in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 and in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 did not expressly refer to a concept of proportionality, and while the term "proportionality" is relatively new in this jurisdiction, it is inherent in any analysis of the reasonableness of a decision.
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> ***[135]*** "Proportionality" has been expressly referred to in judicial reviews in recent years. The doctrine of proportionality has roots in the civil law countries of Europe but it has been applied in other common law countries, as well as in Ireland. For example, in *Radio Limerick One Ltd. v. Independent Radio and Television* [1997] 2 I.R. 291, Keane J. stated at pp. 311 and 312:-
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> > "The grounds on which the High Court can set aside a decision of a body such as the commission established by the Oireachtas with specified functions and powers have been made clear in a number of decisions and need be referred to only briefly. The *locus classicus* is the frequently cited passage from the judgment of Lord Greene, M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223."
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> ***[136]*** Keane J. went on to quote from *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223, and from Henchy and Griffin JJ. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 641. He stated at p. 312:-
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> > "Thus, in the present case, if the only ground on which the commission terminated the applicant's contract was the carrying of the outside broadcasts and they were wrong in law in treating, as they did, those broadcasts as advertisements within the meaning of the Act, it is difficult to see how their decision could be described as 'reasonable' either in terms of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 or on the application of the criteria proposed by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642."
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> ***[137]*** Keane J. then discussed the use of the test of proportionality in determining whether legislation was unconstitutional. The judge noted that no Irish authority had been cited for the proposition that the principle of proportionality could be invoked as a test on an administrative act. He referred to an approach being developed in England and stated at p. 314 that:-
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> > "Whatever view may be taken as to the desirability of that approach, it can be said with confidence that, in some cases at least, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and the permanent withdrawal of the privilege could be so gross as to render the revocation unreasonable within *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 or *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 formulation. Thus, in the present case, if the amount of advertising in the applicant's programmes had on two widely separated occasions exceeded the permitted statutory limit by a few seconds, the permanent revocation of the licence, with all that was entailed for the livelihood of those involved, *would clearly be a reaction so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness.* It is unnecessary to emphasise how remote that example is from what admittedly occurred in the present case" (emphasis added).
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> ***[138]*** This analysis of the proportionality test and the reasonableness test highlights the underlying similarity, with which I agree.
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> ***[139]*** Irish courts have referred previously to the concept of proportionality as described in Canada. Costello J. stated in *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 607:-
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> > "The means chosen must pass a proportionality test. They must:- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that their effects on rights are proportional to the objective: see *Chaulk v. R.* [1990] 3 S.C.R. 1303, at pages 1335 and 1336."
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> ***[140]*** Costello J. went on to consider whether the restrictions imposed in that case were proportional to the object sought to be achieved. I would adopt an approach to the proportionality test similar to that of Costello J.
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> ***[141]*** The nature of the proportionality test is that, as described above, it must be rationally connected to the objective; not arbitrary, unfair, or irrational. The inherent similarity may be seen in the requirement in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 that the decision not be irrational, or at variance with reason or common sense."

57. In these proceedings it is common case that the applicant will be unable to trade in mineral oil without either an AFL licence or an MFL licence. Having been challenged by the Commissioners - in an affidavit sworn on their behalf on the 12th February 2014 by David Corrigan, a Principal Officer with that body - that the applicant had failed to establish what portion of its turnover relates to the sale or supply of mineral oils, Damien McPartland swore a further affidavit on the 24th February 2014 on behalf of the applicant, in which he avers as follows:-

> "I say that the Applicant's total turnover in 2012/13 was €17,001,033. In that year the Applicant's trade in Wetstock/Mineral Oils made up 87.98% (€14,958,232) of its overall turnover. That same year the Applicant's trade in Solid Fuels made up 11.98% (€2,032,095) and its trade in haulage plant hire made up 0.03% (€5,907). I say that the Applicant's total turnover in 2011/12 was €17,857,965. In that year the Applicant's trade in Wetstock/Mineral Oils made up 89.58% (€15,997,461) of its overall turnover. That same year the Applicant's trade in Solid Fuels made up 9.70% (€2,032,095) and its trade in haulage and plant made up 0.72% (€128,276). Clearly, without the proper mineral oil licensing the Applicant's business will be deprived of the 'lion's share' of its turnover and will certainly be forced to close."

58. Later in the same affidavit, Mr. McPartland avers:-

> "I say that the Applicant will be closed down and over 20 direct employees will be put out of work if the Applicant is denied the licence it requires to trade."

59. As I have already described, any failure to maintain the records that mineral oil traders such as the applicant are required to keep under the 2012 Regulations is a criminal offence contrary to s. 102, subs. 1(a) of the 1999 Act, attracting - by way of punishment under s. 102, subs. 2 of the 1999 Act - a fine of no more than €5,000. Of course, any such punishment could only be imposed upon conviction, and subject to the right of an accused person to a trial in due course of law. That right encompasses the application of the presumption of innocence and the requirement of proof beyond reasonable doubt. In this case, the Commissioners contend that a failure to provide any of the information required to be recorded under those Regulations - in response to a requirement for the provision of such information under s. 101, subs. 6(a) of the 1999 Act - properly warrants the peremptory refusal by the Commissioners of both an AFT licence and an MFT licence, thereby effectively extinguishing the applicant's business. That decision has been made according to the Commissioners' subjective assessment both of the information that they are entitled to 'reasonably require' under the section and of whether the information actually provided by the applicant meets that requirement. In the circumstances, I do not believe that the manner in which the Commissioners have exercised the licensing power conferred upon them by s. 101 of the 1999 Act in this case is capable of passing the proportionality test identified by Costello J. in *Heaney, supra*, even it were otherwise *intra vires* the Commissioners (and I have already concluded that it is not).

60. It follows that, were it necessary to do so, I would have no hesitation in concluding that the decisions at issue are also invalid on *Keegan-O'Keefe* principles, as fundamentally at variance with reason and common sense.

61. Finally and for the avoidance of doubt, I wish to emphasise that nothing in the preceding judgment in any way affects the entitlement (or, for that matter, the extensive powers) of the Commissioners to investigate or prosecute any offence under the Finance Act 1999, as amended, or to investigate or prosecute any offence concerning the fraudulent evasion of VAT, in whatever manner the Commissioners may deem fit, within the law.