

THE HIGH COURT

[2008 No. 6170 P]

BETWEEN

VEHICLE TECH LIMITED

PLAINTIFF/APPLICANT

AND

ALLIED IRISH BANKS PLC.

COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND

AND THE ATTORNEY GENERAL

DEFENDANTS/STATE RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on the 3rd day of December 2013

1. The court, in this application, has been directed to determine three questions of law:

(i) whether the State, as defendants, has the entitlement to claim that the State acted lawfully under the provisions of s. 31(8) of the Criminal Justice Act 1994, as amended (the Act of 1994) which, by order of Ms. Justice Laffoy, was declared unconstitutional;

(ii) whether the plaintiff is now entitled to pursue a claim based upon the abuse of a section of the Act of 1994, in this case being s. 31(8) declared unconstitutional;

(iii) whether the plaintiff as a matter of law has an entitlement per se to an award of damages arising from the findings of the court on 4th October, 2010, of unconstitutionality of s. 31(8) of the Act of 1994, or only on proof of actual damage.

2. The parties are agreed that the answer to the first question is, no.

3. The second question is as to whether the plaintiff can now pursue a claim based upon the allegations of abuse of s. 31(8) of the Act of 1994, involving gardaí who conducted a search of the premises on 10th July, 2009, and also any abuse widely practiced of the Garda Síochána of the authority given them by this section in recent years. The substantial hearing of this matter which dealt with liability has concluded. On 4th October, 2010, Laffoy J. delivered her judgment. At para. 3.3 of this judgment, she stated as follows:

"The foregoing are the only pleas in the statement of claim which, in my view, are pertinent to the reliefs claimed. There are other allegations in the statement of claim in relation to the conduct of the officers of An Garda Síochána who conducted the search of the premises of the plaintiff and its directors on 10th July, 2008. However, no cause of action is pleaded arising from those allegations. It is also pleaded that members of An Garda Síochána in recent years have extensively and unlawfully abused such authority as s. 31(8) 'purports to give them' and three cases were cited, two which were pending in the High Court when this matter came on for hearing, the third being *Burns v. Bank of Ireland* [2008] 1 I.R. 762, to which I will refer later. No cause of action at the suit of the plaintiff arising from that allegation is disclosed in the statement of claim."

Later, at para. 3.8, where she dealt with the scope of the court's investigation before here, she stated:

". . . when the case was being opened, the Court was informed that the parties had agreed that the Court should only determine the question of 'liability'. What that meant was the subject of controversy, which, on reading the transcript, I am not sure was satisfactorily resolved. Nonetheless, the position I am taking as to the outcome of the controversy and what the Court's task is, is that it is to determine whether the plaintiff has established an entitlement to the declaratory relief it seeks. If it has, the Court has to decide, if it is possible to do so, whether the contention of the State parties that, on the ground of public policy, the plaintiff does not have a claim in damages against either the Bank or the State parties is correct."

4. Thus, the two instances of alleged abuse by the gardaí has been considered by Laffoy J. and ruled out on the basis that, firstly, no cause of action is pleaded in respect of the searching of the premises, and secondly, no cause of action is disclosed in the statement of claim arising from the latter allegations in respect of the garda practice in recent years. Clearly, the judge had some difficulty in ascertaining from the pleadings and oral presentation just what was meant by "determining the question of liability". She even consulted the transcript and still was not sure that the matter had been satisfactorily resolved. The court, however, must determine what the nature of its inquiry is and where, most unusually, as here, that has not been made clear, it must itself determine that question. Laffoy J. did so. She had ruled out allegations of abuse and decided that the court's task was to determine if the plaintiff was entitled to the declarations sought. If they were, then the court would proceed to decide whether the plaintiffs do or do not have a claim in damages arising from those declarations.

5. Having decided at para. 13.1 that the plaintiff was entitled to a declaration of the invalidity of s. 31(8) and the July 2008 direction, at para. 13.4 she adjourned the issue of damages. Thus, the proceedings have progressed to an inquiry as to damages arising from those two declarations. No other issues are before the court and none can be raised at this stage. The answer to question two, therefore, is, no.

6. It would appear that the third question is not yet settled in Irish law. Yet it seems that there are many indicators in the case law that the answer is no. The point of departure must be the memorable passage of Henchy J. in *Murphy v. Attorney General* [1982] I.R. 241, at p. 314, where he stated:

"But it is not a universal rule that what has been done in pursuance of a law which has been held to have been invalid for constitutional or other reasons will necessarily give a good cause of action: see, for example, the decision of this Court in *The State (Byrne) v. Frawley* [1978] I.R. 326. While it is central to the due administration of justice in an ordered society that one of the primary concerns of the Courts should be to see that prejudice suffered at the hands of those who act without legal justification, where legal justification is required, shall not stand beyond the reach of corrective legal proceedings, the law has to recognize that there may be transcendent considerations which make such a course undesirable, impractical, or impossible.

Over the centuries the law has come to recognize, in one degree or another that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, *res judicata*, or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened. To take but two examples, both from a non-constitutional context, where a judicial decision is overruled by a later one as being bad law, the overruling operates retrospectively, but not so as to affect matters that in the interval between the two decisions became *res judicatae* in the course of operating the bad law (see *Thomson v. St. Catherine's College, Cambridge* [1919] A.C. 468.) or to undo accounts that were settled in the meantime in reliance on the bad law: see *Henderson v. Folkestone Waterworks Co.*

For a variety of reasons, the law recognizes that in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened has happened and cannot, or should not, be undone. The irreversible progressions and by-products of time, the compulsion of public order and of the common good, the aversion of the law from giving a hearing to those who have slept on their rights, the quality of legality - even irreversibility - that tends to attach to what has become inveterate or has been widely accepted or acted upon, the recognition that even in the short term the accomplished fact may sometimes acquire an inviolable sacredness, these and other factors may convert what has been done under an unconstitutional, or otherwise void, law into an acceptable part of the *corpus juris*. This trend represents an inexorable process that is not peculiar to the law, for in a wide variety of other contexts it is either foolish or impossible to attempt to turn back the hands of the clock. As an eminent historian vividly put it, speaking of the pointlessness of seeking to undo or reshape the facts of history: 'The statue has taken its shape and can never go back to the quarry'.

In this judgment, I deliberately avoid any general consideration of the broad question as to when, and to what extent, acts done on foot of an unconstitutional law may be immune from suits in the court; for any conclusion I might express would, in the main, be obiter. In any event, I think experience has shown that such constitutional problems are best brought to solution, step by step, precedent after precedent, and when set against the concrete facts of a specific case. I confine myself, therefore, to the precise question raised. Notwithstanding the invalidity *ab initio* of the condemned sections, are the taxes collected under them recoverable?"

7. It seems to me that Henchy J. was stating that whilst a particular statute might be found to be unconstitutional, that finding did not in itself entitle a party affected to damages in respect of anything done thereunder, prior to the finding of invalidity. He and the majority of the Supreme Court decided that the plaintiffs therein could only recover taxes invalidly imposed upon them under the condemned provision from the first day of the financial year immediately succeeding that in which they had challenged the validity of the imposition of the tax in question. All that was paid before then was irrecoverable.

8. Thus, damages did not flow per se from a finding of invalidity, but might, on proof of damage because the acts done prior to the issue of proceedings under the statute were converted into "an acceptable part of the *corpus juris*" whilst those post-issue could not be and thus resulted in an award of damages in the amount of the tax they paid thereunder.

9. In these proceedings, the State parties argue that they are involved in respect of this legislation in waging battle against the financial crime of money laundering. The importance of this battle is self-evident. Examining the rationale of Laffoy J. in her decision striking down the relevant provision, she does not condemn the overall principle of freezing suspect funds, but rather the lack of adequate procedural protection for the account holder to either challenge the freezing order or alleviate the effect before an independent arbitrator. Thus, it may well be open to the court in assessing damages, if any, to consider what Henchy J. referred to as "compulsion of public order and of the common good".

10. In *Redmond v. Minister for the Environment (No. 2)* [2006] 3 I.R. 1, at p. 4, Herbert J. adopted the above passage of Henchy J. He stated:

"However, I do not think that it is reasonably possible or even desirable to attempt to formulate any principles of general application as to the circumstances in which the court might so award damages or as to the type or amount of those damages. In this respect, I adopt what was held by Henchy J. in *Murphy v. Attorney General* [1982] I.R. 241 at p. 315, where he stated, when speaking of such redress and of the sometimes 'transcendent considerations' which may render any or some particular forms unavailable i.e. damages or restitution:-

'In any event, I think experience has shown that such constitutional problems are best brought to solution, step by step, precedent after precedent, and when set against the concrete facts of a specific case'."

In that case, Herbert J. awarded nominal damages of €130 which I am informed was the equivalent of the deposit required of a candidate for election to the Dáil.

11. I am conscious of the fact that in this preliminary examination, I have heard no evidence. I should, therefore, I think adopt the restrained approach advocated by Henchy J. in such questions and avoid general considerations of when and to what extends acts done under s. 31(8) may be actionable in damages. I can answer this question on the basis of the above principles as follows; the plaintiff does not have an entitlement per se to an award of damages arising from the findings of the court on 4th October, 2010. In the inquiry into damages herein, the plaintiff may be awarded such damages as he can prove to flow in consequence of the unlawful acts of the State parties, he may be awarded nominal damages or the court may find that the declaration of invalidity is sufficient remedy in the circumstances of the case.