THE HIGH COURT
DUBLIN
(JUDICIAL REVIEW)

Record No. 97JR/2000

BETWEEN

CIARAN WALDRON

APPLICANT

AND
D. P. P.

FIRST-NAMED RESPONDENT

DISTRICT JUDGE WILLIAM EARLY

SECOND-NAMED RESPONDENT

AND
HIS HONOUR JUDGE MATTHEW DEERY

THIRD-NAMED RESPONDENT

Mr. Justice T.C Smyth delivered his Judgment , As follows, on Wednesday, 15th June 2004.

1. Mr. Justice Smyth: By order dated 1st March 2000, Geoghegan J granted the Applicant leave to apply for judicial review for all reliefs on all grounds set out in the statement required to ground an application for judicial review. The order was made ex parte, the Applicant appearing in person. There is no evidence in the order made or in the grounding affidavit or the subsequent five affidavits sworn by the Applicant in these proceedings, between 18th February 2000 and 6th December 2002, that Geoghegan J was informed on 1st March 2000 that there had been two previous sets of proceedings for judicial review relating to the matters put in issue in these proceedings. It is clear from the statement that there was one set of judicial review proceedings in 1994,but there is no reference whatsoever to the second set of judicial review proceedings 208JR/1997. I cannot and do not believe that so experienced a judge would have made the order he did, or at least not insisted on the Respondents being put on notice before entertaining the application and making any order on it had he been alerted to the second set of judicial review proceedings. This expression of reserve I record because of the applicant's response to my queries in this regard at the hearing.

The Facts

Historical

2. The Applicant was complained of to the District Court for the following alleged offences on 24th March 1993:

> (a) Dangerous driving at Ballyderowen, Burnfoot, County Donegal, contrary to the provisions of Section 53 of the Road Traffic Act 1961, as amended by Section 51 of the Road Traffic Acts 1964/84.
>
> (b) Dangerous driving at Bridgend Roundabout, Carrowreagh, Bridgend, contrary to the provisions of Section 53 of the Road Traffic Act 1961, as amended by Section 51 of the Road Traffic Acts 1964/84.
>
> (c) Causing damage to motor car 91 MN 867 at Carrowreagh, Bridgend, on 24th March 1993, contrary to Section 106 of the Road Traffic Act 1961, as amended.
>
> (d) Obstructing John B. Lynch, an officer of the Revenue Commissioners, in the performance of his duties at Lisfannon, Fahan, contrary to Section 94(2)(8) of the Finance Act 1983.
>
> (e) Possession of an unregistered motor vehicle, to wit Vauxhall Cavalier KJI 6519, at Lisfannon, County Donegal, contrary to Section 139(3)(a) of the Finance Act 1992.

(The foregoing will hereinafter be referred to as the March 1993 offences.)

3. The Applicant was convicted in Donegal District Court on 22nd December 1993 on a number of charges and was, inter alia, disqualified from driving for a period of 15 months, such disqualification to commence on 1st March 1994.

4. On 12th January 1994, District Judge Liam O'McMenamin, on the application of the Applicant, extended the time to appeal the order of 22nd December 1993.

5. It is averred in paragraph (6) of the Applicant's affidavit sworn in these proceedings on 6th December 2002 that on 13th March 1994 counsel on behalf of the Applicant mentioned to Judge Sheehy at the Circuit Court in Donegal Town that the Applicant "would continue to drive during the pendency of his appeal" and that an application for leave to apply by way of judicial review was being lodged in the High Court. There is no evidence that the Circuit Court Judge made any order in regard to this declared intention.

6. Evidence in this case discloses that the Applicant was complained of to the District Court in respect of the following alleged offences under the Road Traffic Acts 1964/84:

> (a) 15/4/1994: No insurance on motor vehicle BGI 949 at Keeloges, Buncrana, County Donegal, contrary to Section 56 (date 11/4/94 referred to by the Applicant in his affidavit sworn on 28th February 2000, paragraph 14, referred to in paragraph 4(a) of the same affidavit as 15th April 1994).
>
> (b) 17/4/1994: No insurance on motor vehicle BGI 949 at St. Mary's Road, Buncrana, County Donegal, contrary to Section 56.
>
> (c) 11/5/1994: No insurance on motor vehicle 89 D 38623 at Glebe Large, Fahan, County Donegal.
>
> (d) 16/5/1994: No insurance on motor vehicle 90 DL 496 at Gortyarrigan, Linsfort, Buncrana, County Donegal, contrary to Section 56.

(Hereinafter for convenience referred to as the Section 56 offences.)

7. The Applicant avers at paragraph (14) of his affidavit sworn on 28th February 2000 that he produced a certificate of insurance

from Hibernian Insurance Company, certificate number 180068, within ten days of one or more of the aforementioned Section 56 offences at Buncrana Garda Station. Judicial review proceedings bearing Record No. 289JR/1994 (hereinafter referred to as the first set of judicial review proceedings) were begun before Carney J, whose order granted leave to apply for judicial review and which order stayed the order of the District Court made on 22nd December 1993, per paragraph (6) of the Applicant's affidavit sworn on 6th December 2002. In my judgment, if the Applicant held the belief that there was a stay on the District Court order of 22nd December 1993 as from its date, there was no necessity to (a) refer before Judge Sheehy that he "would continue to drive during the pendency of his appeal" or (b) request Carney J to put a stay on the order of the District Court made on 22nd December 1993, or 12th January 1994.

8. I am satisfied and find as a fact that the District Court Clerk, Mr. Connell Melley, issued on 11th February 1994 Forms 195, Minute Book Nos. 656, 657 and 659. Mr. Melley, at the request of the Applicant, was brought to court to be cross-examined upon an affidavit he had sworn (in these proceedings) on 1st November 2001. He accepts that the forms were completed by him even though he has no particular recollection of completing them. He avers that he made two photocopies of such completed forms. The photocopies were made from the originals, the originals of which were sent to Donegal County Council, one set of photocopies were forwarded to the Department of the Environment and the other set was retained in the District Court Office. The set sent to the Department of the Environment has been destroyed. A photocopy made from the original which was sent by Mr. Melley to Donegal County Council has a material alteration from the originals as first dispatched by him -- it is not conformable to the original as photocopied by him. I am satisfied and find as a fact that the deletion of the words "was not" from the Forms 195 was made subsequent to his sending the original forms to the office of Donegal County Council. The affidavits of the Applicant (who on the papers of this case described himself as a solicitor's apprentice), though he has not been a solicitor's apprentice since 21st December 1996, was present with his solicitor in the District Court on 22nd December 1993 when the District Court imposed the penalties hereinbefore referred to. For no disclosed reason, the Applicant attended Donegal County Council to see the original Forms 195. Other explanations have been given for this visit, also. As the Applicant did not explain why, a possible reasonable inference (on the basis that neither the District Court Clerk nor Donegal County Council had any interest or concern to alter the forms as originally issued by.Mr. Melley) is that the Applicant or someone at his direction may have been in some way implicated in the alteration. The Applicant did not explain or aver anything that might have dispelled such inference in these proceedings. Having considered it inappropriate to ask him for an explanation out of respect for his entitlement to refuse to answer any questions which might possibly lead to self-incrimination and, furthermore, having regard to the evidence given by Mr. Melley, that while there was a possibility that he may have inserted the words and made photocopies from a different original, he was not at all certain on this and merely left it as a possibility. The Applicant admits that he attended at the Motor Taxation Office (public office) at Donegal County Council on one occasion in 1997 to tax his car. The Applicant's affidavit sworn on 12th February 2002, paragraph (6), avers that the original Forms 195 were in fact being held by the Motor Taxation Office, Donegal County Council, Lifford, as "as constantly stated by the Applicant herein". Paragraph (8) of the Applicant's affidavit sworn on 12th February 2002 avers that he did not, between 12th February 1994 to date, vis 12th February 2002, attend Donegal County Council in relation to any of the matters concerned in these proceedings, though he made representations in court that he had called to the office in the year 2000.

9. I draw no inference or adverse inference from the unsatisfactory circumstances that some person altered or tampered with the original Forms 195 after it had been dispatched by Mr. Melley to Donegal County Council. However, I do not accept as a fact that the Applicant had, at any material time on or after 22nd December 1993, or more particularly after 12th January 1994, a bona fide belief or a belief or a continued belief that his disqualification was suspended pending the hearing of his appeal. He may have so convinced himself, but I am not satisfied that such was grounded any reasonable belief, given that he had been a District Court Clerk at some time in the past.

10. The first set of judicial review proceedings came on for hearing before Laffoy J on 2nd July 1996, when the application was refused and the Respondent, the DPP, was ordered to furnish the Applicant's solicitors with copies of all prosecution statements in advance of the appeal pending in the Donegal Circuit Court not later than 23rd July 1996. In fact, the witness statements had not reached the Applicant by the close of business on 23rd July 1996 because the fax at the receiving end was not available and functioning at that time, but on the following day, 24th July 1996, the documentation was in fact handed to his counsel. The Circuit Court hearing took place some six months later.

11. The Applicant's appeal to the Circuit Court was heard by the third-named Respondent in February 1997, and the judgment of the court was pronounced on 6th February 1997. The order of the Circuit Court confirmed the order of the District Court of 22nd December 1993. The order of the Circuit Court provided the Applicant was disqualified from driving for a period of fifteen months beginning on 1st March 1994. I do not accept as true that the Applicant only became aware on 13th January 2000 at Buncrana District Court of the consequences of the Circuit Court order of 6th February 1997, notwithstanding what is stated in paragraph (22) of the Applicant's sworn affidavit of 28th February 2000.

12. Judicial review proceedings bearing Record No. 208JR/1997 (hereinafter referred to as the second set of judicial review proceedings) were begun before Moriarty J on 16th June 1997, wherein the Applicant sought orders of *Certiorari* quashing his conviction in relation to the March 1993 offences and prohibition of his further trial on the Section 56 offences. In paragraph (13) of his written submissions to the court in the present proceedings, it is stated as follows:

> "In relation to the second set of judicial review proceedings bearing Record No. 1997/JR208, the Applicant did seek to challenge the same orders and sought the same reliefs as in the present proceedings. However, the Applicant did not pursue the relief of prohibition on those proceedings and accordingly it was never adjudicated upon and therefore the plea of res judicata does not arise ..."

13. This second set of judicial review proceedings came on for hearing before Kelly J on 27th May 1998 and were struck out, there being no appearance by the Applicant. A successful application for reinstatement, perhaps on foot of a motion dated 15th June 1998, returnable for 22nd June 1998, ultimately led to a hearing by McCracken J on 4th March 1999, when the Applicant indicated that he wished to proceed in respect of the application for *certiorari* only. This application was refused by McCracken J with an order of costs against the Applicant.

14. It was perfectly in order for the prosecution to proceed as matters then stood to have the Section 56 offences dealt with by the District Court. They were listed for hearing on 13th (otherwise 15th) May 1999.

15. From that date up to 2nd March 2000, the matter was before the District Court on no less than eight occasions, before not less than three (and possibly four) different District Judges, and the Applicant represented in court by four different solicitors, (though it is possible that they may have been the same firm or practice). I hesitate to use an expression to characterise events in this period lest it be misconstrued (deliberately or otherwise), suffice to say that no justice system could function if permitted to continue in such courses; an appreciation of the prevarication and obfuscation of issues and events is possible on a consideration of the affidavit of

Ciaran MacLochlainn, State Solicitor for County Donegal, sworn in these proceedings on 14th July 2000.

The Course of the Third Set of Judicial Review

Proceedings
16. Subsequent to the preliminary order granting leave, Terence Lyons & Co, solicitors, came on record on November 2000 (eight months after the order of Geoghegan J). A motion for Discovery dated 18th December 2000, returnable for 6th February 2001, appears to have been struck out due to no appearance. On 5th November 2001, Lavan J acceded to an application of Terrance Lyons & Co, solicitors, to come off record. That application was grounded on two affidavits of Declan Fahy, who, in the supplemental affidavit of 5th November 2001, swears as follows:-

> "4. I say that counsel was instructed by your deponent at the time this matter was first listed for hearing and that a number of attempts were made subsequent to that time to arrange for counsel to hold a consultation with the Applicant in order that more detailed instructions could be taken. I say that the Applicant failed to attend at consultations on each of those occasions and that Counsel did not, in fact, meet with the Applicant until the hearing date on the 13th day of July 2001.
>
> 5. I say that as a result of that meeting and discussions between the Applicant and his legal representatives, it was deemed prudent that your deponent would make further enquiries into the factual background of the Applicant's claim. I say that such enquiries were made during the last long vacation.
>
> 6. I say that having made these enquiries, further instructions were sought from the Applicant but that the Applicant was unable to furnish your deponent with any adequate explanation or instructions. I say that in the circumstances I formed the view that I would be unable to further represent the Applicant and I say that I informed the Applicant of my view."

17. By Notice of Motion dated 7th December 2001, returnable to 17th December 2001, the Applicant sought liberty to issue and serve a notice of crossexamination of five named persons. Kelly J, by order dated 17th December 2001, ordered that Ciaran F. MacLochlainn and Connell Melley attend court for the purpose of being cross-examined on their affidavits sworn herein and reserve the costs of the motion and order. Notwithstanding having obtained this order and on one occasion had the State Solicitor in Dublin for a hearing which was adjourned on the court receiving a medical certificate on behalf of the Applicant indicating that he was unfit and unwell, and the court being informed that the Applicant was seen in and about his lawful business at the time he was supposedly ill and unfit to come to court, and ultimately the Applicant informed the Respondents that he did not wish the attendance of Mr. MacLochlainn in court, Mr. MacLochlainn did not come to court and give evidence.

18. The true reason for the lack of progress in these proceedings with due expedition, I am unable to determine with total accuracy. The Applicant lists some twenty-one occasions in the period loth April 2000 and 8th November 2002 when it was before the court. By order dated 8th November 2002, Kearns J dismissed the application for judicial review, there being no appearance on behalf of the Applicant. An application again for a reinstatement was brought by motion dated 4th December 2002, returnable to 9th December 2002, and by order of Murphy J dated 17th December 2003, the order of 8th November 2002 was vacated and the proceedings re-entered. The order of Murphy J provided the Applicant do pay the costs of the first-named Respondent.

19. Before embarking on a consideration of the law and the legal submissions, I should record that I am satisfied and find as a fact that:-

> (a) The Applicant cannot truly aver, as he did in paragraph (8) of his affidavit sworn on 6th December 2001, that the three Forms 195 dated 11th February 1994, forwarded to the Secretary of the Department of the Environment, appeared with the words "was not" deleted corresponding to the "identical deletions" as contained in the original Forms 195 held by the Motor Taxation Office, Donegal County Council, Lifford. I find the evidence in paragraph (5) of the affidavit of Ciaran MacLochlainn, when taken in conjunction with the written and oral evidence of Mr. Connell Melley, more credible and I make my decision based on those facts.
>
> (b) Connell Melley, I found to be a candid and reliable witness.
>
> (c) At all material times on and from 22nd December 1993, the Applicant was fully aware that he was disqualified from driving as and from 1st March 1994 for a period of fifteen months and that there was no stay thereon in the event of an appeal. I do not accept as a truthful account the Applicant's stated belief.
>
> (d) The Applicant, in making his application ex parte to Geoghegan J on 1st March 2000, did not keep faith with the court and deliberately did not disclose the existence and outcome of the second set of judicial review proceedings, to wit 208JR/1997. Notwithstanding, I do record the Applicant stated in court in presenting his case, though not on oath at the time, that he had brought these matters to the attention of Geoghegan J.

The Law and Legal submissions
20. It is the Applicant's case that the order of the District Court of 22nd December 1993 would have had attached to it a stay pending an appeal and therefore it was not open to the third-named Respondent to "retrospectively impose the ancillary disqualification" (see paragraph (5) of the Applicant's affidavit of 6th December 2002). It is common case that the Applicant did not appeal within the fourteen days of 22nd December 1993, but brought a motion before District Judge McMenamin on 12th January 1994, for the purpose of extending the time within which to appeal. That order was put before the court by the Applicant, it is not disputed by the Respondent, though it is not exhibited otherwise in the papers. The provisions of the District Court Rules in regard to the position of an appeal may be simply stated as follows: Had the Applicant appealed within the time provided for in the rules, a stay would automatically have attached to the order. However, in the event of an application being made for the extension of time, such stay is not at all automatic. The relevant provisions of the Rules of the District Court, so far as pertinent to these proceedings, are as follows, order 194 of the Rules provides as follows:-

> "A party desiring to appeal to a Judge of the Circuit Court from the decision of a Justice in a criminal case may within a period of seven days from the date on which the date has been given, in addition to lodging and serving the notice of appeal as provided for by Rule 190 hereof, enter into a recognisance (Form A3) with one or more sufficient sureties in such sum as the Justice shall direct conditioned to prosecute the said appeal and to attend personally at the sitting of the Circuit Court to which such appeal shall be brought or any adjournment or adjournments thereof until such appeal

shall have been determined, and to abide and perform the judgment and order of the Circuit Court thereon, and to pay such costs of the appeal as may be awarded against him. The appellant, if in custody, shall be liberated upon the said recognisance being entered into by him."

21. Order 192 provides for a stay of execution in civil cases in this fashion:

"Save as provided in Rule 193 hereof, a notice of appeal shall be a stay of execution in civil proceedings and in summary proceedings of a civil nature provided a recognisance (Form A2) with one or more sufficient sureties conditioned to pay the sum recoverable and costs, or costs awarded in case no sum recoverable if a defendant appealing, or to pay the costs awarded where the appellant was a plaintiff in the District Court, and in ejectment proceedings, if a defendant appealing, to pay such amount for mesne rates pending the determination of the appeal not exceeding the amount of rent per gale hitherto payable in respect of the premises the subject matter of the proceedings, as may be fixed by the Justice, and to pay the costs of the appeal, be entered into within the said period of seven days before a Justice or a Peace Commissioner, or in case the party appealing shall desire to dispense with the recognisance, by lodgment with the Clerk within the like period of the amount of the said sums respectively as fixed by the Justice."

22. I am satisfied that the provisions concerning the stay pending appeal are automatic in the case of an appeal brought within time, but not so in respect of the offences in this instance where obtained on the basis of an extension of time.

23. Notwithstanding that the Applicant's legal submissions cite the provisions of Section 30(3) and (5) of the Road Traffic Act 1961, (the Principal Act), Section 20 of the Road Traffic Act 1968provides that Section 30 of the Principal Act is amended by substitution. Notwithstanding its length, the section is now quoted in full as it covers points raised by the Applicant who asserted that the law was otherwise:-

20. The Principal Act is hereby amended by the substitution of the following section for section 30:

"Operation of disqualification order.

30(1) A person in respect of whom a consequential, ancillary or special disqualification order is made shall stand disqualified in accordance with the order for holding a driving licence, and a driving licence held by him at the date of the order shall stand suspended correspondingly.

(2) Where a disqualification is removed under section 29 of this Act, subsection (1) of this section shall cease to have effect as and from the date from which the disqualification is so removed.

(3)(a) Save as provided by paragraphs (b) to (e) of this subsection:

(i) a special disqualification order shall come into operation immediately it is made and a consequential or ancillary disqualification order shall come into operation on the fifteenth day after it is made,

(ii) the operation of a special, ancillary or consequential disqualification order shall not be suspended or postponed.

(b) Where an appeal is being brought against a special disqualification order, the court making the order may direct the suspension of the operation of the order pending the appeal.

(c) Where a consequential or ancillary disqualification order (or, where the order is related to a conviction, that conviction) is the subject of an appeal, notice of which is lodged within fourteen days of the making of the order, and the convicted person has duly entered into a recognisance to prosecute the appeal, the operation of the order shall stand suspended pending the appeal.

(d) When making, confirming or varying a consequential or ancillary disqualification order the court may, at its discretion but subject to paragraph (e) of this subsection, postpone the operation of the order for a period not exceeding six months.

(e) A court shall not postpone under paragraph (d) of this subsection the operation of a consequential or ancillary disqualification order unless it is satisfied that a special reason (which it shall specify when postponing the operation of the order) relating to his personal circumstances (including the nature of his employment) has been proved by the convicted person to exist in his particular case.

(4) Where:

(a) a notice of appeal has been lodged in a case in which a consequential, ancillary or special disqualification order has been made,

(b) the operation of the order stands suspended pending the appeal, and

(c) the appellant has given notification in writing that he wishes to withdraw the appeal, the suspension of the operation of the order shall be regarded as having terminated immediately before the day on which the notification was given and the period of disqualification shall begin on that day.

(5) Where:

(a) a consequential or ancillary disqualification order (or, where the order is related to a conviction, that conviction) is the subject of an appeal,

(b) the operation of the order stands suspended pending the appeal, and

(c) the appeal is not prosecuted or the order is confirmed or varied by the appellate court, the period of

disqualification shall begin on the day on which the appropriate order of the appellate court is made, save in a case where the operation of the consequential or ancillary disqualification order is postponed under paragraph (d) of subsection (3) of this section.

(6) Where:

(a) a consequential, ancillary or special disqualification order operates until the person concerned produces to the appropriate licensing authority a certificate of competency or fitness, and

(b) such person produces to that authority such certificate, the authority shall, where appropriate, note the production of such certificate on the relevant driving licence."

24. Section 3(d) makes it clear that a court has discretion to postpone an order of consequential or ancillary disqualification for a period of not exceeding six months, but subsection 3(e) provides a court may not postpone as aforesaid unless proven circumstances exist. on the basis that the District Court orders of 22nd December 1993 in this regard postponed the coming into effect of the order until 1st March 1994, the jurisdiction of subsections 3(d) and (e) were invoked.

25. When, therefore, one comes to apply the canons of statutory interpretation to subsection (5) of Section 30, I am satisfied that the elements (a), (b) and (c) are conjunctive and that each and all of the provisions thereof must be in place and complied with and, in the instant case, I am not so satisfied. In such circumstances, when an appeal is heard, the period of disqualification shall begin on the day on which the appropriate order of the Appellate Court is made (save in a case where the operation of an ancillary disqualification order is postponed under paragraph (d) of subsection (3) of this section). If a stay had been put on the orders of the District Court, then clearly the order, if affirmed by the Circuit Court, would take effect from the date of the Circuit Court order forward. However, in the absence of a stay on the District Court order, the order has effect and when confirmation is pronounced by the Circuit Court order on appeal it must be as envisaged as recorded in the Minute book of the District Judge, whose order is of 22nd December 1993.

Res Judicata

26. The Respondent submitted that because the Applicant in these proceedings is seeking an order of *Certiorari*, which he was refused by McCracken J in the second set of judicial review proceedings (208JR/1997), the matter is *res judicata*.

27. The response of the Applicant was that for the plea of res judicata to be successfully pleaded a judgment point in question must have been made by a judicial tribunal and be final and conclusive on the merits. He submitted that as there has been no judgment given on the merits of the present application and that while McCracken J to refuse certiorari on the grounds then him, such did not include an argument the jurisdiction of the Circuit Court, have been made to him at that time. The Applicants submission was grounded on the decision of Lord Shaw in *Bradshaw -v- McMullen* [1920] 2 IR 412 at p.424, to the following effect-

> "*Res judicata*, by its very words, means a matter upon which the court has exercised its judicial mind, and has come to the conclusion that the one side or the other is right, and has pronounced a decision accordingly."

28. Furthermore, the Applicant sought to rely on the provisions of Order 26, Rule 1, which it is contended states that the discontinuance or withdrawal of proceedings "shall not be a defence action". Altogether from the clear rule being referable to proceedings of a plenary nature, such withdrawal or discontinuance may very for opposition to a judicial well be a proper ground review application.

29. Earlier in this judgment I have quoted paragraph (13) of the Applicant's submission which on its face confines the inapplicability of the plea of *res judicata* to the claim for relief of an order of Prohibition. This issue may have been withdrawn from McCracken J. The matter is clearly not res judicata, in the sense referred to by Lord Shaw. In my judgment, notwithstanding the refusal by McCracken J of Certiorari, such refusal not being grounded on the point of jurisdiction, the plea of the Respondents of *res judicata* has to be considered in the light of (a) the view of de Smith in Judicial Review of Administrative Action, 4th Edition (1980), p.180, is in point:

> "It is difficult not to conclude that the concept of res judicata in administrative law is so nebulous as to occlude rather than clarify practical issues, and it should be used as little as possible."

and (b) the decision of the Supreme Court in *Ahmad -v- The Medical Council* and the Attorney General [2004] 1 ILRM 372, wherein it was stated in the headnote:

> "(2) Rules and principles intended to protect a party against oppressive and vexatious litigation cannot, in their nature, be applied in an automatic or unconsidered fashion. Sympathetic consideration must be given to the position of a plaintiff or applicant who, on the face of it, is exercising his right of access to the courts for the determination of his civil rights or liabilities."

30. Furthermore, it is also noted that:-

> "The issues in relation to legal aid were issues in which the applicant, exercising reasonable diligence, might have brought forward at the time of the first proceedings. The second proceedings ran foul of the rule of public policy, based on the desirability in the general interest as well as that of the parties themselves, that litigation should not drag on forever, and that a defendant should not be oppressed by successive suits where one would do."

31. The Applicant in particular relied on that passage in the judgment of the Chief Justice, appearing at page 378, to the following effect:

> "It is also to be remembered that, under order 58, Rule 1, all appeals to this court are to be ,by way of rehearing'. As noted by Henchy J in *Northern Bank Finance Ltd v. Charleton* [1979] IR 149, so far as oral evidence is concerned, the court must rely on the transcript of that evidence in the High Court rather than conduct a rehearing in the manner appropriate to an appeal from the Circuit Court to the High Court. Subject to that major qualification, the court has jurisdiction to consider all the issues defined by the pleadings which were the subject of evidence or submissions in the High Court and the court is not automatically precluded in every case from considering such an issue simply because it has not been subject of a determination by the High Court judge. Whether a party is to be precluded from advancing again arguments which were relevant to an issue in the case and on which he relied in the High Court must, in the interests of justice, be determined according to the circumstances of the particular appeal before this court."

32. Altogether from the clear distinctions of this case in regard to the factual issues in Ahmad, it is a decision with no dissenting judgment and in particular the Respondent drew attention to the provisions and content of the judgment of Hardiman J, at 384 and onwards, dealing with the law in this regard. In particular, Ms. McDonagh drew attention to the passage in *Henderson -v- Henderson* [1843] 3 Hare 100, in which Sir James Wigram stated as follows:-

> "... I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time."

33. The Respondent, in particular, sought to rely on the passage of the same judge's excerpt from the decision of Lord Bingham in *Johnson -v- Gore Wood & Co* [2001] 2 WLR 72, at 90, where, *inter alia*, he stated as follows:-

> "It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merit-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case ..."

34. I am satisfied in the instant case, however, that this has been the third set of judicial review proceedings and as the issue was as much live in at least the second set of judicial review proceedings, the matter, in the context of the decision in *Ahmad*, can be considered as *res judicata*.

Issue Estoppel
35. Argument in this regard arose from a discussion during the hearing on the issue even if the matter were not res judicata because the ground of want of jurisdiction of the Circuit Judge was not advanced in the second set of judicial review proceedings seeking *Certiorari*, the Applicant is estopped from raising or seeking *Certiorari* on different grounds.

36. In *R -v- Secretary of State for the Environment, ex parte Hackney, London Borough Council & Anor* [1983] 1 WLR 524, a Divisional Court considering statutory power, and in particular statutory discretion to reduce rate support, at P.539 of the report, adopted the following passage from Wade on Administrative Law5th Edition (1982), p.246, wherein it is written:

> " . in these proceedings the court 'is not finally determining the validity of the Tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not'. They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown, and they may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of legal process."

37. The judgment of the Divisional Court (affirmed by the Court of Appeal at [1984] 1 WLR 592) is expressed thus:

> "The principle that relief under Order 53 is granted in discretion only, as well as the obligation to obtain leave from the court before an application for relief can be made, seems to us contrary to the concept of a final determination of an issue between the parties which is at the root of issue estoppel. The court, under this jurisdiction, is fully able to give effect to the rule of public policy that there should be finality in litigation, which underlines the doctrine of issue estoppel in civil litigation and the prohibition against double jeopardy in criminal prosecution, by the use of its powers to refuse to entertain applications and to refuse to grant relief in the process of judicial review of administrative acts or omissions: this is particularly, but not exclusively, so when the application may be oppressive, vexatious or an abuse of the process of the court."

38. As the matter was not fully argued in the hearing, I think it unnecessary to treat it further save to note that in *R (Munjaz) -v- Mersey Care NHS Trust* [2004] QB 395, at p.437, paragraphs 78 and 79, the Court of Appeal shared the doubts expressed by it in the decision in *ex parte Hackney LBC*, hereinbefore recited, as to whether the doctrine of issue estoppel is applicable at all in judicial review proceedings.

39. I do not refuse the reliefs sought, certiorari in particular, on any point of issue estoppel, but I am satisfied and find as a fact and as a matter of law that the proceedings before the court are oppressive, vexatious and an abuse of the process of the court in this instance.

Delay
40. The application pursuant to Order 84, Rule 21 of the Rules of the Superior Courts in the case of *certiorari* indicates that it must be brought promptly and not later than six months after such judgment, order, conviction or other proceeding shall be so had or made. I am satisfied and find as a fact that the proceedings for certiorari were not brought within six months of 6th February 1997, nor were they brought promptly. The fact that the Applicant or his advisors, who had not been successful in challenging by way of certiorari in 208JR/1997, have considered thereafter another ground that they might (but for reasons undisclosed in the instant case did not) have advanced on the unsuccessful application, cannot ipso facto and unilaterally extend the time within which to issue proceedings -- an application brought, as in this case, over three years after the decision is out of time, and I am not satisfied any valid reason has been tendered to the court to excuse this noncompliance.

41. The Applicant sought to rely on the dictum of McCarthy J in *The State (Furey) -v- The Minister for Justice* [1988] ILRM 89 p.100, asserting that an Applicant is entitled to relief notwithstanding the delay since the making of the impugned order.

42. As McCarthy J observed:

> "I see no logical reason why delay, however long, should of itself disentitle to certiorari any applicant for the remedy who can demonstrate that a public wrong has been done to him -- that, for instance, a conviction has been obtained without jurisdiction or that, otherwise, the State has wronged him and that the wrong continues to mar his life."

43. Two brief facts distinguish that case from the Applicant's:

(A) It was a case decided by the Supreme Court on 2nd March 1984, before the present procedure governing judicial review was introduced by Order 84 of the Rules of the Superior Courts 1986.

(B) Although the three-year period for which the prosecutor had enlisted had expired in *Furey's* case, an Order of Certiorari would not lack effect or be without advantage to the prosecutor in view of the impact of the discharge of his employment and re-enlistment prospects in the Army. I do not at all accept the instant case is comparable to *Furey's* case. In the High Court *Furey* was unsuccessful, but by a majority of two to one in the Supreme Court he was successful. Even if judicial opinion may be considered to be divided at that time, considerable doubt has been expressed concerning McCarthy J's orbiter dicta and it seems not at all in line with current judicial thinking. Indeed, Keane CJ quite clearly states in *De Roiste –v The Minister for Defence* [2001] 1 IR 190 that "this passage cannot be regarded as a correct statement of the law".

44. The Applicant further submitted that where the order sought to be quashed arises proceedings, then the court out of criminal will have a greater onus to exercise its discretion in favour of the Applicant. The authority advanced to sustain this argument was a passage in the judgement of Denham J in *De Roiste -v- The Minister for Defence*, herein before referred to at p.13:

> "Where there is a conviction in record made without jurisdiction, it is possible that the court will only exercise its jurisdiction one way; ie, by granting *certiorari*: *State (Vozza) -v- O Floinn* [1957] IR 22. However, even there, factors may have to be considered, such as the conduct of the Applicant and alternative remedies. As Maguire CJ sated in the *Vozza* case, at p.244:
>
> > 'I find it difficult, however, to imagine conduct on the part of an Applicant for certiorari which would disentitle him to an order of certiorari in regard to a conviction of a crime of any sort, where it is established that it was made without jurisdiction.
> >
> > Implied in this statement is the necessity for the court to consider the facts of a case in the exercise of its discretion and that even in the case of a criminal conviction there is conduct, although it is hard to imagine, which would disentitle an applicant to an order for *certiorari*."

45. In my judgment, the Applicant is in delay which is both inordinate and inexcusable and furthermore, in this case, has not been justified. Furthermore, it is not a case in which the Respondents contributed in any way to the delay.

46. Even if, as argued by the Applicant, certiorari should be available to him *ex debito justitia*, the judgment of O'Higgins CJ in *The State (Abenglen Properties Limited) -v- Dublin Corporation* [1984] IR 381, at p.392, makes it clear that even where *certiorari issues ex debito justitia* .

> "This should not be taken as meaning that a discretion does not remain in the High Court as to whether to give the relief or to refuse it. There may be exceptional and rare cases where a criminal conviction has been recorded otherwise than in due course of law and the matter cannot be set right except by *certiorari*. In such circumstances, the discretion may be exercisable only in favour of quashing (see *The State (Vozza) -v- O'Floinn* [1957] IR

47. In the passage immediately following her judgment in *De Roiste*, earlier quoted, Denham J stated at p.208:

> "Thus, the general rule is that certiorari is a discretionary remedy. However, if, for example, a conviction was made without jurisdiction, the general course would be for the court to grant the application. There are no absolutes in the exercise of a discretion. An absolute rule is the antithesis of discretion, the balancing of factors -- a judgment."

48. That judgment proceeds to illustrate the factors which a court may take into account, which I do in this case, and in particular, that in the matter of public policy, that proceedings relating to public law domain must take place promptly, except when good reason is furnished. Fennelly J, in his judgment in *De Roiste*, at p.217/8 of the report, considered an earlier decision of the Supreme Court in *The State (Kelly) -v- District Justice for Bandon* IR 258. It is clear that if there is established a lack of jurisdiction in the order being challenged, it should, in most cases, be indicative of an order of certiorari, but such matters as lack of candour and delay are factors to be considered thereafter before the discretion of the trial judge is finally exercised. There was no lack of jurisdiction in the Circuit Court Judge's determination in this case. Furthermore, the obiter dicta of McCarthy J was not only dealt with, as I have indicated, by the Chief Justice in *De Roiste*, but also commented upon in a confirmity fashion by Fennelly J in *Dekra Eireann Teo -v- The Minister for Environment* [2003] 2 IR 270 at p.303. Even if the case of the Plaintiff had been correct, my discretion would not have been exercised in his favour and I would, in particular, have relied on the passage of the judgment of Denham J in

De Roiste, hereinbefore referred to, at p.210, which is to the following effect:-

> "The time element in judicial review proceedings requires early application to court by an Applicant. This is indicated by the requirement that the application be made promptly, and in any event within three or six months from when the grounds for application arose, unless there is good reason to extend the period within which the application shall be made."

49. In determining the question of the good reason, if one existed, and none has been set forth to my satisfaction, I would be guided by the decision of Costello J in *O'Donnell -v- Dun Laoghaire Corporation (No. 2)* [1991] ILRM 301, wherein, in relation to the phrase "good reason", he put it as follows:-

> "In considering whether or not there are good reasons for extending the time, I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved Plaintiff believed that he or she was justified in delaying the institution of proceedings. What the Plaintiff has to show (and I think the onus under order 84, Rule 21 is on the Plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."

50. In the instant case, I do not find either to exist.

Prohibition

51. In the instant case, I do not find anything in the affidavits or in the submissions put to the court on behalf of the Applicant that would justify making an order of this character. There is noting to suggest that the District Judge to whom the case may be entrusted for determination will fail to observe the law. There is nothing inherently unfair or unjust in having the proceedings take

their normal course. This is a form of relief which, having been to the Applicant at the time the matter was before McCracken J, he declined to proceed and now resurrect the matter. I do not think the judicial review proceedings can be conducted on the basis of seeking reliefs and then not pursuing them and seeking to resurrect them at a later date when well out of time. Accordingly, I would also refuse this relief .

52. In this case, it may appear at first glance that an order of Prohibition should issue on the basis that the alleged offences are some ten years old and there is a long interval of time which has elapsed. However, I am satisfied that the Applicant in this case has used the court procedure and procedures over the last number of years with a view to avoiding the Section 56 offences to proceed. It is some ten years since the first set of judicial review proceedings issued and when, after the second set of judicial review proceedings were determined and the matter was returned to the District Court in 1999, it is quite clear to me from a consideration of the papers that every effort was made by the Applicant to frustrate the court in dealing with these matters and coming to a determination. The delays in these matters would not have arisen had the Applicant in these and other judicial review proceedings, and in the District Court, not begun these proceedings in 1994 and 1997, and through one means or another continued to "string them out" for a whole decade. This case is quite clearly distinguishable from *Dawson -v- Hamill (No. 2)* [1991] 1 IR 213 and the grounds of appeal as summarised by Finlay CJ at p.215.

53. I repeat, in my judgment, in these proceedings are oppressive, vexatious and an abuse of process of the court. I refuse the reliefs sought.