

THE HIGH COURT

CONSULTATIVE CASE STATED

[2018 1442 SS]

IN THE MATTER OF S. 52 (1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961 (AS AMENDED)

AND

IN THE MATTER OF O. 102 (b) R. 15 OF THE RULES OF THE DISTRICT COURT

AND

IN THE MATTER OF O. 62 OF THE RULES OF THE SUPERIOR COURTS

AND

IN THE MATTER OF PROCEEDINGS

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

V.

CLAUDIA FOGARTY

DEFENDANTS

THE MINSITER FOR JUSTICE AND EQUALITY

NOTICE PARTY

JUDGMENT of Mr. Justice Robert Eagar delivered on the 10th day of May 2019

1. This is a judgment of this Court in relation to the questions posed by Judge O'Leary of the District Court.
2. On the 19th November 2018, Judge O'Leary as a Judge of the District Court assigned to District No. 19 sought the opinion of this Court by way of consultative case stated.
3. S. 52 of the Courts (Supplementary Provisions) Act 1961 as amended, makes provision for "a consultative case stated" whereby a case can be stated in the course of the proceedings before the District Court prior to their determination.
4. In *O'Shea v. Westwood Club Ltd.* [2015] IEHC, the question of law must be one "arising" from the facts as found by the District Judge and so must relate to a matter in issue in the case. The jurisprudence makes it clear that a District Judge may state a case at any stage in the proceedings up until he makes his final determination in the matter.
5. In the *Attorney General v. McLoughlin* [1931] IR 430, Sullivan P. stated: -

"It is obvious that the only question of law which a District Justice can refer to this Court is a question of law arising in any case before him, and that he has no right to ask this Court to answer questions 'extraneous to the issues affecting the defendant's case'".

Therefore, a District Judge must hear sufficient evidence to make findings of fact on the basis of which questions of law set out in the case stated can be decided.

6. The court will set out the consultative case stated and the first issue which the court must decide is whether or not the case is stated in accordance with the jurisprudence.

The case stated

7. "This is a case stated by me, Constantine G. O'Leary, a Judge of the District Court assigned to District No. 19 pursuant to s. 52 (i) of the Courts (Supplementary Provisions) Act 1961.

(i) In a prosecution by the Director of Public Prosecutions, Claudia Fogarty the defendant named above was duly fined €600 by a judge of the District Court duly assigned to District No. 19 on the 24th November 2016, which fine has not been paid.

(ii) A number of requests for payment were sent by the Courts Service to the defendant which did not result in payment and ultimately a Notice was sent to the defendant in accordance with the provisions of s. 7 (4) of the Fines (Payment and recovery) Act 2014, requiring her to attend at a sitting of the District Court at the Courthouse, Anglesea Street, Cork, on the 30th October 2018 and provide information to the court in accordance with the terms of that subsection.

(iii) The defendant instructed her solicitor, Ms. Emma O'Leary, to attend on her behalf on that date and place which her solicitor duly did.

(iv) There was no appearance by or on behalf of the prosecutor, which as far as I am aware is a universal practice of the prosecutor in such matters, she having taken the view that she has no role in them and it is under the legislation a matter exclusively for the Courts Service and the Judge of the District Court to secure collection of the amount payable as a fine, the prosecutors' role having ceased at the time of the imposition of the fine.

(v) I was concerned at the position that I was in as I am not aware of any other function permitted to or directed

to be performed by a Judge of the District Court where the named ruling party is not required to attend to secure a decision by the court and found the nature of the proceedings as between being proceedings of a judicial or an administrative nature difficult to identify and was therefore uncertain of the legal context of the proceedings and of the nature as opposed to the specifics of the proceedings and therefore of the principles to be applied.

(vi) I note that the forms prescribed by the District Court (Fines) Rules 2016 make provision for the prosecutor of the offence the subject of the fine to be named in the notice under s. 7 (4) to be named as "prosecutor".

(vii) I note that O. 23 r. 5 of these rules states that in the event of the appearance of the defendant and the non – appearance of the prosecutor, the "complaint" may be struck out.

(viii) I note that the Court of Appeal concluded in its judgment in the cases of *Owens v. DPP & Ors* and *Dooley v. DPP & Ors* by indicating that it was a matter for the Director to decide if she should institute proceedings under s. 7 of the Fines (Payment and Recovery) Act 2014, which statement I cannot reconcile with the position taken by the Director to proceedings before me under the Act.

(ix) When the matter came before me on the 13th November 2018 and asked that the local state solicitor be notified of my difficulties, there was no appearance by any person on behalf of the Director on the said dates.

(x) On the 13th November 2018 Ms. Emma O'Leary for the applicant made an application under O. 23, r. 5 for the matter to be dismissed for want of prosecution in the light of the fact that the prosecutor was not in attendance. I say that I decided to state a case based on the application made above and the law as open to the court before me on the 13th November 2018 and adjourned this matter to the 15th November 2018 to allow the necessary question to be drafted.

(xi) *The opinion of the High Court is therefore sought on the following questions:*

- (a) Are the proceedings under s.7 of the Fines (Payment and recovery) Act, 2014 of a judicial or an administrative nature?
- (b) Is the DPP or other prosecuted proceedings which result in a fine which subsequently becomes the subject of the notice issued under s. 7 of the Fines (Payment and Recovery) Act, 2014 a party to proceedings on foot of said notice?
- (c) Do the provisions of O. 23, r. 5 of the District Court Rules, as amended by the District Court (Fines) Rules 2016 apply to such proceedings or do I have a discretion to apply an analogous provision to the proceedings before me?
- (d) Do I have a discretion to strike out proceedings on foot of such notice in the event of neither the person named as prosecutor nor the person named as defendant in such a notice appearing on the occasion of such listing of such notice, which is a circumstance not provided for in the District Court Rules?
- (e) Do such proceedings come within the sort of proceedings which may be the subject of a criminal legal aid certificate under the relevant legislation?

Signed by Constantine O'Leary.

8. The facts of the case were set out by Judge O'Leary as follows: -

(i) "In her prosecution by the Director of Public Prosecutions, Claudia Fogarty, the defendant, was duly fined €600 by a Judge of the District Court duly assigned to District Court 19 on the 24th November 2016 which fine has not been paid.

(ii) A number of requests for payment were sent by the Courts Service to the defendant which did not result in payment and ultimately a Notice was sent to the defendant in accordance with the provisions of s. 7 (subs. 4) of the Fines, (Payment and Recovery Act) 2014 requiring her to attend at a sitting of the District Court at the Courthouse, Anglesea St., on the 30th October 2018 and provide information to the court in accordance with the terms of that subsection.

(iii) The defendant instructed a solicitor, Ms. Emma Leahy, to attend on her behalf on that day and place which her solicitor duly did.

(iv) There was no appearance by or on behalf of the prosecutor which as far as I am aware is a universal practice of the prosecutor in such matters, she having taken the view that she has no role in the matter and that it is under the legislation a matter exclusively for the Courts Service and the Judge of the District Court to secure collection of the amount payable as a fine, the prosecutor's role having ceased at the time of the imposition of the fine.

(v) I was concerned at the position as I was in, as I am not aware of any other function permitted to or directed to be formed by a Judge of the District Court where the named moving party is not required to attend to secure a decision by the court and how in the nature of the proceedings being proceedings of a judicial or an administrative nature difficult to identify. I was therefore uncertain of the legal context of the proceedings and of the nature, as opposed to the specific steps, of the proceedings, and therefore of the principles to be applied.

(vi) I note that the forms prescribed by the District Court (Fines) Rules 2016 make provision for the prosecutor of the offence the subject matter of the fine to be named in the Notice under s. 7 subs. 4 to be named as "prosecutor".

(vii) I note that O. 23, r. 5 of those Rules state that in the event of the appearance of the defendant and the non – appearance of the prosecutor, the "complaint" may be struck out.

(viii) I note that the Court of Appeal concluded its judgment in the case of *Owen v. DPP & Ors* and *Dooley v. DPP & Ors* by indicating that it was a matter for the Director to decide whether she should institute proceedings under s. 7 of the Fines (Payment and Recovery) Act 2014 which statement I cannot reconcile with the position taken by the Director to proceedings before me under the Act.

(ix) I adjourned the matter before me to the 13th November 2018 and asked that the local State Solicitor be notified of my difficulties. There was no appearance by any person on behalf of the Director on the adjourned date.

(x) On the 13th November 2018, Ms. Leahy, solicitor for the applicant, made an application under O. 23, r.5 for the matter to be dismissed for want of prosecution in the light of the fact that the prosecutor was not in attendance. I say I decided to state a case based on the application made above and the law that is open to the court before me on the 13th November and adjourn this matter to the 15th November 2018 to allow the necessary question to be drafted".

9. The court has already set out the questions asked by the District Judge. The matter first came before the High Court on the 17th December 2018 when Noonan J. noted the consultative case stated and noted the intention of the defendant to apply for costs pursuant to the legal aid custody issue scheme, adjourned the matter to the 28th January 2019.

10. By notice of motion dated the 26th March 2019, the Minister for Justice and Equality, the proposed notice party, applied to the President of the High Court for an order adding the Minister for Justice and Equality as a notice party to these proceedings.

11. This notice of motion was grounded on the affidavit of Kevin Condon, Principal Officer of the Department of Justice and Equality and he made this affidavit for the purpose of grounding the application for the Minister for Justice and Equality to be joined as a notice party to these decisions. He stated the following: -

"Para.4: The Fines (Payment and Recovery) Act 2014 was initiated by the Minister for Justice and Equality pursuant to the Ministers and Secretaries Act 1924. The Minister has responsibility for the administration and business generally of public services in connection with law, justice, public order and police and all powers, duties and functions connected with the same (except such powers duties and functions as are by law reserved to the executive council and such powers, duties and functions as are by the Constitution or law accepted from the authority of the executive council (or an executive Minister) which includes courts policy".

12. On the 26th March, the President of the High Court ordered that the Minister for Justice and Equality be added as notice party to the proceedings.

Is the consultative cases stated properly before this Court?

13. S. 52 of the Courts (Supplemental Provisions) Act provides: -

"(1) A justice of the District Court shall, if requested by any person who has been heard in any proceedings whatsoever before him (other than proceedings relating to an indictable offence which is not being dealt with summarily by the court) unless he consider the request frivolous, and may (without request) refer any question of law arising in such proceedings to the High Court for determination".

14. The court is of the view that the case stated in this case falls marginally under the Courts (Supplemental Provisions) Act 1961. I will propose to deal with the questions raised.

The legislation

15. The Fines (Payment and Recovery) Act 2014 provides for a mechanism whereby a person who fails to pay a fine should be brought before the District Court to facilitate representations made by him or on his behalf to prevent his imprisonment and which allows for staged payments or for an alternative to imprisonment such as community service.

16. S. 7 of the Fines (Payment and Recovery) Act 2014 provides: -

"(1) Subject to subsections (3) and (5), where a fined person fails to pay the fine by the due date for payment, the court shall, at the sitting of the court on the date specified in the notice concerned under subsection (4) served on the person (unless the person has paid the fine on or before that date)—

- (a) subject to subsection (2), make a recovery order,
- (b) make an attachment order, or
- (c) make a community service order if section 4 of the Act of 1983 has been complied with.

(2) The court shall not make a recovery order in respect of the fined person (not being a body corporate) unless the fine or, as may be appropriate, that part of the fine that remains unpaid—

- (a) exceeds such amount greater than €500 as may be prescribed, or
- (b) if no such amount stands prescribed, exceeds €500.

(3) Where a fined person who has exercised his or her option under section 6 (1)(a)(ii) to pay the fine by instalments fails to pay any such instalment (in this subsection referred to as the "relevant instalment") by the due date for payment, it is not necessary for the court to take action under this section in respect of the failure unless—

- (a) there are 2 other failures by the fined person to pay that fine by instalments by the due date for payment, or

(b) the relevant instalment has still not been paid when all other instalments have been paid.

(4) The appropriate court official concerned shall, by notice in writing served on the fined person, require the person to appear before the court on the date and at the time specified in the notice, and to provide to the court a statement in writing of his or her financial circumstances.

(5) (a) The court shall, after considering a statement provided to it pursuant to subsection (4) in deciding what order to make under subsection (1)—

(i) first, give consideration to making an attachment order in respect of the fined person, and

(ii) second, if it is satisfied that it would not be appropriate for it to make an attachment order in respect of the fined person, give consideration to making, subject to subsection (2), a recovery order or community service order in respect of the fined person.

(b) Where the court is satisfied that it would not be appropriate for it to make an attachment order, recovery order or community service order in respect of the fined person, it may commit the person to prison in accordance with section 2 or 2A of the Act of 1986.

(6) A notice under subsection (4) shall—

(a) inform the fined person of the orders that the court may make under subsection (1) in respect of the person and of the court's power under subsection (5) to commit the person to prison, and

(b) state that a warrant may be issued for the arrest of the fined person if he or she fails to appear before the court as required by the notice.

(7) Where a fined person fails, without reasonable excuse, to appear before the court as required by a notice under subsection (4), the court shall, if satisfied that the notice was served on the person—

(a) issue a warrant for the arrest of the person, or

(b) if the court thinks it appropriate in all the circumstances, cause a further notice under subsection (4) to be served on the person specifying a new date for the person to appear before the court, and to provide it with the statement referred to in that subsection.

(8) A fined person arrested under subsection (7)(a) shall be brought before the next sitting of the court.

(9) A fined person who knowingly or recklessly makes a statement, in purported compliance with a notice under subsection (4), that is false or misleading in any material respect shall be guilty of an offence and shall be liable, on summary conviction, to a class B fine or imprisonment for a term not exceeding 6 months, or both.

(10) Rules of court shall prescribe the form of a statement referred to in subsection (4)."

The historical background to the Act

17. The historical position has been that the courts enforce the payments of fines of their own motion and it is not something that is done by a prosecutor such as the DPP. Under the scheme that operated prior to the Act, the order of conviction and sentence would specify a specific period of imprisonment that were to apply if the fine was not paid, and in such a case, no further application was required by the DPP if the fine were not paid, but rather a warrant would issue automatically from the court.

18. In *Forde v. Judge Doyle* [2018] IECA 382, the accused in this case was fined a sum of €39,527.32. The Circuit Court had allowed a period of twelve months to pay the said fine and as authorised by s. 195 of the Criminal Justice Act 2006, the sentence provided for one years' imprisonment in payment (s. 195 has now been repealed by s. 4 of the Act). No part of the fine was paid within the twelve months allowed. Some two months after the due date for payment of the fine the accused was before the Circuit Criminal Court on another matter and the Director of Public Prosecutions sought to re – enter the first matter. This application was unsuccessful, the Circuit Judge sitting that day refused to deal with the matter as he was not the original sentencing judge, and he stated that: -

"default of payment process would take its normal course".

19. The normal practice then did occur. It did not involve any application by the Director of Public Prosecutions. Rather, a committal warrant issued for the arrest and detention of the accused as he had failed to pay the fine within the statutory time permitted. The warrant was signed by a nominated signatory of the Court Registrar, a person in the employ of the Courts Service. The accused was duly arrested and lodged in Mountjoy Prison.

20. In a judicial review brought by the accused, the High Court (Murphy J.) found that the committal warrant had been issued ultra vires by an employee of the Courts Service and therefore should be quashed.

21. This finding was overturned on appeal by the Court of Appeal. One of the primary issues debated before the court was whether the fact that the committal warrant had issued out of the Courts Service as opposed to being issued by a judge was lawful. Birmingham J. stated: -

"It is worth considering what the position would have been on 19th March 2013 had someone posed the question 'what happens if the fine is not paid within the year?' It seems to me that nobody would have answered 'Mr. Forde will be brought back before a judge who will decide what to do'. It seems to me that the universal response would have been

'Mr. Forde will be imprisoned for twelve months', that would have been the universal response because that was what the judge, acting within jurisdiction, had decided should happen and had so stated in clear and unequivocal terms. It is, of course, the case that the Courts Service or its officials cannot decide to issue a warrant, but that is not what happened here. The decision that Mr. Forde should be imprisoned for a period of twelve months if he failed to pay the fine within the prescribed time was a decision that was taken by Judge Alice Doyle (this Court's emphasis) on 19th March 2013. No further decision thereafter was required. . . .

...In my view, the High Court Judge erred in concluding that an official of the Courts Service had decided or determined that Mr. Forde should serve a period of imprisonment. The decision that Mr. Forde should serve a period of imprisonment in default of payment of the fine was one taken by the Judge in the Circuit Court and the actions of the official in the Courts Service in drawing up the warrant were simply designed to give effect to the Judge's decision and order".

22. The Fines (Payment and Recovery) Act 2014 (henceforth described as the 2014 Act) came into force on the 11th January 2016. In the judgment of the Court of Appeal in *Owens and Dooley v. DPP* [2017] IECA 299 stated: -

"The introduction by the legislature of the 2014 Act was primarily prompted by a desire to reduce the extent to which defaulters of fines imposed by the Courts found themselves incarcerated in prison and, usually, in practice, because of prison over-crowding, then being freed almost immediately. The cost and inconvenience for the Gardaí and the prison authorities was considered to be needlessly high. The enactment of the 2014 legislation was preceded by an almost unified political and public demand for an alternative system for the collection and enforcement of fines compared to the then existing system which was heavily reliant on imprisonment".

District Courts (Fines) Rules 2016 (SI 19 of 2016)

23. The District Court Rules which were promulgated after the Act came into operation were made on the 18th January 2016. It amended O. 23 of the District Court Rules 1997 (SI 93 of 1997). Of course the amended rule provided for appearances: -

"3. Where the accused personally or by his solicitor or counsel appears and admits the truth of the complaint made against him or her, the court may, if it sees no sufficient reason to the contrary, convict or make an order against him or her accordingly, but if the accused does not admit the truth of the complaint the court shall, subject to the provisions of r. 4, proceed to hear and determine the complaint.

4. Subject to the provisions of Order 22, rule 3, where the accused is not present and is not represented to answer the complaint and, in the case of a summons it appears to the Court that the summons was duly served, the Court may proceed to deal with the complaint or may issue a warrant for the arrest of the accused.

5. Where the accused (or his or her representative) is present at the required time and place and the prosecutor (or his or her representative) is not present, the Court may strike out, dismiss without prejudice or adjourn the hearing of the complaint".

24. In the facts of the consultative case stated as outlined, the solicitor for the accused made an application under O. 23, r. 5 for the matter to be dismissed for want of prosecution. This clearly did not apply as in this case the defendant was charged with driving without insurance, was convicted and duly fined €600 by the Judge of the District Court. In those circumstances, this application would be absolutely inappropriate.

Fines

25. Matters to be considered include, fixing the amount, time for payment, notice to the fined person, notice to attend court in default of payment, recovery orders, attachment orders, community service orders, payment of compensation and appropriation of fines.

Submissions of the Director of Public Prosecutions

26. Counsel for the DPP raised the question of whether this was within the proper scope of a case stated and suggested that the normal rules applicable to litigation apply including that the High Court should only determine issues which have actually arisen before the District Court and should avoid engaging with speculative issues which have not arisen at this point in time and which may never arise.

27. He suggested that the only issue which properly arose before the District Court at the point the proceedings had reached was whether or not there had to be a prosecuting party in court, and if so whether that party should be the DPP. He says that deals with question B which is the only substantive question that arises, and questions (c) and (d) both appear to be ways of asking the consequential question of what the court can do if the DPP should but fails to attend. Question (a) asked by way of inviting this Court to engage in a general exposition of the issue whether the proceedings are of a judicial or an administrative nature. He stated that it was not clear why this question had been asked or how it was relevant to the next substantive question as to whether the statutory scheme in question envisages that the DPP will attend court to prosecute the application. If the proceedings were to be viewed as judicial in nature, nothing actually turns on this, since they were being dealt with by a court as opposed to a non-judicial body. He also submitted that question (a) refers as to whether legal aid is available but does not identify what is described as "the relevant legislation". There is nothing in the body of the case stated to suggest that the defendant actually made any application for legal aid, or if she did what the judge's view of that application was. Thus, this question is posed in a vacuum and it is unclear what precise issue of law the court is being asked to determine (for example, is the court being asked to interpret a specific statutory provision or the terms of a non – statutory scheme?). It follows that this issue does not properly arise in the case stated.

The position of the Director of Public Prosecutions on the substantive question

28. The DPP submits that the answer to the question as to whether she is obliged to prosecute a hearing held pursuant to s. 7 (4) of the Act is to be found by looking at the wording of the statutory scheme and properly interpreting it. The enforcement process is created by legislation.

29. He submitted that it was clear that the scheme envisages that it is a court which is enforcing its own order and that there is no other moving party or prosecutor who is required to attend court in order to move the application. The Director of Public Prosecutions' role in the process ends once the defendant has been convicted and sentenced. The mechanism of the collection of any fine imposed is not a task the DPP is given any role in respect of by the Act. It is not a matter that the DPP would historically have had a role in. The process is not a criminal law dispute but rather it is a matter that relates to the mode of enforcement of the final order that the court has previously made in a criminal matter. There is nothing that the DPP is required to approve. The DPP will not have any

knowledge relevant to the role of a receiver or relevant to the application of an attachment order. In fact, the DPP will not even be aware of the fact of non – payment of the fine since the Courts Service will only have communicated that fact to the fined person postulant to its obligations in that regard under the Act. The body that controls the process is the court itself, acting through its officials, who are in turn assisted by the Courts Service. S. 5 of the Courts Service Act 1998 provides that one of the functions of the Service is to provide support for judges where any other body is to play a role in the process, this is expressly provided for in the Act. For example, a receiver has the power to apply to the court for directions and an employer has a duty to inform the court of certain matters relating to attachment orders. The Act refers to the person in question as the fined person as opposed to the accused or to the defendant. S. 2 of the Act of 2014 defines the fined person as meaning: -

“... person on whom a court has imposed a fine and, in relation to a recovery order or attachment order, means such person the subject of the order”.

The Act is predicated on the fact that there has been a conviction and on the fact that having been a sentence that involved the imposition of a fine.

The District Court Rules 2005 (“the Rules”)

30. The imposition of conviction and sentence marks the point at which the prosecutor (in this case the DPP) is no longer involved and where the courts staff took over. R. 8 (1) provides: -

“Where a fine has been imposed by the court there shall be issued on or behalf of the Clerk (this Court’s emphasis) a notice in the form 23.2 Schedule B to the fined person stating that a fine has been imposed, the amount of the fine, the time within which the fine is to be paid”. (this Courts’ emphasis)

31. S. 7 of the Rules then set out what is to happen where there is a failure to pay the fine by the due date. S. 7 (4) of the Act provides for the mandatory initiation of the recovery process, not by the DPP but by a court official: -

“The *appropriate court official* concerned shall, by notice in writing served on the *fined person*, require the person to appear before the court on the date and at the time specified in the notice, and to provide to the court a statement in writing of his or her financial circumstances”. (This Court’s emphasis)

Part 5 of the Act then addresses community service orders and imprisonment in default of a fine. There is no mention in the Act of the DPP having any role in respect of either of those outcomes. It may be noted that s.11 of the Criminal Justice (Community Service) Acts 1983 – 2001 provides that it is the offender or the probation officer who applies to the court for the revocation of a community service order.

32. Counsel on behalf of the DPP referred to para. 10 of the case stated which refers to “the law as open to the District Court” on the adjourned date but does not record what that was. First, the defence reverted to the District Court (Fines) Rules 2016 which inserts a new O. 23 r.5 into the District Court rules to the effect that where the accused is present but the prosecutor is not then the court may dismiss the case. This submission does not take into account the structure of O. 23 since it has the general meaning heading “Trial of summary offences” and part 2, which is where r. 5 is to be found has the subheading “Appearances”. It is only when one gets to r. 6 onward that the heading “Fines” appears. Thus, O. 23, r. 5 is dealing with ordinary criminal matters where the DPP or some other body is the moving party who has not put into address the separate issue of the enforcement of fines. The reference to complaint is to the criminal complaint that is to be the subject of a trial, thus this rule is simply not relevant to the question of whether the DPP is to be the prosecuting party in a fine enforcement hearing which is an entirely separate process to the trial of the complaint and which has only occurred after conviction and sentence have been completed.

33. The defence noted that the Form that is provided for in the 2016 Rules, Form 23.3, has the heading “Prosecutor and accused”. All of the forms in the Rules have this heading and is no more than recognition of the fact that at all times the proper title of the case that has led to the fine is in the form DPP or other prosecuting body v. the accused. The fact that the case retains the same title and is simply a matter of administrative convenience and does not govern the question as to who is the moving party in the enforcement process.

34. The other feature that arises in the defence submissions is the judgment of the Court of Appeal in *Owens & Dooley v. DPP* [2017] IECA 299, the substantive issue in that judicial review concerned the temporal impact of the Act. The High Court quashed the two committal warrants in question and directed the DPP to initiate s. 7 proceedings under the Act. The Court of Appeal (Mahon J.) upheld the judgment of the High Court but varied the order slightly as follows: -

“I would therefore dismiss the appeals, save to the following extent. I would quash the Orders made in the High Court directing the Director of Public Prosecutions to initiate proceedings under s. 7 of the 2014 Act in respect of the unpaid fines to date. It should remain a matter for decision by the Director to proceed as she believes appropriate, including a decision to initiate such proceedings should she so decide”.

Thus, both the High Court and the Court of Appeal seem to be under the impression that the DPP was the moving party in the 2014 Act. The defence in the present case has viewed the judgment as being inconsistent with what is described in the case stated as: -

“The position taken by the Director to proceedings before me under the Act”.

35. No submissions were made to the High Court by either side in that case as to whether the DPP should prosecute on application and the court seems to have simply misunderstood the position when fashioning the relief. The same error was apparently made by the Court of Appeal. In that case, it will not be the DPP who decides whether the application is to proceed and who takes any further steps in it, rather it will be the Courts Service, acting pursuant to s. 7 (4) of the Act in the usual way. Counsel also noted that the case is subject to an appeal to the Supreme Court and he quotes the written submission of the Director to the Supreme Court as follows: -

“At para. 48, the Court of Appeal recites a misconception that the DPP has a role connected to the enforcement procedures set out in the 2014 Act and in particular s. 7 thereof. The only statutory official charge of moving the application for a committal warrant is the ‘appropriate court official’ as defined in the 2014 Act. That definition does not encompass the DPP who has no role as set out. No lawful basis for such a role has been identified by either court below or the respondents”.

36. Counsel for the DPP submitted that the following answers should be made to the five questions posed in the case stated: -

- (a) Does not properly arise;
- (b) No;
- (c) Does not arise as regards the prosecutor not attending the court in the light of the answer to (b);
- (d) Does not arise as regards the prosecutor not attending court in the light of the answer to (b). There is no basis for striking out the proceedings in either circumstance;
- (e) Does not properly arise.

Further submissions of the notice party on the questions

37. Counsel on behalf of the notice party said that the Fines (Payment and Recovery) Act 2014 ("the Act") commenced on the 11th January 2016 and has been operational for three years. Its primary purpose was to provide for alternatives to imprisonment for non – payment of fines including attachment of earnings, community service and debt recovery proceedings. Determinations in respect of alternative sanctions for non – payment are to be made at enforcement hearings where a person has defaulted on the fine payment. The principle policy goal enshrined in the 2014 Act was a reduction in the high level of committals to prison that previously pertained for non – payment of fines (just under 10,000 in 2015). The Act represented a significant reform to provide an appropriate response to the problem of refusal or failure of some persons to pay fines imposed and to the inappropriateness of imprisonment as an automatic response where this happens. It represented a new direction for the administration of fines and the administration of justice in respect of minor offences.

The fines system prior to the commencement of the Act

38. Prior to the commencement of the Act, all fines had to be paid in full in the local court office or online on the Courts Service website. At the same time the judge imposed a fine, the time for payment was generally fixed and the penalty to be imposed if the fine remained unpaid was fixed. The default option was imprisonment and this penalty would be imposed for non – payment without any further involvement of the prosecutor of the original offence.

39. He said the main procedural change from that regime under the 2014 Act is that if a fine goes unpaid, or if a first instalment is not paid by the due date for payment, the person must be brought back to court through an enforcement notice system under s. 7 and the court shall make either a recovery order, an attachment order, or make a community service order. A term of imprisonment can also be ordered as a last resort.

40. In relation to question (a) are the proceedings under s. 7 of the Fines (Payment and Recovery) Act 2014 of a judicial or administrative nature? Counsel on behalf of the notice party stated that it was not wholly clear from the case stated why this question was raised. The background facts are set out clearly and succinctly in the case stated and a determination of this question may not necessarily help the District Court Judge in applying s. 7 of the Act in the adjourned hearing. The Minister however believes that the answer to the question is that the s. 7 process constitutes the administration of justice. The legal position on this point may not impact much on the other questions to be addressed. He quoted from Kelly J. in *McDonald v. Bord na gCon* [1965] 1 IR 217: -

"It seems to me that the administration of justice has these characteristic features:

- (i) A dispute or controversy as to the existence of legal rights or a violation of the law;
- (ii) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty.
- (iii) The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
- (iv) The enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;
- (v) The making of an order by the court which is a matter of history, an order characteristic of courts in this country".

41. Counsel for the Minister submitted that the District Court here is administering justice. It is not an administrative procedure. The court is determining what order is to be made, having regard to the convicted persons' financial circumstances. The court has a discretion as to which method of enforcement or punishment to impose. The court is also deciding as between different sanctions. This is the administration of justice; in this respect the Minister relies on the judgment of the Supreme Court in *State (Lynch) v. Ballagh* [1986] 1 IR 203, where Walsh J. held: -

"The granting of bail by a court is a judicial act and not a ministerial one. A court has to consider the various matters which may be taken into consideration and exercise its discretion according to the law".

(B) Is the DPP or other prosecutor of proceedings which result in a fine which subsequently becomes the subject of a notice issued under s. 7 of the Fines (Payment and Recovery) Act 2014 a party to proceedings and on foot of such Notice?

42. Counsel on behalf of the Minister submitted that there was a clear distinction between the imposition of the original fines utilising s. 5 of the 2014 Act and the enforcement procedure provided for by s. 7. S. 7 provides as subs. 4: -

"The appropriate court official concerned shall, by notice in writing served on the fined person, require the person to appear before the court on the date and at the time specified in the notice, and to provide to the court a statement in writing of his or her financial circumstances".

The Minister submits that it is a separate consequential procedure from the proceedings that resulted in the original fine. There is no requirement for the District Court clerk to serve the notice on the prosecutor. The only person who may be able to assist the court is the person fined and counsel for the Minister submitted that there was no provision in the Act which requires, explicitly or implicitly, and there is no other applicable rule of law that requires the DPP or other prosecutor to attend or make that person a party in s. 7 proceeding. S.7 (5) sets out the options available to the court where the fined person is brought before the court. Like s. 7(1), the

provision is compulsory. The court must consider the statement of means then consider an attachment order in respect of the fined person, or if that is not appropriate, to give consideration to a recovery order or a community service order. If it is not appropriate to make any of these orders, the court may commit the person to prison. There is no reference to a prosecutor and the DPP or other prosecutor. The s. 7 mechanism does not constitute the prosecution, therefore there is no role for a prosecutor. A "fine" is defined in s. 2 of the Act as: -

"a fine imposed by a court on a person consequent upon his or her being convicted of an offence by that court, (Counsel for the Minister's emphasis) and includes any costs, compensation or expenses, in addition to the fine, that the court orders the person to pay".

43. In relation to *Owens & Dooley v. DPP*, the Court of Appeal considered an appeal against an order of the High Court wherein the High Court quashed committal warrants issued against Mr. Owens and Mr. Dooley for non – payment of the fines imposed by the District Court and counsel for the Minister repeated para. 48 of Mahon J.'s judgment. He also submitted that whether or not the DPP or other prosecutor had a role in the s. 7 process was not an issue raised by the applicant in that case which concerned the retrospective application of the Fines (Payment and Recovery) Act 2014 and he submitted that the answer to question (b) is "no".

(C) Do the provisions of O. 23, r. 5 of the District Court rules as amended by the District Court (Fines) Rule 2016 apply to such proceedings or do I have a discretion to apply an analogous provision in the proceedings before me?

44. Counsel for the Minister submitted that the District Court (Fines) Rules 2016 (the Rules) amended the District Court Rules 1997, by the substitution of a new O. 23. Part (II) of the Rules deals with appearances and clearly relates to court appearances where the original complaint is considered and a conviction is made on the original fine imposed. The word "convict" therefore, contemplates the court sitting during which the fined person is originally convicted. This is not the procedure provided for under s. 7 of the 2014 Act which comes much later.

45. O. 23, r. 4 deals with where the accused does not appear, and r. 5 deals with the absence of the prosecutor. The rule provides: -

"Where the accused (or his or her representative) is present at the required time and place and the prosecutor (or his or her representative) is not present, the Court may strike out, dismiss without prejudice or adjourn the hearing of the complaint".

46. Counsel submitted that the word "complaint" in O. 23, r 5 is the original complaint of the summary offence with which the accused is charged. The word "accused" indicates that the person has not yet been convicted. It is submitted that the word "complaint" is the same as rules 3 and 4 considered above. Counsel on behalf of the Minister indicated that r. 7 dealing with the question of fines is a matter for the Courts Service and suggests that the correct answer to question (c) is "no".

D. Do I have a discretion to strike out proceedings on foot of said notice in the event of neither the person named as prosecutor nor the person named as defendant to such notice appearing on the occasion of the listing of such notice which is a circumstance not provided for in the District Court rules?

47. In the event of no appearance without reasonable excuse the court must proceed as per s. 7 of the 2014 Act. In other words, the court must either issue a warrant for the fined persons arrest or cause a further notice under subs. 4 to be served on the person. The Minister submits that the answer to question (d) is firstly that the question does not arise because the prosecutor is not required to attend and secondly there is no discretion to strike out proceedings as suggested in the question. There is no statutory basis for striking out proceedings as suggested in the question. There no statutory proceedings for striking out the question and no jurisdiction conferred on the District Court to do so by reason of any failure to attend on the part of the original prosecutor now no longer involved or other prosecutor or the person fined. The court as regards the non – appearance of the person fined has other enforcement powers available to it.

(E) Do such proceedings come within the sort of proceedings which may be the subject of a criminal legal aid certificate under the relevant legislation?

48. Counsel for the Minister submitted that it was not immediately apparent from the consultative case stated why the District Court raised the question. It is clear however, that the judge sees the s. 7 (4) process as distinct from the original trial of the summary offence. The facts set out in the case stated do not refer to an application for legal aid. It is not clear whether the fined person actually applied for legal aid.

Submissions on behalf of the defendant in relation to the questions raised

49. On the 24th November 2016, Claudia Fogarty was convicted of an offence of using a vehicle while uninsured. The prosecuting member was Gda. Sean Murphy and following conviction (this Court's emphasis) a fine of €600 was imposed by the court.

50. On the 4th July 2018, a notice was sent to the defendant under s. 7 (4) of the Fines (Payment and Recovery) Act 2014 requiring her attendance at Cork District Court to answer for her alleged failure to pay said fine. On the return and all the adjourned dates, the DPP did not appear. The defendant instructed a solicitor to appear in relation to the above matter and the defendant was in attendance on the return date and all adjourned dates, the solicitor for the defendant applied for the application to be dismissed for want of prosecution on the basis that the DPP had not attended court to prosecute her and the District Judge decided to state a case on foot of the said application, and this is what has led to the five questions appearing and the case stated being submitted.

(a) The question of proper scope of a case stated. In the *DPP (Travers) v. Brennan* [1984] 4 IR 67, it was stated that: -

"In a case stated, the High Court may only determine relevant questions of law which arise on foot of findings of fact that have been made by the court".

51. Counsel submitted that the District Court Judge had put before the Court all of the facts which were relevant to the questions of law raised by him in each of the five questions posed in the consultative case stated. These questions arise from a significant and fundamental preliminary matter which has been clearly given rise to concerns on the part of the District Judge, and require to be answered prior to his entering into the determination of the substantive issues arising from the issue of a notice under s. 7 (4) of the 2014 Act. The District Court at the opening of the case posed that the preliminary question "Was there a need for the DPP to be present at the commencement of the hearing?" Counsel submitted that necessarily arising from or linked with question (b) is the question (a), whether the proceedings at issue are of judicial or administrative in nature. It was submitted that the fundamental change between the procedures in relation to actions taken following the non – payment of a fine before and after the coming into force of the 2014 Act, illustrate while this issue is one of importance in this case. The defendant contends that all questions raised are ones properly before the court by way of consultative case stated. The defendant submits they should be answered as follows: -

- (a) proceedings under s. 7 of the 2014 Act are of a judicial nature;
- (b) The DPP as a party to such proceedings is required to attend any hearing under s. 7 of the 2014 Act;
- (c) Yes, O. 23, r. 5 of the District Court Rules (as amended by the District Court Fines) Rules) do apply and give the District Judge the discretion mentioned therein;
- (d) Yes;
- (e) Such proceedings can attach a legal aid certificate.

52. Counsel for the accused said in the DPP's submissions the DPP sets out the background of the Act and deals with the case of *Owens & Dooley v. DPP* [2017] IECA 299. The defendant accepts the history of the Act as set out in the case. The defendant takes issue with any speculation in relation to this case but it is accepted that the 2014 Act was introduced to make sure that fines would be paid and to use prison as a last resort. Despite the court having to consider which of the sanctions to impose following non – payment on the interpretation contended for by the DPP and the notice party, the prosecutor will not be in court at this stage of the process. This is to be contrasted with the role and active involvement of the prosecutor in other circumstances where a convicted person has received a non – custodial sentence and conditions set out by a judge was brought back to court following failure to comply with such conditions to be resentenced. So, for example, where a convicted person has failed to comply with a community service order or the terms of a suspended sentence the DPP attends and takes part in the subsequent or resentencing hearing. Counsel quoted from Prof. O'Malley's "Sentencing Law and Practice" 3rd Ed. where he sets out the role and duties of the prosecutor at sentence. These include an obligation to provide the judge with legal assistance particularly important given the increased complexity attached to sentencing ensuring that the judge is fully apprised of all relevant facts and assisting the judge by providing all relevant information in relation to a defendant.

53. Counsel for the accused submitted that by analogy the prosecutor is obliged for the same reasons as identified in the previous paragraph to attend and take part in what is in effect a resentencing of a defendant following a failure to pay a fine in a defined period. The defendant contended that the decision in *Owens & Dooley v. DPP* at para. 48 is neither incorrectly decided nor *obiter*, and that the court acting under s. 7 would need the prosecutor to be present. Counsel for the accused confirmed that s. 7 refers to the person as "the fined person" but this is only in relation to the s. 7 notice as stated above the DPP remains the prosecutor. Counsel on behalf of the accused agrees with the DPP that the appropriate court official concerned initiates the process of bringing the fined person back before the court. The defendant also accepted that the DPP has set out the mechanisms of the 2014 Act in relation to the options open to the court.

The defence submissions

54. The defendant relies on District Court Fines Rules which issue a new O. 23, r.5 on the DPP in her submissions put some reliance in the main heading "Trial of summary offences". The defence does not agree with the interpretation that the DPP has put on this amendment and it was its intention to only deal with fines in the rule would have been made clear. Finally, the defendant refers to para. 48 of the judgment of Mahon J. in *Owens & Dooley v. DPP* but states however that the defendant was a party obviously to the *Owens & Dooley v. DPP* and is unaware what arguments the DPP made to the High Court, the Court of Appeal or indeed to the Supreme Court. For all of the reasons above he submits that the answer to the questions should be: -

- (a) The matter is judicial in nature;
- (b) Yes;
- (c) Yes, and the court has discretion as set out in O. 23, r. 5
- (d) Yes;
- (e) Yes.

Discussion

55. The court is satisfied that in relation to a number of the points raised by the District Court the consultative case stated is the appropriate way of raising the questions which arise.

56. There is no doubt but that the exercise by the District Judge on application by the Courts Service is the administration of justice and in those circumstances it seems clear that the words of the first question posed by the District Judge, the proceedings under s. 7 of the Fines (Payment and Recovery) Act 2014 are of a judicial or administrative nature. The next issue relates to the position of the DPP/prosecutor. The court in the statutory scheme as set out in the Act and the Rules is twofold. The Act itself provides for the capacity to pay a fine, payment of a fine by instalments and failure to pay fines, and also deals with recovery orders, attachment orders, community service orders and the service of notice

57. S. 7 of the Act applies to failure to pay a fine by due date, which is the circumstances in this case. S. 7 (1) provides: -

"(1) Subject to subsections (3) and (5), where a fined person fails to pay the fine by the due date for payment, the court shall, at the sitting of the court on the date specified in the notice concerned under subsection (4) served on the person (this Court's emphasis) (unless the person has paid the fine on or before that date)—

- (a) subject to subsection (2), make a recovery order,
- (b) make an attachment order, or
- (c) make a community service order if section 4 of the Act of 1983 has been complied with.

(2) The court shall not make a recovery order in respect of the fined person (not being a body corporate) unless the fine or, as may be appropriate, that part of the fine that remains unpaid—

- (a) exceeds such amount greater than €500 as may be prescribed, or
- (b) if no such amount stands prescribed, exceeds €500.

(3) Where a fined person who has exercised his or her option under section 6 (1)(a)(ii) to pay the fine by instalments fails to pay any such instalment (in this subsection referred to as the "relevant instalment") by the due date for payment, it is not necessary for the court to take action under this section in respect of the failure unless—

- (a) there are 2 other failures by the fined person to pay that fine by instalments by the due date for payment, or
- (b) the relevant instalment has still not been paid when all other instalments have been paid.

4) *The appropriate court official concerned shall, by notice in writing served on the fined person, require the person to appear before the court on the date and at the time specified in the notice, and to provide to the court a statement in writing of his or her financial circumstances".* (This Court's emphasis).

It seems clear that the rule of the prosecutor ends at the time when the court records a conviction in a summary offence and directs the payment of a fine. There seems no reason for the prosecutor to be present at this administration of justice by the District Judge for the purpose of enforcing the court's order.

58. The scheme of the Act envisages that it is the court which is enforcing its own order and there is no other moving party or prosecutor who is required to attend court in order to move the application. A reading of the sequence of steps set out in the Act and in the District Court (Fines) Rules 2016 (the Rules) made under it confirm that the DPP has no role in prosecuting the application. The long title to the Act commences by stating that: -

"The Act to provide for the payment and recovery of fines imposed on persons convicted of offences;".

Of the Rules, and in particular the sequence of the Rules provides initially for:

- (a) Trial of summary offences;
- (b) Appearances;
- (c) Fines.

S. 8 of the Rules, notice to fined persons, provides: -

"8 (1) Where a fine has been imposed by the Court, there shall be issued by or on behalf of the Clerk a notice in the Form 23.2 Schedule B to the fined person stating that a fine has been imposed, the amount of the fine and the time within which the fine is to be paid. The notice shall inform the fined person of the option to pay by a single payment or by instalments, where allowed, in accordance with section 6 of the 2014 Act and of the consequences of failure to pay the fine by the due date for payment or, as the case may be, failure to pay a relevant instalment in the circumstances mentioned in section 7(3) of the 2014 Act, in accordance with section 7 of the 2014 Act".

Under the Rules there are clearly no obligation on the District Court Clerk, nor there is no requirement on the District Court Clerk to notify the prosecutor or the DPP of the failure to pay the fine. The court is of the opinion that there is no requirement for the prosecutor or the DPP to be a party to proceedings on foot of the notice nor to be present. In relation to the other questions posed by the District Judge, O. 23, r. 5 of the District Court Rules as amended by the District Court (Fines) Rules 2016, clearly do not apply to proceedings for the enforcement of fines, and only relate to the hearing of the complaint. Under those circumstances, the answer to question 4 which is whether or not the District Judge has discretion to strike out proceedings on foot of such notice in the event that neither the person named is prosecuting or the person named is defending is sent a notice. Such a notice appearing on the occasion is the listing of such notice which is circumstances not provided for in the District Court Rules. The very fact that it is not provided for in the District Court Rules makes it clear that the District Judge in the enforcement of its own fine, must comply with the 2016 Rules.

59. The learned District Judge raised the question of a criminal legal aid certificate. There is no suggestion that a statement of means was provided in relation to the complaint of the prosecution of the accused person for the offence of driving without insurance. This Court notes that the within sort of proceedings would not normally be subject to a legal aid certificate under the relevant legislation.

Decision

60. The answers to the questions are as follows: -

- (a) Proceedings under s. 7 of the Fines (Payment and Recovery) Act 2014 are of a judicial nature.
- (b) Neither the DPP nor any other prosecutor in respect of proceedings which result in a fine are party to the proceedings and are not required to attend.
- (c) In the light of the answer to question (b), s. 3 does not arise as it relates to the hearing of the initial complaint under O. 23, r 5.
- (d) This does not arise as regards the prosecutor not attending court in the light of the answer to question (b). If the person fined does not attend then s. 7 (7) of the Act provides that the court may issue a warrant for the arrest of the person, or set a new date for their attendance. There is no basis for striking out the proceedings in either circumstance.
- (e) This Court has not sufficient information to deal with this matter except insofar as to say that after the decision of the complaint results in either an acquittal or a conviction, the legal aid certificate does not continue where a

fine has been imposed and the complainant does not discharge the fine as required.