

BETWEEN

MUHAMMED MUJAHID

HOLLY STAR LIMITED

APPLICANTS

AND

SERGEANT JAMES F CARROLL

RESPONDENT

**JUDGMENT of Ms. Justice Stewart delivered on the 31st day of March, 2017.**

1. This is an application, dated 24th June, 2016, for an order of *certiorari* by way of Judicial Review quashing the decision of Judge Mary Fahy made on 25th May, 2016, at the District Court sitting in Galway, to issue two search warrants obtained by the respondent in respect of the domestic dwelling of the first-named applicant (who is the sole director of the second-named applicant) and the business premises of the second-named applicant, both of which are located in Claremorris, Co. Mayo. The warrants in question refer to alleged wrongdoing pursuant to the Trade Marks Act 1996 and were executed on 26th May, 2016. A grounding affidavit was sworn by Myles Gilvarry on behalf of the first-named applicant on 22nd June, 2016, because the first-named applicant was in Garda detention at the time and not in a position to swear the affidavit himself. An undertaking was given to furnish a verifying affidavit as soon as practicable but no such affidavit is included in the papers submitted to the Court.

**Background**

2. Upon execution of the warrants, the respondent (who is a member of An Garda Síochána holding the rank of sergeant and based in Claremorris Garda Station) searched the two addresses named therein and seized property reasonably believed to be related to the alleged committed wrongdoing. Some or all of this property comprises of a consignment of clothing purchased from a supplier in Pakistan. The consignment entered this jurisdiction on 5th May, 2016, and was delivered to the applicants on 26th May, 2016, the same day the warrants were executed. In an affidavit sworn on 14th October, 2016, the respondent avers that he sought the warrants following an examination of the contents of this consignment, from which he concluded that they were counterfeit goods infringing upon the "PACIFIC MERCHANTS" trademark currently held by Abercrombie & Fitch. A file is currently being prepared for the Director of Public Prosecutions and the applicants have not been formally charged with the commission of an offence at this time. The first-named applicant maintains his innocence of any alleged wrongdoing and also seeks an order for the return of the above mentioned property.

**Legal Instruments**

3. The relevant section of the impugned warrants reads as follows:-

*"I AM SATISFIED THAT there are reasonable grounds for suspecting that infringed goods, material or articles, namely documents, financial records, computer hard drive and clothing, evidence of, or relating to, the commission of an arrestable offence to wit infringement of a registered Trade Mark contrary to Section 14 of the Trade Marks Act 1996 and Section 92 of the Trade Marks Act 1996 (within the meaning of Section 2(1) of the Criminal Law Act 1997, as amended by section 8 of the Criminal Justice Act 2006) is to be found in a place (within the meaning of section 10(6) of the Criminal Justice (Miscellaneous Provisions) Act 1997) namely..."*

4. Section 10 (1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted by s. 6 of the Criminal Justice Act 2006) reads as follows:-

*"If a judge of the District Court is satisfied by information on oath of a member not below the rank of sergeant that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place."*

5. Sections 14 and 92 of the Trade Marks Act 1996 reads as follows:-

*"14.—(1) A person shall infringe a registered trade mark if that person uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.*

*(2) A person shall infringe a registered trade mark if that person uses in the course of trade a sign where because—*

*(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or*

*(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,*

*there exists a likelihood of confusion on the part of the public, which includes the likelihood of association of the sign with the trade mark.*

*(3) A person shall infringe a registered trade mark if that person uses in the course of trade in relation to goods or services a sign which is identical with or similar to the trade mark where the trade mark has a reputation in the State and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the reputation of the trade mark.*

*(4) For the purposes of this section, use of a sign shall include, in particular—*

(a) affixing it to goods or the packaging thereof;

(b) offering or exposing goods for sale, putting them on the market or stocking them for those purposes under the sign, or offering or supplying services under the sign;

(c) importing or exporting goods under the sign; or

(d) using the sign on business papers or in advertising.

(5) A person who applies a registered trade mark to material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services shall be treated as a party to any use of the material which infringes the registered trade mark if, when that person applied the mark, that person knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee of the registered trade mark.

(6) Nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor or licensee of the registered trade mark; but any such use, otherwise than in accordance with honest practices in industrial or commercial matters, shall be treated as infringing the registered trade mark if the use without due cause takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the trade mark.

92.—(1) Subject to the provisions of subsection (3), it shall be an offence for any person—

(a) to apply a mark identical to or nearly resembling a registered trade mark to goods or to material used or intended to be used for labelling, packaging or advertising goods,

(b) to sell, let for hire, offer or expose for sale or hire or distribute—

(i) goods bearing such a mark, or

(ii) material bearing such a mark which is used or intended to be used for labelling, packaging or advertising goods,

(c) to use material bearing such a mark in the course of a business for labelling, packaging or advertising goods, or

(d) to possess in the course of a business goods or material bearing such a mark with a view to doing any of the things mentioned in paragraph (a) to (c),

when that person is not entitled to use the mark in relation to the goods in question or authorised by a person who is so entitled.

(2) Subject to the provisions of subsection (3), it shall be an offence for any person to possess in the course of a business goods or material bearing a mark identical to or nearly resembling a registered trade mark with a view to enabling or assisting another person to do any of the things mentioned in subsection (1) (a), (b) or (c), knowing or having reason to believe that the other person is not entitled to use the mark in relation to the goods in question or authorised by a person who is so entitled.

(3) Any person who contravenes the provisions of subsection (1) or (2) shall be guilty of an offence if, but only if that person acts with a view to gain, for himself or another, or with intent to cause a loss to another and it shall be a defence for a person charged with an offence under subsection (1) to show that he believed, on reasonable grounds, that he was entitled to use the trade mark in relation to the goods in question.

(4) A person who commits an offence under this section shall be liable—

(a) on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000, or to both;

(b) on conviction on indictment to imprisonment for a term not exceeding five years or to a fine not exceeding £100,000, or to both."

### **The Applicants' Submissions**

6. The central argument submitted by counsel for the applicants is that the Learned Judge did not have jurisdiction to issue the impugned warrants because the wrongdoing which the applicants are suspected of committing is not an offence under Irish law, let alone an arrestable offence. It is submitted that "*infringement of a registered Trade Mark*" is a civil wrong established under s. 14 and that the Learned Judge did not have jurisdiction under s. 10(1) of the 1997 Act to issue a search warrant in respect of s. 14. In characterising the suspicions outlined in the warrants as that civil wrong, the applicants rely on the definition of infringement proceedings set out in s. 2(1) of the 1996 Act and the civil proceedings envisioned by the "*Infringement Proceedings*" sub-part of the Act. The applicants also contend that the Learned Judge failed to properly appraise the wrongdoing with which they were suspected and therefore failed to meet the parameters outlined in s. 10.

7. Regarding the recital of s. 92 in the warrants, the applicants concede that an arrestable offence is contained therein. But they also emphasise that the relevant section of the warrants employ terms referable to s. 14, that the constituent terms of s. 92 are not present on the face of the warrants and that the phrasing of the two wrongs are not interchangeable. In oral submissions, counsel characterised this as a failure to refer to particulars of the arrestable offence. These particulars would include elements such as "fraudulent use". He specifically contended that the s. 92 offence is only constituted when the offending act coincides with a fraudulent intent within the meaning of s. 92(3). The applicants underlined this point by submitting that the warrants were invalid because they did not contain a reference to the mens rea of a s. 92 offence.

8. The bulk of the applicants' submissions focus on establishing the manner in which warrants should be scrutinised. They rely on the decisions in *People (DPP) v. Mallon* [2011] 2 IR 544 and *Simple Imports Ltd v. Revenue Commissioners* [2000] 2 IR 243 in submitting that the Court must adopt a searching and sceptical approach in determining whether the statutory conditions providing for a warrant

are strictly met. They allege that this principle is strengthened by the constitutional protections afforded to the domestic dwelling and that the Court should keep those protections in mind when examining the warrant for the first-named applicant's family home. The principles outlined by Macken J. in *People (DPP) v. McCarthy* [2010] IECCA 89 are also relied upon.

9. The applicants further rely on the decision in *People (DPP) v. Morgan* [2015] IECA 50 in arguing that it ought to be clear when examining a warrant that the suspected offence is an arrestable one, so that the impacted party may know the basis on which it was issued. They highlight the decision in *People (DPP) v. McGoldrick* [2005] 3 IR 123, in which Denham J. (as she then was) found that "incorrect reference to incorrect sections of the relevant legislation" can render a warrant unlawful (as it did in that case, where the warrant referred to s. 143 of the Copyright and Related Rights Act 2000 and not s. 140).

10. At no point did the applicants suggest that the failure to properly structure the warrants was a deliberate act of misfeasance. However, they did submit that the innocence of that mistake is irrelevant when assessing a warrant's validity. In this regard, they rely on Murphy J.'s judgment in *People (DPP) v. Balfe* [1998] 4 IR 50.

11. Regarding the dichotomy outlined by O'Donnell J. in *Mallon* between innocuous errors and errors as to jurisdiction, the applicants submit that the impugned warrants belong to the latter category. In the event that the Court rules against the applicants on this point and holds that the reference to s. 92 is sufficient to maintain the warrants' jurisdictional validity, counsel argued in oral submissions that the warrants are so erroneous on their face that they fail the three stage test outlined by Clarke J. in *DPP v. Gormley* [2014] 2 IR 591. He submits that the impugned warrants fail this test because they do not refer to the elements of the offence alleged and are therefore insufficiently intelligible for the person impacted to understand the basis on which they were issued.

### **Respondent's Submissions**

12. The characterisation of s. 14 as a civil wrong is not disputed by the respondent. However, the respondent does contend that the phrase "infringement of a registered Trade Mark" has meaning outside the s. 14 context, as "criminal infringement" is common in legal parlance when referring to a s. 92 offence.

13. The respondent relies on *Balfe* as a statement on the law relating to patent defects in a warrant. It is submitted that such flaws must be sufficiently serious as to amount to inherent, fundamental defects. It is submitted that the alleged defects present in the impugned warrants currently before the Court do not reach that standard.

14. The respondent recognises the strict nature of the requirements outlined in *Simple Imports* regarding satisfaction of the District Judge within the terms of statute. However, he also underlines the presumption set out in the judgment of Keane J. (as he then was) that the District Court Judge is presumed to act in accordance with law, unless the moving party can establish otherwise.

15. The respondent distinguishes the *McGoldrick* decision on several grounds:

- The warrant in that case referred solely to the incorrect section of the Act, without any reference to the correct section,
- There were a number of other errors, some of which were part of the printed form,
- The warrant lacked clarity,
- The documents could not be construed as meeting the strict terms of the legislative provisions.

The respondent submits that none of these flaws apply to the impugned warrants in this case. He contends that these warrants do not offend the principles set out in *McCarthy*. In particular, it is submitted that the first-named applicant, in reading the warrants, could not have failed to understand the grounds and authority under which they were issued. The respondent relies on the *Mallon* decision, and its subsequent exploration in *Morgan* and *Gormley*, in underlining the duty on the Court to have regard to the communication that these warrants seek to make.

16. While it is conceded that an erroneous reference was made to s. 14, it is submitted that the simultaneous reference to s. 92 facilitates the applicants' right to know with a reasonable level of precision what the warrants authorise and the legal basis on which they were issued.

17. In rebutting the applicants' argument regarding the lack of s. 92 phrasing in the warrant, the respondent submits that the terms of one section are not divorced and mutually exclusive from the other. He relies on English case law (such as *R. v. Boulter* [2008] EWCA Crim 2375) and the English counterpart to the 1996 Act (the Trade Marks Act 1994) in support of this submission. The suggestion that the particulars or elements of an offence must be set out is specifically rejected as inconsistent with the Court of Appeal's decision in *Morgan*, which did not take issue with a warrant where it contains sufficient information for the arrestable nature and specifics of the offence to be inferred from it.

### **Decision**

18. In their submissions, the applicants placed heavy reliance on *McGoldrick* and *Simple Imports*, even going so far as to say that the latter could not be logically distinguished from the case currently before the Court. The Court cannot agree with that approach. In the case of the former, the warrant was deemed invalid because it purported to operate in relation to a statutory provision that does not establish an arrestable offence. While the impugned warrants in this case include a similar error by referring to s. 14 of the 1996 Act, the simultaneous reference to s. 92 is sufficient to distinguish this case from *McGoldrick*. It is also worth noting that there was not one, but a series of errors in the *McGoldrick* warrant. That factor appears to have had some influence on Denham J.'s reasoning and does not apply to this case, where no issue is taken with the content of the warrants besides the arrestable offence element. While one of the errors in *McGoldrick* was the use of phrasing more properly referable to another section in the same Act, that other section was not explicitly mentioned in the *McGoldrick* warrant.

19. With regard to *Simple Imports*, Hardiman J. characterised that decision in *People (DPP) v. Edgeworth* [2001] 2 IR 131 in the following terms on pg. 137:-

*"In (...) Simple Imports the warrant itself provided positive evidence that the condition precedent had not been met. In the present case the position is quite different: all the statutory criteria can be seen, at least on a prima facie basis, to have been met."*

The thrust of the applicants' case is that the Learned Judge assessed the sergeant's reasonable grounds of suspicion within the context of a breach of s.14 and that she issued the warrants following that assessment, without performing a similar appraisal within

the context of the arrestable offence created under s. 92 (or, if she did perform such an appraisal, it is not reflected in the body of the warrants). In advancing this argument, they rely on a particular interpretation of the precise terms employed by the warrants. This is a technical exercise that goes far beyond a simple case where a warrant indicates (correctly or otherwise) on its face that a key statutory requirement was not complied with. On that basis, *Simple Imports* can be distinguished from this case.

20. Both parties made a variety of arguments in attempting to establish the proper interpretation of the wording contained in the warrants. The respondent submitted that the word “*infringement*” was to be understood in terms of “*criminal infringement*”, an allegedly common phrase in legal and judicial parlance. The respondent has provided no Irish authority to support that submission. With regard to the applicants’ interpretive arguments, it is undeniable that the warrants are constructed using phrasing relative to s. 14. The terms used to describe the suspected offence mirror the shoulder note for s. 14 of the 1996 Act. The descriptor “*infringed goods, material or articles*” is present in the 1996 Act only in ss. 19 – 25, which relate to civil proceedings under s. 14. The influence of s. 14 in the warrant’s design is undeniable. Nevertheless, that does not render the reference to s. 92 nugatory and the Court cannot simply ignore it. In reading the two sections as a whole, the similarities in the behaviour that they seek to prevent also cannot be ignored.

21. The Court has had regard to the decision in *Morgan*, which states that a warrant may retain its validity if the information contained therein is sufficient to allow the arrestable nature and specifics of the offence to be inferred. Notably, the search warrant in *Morgan* related to the appellant’s domestic dwelling (he being 19 years old at the time and residing with his mother at the house she owned). Thus, in reaching their decision, it would appear that the Court of Appeal had regard to the appellant’s rights pursuant to Art. 40.5 of Bunreacht na hEireann, per the principles outlined in *McCarthy*. Having regard to the first-named applicant’s rights pursuant to Art. 40.5, the Court must assess whether the phrasing in the impugned warrants is sufficient to maintain their validity through the explicit reference to s. 92 and a strict interpretation of the suspected wrongdoing outlined using the s. 14 phrasing. I am of the view that their validity can be maintained in this regard.

22. The applicants made oral submissions that there is a requirement to set out the particulars or elements of the suspected offence in the warrant itself. This argument was advanced so far as to suggest that the Court should note the failure to refer to the mens rea of fraudulent use in the warrants. No legal authority was submitted to support this submission. It has never been the position that search warrants must include all the particulars/elements of the suspected offence. Such a suggestion directly contradicts the Court of Appeal’s decision in *Morgan*. Clarke J. also stated at para. 133 of his decision in *Gormley*:-

*“It is not, in my view, therefore, necessary that there be a specific recital of each of the matters of which the issuing judge was required to be satisfied in order that the warrant be considered valid.”*

23. Para. 54 of O’Donnell J.’s decision in *Mallon* reads as follows:-

*“... (I)n scrutinising a warrant, a court should not approach a warrant as if it were an exotic artefact, capable of being viewed only under a microscope, of which nothing is known, and about which no assumption can be made. The approach of the court is searching and even sceptical, but not one of deliberate, unreasonable, and unreasoning ignorance which is blind to the communication the document seeks to make.”*

In specifying the nature of the suspected wrongdoing, the warrants refer to “*infringement of a registered trademark*”. While it could be argued that a more complete and accurate description should have been included, it is nevertheless an adequate description of the arrestable offence outlined in s. 92 for the warrant’s validity to be maintained. The communication that the warrants seek to make is clear. The use of s. 14 phrasing is insufficient to support the argument that s. 92 was not assessed by the Learned Judge (or that such an assessment is not reflected on the face of the warrant), nor is it sufficient to rebut the presumption outlined in *Balfé*. It cannot be said that the Learned Judge lacked jurisdiction.

24. At para. 132 of the decision in *Gormley*, Clarke J. set out a general three step test for the validity of warrants issued by a judicial authority:-

*“(a) it specifies the legal power which is being exercised by the issuing of the relevant warrant;*

*(b) it specifies, or it can reasonably be implied from the text, that the relevant judge is satisfied that it should be issued; and*

*(c) (having regard to [Simple Imports] ) it does not contain on its face any recital or other statement which would reasonably lead to the conclusion that the judge issuing the warrant had approached the question of whether it was appropriate to issue the warrant on an incorrect basis having regard to the relevant statute.”*

The impugned warrants in this case meet all three of the criteria. While the use of s. 14 phrasing is erroneous, it is not so erroneous or disconnected from s. 92 as to reasonably lead to the conclusion that the Learned Judge approached the question of whether it was appropriate to issue the warrants on an incorrect basis.

25. Given what was being searched for and the wrongdoing outlined in the warrant, it would be apparent to the occupants of the properties (i.e. the applicants) that the search related to, in lay-person terms, improper activity regarding a registered trade mark. There is no question that the applicants could have been misled in that regard. It is clear that, in designing this warrant, s. 14 phrasing was employed to act as a description for the wrongdoing suspected under s. 92. This choice is understandable, given the similarities in the behaviour ss. 14 and 92 proscribe.

26. There is no doubt that the Learned Judge lacked jurisdiction to issue a s. 10 warrant for a suspected breach of s. 14 in its own right, as s. 14 does not give rise to an arrestable offence. However, the behaviour complained of in relation to s. 14 is capable of constituting satisfactory evidence for wrongdoing under s. 92. Speaking in terms of the physical act of wrongdoing, which is generally what gives rise to the suspicions on which a warrant is sought, it would be an unusual scenario indeed where a wrongdoer would breach s. 92 without also breaching s. 14. That does not make the use of s. 14 phrasing any less of an error when issuing a warrant under s. 92 and, had the warrants failed to specify s. 92 in the 1996 Act, there is little doubt that they would be invalid on that basis.

27. Having considered the matter in light of the foregoing, I am of the view that the misdescription contained in these warrants is not sufficiently fundamental as to render the warrants invalid, given that s. 92 was specified therein. The warrant’s legal basis and authorisation are apparent and it is intelligible. The applicants could not have been in any doubt as to the basis on which the warrants were issued and the offence that the respondent had reasonable grounds for suspecting was being committed.

28. It is worth noting that the facts of this case are quite unusual. Had the offending behaviours under ss. 14 and 92 not been so similar, this matter could have been disposed of under the current caselaw in a relatively straightforward manner. In considering and applying the relevant caselaw, the Court has had regard to all the applicants' rights and entitlements that were infringed upon by the execution of these warrants, including the first-named applicant's constitutional rights pursuant to Art. 40.5. For the reasons set out above, the Court refuses the reliefs sought.