Neutral Citation Number: [2011] IEHC 312

THE HIGH COURT

2011 211 JR

BETWEEN

LIAM COSGRAVE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on the 28th day of July,2011

1. The applicant resides at 103, Merrion Park, Blackrock, County. Dublin.

The first named respondent is the person charged with the direction, control and supervision of prosecutions in the State, and his office is located at Chapter House, 26-30 Upper Abbey Street, Dublin. The second named respondent is the Irish State. The third named respondent is sued as legal representative of the first and second named respondents.

2. The applicant seeks the following reliefs:

(1) An order permanently restraining the first named respondent herein from continuing to prosecute the applicant in respect of the charges alleged against him in Bill Number 1216/2010, at present pending before the Dublin Circuit Criminal Court.

(2) A declaration that the initiation and continuation of the prosecution of the applicant on the charges alleged in Bill Number 1216/2010, amounts to an abuse of process, is oppressive and unfair, amounts to a violation and failure to vindicate the applicant's constitutional right to trial in due course of law, and his rights under the European Convention of Human Rights and its conventions and protocols, and is in breach of his legitimate expectations in circumstances where the applicant has already been prosecuted, has pleaded guilty, has been convicted and sentenced on Bill No. DU 430/2005 for an offence arising from the same factual matrix grounding the instant prosecution on Bill No. DU 1216/2010.

(3) An order against the first named respondent pursuant to O. 84, r. 20, of the Rules of the Superior Courts, staying the further prosecution of the applicant herein on the charges complained of herein until the determination of these proceedings.

(4) Such further or other relief as to this honourable court will seem meet.

(5) The costs of and incidental to these proceedings.

Background Facts
3.1 On 15th October, 2003, Mr. Frank Dunlop gave a statement to the Garda National Bureau of Criminal Investigation (NCBI) in which he alleged that he made ten payments to the applicant between 1991 and 1997. These payments include, *inter alia*, all the payments set out below which give rise to the current charges of corruptly receiving payments:

(a) IR£ 2,000 - June, 1992

(b) IR£ 2,500 - 30th October, 1997

(c) IR£ 4,500 - 23rd December, 1997

Approximately one week later, on 21st October, 2003, Mr. Dunlop gave a further statement to gardaí giving further details in relation to some of these payments These two statements, along with a letter from Mr. Dunlop to the manager of AIB Bank, on 26th February, 2004, form the composite statement of evidence of Mr. Dunlop in the Book of Evidence in Bill No. 430/2005.

3.2 On 16th March, 2004, Mr, Dunlop made a statement to gardaí alleging that he made the above mentioned payments i.e. June 1992, October 1997 and December 1997 to the applicant in return for the latter voting in favour of rezoning certain lands at Carrickmines. A short time prior to this, on 3rd March, 2004, the applicant was interviewed under caution by gardaí attached to The Criminal Assets Bureau (CAB). During the course of that interview, the precise allegations that would be made by Mr. Dunlop in his witness statement of 16th March, 2004, were put to the applicant. During the interview, the applicant denied receiving any payments from Frank Dunlop in October and December 1997, corrupt or otherwise. He admitted receiving a political donation in 1992, but denied that this was a corrupt payment.

3.3 On 8th June, 2004, the applicant was interviewed by the gardaí (NBCI). He was asked whether the alleged payments received from Frank Dunlop in June 1992, October 1997 and December 1997 had anything to do with planning applications made by Jackson Way Properties. The applicant declined to answer these questions on the advice of his solicitor. On 22nd October, 2004, a file was sent to the DPP. The file included evidence gathered by gardaí attached to both the CAB and the NBCI. This file contained all statements made by Frank Dunlop. On 11th April, 2005, the applicant was charged and returned for trial on Bill No. 430/2005, with two charges of knowingly making false or misleading declarations on two dates in January 1998, in relation to donations exceeding £500 in value, received in May and December of 1997 contrary to s. 25 of the Electoral Act 1997.

3.4 On 27th April, 2005, the applicant's solicitors, Garrett Sheehan & Partners, wrote to the first named respondent, seeking disclosure of, *inter alia*, all statements made to the gardaí by Mr. Frank Dunlop. On 17th June, 2005, the first named respondent

furnished the original of the statements of Frank Dunlop of 15th October, 2003, and of 21st October, 2003, and the letter of Frank Dunlop which together form the composite statement of Frank Dunlop, witness No. 1 in the Book of Evidence in Bill No. 430/2005. The statements of Frank Dunlop to gardaí (CAB) on 16th March, 2004, and the draft statement of 24th September, 2004, which form the composite witness statement of witness No. 1, Frank Dunlop, in the current prosecution Bill No. 1216/2010 were not disclosed.

3.5 On 17th October, 2005, the applicant pleaded guilty before Dublin Circuit Criminal Court to a single count of knowingly making a false or misleading declaration on 29th January, 1998, in relation to donations exceeding £500 in value received between May and December 1997, contrary to s. 25 of the Electoral Act 1997. On 6th May, 2006, following the preparation of a Probation Report, the applicant was sentenced to 75 hours community service in lieu of six months imprisonment.

3.6 Approximately five years after the original hearing, the applicant was arrested and charged on 26th October, 2010, with five offences of receiving corrupt payments from Frank Dunlop in June 1992, on 20th October 1997 and on 23rd December 1997, in relation to zoning of lands at Carrickmines, contrary to s.1 of the Public Bodies Corrupt Practices Act 1889, as amended. He was served with a Book of Evidence and returned for trial on what has become known as Bill No. 1216/2010 on 28th October 2010, along with a number of other individuals, namely, James Kennedy, Sean Gilbride, Donal Lydon, Colm McGrath and Tony Fox. The Book of Evidence in Bill 1216/2010 includes:-

(i) The statement of Frank Dunlop of 16th March, 2004 to Gardaí (CAB).

(ii) The draft 'Supplemental Statement of Witness' of Frank Dunlop of 24th September 2004.

This Book of Evidence contains no further evidence additional to what was in the possession of the investigating and prosecuting authorities when a file was sent to the DPP in October 2004, and when the applicant was prosecuted in 2005.

Applicant's Submissions

4.1 When the applicant entered a plea, he had been advised by his lawyers on the understanding that the entirety of the prosecution case arising out of the allegations made by Frank Dunlop were contained in Bill No 430/2005. The applicant believed, and was so advised, by his then counsel that in entering a plea, all criminal proceedings against him concerning allegations by Frank Dunlop would then be concluded. Counsel for the applicant submits that the continued prosecution of the applicant on current Bill Number 1216/2010 amounts to an abuse of process; is oppressive and unfair and amounts to a violation and failure to vindicate the applicant's constitutional right to trial in due course of law and his rights under the European Convention of Human Rights. It is submitted that this abuse of process and breach of rights arises by reason of the fact that:

(a) The investigating and prosecuting authorities had in their possession all the proposed evidence forming the content of the Book of Evidence in relation to the current Bill Number 1216/2010, when prosecuting the applicant in Bill Number 430/2005, but held off for nearly five years before charging him in the current prosecution.

(b) The applicant was charged in 2005 and pleaded guilty and was sentenced to an offence under the Electoral Act 1997. He now faces more serious charges contrary to the Public Bodies Corrupt Practices Act 1889, as amended, which carry much higher penalties. These new charges are based on evidence which was in the possession of the prosecuting authorities in 2005.

(c) The prosecution failed to disclose the existence of the statements by Frank Dunlop relied on in the current prosecution, despite being requested to disclose all statements made by Frank Dunlop to gardaí in the context of disclosure in Bill 430/2005.

(d) The applicant faced up to the prosecution against him in the manner in which he did in 2005, in his belief, and that of his legal advisers, that this concluded matters concerning the allegations made by Frank Dunlop.

(e) After having dealt with the matter, the applicant is now faced with new offences arising from essentially the same evidence, or other evidence from the same witness, which was available to the prosecution authorities at the time.

4.2 It is submitted that the applicant is being subjected to a process, which, when all matters are considered, including the passage of time and the deficiencies in disclosure, is unfair and oppressive and not in accordance with due process. The applicant submits that the principles established in *D.S. v. Judges of the Cork Circuit Court* [2008] 4 I.R. 379, are applicable to the applicant's case, and he relies on them in support of his submissions. In DS, the applicant did not come within the narrow definition of double jeopardy. Notwithstanding this, the Supreme Court confirmed prohibition of a further trial on grounds that this would not be a trial in due course of law. Denham J. stated as follows at paragraph 27:-

> "27. . . the fact that the double jeopardy principle has no application does not conclude the matter. The process, the multiplicity of trials, may be reviewed by the court to determine whether there has been unfairness, in all the circumstances, so as to be contrary to trial in due course of law under the Constitution. This approach pursuant to the Constitution was referred to by Henchy J. in the People *(DPP) v Quilligan* (No. 2) [1989] I.R.46 at p.57, where he stated, referring to the rule of double jeopardy:-
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> 'The rule of *autrefois acquit* means that if an accused duly and successfully raises the plea that he has already been tried in a court of competent jurisdiction, acting within jurisdiction, for the offence now charged, and that he was acquitted of that charge in that court, the second trial for that offence may not take place. This rule (or principle) which is sometimes referred to as the rule against double jeopardy, is but an aspect of the canon of fundamental fairness of legal procedures, inherent in our Constitution, which is expressed in the maxim *nemo debet bis vexari pro eadem causa'*."

Denham J. went on to hold at paragraph 31:-

> "31. The court's duty is to protect due process. The test to be applied is whether there is a real risk of an unfair trial. As Finlay C.J. stated in *Z v. Director of Public Prosecutions* [1994] 2 I.R. 477 at p. 506-
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> > 'This Court, in the recent case of *D v. Director of Public Prosecutions* [1994] 2 I.R. 465, unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair, is that he should establish that there is a real risk that by reason of those circumstances . . . he could not obtain a fair trial'.
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> 32. In each case, there should be a balance sought between competing public interests. While protecting the public interest in prosecuting an accused, the integrity of the trial process also requires protection, guarding against the inherent dangers of repeat trials."

In *D.S.,* the trial had been before the courts, in one set of proceedings or another, for six years. The applicant submits that it is relevant that in October 2011, it will be six years since the applicant was arrested and charged in Bill 430/2005. A court should exercise its discretion to prohibit a trial with caution; however, the court has a duty to protect due process. This duty will arise where the court is reviewing the fairness of procedures and due process in circumstances where proceedings have been ongoing for years. In *D.S. v. Judges of the Cork Circuit Court* [2008] 4 I.R. 379, Denham J. went on to conclude at paragraphs 53-54:

> "53. In this case, no individual factor is such of itself as would be a ground upon which to prohibit the trial of the applicant. However, having considered the grounds individually, it is also appropriate to consider them cumulatively, as the ultimate decision should be proportionate, relate to the process as a whole, and to fairness of the procedures. The court is required to exercise a supervisory role, and to take into account all the circumstances of the case, which have been set out above in the judgment.
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> 54. Bearing in mind all of the circumstances of the case, I am satisfied that it would be oppressive and unfair to prosecute a further trial in this case."

In this case, the applicant submits that the fact that he is not able to invoke the principle of double jeopardy in the strict sense does not prevent this Court from granting him the relief he seeks.

4.3 In *D.S.* Kearns J. (as he then was), also came to the conclusion that the applicant could not invoke the principle of double jeopardy. However, he went on to state that this was not the end of the matter. He stated as follows at paragraph 103:-

> "103. However, as is apparent from both the authorities in the United States and in Britain, there must come a time in the criminal process where repeated trials of a citizen may come to be seen as oppressive and as an abuse of discretion on the part of the Director of Public Prosecutions. It may become an unfair procedure in itself to re-try. Put another way, a 'breaking point' may be reached where no further trial should be permitted if the fairness and due process requirements of Article 38.1 of the Constitution and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 are to be properly observed."

The applicant submits that O'Malley '*The Criminal Process'* (2009) at p124-125, is a correct statement of the legal position:

> "Apart from that, even if autrefois pleas are to be interpreted as narrowly as Lord Devlin suggested in Connelly v. DPP [1964] A.C. 1254, an accused person claiming to be in jeopardy of a repeated trial for the same matter, as opposed to the exact same offence, in respect for which he has already been acquitted or convicted, may still seek to have his later trial prohibited by way of judicial review."

4.4 The applicant submits that the case of *L.O'N v. Director of Public Prosecution* [2007] 4 I.R. 481, contains a parallel with the instant case. In that case, Mac Menamin J. granted relief, prohibiting the further prosecution of the applicant in 2004, in circumstances where he had been arrested for the same offence in 1987, but subsequently told that that there would be no prosecution. While the facts are clearly different from the instant case, the applicant relies on the following passage from the judgment of Mac Menamin J. at p. 493:-

> "More fundamentally, however, it is also clear that the respondent has been unable to identify any significant information which was provided to the gardaí in the year 2000 by either of the complainants which was not, in essence available to gardaí in 1987."

The applicant submits that, similarly, the respondents have been unable to identify any significant information which is contained in the current prosecution Bill No 1216/2010, which was not available to the prosecuting and investigating authorities in 2005 when the applicant was first prosecuted. The applicant further submits that the abuse of process herein is increased in circumstances where the offences the applicant is being asked to meet date as far back as 1992, and that in these circumstances, the need for the prosecuting authorities to bring forward their whole case in 2005 was even more pressing.

4.5 The applicant relies on the decision of the English Court of Appeal in the case of *Reg v. Beedie* [1998] Q.B. 356, in support of a submission that, as a matter of principle, there should be no sequential trials for offences on an ascending scale of gravity. The Electoral Act 1997, offences on which he was prosecuted in 2005, carries a penalty of up to three years imprisonment and/or a fine of up to £20,000. He now faces more serious charges, contrary to the Public Bodies Corrupt Practices Act 1889, as amended, which carries penalties of up to seven years imprisonment and/ or fines of up to £50,000. In the instant case, the DPP appeared to have all the evidence gathered by investigating gardaí attached to the NBCI, on the one hand, and to CAB on the other, back in 2005. It is submitted that any attempt to explain or excuse the failure on behalf of prosecuting authorities to bring forward their entire case in one indictment by reason of separate NBCI and CAB investigations should not be entertained on the authority of *Beedie.*

4.6 The rule in *Henderson v. Henderson* [1843] 3 Hare 100, means that a litigant may not make a case in legal proceedings, which might have been, but was not brought forward in previous litigation. The applicant respectfully submits that there is no reason as to why that principle should not apply equally, where the litigants are the DPP and an accused person in the context of criminal proceedings. In *Arklow Holidays Ltd v. An Bord Pleanala & Others* [2007] IEHC 327, the High Court found that there was no reason why the rule in *Henderson v. Henderson* should not apply in relation to the exercise by public or quasi-public bodies of a public law role. Clarke J. stated at 13:-

> "As a matter of domestic law, there does not, therefore, it seems to me, appear to be any reason why the rule in *Henderson v. Henderson* should not apply with at least equal force in relation to judicial review proceedings. Such proceedings involve the exercise by public or quasi-public bodies of a public law role. There will almost invariably be similar considerations to those identified by Hardiman J. (In *AA v. Medical Council* [2003] 4 IR 302) in respect of the Medical Council, which mandate that the public role be carried out in an expeditious way in the interests of the public generally and those persons whose rights and obligations may fall to be governed by the public body concerned. It seems to me that the principles apply with equal force, if not greater, in relation to the planning process."

The applicant submits that, equally, there is no reason as to why the rule in Henderson v. Henderson should not apply to the bringing of criminal prosecutions by the Director of Public Prosecutions, and that having regard to the particular circumstances of this case, it is an appropriate case in which to apply the rule in *Henderson v. Henderson*.

Respondents' Submissions

5.1 In this case, the applicant seeks to rely on the fact that statements made on 16th March 2004 and 24th September 2004 were

not disclosed. It is submitted on behalf of the applicant that this non-disclosure led the applicant to do something which he otherwise would not have done i.e. plead guilty to an offence under the Electoral Act 1997. The applicant now seeks to argue that as a result of the non-disclosure, it would be unfair to allow the current charges of receiving corrupt payments to be heard as the applicant's defence has been prejudiced by his earlier plea. It is common case that both statements were not disclosed. The respondents submit that the statement made by Frank Dunlop on 24th September, 2004, was a draft statement and therefore not disclosable. In his statement of 16th March 2004, Frank Dunlop alleged that the payments that he had given to the applicant were for a corrupt purpose. The applicant seeks to attach a significance to the non-disclosure of the statement of 16th March 2004, which is not borne out by the facts. The facts are that during the course of an interview on 3rd March, 2004, between the applicant and the Criminal Assets Bureau, the precise allegations that would be made by Frank Dunlop, in his witness statement of 16th March, 2004, were put to the applicant. As a result of this interview, the applicant was aware of the true substance of the allegations that were being made against him. In the memorandum of the interview contained at Tab 5, the applicant answers one of the questions put to him by the gardaí in the following terms:-

> "I never received a corrupt payment from Frank Dunlop."

From an objective point of view, this answer demonstrates a sufficient level of knowledge on behalf of the applicant to put him on notice that that the gardaí were investigating matters of corruption in the planning process and not just failure to declare a political donation in excess of £500.

5.2 The applicant argues that in the circumstances of this case, he had a legitimate expectation that he would not be prosecuted again. The essential elements of the doctrine of legitimate expectation were set out in *Glencar Exploration plc v. Mayo County Council* [2002] 1 ILRM 481. It was held that to succeed on grounds of legitimate expectation against a party, that party must have made a statement or adopted a position amounting to a promise or representation, express, or implied, as to how it will act in respect of an identifiable area of its activity. The applicant argues that the non-disclosure of the statement in 2005 amounted to a representation that further charges would not be made against the applicant. The respondents submit that a failure to do something cannot amount to a representation.

5.3 The respondents do not accept that when the applicant pleaded guilty to the Electoral Act offences, he, in fact, did believe or could have believed that he had obtained immunity from prosecution in respect of any other offences he may have committed. Had the applicant had any doubt on this point, all he had to do was to ask the DPP to clarify the position. In considering the second investigation and its nature and scope, one cannot simply look at the material in the Book of Evidence and work backwards with the benefit of hindsight. At the outset of an investigation of this nature, the investigating authorities do not know who may have relevant testimony to give or what may emerge. Thus, even if it were correct that the Book of Evidence, as served, contained a lot of material that was available at an earlier stage, it does not automatically follow that the prosecution could have been brought at an earlier stage.

5.4 No double jeopardy issue arises in this case. None of the basic ingredients of a plea in bar are present. The applicant is facing different allegations than those he faced before. The applicant has never stood trial on these allegations. Thus, he has not been acquitted of them, he has not been convicted of them and he has not even been the subject of a jury disagreement about them. The case of *D.S. v. Judges of the Cork Circuit Court* [2008] 4 I.R. is of no assistance to the applicant. That case concerned the number of times the prosecuting authorities are permitted to seek to try a person on the same charges. Here, the applicant has never been put on trial in respect of the allegations the subject matter of the charges against him. The case of *L.O'N v. Director of Public Prosecution* [2007] 4 I.R. 481, is also of no assistance to the applicant. The facts of *L.O'N* are entirely distinguishable from the present case. There, the applicant had been arrested for a particular offence and was expressly told no prosecution would ensue. The DPP subsequently changed his mind. In the present case, there has been no change of mind by the DPP.

5.5 The applicant also relies on the English authority of *Reg v. Beedie* [1998] Q.B. 356, in support of a submission that as a matter of principle, that there should be no sequential trials for offences on an ascending scale of gravity. However, the facts of *Beedie* are that the applicant had already been prosecuted twice, arising out of the same incident, and an attempt was now being made to prosecute him for a third time on precisely the same facts. Once again, that is not the situation in this case. In any event, the respondents submit that the law in this jurisdiction can be found in *DPP v. Finnamore* [2009] 1 I.R. 153, where Macken J. stated at 176:-

> "Assuming that the case law such as *Reg v. Beedie* [1998] Q.B. 356, should also be considered as helpful in the matter, that case, too, makes it clear that a subsequent trial will not always be prohibited if exceptional reasons exist as to why it should proceed. Even if there had been sequential trials on separate indictments, which is not the case here, it does not follow that a second trial must be prohibited. There is no reason why, in the absence of any explanation for the failure to address the matter, a conviction-perfectly valid on its face - on an indictment on which all counts were validly included, should be set aside in favour of the accused on the basis that the accused was earlier convicted of a different and lesser, offence, even one arising out of the same events."

5.6 The applicant further submits that the rule in *Henderson v. Henderson* [1843] 3 Hare 100, that a litigant may not make a case in legal proceedings, which might have been, but was not brought forward in previous litigation, is applicable in this case. The respondents, however, submit that the rule in *Henderson v. Henderson* applies to civil law and has nothing to do with the pleas in bar that exist in criminal law. The applicant's submissions refer to Irish cases on the rule. However, they omit the most recent case, namely, *Mc Farlane v. DPP* [2008] 4 I.R. 117, where Kearns J (as he then was) stated that:-

> ". . . the courts have repeatedly made it clear that the rule in *Henderson v. Henderson* should not be blindly or invariably applied, particularly if there are special circumstances in the case which would suggest that the imposition of the limitation would be either unfair, excessive or disproportionate."

It is submitted that the applicant has been unable to point to any authority that directly supports the principle that he is contending for in this aspect of his case. The applicant cannot simply recite the submission that to prosecute him is an abuse of process. He has to identify some specific and recognised legal grounds why this is so. The applicant refers to "cumulative factors". However, it is not clear what factors he seeks to rely upon in this context.

Decision of the Court

6.1 On 15th and 21st of October, 2003, Frank Dunlop gave statements to the Garda NCBI, alleging that he paid the applicant IR£ 2,000 in June 1992, IR £2,500 in October 1997 and IR £4,500 in December 1997. On 16th March, 2004, Mr. Dunlop made a further statement to gardaí, alleging that the above payments were made to the applicant in return for voting in favour of rezoning lands at Carrickmines. Shortly before this, on 3rd March, 2004, the applicant was interviewed by Garda CAB. During the course of that

interview, he was asked whether the payments in question were corrupt payments. He denied receiving any corrupt payments. On 22nd October, 2004, a file was sent to the DPP. This file included evidence gathered by gardaí attached to both the NCBI and the CAB. On 11th April, 2005, the applicant was charged with knowingly making false or misleading declarations on two dates in January 1998, contrary to s. 25 of the Electoral Act 1997. The applicant's solicitors wrote to the respondents in relation to these charges on 27th April, 2005, seeking disclosure of all statements made by Mr. Frank Dunlop. The respondents disclosed the statements of 15th and 21st October, 2003, but not the statement of 16th March 2004, and a draft statement of 24th September, 2004. On 17th October, 2005, the applicant pleaded guilty to a single count of knowingly making a false or misleading declaration contrary to s. 25 of the Electoral Act 1997. He was subsequently sentenced to 75 hours community service. Approximately five years later, on 26th October, 2010, the applicant was charged with five offences of receiving corrupt payments from Frank Dunlop in June 1992, October 1997 and December 1997 in relation to zoning of lands at Carrickmines contrary to s. 1 of the Public Bodies Corrupt Practices Act 1889, as amended. The Book of Evidence included the statements of Frank Dunlop on 16th March 2004, and 24th September, 2004. The Book of Evidence contained no further evidence additional to what was in the possession of the authorities when a file was sent to the DPP in October 2004.

6.2 The applicant submits that considering the deficiencies in disclosure and the passage of time, his continued prosecution amounts to an abuse of process and is in breach of his legitimate expectations. It seems to me that there are two distinct aspects to the applicant's case. First, the issue of non-disclosure, and second, the issue of legitimate expectation. I propose to deal with each of these issues in turn. It is common case between the parties that two statements made by Frank Dunlop were not disclosed. The second of the statements that was made on 24th September 2004, was a draft statement, therefore, there was no obligation to disclose it. The first statement was made on 6th March, 2004. In this statement, Frank Dunlop alleged that the payments, which are the subject matter of these proceedings, were corrupt payments. The applicant submits that if this statement was disclosed, he would have been put on notice that he was likely to face further proceedings, and as a result, may not have pleaded guilty to the Electoral Act offence. The consequences of entering this plea are that the applicant is now effectively precluded from arguing that he received no monies.

6.3 In adjudicating upon this submission, it seems to me that it is necessary to consider the context in which disclosure was sought by the applicant's solicitors. On 27th April 2005, the applicant's solicitors, Garrett Sheehan & Partners, were seeking disclosure in order to deal with an offence under the Electoral Act. The charge the applicant was facing was of knowingly making false or misleading declarations in relation to donations exceeding £500 in value received between May and December of 1997. The statement made by Frank Dunlop on 16th March, 2004, was not relevant as the applicant was not facing corruption charges. I am therefore not satisfied that this statement was disclosable at that time. The fact that the obligation to disclose is ongoing is also not relevant since at the time when the applicant's criminal case was heard and concluded, the same situation pertained.

6.4 I will now turn to the applicant's arguments based on legitimate expectation. In *Glencar Exploration plc v. Mayo County Council*. [2002] 1 ILRM 481, it was held that to succeed in a claim based on legitimate expectation, it necessary to establish three matters. Fennelly J. held at paragraph 168:-

> "Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed, either directly or indirectly, to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

The applicant seeks to argue that the non-disclosure of the statement in 2005 amounted to a representation that further charges would not be made against the applicant. This failure cannot, in my view, amount to the adoption of a position, a promise or a representation. The statement that was not disclosed in 2005 was not going to be used against the applicant in his trial at that time because it was not necessary to prove the case against him. It seems to me that to suggest that this non-disclosure amounted to a representation would be to stretch the meaning of *Glencar* far beyond its true meaning.

6.5 While the statement of 16th March 2004, was not disclosed to the applicant prior to his trial in 2005, it is, nevertheless, clear that he was well aware of the allegations contained therein. In the interview on 3rd March, 2004, all of the matters referred to in the statement of 16th March, 2004, were put to the applicant. In the memorandum of the interview contained at Tab 5, the applicant answers one of the questions put to him by the gardaí in the following terms:-

> "I never received a corrupt payment from Frank Dunlop."

Thus, it is not sustainable for the applicant to argue that he was unaware that the gardaí were investigating matters of corruption and had he known that they were he might not have pleaded guilty to the Electoral Act Offence. Moreover, there is a considerable difference between failing to disclose a donation, on the one hand, and corruptly receiving a payment, on the other. While the former offence may simply involve inadvertently failing to disclose a *bona fide* donation, the latter offence clearly involves dishonesty and is a much more serious offence, as reflected by the more severe penalties provided for in the legislation. The Electoral Act 1997 offences on which the applicant was prosecuted in 2005, carry a penalty of up to three years imprisonment and/or a fine of up to £20,000. The charges that the applicant now faces under the Public Bodies Corrupt Practices Act 1889, as amended, carry penalties of up to seven years imprisonment and/or fines of up to £50,000. The applicant knew that the gardaí were investigating serious charges of corruption. In these circumstances, it is difficult to understand how the applicant could have reasonably believed that a plea in respect of the Electoral Act charges would conclude all criminal proceedings against him concerning all the allegations made by Frank Dunlop. To obtain such immunity would be highly unusual. The very least one would expect would have been some formal communication of that fact from the prosecuting authorities. In Glencar, it was held that in order to succeed in a claim based on legitimate expectation, the first element required is a representation. Such representation must be of a nature as to create an expectation reasonably entertained by the person that the public authority will abide by the representation. No such representation was made herein.

6.7 In relation to the applicant's complaint of delay, the respondents have argued that significant delay was caused by the necessity that Frank Dunlop would give evidence in the case against the applicant. This case could therefore not proceed until the Tribunal had concluded its work. It seems to me that had there been an attempt to initiate proceedings while the Tribunal was still sitting, this would have resulted in an application to the High Court on the basis that the accused would be prejudiced by the continuance of the Tribunal. This is the unfortunate consequence of the establishment and continuance of the Tribunal of inquiry into the matters in question. Whilst this may well not be in accordance with Ireland's obligations under Article 6 of The European Convention on Human

Rights, that would not, of itself, require the prohibition of the trial. In the context of Irish law, it seems to me that the delay occasioned thereby was an excusable reason for inordinate delay. It cannot therefore give rise to an order of prohibition.

6.8 The applicant bears the name of a family who have given service of the highest distinction to this country. I can well accept that the decision to plead in 2005 was a very difficult one for him and his family. I can accept that it must have taken some measure of moral courage to do so. He may well have held the honest belief that this was the end of matters. This, however, was not in my view, absent some clear indication from the DPP, a reasonable belief for either him or his advisers to hold, nor was it nor could it be such that could constitute a representation. In these circumstances, I must refuse the relief sought.