Neutral Citation [2014] IEHC 412

HIGH COURT

[2014 No. 3750 P]

BETWEEN

KEVIN ROGERS

APPLICANT

AND

AN POST

RESPONDENT

JUDGMENT of Mr Justice Keane delivered on the 25th July 2014

Introduction

1. The plaintiff in these proceedings was the acting branch manager at Roscommon Post Office when, on the 28th March 2012, he was suspended on full pay by the defendant An Post, which is, of course, the national postal service. More than two years later, the plaintiff remains suspended on full pay pending the determination of disciplinary proceedings against him.

2. A plenary summons was issued on behalf of the plaintiff on the 10th April 2014. In those proceedings, the plaintiff seeks a single substantial relief, namely, "an injunction restraining the defendant from taking any further steps in the disciplinary process relating to the plaintiff until the determination of criminal proceedings currently pending before Roscommon Circuit Criminal Court and titled *The Director of Public Prosecutions v. Kevin Rogers, Accused, Bill No. RNDP/0004/13*."

3. On the 11th April 2014, the plaintiff was granted leave to issue, and effect short service of, the motion now before the Court. The single substantive interlocutory relief, the subject of that motion, is: "an order restraining the defendant from taking any further steps in the disciplinary process relating to the plaintiff until the determination of criminal proceedings currently pending before Roscommon Circuit Criminal Court and titled *The Director of Public Prosecutions v Kevin Rogers, Accused, Bill No. RNDP/0004/13.*"

Background

4. The defendant seeks to investigate whether the plaintiff has engaged in serious misconduct: specifically, whether, on or about the 5th March 2012 at Roscommon Post Office, he was responsible for the mistreatment of an item of registered post containing a urine sample from another postal worker, which was *en route* from a member of An Garda Síochána in Roscommon to the Medical Bureau of Road Safety in Dublin for analysis in connection with a suspected drink driving offence.

5. On the 28th March 2012, the plaintiff was detained for questioning by An Garda Síochána. On the 2nd October 2012, the plaintiff was charged with an offence of perverting the course of justice, contrary to common law. The particulars of that offence are that on or about the 5th March 2012 the plaintiff tampered with a drink driving sample which had been posted by An Garda Síochána to the Medical Bureau of Road Safety for analysis.

6. The trial of the plaintiff took place before a judge and jury at Roscommon Circuit Criminal Court between the 26th November 2013 and the 5th December 2013. The jury could not agree upon a verdict and was discharged. A re-trial has now been fixed to commence on either the 9th or the 10th December 2014.

The disciplinary process

7. On the 6th September 2012, An Post wrote to the plaintiff specifically describing the suspected serious misconduct of the plaintiff that was under investigation; providing what amounts to a précis of the relevant evidence; and describing the course of action that An Post was proposing to take in the following terms:

> "The Company views this matter very seriously and is considering taking disciplinary action against you, including recommending your dismissal from employment with An Post.
>
> In order to afford you an opportunity of furnishing any explanation, making any union representations or other representations you may wish to offer in respect of the above matters no further action shall be taken for a period of fourteen days (21st September 2012). If you fail to reply to this letter before that date the Company will proceed on the basis that you have no explanation to offer.
>
> You are also being afforded the opportunity, should you so wish, of attending an oral hearing in addition to, or as an alternative to furnishing a written explanation. You may be accompanied at such a hearing by a union representative or by a friend. If you do wish to avail of the opportunity of attending an oral hearing, please inform me in writing of your intention to request such a hearing within three working days of receipt of this letter. Alternatively, you may contact [An Post by telephone] to arrange same."

8. That letter marked the beginning of an extensive exchange of correspondence between the parties' legal representatives. The salient points to emerge for the purposes of the present application, according to the arguments advanced, are the following:

> (a) The defendant initially acceded to a request by the plaintiff's solicitors that the disciplinary process be deferred pending the determination of the criminal charge against the plaintiff.
>
> (b) After the plaintiff's criminal trial resulted in a hung jury, the defendant informed the plaintiff of its intention to re-initiate the disciplinary process against him. The plaintiff was again invited to furnish any explanation or make any representations he might wish, and was again offered an oral hearing, in the same terms as were contained in the defendant's earlier letter of the 6th September 2012.

(c) The plaintiff objects to the resumption of the disciplinary process on the basis that it was (and is) proposed to conduct a retrial of the criminal charge against him. Without prejudice to that submission, the plaintiff requires an oral hearing and requires to be represented by Senior and Junior Counsel, instructed by his solicitor, for that purpose.

(d) The defendant is willing to permit the plaintiff to be represented at the proposed oral hearing by solicitor and counsel, even though that is not contemplated under the defendant's agreed disciplinary procedures.

(e) The explanation that the plaintiff wishes to provide, and the representations he wishes to make, for the purpose of the proposed disciplinary process are those set out in the written cautioned statement that he made to An Garda Síochána while detained for the purpose of questioning on the 28th March 2012. The plaintiff points out that Ms. Ann O'Reilly, a Fraud and Investigation manager with the defendant, was present at the Garda interview during which that statement was made.

(f) The defendant has adopted the position that it is not appropriate for it to receive the plaintiff's written cautioned statement to An Garda Síochána for the purpose of the disciplinary process, although it was conceded in the course of argument before me that little purpose is served by obliging the plaintiff to make a separate, though in all probability substantially identical, statement to the defendant by way of explanation or representation for the purpose of the disciplinary process. The defendant had indicated that, if no explanation was furnished nor any representations made before the 13th February last the defendant would proceed with the disciplinary process on the basis of the information available to it.

(g) The plaintiff has been furnished with an extract from the defendant's investigation report together with a copy of statements and attachments referred to in that report, totalling 48 pages of material. In addition, the plaintiff is to be afforded an opportunity to view the relevant CCTV footage for the purpose of the disciplinary process.

(h) The defendant is prepared to provide an undertaking to the plaintiff that it will not require him to provide any information either by way of written or oral response, which he believes may incriminate him.

(i) The defendant contends that the proposed oral hearing is not intended to be an adversarial one. No witnesses are to be called at the hearing. Its purpose is to afford the plaintiff an opportunity to put forward any representations he may wish to the defendant as part of the overall disciplinary proceedings. The plaintiff will not be cross-examined. Some questions may be asked of him regarding any representations put forward by him but such questions are generally only for the purpose of clarification. The only documentation that the defendant proposes to rely on for the purpose of the proposed hearing is that which has already been provided to the plaintiff.

9. On the 28th of March the plaintiff's solicitors wrote to the defendant indicating that the advices of Counsel had been sought in the matter and that it was entirely inappropriate in the circumstances to proceed with the proposed disciplinary hearing. The letter sets out the reasons for that conclusion as follows:

"Firstly, the criminal charge against our Client arising out of the same set of circumstances to which this proposed Hearing refers has not yet been determined. His Trial in that regard resulted in the Jury failing to reach a verdict and a date for a re-trial has been set on the 9th/10th of December of this year.

Secondly, you have not set out precisely what allegation is being levelled against Mr. Rogers rendering it impossible for him to defend himself in that regard.

Thirdly, we note it is not proposed to call any witnesses and so it is not clear how any allegation against Mr. Rogers can be established, nor is it clear what if any benefit it would be to him to have legal representation as cross examination will not be possible.

Finally, an additional important issue now arises in the context of the recent revelations concerning recording/interception of certain communications to and from certain Garda Stations...It will be necessary for us to establish whether communications to and from Roscommon Garda Station in and about that time involving our Client were recorded or intercepted and this very important issue will have to be clarified, not just in the context of the criminal charge against him, but also in the context of your proposed Disciplinary Hearing, which had its genesis in the presence of a representative of an Post in Roscommon Garda Station during the course of the Garda investigation and interview."

10. In the same letter the plaintiff's solicitors sought an undertaking from the defendant that the disciplinary hearing would be deferred until the conclusion of the criminal proceedings against the plaintiff. In a letter of the 1st of April 2014, the defendant indicated its intention to continue with – or, perhaps more accurately, to finally commence - the disciplinary process. As already outlined above, these proceedings then issued on the 11th April 2014 and the plaintiff issued the present motion on the same date.

The defendant's disciplinary policy and procedure

11. While the defendant did not file any affidavit in response to that of the plaintiff, sworn on the 9th April 2014, which grounds the present application, a copy of its "Discipline Policy and Procedure", effective from the 17th December 2012, was handed into court without objection on the plaintiff's side and the defendant relied upon the terms of that document in opposition to the plaintiff's application.

12. The defendant submits that a consideration of its disciplinary policy and procedure serves to clarify how it proposes to conduct the disciplinary process in this case. The preface to the policy recites that its terms have been agreed between the defendant and the trade unions/staff associations representing the defendant's staff. Paragraph 7 of the policy states:

"Where the disciplinary procedure is invoked the employee shall have the following entitlements:

- the right to be notified of the specific matters in respect of which disciplinary action is being considered at the time any proceedings are initiated and receive any relevant material, records or sources of data at that time, to the extent that they have been relied upon by management in initiating the proceedings

- the right to respond to the allegation(s) prior to any disciplinary decision being made

- the right to representation by a trade union representative at all stages of the procedure, including the appeal

stage. Alternatively the employee may chose to be represented by a fellow employee of his/her choice provided the fellow employee they nominate is immediately available or available within a reasonable period of time, so that proceedings are not unduly delayed

• the right to consideration of any matters he or she puts forward to the Company or is put forward on their behalf in the course of the disciplinary process

• the right to be advised of the outcome of the Company's disciplinary investigation

• the right to appeal against any disciplinary sanction imposed by the Company"

13. Section 6.0 of that part of the policy that deals with "Disciplinary Procedure" is headed "Preliminary Enquiries". Paragraph 6.1 states:

> "Prior to any disciplinary proceedings being initiated under these procedures a process of preliminary enquiry aimed at establishing basic facts and determining whether disciplinary proceedings against any individual is warranted will be undertaken. The extent of those enquiries will vary according to circumstance and will, generally, be more extensive in instances which may result in a higher level sanction being contemplated."

14. It seems to me that section 8.0 of that part of the policy is also relevant to the plaintiff's claim. It states:

> "8.1 At the time any disciplinary proceedings are initiated any relevant material records or sources of data, to the extent that they are relied upon by management in initiating proceedings will be provided to the employee and he/she will be given an opportunity to comment. It will only be for the gravest reasons that the right of an employee to a copy of any written complaint against him/her will be withheld (*e.g.* an indisputable need to safeguard privileged information). The benefit of any element of doubt which exists in such cases will be extended to the employee.
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> …
>
> 8.2 The Company is not obliged to afford the employee the right of cross-examination of any person or persons who has given a statement which is relied upon in initiating or continuing disciplinary proceedings. In instances where a final written warning or dismissal is being considered, however, the employee may raise questions he/she would wish to have put to the party concerned and the Company will do so, within reason, as part of any process of further enquiry following the employee's initial response to the notice of disciplinary proceedings."

15. Section 14.0 deals with "Dismissal" and the defendant places particular reliance upon it. It states, in material part:

> "14.2 There may also be circumstances in which, because of the seriousness of the matters in respect of which an employee comes under notice, that dismissal will be justified without recourse to the earlier stages of the above procedure [that is, a series of escalating warnings]. Such instances may relate to either of the following:
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> …
>
> (ii) instances of ***serious misconduct***, a non-exclusive list of which is set out hereunder
>
> **Instances of Serious Misconduct**
> …
>
> • Wilful delay of or interference with mail
>
> ....
>
> 14.3 Ordinarily, prior to disciplinary proceedings being initiated where dismissal related to serious misconduct is a consideration, a process of preliminary enquiry aimed at establishing basic facts and determining whether disciplinary proceedings against any individual is warranted will be undertaken.
>
> 14.4 In any instance where consideration is being given to dismissal, the employee shall be advised in writing of the irregularity for which he/she has come under notice.
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> …
>
> 14.5 An employee who has been notified that their dismissal is under consideration shall be afforded a reasonable opportunity to respond (usually 10 working days) verbally and/or in writing to the notice of disciplinary proceedings and the irregularity(s) identified therein.
>
> 14.6 If further enquiries are necessary arising from the employee's response these will be undertaken. If as a consequence of these enquiries any matters arise which are likely to be relied upon in making a disciplinary decision the employee will be provided with appropriate written details and afforded a further reasonable opportunity (usually 5 working days) to respond verbally and/or in writing. Ultimately, if the employee's response is unsatisfactory, a decision to dismiss will be made."

16. For the sake of completeness, it should be noted that section 15.0, which immediately follows, is headed "Appeals Process", and commences by stating that all disciplinary sanctions issued under the procedure may be appealed.

The arguments

17. The plaintiff has put forward four separate arguments in support of the single relief that he claims in these proceedings, and has submitted that, in order to obtain the same relief on an interlocutory basis prior to the trial of the action, he need only satisfy the court that he has raised a fair issue to be tried and that the balance of convenience favours the making of such an order, in circumstances where it is acknowledged that damages are not an adequate remedy for either party in this case.

18. The first argument is that the plaintiff is entitled to the injunction he seeks because otherwise he will suffer irremediable prejudice - either through being constrained or inhibited in his participation in the disciplinary process or, should he participate fully, by potentially losing (at least some of) the benefit of the privilege against self-incrimination in the criminal process, or the tactical advantage of not disclosing his line of defence in advance of trial, or both.

19. As each party acknowledged in the course of argument, *O'Flynn v. Mid-Western Health Board* [1991] 2 I.R. 223 is the leading modern authority in this area. In that case, the Supreme Court (*per* Hederman J., with whom Finlay C.J., Griffin and O'Flaherty JJ concurred on the point) held that there is no immutable rule that civil proceedings must remain at a standstill to await the outcome of a criminal investigation. That finding was based, in turn, on the earlier decision of the Supreme Court in *Dillon v. Dunnes Stores* [1966] I.R. 397 (*per* Ó Dálaigh C.J., Haugh and Walsh JJ. concurring).

20. On behalf of the plaintiff it was submitted that the matter was, therefore, one of first impression, in which context the Court should be guided by the fundamental importance of the plaintiff's constitutional right to a trial in due course of law, in conjunction with his entitlement to a disciplinary process that accords with the requirements of natural and constitutional justice and fair procedures. The plaintiff submits that there is a fair issue to be tried as to whether due deference to those constitutional rights requires that the disciplinary process should be suspended pending the determination of the criminal charge against him.

21. However, it is clear that, in order to demonstrate that he is entitled to an order restraining the disciplinary process against him, the plaintiff must show more than merely that there is a criminal trial pending arising out of the same events. If that was enough, in light of the constitutional rights to which anyone in the plaintiff's position is plainly entitled, then it seems to me that there would be an immutable rule that disciplinary proceedings must remain suspended to await the outcome of a criminal prosecution in every case.

22. The plaintiff's second and third arguments can conveniently be considered together, as they both involve what is, in essence, a separate and distinct claim that the disciplinary process in the form proposed will not be carried out in accordance with fair procedures (whether it is conducted before or after the determination of the criminal charge against the plaintiff). Specifically, the plaintiff's second argument is that the defendant has not set out precisely what allegation is being levelled against him, rendering it impossible for him to defend himself. His third argument is that no allegation can be fairly or properly established against him except through the evidence of witnesses (presumably, such evidence to be given *viva voce* and subject to cross-examination), and that the legal representation he has been permitted to have at the proposed oral hearing confers no benefit upon him unless the process is conducted in that way.

23. A case very closely, if not directly, on point in relation to each of the first three arguments raised by the plaintiff is that of *Carroll v. Law Society of Ireland (No. 2)* [2003] 1 I.R. 284. The applicant, an apprentice solicitor, was facing a hearing before the respondent's education committee concerning whether it had jurisdiction to entertain a number of complaints against him that, if made out, would preclude him from meeting the criterion of being a fit and proper person for admission to the roll of solicitors. One of the arguments put forward on behalf of the applicant was that the proposed hearing risked compromising his privilege against self-incrimination in the event of any subsequent criminal prosecution against him. Various declarations were sought by way of Judicial Review, including a declaration that, if the committee did have jurisdiction to hear and determine the complaints against the applicant, it could not rely on hearsay evidence and must permit cross-examination of all witnesses.

24. In addressing the latter submission, McGuiness J. concluded as follows (at 297):

> "The education committee's inquiry in this case is not a court of law, but, as the respondent itself acknowledges, it is crucial to the applicant's future professional career and it must act fairly and in accordance with the principles of natural and constitutional justice.
>
> I would however accept the submission of counsel for the respondent that it is not the function of judicial review to direct procedure in advance and I regard the *dictum* of Carroll J. in *Philips v. Medical Council* [1992] I.L.R.M. 469 as persuasive authority. I am not therefore prepared to make the declaration sought by the applicant."

25. The particular *dictum* of Carroll J. in *Philips v. Medical Council*, relied upon by McGuiness J. in *Carroll –v- Law Society of Ireland (No. 2),* was the following (at 475):

> "Judicial Review does not exist to direct procedure in advance but to make sure bodies which have made decisions susceptible of review have carried out their duties in accordance with the law and in conformity with natural and constitutional justice."

26. There is some force to the argument that the same stricture must apply, *mutatis mutandis*, to any application for an injunction to restrain a proposed disciplinary process in an employment law context. That argument receives support, subject to qualification, from the decision of the High Court in *Carroll v. Bus Átha Cliath/Dublin Bus* [2005] 4 I.R. 184 and, in particular, the following passage from the judgment of Clarke J. in that case (at 189):

> "10. The final matter in respect of which the plaintiff seeks interlocutory relief concerns a disciplinary process that has been put in place by the defendant. It seems to me that a court should be reluctant to intervene and in particular to intervene at an interlocutory stage, in an as yet incomplete disciplinary process. To do so would be to invite a situation where recourse might well be had to the courts at many stages in the course of what would otherwise be a relatively straightforward and expeditious set of disciplinary procedures.
>
> 11. There may, however, be exceptions to that general rule. Where an employer has, in clear and unequivocal terms, indicated that procedures will be followed which will be manifestly unfair there may be circumstances where it is appropriate for the court to intervene at that stage. This will be so, in particular, in cases where the degree of prejudice which the employee concerned would suffer in the event of an adverse finding at the particular stage in the process in respect of which complaint is made would be great and unlikely to be substantially reversed by a finding of a court made after the process had come to an end."

27. In this case, the defendant points to the terms of its agreed written disciplinary procedure – in particular, paras. 6.0 and 14.3 thereof - and submits that the process is still at the preliminary enquiry stage, aimed at establishing whether disciplinary proceedings against the plaintiff are warranted. In that context, the defendant submits that it is still awaiting the plaintiff's explanation or representations, which – should either be forthcoming - it is intended to consider at the proposed oral hearing that has been arranged at the plaintiff's own request.

28. I return now to the other relevant argument advanced by the applicant in *Carroll v. Law Society of Ireland (No. 2)*: that the necessity to safeguard his privilege against self-incrimination, in the face of certain of the complaints that were the subject of the proposed hearing before the education committee, mandated a finding that the education committee had no jurisdiction to consider those complaints. The relevant complaints were that the applicant had passed himself off as a solicitor when not qualified as such. To pretend to be a solicitor when not one is an offence under s. 56 of the Solicitors Act 1954. The Law Society of Ireland may prosecute any such offence under s. 77 of that Act.

29. In addressing that submission, McGuinness J. observed (at page 299 of the report) that the privilege against self-incrimination, or the right to silence, is a constitutionally protected right but that it is not an absolute one. Having noted that the respondent acknowledged the applicant's right to remain silent for the purposes of the proposed hearing, McGuinness J. stated (at 299):

> "However, the difficulty that arises in such a situation is not so much the question of the applicant's right to silence as the question of the practical results of his either remaining silent or answering the questions put to him. If he is to deal properly with the allegations made against him at the inquiry it is probably in his interest to answer as fully as possible any question put to him. Silence may damage his case at the inquiry. On the other hand he understandably is concerned that information or evidence given by him in the context of the inquiry might later be used by the respondent in mounting a prosecution against him."

30. McGuinness J. went on to note that this is a difficulty that has arisen in other contexts, notably under the statutory procedures laid down under s. 9 of the Proceeds of Crime Act 1996, which require a respondent to file an affidavit in regard to his property and income which may, in the event, prove self-incriminatory. McGuinness J. analysed the manner in which the issue had been addressed by Moriarty J. in *M. v. D.* [1998] 3 I.R. 175 and by McGuinness J. herself in *Gilligan v. Criminal Assets Bureau* [1998] 3 I.R. 185, before concluding as follows (at 301):

> "Of course, the dilemma faced by the applicant in this case is by no means so acute. Here the education committee is not empowered to direct the applicant to give any or any particular evidence and the respondent acknowledges his right to silence. Nevertheless the nexus between the education committee as the inquiring authority and the respondent as a prosecuting authority is very close.
>
> On consideration, it seems to me that this aspect of the applicant's claim is also subject to the *caveat* that it is not the purpose of judicial review to direct procedures in advance. While the difficulty I have discussed above is a real one, it does not seem to me to be sufficient reason to hold that the education committee cannot be permitted to proceed with its inquiry. I am not prepared to make the declaration sought by the applicant but again I would direct the respondent's attention to the need to maintain a clear line of division between this inquiry and any aspect of the respondent's role as prosecutor under s. 77 of the Act of 1954."

31. In this case, the defendant has informed the plaintiff in correspondence that it is prepared to provide an undertaking to the plaintiff that it will not require him to provide any information either by way of written or oral response, which he believes may incriminate him. It was also conceded before me in argument on behalf of the defendant that it is not appropriate to maintain any objection to the plaintiff's intention to rely upon the terms of his written cautioned statement to An Garda Síochána as the explanation or representation that he wishes to make for the purpose of the proposed oral hearing. While the plaintiff points out that a representative of the defendant's fraud and investigation section was present during the defendant's interview by a member of An Garda Síochána, the nexus between the defendant and the Director of Public Prosecutions is not otherwise a close one.

32. The plaintiff's second argument - that the defendant has not set out precisely what allegation is being levelled against him - is, I must confess, difficult to follow. In the letter that the defendant wrote to the plaintiff on the 6th September 2012, indicating that it was considering disciplinary action against him, including recommending his dismissal, very specific details of the misconduct at issue are set out over three pages, amounting to a précis of the evidence then available to the defendant in relation to certain events that were alleged to have occurred at Roscommon Post Office on the 5th March 2012. On the penultimate page of that letter it is expressly stated:

> "Based on the above information the Company is concerned that you are responsible for the mistreatment of registered item RL 322 706 782 IE containing the urine sample of Mr Michael Lyons, Postal Operative, Roscommon DSU, which was posted at Athleague PO."

33. Even if it were appropriate to equate disciplinary proceedings directly with criminal proceedings – and the decision of the Supreme Court in *Mooney v. An Post* [1998] 4 I.R. 288 establishes that it is not – it is difficult to see how the detailed particulars provided of the misconduct involved do not compare favourably, rather than unfavourably, with those set out in the charge sheet that grounds the criminal prosecution of the plaintiff.

34. The final argument raised by the plaintiff is that the disciplinary process against him should be restrained (presumably, without reference to the determination of the criminal proceedings against him) on the further discrete ground that it is as yet unclear whether any telephone communications involving him or his detention in Roscommon Garda Station were unlawfully recorded or intercepted by An Garda Síochána. This appears to be a reference to the matters the subject of the Commission of Investigation on the operation of Garda Síochána telephone recording systems, established on the 30th April 2014 by the Commission of Investigation (Certain Matters relative to An Garda Síochána and other persons) Order 2014. However, it has not yet been made clear how any such issue is capable of affecting the disciplinary process concerning the plaintiff, particularly in circumstances where it is the plaintiff himself who wishes to rely on the contents of the written cautioned statement that he made while in garda custody for the purpose of the proposed oral hearing that is to form part of the disciplinary process.

The test

35. The foregoing, then, are the arguments by reference to which the plaintiff submits he is entitled to the interlocutory injunction that he seeks. The plaintiff contends that his application is governed by the *Campus Oil* guidelines and that, in consequence, all he must establish is, in the words of O'Higgins C.J. in *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88 (at 107), that he has raised a "fair *bona fide* question"; that an award of damages would be inadequate to compensate him for any loss he might suffer if an injunction is not granted; and that the balance of convenience favours granting an injunction.

36. However, it is clear that in this case the grant of an interlocutory injunction will have the practical effect of determining the proceedings as a whole because the plaintiff will have obtained in advance of trial the very relief that he is seeking at the trial of the action.

37. In *Jacob v. Irish Amateur Rowing Union Ltd* [2008] 4 I.R.731, Laffoy J. addressed a broadly analogous situation. The plaintiff sought an order restraining the defendant from preventing him from competing at a regatta, which represented his final opportunity to compete for a place representing Ireland in the single scull class at the 2008 Olympic Games. The plaintiff argued that he had three separate causes of action against the defendant: a public law claim of legitimate expectation; a private law claim for breach of contract; and a constitutional claim that he had been deprived of his constitutional right to fair procedures. The defendant submitted that the ordinary principles in relation to interlocutory relief did not apply where the grant of interlocutory relief would effectively resolve the matter in favour of the plaintiff.

38. Laffoy J. noted that, in *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396, the starting point for Lord Diplock's analysis of the principles applicable to the determination of an application for an interlocutory injunction was that the grant of an interlocutory injunction is both temporary and discretionary.

39. Laffoy J. next pointed to the following observations with which O'Higgins C.J. prefaced his analysis in *Campus Oil v. Minister for Industry (No. 2), supra*, of the principles applicable to an application for an interlocutory injunction (at pp. 105-106 of the report):

> "Interlocutory relief is granted to an applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in *statu quo* until the hearing. The application for an interlocutory injunction is often treated by the parties as the trial of the action. When that happens the rights of the parties are finally determined on the interlocutory motion. In cases where rights are disputed and challenged and where a significant period must elapse before the trial, the court must exercise its discretion (to grant interlocutory relief) with due regard to certain well-established principles."

40. I pause here to observe that, in this case, there was no agreement between the parties to treat the interlocutory application as the trial of the action.

41. Laffoy J. had particular regard to the judgment of the English Court of Appeal in *Cayne v. Global Natural Resources plc* [1984] 1 All E.R. 225. In that case the plaintiff shareholders applied for an interlocutory injunction to restrain the defendant company from implementing a merger agreement (and from proceeding with the associated allotment of shares) prior to the company's impending A.G.M. The plaintiff shareholders contended that the merger agreement had been concluded specifically to dilute the votes of the existing shareholders rather than in pursuit of any legitimate commercial goal of the company, with the aim of defeating a motion to remove the company's directors at the A.G.M. If the injunction were granted, the balance of power in the company would remain the same until after the crucial vote was taken at the A.G.M. and the plaintiffs would therefore obtain the result they sought in the proceedings. Kerr L.J. began his speech by considering the scope of application of the test set out in *American Cyanamid, supra*, stating (at 235): "The test for the application of *Cyanamid* is therefore whether the case is one where the court can see that it is likely to go to trial at the instance of the plaintiffs, and whether the grant of an injunction is therefore appropriate or not, as a way of holding the situation in the interim." He continued (at 236): "[T]he overriding test for present purposes is that, if an injunction is granted, the effective contest between the parties is likely to have been finally decided summarily in favour of the plaintiffs."

42. Laffoy J. went on to quote the following passage from the judgment of May L.J. (at p. 238):

> "With those considerations in mind, I do not think that in cases such as the present, whatever the strengths on either side, where the decision on an interlocutory application for an injunction will effectively dispose of the claim, the court can legitimately, nor is it bound, to apply the *Cyanamid* guidelines, which, as I have already said, I think are based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined.
>
> It may well be that it is the same ultimate consideration which the court has in mind, namely the question whether it is likely to do an injustice. Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at the interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined in a full trial. There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional."

43. Applying the principles summarised above to the facts in *Jacob*, Laffoy J. concluded that it was not possible, in view of the conflicts of evidence between the parties to reach a meaningful conclusion on the relative strengths and weaknesses of the case put forward by the plaintiff and the defendant. The best that the court could do was to consider the question suggested by May L.J. in *Cayne v. Global Natural Resources plc, supra*: whether the plaintiff's case on the evidence is so strong that to refuse an injunction would constitute an injustice. Laffoy J. concluded that the plaintiff's case was not as strong as that and, consequently, refused to grant an injunction.

Conclusion

44. It seems to me appropriate, and therefore necessary, to approach the present application by reference to the principles identified by Laffoy J. in *Jacob v. Irish Amateur Rowing Union Ltd, supra.*

45. In doing so, I have reached the following conclusions:

> (a) The grant of an interlocutory injunction is discretionary and is intended to be temporary, maintaining the *status quo* until the rights and obligations of the parties can be properly determined at trial. It is telling that, in this case, the temporal scope of the interlocutory injunction sought is that it should remain in force pending the determination of the criminal proceedings against the plaintiff, rather than pending the trial of the present action. If this were merely a pleading point, I would have no difficulty in permitting any necessary amendment to enable the appropriate relief to be pursued. However, it seems to me that the real significance of the particular wording used is that it serves to indicate an implied acceptance by the plaintiff that the interlocutory relief he seeks would, if granted, determine the ultimate issue in the main action in his favour.
>
> (b) This case is not one that is likely to go to trial at the instance of the plaintiff if he is granted the substantive relief that he seeks in the action at the interlocutory stage. It follows that the grant of an interlocutory injunction is not appropriate in this case as a means of maintaining the *status quo* pending such trial.
>
> (c) I am satisfied that this is a case in which, if the injunction sought is granted, the effective contest between the

parties is likely to have been finally decided summarily in favour of the plaintiff.

(d) In the premises, it would be an injustice to grant the injunction now sought at the interlocutory stage, as there is a very great likelihood that this would effectively preclude the defendant from the opportunity of having its rights determined at a full trial.

(e) I am unable to conclude that this is an exceptional case in which the plaintiff's evidence is so strong that to refuse an injunction and allow the case to go to trial would be an unnecessary waste of time and expense, or that it would do an overwhelming injustice to the plaintiff.

46. In light of these conclusions, it is particularly important to emphasise that, while I have given consideration to the four arguments advanced on behalf of the plaintiff in support of the present application, I have not purported to finally decide any factual or legal aspects of the plaintiff's claim. I fully appreciate that, as Hardiman J. observed in *Dunne v. Dun Laoghaire Rathdown Co Council* [2003] 1 I.R. 567 (at 581), it would not be appropriate to do so when, at trial, the evidence may be different and more ample and the law will be debated at greater length.

47. For the reasons set out above, I must refuse the application.