Neutral Citation Number: [2008] IEHC 397

THE HIGH COURT
JUDICIAL REVIEW

2008 348 JR

BETWEEN

L. C. AUTOLINK LTD. AND
LEE CULLEN

APPLICANTS

AND

JOSEPH FEEHILY, DAVID WARD, BRIAN HARKIN, REVENUE COMMISSIONERS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin delivered on the 12th day of December, 2008.

1. The first named applicant L.C. Autolink Ltd. ("Autolink") is a motor sales and import business. The second named applicant Lee Cullen ("Mr. Cullen") is the principal in that firm. Both applicants seek judicial review of a number of determinations made by the first four named respondents who are officials of the Revenue Commissioners, to detain and seize four Mitsubishi Lancer motor cars. These determinations were made in December, 2007, and January, 2008. The procedures followed a visit to Autolink's premises which took place on 12th December, 2007. On that date, a team of Revenue officers went to Autolink's garage at Saggart, Co. Dublin. Autolink had traded from there for a number of months and previously at another premises. The Revenue officers carried out an examination of available records and a physical examination of the stock. The majority of vehicles stored there were part of Autolink's stock. But along with vehicles which were part of Autolink's stock-in-trade, the Revenue officers found four Mitsubishi Lancer Evolution motor cars. These four vehicles were not registered. They were not recorded as part of Autolink's stock. They did not appear in any of that company's records. The Revenue officials took the view that there had been a breach of the law relating to vehicle registration tax (VRT) and value added tax (VAT) and that they were entitled to detain and later seize the vehicles.

2. The determinations made by the Revenue officials were made under powers as defined in the Finance Act 2001. The applicants claim that the determinations which were made were *ultra vires* and unlawful.

3. This judgment is divided into the following sections:-

(A) A brief description of the relevant law relating to vehicle registration tax.

(B) Outline of the statutory powers of the Revenue to detain, seize, forfeit and apply for condemnation of vehicles and the claimants appeals procedure.

(C) What occurred on and after the date of detention.

(D) The procedures subsequently followed, the claims of the applicants, and consideration of that evidence.

(E) Findings and decisions on discretionary issues.

(F) The nature of the vehicles.

(G) The validity of the notices and determinations made by the Revenue Commissioners.

(H) Denial of natural justice.

Parts of claim withdrawn

4. Leave to seek judicial review was granted by this Court on 31st March, 2008. Then, the claim made by the applicants was far broader. The issues included assertions that the statutory provisions under which the Revenue Commissioners had proceeded were invalid, having regard to the Constitution of Ireland 1937 and incompatible with the European Convention on Human Rights Act 2003. These broader claims were abandoned at the outset of the hearing and the questions for determination by the Court are now confined to those arising in this judgment.

(A) Brief outline of the laws relating to vehicle registration tax

5. In order to understand the actions of the respondents and the claims made by the applicants, it is necessary to outline briefly the law relating to vehicle registration tax. In summary the applicants claimed that the vehicles are "special purpose vehicles" and therefore not liable to this tax.

6. Vehicle registration tax was introduced in 1992. By virtue of s. 131 of the Finance Act of that year (the 1992 Act), the owner of a vehicle is obliged to register it for VRT when such a vehicle is first imported into the State. Failure to do so involves serious penalties. Vehicles are to be registered and the VRT paid by the end of the next working day following the arrival of a vehicle into the State. Delay may result in the imposition of penalties including forfeiture of the vehicle and prosecution. Detention and seizure are preliminary procedures prior to forfeiture. The actual level of tax to be levied in any particular instance depends on the category of vehicle concerned. There are exemptions for certain categories of vehicle.

7. The starting point for this short consideration is the statutory characterisation of a "mechanically propelled vehicle". Such a vehicle is designed fundamentally for the purpose of carriage of persons or goods. Section 130 of the Finance Act 1992 contains the following definition of such vehicle as being:-

"…intended or adapted for propulsion by mechanical means, including –

(a) bicycle, tricycle or quadricycle propelled by an engine or motor or with an attachment for propelling it by mechanical power, whether or not the attachment is being used, a moped, a scooter and an autocycle, and

(b) a vehicle the means of propulsion of which is electrical or partly electrical and partly mechanical,

but not including a tramcar or other vehicle running on permanent rails or a *vehicle as respects which the Commissioners*

are satisfied that it is designed or constructed for off-road use (other than racing vehicles, scrambling vehicles or other sporting vehicles)" (emphasis added).

8. Certain forms of vehicle are however exempt from VRT. One is relevant in these proceedings. It is that for vehicles designed or adapted for off road use (see s. 130 of The Act of 1992). Such a vehicle is "a special purpose vehicle", defined under s. 130 of the Finance Act 1992, as being:-

> "a vehicle which is designed, constructed or adapted solely or mainly for a purpose other than for the carriage of persons or goods".

(B) Outline of the statutory powers of the Revenue Commissioners to detain seize and forfeit vehicles

9. It is necessary next to outline certain powers now vested in the Revenue Commissioners *inter alia* by the Finance Act 2001 (the Act of 2001). While these powers are generally of long duration they are developed and refined in that Act.

10. The powers in relation to vehicles untaxed for VRT purposes may be summarised as:-

a) detention;

b) seizure;

c) forfeiture;

d) application for condemnation by Court.

As part of this code of procedure, the Act lays down a claims and appeals procedure.

a) Detention

11. It is necessary to look at ss. 140 and 141 together. Section 140 of the 2001 Act contains general powers, allowing for the detention of any excisable product or other goods, on the grounds of reasonable suspicion by a Revenue officer. It also permits the detention of any conveyance or vehicle, used for the purpose of conveying excisable products which may be so liable (s. 140(1)). Detention is a temporary power for the purposes of investigation only.

12. Section 141(1) should be entirely irrelevant to this case. It relates to a power to detain vehicles used for the carrying of excisable products or goods. It became relevant only because the Revenue Commissioners, having detained the vehicles on 12th December, 2007, furnished a document purporting to be a "notice of detention" to the applicants. This was stated to be pursuant to that provision. It is accepted that this reliance was misplaced. There is no question in this case of the vehicles being used to carry excisable goods.

13. Section 140(3) is however, central to the consideration of the issues. It outlines detention powers which arise in the case of a suspected breach of the VRT statutory code. It provides:-

> "140.—(3) Where an officer or a member of the Garda Síochána reasonably suspects—
>
> (a) that a vehicle has not been registered in any of the registers established and maintained under Chapter IV of Part II of the Finance Act, 1992,
>
> (b) that a vehicle has been converted (within the meaning of that Chapter) and a declaration in relation to such conversion has not been made under section 131 of the Finance Act, 1992 , or
>
> (c) that vehicle registration tax has not been paid in respect of a vehicle,
>
> then such officer or member may detain such vehicle for such period as is required to carry out such examination, enquiries or investigations as may be deemed necessary by such officer or member to determine to his or her satisfaction whether or not—
>
> (i) such vehicle has been registered,
>
> (ii) such declaration has been made, or
>
> (iii) such vehicle registration tax has been paid."

14. Subsection 4 provides for a time limitation between the act of detention and the next step in the procedure, that is to say, seizure. It provides:-

> "140.—(4) When a determination referred to in subsection (1), (2) or (3) has been made in respect of any excisable products, other goods, other thing or a vehicle or on the expiry of a period of one month from the date on which such products, goods, other thing or vehicle were or was detained under that subsection, whichever is the earlier, such products, goods, other thing or vehicle are to be either seized as liable to forfeiture under the Customs Acts or under section 141 , or released."

Thus in the context of this case, when the Revenue Commissioners decided to detain the vehicles they were allowed a period of one month within which to make a decision as to whether the vehicles should be seized. That time began to run from the date of the determination to detain.

b) Seizure

15. The next power to be considered is that of seizure, vested in the Revenue Commissioners by virtue of s. 141 of the Act of 2001. This provides:-

"141.—(1) Any goods or vehicles that are liable to forfeiture under the law relating to excise may be seized by an officer."

The circumstances in which this more radical, power of seizure may be exercised are outlined in the next section:

"142.—(1) Subject to *subsection (2)*, an officer shall give notice of the seizure of anything as liable to forfeiture and of the grounds for seizure to any person *who to the officer's knowledge was at the time of the seizure the owner or one of the owners of the thing seized.*" (emphasis added).

This mandatory provision is however subject to an exception when seizure takes place in the presence of a suspected person:-

"(2) Notice under *subsection (1)* need not be given under this section to a person if the seizure was made in the presence of the person, the person whose offence or suspected offence occasioned the seizure or in the case of anything seized in any ship or aircraft, in the presence of the master or commander of such ship or aircraft."

The rather awkward phraseology of this provision does not alter its effect on this case, that is to say, that no notice need be served when a suspect was present at the time of seizure.

16. The distinction between the powers of detention and seizure are reflective of the degree of incursion into the constitutional rights of the possessor of the thing seized. Mere detention involves a simple power exercised by an officer, operating on the grounds of reasonable suspicion but without need for the furnishing of notice or record, upon the person in possession. The provision does not require that such power be conferred by the issuing of any document or by an order of court. Elsewhere, the Act does provide for powers of search, detention and seizure on foot of warrant obtained on application to the District Court (s. 136(5)).

17. Because the power of seizure involves a more significant incursion of right, the circumstances in which that power should operate are rather more fully outlined. Thus in certain situations there is provided protections for a claimant. Thus, in s. 142, the following provision is mandatory:-

"(3) Notice under *subsection (1)* shall be given in writing and the notice shall include a statement of section 143 and be deemed to have been duly given to the person concerned—

(a) if it is delivered to the person personally, or

(b) if it is addressed to the person and left or forwarded by post to the person at the usual or last known place of abode or business of the person or, in the case of a body corporate, at its registered or principal office, or

(c) if the person has no known address in the State, by publication of notice of the seizure concerned in *Iris Oifigiúil*."

The statutory intention is therefore to protect the rights of a claimant who was not present when the goods were seized or who may not be in the jurisdiction.

18. Then, there must be provided:-

(i) a seizure notice, which,

(ii) gives the grounds for such seizure,

(iii) outlines the procedures available to a "claimant" under s. 143, and

(iv) be served on any person who to the officer's knowledge was at the time of seizure the owner or one of the owners.

19. The provision is mandatory only in such circumstances. A decision to seize must be made on reasonable suspicion that there exist good grounds that the goods or vehicles in question are liable to forfeiture.

20. Once a decision to seize is made, there may follow a procedural step designed to protect the interests of a person with a claim to the thing seized. Section 143 provides:-

"143.—(1) A person who claims that anything seized as liable to forfeiture is not so liable, (referred to in this section as the "claimant") shall, within one month of the date of the notice of seizure or, where no such notice has been given to the claimant, within one month of the date of the seizure, give notice in writing of such claim to the Commissioners."

A claimant is permitted one month to exercise their right as provided by the statute, to assert that the thing seized is not liable to penalty. Once the Revenue Commissioners are of the opinion that a claimant is liable to pay a duty of excise, that opinion may be appealed, first internally, to a VRT Appeals Officer. However such right of appeal may involve the claimant being called on by the Revenue Commissioners to pay the amount of such duty. Section 145(1) of the Act provides:-

"145.—(1) Any person who has paid or who, in the opinion of the Commissioners, is liable to pay a duty of excise and is called on by them to pay an amount of such duty may appeal in accordance with this section, against the decision concerned in respect of the liability or the amount of the duty."

21. An unfavourable determination by the Revenue Commissioners is in turn subject to a right of appeal. This is outlined in s. 146 of the Act, which provides:-

"146.—(1) A person who is aggrieved by a determination of the Commissioners under *section 145* may, in accordance with this section, appeal to the Appeal Commissioners against such determination and the appeal is to be heard and determined by the Appeal Commissioners, whose determination is final and conclusive unless a case is required to be stated in relation to it for the opinion of the High Court on a point of law."

The right of appeal to the High Court is thus confined to matters of law and not of fact. These rights of claim and appeal are part of a self contained statutory procedure. The effect of these provisions on the way in which the court will exercise its discretion in this case as to whether to grant judicial review is outlined later.

c) Forfeiture
22. Section 127(1) of the Act of 2001 contains a default provision as to the procedure in the absence of a claim:-

> "127.—(1) If, on the expiration of the period referred to in *subsection (1)* of *section 143* , no notice of claim has been given under that section, the thing in question shall be deemed to have been duly condemned as forfeited."

d) Condemnation as forfeited
23. Where a claimant serves a notice in respect of anything seized under s. 143, the Commissioners must take legal proceedings for the condemnation of the thing by a court. Where such court finds that the thing was, at the time of seizure liable to forfeiture, it shall condemn the property as forfeited and in any other case shall order its release (s. 143(2)). The order of forfeiture is to apply from the date when the liability to forfeiture arose first (s. 127(3)).

24. This final step of condemnation is provided for under s. 128 of the Act of 2001. These are civil proceedings. They may be instituted either in the High Court or in the District Court, subject to the value of the goods in question. The Act provides a statutory immunity for any officer or person who made or assisted in the making of a seizure, in the event that it is found that there was probable cause for such seizure or detention. The Act also provides for a power of mitigating fines or penalties, a series of presumptions applicable, and also penalties for false evidence.

25. In summary, therefore, the Act provides for a graduated procedure of increasing formality from detention of property which may be unlawfully held through to its ultimate condemnation by a court. But as explained, by no means all the steps in the procedure are mandatory: and in certain circumstances the Act does not mandate service of notices of detention or seizure.

This judgment now turns to the manner in which these certain of these powers were exercised by the Revenue Commissioners in this case.

(C) Evidence as to what occurred on and after the date of detention and seizure

The detention of the vehicles
26. Autolink trades from Unit 5, Heritage Business Park, Saggart, Co. Dublin. As outlined the business is operated by Mr. Cullen. The visit of 12th December, 2007, has been described in paragraph 1 of this judgment.

27. At the scene Mr. Ward, one of the Revenue officials questioned Mr. Cullen on the absence of the four vehicles from Autolink's stock records. His admissions are set out later in the judgment.

28. Had the vehicles been Autolink's property, and had the normal procedures for registration for VRT purposes been complied with, no issue would have arisen. There would have been no liability. However, part of Mr. Cullen's explanation was that he intended to maintain these vehicles, and to allow certain of his clients to race them at Mondello racetrack. This was the only reason he gave then for not registering the cars for VRT purposes.

29. Mr. Ward decided to exercise the powers conferred on him by s. 140 of the Finance Act 2001. He determined that the cars should be detained by the Revenue Commissioners for further investigation. The four vehicles were driven by Revenue officials to the State warehouse. Further information later obtained, confirmed that they had been imported from the United Kingdon on 19th October, 2007. For a full period of seven weeks, therefore, the vehicles had been in the State and had remained unregistered for VRT.

The visit of 21st December, 2007
30. A little over a week later, on 21st December, 2007, Mr. Ward and another official again visited the garage premises. He interviewed Mr. Cullen. The latter accepted that the vehicles had been unregistered for VRT and had not been recorded in any stock register. He acknowledged that they had been imported and two actually paid for, out of his own money, on 19th October, 2007.

Seizure
31. Mr. Ward informed Mr. Cullen that the four vehicles were to be seized pursuant to s. 141 of the Finance Act. He offered to release the vehicles on payment of a penalty of 10% of the open market selling price and immediate payment of the outstanding VRT, VAT and penalties, in lieu of a prosecution. Mr. Cullen did not avail of this offer. Mr. Cullen himself, and later his solicitors corresponded with the Revenue Commissioners. The applicants, and those advising them, sought to outline a basis upon which they claimed that the vehicles were not liable for VRT, VAT, or any penalties which might have been imposed. The payment of these penalties would have been a pre-condition for availing of the appeal process.

(D) Evidence adduced by affidavits and by cross examination

The notices of seizure and the correspondence
32. In this section, the judgment deals with the notices of detention and seizure furnished and subsequent correspondence.

33. The first notice furnished by the Revenue Commissioners was stated to be a "notice of detention". This was dated 12th December, 2007, the date of the first visit to the premises. In fact there is no statutory requirement for such a notice. It is not mandated or even mentioned under any provision of the Act. The notice contained what are accepted to be a number of inaccuracies.

34. First, it stated on its face that it had been issued pursuant to s. 140(1) of the Finance Act 2001. This was incorrect. That provision relates to the detention of vehicles used for the *conveyance of excisable products*. This was not such a case. The notice should properly and more accurately have referred to s. 140(3) of the Act outlined earlier, that is, relating to the seizure of vehicles liable for VRT.

35. Second, the grounds of detention recited in the notice, failed to recite that this step was based on the *reasonable suspicion* of the Revenue Officers. In fact, the notice stated that the detention had been effected, because the officer simply *suspected* that the goods in question were liable to forfeiture. The applicants contend that these defects are errors on the record which go to jurisdiction. These questions are dealt with later.

36. The second notice served was a "notice of seizure". This was dated 21st December, 2007. It also contained errors. The heading recited that the seizure was pursuant to s. 142 of the Finance Act 2001; in the body of the text it stated that the power was exercised under s. 141 of the same Act. It recited that the goods were liable to forfeiture under s. 125 of the Finance Act 2001. This

again was inaccurate. The reference was to an inappropriate provision of the Act not applicable in this context.

37. Mr. Ward wrote back, accepting that he had inadvertently not amended this seizure form. Amended notices in relation to each of the four vehicles were ultimately served on 7th January, 2008. On this occasion, finally, these were headed, correctly,

> "Detention – Finance Act 2001, Section 140(3)"
>
> "Seizure – Finance Act 2001, Section 140(4) and 141(1)."

The notices recited that the vehicles were unregistered and therefore liable to forfeiture under s. 139(6) of the Finance Act 1992. They were also accompanied by an information leaflet, outlining the effect of detention and seizure.

38. Mr. Cullen testified that the letters he sent were written by himself without any guiding hand. He raised a number of questions as to the validity of the procedures applied. These were first outlined in a carefully composed letter of 7th January, 2008. This led to a reply of the same date where Mr. Ward admitted his error in the notice of seizure.

39. Three days later, on 10th January, Mr. Cullen sent a further letter, phrased in terms which would do justice to a skilled lawyer. He wrote *inter alia*:-

> "I would also caution that any belated attempt to single me out for prosecution, solely for the purpose of glossing over or remedying errors committed by the Revenue, or for the purpose of penalising a taxpayer who challenges invalid actions of the Revenue, would to my mind, constitute a malicious prosecution and would amount to administrative malfeasance"

The style of the letter is in marked contrast to the laconic nature of the evidence which Mr. Cullen gave to the Court in cross-examination.

40. Having proposed a series of options to the Revenue, including the return of the cars, Mr. Cullen added:-

> "(c) If I am satisfied that a VAT/VRT charge arises, I will pay what is owing as I have always done. If *I am not so satisfied I would exercise my right to appeal your view to the Appeal Commissioners and I will be guided by their determination in the matter.*"

This letter was written in the terms of the first person singular. It did not refer to Autolink in any way. This is of some significance in that Mr. Cullen later claimed that the cars were actually Autolink's property, not his. It is difficult to see how this distinction can be relied on only when convenient.

41. On 1st February, 2008, the applicant's solicitors wrote to Mr. Ward. They asserted the vehicles were in fact "special purpose vehicles", a legal point made earlier by Mr. Cullen in his letter of 7th January. They claimed the seizure had been unlawful. Mr. Brian Harkin, Higher Executive Officer, VRT Seizures and Prosecutions Section, furnished a full response to this on 12th February, 2008. He stated that on the basis of the information available to him, the vehicles were not special purpose vehicles, and were therefore liable to VRT and VAT. He outlined the claimant's right to appeal this determination to the internal VRT Appeals Officer in the Revenue Commissioners. He wrote that in such event, the full VAT and VRT due would have to be paid before such a determination could be entertained. He enclosed an information leaflet on the appeals procedure, and outlined the basis of the sum which would have to be paid in the meantime, for VAT, VRT and penalties on the vehicles. This came to a very sizeable sum, €124,201.28. No further inter partes correspondence took place. The applicant did not seek to make any further case prior to initiating judicial review proceedings, seeking leave on 31st March, 2008.

42. One should not leave the subject of exhibits without reference to two faxed letters exhibited by the applicant. The first was dated 18th December, 2007. It came from a Mr. Simon Close of Corby Mitsubishi, a firm based in Corby, Northamptonshire. It referred to one of the Mitsubishi vehicles. He said that this Mitsubishi 8 RS was a motor sports vehicle "*designed to either be converted* into rally or race vehicles". It will be observed that he did not state that this particular vehicle was actually a rally or race vehicle. He opined that the cars were not best suited for road use. He added "Mitsubishi UK use these vehicles *as the base to build there highly successful rally cars as do all of the other top motor sports teams" (sic).* Mr. Close did not claim that these vehicles had in fact, been converted or manufactured so as to render them entirely unfit for highway use. The second faxed letter of 5th March, 2008, is referred to at para. 52 of this judgment.

Mr. Cullen's characterisation of admissions made to the Revenue officials

Mr. Cullen's admissions

43. A series of admissions made by Mr. Cullen formed part of the evidence. I find that in the course of interview on 21st December, 2007, he in fact accepted that the vehicles were unregistered, were not contained in the company stock records and that he, personally, had paid so far for two of the cars. The Revenue officials made a record of the interview. He was questioned as follows by Mr. Ward:-

> "DW (David Ward): You brought these in on your VAT number, free of VAT. I have had these valued at €59,200.00 and they are now subject to VRT and VAT and a penalty if they are to be released*. You bought these personally and with your own personal funds.*'
>
> LC (Lee Cullen): '*Yes'.*
>
> DW: '*You* paid for two and have still to pay for two.'
>
> LC: '*Yes.*'
>
> DW: 'They were registered in the U.K.'
>
> LC: 'Yes, but I was not aware of that at the time.'
>
> DW: 'I have now to seize these under section 141 of the Finance Act 2001.'
>
> 13.35 hours: Notice of Seizure issued for 4 Mitsubishi Evolutions.

DW: 'Can I clarify that the vehicles were imported on 19/10/2007?'

LC: 'Yes.'

DW: 'I have got to remind you that stock records are being kept up to date.'

LC: 'Yes, I am doing it and it will be done.'" (emphases added).

While there may be a degree of ambiguity in relation to the final quotations in relation to stock records, there can be no ambiguity in relation to the earlier question put by Mr. Ward. He specifically put it to Mr. Cullen that he, personally, had bought these cars with his own personal funds, that he had paid for two of them and still had to pay for the other two. There can be no room for misinterpretation, especially having regard to the way the correspondence in the case evolved, the sequence of the affidavits, and the quality of Mr. Cullen's own testimony.

44. In the case as opened by counsel, in a later sworn affidavit of 8th August, 2008, and in cross examination, Mr. Cullen asserted that he regarded himself and Autolink as being one and the same entity. Thus, he claimed, that when he made admissions using the word "I" he was speaking as Autolink, not as Lee Cullen. This was a brave and novel assertion. I find that in his own sworn affidavits, and in cross examination, he sought to "re-contextualise" these admissions as being statements made by him *qua* director of Autolink, and not in his personal capacity.

45. In the supplemental affidavit sworn on 8th August, 2008, he referred to a number of admissions which he had made to Revenue officials. He alleged that certain averments made by Mr. Ward on affidavit were "inaccurate". The alleged inaccuracies appear to derive from his claim that he had been speaking as a director of Autolink. He swore in that affidavit and in cross examination that the intention had been that certain clients of Autolink would be allowed to race these vehicles at Mondello. However, he did not actually say that any admission ascribed to him was false. It would have been difficult to do so, in light of the fact that he had signed the contemporaneous notes of his statements taken by the Revenue officials. This new gloss on events arose only after Mr. Ward's replying affidavit was filed, exhibiting Mr. Cullen's admissions *and* his signature.

46. In his supplemental affidavit, he also sought to further re-contextualise the conversation so as to claim that the cars formed part of Autolink's stock-in-trade. Mr. Ward swore that Mr. Cullen admitted that the vehicles did not form part of that stock and that they were his personally and were liable for the taxes in question. Mr. Cullen swore that he disagreed with Mr. Ward's account, "as I did not confirm in the course of the said interview, that the vehicles did not form part of the stock-in-trade of either of the applicants". The meaning of this statement is obscure. It is impossible to avoid the conclusion that this obscurity, phrased in a double negative, was intentional. Mr. Cullen did not suggest that he had used words other than those quoted. It is difficult to see how he could have, in the light of his signed admissions.

(E) (i) Findings on the evidence and discretion of the Court in judicial review proceedings

47. In general, in judicial review proceedings, a court does not embark on fact finding. However, the interpretation of Mr. Cullen's admissions as to ownership of the vehicles, and their context, have been squarely put in play by the applicants. The original jurisdiction of the High Court has been invoked by the applicants to resolve this issue. A judicial review court will not normally trespass into fact finding, especially when there is, (as here) a self contained and statutory procedure which allows for fact finding.

48. But in the light of the manner in which the applicants have put this case, the duty of the Court to reach certain conclusions on the evidence, is unavoidable. The issue is not primarily one of fact, but of candour. The Court has had the advantage of being able to assess Mr. Cullen as a witness, on foot of the cross examination. This was not simply a conflict of fact on affidavit evidence.

49. I regret I must find that the applicant in testimony was evasive and disingenuous. First, on any plain interpretation, the meaning of the admissions was that Mr. Cullen accepted that he *himself* had bought the cars and brought them into the country using a VAT number.

50. Second, it is impossible to avoid the conclusion that Mr. Cullen's averments and testimony were designed to "work around" these admissions. Under cross examination he was unable to furnish any satisfactory explanation for those admissions, other than to contend that he saw his own activities and those of the company interchangeably.

51. Third, in the letters written in January and February, 2008, the issue of ownership of the cars was not mentioned at all. Those in Mr. Cullen's name were written using the pronoun "I". He was unable to explain this. One would have thought that this important question would have been to the forefront of his mind, if Autolink actually owned the cars.

52. Invoices from the English vendors of the cars were subsequently sent to the Revenue. These, recorded the purchaser of the vehicles as L.C. Autolink and not Mr. Cullen himself. There is no evidence as to why this occurred. On his own admission, Mr. Cullen had himself written the cheques for the two cars on his own personal bank account. These invoices are to be seen in the context of the later fax from Mr. Close, previously referred to. In the faxed letter of 5th March, 2008, Mr. Close refers to the Mitsubishi supplied "to Mr. Lee Cullen". There was no mention of Autolink.

53. I refrain from making any finding in relation to the number sequence of the invoices. In one invoice of the four, the date is out of synchronisation with its number sequence. There may be an entirely innocent explanation for this. But more significantly, the weight to be attached to these invoices would be more significant if at any stage Mr. Cullen had referred to the issue of ownership at interview, in his own early correspondence, or at any time before the matter was put in issue here. He never said the cars were Autolink's when it would have been an entirely natural and proper point to make.

54. The unconvincing nature of the evidence is the more so having had the opportunity to observe Mr. Cullen's evasive and non-committal demeanour in the witness box. The context of the interview allows only for the inference that Mr. Cullen knew and appreciated on 21st December, 2007, precisely the point being put to him by Mr. Ward.

55. I regret that I must conclude Mr. Cullen's testimony was untrue. The explanation which he sought to give to the Court as to the admissions was tailored so as to reduce the impact of admissions otherwise damaging to his case. There was no documentary evidence to show that the personal cheques paid for the vehicles, were advanced as a loan to the company. Mr. Cullen testified that Autolink's company accounts subsequently recorded the sums paid for the two vehicles by himself, as being directors' loans. These accounts were not exhibited.

56. Mr. Cullen's legal advisers are not to blame. They must act on his instructions. It was the applicants' decision to place in issue the

question of ownership. They instructed their lawyers to serve a notice to cross examine Mr. Ward, who I find, was a truthful witness, fully prepared to accept the inaccuracies in the earlier notices of detention and seizure. Issues of fact could properly have been dealt with in the internal appeal procedure to the Revenue Commissioners themselves, or, subsequently, to the Appeal Commissioners. A question which should have been entirely collateral in normal circumstances to these proceedings was rendered central not as a question of fact but as a matter of credit and candour.

Decision on absence of candour
57. This testimony from Mr. Cullen demonstrated an absence of candour, honesty and truthfulness. Judicial review is a discretionary remedy. Want of candour will be a bar to relief. In the exercise of its discretion therefore, the Court will, dismiss the applicants' proceedings on the basis of want of candour. The testimony of Mr. Cullen was on behalf of both applicants.

(E) (ii) The discretion of the Court in granting judicial review – alternative remedy available
58. A further discretionary factor arises. In choosing to pursue their remedies by way of judicial review, the applicants opted not to avail of any of the appeal procedures in a well defined self-contained code. A decision of the Revenue Appeal Commissioners on issues of fact and in this area of law will properly attract curial deference.

59. Here in addition to the evidence on ownership, further lengthy evidence was adduced in relation to the nature of the vehicles. This consisted of expert testimony from two highly qualified motoring consultants. No effort was made to adduce this material within the Revenue appeal procedures. There is no evidence that the applicants were prevented from making such a case where it should have been made. None of this detailed material was ever placed before the appropriate decision makers.

60. Failure to avail of an appeals procedure will, in certain circumstances, debar applicants from the remedy of judicial review. This is precisely such a case. The factual questions which the Court was asked to determine in this four day hearing, were pre-eminently ones which should, and ought, to have been dealt with within the parameters of the Revenue appeal procedure. The applicants were not debarred from first making such case as they might have wished, subject to paying the penalty as a precondition but without prejudice.

Decision on alternative remedy available
61. I conclude that the Court should refuse relief on these discretionary grounds also.

(F) Evidence on the nature and characteristics of the vehicles
62. For the purpose of these proceedings, it is necessary to distinguish clearly between information available to the Revenue Commissioners, and evidence adduced before a Court. This is because ultimately, one question for the Court to determine is whether the Revenue Commissioners acted reasonably in the light of the information then available to them. It is not appropriate for a Court to make a final determination as to the nature of the vehicles when there was another forum and procedure for doing so. What is at issue is whether the actions of the respondents were in accordance with the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, that is to say, rational.

63. The following information was available to the Revenue Commissioners:-

1) The cars had been registered as saloon cars in the United Kingdom prior to importation.

2) They are to outward appearances modified saloon cars with fitted rear air spoilers as standard. Two of them had been fitted with anchored "racing" driver seats with full cross harness safety belts. They carried substantial advertising livery.

3) All of the vehicles retained both the front and rear seats as fitted by the manufacturer.

4) (As emerged in evidence from Mr. Ward), there was in fact, no problem in driving the cars on the public roadway after their detention. They were driven from Saggart to the Revenue pound without difficulty. This evidence negated testimony from the expert witness relied on by the applicants, the thrust of which was to suggest that the modification rendered the cars effectively unfit for road use.

5) Correspondence was received from the U.K. Dealer Principal of Mitsubishi to the effect that the cars were "rally/racing vehicles". It has not been shown whether such a designation would necessarily negate their liability to VRT. The invoices state that no warranty was given with the cars because they were for motor sport only.

64. Further expert evidence adduced before this Court on behalf of the applicants was simply to the effect that:-

a) the engines of the cars had been modified so as to increase their brake horse power from approximately 280 b.h.p. to 320 b.h.p.

b) The exhausts had been significantly modified.

c) The gear boxes of the cars had been modified to produce more torque at low engine revolutions.

d) Ceramic brakes were fitted.

e) The safety air bags in the front of the vehicles had been disconnected.

f) Internationally recognised regulations for racing/rallying, provide that there should be fitted circuit breakers, fire extinguishers and (in the case of rallying) towing eyes, on competition cars. These had not been installed.

g) None of the vehicles had been fitted with roll bars or safety cages; both safety devices used in competition. They are not therefore qualified for competition purposes.

65. I conclude that on the basis of points (a) to (g) there was sufficient information before the Revenue Commissioners for them rationally to reach the opinion and determination for the purpose of seizure, in accordance with *O'Keeffe* principles, that the vehicles moved *prima facie* would be liable to VRT and VAT. Such a determination would, of course, have been open to appeal.

(G) The attack on the notices served by the Revenue Commissioners
66. A further challenge is made to the effect that the notices furnished were invalid. Thus, it is asserted, the steps of detention and

seizure taken by the Revenue were *ultra vires*.

It is well established that Revenue statutes are to be strictly construed *(Inspector of Taxes v. Kiernan* [1981] I.R. 117), but it is necessary to ascertain whether the provisions which are to be strictly construed are mandatory, directory, or purely discretionary. They may have no statutory basis whatsoever. The literal meaning must be given to the words actually used in the statute, not a meaning or interpretation imported from elsewhere.

Here, factual context is important. The evidence was that detention of the vehicles was actually in pursuit of Revenue powers under s. 140(3) of the Act of 2001. The intent of this provision is to allow for a period of examination, enquiry and investigation. It does not allow for a permanent deprivation of possession. The actions of the Revenue did not involve a visit to a dwelling house, but to a business premises. It has not been suggested that there was any absence of consent from Mr. Cullen to the visit. There was no question of deliberate or conscious violation of constitutional rights. The Act of 2001 does not in fact require that Revenue officers carry a search warrant for the purpose of detaining vehicles although they may do so, and statutory provision is made for application to the District Court for such purpose, as outlined earlier, s. 136(5) of the Act. The litmus test which must be applied here is whether there are errors *on the record which go to jurisdiction* (*R.v. Northumberland Compensation Appeal Tribunal* [1952] 1 K.B. 338; [1952]1 All E.R. 122; considered and approved in *Bannon v. Employment Appeals Tribunal* [1993] 1 I.R. 500). In *Bannon*, Blaney J. at p. 510 quoted with approval the final paragraph, at p. 133, of the judgment in the All England Reports of Morris L.J. in the Court of Appeal in *Northumberland* as follows:-

> "It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct an error of law where revealed, on the face of an order or decision, or irregularity or absence of, or excess of jurisdiction, where shown. The control is exercised by removing an order or decision, and then by quashing it."

67. The "notice of detention", furnished by the Revenue Commissioners on 12th December, 2007, was palpably incorrect in the manner outlined. Section 140 is reliant as a precondition, upon reasonable suspicion being established. But did the errors on this document go to jurisdiction?

68. First it is necessary to recollect what this document is not. As explained, a notice of detention is not a creature of statute at all. In his judgment (albeit dissenting) in *Director of Public Prosecutions v. Kemmy* [1980] 1 I.R. 160, O'Higgins C. J. observed at p. 164:-

> "*Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provision be complied with.* The Courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes, which create particular offences and then provide a particular method for their proof." (emphasis added).

But the Act of 2001 does not stipulate that a notice of detention is evidence or a *prima facie* proof. The Act does not require such a notice be furnished at all. Detention may take place without any documentation. The furnishing of this notice was a discretionary act by the Revenue officials. A further test is to look to the effect of these inaccuracies. It cannot be said that the applicants suffered any detriment thereby. It cannot be suggested the respondents acted in excess of powers or exercised powers not conferred on them. The errors were in that sense "technical" not substantive. Much erudition has been dedicated to the identification as to whether defining factors going to jurisdiction are issues of fact or law. Sometimes this is a sterile exercise in taxonomy. The test is a practical one of context and effect. The errors here were of mixed fact and law. But the *effect* was not such as to go to jurisdiction. No *ultra vires* power was exercised. No unfairness resulted. No deciding body misdirected itself as to a material matter of fact or law.

69. There is no doubt that a citizen is entitled, by virtue of Article 40.5 of the Constitution, to a right of freedom from trespass to property. The actions of the Revenue in detaining these cars, involved an incursion into personal rights, such as the right of property. All such actions must be closely scrutinised and expressly justified. But whether the error of fact or law goes to jurisdiction will depend, too, on the terms of the statutory procedure invoked as well as the propriety of the procedures observed. These were not mandatory procedures.

70. In *Simple Imports Ltd & Anor. v. The Revenue Commissioners* [2000] 2 I.R. 243 the Supreme Court had to consider powers of the Revenue Commissioners purportedly exercised in accordance with search warrants obtained as a result of applications made to the District Court, engaging statutory powers. The warrants were issued under s. 205 of the Customs Consolidations Act 1876. They had been sought to search for material said to be indecent or obscene. The section permitted such warrants to be issued in relation to dwelling houses. The Supreme Court held that strict scrutiny of warrants would be required, even where there was no apparent breach of constitutional protection of a dwelling place. Delivering the majority decision, Keane J. observed at p. 250:-

> "Under the Constitution, this principle [of the right to freedom from trespass to property], is expressly recognised in Article 40.5 in the case of the dwelling of every citizen. Protection against unjust searches and seizures is not, however, confined to the dwelling of the citizen: it extends to every person's private property."

In *Simple Imports* the warrants in question recited that the Customs officer "had cause to suspect" whereas the Act required that such officer have "reasonable cause". On that basis the Supreme Court at p. 255 held that:-

> "a warrant cannot be regarded as valid which carries on its face a statement that it has been issued on the basis which is not authorised by Statute".

It follows from Keane J.'s judgment that if a statutory power conferred is exercised other than in strict compliance with the terms in which it is granted, then such power is exceeded. The power is exercised in a manner which is *ultra vires* and unlawful. The principle at issue is the same as that identified in O'Higgins C.J.'s judgment in *Kemmy*.

71. But the power of detention under s. 140 of the Act of 2001 is distinct from the search power relating to warrants in *Simple Imports*. The detaining power exercised by the officers, is to be found in the statute not in the notice of detention. This detention did not require a warrant. Instead the power is to be found in the exercise of statutory provisions vested in the officers, pursuant to the terms of s. 140, itself requiring no warrant or notice to confer authority. The document operated merely to notify Mr. Cullen that the statutory power had been exercised. It is a discretionary notice, neither mandated nor directed. The facts of Simple Imports are therefore distinguishable from the instant case.

Decision on notices of detention

72. While that notice contained errors, they were not such as to go to jurisdiction. I do not consider these were errors on the face of "the record" i.e., on any document establishing or going to jurisdiction. Had there been an error in a document itself constituting jurisdiction however, my conclusion would have been otherwise.

73. In *Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447, a drink driving case, Henchy J. considered a form adduced in evidence which identified a particular blood sample. He observed at p. 449:-

> "The purpose of this form was to identify the particular blood sample and to show that the set procedures were followed in regard to it. Once Dr. Landon affixed his signature to the form as filled in, the failure to delete in full the line referring to a specimen of urine, was no more than a technical slip. It left the true content filled-in and signed form unaffected. So it cannot be said that this slip meant that the form was not duly completed."

This defect not going to jurisdiction is in contrast to the document referred to by O'Higgins C.J. in *Kemmy*, an evidential proof. The observations of Henchy J. are more apposite in the case of this non statutory document.

74. I find also a further reason why relief should not be granted even were these findings incorrect. Judicial review is not available when it does not serve a useful purpose. Even were I to hold that the notice of detention itself actually constituted a power to detain the vehicles, such notice has now been spent, subsequent to the exercise by the Revenue of the power to seize the vehicles. Judicial review should not be granted therefore.

75. In my view the respondents acted lawfully and within jurisdiction on this issue.

The notices of seizure – consideration
76. The legal requirements with regard to a determination to seize are rather different. The power is to be exercised and is vested by virtue of ss. 141 to 143 of the Act.

77. The actual power of seizure is conferred by s. 141 of the Act. The purpose of the notice to seize procedure however, is to ensure compliance with a further step in the statutory framework. It is to enable a person with a valid claim to the goods in question, to assert their interest therein. This is shown by reference to s. 143 which provides:-

> "143.—(1) A person who claims that anything seized as liable to forfeiture is not so liable (referred to in this section as the "claimant") shall, within one month of the date of the notice of seizure or, where no such notice has been given to the claimant, within one month of the date of the seizure, give notice in writing of such claim to the Commissioners."

It is claimed that the true owner of the vehicles is Autolink. Therefore the notice of seizure was not properly served on Autolink but rather, on Mr. Lee Cullen who was served at his home address. The following observations apply even had it transpired that Autolink was the true owner.

78. Section 142(1) refers to the state of an officer's knowledge, in the context of the "reasonably suspected" person (see para. 13 of this judgment). That knowledge is inextricably time-connected, reflected in the phrase "was at the time of the seizure the owner, or one of the owners of the thing seized". The test must be as to whether the officer acted reasonably at the time of seizure, on the basis of the knowledge available to him. A right arises only when the suspect or claimant is not on imputed notice of the circumstance as to seizure. In the light of the information available to Mr. Ward on foot of Mr. Cullen's own admissions, I consider that there was a reasonable basis for his invocation of the procedures of detention and seizure.

79. Mr. Cullen's claim is that he treated his and his company's identities as interchangeable. But, an analysis of the provisions demonstrates that they do not go so far as to require that the true owner or owners be objectively identified at the time of the serving of the notice of seizure. Section 142 can only be understood by reference to section 143. The latter permits "a person who claims that anything seized as liable" to make a claim. A logical reading of ss. 142 and 143 together, shows that the provisions of the statute expressly contemplates a sequence whereby, if a notice is served, such notice of seizure is given *to any person who to the officer's knowledge was the owner at the time of the seizure*. The duty imposed under s. 142(1) is to give notice of the seizure and the grounds therefor. However the actual determination to seize is exercised pursuant to s. 141, and not 142. Section 142 does not constitute the power permitting seizure. The purpose of s. 142 is not therefore, to empower seizure by the Revenue Commissioners, but to identify the circumstances when a notice of seizure should be served, and as to when time commences to run against a claimant. It has no impact on the exercise of the power to seize itself. In the context of this case, the mandatory procedure was simply that the power to seize be exercised on reasonable grounds.

80. As of the dates upon which the notices of seizure were served, Mr. Ward's stated knowledge was to the effect that Mr. Cullen was either the owner or one of the owners of the vehicles. It is clear that there was ample basis, to justify the reasonableness of Mr. Ward's actions, even were it demonstrated that he was ultimately mistaken as to ownership of the vehicles. He, Mr. Ward, had information from Mr. Cullen which he reasonably acted upon having regard to his suspicion reasonably held. The other, mandatory provisions do not therefore arise. Detention had taken place in Mr. Cullen's presence. The officers had Mr. Cullen's own admissions.

81. The seizure, logically, took place prior to the delivery of the notice. The statute does not provide that such grounds be contained in the notice of seizure where required. Instead it simply expressly provides that the notice:-

> "shall be given in writing and …shall include a statement of section 143".

Section 143 of the Act 2001, does not require that the notice of seizure recite the grounds upon which the seizure took place. Had the Oireachtas intended that the notice recite such grounds it would have so provided. The court looks to the intendment of the Oireachtas expressed in the terms of the statute.

Decision on notices of seizure
82. The errors in the notice of seizure do not form an element to the proofs required under the statutory provision. Were there such error in the context of a provision which was truly mandatory there could be no excuse for departure therefrom. But the facts do not give rise to a mandatory procedure. What is in question here is not a failure in substantial compliance. At their height, the defects outlined are technical defects. The tests applicable as to jurisdiction in this case have been explained earlier and would not gain by repetition. I can find no error going to jurisdiction with regard to these notices.

(H) The claim of denial of natural justice
83. The applicants contend finally, that the procedures adopted by the respondents involved a want of natural justice and fair

procedures. Strong reliance was placed on the decision of the Supreme Court in *Keogh v. Criminal Assets Bureau* [2004] 2 I.R. 159. *Keogh* related to the adoption by the Revenue Commissioners of a document known as the "Taxpayers' Charter of Rights". This provided that, in their dealings, the Revenue Commissioners would afford to taxpayers every reasonable effort to give them access to full, accurate and timely information about Revenue law and their entitlements and obligations.

84. Keane C. J. stated at p. 165:-

> "While it is conceded on behalf of the applicant that he is unaware of this document [*i.e.* the Charter] at the relevant time, it is submitted that its adoption by the second respondents indicated an acceptance by them of specific requirements as to fairness in their dealing with taxpayers, which created the legitimate expectation that they would be met in the case of the applicant. It was submitted that the failure by the first respondent, acting in his capacity as inspector of taxes on behalf of the second named respondents, to inform the applicant as to his alleged obligation to deliver returns and pay the appropriate tax and the time limit for bringing appeal from their refusal to treat his notice of appeal as valid constituted a breach of the practice adopted under the charter. It was claimed on behalf of the respondents that any alleged failure to carry into effect the provisions of the charter could not have the effect of altering the statutory regime established by the Oireachtas for the assessment and collection of taxes".

However, the judge concluded at p. 174:-

> "It is beyond argument that the second respondents and their agents, as public authorities, are bound to observe fair procedures in the exercise of the powers conferred on them by the tax code and, where an actionable breach of those requirements has been established, that does not mean that the statute has been in any way amended as a result of a decision to that effect by a court. That view would be impossible to reconcile, in my judgment, with the obligation of the courts to ensure that public authorities perform the functions entrusted to them by statute in accordance with the Constitution and the law".

85. A pivotal element of this decision was that the applicant had not been properly informed as to his legal rights. He had not been properly informed of the legal courses available to him in the "Byzantine maze" of tax law. But this is not so in the instant case.

86. The extensive correspondence from 7th January onwards, demonstrates that Mr. Cullen was a man remarkably aware of his rights. There is no evidence as to deprivation of any right. Rigorous the provisions of the statute may be: but it has not been demonstrated that the Commissioners shut out the applicants by prematurely reaching their *opinion* of liability to duty. That opinion was subject to the right of a claimant to submit that liability should not be imposed prior to any final determination by the Commissioners. That *determination* could have been appealed.

87. Finally it may be observed that the procedures in question did not involve an administration of justice; the determination of the Revenue Commissioners did not impose a binding liability on the taxpayer. As a consequence there was no justiciable controversy between the taxpayer and the Revenue Commissioners created by the determination. (*Deighan v. Hearne* [1990] 1 I.R. 499).

Decision on natural justice issue

88. I find that there was no breach of fair procedures in the actions of the respondents. They informed the applicants of the steps available to them and served the notice in accordance with s. 143 of the Act. It was at all times open to the applicants to make such submission they chose to the Commissioners, prior to the latter reaching their determination. They chose not to do so.

89. For these reasons the application for judicial review will be declined.