THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 311 J.R.]

BETWEEN

THE MINISTER FOR EMPLOYMENT AFFAIRS

AND SOCIAL PROTECTION

APPLICANT

AND

OCS OPERATIONS LIMITED (IN LIQUIDATION),

DEIRDRE FOLEY AND MARK REDMOND

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 11th day of July, 2019

Introduction

1. The first named respondent was the operating company for Clerys Department Store on O'Connell Street, Dublin 1. Following a series of complex commercial transactions, the first named respondent was acquired by Natrium Limited ("*Natrium*"). Immediately thereafter, on 12 June 2015, a provisional liquidator was appointed over the first named respondent with the result that 134 employees were made redundant. A further 330 employees that were employed by various concessionaires were affected by the appointment of the provisional liquidator. The loss of employment on such a scale cannot have been anything other than traumatic for those involved and their families. That these commercial transactions could have such an effect undoubtedly raised serious issues. These transactions are not however before this Court rather what this Court has to consider are a number of criminal prosecutions which were initiated following these events.

2. In these judicial review proceedings, the applicant seeks to challenge the decision of the District Court, dated 20 March 2018, striking out the charges that remained in being on that date.

The charges

3. Prosecutions were initiated against the first named respondent and against the second and third named respondents as "shadow" directors. Before this Court, the first named and the second/third named respondents were separately represented.

4. The numerous criminal charges that were brought against the respondents and Natrium fell essentially into two categories. The first category involved a number of charges brought under the Workplace Relations Act 2015 ("*the Act of 2015*") and the Employment Permits Act 2006 ("*the Act of 2006*") against Natrium and the second named respondents As regards the Act of 2015, these charges related to allegations of impeding an inspector of the Workplace Relations Commission ("*WRC*") in the course of exercising the powers conferred upon him. The charges under the Act of 2006 related to an alleged failure to comply with a requirement of an authorised officer. In the event that the second named respondent was to be convicted of these charges, she would have been liable to a fine and/or imprisonment.

5. These charges were withdrawn on 4 December 2018 in circumstances which will be outlined later in this judgment.

6. The second category of charges brought against the respondents were brought under various sections of the Protections of Employment Acts 1997 – 2014 ("*the Acts of 1977 - 2014*"). These charges concerned an alleged failure to initiate consultations with employee representations in circumstances where the employer proposes to create collective redundancies, the provision of relevant information relating to the redundancies and the keeping of particular records. These charges are tried summarily and are punishable, on conviction, by a fine not exceeding €5,000. These charges are clearly less serious than those in the first category. It was these charges that were struck out by District Judge John Brennan on 20 March 2018.

7. The same District Judge dealt with the various charges since the date that they were first brought before him on 10 April 2017. The charges were back before him on 19 May 2017, 3 July 2017, 28 July 2017, 11 September 2017, 10 October 2017, 23 October 2017, 27 November 2017, 30 November 2017 and 4 December 2017. In the course of the hearing on 4 December 2017 the District Judge made an order for disclosure against the applicant, which it consented to. The District Judge ultimately found that this order had not been complied with. The failure of the applicant to comply with this order together with other issues led to the decision to strike out the charges that remained in being as against the respondents on 20 March 2018. Given the number of occasions upon which the District Judge had dealt with the charges prior to this date, it can safely be said that the District Judge had full knowledge of the nature of the charges, their background and procedural history.

Judicial review proceedings

8. In April 2018 the applicant was granted leave to seek certain reliefs by way of judicial review. Amongst these reliefs were, *inter alia*, the following: -

> "(i) An order of *certiorari* by way of application for judicial review quashing the decision of the District Court .. given on 20th March, 2018 whereby the District Judge made an order striking out the prosecution that had been instituted by the applicant against the respondents.
>
> (i) A declaration that the District Judge failed to apply the appropriate test and failed to strike a balance between the public interest in the prosecution of the offences and any risk of an unfair trial to the respondents or any of them.
>
> (ii) A declaration .. that the District Judge's order striking out the said criminal proceedings was wholly disproportionate and unjust having regard to all the circumstances of the case.

(iii) A declaration .. that there existed no risk of an unfair trial and in the circumstances the District Judge acted irrationally and in excess of jurisdiction conferred.

(iv) A declaration .. that the applicant had fully discharged its duty to make disclosure to the respondents.

(v) A declaration that the order given by the District Judge on 4th December, 2017 was vague and uncertain and if necessary, an order .. quashing the District Judges order given on 4th December, 2017."

9. It has to be said that the relief set out at (v) above is somewhat surprising given that the District Judge was told on several occasions that his order had been complied with and there was no application by the applicant to amend or vary the said disclosure order despite numerous opportunities to do so.

10. The within proceedings were not the only judicial review proceedings that arose out of this commercial transaction. The other proceedings related to the seizure of a laptop, used by the second named respondent and D2 Private Limited, by inspectors from the WRC. A protocol was ultimately agreed before the Court of Appeal concerning the use of information that was contained on the laptop. The hearing before the Court of Appeal took place on 27 July 2017.

History of summonses

11. The relevant date in regard to the history of the summonses is 12 June 2015, that being the date upon which a provisional liquidator was appointed over the first named respondent resulting in the redundancy of the employees involved. It was not until 10 June 2016 that the applicant applied to the District Court office for the issue of a number of summonses against the respondents. The summonses appear to have been re-issued after their original return date of 13 February 2017 had expired. These summonses were not served until in or about March 2017 and were first listed before the District Court on 10 April 2017, some two months short of two years since the date of the redundancies.

12. It is clear that the various summonses were issued in an effort to stop time running before the expiration of the relevant twelve month period. The summonses were issued at a time before the relevant evidence necessary to sustain a prosecution had been gathered. This is set out in an affidavit filed on behalf of the applicant: -

"I say the same procedures were deployed i.e. the summonses issued but were not served or returned until it was determined that there existed a strong evidential basis for their prosecution."

13. This raises the issue as to whether it is appropriate to issue summonses for the purpose of stopping time running. I refer to *Director of Pubic Prosecutions v O'Donnell* [1995] 2 I.R. 294, a case which involved a statutory provision that an application for the issue of summonses was to be made "*within six months from the time when the cause of complaint shall have arisen, but not otherwise*", as per s. 10(4) of the Petty Sessions (Ireland) Act 1851. The summonses in question were issued within days of the six-month period elapsing but were not served. In the High Court, Geoghegan J. held that in such circumstances the trial judge was entitled to come to the conclusion that the issue of the summonses was an abuse of the process of the court. In the instant case, there is little doubt but that the summonses were issued to stop time running and were not served for a considerable period of time thereafter. There are serious issues therefore as to whether the issue of the summonses against the respondents was an abuse of process. The circumstances under which the summonses were issued was a factor which the District Judge was entitled to take into account in reaching his decision on 20 March 2018.

14. The summonses first came before the District Court in April 2017. It would appear that as of September 2017 the statements of evidence from the WRC inspectors, central to the prosecution, were still being brought into existence. It was also the case that a number of these statements had been revised on several occasions. Legal representatives on behalf of the respondents and Natrium sought disclosure of the various statements that had been revised and edited over a period of time. There was no dispute but that they were entitled to such statements. Indeed, the *Guidelines for Prosecutors* (4th Ed – October 2016) prepared by the Office of the Director of Public Prosecutions provides that : -

"9.10 In the ordinary course disclosure of evidence should be made, without a request, if the evidence is relevant. In this regard relevant evidence includes information which may reasonably be regarded as providing a lead to other information that might assist the accused in either attacking the prosecution

case or making a positive case of its own. The following information should ordinarily be disclosed if relevant:

…

(h) the unedited version of statements prepared for inclusion in the book of

evidence."

15. Earlier versions of the revised statements in question were held on computers, access to which was central to the events which culminated in the District Judge striking out the charges on 20 March 2018.

Hearing on 4 December 2017

16. By 4 December 2017 the various charges had been before the District Judge on many previous occasions, as detailed at para. 7 above. On that date, the solicitor for Natrium, Mr James MacGuill, made a lengthy application to the court in the course of which he pointed out that the relevant computer record indicated that the prosecution witnesses, being inspectors, commenced drafting their statements on 6 September 2017. Following that date, it would appear that there were some 168 revisions, culminating in a total editing time of 78 hours. It appears that this did not mean that there had been 168 material revisions to the statements in question but rather that it did indicate that there had been a substantial number of revisions. The District Judge noted: -

"If there are draft statements and if they are on the computer they should be furnished."

He further commented: -

"[N]ow we have 78 hours working on these statements and they are still not finished in a situation where a summons was issued where there was not a statement too, which is highly irregular"

17. Counsel for the applicant was before the District Court on 4 December 2017 and did not contest the respondent's entitlement to access the earlier draft statements and accepted that the respondents were entitled to interrogate the data on the computers so far as it related to the issues before the court. It appears to have been agreed that access would be provided to the computers under the supervision of the applicant's expert. Though a formal order was not drawn up by the District Court, the aforesaid was the substance of the order made.

18. The legal representatives on behalf of the respondents sought to have the more serious charges, referred to at para. 3 above, heard on 2 January 2018. Following a short adjournment, Natrium and the respondents were informed that those charges were being withdrawn with no explanation being provided. Consequently, the only charges then before the District Court were the less serious charges under the Act of 1977 punishable, upon conviction, only by the imposition of a fine.

19. Following the hearing on 4 December 2017 there was an exchange of correspondence arising out of the order of the District Court. The respondents sought access to the computer(s) but on 12 December 2017 the solicitor for the applicant wrote in response: -

> *"With regard to earlier versions of statements of Inspectors Kelly and Phelan, the departments IT personnel did not appear to have the expertise to extract any earlier versions from the server. The inspectors have instructed the department's own experts, Wards Solutions, to start extracting earlier versions from the relevant drivers. Ward Solutions are expected to revert today with a time frame when this has been completed."*

20. In replying correspondence the respondents made it clear that it was the order of the District Court that the respondents' own experts would have access to the computers in question. The matter came before the District Court again on 20 December 2017.

Hearing on 20 December 2017
21. It should be noted at this stage that though there appears to have been a difference of opinion on the interpretation of the order of 4 December 2017 the applicant made no application to the District Court to have the order amended or clarified.

22. The issue that had arisen concerning the inspection of the computers was the subject of submissions on behalf of the second and third named respondents. The District Judge observed: -

> *"[A]side from the history of intemperate exchanges in this matter and heated ventilation of these matters on a regular basis, there is also history of affective delay on the part of the prosecution in relation to this. I won't go into as to why that is the case, so I can understand why Mr. Kennedy, on behalf of the second and third named respondents, has an issue here about confirming that his clarifying the order, confirming the nature of the order. I am satisfied that this is an issue that should not delay the court again on 2nd February and clearly there has been two much delay in this matter to date. So, in the circumstances, what I am going to do is give liberty to mention to both parties prior to that date if there is any further issue"*

23. The next hearing in fact took place on 6 February 2018.

Hearing on 6 February 2018
24. Counsel for the applicant informed the District Court: -

> *"[I]t would be my position, I think, and I will keep this neutral, that we have complied with the court's order. [the second named respondent] is going to claim that we haven't, and in order to make it clear to the court that we are fully compliant with the orders of the court and fully obedient in relation to orders of the court, I wanted to have available to me the expert who actually carried out the analysis. And he is here in court and he is the man that compiled the report"*

25. The District Judge, having heard further argument, concluded by warning the applicant that the matter "*appears to be going on and on*" and that he was determined that once the matter was finalised on 14 March 2018 then a date would be fixed for hearing.

26. It should be noted that the applicant made no application to the District Judge to vary his order concerning disclosure nor did the applicant seek to call it's IT expert to give evidence. This was so in spite of the fact that the applicant later admitted that there were difficulties in complying with the order.

Hearing on 14 March 2018
27. At the hearing on 14 March 2018 the District Judge heard submissions on whether or not the applicant had complied with his order made on 4 December 2017. Counsel for the second and third named respondents referred to the history of the prosecution, the transcript of the hearing on 4 December 2017 (in the course of which the order for disclosure was made) and subsequent correspondence and hearings. Arising from this, an application was made to strike out the remaining charges. In response, counsel for the applicant maintained: -

> *"[W]hat I say, judge, is I have complied in full with all of the orders that were provided by the court on that day without exception whatsoever"*

28. Having heard the submissions, the District Judge reserved his decision.

Decision of the District Court
29. District Judge Brennan delivered his decision on 20 March 2018 and stated that though the order concerning disclosure of 4 December 2017 was not reduced to writing the Digital Audio Recording ("*DAR*") was available to all of the parties and that confirmation of the order was sought and given on 20 December 2017. The District Judge was satisfied that the import of the order was clear, namely that the respondents' expert was to be given access to the WRC computers for inspection under the supervision of the applicant's expert. Though such inspection was not to be unfettered, the District Judge found that "*no attempt has been made to facilitate any form of supervised access or indeed any access at all*". The Judge, however, held that he was not satisfied that documentation concerning the review of the laptop (the subject matter of the other judicial review proceedings) or any forensic image had been disclosed. The District Judge continued: -

> *"[N]otwithstanding this finding, I am of the view that it would be disproportionately harsh to strike out on this basis alone, particularly taking into account the substantial efforts made to retrieve information by the prosecutor's IT experts. However, I have to then to decide if I should allow time for compliance by way of further adjournments. In considering this, I have to take into account the background to these proceedings"*

30. The District Judge then set out a summary of the various hearings that had taken place on 10 April 2017, 19 May 2017, 11 September 2017 and 27 September 2017. The District Judge also had regard to the fact that there had been a considerable delay in applying for the issue of the summonses which was followed by a further delay. The District Judge also took into account Directive 2012/13/EU on the Right to Information in Criminal Proceedings whereby it is a requirement that the respondents are entitled to the basic materials that form the case against them.

31. Taking all of these matters into account, the District Judge was of the view that at that stage any further adjournment would constitute a fundamental encroachment on the rights of the respondents and he granted the application to strike out the summonses.

32. In my view, the ruling of the District Judge was considered, clear, well-reasoned and, for the reasons I will state later, entirely in accordance with well-established principles.

Submissions of the applicant

33. In previous paragraphs I have set out, in some detail, the various hearings that took place before the District Judge and his subsequent ruling. In the statement of opposition, the applicant stated: -

> *"[T]he actions on the part of the District Judge are of the most extreme kind and they are wholly disproportionate and unjust"*

and,

> *"c. [T]he actions on the part of the District Judge were manifestly irregular. e. [T]he actions on the part of the District Judge have no legal authority and cannot be justified or underpinned by reference to known procedure"*

and,

> *"[T]he learned Judge failed to take into account the nature of the order as given by him on 4th December, 2017 and he failed to take into account and refused to hear evidence with regard to the steps taken by the prosecution to comply with its terms"*

34. It is entirely clear to me that the aforesaid criticisms of the District Judge are completely unwarranted. Even a cursory reading of the transcript shows that there was no basis whatsoever for the criticism that the District Judge "*refused to hear evidence*". In the course of submissions to this Court, however, counsel on behalf of the applicant, Mr Padraig Dwyer S.C., made it very clear that he was not relying on these statements and indeed put it on the record that District Judge Brennan afforded both the prosecution and the defence every possible opportunity to address the issues before him and was very indulgent of both sides. I am satisfied that this aspect of the applicant's claim was dealt with correctly and appropriately by Mr Dwyer. The applicant's submission to this Court centred upon the contention that the decision of the District Judge was unreasonable in that it was "disproportionate". It was submitted that the District Judge ought to have left the matter of disclosure over to the trial judge who would deal with it in the context of the substantive hearing.

Consideration of issues

35. It was accepted by counsel for the applicant that the District Judge had jurisdiction to make the order he did and thus was not obliged to leave the matter of disclosure over to the trial judge hearing the prosecution. In the previous paragraphs I have set out the numerous occasions upon which these charges came before the District Judge. The District Judge was fully aware of the background to the charges and the circumstances under which he directed disclosure. It seems to me that the District Judge was in a particularly good position to consider the consequences of what he found to be the failure on the part of the applicant to comply with his order for disclosure. I am, therefore, of the view that the District Judge was correct to deal with the matter of disclosure at the stage he did and deliver the ruling on 20 March 2018.

36. On the issue as to whether the decision of the District Judge was unreasonable in the sense of being disproportionate the Court was referred to the Supreme Court decision in *Cormack v. Director of Public Prosecutions* [2009] 2 I.R. 208. In *Cormack* two applicants were granted leave to bring judicial review proceedings seeking, *inter alia*, prohibition of their respective prosecutions on the basis of delay. In giving the judgment of the court, Kearns J. stated at p. 223: -

> *"[43] Counsel for the applicants in these cases has argued that the amount of delay which may be tolerated for the prosecution of a summary offence is considerably less than that which might be allowed for a serious or complex charge. He submitted that the whole philosophy underpinning the summary disposal of criminal offences is the public interest and that of alleged offenders in having such matters disposed of as expeditiously as possible. I accept the validity of this contention. It follows that delay in summary proceedings is less to be tolerated than in other cases."*

37. In the instant case, what was before the District Court on 14 March 2018 were summary proceedings.

38. As to how a District Court should proceed where delay is established Kearns J. stated at p. 225: -

> *"[47] …I would be strongly of the view that courts should not act as legislators to frame a subjective limitation period for the prosecution of criminal offences, even offences of a summary nature, and should in every case where delay is established conduct the balancing exercise indicated in Barker v. Wingo (1972) 407 U.S. 514. This is the approach replicated in the Irish cases which have applied similar, if not identical, criteria in this jurisdiction; see P.M. v. Malone [2002] 2 I.R. 560; P.M. v. Director of Public Prosecution [2006] IESC 22; [2006] 3 I.R. 172; McFarlane v. Director of Public Prosecution [2008] IESC 7, [2008] 4 I.R. 117."*

39. The Court was also referred to the decision of the High Court in *Director of Public Prosecutions v. Dean Paget* [2016] IEHC 559. This case concerned an application by the DPP challenging an order of the District Court striking out proceedings for want of prosecution. In *Paget* the District Court Judge had made an order for disclosure, disclosure which was not made by the date specified. The District Judge granted an application for an adjournment peremptorily against the applicant. The applicant however continuously failed to comply with the disclosure order and as such the proceedings were dismissed on the adjourned date. In giving judgment, Hunt J. stated: -

> *"14. It follows logically that if the District Court can issue an order, it should also enjoy the ability to secure compliance with such orders when made. In this case, a disclosure order was made in favour of the respondent without demur by the applicant. The applicant did not comply with the terms of this order by the expiry of the initial period specified by*

the District Court in that regard, and was unable to demonstrate compliance to the learned District Court Judge on the expiry of the second limit prescribed by the District Court, resulting in the dismiss 'for want of prosecution'."

40. Hunt J. further stated: -

> *"25. There is no evidence that the learned District Court Judge evaluated whether the respondent's right to fair procedures and a fair trial required the making of the order in question, as opposed to any other order that might have been available to the learned District Judge. The previous peremptory adjournment seems to have been the sole justification for the significant step of dismissing a public prosecution without further ado. There is no evidence that the learned District Judge considered, as he ought to have done, whether and to what degree weight ought to be accorded to the public interest in ensuring that crime is prosecuted. Although the rights of the individual accused will, of necessity, enjoy primacy in such situations, in order that the jurisdiction to dismiss a complaint for want of prosecution in these circumstances is reasonably exercised there must be some consideration of the correct balance to be struck between competing rights on the facts of each case. I am mindful of the difficulties faced by District Court Judges in efficiently processing large and varied caseloads, and it is fair to observe that the learned District Court Judge in this case did not derive much assistance from the parties appearing before him in the discharge of his task. The balancing process in question need not be prolonged or elaborate, but it must take place."*

41. Arising from these authorities it is clear that in reaching his or her decision the District Judge must engage in a balancing exercise. In carrying out this exercise, as was stated by Hunt J., the rights of the individual accused will enjoy primacy. An analysis of the decision given by the District Judge herein shows clearly that in reaching his decision the District Judge did carry out such a balancing exercise. He found that the order for disclosure made on 4 December 2017 had not been complied with even though confirmation of the order was sought and given on 20 December 2017. Despite having made such a finding, the District Judge stated *"that it would be disproportionally harsh to strike out on this basis alone, particularly taking into account the substantial efforts made to retrieve information by the prosecutor's IT experts".* This is a clear illustration of the District Judge engaging in a balancing exercise. The District Judge then went onto to consider the fact that on previous occasions he had acceded to the applicants request and refused the respondents' request for disclosure. In doing so the District Judge took into account that this was not a straightforward prosecution and that there were *"significant issues at play which were being determined by other courts in relation to this matter".*

42. The District Judge referred to the considerable delay in applying for the issue of the summonses and pointed out that a period do ten months had elapsed between the date of the alleged offences and the return date during which the respondents were effectively in the dark as to what the case against them was. This was not however the end of the delay in that a further eleven months elapsed as disclosure had not been complied with during which time the respondents remained in a position where they were not fully cognisant of the case being made against them. In addition, the District Judge took into account Directive 2012/13/EU on the Right to Information in Criminal Proceedings.

43. In light of the foregoing, I cannot see any basis for it being suggested that the District Court Judge did not carry out a balancing exercise. Indeed, in this case, the balancing exercise was very detailed and took into account the various factors that concerned both the applicant and the respondents.

44. As stated earlier in this judgment, the first named respondent and the second/third named respondents were separately represented. The first named respondent adopted the submissions of the second/third named respondents in opposing the application for judicial review. In addition, the first named respondent referred to s. 678 of the Companies Act 2014 which provides, in relation to a company, that no action or proceedings shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose where a winding up order has been made.

Conclusion

45. By reason of the foregoing, I am satisfied that the applicant has fallen well short of establishing any grounds upon which this Court could grant the reliefs sought. For the reasons stated earlier, the decision of District Judge John Brennan to strike out the charges against the respondents was within jurisdiction, followed a full hearing and was the subject of a ruling which was clear, considered and correctly applied the appropriate legal principles. I therefore dismiss the application.