THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J

Neutral Citation Number: [2019] IECA 320

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[Article 64 Transfer]

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT IN HIGH COURT PROCEEDINGS / RESPONDENT TO APPEAL

V

DISTRICT JUDGE ELIZABETH MCGRATH

RESPONDENT TO HIGH COURT PROCEEDINGS

AND

JOHN MATTHEWS

FIRST NOTICE PARTY IN THE HIGH COURT PROCEEDINGS / APPELLANT

AND

GERARD GEARTY

SECOND NOTICE PARTY TO THE HIGH COURT PROCEEDINGS

JUDGMENT of Mr. Justice Edwards delivered on the 20th day of December 2019

Introduction

1. Although the title to this judgment precisely identifies the role of each of the parties, it is proposed to refer to them hereafter simply as "the DPP", the "District Judge", "the appellant", "the second notice party" and when referring to the appellant and the second notice party together "the notice parties".

2. This is an appeal from the judgment of Hanna J. delivered on the 12th of October 2011, and against his related order of the 19th of December 2011, which order was perfected on the 12th of January 2012, in judicial review proceedings brought by the DPP seeking to quash an order for costs made by the District Judge in favour of the notice parties. The DPP was successful in the High Court in obtaining an Order of Certiorari quashing the said costs order, and the appellant now seeks to have this Court reverse that decision.

3. The High Court judge had gone on to award the appellant 50% of the costs of the judicial review proceedings in the High Court against the DPP, and there is also a cross-appeal on behalf of the DPP in respect of that costs order. A relevant contextual detail is that the appellant had applied unsuccessfully to the High Court (Hedigan J) in advance of the substantive hearing in the judicial review proceedings for a protective costs order to facilitate his adoption of the position of *legitimus contradictor*, in circumstances where the District Judge was the respondent and he was merely a notice party to the judicial review proceedings (albeit one with a significant interest).

Procedural History

4. The notice parties were prosecuted summarily at the suit of the DPP, each having been charged with assaulting the other. The background to the matter is that the appellant is a Wildlife Ranger with the National Parks and Wildlife Service. He had complained to Gardai that, whilst he was carrying out an investigation in the course of his duties at Cloonart, Co. Leitrim on the 28th of April 2008, he was beset and assaulted by the second notice party. The second notice party, in a counter allegation to Gardai, maintained that, on the contrary, he was the one who had been assaulted on the occasion in question.

5. Their cases were heard together in a joint trial which was part-heard in July 2009, and then adjourned to September 2009 for resumption and completion. However, the joint trial did not resume in September because both cases were withdrawn on the DPP's instruction. No reason for this instruction was offered to the District Judge, and she was understandably critical of the lateness of the decision, in circumstances where court time - which is a scarce resource, had been taken up unnecessarily and where two citizens had been put to trouble and expense and had had their good names impugned, albeit that they each retained their presumption of innocence, in a part-heard joint trial which would not then proceed to a conclusion. The appellant objected to DPP's request to withdraw the case against him, contending that he wished to "clear his name", but the District Judge nevertheless struck out the charges.

6. Both the notice parties then applied for their costs of having had to contest the lately abandoned proceedings up to the point of withdrawal, and on the 16th of September 2009 the District Judge awarded them their costs.

7. On the 1st of February 2010 the DPP successfully obtained leave to apply for judicial review with a view to having the said costs order quashed by Order of Certiorari. In substance the DPP's case was that the District Court had no statutory power to award costs against her in summary criminal proceedings. Accordingly, the District Judge exceeded her jurisdiction in making the order that she had purported to make, having regard to the applicable statutory framework. Suffice it to say that this view of the law is hotly contested by the appellant. The substantive judicial review hearing ultimately took place before Hanna J, resulting in the judgment and order now under appeal.

The statutory background to the issue in the case

8. There was no controversy in the judicial review proceedings as to any matter of fact. The decision in the case required the resolution of an issue of law, and more particularly an

issue of statutory interpretation. It is therefore desirable, before describing the arguments of both sides in any further detail, before summarising the judgment of the High Court, and indeed before setting out the grounds of appeal - to set out the relevant statutory provisions.

9. It is necessary to refer in the first instance to s.59 of the Dublin Police Act 1842 ("the Act of 1842"), from which the District Court derives a general power to award costs in criminal cases. Section 59 is in the following terms:

> *"It shall be lawful for any divisional justice who shall hear and determine any charge or complaint, whether or not a warrant or summons shall have been issued in consequence of such charge or complaint, to award such costs as to him shall seem meet to be paid to or by either of the parties to the said charge or complaint."*

10. The DPP acknowledges the jurisdiction conferred by s.59 of the Act of 1842 and further acknowledges that this is the parent provision on foot of which the current District Court enjoys a general power to award costs. To elaborate on the latter, it is not in controversy that the jurisdiction created by s.59 of the Act of 1842, and which at the time of its enactment applied only to divisional justices of the Dublin Metropolis, was transferred after the foundation of Saorstat Éireann to the then newly established District Court by s. 78 of the Courts of Justice Act 1924 (the Act of 1924) ; and subsequently to the current District Court, created by the Courts (Establishment and Constitution) Act 1961, by s. 33 of the Courts (Supplemental Provisions) Act 1961.

11. Since the establishment of a District Court shortly after the foundation of the State, rules of court have been made for that court on three occasions: i.e., in 1926, 1948 and in 1997.

12. District Court Rules were made by the Minister for Justice in July 1926. The rules were approved by resolutions of both Dáil Éireann and Seanad Éireann. Rule 37 (a) of those rules provided that a justice had power to award costs against *"any party to the said charge or complaint other than the Attorney General or a member of the Garda Síochána in his official capacity"*.

13. New District Court Rules replacing the 1926 rules were made in 1948. Rule 67 of those the 1948 rules provided as follows: –

> *"A justice who makes an order in any case of summary jurisdiction shall have power to order any party to the proceedings other than the Attorney General, or a member of the Garda Síochána acting in discharge of his duties as a police officer, to pay to the other party such costs and witnesses expenses as he shall think fit to award…"*

14. The latest iteration of the District Court Rules was promulgated in 1997. Order 36, rule 1 of those rules provides as follows: –

"Where the Court makes an order in any case of summary jurisdiction (including an order to 'strike out' for want of jurisdiction) it shall have power to order any party to the proceedings other than the Director of Public Prosecutions, or a member of the Garda Síochána acting in discharge of his or her duties as a police officer, to pay to the other party such costs and witnesses expenses as it shall think fit to award."

15. As Hanna J. points out (at pp.5-6) of his judgment, on each occasion on which new District Court Rules were promulgated, there has been a prohibition on an award of costs against the Attorney General or the DPP, and against gardaí acting in the course of their duty. The role of the Attorney General in summary proceedings has been largely replaced by the DPP since the enactment of the Prosecution of Offences Act 1974, under which the office of the DPP was established.

16. There are several additional pieces of the statutory jigsaw to which reference should be made. The first is s.91 of the Act of 1924, as amended by s. 72 of the Courts of Justice Act 1936, which provides:

"91.—The District Court Rules Committee with the concurrence of the Minister for Justice may at any time and from time to time after the passing and before or after the commencement of this Act make rules to be styled "District Court Rules" for carrying into effect this Part of this Act (except the hearing by the Circuit Court of appeals from the District Court and the hearing by the High Court of cases stated by the District Court), and may annul or alter such rules and make new rules. In particular rules may be made for all or any of the following matters, viz., for regulating the sittings and the vacations and the districts of the Justices and the places where proceedings are to be brought and the forms of process, summons, case stated, appeal or otherwise, and the conditions which a party who requires a case stated or an appellant must comply with in civil cases or in criminal cases or in licensing cases as the case may be and the practice and procedure of the District Court generally including questions of costs and the times for taking any step in the District Court, the entering-up of judgment and granting of summary judgment in appropriate cases and the use of the national language of Saorstát Eireann therein and the fixing and collection of fees and the adaptation or modification of any statute that may be necessary for any of the purposes aforesaid and all subsidiary matters."

17. Section 48 of the Courts (Supplemental Provisions) Act 1961 made provision for the application of enactments relating to existing courts and judges and officers thereof, and rules of court, to the courts established by the Courts (Establishment and Constitution) Act 1961, including the District Court.

18. The next provision to which reference should also be made is s.34 of the Courts (Supplemental Provisions) Act 1961, which provides:

"34.—The jurisdiction which is by virtue of this Act vested in or exercisable by the District Court shall be exercised as regards pleading, practice and procedure generally, including liability to costs, in the manner provided by rules of court made under section 91 of the Act of 1924, as applied by section 48 of this Act."

19. Finally, Order 38, of the District Court Rules, 1997 provides for *"Miscellaneous matters"*. Rule 1 thereof, under a sub heading *"Power of Court in cases of variance, defects, omissions, no offence disclosed or no appearance"*, contains four sub-rules. Sub-rule 1(4), which is under the sub subheading *"No Offence Disclosed/No Appearance"*, provides as follows:

> *"Where the Court is of opinion that the complaint before it discloses no offence at law, or if neither the prosecutor nor accused appears, it may if it thinks fit strike out the complaint with or without awarding costs."*

The arguments in the court below

20. At the hearing in the High Court, it was submitted on behalf of the DPP that the District Judge had had no jurisdiction to award costs, on the basis that Order 36, Rule 1 of the District Court Rules 1997 (SI No 93 of 1997) precluded the District Judge from awarding costs against the DPP, or a member of An Garda Síochána acting in discharge of his or her duties as a police officer.

21. Responding to this, it was submitted on behalf of the appellant that since s. 59 of the Dublin Police Act 1842 grants a general jurisdiction to the District Court to award costs, this general jurisdiction is not capable of being undermined by any rule contained in the District Court Rules, even if such a rule purported to do so. To bolster his point, the appellant argued that the DPP could not be regarded as having been exempted by the Rules on a blanket basis from being the subject of a costs award, because Order 38, rule 1(4) of the District Court Rules 1997 specifically provides for the awarding of costs against State parties in summary criminal proceedings where the court is of the opinion that the complaint before it discloses no offence at law, or if neither the prosecutor nor the accused has appeared.

22. The appellant also invoked the Supreme Court authorities of *The State (O'Flaherty) v O'Floinn* [1954] IR 295, *Thompson v Curry* [1970] IR 61 and *Rainey v Delap* [1988] IR 470 to demonstrate how the Supreme Court had repeatedly read s.91 of the Act of 1924 restrictively so as not to permit the making of rules that strayed beyond provision for practice and procedure or that extended into statutory amendment.

23. In rejoinder, the DPP acknowledged the District Court's general ability to award costs under the 1842 Act, but contended that the awarding of costs was deemed to be part of the practice and procedure of the District Court by s.91 of the Act of 1924, and that by virtue of that section the District Court Rules Committee in making District Court Rules regulating *"practice and procedure of the District Court generally, including questions as to costs"* had the power to adapt or modify statutory provisions as required for that purpose. It was argued that, notwithstanding the general statutory jurisdiction to award

costs, it has been part of the practice and procedure of the District Court since the foundation of the State, reflected in successive iterations of the District Court Rules, that costs should not be awarded against the DPP, or against her predecessor until 1974 as prosecuting authority, i.e. the Attorney General. Accordingly, the District Court Rules committee in promulgating Order 36, Rule 1 of the District Court Rules 1997 had lawfully modified the scope of general jurisdiction granted under the 1842 Act, thereby restricting the jurisdiction of the District Court to award costs to an accused in criminal proceedings. Furthermore, Order 38, rule 1(4) of the District Court Rules 1997 was not inconsistent with Order 36, Rule 1 because of the survival of the "common informer" route by means of which a prosecution may sometimes be initiated and pursued.

The Judgment of the High Court

24. In his judgment delivered on 7 October 2011, Hanna J, having set out and considered the relevant legislative provisions, and having reviewed jurisprudence in which Order 36 of the District Court Rules, 1997, and its antecedents, had received judicial consideration, concluded:

> *"In my view it is clear that the power to make rules of court is confined to issues of practice and procedure and does not extend to issues regarding substantive law. Section 91 of the act of 1924 explicitly includes the issue of costs as a type of practice and procedure which the Rules Committee has been empowered to modify or adapt as may be necessary. Order 36 Rule 1 of the District Court Rules 1997 does not extend the statutory power in any way, 'does not grant any rights or powers on a person or body which is not been given by statute', and does not make, repeal or amend any law. The rule merely modifies and adapts the power to award costs conferred on the District Court by the Act of 1842. In my opinion, the effect of the limitation in O 36, r. 1 is not of such a character such as would place it outside the modifications or adaptations envisaged by the legislature when they were drafting the Act of 1842"*

25. The High Court judge went on to hold, having referred to s.5 (2) of the Interpretation Act 2005, that:

> *"In my view it is clear from the wording of the District Court Rules 1997 that the plain intention of the Rules Committee was to exclude the applicant from costs orders. There is no reference in O. 38, r. 1 (4) excepting it from the remit of O. 36, r. 1, and there is no reason to believe that the former rule is an exception to the general principle enumerated in the latter. In any event, the former rule can have no application to the current case. The respondent made no finding relevant to the substance of the complaint. Further, both parties turned up.*

In my view, O. 36, r. 1 both on a current basis and historically, reflects the intent for (sic) the Rules Committee. Accordingly, I granted the reliefs sought by the applicant."

The Grounds of Appeal

26. The appellant, in his Notice of Appeal, contends that the High Court Judge erred in law as follows:

1. In holding that the District Judge had no jurisdiction to direct the DPP to pay the costs of the appellant in the criminal proceedings pending before her;

2. In holding that Order 36 rule 1 of the District Court Rules, 1997 (S. I. 93 of 1997) precluded the District Judge from directing the DPP pay the costs of the appellant in the criminal proceedings before her;

3. In holding that the jurisdiction of the District Court in matters of costs conferred by s. 59 of the Dublin Police Act 1842, could be and/or was properly restricted by Order 36 rule 1 of the said District Court Rules, so as to remove the District Court's power to direct the DPP to pay the costs of another party in criminal proceedings pending before it;

4. In that any purported restriction on the jurisdiction of the District Court in matters of costs conferred by s. 59 of the Dublin Police Act 1842 was a rule of 'practice and procedure' so as to bring it within the rulemaking authority conferred on the District Court Rules Committee by s. 91 of the Courts of Justice Act 1924;

5. In holding that any purported restriction on the jurisdiction of the District Court in matters of costs conferred by s. 59 of the Dublin police act 1842 was an 'adaptation or modification' of a statute contemplated by s. 91 of the Courts of Justice Act 1924, such that the said restriction was within rulemaking authority conferred on the District Court Rules Committee by s. 91 of the Courts of Justice Act 1924;

6. In so far as he held that the purported conferral by s. 91 of the Courts of Justice Act 1924 of the power to make regulations capable of restricting the exercise of a general power as to costs conferred by statute could be in compliance with Article 15. 2. 1o of the Constitution of Ireland or could otherwise be lawful.

Submissions on this Appeal

25. The submissions of the parties made in the court below, as reflected in the High Court's judgment, were largely re-iterated in arguendo before us, albeit that there was some amplification or greater elaboration of the points made at first instance. We are at the slight disadvantage of not having had sight of the written submissions that were filed before the High Court. However, we have received extensive written submissions in connection with the appeal, and we are grateful for the assistance that these provide.

Submissions of the Appellant

26. The appellant has submitted that Hanna J. "conflated the question of the extent of the rule-making power of the District Court Rules Committee having regard to the relevant parent statute, namely s. 91 of the Act of 1924, with the fundamental principle that the provisions of primary legislation take precedence over the provisions of secondary legislation".

27. As the principle alluded to is fundamental to the hierarchy of laws established under the Constitution, the appellant submits that it follows, having regard to s.59 of the Act of 1842, that District Court judges must be considered as having jurisdiction to make costs

orders against the DPP, and that this must take precedence over any purported limitation arising from the Rules.

28. In support of this argument we were referred to Luby v McMahon [2003] IR 133. There, the issue was whether the costs of an unsuccessful application brought by the liquidator of a company seeking to restrict the company's directors could be awarded to the applicant. The applicant relied on O. 99 r. 1 of the Rules of the Superior Courts which provided, *inter alia*, that the costs of all proceedings are in the discretion of the court. However, the respondents submitted that s.150(4B) of the Companies Act 1990 precluded the court from making such an order. S.150(4B) provided:

> "The court, in hearing an application for a declaration under subsection (1) from the Director, a liquidator or a receiver, may order that the directors against whom the declaration is made shall bear the costs of the application and any costs incurred by the applicant in investigating the matter.".

Finlay-Geoghegan J. held as a matter of principle that the provisions of an Act will always hold primacy over those of a statutory instrument:

> *"The provisions of Ord 99 r 1 are expressly subject to 'any other statues relating to costs. This accords with what would be the general position. The Rules of Court are a statutory instrument made pursuant to the powers conferred on the Superior Court Rules Committee … Such Rules would always be subject to a legislative provision in the normal constitutional hierarchy of laws. Accordingly, the specific provisions of s.150(4B) of the Act of 1990 will take precedence over the provisions of Ord 99 r 1 and may have the effect of expressly or implicitly limiting the powers and discretions conferred therein".*

29. The appellant therefore contends that the scope of rule-making powers granted to the Rules Committee under s. 91 of the 1924 Act is irrelevant; it cannot make a rule restricting the statutory jurisdiction of the District Court, conferred by the 1842 Act, to make costs orders, as distinct from prescribing the incidents of its exercise.

30. The appellant further submits that Hanna J. also erred in finding that, by virtue of the reference to *"the practice and procedure of the District Court generally including questions of costs"* in s. 91 of the Act of 1924, all issues of costs (including whether District Court judges can grant them and in what circumstances) are to be regarded as matters of practice and procedure, and thus fall within the scope of the rule-making power of the District Courts Rules Committee.

31. In that regard we were referred to the Supreme Court's decision in *The State (O'Flaherty) v Ó Floinn* [1954] IR 295, in which s.91 of the Act of 1924 was previously considered. At issue was the validity of Rule 55(4) of the District Court Rules 1948 which permitted a person charged with an Indictable Offence to be remanded for a period not exceeding fifteen days, notwithstanding that s.21 of the Indictable Offences (Ireland) Act 1849 ("the Act of 1849") expressly provided that the maximum period of remand should be eight

days. It was argued on behalf of the State that s. 21 of the Act of 1849 had been lawfully modified and adapted by the Rule 55(4), such modification or adaption being expressly authorised by s. 91 of the Act of 1924.

32. The Supreme Court rejected the State's argument. *Per* Kingsmill Moore J:

> *"It is a canon of construction that general words or expressions following specific words or expressions take their colour from the specific instances … in section 91 we find not so much specific words followed by general words as specific subjects followed by a general subject, but I consider that the principle is equally applicable. 'Practice and procedure generally' must be confined to 'things of the same kind' as the specific subjects enumerated, which are all matters strictly procedural in the narrowest sense".*

33. The appellant contends, based on *The State (O'Flaherty) v Ó Floinn* and subsequent jurisprudence, that a certain distinction must be made. Whilst there are certain aspects of the courts' powers to award costs that could fall within the scope of 'practice and procedure' (for example, the procedure to be followed in applying for costs; relevant matters in considering costs, etc), the power to make costs orders, or the direction in which they will fall, do not. The latter are concerned with the substantive jurisdiction of the District Court and the accompanying substantive right to apply for (or receive) such orders for costs. They are not amenable to prescription by the District Court Rules Committee as a matter of 'practice and procedure', and certainly not when that prescription additionally purports to remove a substantive power – and concomitant right – found in a pre-existing statute.

34. The appellant suggests further support for his position is to be found in the judgment of Charlton J. in the Supreme Court case of *Sweetman v Shell E&P Ireland Limited* [2016] 1 IR 742, in which he concluded that the award of costs in litigation was not a matter of procedure. That case concerned the potential for retrospective application of the Environment (Miscellaneous Provisions) Act 2011, which changed the ordinary rule as to costs in cases brought to protect the environment. The Supreme Court rejected the argument that they could be applied retrospectively on the basis that the rule against retrospective application of legislation did not apply to matters of procedure and that costs sat within that category. Charlton J.'s reasoning is quoted below:

> *"[14] Why rules of procedure (how cases are presented in court) or evidence (how cases are proved in court), are an exception to this rule is explained in Bennion, Statutory Interpretation (Butterworths, 1984), at p. 314, s. 131:-*
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> > *"Rules of legal procedure are taken to be intended to facilitate the proper settlement of civil or, as the case may be, criminal disputes. Changes in such rules are assumed to be for the better. They are also assumed to be neutral as between the parties, merely holding the ring. Accordingly the presumption against retrospective penalization does not apply to them, since they are*

supposed not to possess the penal character. Indeed if they have any substantial penal effect they cannot be merely procedural".

35. In *Sweetman*, the Supreme Court held that this was a description that could not be applied to the power to make costs orders. Charleton J stated (at para 18):

> *"It would be easy, but productive of a potentially facile error, to describe a change in the regime as to the award of costs as "procedural" when in reality the rights that were there would be taken away. The question of costs is a matter not just as to calling witnesses, or how many of them, or what evidence might be admitted, or how an action was to proceed through the system, but as to funding litigation. Liability as to costs is more than merely procedural. Indeed, in* Yew Bon Tew v. Kenderaan Bas Mara *[1983] 1 A.C. 553, at pp. 558 and 559, Lord Brightman cautioned against the potential dangers lurking in the description of costs as procedural merely."*

36. Regarding s. 91's allowance for *"modification and adaption"* of statute in the context of practice and procedure, the appellant submits that this cannot be interpreted as a mandate for amendment of a statute. To interpret the statute otherwise would render s. 91 unconstitutional as offending Article 15.2 of the Constitution.

37. Our attention was drawn to *Mulcreevy v Minister for the Environment* [2004] 1 IR 72, in which the constitutionality of a statutory instrument was called into question, in circumstances where it reduced the number of bodies who could consent to interference with a national monument from the number prescribed by statute. Keane CJ. observed:

> *"Article 15.2.1 of the Constitution provides that:-*
>
> > *'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.'*
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> *It is well established that the exclusive role assigned to the Oireachtas in the making of laws by this Article does not preclude the Oireachtas from empowering Ministers or other bodies to make regulations for the purposes of carrying into effect the principles and policies of the parent legislation (see* Cityview Press Ltd. V. An Chomhairle Oilúna *[1980] I.R. 381). But it is also clear that such delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Act purports to confer such a power, it will be invalid having regard to the provisions of the Constitution. Thus, in* Cooke v. Walsh *[1984] I.R. 710, O'Higgins C.J., delivering the judgment of this court, said at p. 729:-*
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> > *'… it is necessary to seek a meaning for … [the words in the statue] which absolve the National Parliament from any intention to delegate its exclusive power of making or changing the laws. Needless to say, if such a meaning is not possible then the invalidity of the subsection would be established.'"*

38. It appears that the power to make rules 'modifying and adapting' legislation has been subjected to narrow interpretation. In *The State (O'Flaherty) v Ó Floinn*, Kingsmill Moore J observed that this allowance was confined to what was necessary in terms of practice and procedure *"for, on the narrowest construction of 'practice and procedure' it would still have been necessary to adapt some of the procedural rules and forms contained in earlier statutes so as to make them applicable to the new institutions. Moreover, this power of modification and adaptation is expressly confined to 'the purposes aforesaid and subsidiary matters."*

39. In that case, Kingsmill Moore J found that the power to adapt or modify did not *""warrant the rule making authority in framing a rule which in the guise of an alteration in practice or procedure nevertheless operates to extend enormously a substantive power which the legislature was careful to confer in a restricted form"*. In his judgment in the same case Ó Dalaigh J contrasted the use of the expression *"adaptation or modification"* with the omission of the word "amendment", as a consequence of which he held that the increase in the maximum period of custody effected by the Rules was radical in character, and went beyond the type of modification or adaption permitted by s. 91 of the Act of 1924. Accordingly in purporting to make such a rule the District Court Rules Committee had acted *ultra vires* their powers.

40. Subsequently, in *Thompson v Curry* [1970] IR 61, Walsh J accepted the proposition that a rule making authority cannot amend a statute but is limited to adapting or modifying it as may be necessary. The Supreme Court in that case believed a rule dispensing with a statutory condition precedent constituted an amendment of a statute, as opposed to an adaptation or modification thereof, and was therefore ultra vires the powers of the District Court Rules Committee.

41. It was submitted that the Supreme Court also followed this approach in *Rainey v. Delap* [1988] IR 470, where it held that insofar as rules 29 and 30 of the District Court Rules 1948 purported to confer on a District Court Clerk the power of receiving a complaint and deciding whether or not to issue a summons on foot of it, which power had previously been confined by statute to a District Justice, it went far beyond the type of adaptation or modification of a statute authorised by section 91 of the Act of 1924 and that consequently the rules in question were ultra vires the powers of District Court Rules Committee.

42. While the DPP had argued before the High Court that it was significant that Order 36 rule 1 did not extend powers granted by statute, and this argument had found favour with the High Court judge, the appellant submits that it is no more permissible to purport to take away a power that has been granted by statute as in this case than to extend it; and that such a provision is no less a purported amendment of statute than one that results in the conferral of additional powers.

43. The appellant has also submitted that the High Court erred in his interpretation of Order 38 Rule 1(4). It was submitted that Order 38 rule 1(4) is patently to do with cases which have become redundant or futile and/or where the prosecuting party declines to

prosecute the action. The appellant contends that both the spirit and letter of the rule find their counterpart in the facts of this case, the initial bringing of the prosecution, the maintaining of the action for a day, several adjournments and then abandonment of the case without explanation.

Submissions of the Respondent

7. The DPP argues that, as stated by Keane CJ in the Mulcreavy case cited earlier, the exclusive role assigned to the Oireachtas in the making of laws by Article 15.2.1 of the Constitution does not preclude the Oireachtas from empowering Ministers or other bodies to make regulations for the purposes of carrying into effect the principles and policies of the parent legislation. In this instance the task of making relevant rules for the District Court has been delegated to the District Court Rules Committee. As with any secondary legislation, such rules can only be made within the statutory framework provided by parliament, i.e., in this instance by s.91 of the Act of 1924, as amended by s.72 of the Courts of Justice Act 1936, and as provided for in s.34 of the Courts (Supplemental Provisions) Act 1961.The latter provision is, it is said, particularly significant because it refers to "practice and procedure generally, including *liability* to costs", whereas s.91 of the Act of 1924 had referred, with perhaps less clarity, to "practice and procedure generally, including *questions* to costs" (emphasis added by the Court). In this instance the Oireachtas has provided for *"the adaptation or modification of any statute"* by the Rules Committee where necessary.

44. The DPP accepts that on the authorities the rule-making authority cannot amend a statute but may only adapt or modify it as may be necessary, but says that the Rule in controversy only represents an adaption or modification and that it does not amend s.59 of the Act of 1842. The DPP draws support for her view from the following passage in the judgment of Kingsmill Moore J in *The State (O'Flaherty) v Ó Floinn*:

> *""What is meant by the words, 'practice and procedure'? Broadly I would answer 'the manner in which, or the machinery whereby, effect is given to a substantive power which is either conferred on a Court by statute or inherent in its jurisdiction.' Such a definition may not remove all difficulties. A statute conferring a power on the Court may, at the same time, circumscribe the generality and extent of such power by imposing a limitation which is in form procedural. It can be said with force that a rule abolishing that limitation is a rule concerned with practice and procedure. Yes, but it is not only concerned with practice and procedure if it operates to enlarge the extent of the substantive power, and so it cannot be properly classed with the restrictive heading of a rule of practice and procedure."*

45. Great store is placed on the fact that the issue of costs is explicitly included as a type of practice and procedure which, it is said, the Oireachtas has empowered the Rules Committee to modify or adapt as may be necessary. The DPP submits, as in the court below, that the rule does not extend or expand the jurisdiction in any way. It does not confer a power on any person which it is not given by statute. On the DPP's interpretation, it merely authorises adaption and modification as required of the power conferred on the District Court by the Act of 1842 to award costs.

46. We have been referred to some additional jurisprudence by counsel for the DPP which it is contended supports her in that interpretation. The case of *Attorney General v Crawford* [1940] 1 I.R. 335 was concerned with Rule 37(a) of the District Court Rules 1926. The accused was prosecuted by the Attorney General for customs offences and acquitted. The District Court Judge was minded to award costs to the accused and stated a case on his jurisdiction to do so. A Divisional High Court held that there was no jurisdiction because of Rule 37(a) of the 1924 Rules. Maguire J. held as follows:

> *"I hold that the District Court Rules provide a complete and comprehensive code governing procedure and the incidence of costs in that Court, save where otherwise expressly provided by statute, and that under r. 37 (a) there is no power to award costs against the Attorney-General where proceedings in the nature of a prosecution by him fail, and are dismissed by the District Justice."*

47. We were also referred to *The State (Hempenstall) v Shannon and Reddin* [1936] 1 IR 326, a case in which the High Court considered the power to award costs under s.59 of the Dublin Police Act 1842. That case has involved proceedings before the District Court under the Married Women (Maintenance in case of Desertion) Act 1886. Sullivan P. considered the power to award costs and the power of the District Court Rules to regulate costs and observed that rules had been made exempting the Attorney General and Gardaí. He remarked:

> *"In exercise of the power so conferred rules were made regulating the practice and procedure of the District Court, and Rule 37 (a) reads:—'The Justice who shall hear and determine any charge or complaint, whether or not a warrant or summons shall have been issued in consequence of such charge or complaint, shall have power to order any party to the said charge or complaint other than the Attorney-General or a member of the Garda Síochána in his official capacity to pay to the other party such costs including the costs of any adjournment and any witnesses' expenses as to him shall seem meet.'*
>
> *I am therefore of opinion that the District Justice had jurisdiction to order that James Hempenstall should pay …the costs stated in the order… ."*

48. In a concurring judgment, Hanna J. concluded that the rule at issue was an intra vires articulation of the statutory power, remarking that Rule 37 of the District Court Rules *"has been properly and validly made under s. 91 of the Courts of Justice Act, 1924, which section expressly covers 'questions of costs' "*

49. We were also referred to *Dillane v Ireland* [1980] ILRM 167, where the plaintiff was prosecuted by a garda who was acting in the course of his duty. The prosecution was subsequently withdrawn. The plaintiff then brought plenary proceedings to attack the constitutionality of Rule 67 of the District Court Rules 1948 which prohibited the making of an order for costs against the Attorney General or a Garda acting in the course of his duty. The constitutional challenge was brought on the grounds that the rule at issue

offended the guarantee of equality before the law afforded by Article 40.1 of the Constitution and also on the grounds that it interfered with the plaintiff's property rights.

50. In the Supreme Court Henchy J. (with whom O'Higgins C.J., Griffin, Kenny and Parke JJ. agreed) in finding that the rule did not breach Article 40.1 of the Constitution, or the plaintiff's property rights, said the following with respect to the vires the District Court Rules Committee to promulgate the rule at issue:

> *"It seems to me to have been well within the law-making discretion allowed by Article 40.1 for the District Court Rules Committee to draw a distinction between, on the one hand, a common informer who is a Garda acting in discharge of his duties as a police officer, and on the other, a common informer who is either a mere member of the public or a Garda not acting in discharge of his duties as a police officer."*

51. Henchy J. continued:

> *"Whether the court supports or approves of that distinction is irrelevant: what matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principles upon which costs are to be awarded. The District Court Rules Committee might equally have vested a full discretion as to costs in the District Justice…But that is a different thing from saying that in this respect Rule 67 exceeded the power of discrimination given by Article 40.1 . For a variety of reasons — among them the desirability that members of the Garda Síochána should be encouraged to discharge their police duties assiduously by being given immunity from liability for costs or witnesses' expenses in the District Court — this discrimination could reasonably be thought a justifiable concomitant of the social functions of the members of the Garda Síochána when carrying out their duties as police officers."*

52. With respect to Order 38, Rule 1(4) the DPP makes the point that it is not necessarily inconsistent with Order 36 Rule 1, and that there is at most an ambiguity.

Discussion and Decision

53. It is convenient to start with the point relied upon by the appellant in relation to Order 38, Rule 1(4). I am satisfied that it is not correct to say that Order 38, Rule 1(4) is inconsistent, and incapable of reconciliation, with Order 36, Rule 1, and I believe the appellant's contention to the contrary to be erroneous.

54. I believe it to be erroneous because the possibility of summary criminal proceedings being commenced by someone other than the DPP or a member of An Garda Síochána still exists in Irish law. The concept of a "common informer" as prosecutor has been preserved with respect to summary proceedings, although it was abolished with respect to indictable proceedings by s. 9(2) of the Criminal Justice (Administration) Act 1924. However, even in the latter case a common informer remains competent to initiate and prosecute an

indictable offence up to the return for trial, at which point the DPP must either agree to take it over or the court will refuse informations. For many years, members of An Garda Síochána who brought summary prosecutions on behalf of the DPP did so as common informers. That situation was altered by the enactment of s.8 of the Garda Síochána Act 2005 which, inter alia, granted to gardai a statutory right to institute and conduct prosecutions in a court of summary jurisdiction, but only in the name of the DPP. However, a private prosecution is still capable of being commenced by a "common informer" who is not a Garda. It is true that since the enactment of s.4 A(3) and (4) of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999, such a prosecution may not proceed to summary disposal unless the DPP is prepared to consent to it, but that rule does not prevent a private prosecution from being commenced.

55. Manifestly, Order 36 Rule 1 could not apply to such proceedings but Order 38, Rule 1(4) potentially could. Accordingly, it seems to me these rules are complimentary and there is no inconsistency.

56. Be that as it may, it seems to me that the central or core issue for decision in this case is whether Order 36, Rule 1 purported to effect an amendment to s.59 of the Act of 1842, or whether, on the contrary, it was a mere adaptation or modification. If it amounts to the former then I consider, having regard to the terms of Article 15 of the Constitution, and on the authorities, that the making of the rule in question would have been ultra vires the rule-making power of the District Court Rules Committee. However, if it amounted to the latter, then it must be concluded that it was a lawful and valid rule made intra vires by that committee.

57. There are two separate prohibitions which, post *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381, delegated legislation must overcome in order to be lawful. The first concerns the exercise of a purportedly delegated power in the absence of sufficient principles and policies to guide the exercise of the power (the so-called principles and policies test). The appellant in this case has not sought to make the case that the power delegated to the District Rules by s.91 of the Act of 1924 fails the principles and policies test. The second prohibition concerns changing or amending primary legislation, where such changes are fundamental and go beyond permitted adaptions or modifications. The appellant's case is firmly based on the latter.

58. The issue of the distinction between an 'amendment' and a 'adaption or modification' of primary legislation is discussed extensively by Hogan G.W., Whyte, G.F., Kenny, D., & Walsh, R in the latest edition of that seminal work *Kelly: The Irish Constitution*, (2018) (5th ed) (Dublin: Bloomsbury Professional) from paras 4.2.33 to 4.2.51 inclusive.

59. It appears that there is no bright line distinction between the two, but that in principle there are certain fundamental matters that it is to be expected would be the subject of primary legislation, and these may not be delegated; whereas the power to legislate concerning subsidiary and non-fundamental matters, including matters of detail and procedure, may be lawfully delegated to an appropriate delegated law-maker who will

have power to adapt or modify primary legislation to the extent necessary. Sometimes, it will be clear on which side of the line a regulation or rule, comprising secondary legislation created by a delegated law-maker, falls. However, in other cases the decision as to which side of the line it falls on may be a finely balanced one.

60. The case made by the appellant, and with which I find myself in agreement, is that both the creation of a court's jurisdiction to address a particular type of justiciable controversy and, where it already exists, any restriction or curtailment of a court's jurisdiction to do so, is a matter of fundamental significance. Having regard to our tripartite system of government, and in particular the respective roles, under the Constitution, of the Oireachtas on the one hand as primary legislator, and of the Courts, on the other hand, which have been exclusively entrusted with the administration of justice, it cannot be right that a court's jurisdiction, in this case the jurisdiction granted by a statute, i.e., s.59 of the Act of 1842, to the District Court to award costs in a cause to any party, can be altered fundamentally by secondary legislation created and promulgated by a rule-maker other than the Oireachtas, purportedly on foot of a delegated power.

61. In my view the purported curtailment in Order 36 Rule 1 of the District Court Rules 1997 of the general jurisdiction to award costs created by s.59 of the Act of 1842, by effectively exempting the DPP and members of An Garda Síochána acting in the course of their duty, from having costs orders made against them, was *ultra vires* the delegated power granted to the District Court Rules Committee by s.91 of the Act of 1924 as adapted and amended. This was a measure of such far reaching import as to require that it be given effect to by primary legislation. It was no mere adaption or modification of the Act of 1842 of the type that is permissible. Its import was profound. It operated to restrict a hitherto unrestricted jurisdiction of the District Court, and to curtail the class of persons from whom a successful defendant in summary criminal proceedings could potentially recover costs. The effect of it was to significantly amend the Act of 1824 so as to reduce the scope of the jurisdiction created by s.59 of that Act. Such a profound change required primary legislation in my view.

62. In saying that, I do not for a moment gainsay that there may be excellent policy reasons why the DPP and members of An Garda Síochána acting in the course of their duty should be exempted from having costs orders made against them in summary criminal proceedings. However, I believe that such a policy can only lawfully be implemented by means of primary legislation, having regard to the existence of the general and unrestricted jurisdiction to award costs already provided for in s.59 of the Act of 1842. The Act of 1842 requires amendment, if it is desired to give effect to the type of policy being spoken of.

63. Arising from the views I have expressed I feel it necessary to specifically address several issues raised in the DPP's submissions. The first is the reliance placed by her on the words *"practice and procedure of the District Court generally, including questions of costs"* that appear in s.91 of the Act of 1924, and the words *"practice and procedure generally, including liability as to costs"*, that appear in s.34 of the Courts (Supplemental Provisions)

Act 1961. It has been argued on behalf of the DPP that because of these provisions any question as to costs, or as to liability for costs, is to be treated as a matter of practice and procedure, and not as a matter of substantive jurisdiction. In effect, it is argued, the Oireachtas has deemed questions of costs and issues as to liability for costs to be matters of practice and procedure. Her argument goes, as s.91 of the Act of 1924 expressly provides for the making of District Court Rules, *"for regulating … practice and procedure of the District Court generally, including questions of costs"*, and further authorizes *"the adaptation or modification of any statute that may be necessary for the purposes aforesaid and all subsidiary matters"*, Order 36 Rule 1 was therefore made *intra vires* and was perfectly lawful. However, I do not agree.

64. Notwithstanding the terms of the clauses highlighted from s.91 of the Act of 1924, and s.34 of the Courts (Supplemental Provisions) Act, 1961, these provisions ought to be given a constitutional interpretation if it is possible to do so. It is recognised that the Act of 1924 is a pre-1937 statute and enjoys no presumption of constitutionality. However, the Courts (Supplemental Provisions) Act does.

65. It could never have been intended by the drafters of the Constitution that the limits of the substantive jurisdiction of one of the courts of local and limited jurisdiction provided for in Article 34.3 of the Constitution, or any aspect thereof, should be determined by anybody other than the Oireachtas itself in primary legislation.

66. Moreover, the Oireachtas could not itself lawfully seek to circumvent that constitutional requirement by the expedient of legislatively deeming that which is both in law and in fact a matter of substantive jurisdiction to be nothing more than a matter of practice and procedure.

67. In my judgment the reference to *"practice and procedure of the District Court generally, including questions of costs"* that appears in s. 91 of the Act of 1924, and the words *"practice and procedure generally, including liability as to costs"* that appear in s.34 of the Courts (Supplemental Provisions) Act, 1961 may permissibly be construed, in order to give the legislation a constitutional interpretation, as referring to matters of practice and procedure relating to the exercise of the substantive jurisdiction of the District Court to award costs, and not as denying the existence of any such substantive jurisdiction.

68. In my judgment the High Court judge correctly recognised that *"the power to make rules of court is confined to issues of practice and procedure and does not extend to issues regarding substantive law"*. However, thereafter he immediately fell into error by holding that:

> *"Section 91 of the act of 1924 explicitly includes the issue of costs as a type of practice and procedure which the Rules Committee has been empowered to modify or adapt as may be necessary. Order 36 Rule 1 of the District Court Rules 1997 does not extend the statutory power in any way, 'does not grant any rights or powers on a person or body which is not been given by statute', and does not make, repeal or amend any law. The rule merely modifies and adapts the power to*

award costs conferred on the District Court by the Act of 1842. In my opinion, the effect of the limitation in O 36, r. 1 is not of such a character such as would place it outside the modifications or adaptations envisaged by the legislature when they were drafting the Act of 1842"

69. The power to award costs is a matter of substantive jurisdiction, and it is not a matter of practice and procedure, although rules of practice and procedure may regulate by what means that jurisdiction can be invoked and availed of. There has in the past been some conflation of the two, as is clear from the extensive review of the caselaw conducted by Charleton J in *Sweetman v Shell E&P Ireland Limited*. However, it is clear both as a matter of logic, and as a matter of law (now put beyond doubt by the Supreme Court in *Sweetman*), that liability to costs is more than merely procedural. It involves the exercise in the applicant's favour of a substantive jurisdiction. In the case of the District Court, since the enactment of the Constitution, only the Oireachtas may grant it such a jurisdiction and it must be done by means of primary legislation; and where, as in this case, that jurisdiction has already been granted to it by a statute (in this case s.59 of the Act of 1842) only the Oireachtas can remove it, or curtail or reduce the scope of it, again it must be done by means of primary legislation.

70. The other issue that I wish to address arising out of the submissions of the DPP is her reliance on several old authorities in which either s.91 of the Act of 1924, or provisions of previous iterations of the District Court Rules broadly analogous to Order 36 Rule 1 of the District Court Rules 1997 were considered. In my view all these cases are readily distinguishable from the circumstances of the present case, and they do not provide the support for the DPP's case that has been suggested.

71. In the case of *Attorney General v Crawford* [1940] 1 I.R. 335, which pre-dates the enactment of the Constitution, no issue was raised before the High Court concerning the *vires* of the delegated power in the light of Article 15.2.1o of the Constitution or having regard to the separation of powers. Accordingly, the finding of Maguire J, on which the DPP relies, to the effect that *"the District Court Rules provide a complete and comprehensive code governing procedure and the incidence of costs in that Court, save where otherwise expressly provided by statute, and that under r. 37 (a) there is no power to award costs against the Attorney-General where proceedings in the nature of a prosecution by him fail, and are dismissed by the District Justice*" is of no application in the present case which does raise those issues.

72. The same is true in the case of *The State (Hempenstall) v Shannon and Reddin* [1936] IR 326 which considered Rule 37(a) of the District Court Rules 1926 and whether it had implications for the power to award costs to the aggrieved party on the hearing of a criminal complaint under the Married Women (Maintenance in case of Desertion) Act 1886. The general jurisdiction to award costs arose, as it does in this case, under s. 59 of the Act of 1842. However, in this case the prosecutor was the wife who had been denied maintenance, prosecuting in her capacity as a common informer, and the defendant was her husband. The Court found that Rule 37(a), which was in broadly similar terms to

Order 36 Rule 1 of the District Court Rules 1997, had no application in the circumstances of the case. The issue concerned the correct interpretation of Rule 37(a), or more precisely its scope of application, rather than the vires of that rule. Moreover, that case, which was heard in 1936, pre-dated the 1937 Constitution and manifestly could not therefore have been concerned with how a rule made under a power delegated under s. 91 of the Act of 1924, for the purpose of regulating *"practice and procedure of the District Court generally, including questions of costs"*, the effect of which was to curtail the substantive jurisdiction created by s.59 of the Act of 1842, would sit with Article 15.2.1o of the 1937 Constitution or having regard to the separation of powers as provided for in the 1937 Constitution. In so far as Hanna J, in his concurring judgment, commented on vires his remarks were, in circumstances where the point had not been at issue, *obiter dictum*.

73. Considerable reliance was also placed by counsel on behalf of the DPP on *Dillane v Ireland* [1980] ILRM 167. Once again, that case is distinguishable on the basis that it was not concerned with the vires of a rule by the District Court Rules Committee having regard to Article 15.2.1o of the Constitution or having regard to the separation of powers. Rather it involved a challenge to the constitutionality of Rule 67 of the District Court Rules 1948 on the grounds that the rule at issue offended the guarantee of equality before the law afforded by Article 40.1 of the Constitution and also on the grounds that it interfered with the plaintiff's property rights. These were completely different issues to the issue in the present case, and therefore I regard *Dillane v Ireland* as having been of no assistance.

Conclusion

74. I have concluded for the reasons stated that the appeal should be allowed and that the orders made by the court below should be vacated, and I would leave over any issues as to costs in these proceedings pending further arguments in the light of the result.