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(subject to editorial corrections)*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

(APPEAL BY WAY OF CASE STATED)

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BETWEEN:

PUBLIC PROSECUTION SERVICE

Appellant;

and

SHANE DEVINE

Respondent.

_____

Before: Treacy LJ and Horner J

_____

HORNER J (delivering the judgment of the court)

A. INTRODUCTION

[1] This is an appeal by way of case stated of the decision of District Judge McKibbin in respect of three separate questions. They are:-

(i) Whether as a matter of law the Court was right to determine that the intelligence document containing information passed to the Driver and Vehicle Agency relevant to the investigation of the accused was capable of assisting the case for the accused or undermining the case for the prosecution? (The prosecution acknowledged that this decision was made by DJ Nixon on 9 May 2017 and accordingly it may be considered that leave to appeal against this decision requires time to be extended or abridged). ("The First Question")

(ii) Whether, as a matter of law, the Court of first instance, I was right in the circumstances in refusing to hear and grant the application made on behalf of the Public Prosecution Service ("PPS") to assert public interest immunity ("PII") of the intelligence document containing information passed to the Driver and Vehicle Agency ("DVA")? ("The Second Question")

(iii) Whether in all the circumstances, as a matter of law, the Court was correct to find that the case against the defendant/respondent should be stayed as an abuse of process? ("The Third Question")

B. BACKGROUND FACTS

[2] Shane Devine ("Devine") is the owner and operator of a Mercedes motor vehicle which operates out of the Republic of Ireland under the title 'Devine's Chauffeur Services' ("DCS"). The DVA was investigating a complaint in relation to the allegation that taxis which were not lawfully licensed were operating at the SSE Arena during a One Direction concert on 23 October 2015.

[3] Devine had collected a fare at the Culloden Hotel on the instructions of Aitken Promotions who were promoting the One Direction Concert. At approximately 6.00pm Devine collected a passenger in the grounds of the hotel while driving a black Mercedes BM Viano Registration Number 131 D7384. The passenger was taken from the Culloden Hotel to the SSE Arena and then to the performers' entrance.

[4] The observations were made by Ciaran McDaid and Gary Ritchie, both vehicle examiners from the DVA. Devine was spoken to after he had left the passenger off at the SSE Arena by Mr Ritchie. Under caution he stated:-

> "From my understanding, the vehicle was booked as a continuous service as directed and originated and terminated in the South of Ireland. As a result we had multiple pick up and drop offs within N. Ireland."

[5] He confirmed that he did not have an NI PSV licence, a Taxi Operator's Licence or a Taxi Driver's Licence ("the Tax Documents"). He claimed to have all the necessary accreditation in the Republic of Ireland including a PSV driver's licence.

[6] Subsequently, Devine was summonsed in respect of three different offences. These were:

(i) On 23rd day of October 2015 he drove a taxi when it was carrying passengers for hire or reward without being the holder of a taxi driver's licence in contravention of Section 22(1) of the Taxis Act (Northern Ireland) 2008.

(ii) On 23rd day of October 2015, he used a public service vehicle for hire without there being in force in respect of that vehicle a Public Service Vehicle Licence contrary to Article 60 of the Road Traffic (Northern Ireland) Order 1981.

(iii) On 23rd day of October 2015, he operated a taxi service without being the holder of an Operator's Licence, contrary to Section 1(3) of the Taxis Act (Northern Ireland) 2008.

[7] The evidence which the PPS rely on in prosecuting Devine was the evidence of the vehicle examiners, McDaid and Ritchie. There was also a statement provided to the court by Stephen Spratt, vehicle examiner, which sets out the arrangements relating to taxis registered in another European Member State.

[8] Following service of the summonses there was correspondence about disclosure of the PSV 1 examination report, progress and statistical return sheet as set out in the unused schedule (items 6-8). On 10 June 2016 Devine was given a contemporaneous notebook entry from item 6. No other items were disclosed because the PPS contended that the threshold for disclosure had not been met.

[9] A further request was made for disclosure by letter of 10 January 2017. This was also refused by PPS on the basis that it did not meet the test for disclosure. The matter was further considered after the defence statement was served on 25 January 2017 which pleaded that the defendant was not guilty of the offences with which he had been charged. The matters which he relied upon were:-

> "… 3. The defendant initiated a journey in the Republic of Ireland. As part of his journey he travelled over the border into the Odyssey (SSE Arena) in Belfast. This was all part of one continual journey.
>
> 4. The defendant confirms that he was spoken to by officials from the Department at Odyssey (SSE Arena) …
>
> … 7. The defendant asserts that the Taxis Act (Northern Ireland) 2008 is not applicable to him in the circumstances of this matter.
>
> 8. The defendant takes issues with the compliance of the 2008 Act vis-à-vis the Treaty Framework of the European Union ("TFEU") …".

[10] Issue was taken with the account provided by the complainant in every respect because it was said that it did not reflect what had happened.

[11] There was also a request for further documents by way of secondary disclosure on 10 January 2017. These were:

(1) Full details of the complaint referred to by Gary Ritchie and Ciaran McDaid. In particular:-

(a) What was the complaint?

(b) Who made the complaint?

(c) To whom was the complaint made?

(d) When was the complaint made?

(e) What actions arose immediately following the complaint?

(f) Was such a complaint previously made?

(2) Details of any command and control entries of any communication with the PSNI on 23 October 2015.

(3) Confirmation of any similar prosecutions within Northern Ireland details thereof.

(4) Items 6, 7 and 8 from the Disclosure Schedule, namely the PSV 1 examination report serial number 06094, progress report and statistical return sheet.

[12] The Defence Statement of 25 January 2017 included the following:

> "The Defendant challenges the evidence of all prosecution witnesses and in particular the reliability of same as set out in the tendered statements in this case. All material which discloses any information that may have been communicated by those witnesses at any time relevant to this case should therefore be disclosed to the defence. Any collateral information relevant to the credit of any prosecution witness in this case should be disclosed to the Defence. Any information indicating a version of events inconsistent with the Defendant's alleged guilt should be disclosed to the Defence." [sic]

[13] On 13 February 2017 a Section 8 application under the Criminal Prosecution and Investigations Act 1996 ("the 1996 Act") was served by Devine. Included within the application was a request by Devine for all matters previously requested in the Defence Statement (at paragraphs 1-4) together with at paragraph 5 the following:

> "Full details of:
>
> (a) Surveillance and/or monitoring of the accused on 23/10/15.

(b) Any surveillance and/or monitoring of the accused prior to this date.

(c) The authorisation in place permitting same.

(d) Confirmation if any commercial (or other) relationship exists in any context between the DVA and/or PPS and the person/organisation which initiated the **complaint**." [sic]

[14] The case which was made for disclosure at the application before DJ Nixon was that "department officials were essentially watching Mr Devine on the night in question following what they say was a **complaint**. No details of this complaint or details as to how department official [sic] were lying in wait for Mr Devine have ever been produced". During the course of the hearing DJ Nixon asked the PPS counsel, to provide him with materials in the prosecution possession which Devine sought but which the Crown asserted did not meet the test for disclosure. The PPS had not sought a judicial ruling and this was not a case it is asserted by the PPS in which whether or not the documents sought were "a truly borderline case": see *R v H* [2004] 2 AC 134 at para [35].

[15] On 9 May 2017 DJ Nixon ruled that the document, together with items 6-8 of the unused schedule fell to be disclosed but apparently did not give any reasons for his decision.

[16] At that stage no application had been made pursuant to Section 8(5) of the 1996 Act in respect of the sensitive material ordered to be disclosed on 9 May 2017. Counsel for the PPS considered the position in the wake of the hearing. Items 6-8 of the unused material (not deemed sensitive) were disclosed to Devine on 19 May 2017. Also included within the correspondence was an edited version of the sensitive material. This material supplied to Devine was in line with the guidance provided by the Court of Appeal in *R v H*. The PPS claims that in the absence of any clear rationale from DJ Nixon as to the relevant nature of the material ordered to be disclosed, it was not clear whether the redacted form of the document would be sufficient.

[17] Absent any agreement with Devine on the edited material being sufficient, an application was made to the court pursuant to Section 8(5) of the 1996 Act on 6 June 2017. The important public interest was identified as required within the application. DJ Nixon without any application being made by either side recused himself from hearing the application. Apparently no explanation was provided by him for his action.

[18] The matter then came on before DJ McKibbin who described the application pursuant to Section 8(5) as being akin to a "second bite of the cherry". The PPS contend this was the first time when the issue of a public interest immunity ("PII ")

application pursuant to Section 8(5) had been put forward. However, DJ McKibbin felt that the appropriate way forward was to bring a disclosure application pursuant to Article 158A of the Magistrates' Courts (NI) Order 1981. He refused to hear a PPS application pursuant to Section 8(5) as he regarded the PPS's application which was not pursued before DJ Nixon as being "an abuse of process". Given the PPS's concerns that the case was about to be stayed as an abuse of process and that the PPS needed to be in a position to invite the court to state a case, the PPS set out its position in full and specifically made the case that no application had been made pursuant to Section 8(5) of the 1996 Act. In order to prevent a stay, the court was invited again to consider the application under Section 8(5).

[19] At the hearing on 13 December 2017 having considered the response of the PPS, DJ McKibbin indicated it had not been his intention to suggest he was minded to stay the proceedings and therefore he indicated there was no need to state the case. However, DJ McKibbin having considered the PPS's position in respect of Section 8(5) of the 1996 Act subsequently refused to entertain a PII application. The court having refused to hear the application stayed the case as an abuse of process on 31 January 2018. In the opinion of DJ McKibbin, the application pursuant to Section 8(5) of the 1996 Order amounted to "harassment" of the court. The learned judge, taking into account the amount of time which had passed since commencement of proceedings, ruled that the proceedings should be stayed.

[20] On 26 April 2018 the District Judge stated the following questions for consideration of the Court of Appeal by way of case stated. They are:

(a) Question 1 as previously set out at paragraph 1 above.

(b) Question 2 as previously set out at paragraph 1 above.

(c) Question 3 as previously set out at paragraph 1 above.

C. DISCUSSION

Question 1

[21] There is no right of appeal from the District Judge's Court except pursuant to statute. Only a defendant can appeal to the County Court: see Schedule 5 paragraph 9 of the Magistrates' Court (NI) Order 1981 ("the Order"). However, either party can appeal on a point of law to the Court of Appeal.

[22] Section 146 provides:

> "*Cases stated by Magistrates' Courts*
>
> 146(1) Any party to a summary proceeding dissatisfied with any decision of the court upon any

> point of law involved in the determination of the proceeding or of any issue as to its jurisdiction may apply to the court to state a case setting forth the relevant facts and the grounds of such determination for the opinion of the Court of Appeal.
>
> (2) An application under paragraph (1) shall be made in writing by delivering it to the clerk of petty sessions within fourteen days commencing with the day on which the decision of the magistrates' court was given and a copy shall be served on the other party within the same period."

[23] Where the Magistrates' Court refuses to state a case then Article 146(7) of the Order applies. It gives the power to apply for a direction that the case be stated:

> "(7) Where the magistrates' court refuses or fails to state a case under paragraph (6), the applicant may apply to a Judge of the Court of Appeal for an order directing the magistrates' court to state a case within the time limited by the order and where the Judge of the Court of Appeal makes such order the magistrates' court shall state the case upon the applicant entering into any recognizance required by Article 149."

[24] Where the magistrate has stated the case, Article 146(9) deals with the requirements for its transmission to the Court of Appeal and the respondent. It states:

> "(9) Within fourteen days from the date on which the clerk of petty sessions dispatches the case stated to the applicant (such date to be stamped by the clerk of petty sessions on the front of the case stated), the applicant shall transmit the case stated to the Court of Appeal and serve on the other party a copy of the case stated with the date of transmission endorsed on it."

[25] There was some argument between the PPS and Devine about the effect of Article 146 of the Order. The PPS maintain that time should not run until the case had been concluded before the District Judge. The respondent argued on the other hand that the application was out of time as it was not made in writing within 14 days of DJ Nixon delivering his decision. It should therefore be struck out on that ground, unless time to appeal was extended by this Court.

[26] Article 146 of the Order (or its earlier equivalent) has been subject to detailed examination by this Court of Appeal on four previous occasions. In *Dolan v O'Hara* [1975] NI 125 an application for a case stated was made pursuant to an identical provision to Article 146(2) of the 1981 Order. The case was despatched to the appellant but was not transmitted to the Court of Appeal as required by the statutory provision set out in Article 146(9). The court held that the requirement was mandatory as to time. Lowry LCJ giving the judgment of the Court of Appeal said:

> "(1) A time limit is likely to be imperative where no power to extend time is given and where no provision is made for what is to happen if the time limit is exceeded;
>
> (2) Requirements in statutes which give jurisdiction are usual imperative;
>
> (3) Where the act is to be done by a third party for the benefit of a person who will be damnified by non-compliance the requirement is more likely to be directory;
>
> (4) Impossibility may excuse non-compliance even where the requirement is imperative."

[27] In the *Pigs Marketing Board (NI) v Redmond* [1978] NI 73 the solicitors failed to endorse the date of transmission on a copy sent to the town agents of the respondent's solicitor. The relevant statutory provision was identical to Article 146(9) of the 1981 Order as it required that date of transmission had to be endorsed by the appellant on the copy which was sent to the other party. It was held that this requirement was mandatory. Lowry LCJ stated:

> "… all the requirements of sub-section (8) are imperative and must be observed if the Court of Appeal is to acquire the statutory jurisdiction to hear and determine a case stated. Examples abound of seemingly strict decisions to the effect that, where a statute creates a jurisdiction, full and literal compliance by the party wishing to resort to the jurisdiction is required. In sub-section (8) it appears both practically and grammatically obvious that the two time limits are imperative (although the second is of less importance that the first), and I consider they would need a strained interpretation in favour of the appellant to switch from an imperative to a directory construction in relation to a further requirement

> annexed to the second requirement in the sub-section."

[28] In *Foyle, Carlingford and Irish Lights Commission v McGillion* [2002] NI 86 the Court of Appeal had to consider Article 146 again. In this case the magistrate stated a case and it was transmitted to the Court of Appeal within the statutory period but was not served within that period on the respondent. Carswell LCJ giving judgment considered the decisions in *Dolan* and the *Pigs Marketing Board* at pages 90-91:

> "In *Dolan v O'Hara* and *Pigs Marketing Board (Northern Ireland) v Redmond* the provision construed was Section 146(8) of the Magistrates' Court (NI) 1964 which in all material respects is identical to Article 146(9) of the 1981 Order. The decision in each case was based squarely on the ground that all requirements of Section 146(8) were imperative and had to be observed if the Court of Appeal was to acquire the statutory jurisdiction to hear and determine a case stated: see the judgment of Lowry LCJ in the *Pigs Marketing Board* case [1978] NI 73 at 79. These decisions are binding upon us and we are obliged by the doctrine of precedent to follow them. There is accordingly no room for reconsideration of the conclusion reached in those cases on the ground that the modern approach to construction of such provisions tends to be more flexible, as argued by Mr McCann in reliance on more recent English cases and that persuasive authority to the contrary may be found in *Hughes (Inspector of Taxes v Viner)* [1985] 3 All ER 40."

[29] However, the Court of Appeal had also to consider the further argument that the failure to serve a copy of the case on the other party where no prejudice had accrued would constitute a violation of the appellant's rights to a fair trial guaranteed by Article 6 of the European Convention on Human Rights ("ECHR"). The court found that, in the particular circumstances of the case, the statutory provision, if applied strictly, would have a disproportionate effect on the right of appeal enjoyed by the applicant. It was therefore decided that it should be interpreted in a way that was compatible with the requirements of Article 6. Carswell LCJ said:

> "The requirement contained in Article 146(9) could not be said to impair the very essence of the right to appeal. The case stated is to be transmitted to the Court of Appeal within 14 days of being dispatched by the clerk of petty sessions to the applicant. Within

> the same time he is to serve a copy on the other party. Its clear object is to prevent possible delays in the process of appealing by way of case stated. That is in our opinion a legitimate aim. We do not find it possible, however, to accept that there is a reasonable relationship of proportionality when the applicant is altogether barred from presenting his appeal because he fails for a period to serve a copy of the case on the other party, even though no prejudice has accrued to that party. We consider that this would constitute a breach of article 6(1) of the Convention. It is incumbent upon us by virtue of section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way that is compatible with the Convention rights. This can be done by construing Article 146(9) as directory rather than mandatory, contrary to the previous case-law, whose binding authority is overridden by the 1998 Act."

[30] In *Wallace v Quinn* [2004] NI 164 the solicitor for the appellant failed to serve a copy of the draft case stated on the respondent. The issue of whether there had been compliance with the time requirement for service of the documents in appeals by way of case stated was argued by way of preliminary issue. Carswell LCJ giving judgment at paragraph [13] said:

> "Where an applicant for a case stated has completely failed to serve the requisition, with the consequence that the respondent is unaware until later that a case stated has been sought and prepared and has had no opportunity to make representations on its terms, we find it very difficult to suppose that this can be regarded as substantial compliance, and we consider that it was the legislative intention that almost, if not completely, invariably in such cases the appeal will be barred. This is what occurred in the present case and it was only fortuitous that the respondent even discovered that the appeal was to be listed for hearing. In these circumstances we must conclude that the appellant cannot be regarded on any footing as having complied with Article 146, with the consequence that the time requirement should not be waived and the appeal should be dismissed. We do not consider that such a result would involve any breach of Article 6(1) of the Convention."(emphasis added)

It was accepted in that case (as in the present case) that the PPS as a public body had no Convention rights and therefore there was no basis on which Section 3 of the Human Rights Act could be used to require the court to follow the line of reasoning set out in *Foyle* and *Wallace*.

These authorities were considered by the Court of Appeal in *Director of Public Prosecutions v Stephen Harris* [2007] NICA 5 where the Court of Appeal concluded that because no Convention right arose, there was no basis on which it could refuse to follow *Dolan* ***and*** *The Pigs Marketing Board*.

[31] There was some argument before us between the PPS and Devine about the effect of Section 146(2) of the Order. The PPS maintain that time should not run until the whole case has been concluded and therefore there is no need to seek an extension. Devine argued that time began to run from when the decision was made, that is the decision of DJ Nixon and therefore this appeal is out of time.

[32] There is some dispute between the text book writers as to how Section 146 should be approached. In Criminal Practice and Procedure in the Magistrates' Court of Northern Ireland the author, J F O'Neill, comments at 5.54 that an application to state a case:

> "… can only be made after the proceedings have been determined by way of a conviction, acquittal or passing of sentence."

[33] However, Valentine on Criminal Procedure (Northern Ireland) (2nd Edition) at 17.67 states:

> "Compliance by the appellant with every duty cast on him by the Magistrates' Courts Order is mandatory, non-compliance is fatal to the jurisdiction of the Court of Appeal save insofar as it is impossible to comply. Failure to comply was held to deprive the Court of jurisdiction … The strict Northern Ireland decisions are still binding on the Court here, subject to the effect of the Human Rights Act."

[34] The authority which J F O'Neill relies upon is an English case of *Essen v DPP* [2005] EWHC 1077 which deals with Section 111 of the Magistrates' Court Act 1980. This provision is similar, but also materially different from the Article 146 of the 1981 Order. However, it is not necessary for us to reach any decision on this issue given our conclusions on Questions 2 and 3. We therefore decline to answer Question 1 although we can see the advantages of a construction of Section 146 that would preclude satellite litigation which is but one aspect of the general public interest principle: see *Sean McVeigh's Application* [2014] NIQB 57 at para [10] and also *Montgomery v Loney* [1959] NI 71.

Question 2

[35] It seems that in refusing to hear an application under Section 8(5) of the Criminal Prosecution and Investigation Act 1996 ("the 1996 Act") the District Judge failed to make a distinction between an application under the 1996 Act and an application for disclosure. The PPS had resisted disclosure of various documents and categories of documents having considered the defence statement on the basis that they did not meet the test for disclosure pursuant to Section 3(1) of the 1996 Act because "none of the materials sought might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".

[36] Section 8(5) of the 1996 Act provides:

> "Materials must not be disclosed under this Section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly."

[37] As we have already noted, DJ Nixon recused himself without providing an explanation for doing so after he had made the disclosure order but without considering any PII application under Section 8(5). When the hearing came on before DJ McKibbin he described the PPS as seeking "a second bite of the cherry". He certainly cannot have been pleased to inherit a case in which, on the face of it, there was no obviously compelling reason why the original district judge could not have made a ruling in respect of the PII issue. However, the PPS decided not to challenge the District Judge's decision to recuse himself and therefore it fell to DJ McKibbin to deal with the application. This was not a disclosure application but an application under Section 8(5), a very different application indeed and one in which there had been no decision. There is no doubt that the District Judge fell into error in regarding the application as a reopening of the preliminary point that had already been decided by DJ Nixon because DJ Nixon had never been asked to, nor never, ruled upon the issue of PII.

[39] Further, there is authority for the proposition that a court should only become involved in PII applications after the prosecution has met its obligations to determine whether or not the material in dispute satisfies the disclosure test: see para [35] or *R v H*. There was no legal basis for the refusal of DJ McKibbin to hear the Section 8(5) application.

[40] In these circumstances, this was a situation which Lord Bingham had referred to in *R v H* at para [18]. He said:

> "18. Circumstances may arise in which material held by the prosecution and tending to undermine the

> prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest. The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations. In such circumstances some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial."

[41] It may be that the PPS's claim for PII in respect of the document relates to the source of the complaint made against Devine. This would not be a surprise. In *R v Rankine* [1986] 2 All ER 566 at 570(a) the Court of Appeal in England said:

> "In our judgment the reasons which give rise to the rule that an informer is not to be identified apply with equal force to the identification of the owner and occupier of premises used for surveillance and to the identification of the premises themselves. The cases are indistinguishable, and the same rules must apply to each. That being so the only question could be whether the judge in the instant case was correct in not exercising the duty exceptionally to admit in order to avoid a miscarriage of justice."

[42] Accordingly, DJ McKibbin should have determined the Section 8(5) application and in doing so considered, inter alia, whether the failure to disclose the identity of any informer or witness who had supplied information was necessary to avoid a miscarriage of justice. On the facts as presently known to us it is difficult to see how the identity of the person who supplied information about Devine's taxi driving could lead to a miscarriage of justice. Either Devine had the necessary Tax Documents (or exemptions) permitting him to drive a taxi in Northern Ireland or he did not.

[43] In the circumstances, we do not consider that the court was correct when it refused to hear the application made on behalf of the PPS under Section 8(5) of the 1996 Act.

Question 3

[44] It is clear that this prosecution had been listed many times before different district judges. DJ McKibbin complained in the case stated correspondence on 26 April 2018 that he felt the approach of the PPS in this particular case was "harassing both the court and the Defendant/Respondent".

[45] These cases are prosecuted summarily and should be heard as soon as reasonably possible. There has undoubtedly been considerable delay in this case.

[46] In *R v Derby Crown Court, ex p. Brooks*, 80 Cr App R 164 Lord Roger Ormrod CJ at [168] stated:

> "The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either:
>
> (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or
>
> (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: …
>
> The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution."

[47] In this case we are not persuaded by the evidence or submissions that the delay to date is such that it prejudices a fair trial or that it produces any genuine prejudice or unfairness to Devine. The issue of whether or not Devine had the Tax Documents (or necessary exemptions) is a straightforward one. Of course, the District Judge dealing with this case can take the delay into account in determining what is a fair penalty, should Devine be convicted of any of the offences of which he is charged.

Conclusions

[48] For the reasons we have stated we do not reach any final conclusion on the first question. We answer the second and third questions in the negative. We will hear the parties on what is the appropriate relief we should grant and on the issue of costs.