THE HIGH COURT

[2021] IEHC 156

[Record No. 2020/304 JR]

BETWEEN

WILLIAM KIELY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms.Justice Miriam O'Regan delivered on the 5th day of March, 2021.

Issues

1. The applicant herein is seeking:

    a. an order prohibiting his further prosecution on foot of charges within a Book of Evidence served on him on 5 February 2020;

    b. a declaration that his prosecution is in breach of his right to:

        i. a fair trial with due expedition under Article 38.1 of the Constitution and Article 6 of the European Convention on Human Rights;
        ii. private and family life contrary to Article 8 of the European Convention on Human Rights.

2. The statement to ground the application of 30 April 2020 identifies nine headings of claim, however, the essence of the argument made by the applicant was to the effect that there was prosecutorial delay from the date when the first complaint was made, to the date when he was served with the Book of Evidence, which amounts to blameworthy prosecutorial delay. Added to this is the assertion that he has suffered general prejudice in that he has got on with his life, therefore it would be unfair now to continue with the prosecution against him. This claim does not assert a deficiency of evidence at trial, but rather prosecutorial/State delay coupled with prejudice, therefore it is stated that it is not within the remit of matters which are considered best raised before the trial judge. It is said the High Court therefore is the appropriate forum to determine the accused's issues.

Background

3. The alleged offences are that of theft which allegedly occurred between 10 November 2008 and 15 February 2013. The amount involved is in dispute between the parties but is in or about €1 million. There are thirteen complainants involved. The alleged offence is to the effect that monies from the thirteen complainants by themselves or through their agents, were furnished to the accused, then a financial adviser, for the purposes of investment in the United States property market which investment was never actually made, nor were the monies repaid.

4. It is alleged that the accused had indicated that the monies would be repaid to the investors by 30 June 2011, however this did not occur and as a consequence Mr. Terry Devitt, who acted for eight of the within complainants, forwarded a complaint to An Garda Síochána on 15 August 2011. The accused was first interviewed in April 2017 and was ultimately charged on 31 July 2019, however, he was not returned for trial until 5

February 2020 when the Book of Evidence was served. The accused secured leave to maintain the within application by order of 1 May 2020.

The within proceedings

5. In the statement to ground the claim the accused set out the various charges against him and then went on to identify the various dates upon which statements were taken from the complainants. The statement of Sergeant Stephen Nyland who was assigned to the investigation in February 2014 is quoted extensively, wherein he identifies the steps he had taken during the currency of the investigation. Sergeant Nyland's involvement ceased on 28 August 2017, and subsequently on 8 September 2017 Detective Garda Ivor Scully was assigned to the investigation. The accused had been interviewed by the gardaí in April and May 2017, and viewed certain documentation with his solicitor in November 2017. He was interviewed again on 29 March 2018.

6. The statement identifies large periods of delay in the investigation and prosecution of the alleged offences which are said to be unexplained, including delay between the date of first interview and ultimate charging. The statement identifies seven to eight years of delay between the making of the first complaint, and the charging of the applicant, and suggests that if the trial does not take place until late 2022 or 2023 there will be up to 14 or 15 years from the date of the earliest alleged offence, and the date of trial.

7. The accused asserts that the Director of Public Prosecutions and An Garda Síochána are guilty of inordinate, culpable, and utterly unjustified delay in this matter, resulting in significant prejudice to the accused. It is also suggested that the accused had been clearly prejudiced by reason of the delay. Under a separate heading it is suggested that there is a real and serious risk that the trial of the accused will be unfair. It is argued that the delay herein has breached the accused's constitutional right to fair procedures, and breached his right to a fair trial with due expedition.

8. In May 2016 the applicant secured employment and moved to his current address. He is currently the director of corporate finance within a limited liability company and he visits his parents once or twice per month. The foregoing comprises the full detail of the accused's personal circumstances identified in the statement. The statement records that the accused intends to contest the charges.

9. In the accused's grounding affidavit of 30 April 2020 he confines himself to stating that he has read the statement of grounds, and so much of same as relates to his own acts and deeds is true, and otherwise he believes same to be true.

10. There is also an affidavit of Mr. Eddie O'Connor of 30 April 2020, being the solicitor on behalf of the accused, and he too states that facts set out in the statement of grounds are true to the best of his knowledge and belief, and for completeness he exhibited the Book of Evidence.

11. The statement of opposition is dated 5 October 2020 and complains that prohibition is a remedy that lies only in exceptional circumstances. It is stated that the applicant has not

made out any case, and has made bare assertions only, without evidence. It denies that the applicant has engaged with the facts, and it further denies that there is blameworthy prosecutorial delay. The applicant's right to a trial with expedition is said not to have been breached and it is stated that because of the seriousness of the offences, and the complexity of the investigation, there are no unexplained periods of delay.

12. The statement of opposition is grounded on two affidavits respectively dated 5 October 2020.

13. In the affidavit of Detective Inspector Patrick Linehan it is stated that the unit to which the within complaints were assigned was already involved in excess of thirty investigations. He states that the reason for the passage of time in the early stages of the matter was owing to a limited amount of resources, and the prioritisation of cases. However, it is suggested that the investigation into the accused received attention on an ongoing basis and was continually monitored, although progress in the case in 2012 and 2013 was hindered owing to the demands placed on the unit.

14. In the affidavit of Detective Garda Scully the chronology of the investigation is set out including securing documentation from lending institutions within this jurisdiction, and making mutual assistance requests of the United States and the United Kingdom. In his conclusion at para. 46 Detective Garda Scully says that the investigation was conducted expeditiously and any lapse of time was by reason of the seriousness of the offence and the complexity of the investigation, together with the need to consider large volumes of financial documents, to obtain court orders, and the need to advance the investigation to a significant degree before interviewing the accused. He highlights that the charges relate to the theft of a significant sum of money from people in respect of whom the accused was in a position of trust and it is essential that such activity is prevented.

Progress of the investigation

15. Although an investigation was launched following the statement of Mr. Devitt, according to the affidavit of Detective Inspector Linehan it was assigned to the Garda Bureau of Fraud Investigation (now The Garda National Economic Crime Bureau) in late 2011, but because of an existing investigative workload (some 34 serious complex fraud investigations were in progress), the progress of this case in 2012 and 2013 was hindered owing to the demands placed on the unit which had limited resources.

16. In 2011 a total of two statements were taken in respect of the investigation, with a further seven statements being taken in 2012. Four statements were taken from investors in 2015, one statement in 2017, and two further statements from investors in January 2018. In 2016 two statements were taken from other witnesses.

17. Commencing on 11 July 2014 various orders were obtained by An Garda Síochána pursuant to s.52 of the Criminal Justice (Theft and Fraud) Offences Act 2001 (s.52 orders) on Anglo Irish Bank. A further such order was served on Anglo on 3 December 2014. A similar order was served on Allied Irish Banks on 17 December 2014, and again on 29 January 2016. Such an order was served on Bank of Ireland on 29 January 2016.

18. A mutual assistance request was made of the United States in June 2015 and again in February 2016. These requests were responded to in March and December 2016. Statements of Mr. Patterson and Mr. Miller, they being two partners of the accused on the United States side of the business were also taken in 2016. In February 2016 a mutual assistance request was made of the United Kingdom with apparently no response.

19. On 23 March 2016 statements from Allied Irish Banks were secured. On 13 April 2017 An Garda Síochána met with the accused who was informed of the allegations and was given time to seek advice on the matter.

20. On 13 May 2017 An Garda Síochána met with the accused and his solicitor, with the accused exercising his right not to answer questions. The interview was terminated on the basis that a list of questions would be prepared. In June 2017 this list was forwarded. On 18 November 2017 the accused attended the garda station to look at exhibits following the invitation to do so in June 2017. On 29 March 2018 the accused was interviewed by An Garda Síochána.

21. According to the affidavit of Detective Garda Scully at para. 41, the investigation file was completed in or about 26 May 2019, with a direction issuing from the Director of Public Prosecutions on 30 June 2019. The applicant was ultimately arrested and brought before the District Court on 31 July 2019. The case remained in the District Court and was adjourned from time to time until February 2020 when the Book of Evidence was served, and the accused was returned for trial. Leave in the within matter was sought on 1 May 2020.

Jurisprudence

22. The accused argues that he has a right to a trial with reasonable expedition as identified by the Supreme Court in *P.M. v. DPP* [2006] IESC 22. This right is dealt with on an *ad hoc* basis in the light of the particular circumstances of a given case. Kearns J. quoted from the United States case of *Barker v. Wingo* [1972] 407 US 514 which identified four factors to be taken into account in the balancing test required of the court in determining an application for prohibition based on a breach of such right:

    i. the length of the delay;

    ii. the reason for the delay;

    iii. the accused's assertion of his rights; and,

    iv. prejudice.

23. Under the heading of prejudice three interests are protected by the right to a trial with reasonable expedition namely:

    (a) avoiding pre-trial incarnation;

    (b) the right to minimise anxiety and concern; and,

(c) the right to limit the possibility of impairment of defence.

24. The accused refers in detail to the Supreme Court judgment of *Noonan v. DPP* [2007] IESC 34, where the Court granted an order of prohibition having regard to the history of the case, the gross delay involved, and the special circumstances of the case, which included the initial delays, systemic delays and the death of a witness. The Court in that case referred to *P.M. v. Malone* [2002] 2 IR 560 which indicated that an applicant for relief must put something more in the balance where prosecutorial delay arises for the purposes of outweighing the public interest in having serious charges proceed to trial, and it was said that a balancing exercise would have to take into account the length of such blameworthy delay because, if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify prohibition of a trial. The applicable test was identified by Kearns J. as:

> "Where blameworthy prosecutorial delay of significance has been established by the applicant, that that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief."

25. The accused argues that:

(a) it is now almost ten years since the first complaint was made;

(b) as to the seriousness of the charge (which might increase the public interest in proceeding with a prosecution) it is asserted that this case is in the mid to upper range; and,

(c) the accused has got on with his life and in these circumstances the public interest in pursuing the prosecution, being a right which is not unqualified, can be lost.

26. The accused is on bail, there is no evidence as to increased anxiety or concern, nor is there any evidence before the Court that the defence would be impaired by reason of the delay, although the accused suggests that there is evident impairment by the delay, and it is suggested that the Court can assume anxiety and concern.

27. In *Noonan v. DPP* Denham J. was satisfied that individually the specific grounds raised were not sufficient to entitle the applicant to succeed, however the cumulative situation was not to be ignored, nor was the discretionary nature of judicial review.

28. The accused lays considerable emphasis on the distinction between general criminal cases and child sexual abuse cases. In *Noonan v. DPP*, above, at para. 41 of her judgment Denham J. stated that "The H. v. Director of Public Prosecutions jurisprudence does not apply". Similarly, at para. 79 of the judgment Hardiman J. commented that the courts had been accustomed over the past decade to very long periods of delay and many of those arose in child sexual abuse cases "which are the subject of a separate jurisprudence".

29. The accused suggests that these two comments differentiating general crime from sex abuse cases, identifies that the body of jurisprudence of the Supreme Court up to and including *DPP v. C.C*. [2019] IESC 94, does not apply. That principle is to the effect that it is preferable except in clear cases that the issue of whether there is a real risk of an unfair trial that cannot otherwise be avoided is preferably left to the trial judge.

30. In *Noonan v. DPP* an order for prohibition was made by the Supreme Court with Hardiman J. stating that not granting the relief would be an indicator of a less demanding standard to applications of this sort than applied over a decade previously. The Court did not agree with the trial judge that there was no prejudice in that case (one of the two complainants for reasons unexplained was deleted from the charge sheet and had since died).

31. Denham J. in *Noonan v. DPP* aforesaid stated at para. 41 that the nature of the offence alleged is important, and in that case the offence was clearly one of fraud and not a very complex fraud. At para. 73 of his judgment Hardiman J. stated that while the investigation involved more than simply speaking to the two relevant personnel who co-signed the relevant cheques, the Court stated that the rest of the work was relatively mechanical, chasing up cheques to see what happened to them after they were drawn. This was said to be neither complex, nor intellectually difficult, and Hardiman J. rejected the suggestion that all fraud cases are by definition complex. Rather the Court was of the view that the difficulties involved related to the inability of the gardaí, and later the State Solicitor to give the case exclusive attention over a shorter period, rather than episodic attention over a period that was in the end immensely long.

32. The offences in that case were alleged to have taken place between January 1990 and May 1992 with the original complaint being made in September 1992. The applicant was arrested and detained for questioning in 1995, and subsequently charged in December 1997. The accused in that matter was returned for trial in July 2002, the matter having been adjourned in the District Court on a large number of occasions to allow for depositions, leave, and submissions.

33. The Court had before it a deposition by a detective sergeant to the effect that the investigation took considerable time and effort due to the complexity of the matter, the number of witnesses, and the fact that the applicant had run the institution in a way as to leave its books in a chaotic state. The Court held that there was prejudice to the applicant as she was originally charged with fraudulently procuring two women to sign blank cheques. Later for reasons unexplained one of those women was deleted from the charge sheet and that woman subsequently died. Hardiman J. expressed the view that the applicant was disadvantaged, and the State advantaged, by her unfortunate death.

34. The foregoing arguments are made by the accused in order to support the contention that recent jurisprudence such as *Nash v. DPP* [2015] IESC 32 and *DPP v. C.C*. are not relevant to any great extent in respect of the within judicial review, by reason of the fact that they concentrate more on prejudice, or the want of witnesses, or documents during the course of trial where the trial judge would be in a better position to assess the matter on the basis of the evidence as it developed, as opposed to the High Court in a judicial

review application. However, the instant judicial review application is concerned with the independent stream of jurisprudence concerning prosecutorial delay with, generally, some additional factors as mentioned in *P.M. v. Malone, P.M. v. DPP* aforesaid and *Devoy v. DPP* [2008] IESC 13, when prohibition might be ordered entirely independently of the run of evidence that might take effect at trial stage.

35. However I cannot agree that *Nash v. DPP* is not on point at all as it does involve reference to prosecutorial delay and the assessment thereof. Therefore it does involve a commentary of the development of this area of jurisprudence. It might further help to understand, that notwithstanding the harsh criticism of Hardiman J. to prosecutorial delay, nevertheless a period of 10 years between the date of complaint and the return of the accused for trial was not enough to warrant prohibition.

36. In *Nash v. DPP* at para. 3.6 of his judgment Clarke J. stated that there was a question as to whether or not the prosecuting authorities were culpable at all:

> "It is important to emphasise that prosecuting authorities should only properly bring criminal proceedings where there is a prospect of success…But even beyond that, prosecuting authorities are, like all other agencies, subject to the limitation of finite resources. Decisions have to be made as to how those resources are best to be deployed. Allocating resources in the prosecution of one case may mean that there are less resources available in another area… a wide margin of appreciation must be left to prosecuting authorities as to how to allocate their resources with particular reference to concentrating on cases where there is the greatest likelihood of securing a conviction."

37. Clarke J. at para. 2.7 *et seq*. stated that it must be acknowledged that persons who may be the subject of adverse findings as a result of a court process have a general constitutional entitlement to have those rights, obligations, or liabilities determined in a timely fashion, which is an entitlement independent of the entitlement to a fair trial. The Court indicated that there was a strand of jurisprudence that recognises that there is a constitutional entitlement to a timely trial of proceedings and that in extreme cases it may be that a particularly serious breach of that entitlement, will of itself override the constitutional imperative that there should be a trial on the merits, and thus require that the case not progress to trial.

38. The applicant also highlights a number of other cases, where the courts have granted prohibition based upon a breach of the accused's right to an expeditious hearing because of serious blameworthy prosecutorial delay. The most recent being that of the High Court in *O'Rourke v. Judges of the District Court* [2009] IEHC 309 where the commendable reform in the applicant's conduct was considered to be exceptional circumstances, and should have been taken into account by the District Court in refusing to issue warrants for the committal to prison of the applicant.

39. In *Devoy v. DPP*, para. 56 *et seq*. Kearns J. refers to *P.M. v. Malone and P.M. v. DPP* aforesaid as to the principles governing prosecutorial delay including that inordinate,

blameworthy, or unexplained prosecutorial delay may breach the applicant's constitutional entitlement to a trial with reasonable expedition, and if such is of a degree, the court can presume prejudice and uphold the right to an expeditious trial by directing prohibition. However, where the period is less than that which would, in and of itself, amount to a reason to prohibit the trial, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted, and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in *P.M. v. Malone* and *P.M. v. DPP* are demonstrated. The Court was satisfied that actual prejudice by the delay, which is such as to preclude a fair trial, will always entitle the applicant to prohibition. The Court effectively reiterated the *ad hoc* nature of the application of the principle so that there is no inflexible rule and the matters to be taken into account would include the length of the delay, the reasons for same, the role of the applicant, and prejudice.

40. In *B v. DPP* [1997] 3 IR 140 Denham J. stated that there was no exhaustive or exclusive list but did mention the following additional factors:

    (a) the accused's actions in relation to the events in issue;

    (b) the accused's assertion of his constitutional rights;

    (c) circumstances which may render the case into a special category; and,

    (d) the community's right to have offences prosecuted.

41. The accused points out that neither the list of factors to be taken into account, nor the interests of the defendant which the speedy trial is designed to protect, have been exhaustively listed by the Supreme Court. Although the accused states that the Court is not at large as to what other factors are to be taken into account, nevertheless the accused states that he is entitled to rely on the fact that he has got on with his life and refers to the Supreme Court judgment in Fin*negan v. The Superintendent of Tallaght Garda Station* [2017] IECA 222 which although did not involve prohibition, nevertheless took into account the fact that the appellant had engaged in family life and had a daughter with his partner in the four-and-a-half-year period between absconding from prison and being arrested on foot of a warrant by reason of such absconding.

42. In response to the accused's arguments in relation to *Devoy v. DPP* and *Finnegan v. The Superintendent of Tallaght Garda Station* aforesaid the respondent argues:

    (a) the issue of prohibition was not dealt with in *Finnegan v. The Superintendent of Tallaght Garda Station.* In this regard O'Donnell J. stated at para. 27 of his judgment, having referred to the case of *Cormack and Farrell v. DPP* [2008] IESC 63 at para. 26 of his judgment, that he agreed with McKechnie J. that *Cormack and Farrell v. DPP* touches only indirectly on the question of delay in execution of a bench warrant since it was an application to prohibit a trial on grounds of delay, however he did not think that the case should be entirely discounted. Presumably

therefore *Finnegan v. The Superintendent of Tallaght Garda Station* should not be entirely discounted as it touches on the issues raised only indirectly in respect of the within matter.

(b) O'Donnell J. in *Finnegan v. The Superintendent of Tallaght Garda Station* discussed *Cormack and Farrell v. DPP* in paras. 26 to 29 of his judgment when he noted that applying the developing jurisprudence of the Superior Courts in relation to delay cases, the Court found in *Cormack and Farrell v. DPP* that where there had been culpable delay on the part of the prosecution authorities, there was no prejudice to the accused and a fair trial was possible (para. 26). In para. 29 O'Donnell J. stated that *Cormack and Farrell v. DPP* made clear that the courts now apply a test that is not merely to consider whether there has been a lapse of time or culpable prosecutorial delay, but also whether the lapse of time or delay has been such as to demonstrate that a fair trial is not now possible. It is rare that culpable prosecutorial delay alone will be sufficient, although with significant delay it may be easier to establish the necessary prejudice. The underlying test however relates to the fairness of the trial. If justice cannot be administered, then a trial can be prohibited.

(c) In *Devoy v. DPP* at para. 53 of the judgment of Kearns J. having referred to the right to a trial with reasonable expedition, so that a period of delay may be so substantial and such a manifest breach of the accused's constitutional rights, the court may prohibit a trial even in the absence of proof of actual prejudice. Kearns J. went on to say that an excessive or inordinate length of time might itself raise an inference that the risk of an unfair trial arises as a reality.

43. The respondent argues that based on the foregoing it is clear that even with prosecutorial delay the risk of an unfair trial is intrinsically linked to the consequences of such delay, and the potential action to be taken by the courts in an application for prohibition.

Assessment

44. In assessing State/prosecutorial delay the starting point must be the statement of Mr. Terry Devitt, agent on behalf of eight of the thirteen complainants, of 15 August 2011, when Mr. Devitt made a formal complaint in respect of the accused. In this regard it might be borne in mind that it is alleged that the accused had indicated to the investors that their monies would be returned to them by 30 June 2011 and the allegation is to the effect that the accused failed to return the monies, or indeed make the investment, and hence the complaint of Mr. Devitt aforesaid.

45. Therefore it took from 15 August 2011 to 5 February 2020 to conduct the investigation and ultimately serve the accused with the Book of Evidence and have him returned for trial, a period of eight and a half years.

46. Assuming a margin of appreciation being afforded to An Garda Síochána and having regard to the affidavit filed by Detective Inspector Patrick Linehan it would appear that

this period would cover up to the beginning of 2014, which leaves a period of six years to conduct the investigation and ultimately serve the Book of Evidence.

47. No witness statement was taken in 2014 and the only activity appears to have been the service of two s.52 orders on Anglo Irish Bank and one such order on AIB. In 2015 one mutual assistance request was made of the United States and four further statements from investors were taken. In 2016 three further s.52 orders were served on lending institutions, one mutual assistance request was made of the United Kingdom, and two statements were taken of the accused's partners. In addition, replies were received from the United States in respect of mutual assistance orders, and documents were received from AIB. In January 2017 one investor statement was taken. In January 2018 two investor statements were taken. The investigation was said to conclude on 26 May 2019 when the file was sent to the Director of Public Prosecutions for directions. Although the accused was arrested and charged and brought before the District Court on 31 July 2019 it was not until 5 February 2020 that the Book of Evidence was served.

48. Arising from the foregoing it is evident that:

    (a) In 2014 three s.52 orders were served without any further activity.

    (b) In 2015 one mutual assistance request was made of the United States and four statements from investors were taken.

    (c) In 2016 three s.52 orders were served, replies were received from the United States mutual assistance request, and a further mutual assistance request made of the United Kingdom. In addition, two witness statements were taken.

    (d) In 2017 one witness statement was taken.

    (e) In 2018, January of that year, two witness statements were taken.

    (f) In 2019 the investigation was said to have concluded on 26 May 2019.

    (g) There was a lapse of a period of seven months between arresting and charging the accused and ultimately serving the Book of Evidence on him.

49. Notwithstanding therefore the margin of appreciation to be afforded to An Garda Síochána having regard to the comments of Hardiman J. and Denham J. in *Noonan v. DPP*, and bearing in mind para. 46 of the affidavit of Detective Garda Scully, it seems to me inescapable that in total there was a period of approximately four years and six months between the beginning of 2014 and 5 February 2020, when there was no real progress of any description made in the investigation.

50. The accused has effectively suggested that the entire period between 15 August 2011 and 5 February 2020 save for a brief period in which a relatively straightforward investigation could take place amounted to prosecutorial delay. However, it appears to me that this does not factor in the margin of appreciation to be afforded to An Garda Síochána, the

delay in securing documentation from AIB, the awaiting of a reply to the mutual assistance requests of the United States and the United Kingdom, the taking of investors and witness statements, the consideration of replies to the United States mutual assistance request, and the various reviews required of the file generally. It appears to me therefore, in the round, a period of approximately four and a half years is a reasonable period to attribute to prosecutorial delay.

51. Given that it is asserted that the accused indicated that monies would be returned by 30 June 2011, notwithstanding that offences might first have been committed in 2008, it appears to me appropriate to take into account (in assessing the overall period of delay involved) the period from 1 July 2011 to July 2021 because of the pause in the progress of the criminal trial by reason of the within judicial review proceedings.

Balancing exercise

52. Given the finding of prosecutorial delay as aforesaid, and having regard to the jurisprudence, it does appear necessary for the Court to undertake a balancing test of the various factors which arise in the particular circumstances of this case in order to determine whether an order of prohibition might, or might not be afforded. Bearing in mind the words of Denham J. in *B v. DPP* to the effect that there is no exhaustive or exclusive list of factors, and the words of Kearns J. in *Devoy v. DPP* to the effect that the list of interests of the defendant for which a speedy trial is designed to protect is not necessarily exhaustive, the following factors are in my view the appropriate factors to be taken into account:

(1) There is prosecutorial delay of a period of approximately four years and six months even allowing for a margin of appreciation in favour of An Garda Síochána and the other matters referred to at para. 50 hereof. The period aforesaid also takes into account the assertion that the accused promised to repay monies by 30 June 2011, and excludes the period of delay in respect of the within judicial review proceedings. Such period is of significance.

(2) Relying on *Finnegan v. The Superintendent of Tallaght Garda Station* which having regard to the judgment of O'Donnell J. only touches indirectly on the within matter but should not be entirely discounted, the accused states that he has been prejudiced because he has moved on with his life to the extent that he secured a job in 2016 which has continued to at least the date of the statement of grounds, and visits his parents once or twice per month.

(3) There is no assertion or evidence of deliberate prosecutorial delay.

(4) The accused has been on bail and not incarcerated on foot of the within charges at any time.

(5) There is no evidence as to any heightened anxiety or concern.

(6) There is no evidence alleging the impairment of any possible defence.

(7) The accused was a professional person in a position of trust in respect of the investors, and a substantial amount of money is involved, involving a significant breach of trust.

(8) It is acknowledged by the accused that there is an arguable *prima facie* case against him although he intends to plead not guilty.

(9) There is a bald assertion in the statement of grounds to the effect that there is a serious risk that the trial of the applicant will be unfair, however it has not been advanced in either written or oral submissions to the Court and in these circumstances it has not been demonstrated that there is a real and serious risk that the trial of the accused will be unfair.

(10) The accused has not, until the institution of the within judicial review proceedings, asserted his constitutional rights.

(11) The community has a right to have serious offences prosecuted and victims also have a statutory right in this regard.

(12) No prejudice in the conduct of a trial has been identified.

(13) Circumstances such as those which prevailed in the case of *Noonan v. DPP* aforesaid such as the alteration in the charge, the death of one of the two women being the focus of the criminal charge, and the benefit of same to the prosecution, do not present in the instant circumstances.

(14) Documentary evidence is available and will play an important role at the trial of the action rendering less significant any period of delay.

(15) There is a notional period of ten years between the commencement of the investigation and a date for hearing which might have been secured but for the intervention of the within judicial review proceedings. This period was found in *Noonan v. DPP* not to be sufficient in itself to warrant prohibition.

Conclusion

50. Having considered each of the foregoing factors, the most significant being in my view that it has not been demonstrated that there is any real or serious risk that the trial of the accused would be unfair, and the minimal asserted prejudice arising because of the delay (namely the accused secured a job in 2016 which he held on 1 May 2020, together with the fact that he visits his parents once or twice a month), a fair trial is possible, same being the overarching test in a determination of whether or not prohibition is appropriate.

53. In the particular circumstances of the instant matter, prohibition should not be granted.