

THE HIGH COURT

[2024] IEHC 251

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857,
AS EXTENDED BY SECTION 51 OF THE COURTS (SUPPLEMENTAL
PROVISIONS) ACT, 1961**

RECORD NO. 2023/1420 SS

BETWEEN

CHARITIES REGULATORY AUTHORITY

APPLICANT

and

DAVID ELLARD

RESPONDENT

JUDGMENT of Ms. Justice Hyland delivered on 26 April 2024

Introduction

1. This is an appeal from the District Court by way of case stated (attached to this judgment as Appendix A). It arose following the decision of District Judge Halpin (the “District Judge”) to acquit the respondent on 27 July 2023 by way of directed acquittal where he had been charged with failure to comply with a requirement under s. 65(2)(a) of the Charities Act 2009 as amended (the “2009 Act”) in that on or about 30 August 2022 he failed to produce the books, documents or other records required of him by way of letter of 9 August 2022.

2. At the request of the applicant, the District Judge stated a case to the High Court on the following question of law:

“Was I correct in my interpretation and application of Section 65(2) of the Charities Act, 2009 (as amended)?”

3. The answer to the case stated is “No”.

Statutory framework for Case Stated

4. Section 2 of the Summary Jurisdiction Act 1857, as amended by s.51 of the Courts (Supplemental Provisions) Act 1961, provides that any party to any proceedings heard and determined in the District Court can request a district judge, if dissatisfied with such determination as being erroneous, after he has heard and determined a matter, to state a case to the High Court on a point of law.
5. Section 6 of the Summary Jurisdiction Act 1857 provides that the High Court shall hear and determine the question or questions of law arising, and shall “reverse, affirm, or amend” the determination of the District Court, or remit the matter to the Judge of the District Court, or may make such other order as to the Court may seem fit.
6. It is clear that a case stated is confined to determining questions of law. As Finlay P stated in *Director of Public Prosecutions v Nangle* [1984] ILRM 171, 173 the case stated procedure is “*exclusively confined to correcting errors of law by an inferior court in the determination of proceedings before it*”.
7. In *Proes v Revenue Commissioners* [1998] 4 IR 174, Costello P summarised the principles to be applied in appeals which come to the court by way of case stated:

“(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.

(2) Inferences from primary facts are mixed questions of fact and law.

(3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside ... ”

Charities Act 2009

8. The appellant was established by the 2009 Act. It is the statutory registrar for charities and regulates charities to ensure their compliance with the statutory scheme. Part 4 of the Act deals with the protection of charitable organisations. Section 64 provides that the appellant may appoint a person, referred to as an “inspector”, to investigate the affairs of a charitable organisation and to prepare a report in such manner as the appellant shall direct. At the conclusion of the investigation, the inspector shall make a final report to the appellant. Section 65 of the Act provides such appointed inspectors with certain powers. Section 65(1) provides powers to seek from charity trustees or a charity's agents:

- The production of documents;
- A person's attendance before the inspector; • Assistance in connection with the investigation.

9. Section 65(2) of the Charities Act 2009 provides:

“(2) If an inspector considers that a person (other than a charity trustee or agent of a charitable organisation) is or may be in possession of information concerning its affairs, he or she may require that person to—

(a) produce to him or her any books, documents or other records in his or her possession, under his or her control or within his or her procurement relating to the charitable organisation,

(b) attend before him or her, and

(c) give to him or her all such other assistance in connection with the investigation as he or she is reasonably capable of giving.”

10. Section 65(5) of the 2009 provides:

“(5) A person who contravenes this section or who fails to comply with a requirement under this section shall be guilty of an offence.”

11. Section 10(1) of the 2009 identifies the penalties for persons guilty of an offence under the Act as follows:

“10.— (1) A person guilty of an offence under this Act shall be liable— (a) on summary conviction, to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months or to both, or (b) on conviction on indictment, to a fine not exceeding €300,000 or to imprisonment for a term not exceeding 10 years or to both.”

Factual Background

12. As already identified, the case in the District Court relates to a prosecution brought against the respondent under s.65(5) of the 2009 Act for failure to comply with s.65(2) of the 2009 Act. The appellant had appointed an inspector (“the inspector”) to investigate the Irish Society for the Prevention of Cruelty to Animals (the “ISPCA”) under s.64 of the 2009 Act. During his investigation, the inspector noticed that an invoice had been issued from the company Apollo Square Limited to the ISPCA, and sought further information relating to that invoice and their business relationship. The respondent is the company secretary of Apollo Square Limited, although he was not the company secretary at the time of the events giving rise to the investigation.

13. On 9 August 2022, the inspector made a statutory demand of the respondent under s.65 of the 2009 Act, requesting of the respondent in his capacity as company secretary to produce the following documents:

“1. All correspondence and emails (including attachments), between Apollo Square Limited and the following:

a) the ISPCA

b) the staff of the ISPCA

2. All correspondence and emails (including attachments), relating to the ISPCA, between Apollo Square Limited and the following:

a) Charity trustee of the ISPCA Marie O’Byrne

b) Charity trustee of the ISPCA Fiona Squibb

c) Charity trustee of the ISPCA Carmel Rooney

d) Charity trustee of the ISPCA Noel O’Donoghue

e) Charity trustee of the ISPCA Kerry Pollock

f) Charity trustee of the ISPCA Michele Quinlivan

3. Copy of the full signed contract between the ISPCA and Apollo Square Limited.

4. Copy all invoices issued by Apollo Square Limited to the ISPCA

5. Any documents evidencing payments received by Apollo Square Limited from the ISPCA.

6. *Any documents evidencing work carried out by Apollo Square Limited for the ISPCA.*
7. *Copy all advices provided to the Board of the ISPCA by Apollo Square Limited.*
8. *Copy all regulator compliance and correspondence and charity compliance documents provided by Apollo Square Limited in relation to the ISPCA*
9. *Any documents relating to any meetings between Apollo Square Limited and the ISPCA.*
10. *Any documents relating to any meetings, in any relation to the ISPCA, between Apollo Square Limited and any of the charity trustees of the ISPCA.”*

14. These documents related to the invoice issued by Apollo Square Limited to ISPCA and the relationship between the two parties. The inspector further set out in that letter his powers under s.65(2) of the 2009 Act, that failure to comply with his request was an offence under s.65(5), and the penalties under s.10(2). The inspector specified that should the respondent not produce the documents by 30 August 2022, the inspector would inform the Charities Regulatory Authority of that failure to comply with the direction under section 65 of the Act. The respondent did not reply to the letter sent by the inspector and was accordingly charged by the Charities Regulatory Authority with a failure to comply with a requirement under s. 65(2)(a) contrary to s.65(5) of the 2009 Act.

District Court Hearing

15. The matter came before the District Judge on 27 July 2023 and having heard the case, the District Judge gave judgment later that day. He made the following findings of fact:

- a) *Mr Mouton was appointed as an inspector in accordance with Section 64 of the Charities Act 2009 on 7 February 2022;*
- b) *Mr Mouton was appointed as an inspector to investigate the affairs of the ISPCA;*
- c) *the Respondent was the company secretary of a company named Apollo Square Limited;*
- d) *During the course of the investigation, it was identified that an invoice had issued from Apollo Square Limited to the ISPCA;*
- e) *Mr Mouton had queried this invoice in relation to whether there was any actual work carried out and whether there was a contract in place between the ISPCA and Apollo Square Limited;*
- f) *Given that the information he had received from the ISPCA was not complete, he decided to make a statutory request of the Respondent who was then the company secretary of Apollo Square Limited;*
- g) *Mr Mouton then issued a letter of request on 9 August 2022 pursuant to Section 65(2) of the Charities Act 2009, as amended, to Mr Ellard;*
- h) *no issue of service arose, and the certificate of postage and receipts were produced;*
- i) *No reply was received; and*
- j) *the investigation remained opened.*

16. He then dismissed the prosecution, as, he found that implicit in s.65(2) was a requirement that any third party be made aware of the possibility of the requirement to submit to a request under s.65, that they should be on notice of the requirement and be given an opportunity to decline relations in the event that they are not so bound. The

District Judge also considered that the nature of a criminal offence may not be immediately apparent to a layperson. The District Judge concluded that the Charities Regulator ought to inform all charities that if contracts are entered into with noncharitable entities that a clause advising of compliance with S.65(2) is an essential term of such contracts. Otherwise, the power of the inspector to request information under s.65 could undermine constitutional protection of individuals such as the respondent. He also held the respondent was powerless to accede to the inspector's request given that Mr. Ellard as company secretary has a fiduciary duty to Apollo Square Ltd. and for him to comply with the request would require the approval of the Company Board to release the requested documents.

Arguments of the Parties

17. The appellant argues the decision should be reversed and the matter remitted to the District Court for fresh hearing. The appellant argues that the District Judge was incorrect in his interpretation of s.65 i.e. that the District Judge's interpretation of the extent of the implied requirement goes too far. For the appellant, it is sufficient if a person, the respondent in this case, is made aware that a failure to comply with a request under s.65 may be criminalised. The appellant draws on case law such as *DPP v Mulligan* [2009] IR 794, and *DPP v BA* [2016] IESC 22, to argue that the extent of the implied requirement to inform an individual that they may be subject to criminal prosecution will depend on context, but it will generally be sufficient to inform an individual of the basic information relating to that statutory power. As such, the appellant submits that the interpretation of s.65 by the District Judge goes far beyond the canons of interpretation envisaged by the case law.

18. The appellant also submits that, if it was true that the respondent's fiduciary duty to Apollo Square Limited prevented his ability to comply with a statutory requirement, this would effectively render any statutory requirement made of a company director or company secretary unenforceable. For the appellant, once the person is made aware that failure to comply may be criminalised, then that is enough.
19. The respondent argues that because the powers in question are conferred upon a third party inspector on behalf of the appellant, and do not relate to statutory Garda powers as in the case law put forward by the appellant, this means that s.65(2) has to impose protections for companies and persons who provide goods and/or services to any charitable organisation, where those persons might be exposed to criminal prosecution. For the respondent, the District Judge was right to impose protections for such persons through a contractual term in-built in any contract between such parties and a charitable organisation.
20. Next, the respondent submits that Section 65(2) of the 2009 Act is unconstitutional insofar as the powers conferred on the appellant and the appointed inspector could not have been in contemplation of the Oireachtas. The respondent accepts that this question was not before the District Judge and is not the subject of the case stated. The District Judge did not pronounce on the constitutionality of the section, although he did interpret it in light of the Constitution. In those circumstances, I cannot entertain any stand-alone arguments as to the constitutionality of the section.
21. The respondent outlines that s.65(2) does not impose an obligation on a person to produce documents unless the inspector has determined if a person in fact has in or her possession information relevant to and concerning the investigation and can produce those documents. That latter argument was developed in oral submissions and I address

it in more detail below. Finally, the respondent observes that the 2009 Act does not impose any temporal limits on the information sought and as such the inspector has the power to impose arbitrary, unfair, and broad timeframes upon individuals who may not have access to the requested information. These standards, the respondent argues, are unfair in comparison with those imposed by the Companies Act 2014, and also may raise GDPR and confidentiality issues. As such, s.65, for the respondent, allows an inspector to impose criminal liability on a person who fails to comply with an arbitrary deadline imposed by a third-party inspector at his or her discretion, with no recourse to a court to seek guidance and direction.

Discussion and Decision

22. I am satisfied that this appeal by way of case stated raises a question of law, namely the correct interpretation of s.65(2). The District Judge acquitted the respondent on the basis of his interpretation of s. 65(2) of the 2009 Act. His core finding in this respect was as follows:

“Generally a defence to a criminal charge is a legal construct and the nature of an offence may not be readily apparent to an unsuspecting lay person and so would be a burden on that person who is ignorant of that offence. After considering this case at length, I am of the opinion that implicit in s.65(2) is a requirement that a third party or de facto stranger must be informed of the latter’s requirement to comply with s.65(2). The non-charitable entity must be on notice of the requirement and be given an opportunity to decline relations in the event he is not so bound. To do otherwise would be to unfairly curtail the constitutional protection afforded to Mr. Ellard or to his office”.

23. He went on to observe immediately after providing this interpretation as follows:

“Section 65(2) does not nor can it afford such a wide power as to circumvent the safeguards of Irish law. Accordingly, I would advise the Charities Regulator to inform all charities that if contracts are entered into with non-charitable entities that a clause advising of compliance with Section 65(2) is an essential term of such contracts otherwise the Section could be entirely undermined.

Moreover, a fact that has not escaped the attention of the Court is that Mr. Ellard as Company Secretary has a fiduciary duty to Apollo Square Limited and for him to comply with the request would require the approval of the Company board so as to release the requested documents. If a contract existed as aforesaid, with an enabling term referable to s.65(2), such board approval would not be required or needed.

It is my decision that Mr. Ellard was powerless to accede to the Inspector’s request.”

24. The question I am asked is whether the District Judge was correct in his interpretation and application of s. 65(2) of the 2009 Act. I find he was not. Effectively, the District Judge construed the section as containing a requirement that a charitable organisation under the 2009 Act is obliged to draw s.65(2) to the attention of any body or person with whom it is intending to contract in advance of that contract being concluded, so that the body or person could decline to enter into that contract given the obligations imposed by s.65(2). Failure by the charitable organisation to so notify third parties in advance means that an inspector appointed by the Charities Regulatory Authority may not exercise his or her powers under s.65(2) in respect of those third parties.

25. Nothing in the section suggests such a radical limitation on the powers of the inspectors.

The interpretation adopted by the District Judge would permit a charitable organisation to effectively nullify powers granted to an inspector by statute by failing to notify third parties of the terms of s. 65(2). The charitable organisation could immunise a third party from the effect of the section by the simple step of not informing them of the existence of same. It would severely limit the investigation powers of inspectors into charitable organisations. Indeed, the consequences of implying such a limitation into s.65(2) is recognised by the District Judge where he suggests that the Charity Regulator should inform charities that contracts entered into with third parties should include a clause advising that compliance with s.65(2) is a term of such contracts “*otherwise the section could be entirely undermined*”. Further, despite the case before him only alleging breach of s.65(2)(a), the interpretation advanced by the District Judge extends to the entirety of s.65(2).

26. Given the impact of such a limitation on the stated powers of the inspectors, one would expect explicit wording to this effect. Yet there is no wording to this effect at all in s.65(2). Nor do the surrounding sub-sections or sections within the relevant part of the 2009 Act suggest such an interpretation. The principles applicable to statutory interpretation have recently been restated by Murray J. in the decision of *Heather Hill Management Company v an Bord Pleanala & Ors [2022] IESC 43*. That makes it clear that the first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning, and these must be viewed in context. The natural and ordinary meaning of s.65(2) is that an inspector may require a person who is or may be in possession of information concerning the affairs of a charitable organisation to produce documents, attend before him or her, or give to him or her assistance in connection with the investigation. There is a condition that the inspector

must satisfy before imposing such a requirement i.e. that the person is or may be in possession of information concerning the affairs of the charitable organisation. The existence of that constraint suggests that there is no other constraint on the inspector as, if there was, it would have been required to be identified with the same specificity as the existing constraint.

27. The magnitude of the limitation that would result from the District Judge's interpretation strongly suggests in my view that if the legislature had intended such a limitation, it would have to have been explicitly spelt out. No ordinary reader of s.65(2) could deduce such a limitation. Returning to *Heather Hill*, Murray J. observed as follows:

"... the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about... Those words are the sole identifiable and legally admissible outward expression of its' members objectives; the text of the legislation is the only source of information a court can be confident all member of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislatures themselves understood when they decided to approve it".

28. Having regard to the plain meaning of s.65(2), I cannot conceive that any member of the Oireachtas would have understood that the powers given to an inspector would be disapplied in their entirety if the person referred to in the section had not been notified in advance before it contracted with the charitable organisation of the existence of those powers.

29. The applicant does concede that there is an implied limitation on the powers of the inspector that derives from case law, i.e. that persons who are the subject of a requirement by an inspector under s.65(2) are entitled to know that their failure to comply with the requirement will result in their behaviour being criminalised. In *DPP (Sheehan) v. Galligan* [1995] 11 JIC 0201, Laffoy J. held there had to be evidence before the trial court that the accused had been informed of the penalties for failing to comply with a public order direction to leave a place before he could be convicted of an offence under such direction. Equally, a person required to submit to arrest, seizure or search (and by analogy to produce documents) must be told in general terms of the relevant power to be exercised (see *DPP v. BA* [2016] IESC 22). But here no such issues arise here. The statutory power was identified in the letter of requirement of 9 August 2022 and the statutory provision was set out in full. It was made absolutely clear that failure to comply with the requirement would result in prosecution and s.65(5) was included in the letter, as was s.10(1) that sets out the criminal penalties for breach.
30. However, the District Judge's interpretation went well beyond such a requirement to notify a person of the criminal consequences should there be a failure to comply with a requirement under s.65(2): his interpretation of the section required notification of s.65(2) before a third party contracted with a charitable organisation i.e. well before the letter of requirement.
31. In his interpretation of the section quoted above, the District Judge referred to the constitutional protection afforded to the respondent and his office as company secretary. The respondent is undoubtedly entitled to the protection of the Constitution in respect, *inter alia*, of the right to a fair trial. A statutory provision should be interpreted in a manner consistent with the Constitution. But the District Judge has not identified any constitutional frailty in the section that can only be remedied by the interpretation he

suggests, in particular given the case law discussed above that makes it clear that a person must be informed that non-compliance with the statutory provision will result in criminal liability. In general a person must be taken to know the law, and the law cannot be avoided by a person not being told by another person of the existence of the law and its possible application to them. That is the interpretation contended for by the District Judge.

32. I turn now to a different interpretation by the District Judge, contended for by the respondent. At the hearing, the respondent focused his submissions on an argument that had been identified but not fleshed out in the Written Submissions i.e. that the exclusive basis for the District Judge's acquittal was the impossibility of the respondent obtaining the documents sought by the inspector. Counsel submitted at the hearing before me that the prosecution had failed to prove that the categories of documents identified in the letter of request were in his possession, under his control or within his procurement including in his legal capacity as company secretary, and that there was no presumption in the 2009 Act to the effect that the documents were obtainable. Absent such proof, it was argued that the Judge could not conclude that the respondent had failed to comply with the requirement and came to the conclusion that the respondent was powerless to accede. It was argued that this meant that the District Judge had interpreted the 2009 Act as requiring that the inspector must be satisfied that the third party has the documents in his possession, under his control or within his procurement and that absent such belief on the part of the inspector, there is no obligation to comply with any requirement under s.65(2)(a).

33. It is certainly true that the District Judge decided that the respondent was powerless to accede to the request and that the approval of the Board was required to allow him to

release the requested documents. However, as per my analysis above, his primary finding appears to have been that the prosecution could not succeed due to the failure of the registered charity to inform the respondent of the existence of s.65(2) prior to contracting or attempting to contract with the registered charity.

34. Nonetheless he did separately address the entitlement of the respondent to release the documents. The thinking of the District Judge may have been that had the third party been informed of s.65(2) in advance, then arrangements would have been put in place to allow the respondent to provide the documents without the approval of the Board. One could possibly infer from those comments that he was interpreting s.65(2)(a) as meaning that no obligation arises under s.65(2)(a) if the recipient of a letter of requirement is precluded from providing the documents i.e. without such an arrangement being in place, the respondent was not entitled to release them and therefore cannot be in breach of an obligation imposed by an inspector under the section.

35. The District Judge did not explicitly state this and I have some hesitancy about ascribing an interpretation to him that he may not have intended. From my reading of the case stated, it was certainly not the primary basis upon which he directed the acquittal.

However, I am conscious of the comments of Charleton J. in *HSE v. Brookshore* [2023] 3 IR 518 to the effect that the statutory mechanism of an appeal by way of case stated “places a responsibility on the High Court to declare what the law is as clearly and accurately as possible”. I will therefore answer the question in the fullest possible way, including addressing this possible additional interpretation of s.65(2)(a) by the District Judge.

36. To the extent that the District Judge interpreted s.65(2)(a) as only imposing a requirement on a person to produce documents if the inspector was satisfied, in advance of imposing the requirement, that the person did indeed have in his possession, under

his control or within his procurement, the documents sought by the inspector, I am satisfied this interpretation of the section is incorrect. This is for many of the same reasons identified above in the context of his interpretation of s.65(2): there is no such language in the section, the interpretation would seriously limit the application and utility of the sub-section, explicit language would be required if such a limitation was intended and the natural and ordinary meaning of the words do not support implying an additional knowledge requirement on the part of the inspector. If the legislature had intended the powers of the inspector to be limited in this way, they could have specified that limitation on those powers. No such limitation exists. The plain and ordinary meaning of the words is that there is no such pre-condition to the exercise of the powers granted to the inspector.

37. Moreover, the section contains words that are somewhat inconsistent with such an interpretation. Section 65(2) provides that if an inspector considers that a person (other than a charity trustee or agent of a charitable organisation) is or may be in possession of information concerning its affairs, he may require certain steps to be taken (emphasis added). It is difficult to see how the reference to “*may be in possession of information*” is consistent with an implied term that the inspector must be satisfied that the person is in possession of books, documents or other records and that, absent such a belief, he cannot impose a requirement. Of course, it is true that there is a difference between the possession of information and the obligation to provide that information. Nonetheless, it is relevant that the only time the section refers to the inspector’s state of knowledge is in relation to the third party’s possession of information: there is no equivalent form of words that address the inspector’s state of knowledge in relation to the possession, control or access of documents by the third party. In other words, the wording of the section strongly suggests that the inspector only has to address his or her mind to

whether the third party has information concerning the affairs of the charitable organisation, but not to the ability of the third party to obtain the documents required to be produced. The third party may in their response to a letter of requirement address that issue: but there is nothing in the statutory provision that suggest such knowledge on the part of the inspector is a necessary pre-condition to the exercise of the powers.

38. Moreover, it is difficult to understand why the legislature would impose such a limitation given that the purpose of the section is to allow an inspector to obtain information relevant to the conduct of a registered charity where there is, by definition, a deficit of information from the registered charity. As identified above, there is a threshold that an inspector must meet in order to make a request i.e. he must consider that a person is or may be in possession of information concerning the affairs of the registered charity. However, beyond that, an inspector could not be expected to know about the ability of the third party to access documents relevant to the registered charity or what limitations might be on them. To impose such a wide-ranging requirement on an inspector prior to a request being made would potentially undermine the purpose of the sub-section i.e. to permit information gathering about the registered charity, including from third parties, in order to ensure that the statutory investigation process can proceed effectively. For example, submissions were made on behalf of the respondent about the statutory powers of company secretaries under the Companies Act and about whether the respondent could or could not access the documents. I have not addressed those arguments because they do not arise in relation to the questions I must answer on this case stated. But if the District Judge's interpretation were correct, an inspector might have to conduct extensive inquiries into the ability of a person to access documents before he or she would be entitled to send a letter of requirement under s.65(2)(a). That would limit significantly the utility of the section.

39. I should add that a rejection of the interpretation discussed above does not mean a person will be criminalised for a failure to provide documents that they do not have or cannot access or procure. In such a situation, if a person establishes the requirement cannot be complied with, then there is no failure to comply with the requirement within the meaning of s.65(5) and no offence can be made out by the prosecution. However, that is quite different to interpreting the section as requiring, as a pre-condition to a valid request, that an inspector has a belief in advance of making the request that the person can access the documents.
40. Accordingly, to the extent that the District Judge interpreted s.65(2)(a) in this way, that interpretation and any application of that interpretation that led him to dismiss the charge, was incorrect.