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Judgment: approved by the Court for handing down | *Delivered:* **19/10/2006**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT

Complainant/Appellant;

-and-

THOMAS O'BRIEN (SENIOR)
THOMAS O'BRIEN (JUNIOR)
AND
PETER O'BRIEN

Defendants/Respondents.

Before: Nicholson LJ, Campbell LJ and Sheil LJ

Nicholson LJ

[1] This is an appeal by way of case stated under Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 in respect of the decisions of Mrs Sarah Creanor, Resident Magistrate, whereby she dismissed complaints brought by the complainant and appellant (DARD) against the three defendants and respondents (the O'Briens) on 5 September 2005.

[2] The complaints were that on 1 September 2003 in the County Court Division of Armagh and South Down the three respondents failed to comply with notices dated 28 May 2003 requiring the segregation of certain bovine animals and their detention on specified land, made by the appellant in pursuance of Article 14 of the Brucellosis Control Order (Northern Ireland) 1972, (hereafter referred to as "the 1972 Order"), contrary to Article 52(1)(a) of the Diseases of Animals (Northern Ireland) Order 1981 (hereafter referred to as "the 1981 Order").

[3] By case stated on 15 October 2005 the Resident Magistrate posed the following question for the opinion of the Court of Appeal:-

> "Was I correct in law in holding that, in the circumstances of this case, where DARD issued a subsequent BT12 notice pursuant to Article 5 of the 1972 Order requiring the accused to present their animals for an official test, the accused had no case to answer on complaints alleging a breach of an earlier BT 50 notice, issued pursuant to Article 14 of the said Order, requiring the segregation of certain bovine animals and their detention on specified lands upon the farm holding?"

[4] The issue involved in this case stated is whether a requirement by DARD to have an official testing of a herd, necessitating the removal of cattle from a specified area, nullifies an earlier requirement to segregate the cattle from the rest of the herd.

[5] The 1972 Order was made by the appellant's predecessor under the Diseases of Animals (Northern Ireland) Act 1958 (the "1958 Act"). Article 14 (as amended) provided:

> "(1) The owner of a herd shall immediately isolate any animal when required to do so, in accordance with the conditions of a notice issued by the [Department] in writing and shall detain such animal in isolation on his premises until informed otherwise by the [Department] in writing.
>
> (2) The [Department] may serve on the owner of any herd a notice in writing requiring that any animals which have been exposed to the possibility of infection with brucellosis by contact with a reactor shall be:-
>
> (a) detained on the area on which they were at the time when the reactor was found or on a specified area of the holding; and
>
> (b) segregated from all other eligible animals in the herd.
>
> (3) ….

(4) Any person who fails to comply with the requirements of a notice served on him by the [Department] under this Article shall be guilty of an offence against the [1981 Order].

[6] The 1981 Order provides by Article 52(1)(a):

"Any person who without lawful authority or excuse, proof of which shall lie on him –

(a) contravenes any provision of this Order, or of an order of the Department …

Shall be guilty of an offence against this Order."

The 1981 Order was substituted for the 1958 Act: see Section 29 of the Interpretation Act (Northern Ireland) 1954 as to the effect of substituting provisions.

[7] Article 5 of the 1972 Order provided:

"(1) The [Department] may at any time cause an official test to be made on any herd.

(2) A herd owner shall, when required to do so by notice in writing from the [Department] present for official test all animals in his possession …

(3) The owner of a herd shall comply with all reasonable requirements of an authorised officer as to the collection, penning and securing of his animals for the purpose of taking samples for an official to test …. for the purposes of this Order."

The history

[8] The appellant detected an outbreak of brucellosis following an official test carried out on the three respondents' herds on 10 December 2002. Although each of the respondents is a farmer and holds an individual herd number issued by the appellant, in their dealings with the appellant for disease control purposes and for the purposes of these proceedings the three herds have been treated as one herd.

As a result of the test a notice under the 1972 Order (as amended) known as a BT40 was served on the respondents restricting the movement of cattle into or out of their herds on 6 January 2003.

[9] On 29 January 2003 officials of the appellant visited the premises of the respondents to draw up a map of the farms and farm buildings to highlight all relevant lands on an ordnance survey map. General veterinary advice was given in regard to the outbreak of brucellosis. On 5 February 2003 officials paid a second visit to get an overview of where cattle were located and concern was expressed that pregnant cattle were on the land and were not housed.

[10] On 7 February 2003 BT50 notices were served in pursuant of Article 14 of the 1972 Order requiring the respondents to detain all in calf cattle on specified areas, namely housing and yards described as Longfield Road/Ballard Road and to keep the said animals off the areas specified in it on the specified areas and segregated from all other bovine animals. The notice prescribed that the movement of these specified animals was thereby prohibited except under the authority of a permit issued by the appellant in writing and subject to the continued segregation of the animals from all other animals. On 21 May 2003 officials of the appellant visited the respondents' premises to identify fields on which segregated cattle could be grazed. In calf cows which did not have a post-calving clear brucellosis test were to be segregated from the remainder of the herd. The selected fields were nominated in a manner which would have a minimum risk to the remainder of the O'Brien herds and neighbouring herds. An official agreed fields with one of the respondents on the farm survey maps and placed an X on each agreed field number.

[11] On 28 May 2003 a second set of notices (BT50s) were sent to the respondents. These referred to in-calf cows due before the end of October and the areas specified as fields numbered on the farm survey maps. It was stated on the notices that they superseded the BT notice of 7 February 2003. On 11 August 2003 there was a further visit by officials to carry out a compliance inspection in order to ensure that the terms of the notice were being complied with. There were nineteen cows and one bull on a field which was specified. There were six cows on a field which was not specified. The officials were informed that these were the segregated cattle in total. No ear tag numbers of the segregated group of cattle were noted by the officials. The officials of the appellant decided to add two field to the specified fields, on one of which were the six cows. The office copy of Form B50 was amended on 12 August 2003.

[12] On 1 September 2003 brucellosis blood sampling was carried out on 172 animals in the respondents' herds at three separate locations, Longfield Road, Ballard Road and Forest Road following the service of BT12 notices requiring the respondents to have their herds tested. Forms BT20 had been prepared contained containing the ear tag number of each animal required to be tested. The test involves the taking of a blood sample by a specially

designed syringe. Each animal blood sample taken is contained in a bottle which bears the ear tag number of the animal. The bottles are also numbered in sequence beginning at the first and finishing at the last animal tested. At time of testing the ear tag number of each presented animal is read and compared with those listed on the forms BT20. When the test is completed the blood samples for the herd or herds are packaged and forwarded to the Veterinary Science Laboratory for analysis. At the time of sampling the bottle number and pregnancy status were written against the relevant ear tag number on the forms BT20. An official of the appellant then received from one of the respondents on request a list of animal ear tag numbers of the segregated in-calf cattle. The official checked the ear tag numbers listed against the order in which the animals were presented at the official test carried out on 1 September 2003. It became clear that the way in which the cattle were presented for testing, as a group that included autumn calving cattle that should have been segregated in accordance with notice BT50 of 28 May 2003. Two of these cattle gave positive results. DARD wrote to the respondents and pointed out that as a result there was a distinct possibility that the whole herd had been put at risk. A firm of solicitors acting on behalf of the respondents wrote to the appellant pointing out that there had been no instructions that there were to be two separate tests. Later they declined a request for an interview of the respondents under caution.

Findings of facts in the case stated

[13]

(a) The Resident Magistrate found that orders were made by the appellant under the 1981 Order and in exercise of its powers under Article 14(2) of the 1972 Order and 28 May 2003 and served on the three respondents. These were known as BT50 notices and superseded previous BT50 notices issued on 7 February 2003.

(b) The respondents complied with the notices except for one occasion as a result of which the appellant amended the BT50s so as include additional fields.

(c) Under Article 5 of the 1972 Order the appellant sent to the respondents BT12 notices instructing them to present all their cattle for testing by the appellant at a specified date and time. No instructions were contained with regard to segregation or how the animals should be kept or presented at the test location.

(d) There had been several BT12s and subsequent tests following the first BT50 in February 2003. No evidence was available as to whether the animals had been segregated for these tests as no list of segregated animals had ever been sought by the appellant.

(e) The appellant's officials knew that the respondents could not test animals in compliance with the BT12s in the specified fields and would have to move them to one of their three handling facilities on other parts of the farm holding.

(f) On 1 September 2003 the respondents presented their animals for testing in accordance with the BT12 Notice. This test had been deferred on a number of occasions at the request of the O'Briens.

(g) After the Test had been carried out, the Department asked Thomas O'Brien, Senior to supply them with a list of animals in the class which would have been covered by the BT50. He provided a list.

(h) The list (supplied by Thomas O'Brien Senior) of the animals which should have been covered by the BT50 of 28 May 2003 was compared with a list of animals tested on 1 September and indicated that the animals covered by the BT50 had been intermixed with the rest of the animals and not tested as a separate group.

Further findings

[14] The BT12 notice required the respondents to present all female animals aged 12 months and over and all bulls aged 12 months and over to have blood samples taken on 1 September at a specified time (of which there is no written record as copies of the BT12s are not kept). The notice goes on to say that "the cattle must be conveniently situated/housed and properly ear marked by the above date."

The resident magistrate set out the competing contentions of the parties to which we will return. She stated at paragraph 5 that she was of the opinion that what was important in considering whether the respondents could be guilty of the offence charged was whether the BT50 continued to apply once the BT12 was issued. The BT50 referred to movement off the specified land "under the authority of a permit in writing" and stated that she believed that a BT12 could not have been a permit of this kind.

She stated that the appellant cannot put the herd owner in a position where he has to commit the offence of breaching the conditions of BT50 or BT12. She further stated that the appellant cannot take a position that the farmer must choose what elements of the BT50 he will breach to comply with the BT12. She added that it seemed to her that the entire BT50 must cease to be operative. Therefore the BT50 being no longer in effect on 1 September 2003 the respondents could not be in breach of it on that date and had no case to answer. She gave a written decision to that effect and dismissed the charges.

As a result of this decision the question set out at [3] was posed for the opinion of the Court of Appeal.

The arguments

[15] Mr McCloskey QC and Mr Valentine appeared for the appellant. Mr Simpson QC and Mr Robinson appeared for the respondents. Mr McCloskey drew our attention to the provisions of Article 14(1) and Article 14(2). He pointed to the emphasis on isolation in Article 14(1) and to the two parts of Article 14(2), namely (a) and (b). Failure to comply with the requirements of either of them would render the person guilty of the offence. There were two separate offences created by non-compliance with Article 14(2), not one. Article 14(1) could also lead to the commission of an offence. He referred to the chronology supplied by the respondents and to the relevant documents which we have set out at paragraphs [8] to [12] of this judgment and the list supplied by Mr Thomas O'Brien Senior referred to by us.

He argued that the notice Form BT12 was comparable to a permit in writing. Alternatively, the notice Form BT12 was an implied variation of BT50 or waiver of the requirement that the animals were to be kept in a specified area, since they had to be moved off the fields to one of three locations to be tested and the appellants' officials knew this.

He referred to the passage from the Sunday Times v United Kingdom [1979] 2 EHRR 245, cited by the respondents in their skeleton argument based on Article 6 of the Convention:

> "A form cannot be regarded as the law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action will entail."

The respondents only had to go to the appellant's officials to be assured that movement of the animals from the fields would not be regarded as an offence, and a written undertaking would be given to that effect or a formal permit in writing would be issued or a document in writing would be forthcoming, confirming that BT12 was to be regarded as a waiver of the obligation to detain the animals in the specified fields. They only had to go to a solicitor to get the same advice. A telephone call to the officers of the appellant would suffice. At the same time the message would have been clearly conveyed to the respondents by the officials of the appellant or from their own solicitor that at all costs the animals must remain segregated from the rest of the herd.

[16] Mr Simpson QC on behalf of the respondents argued that the drafting of notices BT50 and BT12 prevented a citizen from regulating his conduct so as to conform with the law. Notice BT50 was drafted in such a way that the requirements contained therein were conjunctive and the farmer was bound to commit one or other offence if he was also served with notice BT12.

He referred to the respondents' skeleton argument. It was the BT50 notice upon which the prosecution of the respondents was based. There were two requirements of the notice. The actions of the appellant rendered it impossible to comply with both requirements. As the Resident Magistrate found, several BT notices had been issued after February 2003. He relied heavily on the findings of the Resident Magistrate set out in the first lines of paragraph [14] of the judgment of this court. The testing was part of a regime of monthly testing established by the appellant. Tests were carried out in February, March, April and twice in June 2003.

By 28 May cattle were in fields on the farm rather than in houses. It was accepted by the appellant that keeping the cattle in the fields specified by the appellant would not have been considered as having them conveniently situated/ housed for sampling. The appellants' officials were aware that the cattle would be taken to the respondents' handling facilities and expected them to be taken there. If the appellants' case was correct, its officials must have been aware that one or other of the offences contained in Article 14 had been committed twice in June 2003. Yet no summons was issued and no reprimand was given.

If the BT Notice 12 operated as a waiver of BT50 it must operate as a waiver of both requirements of BT50. The two requirements are conjunctive.

It was for the appellant to exercise its powers in a way which did not inevitably lead the respondents to the commission of an offence.

Mr Simpson QC further submitted that it is a fundamental principle of criminal law that the law should be sufficiently precise to enable an individual to know in advance whether his conduct is criminal: see Sunday Times v United Kingdom [1979] 2 EHRR 245. In the circumstances of the present case the respondents, even after the taking of legal advice, would not have known how to regulate their conduct so as to avoid the commission of a criminal offence.

Reliance was placed on Section 3 of the Human Rights Act 1998. The court should read down the legislation to ensure that a result was achieved which did not to interfere with Convention rights: see Sheldrake v DPP A-G's Reference (No. 4 of 2002) [2004] UKHL 43. The appellants' contentions were

disproportionate to the achievement of a lawful purpose (the prevention of the spread of brucellosis).

If the court accepted the appellants' argument it should refuse to remit the matter to the Magistrates' Court and allow the respondents the benefit of the original decision (1) because the appellant benefits from a ruling that its argument is correct, (2) because the period which has elapsed is over three years since the alleged commission of the offence, (3) because on at least two other occasions the respondent had presented animals to the appellant in similar circumstances without comment or criticism by or on behalf of the appellant.

[17] In reply Mr McCloskey QC pointed out that there had been no findings made about earlier tests. Everything was said to be in order in February. Article 14(4) specified that failure to comply with any of the requirements of the Article was an offence. Articles 154 and 155 of the Magistrates' Courts Order allowed for amendment of summonses.

In relation to the argument based on Article 6 of the Convention the appellant relied on the passages in Clayton and Tomlinson's text book at paragraph 6, 128 to 136. The requirements of Article 14 were disjunctive.

Our conclusions

[18] On the true construction of Article 14(2) of the 1972 Regulations there are two requirements set out at (a) and (b). They are not to be read conjunctively. Any person who fails to comply with (a) or (b) commits an offence: see Article 14(4). It so happens that notice BT50 mentions both requirements but in the instant case a pen could have stroked out the words subject to Article 52(1)(a) of the 1981 Order contained at (a) and the word "and". Because that was not done does not render the notice invalid. The serving of notice BT12 could not invalidate notice BT50 in any circumstances. It contains no reference to BT50, express or implied. In the circumstances of the instant case it renders compliance with Article 14(2)(a) impossible and the bringing of a prosecution based on non-compliance with Article 14(2)(a) would entitle the respondents to rely on Article 52(1)(a) of the 1981 Order and establish a lawful excuse for removing the sick animals from the specified fields.

Article 14 is clearly designed to ensure segregation of animals suffering from brucellosis. That is its main purpose and its purpose is achieved by isolation or segregation on the premises of the owner of the herd.

Notice BT12 requires the owner of a herd to present his animals for official testing for the disease but it cannot be read as meaning that animals exposed to the possibility of infection with brucellosis should mix with

animals which were not exposed to that possibility. To hold that the service of a notice BT12 annuls or suspends a BT50 would render futile the work of DARD in attempting to avoid the spread of brucellosis in a herd.

There was no evidence presented to the Resident Magistrate and no finding by her that it was not practicable to segregate the sick animals at testing. In these circumstances it is impossible to answer the question posed for the opinion of the court other than in the negative.

[19] We remit the hearing of the complaints to another resident magistrate. This is no reflection on Mrs McCreanor but we consider that it is better that another resident magistrate hears the complaints afresh.