Neutral Citation No. [2011] NICA 38 | *Ref:* **MOR8271**

Judgment: approved by the Court for handing down | *Delivered:* **6/9/11**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

Between:

NORBROOK LABORATORIES LIMITED

Appellant;

-and-

THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND

Respondent.

_____

An appeal by way of case stated by His Honour Judge McFarland sitting in the County Court for the Division of Armagh and South Down pursuant to article 61 of the County Courts (Northern Ireland) Order 1980

_____

Before: Morgan LCJ, Coghlin LJ and Sir John Sheil

_____

MORGAN LCJ

[1] The appellant appeals by way of case stated from an order of HHJ McFarland sitting at Newry County Court on 28 April 2010 by which he dismissed the appellant's appeal against conviction in respect of 8 charges of operating an incineration machine without a permit contrary to regulations 9(1) and 33(1)(a) of the Pollution Prevention and Control Regulations (Northern Ireland) 2003 (the PPCR) as amended by the Waste Incineration Regulations (NI) 2003 (WIR). The question posed is whether he was correct in law to decline to stay the prosecution against the defendant as an abuse of the process of the court.

[2] All of the convictions relate to the operation without a permit of incinerating machines at three sites in Newry between September 2004 and February 2005. In early 2004 the appellant had installed three Surefire incinerators at the said premises and on the relevant dates used them for the incineration of non-toxic waste such as polythene, wood and cardboard.

[3] The PPCR was amended by the WIR which gave effect to the Waste Incineration Directive 2000/76/EC (the WID) with effect from 22 September 2003. Regulation 9(1) of the PCCR as amended provided that no person shall operate an installation or mobile plant after the prescribed date for that installation or mobile plant except under and to the extent authorised by a permit granted by the enforcing authority. The WIR amended the PCCR to provide that an incineration plant is defined as any stationary or mobile technical unit and equipment dedicated to the thermal treatment of wastes with or without the recovery of combustion heat generated. The WIR also provided that the PCCR applied to the incineration of non-hazardous waste in an incineration plant with a capacity of less than 1 tonne per hour. The trial judge found that the Surefire incinerators were incineration plant with a capacity of less than 1 tonne per hour. The operation of the incineration plant on the days in question contravened Regulation 9(1) of the PCCR and was made an offence by Regulation 33(1)(a) of the PCCR. The appellant now takes no issue with any of this but submits that although a fair trial was possible it was unfair to try the appellant in the circumstances set out below.

Background

[4] On 15 July 2002 Mr Poole, the Managing Director of Todaysure Projects, the company which provided the appellant with the incinerators which were the subject of the prosecution, wrote to DEFRA seeking guidance in respect of the ambit of the application of the WID to incinerators supplied by the company. Mr Poole received an acknowledgement of his letter dated 24 July 2002 in which it was said that his response to the consultation paper had been noted and that the issues raised would be addressed in the analysis of consultation responses.

[5] On 12 March 2003, 6 months before he had any discussion with Norbrook Laboratories regarding the sale of Surefire units, a further letter was sent by Mr Poole to DEFRA. Mr Poole welcomed the consultation document and, in particular, section 2.4 which recognised the existence and status of small non-technical waste burning appliances. That section was subsequently replicated in paragraph 2.4 of Guidance on Directive 2000/76/EC issued by the Department of the Environment for Northern Ireland in November 2003:

> "**Scale of plant covered by the Directive**
>
> The Department is of the view that the definitions of 'incineration plant' and 'co-incineration plant' used in the Directive are not intended to encompass small units or appliances which would be incapable of complying with the requirements of the Directive under any circumstances. The Directive includes

> provisions in relation to residence time, temperature control, monitoring, and compliance with emission limit values, which only plant of a reasonable size and technical sophistication would be capable of meeting.
>
> Small, basic units do not easily fit the descriptions 'technical unit' or 'plant' which are used in the Directive definitions or the scope of the incineration site which is evidently envisaged in these definitions.
>
> The Department is therefore of the view that small non-technical units which burn waste materials are instead subject to control only under the provisions of the WID. This provides inter alia that such activities should not cause risk to water, air, soil, plants, or animals, cause nuisance through noise or odours or adversely affect the countryside or places of special interest. There are therefore sufficient appropriate controls already in place in relation to the operation of units of this nature.
>
> The Department considers that units which are not included within the scope of the Directive on this basis include small waste burners (used for example on farms) and small space heaters or other waste oil burners (used for example on garage premises)..."

The guidance pointed out, however, that the precise legal requirements could only be determined ultimately by the national or European Courts.

[6] Mr Poole indicated in the correspondence that in his view Surefire units were small non-technical waste burning appliances which did not fall within the definition of technical units. He sought confirmation from DEFRA that they agreed. He made a similar submission in respect of his company's Trash X appliance on 26 March 2003. He did not receive a response to either submission. DEFRA had accepted that small waste oil burners (SWOBs) with a thermal output of up to 0.4 MW fell within the exemption. The Surefire unit had a thermal output of 0.25 MW.

[7] On 23 September 2003 Mr Poole wrote to Norbrook concerning the Trash X and Surefire incinerators. Particulars of each incinerator were enclosed. It was claimed that the Surefire incinerator was designed to comply with and exceed appropriate international standards. Confirmation was sought by the appellant that the Surefire incinerator was exempt from licensing requirements when burning non-hazardous materials. It was confirmed by Todaysure Projects that an incinerator having a capacity of less

than 50 kgs *per* hour and a net rated thermal input of less than 0.4 MW is exempt from Local Authority Licensing and Environment Agency Waste Management Licensing, the only relevant requirement being compliance with the Clean Air Act. There is no dispute that the Surefire unit had a thermal output of 0.25 MW and that its capacity was less than 50 kgs per hour. On this basis, Norbrook was satisfied that the Surefire incinerators it was purchasing were exempt from the PPCR.

[8] Between January and March 2004, three Surefire incinerators were commissioned at three sites in Newry. There was correspondence between the EHS and Norbrook in March 2004 and on 30 March 2004 the premises were visited and photographs taken of two of the incinerators. In a note prepared by Dr Megarry, an officer of EHS, on 1 April 2004, following a telephone call from Stephen Mitchell, the Regulation Manager at Norbrook, he noted: *"I agreed that the key issue currently is what is a small non-technical unit that did not require a permit".*

[9] On 5 May 2004 Mr Larmour of the EHS wrote to Mr Mitchell of Norbrook stating:

> "The UK Environment Authorities, including the Department for Environment, Food and Rural Affairs, have now ruled that incinerators of the type installed at your premises are technical units and will therefore be subject to the requirements of the Waste Incineration Directive."

Mr Mitchell sought clarification of the reasoning for the decision. By letter dated 7 June 2004 Mr Larmour stated that the view of the Department was that the units installed at the appellant's premises were clearly of a size and technical sophistication that meant there was no comparison with small oil burners and were, therefore, required to meet the requirements of the WID. He said:

> "The Government is currently of the view that the WID should not apply to small non technical units that would be incapable of complying with the Directive under any circumstances. Examples of such units are small space heaters or other waste oil burners, as sometimes used on garage premises. All other units burning waste must meet the Directive's standards".

[10] It is now conceded by the respondent that SWOBs are in fact governed by the WID and are subject to the licensing requirements of the PCCR. This concession was made in 2005 in light of threatened infraction proceedings by

the European Commission for breach of the WID. It is acknowledged that the decision to issue guidance in England and Wales and Northern Ireland purporting to exclude SWOBs from the operation of the licensing system was made pragmatically on the basis that there were likely to be problems with enforcement of the WID in respect of them particularly in England and Wales. The guidance issued in Scotland made it clear that SWOBs were subject to the licensing system. We accept that the Guidance was deliberately misleading in light of the submissions by the respondent to that effect in that the Guidance did not disclose the true reasons for the suggestion that SWOBs were outside the remit of the WID.

[11] The trial judge found that the Surefire machines installed in Newry were of a similar design and technicality to a SWOB, had a capacity much less than that permitted for a SWOB and were incapable of complying with the permit regulations envisaged by the WID. In those circumstances he accepted that it was logical to conclude that if SWOBs were excluded from the operation of the licensing regime the Surefire incinerators should similarly be excluded.

Abuse of process

[12] The House Of Lords examined the principles governing the exercise of the jurisdiction to stay a criminal case as an abuse of process in R v Horseferry Road Magistrates' Court Ex p Bennett [1994] 1 AC 42. That was a case in which it was alleged that a citizen of New Zealand had been falsely imprisoned by South African police and forcibly transported to London at the request of English police. The issue was whether the court had a supervisory obligation to enquire into the circumstances under which the person appearing before it had been brought into the jurisdiction. The majority were satisfied that it had. Lord Griffiths gave the leading speech but the principles applying were helpfully set out by Lord Lowry.

> "I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and

> ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings"

[13] The House of Lords visited this area again in Attorney General's Reference (No 2 of 2001) [2003] UKHL 68. At paragraph 25 Lord Bingham considered the exercise of the jurisdiction in those cases where a fair trial is possible but it would be unfair to try a defendant.

> "25. The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which Darmalingum v The State [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (Martin v Tauranga District Court [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right."

[14] The principles stated in those cases have been recognised and applied by this court in Re DPP's Application for Judicial Review [1999] NI 106, R v Murray and others [2006] NICA 33 and R v Fulton [2009] NICA 39. All of these cases recognise that the determination of whether a stay is appropriate is a discretionary decision, that such a decision is wholly exceptional and that there is an expectation that a trial should proceed in the absence of exceptional reasons.

[15] The cases also make it clear that it is unwise to attempt to categorise the forms which abuse of process may take but in this case the appellant relies on the understanding which Mr Poole drew from his correspondence with DEFRA and the difference in treatment between the appellant and those operating SWOBs. In relation to the first point there are a number of cases

where the courts have held that it is an abuse of process for the prosecution to proceed in the face of a promise or assurance that no proceedings would be maintained. No such promise or assurance was relied upon in this case but there are some analogies between the circumstances of this case and those in Postermobile Plc v London Borough of Brent (11 November 1997 Div Ct).

[16] In that case the appellants were prosecuted for the unlawful display of posters at two sites in the immediate vicinity of Wembley stadium during the Euro 96 football tournament. It was established that the appellants had contacted Brent Planning Department prior to putting up the posters and at a meeting had been advised that planning consent was not required for temporary advertisements of one month or less. The court concluded that an express representation to the appellants had been made with apparent authority and that they were entitled to rely on it. In those circumstances it was an abuse of process for the authority to proceed by way of prosecution without any prior warning of its change of position.

[17] In this case there was no express representation. The appellant's submissions amounted to a contention, however, that there was in effect an implied representation that the Surefire incinerator was exempt. Such a representation would have to be clear and unambiguous if it was to be relied upon. The argument that there was an implied representation was founded first on the finding by the trial judge that it was perfectly reasonable for Mr Poole and the appellant to come to the conclusion that if the criteria for SWOBs was applied to the Surefire unit it also would be exempt. We do not understand the judge to be saying any more than this at paragraph 26 of his judgment. He noted that although Mr Poole had made these submissions to DEFRA he had not received a response. The absence of a response could not be interpreted as a positive representation and the fact that the approach to SWOBs was based on pragmatism and a measure of deception rather than principle and the failure to communicate that fact could not alter the position.

[18] Secondly, DOE wrote to the appellant some months before the first incident in respect of which a prosecution was launched indicating that the units required licences. There is justifiable criticism of the reasoning advanced in the subsequent letter of 7 June 2004 but this correspondence did not undermine the clear and unambiguous statement contained in a letter of 5 May 2004 setting out the Department's position. That is to be compared with the position in Postermobile where no such pre-prosecution letter was sent and its absence was the source of considerable comment by the court.

[19] Thirdly, the guidance itself upon which the appellant relied expressly indicated that the precise legal requirements could only be determined ultimately by national or European Courts. This was an important qualification which affected any reliance which could be placed upon the statements contained in the Guidance despite the fact that it was plainly

intended to be of assistance to those contemplating the use of incinerators. We consider that for these reasons the argument that there was an implied representation upon which the appellant could rely cannot be sustained.

[20] We accept that there was a difference in treatment between the way in which the appellants were prosecuted for the use of the Surefire units and those operating SWOBs were not. It has not been suggested that this different treatment was based on any characteristic or other status upon which Article 14 of the ECHR might bite. Accordingly we do not consider that any claim on that basis can be sustained.

[21] It is now clear that SWOBs were in fact subject to the WID and that the Guidance suggesting otherwise represented a failure on the part of the state authorities to implement the WID. Such a failure left the United Kingdom open to infraction proceedings in the ECJ and was, therefore, in itself unlawful as a matter of European law. The appellant's contention on this part of the case is that because there was no distinction between its appliance and SWOBs it also should have been exempt from prosecution. It must follow that if the DOE had followed that course it would similarly have been unlawful as a matter of European law. We find it difficult to see the circumstances in which fairness to an appellant could require the authorities to act in breach of European law but in any event we are satisfied that this case is not one of them.

Conclusion

[22] We have concluded, therefore, that there is no reason for us to interfere with the trial judge's discretionary judgment that this was not a case which should be stayed as an abuse of process. The appeal must be dismissed.

[23] It would be wrong to leave this case without deploring the conduct of the Department of the Environment for Northern Ireland in issuing a Guidance document to the people of this jurisdiction which we have been told it knew misrepresented the requirements of the WID in relation to incineration. In a society governed by the rule of law the Department is obliged to promote compliance with the law. Its conduct in this instance was shameful.