

**THE HIGH COURT**

[2021] IEHC 385  
[2020 No. 3949 P]

**BETWEEN**

**SEÁN MCMANUS**

**PLAINTIFF**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL  
DEFENDANTS**

**JUDGMENT of Mr. Justice Twomey delivered on the 4th day of June, 2021**

**SUMMARY**

1. This case concerns a claim that s. 27(3F) of the Misuse of Drugs Act, 1977 (as amended) (the "1977 Act") is unconstitutional, since it has the effect of requiring a court to impose a mandatory minimum sentence on a limited class of persons, namely those who have been previously convicted of an offence for drug trafficking contrary to s. 15A or 15B of the 1977 Act.
2. In bringing the challenge, the plaintiff, who was sentenced to 15 years for drug trafficking under s. 27(3F) of the 1977 Act, relies in particular on the fact that an almost identical provision contained in the Firearms Act, 1964 (as amended) (the "1964 Act") was recently found to be unconstitutional by the Supreme Court in *Ellis v. The Minister for Justice and Equality, Ireland and the Attorney General* [2019] 3 I.R. 511. There, the Supreme Court found that that section was unconstitutional as it legislated for a mandatory minimum sentence to be imposed only on a limited class of persons who shared one particular characteristic, i.e. they had been previously convicted of a firearms offence under the 1964 Act.
3. The defendants (the "State") in defending this claim did not seek to distinguish *Ellis* from the present case, but relied on the principle of *jus tertii* to claim that the plaintiff is seeking to advance arguments regarding mandatory minimum sentencing which did not arise on the facts of his particular case, when he was sentenced for a second drug trafficking offence.
4. While a finding by the High Court that legislation passed by the Oireachtas is a significant step, nonetheless this Court rejects the reliance by the State on the *jus tertii* principle for the reasons set out below and concludes that it is bound by the Supreme Court decision in *Ellis* and therefore must find that section 27(3F) of the 1977 Act is unconstitutional.
5. This judgment also considers the concept of the State as a model litigant, as it is by far and away the most frequent litigant in the country. This concept was recently considered by Murphy J., writing extrajudicially, in *The Role and Responsibility of the State in Litigation* (2020, Irish Judicial Studies Journal, Vol. 4(1)), which article was relied upon by Charleton J. in his judgment in *Zalewski v. The Workplace Relations Commission* [2021] IESC 24 at para. 18 therein. In the present case, the principle of the State as a model litigant arises for consideration in the context of the awarding of the costs of these proceedings to the plaintiff. As noted below the focused approach of the State to the

litigation led to a 50% saving on court resources (i.e. this case took a half day of court time, rather than the estimated one day).

## **BACKGROUND**

6. On 24th April, 2018, the plaintiff pleaded guilty before Cork Circuit Criminal Court to the offence of drug trafficking contrary to s. 15A of the 1977 Act – as he had in his possession cocaine of a value of €13,000 or more. The plaintiff's three co-accused, Ms. Molly Sloynan, Mr. Dean Gilsenan and Mr. William Gilsenan (the father of Dean Gilsenan), also pleaded guilty on that date.

### **The sentencing hearing at Cork Circuit Criminal Court**

7. On 8th May, 2018, a sentencing hearing took place before Judge Ó Donnabháin at Cork Circuit Criminal Court. At that hearing, evidence was given that the plaintiff had twelve previous convictions in Ireland, as well as one previous conviction in Spain relating to a road traffic offence. Of relevance is that in sentencing the plaintiff for this drug trafficking offence under the 1977 Act, the judge was aware that the plaintiff had a previous conviction for drug trafficking i.e. the offence of possession of cannabis resin and cocaine with a value of €13,000 or more contrary to s. 15A of the 1977 Act - hence the activation of the mandatory minimum sentence of 10 years pursuant to s. 27(3F) of the 1977 Act. That was a conviction for which the plaintiff was sentenced in Cavan Circuit Criminal Court on 19th May, 2009, with a sentence imposed of seven years' imprisonment with two years suspended.
8. Evidence was also given in relation to the previous convictions of the three co-accused. Ms. Sloynan had nine previous convictions, including one conviction for an offence contrary to s. 3 of the 1977 Act, but had no previous convictions for drug trafficking. Neither Mr. Dean Gilsenan nor Mr. William Gilsenan had any previous convictions.
9. It may be helpful at the outset to set out the terms of s. 15A(1) and s. 27(3F) of the 1977 Act as both were relevant for the purposes of the sentencing hearing:

“15A.—(1) A person shall be guilty of an offence under this section where—

- (a) the person has in his possession, whether lawfully or not, one or more controlled drugs for the purpose of selling or otherwise supplying the drug or drugs to another in contravention of regulations under *section 5* of this Act, and
- (b) at any time while the drug or drugs are in the person's possession the market value of the controlled drug or the aggregate of the market values of the controlled drugs, as the case may be, amounts to €13,000 or more.”

“27.— (3F) Where a person (other than a person under the age of 18 years)—

- (a) is convicted of a second or subsequent offence under *section 15A or 15B* of this Act, or
- (b) is convicted of a first offence under one of those sections and has been convicted under the other of those sections,

the court shall, in imposing sentence, specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person.”

Though not relevant to the circumstances of the present case, for clarity, it should be noted that s. 15B sets out that it is an offence to import controlled drugs where those drugs have a value of €13,000 or more.

10. At the sentencing hearing, evidence was given of the particulars of the s. 15A offence to which the plaintiff and his co-accused had pleaded guilty. The evidence was that on 26th November, 2017, the plaintiff and his three co-accused were found in a rented house in Bantry, Co. Cork with a quantity of cocaine estimated to have a value of €51,292. A sophisticated cocaine extraction laboratory was found in a downstairs bedroom of the house. The evidence was that the cocaine found in the house had been imported from Brazil within strips of fabric and was being extracted from that fabric using a solvent (isopropanol). Quantities of isopropanol were found within the house and in the garage next to the house. Other materials, including weighing scales, gloves and facemasks, were found in the downstairs bedroom where the cocaine extraction laboratory was in operation.
11. Evidence was given that over the course of six interviews the plaintiff gave full and candid descriptions to Gardaí regarding the cocaine extraction operation. He admitted to Gardaí that he had received €5,000 for showing one of his co-accused, Mr. Dean Gilsenan, how to extract cocaine from fabric using solvent. He also admitted that he had informed Ms. Sloyan via WhatsApp messages how to extract cocaine from fabric.
12. In relation to Ms. Sloyan’s involvement in the operation, evidence was given that she had arranged and paid for the rented house in Bantry, that she had purchased solvent and that she had received monies for the purpose of arranging the logistics of the operation.
13. Evidence was given that Mr. Dean Gilsenan had made admissions only to the extent that he had been in possession of the cocaine found in the house but had refused to answer further questions put to him regarding the extraction process and the intended destination of the final product. In respect of Mr. William Gilsenan’s involvement, the evidence was that he admitted to having possession of the cocaine, to having been involved in extracting the cocaine from the fabric and that the package containing the cocaine had been shipped to his address in Dublin.
14. Following the evidence, certain pleas in mitigation were made on behalf of the plaintiff. It was said on the plaintiff’s behalf that he was the primary carer for his three children in Spain. Counsel for the plaintiff also drew attention to the fact that the plaintiff had entered an early guilty plea and had been fully co-operative and had assisted the Gardaí in their investigation. A positive Governor’s Report from Cork Prison was also submitted on behalf of the plaintiff to the effect that he was a ‘*model prisoner*’ and had been given enhanced status within the prison.

15. Having heard the evidence and the pleas in mitigation, Judge Ó Donnabháin proceeded to sentence the plaintiff and his co-accused. In his sentencing remarks, Judge Ó Donnabháin noted that it was '*a most significant case*'. Judge Ó Donnabháin, who is one of the most experienced criminal trial judges in the country, also remarked that he had '*never come across anything like it before*'. He also remarked that the operation had involved a high level of sophistication and organisation and he stated that the plaintiff had been the '*principal*' in the whole operation and that due to his particular knowledge of the extraction process it could not have happened without him.
16. In relation to Ms. Sloyan, the Judge considered in his sentencing remarks that she had provided '*significant help and organisation*' and that the matter could not have proceeded without her involvement. Judge Ó Donnabháin noted that Mr. Dean Gilsenan had been '*very much involved in the extraction*' and that while Mr. William Gilsenan had no role in the organisational element, he had assisted in the extraction.
17. The Judge then proceeded to sentence the plaintiff, it having been conceded by the plaintiff's counsel as follows:

"[The plaintiff] knows, Judge, that the unfortunate thing about his circumstances is that he comes before you as somebody with a section 15A sentence and that the Court is mandated to fix a minimum of 10 years, notwithstanding his level of cooperation, notwithstanding his return shortly before the opening day of sessions and immediately came into Court and pleaded guilty." (at p. 17 of the transcript)

Judge Ó Donnabháin acknowledged this concession on behalf of the plaintiff as a correct statement of the law:

"[Counsel for the plaintiff] has correctly put to me that in his case there must be a 10-year sentence." (at p. 27 of the transcript)

18. Having acknowledged that he had to impose at least a ten-year sentence pursuant to s. 27(3F) of the 1977 Act since this was the plaintiff's second drug-trafficking offence, the Judge remarked that a ten-year sentence went '*nowhere near*' the seriousness of the plaintiff's involvement in the case. The plaintiff was therefore sentenced to 15 years' imprisonment with the final three years suspended.
19. The three co-accused, for whom this was their first drug-trafficking offence, were sentenced as follows. Ms. Sloyan was sentenced to 10 years' imprisonment with the final three years suspended, Mr. Dean Gilsenan was also sentenced to 10 years' imprisonment with the final three years suspended and Mr. William Gilsenan received a sentence of seven years' imprisonment with the final two years suspended.
20. Ms. Sloyan successfully appealed the sentence imposed on her by the Circuit Criminal Court. The Court of Appeal delivered judgment in the appeal on 8th October, 2019 and noted that while the criminal enterprise was sophisticated, the scale of the enterprise was modest. The court therefore allowed the appeal and reduced Ms. Sloyan's sentence from

ten years (with three years suspended) to a sentence of five years' imprisonment (with the final 18 months suspended) - see *The People (DPP) v. Sloyan* [2019] IECA 242.

21. The plaintiff has also lodged an appeal against his sentence, however that appeal is effectively on hold pending the determination of the within challenge.

**The constitutional challenge**

22. The present proceedings were commenced by way of plenary summons on 2nd June, 2020. A Statement of Claim was delivered on 4th June, 2020 with an appearance being entered on behalf of the defendants on 30th June, 2020. It was submitted by counsel for the State during the course of the hearing that while the Minister for Justice and Equality is the first named defendant in the proceedings, his submissions were being made primarily on behalf of the Attorney General, as the appropriate *legitimus contradictor* in respect of challenges to the constitutionality of legislation.
23. While the plaintiff originally set out a number of reliefs in the plenary summons, including, *inter alia*, a declaration of incompatibility with the European Convention on Human Rights and damages, at the hearing of the action his counsel indicated that the plaintiff would no longer be pursuing those reliefs. Therefore, the reliefs sought by the plaintiff are now limited to the following:
  - a declaration that s. 27(3F) of the 1977 Act is repugnant to the Constitution,
  - an order of *certiorari* quashing the sentence imposed by Cork Circuit Criminal Court in May 2018, and,
  - an order remitting the criminal proceedings to the Circuit Court for resentencing.
24. In support of his claim that s. 27(3F) of the 1977 Act is unconstitutional, the plaintiff places particular reliance on the decision of the Supreme Court in *Ellis*. It is submitted by the plaintiff that the finding of unconstitutionality in *Ellis* should be applied by way of analogy to the present case.
25. In *Ellis*, the plaintiff brought a constitutional challenge to s. 27A(8) of the 1964 Act. That section had an almost identical effect to s. 27(3F) of the 1977 Act, insofar as it required the court to impose a mandatory minimum sentence where a person was convicted of a second or subsequent firearms offence under certain sections of the 1964 Act. The only differences between the effect of that section and the impugned section in the present proceedings, is that the mandatory term of imprisonment was five years, in contrast to ten years in the present case and that the impugned section relates to a second drug trafficking offence, while the provision in *Ellis* related to a second firearms offence.
26. The plaintiff in that case, Mr. Ellis, had been charged with two offences, the first being the offence of possession of a sawn-off shotgun contrary to s. 27A(1) of the 1964 Act and the second being the offence of possession of certain other weapons contrary to s. 15(1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The weapons in both offences were intended to be used in connection with the same offence at a shopping centre in Co.

Dublin. Mr. Ellis pleaded guilty to both charges. Of note, is that Mr. Ellis had 26 previous convictions, including one conviction for the offence of carrying a firearm with criminal intent contrary to s. 27B of the 1964 Act. This second offence under the 1964 Act therefore was the 'second' firearms offence and resulted in the activation of the mandatory minimum sentence in s. 27A(8) of the 1964 Act. Mr. Ellis was subsequently sentenced in the Circuit Criminal Court to the mandatory term of five years' imprisonment in respect of the offence contrary to s. 27A(1) of the 1964 Act and to a term of three years' imprisonment in respect of the offence contrary to s. 15(1) of the 2001 Act. However, both sentences were fully suspended by the sentencing judge.

27. The Director of Public Prosecutions subsequently sought a review of the sentences on the grounds of undue leniency, with the focus of that appeal being the entitlement of the sentencing judge to fully suspend the mandatory five year sentence imposed in respect of the firearm offence in circumstances where Mr. Ellis had a previous conviction under s. 27B of the 1964 Act. That appeal was put on hold, it seems, pending the constitutional challenge by Mr. Ellis to the 1964 Act. However, the appeal subsequently proceeded to hearing with the Court of Appeal concluding that, having regard to the mandatory nature of s. 27A(8) of the 1964 Act, the Judge had been incorrect in law to suspend the sentence imposed in respect of the firearm offence. The Court of Appeal therefore imposed a five year custodial sentence on Mr. Ellis.
28. Having failed in his constitutional challenge in both the High Court and Court of Appeal, Mr. Ellis was granted leave to appeal to the Supreme Court. Judgment in that appeal was delivered by Finlay Geoghegan J. on 15th May, 2019 with Charleton J. delivering a concurring judgment.
29. In her judgment, Finlay Geoghegan J. held that s. 27A(8) of the 1964 Act was repugnant to the Constitution. In summary, that conclusion was premised on the grounds that the Oireachtas, in enacting the section, had *'impermissibly crossed the divide in the constitutional separation of powers'* by virtue of the fact that it had legislated for a mandatory minimum sentence to be imposed only on a limited class of persons who shared one particular characteristic, i.e. they had been previously convicted of a firearms offence under the 1964 Act.
30. On the basis of the Supreme Court's decision in *Ellis* therefore, the plaintiff in this case claims that s. 27(3F) of the Misuse of Drugs Act, 1977 (as amended) is unconstitutional, since it has the effect of requiring a court to impose a mandatory minimum sentence on a limited class of persons, namely those who have been previously convicted of an offence contrary to s. 15A or 15B of the 1977 Act.

## **ANALYSIS**

31. The written submissions of the State claim that:

- the plaintiff does not have *locus standi* to challenge the constitutionality of the 1977 Act and,

- s. 27(3F) of the 1977 Act had no causal connection to the sentence imposed on the plaintiff by the sentencing judge and that he is therefore precluded from bringing the challenge on the basis that it is a claim based on third party rights/*jus tertii*.

**Does the plaintiff have *locus standi* to challenge the constitutionality of the 1977 Act?**

32. In its written submissions the State argue (in reliance on the Supreme Court decision in *Mohan v. Ireland and the Attorney General* [2019] 2 I.L.R.M. 1 where O'Donnell J. at para. 37 therein quotes from para. 6.2.144 of *Kelly: The Irish Constitution* (5th Ed., 2018)) that to challenge the constitutionality of the 1977 Act, the plaintiff must show that there is a:

“plausible case that the disadvantage he suffered is linked with the operation of the Act in question.”

On this basis, the State argue in its written legal submissions that the plaintiff in this case ‘*must also establish a plausible case and he is unable to do so*’.

33. However, in its oral submissions the State resiled from this position as it accepted that the plaintiff has in fact *locus standi* to challenge the constitutionality of s. 27(3F) of the 1977 Act, on the basis that it could not really be argued that he was not adversely affected by the requirement that there be a mandatory minimum sentence of 10 years imposed for a second drug trafficking offence.
34. It seems clear to this Court that this is the correct position since at its most basic, the plaintiff received a sentence pursuant to s. 27(3F) of the 1977 Act and therefore it seems unarguable that he has *locus standi* to challenge the constitutionality of that section of the Act.

**Is the plaintiff prevented by the *jus tertii* rule from challenging the 1977 Act?**

35. The State does however claim that the principle of not allowing a person to advance arguments on a hypothetical basis, which arguments do not arise from the facts of his own case (i.e. not allowing a person to argue a *jus tertii*/ the rights of a third person) prevents the plaintiff herein from challenging the constitutionality of s. 27(3F).
36. In particular, the State submits that there is no causal connection between the sentence imposed on the plaintiff and the claims made by him regarding s. 27(3F). That argument is made on the basis of the circumstances surrounding the sentencing of the plaintiff, as set out above, and in particular the fact that the sentencing judge made certain comments regarding the plaintiff’s involvement in the illegal enterprise to the effect that the mandatory sentence of 10 years went ‘*nowhere near*’ approaching the seriousness of the offence. Before analysing this defence, it is helpful first to note the distinction between *jus tertii* and *locus standi*.

**Distinction between *jus tertii* and *locus standi***

37. The Supreme Court decision in *Cahill v. Sutton* [1980] I.R. 269 which was considered by O'Donnell J. in *Mohan* perfectly illustrates this distinction. As noted by O'Donnell J. at para. 10 of *Mohan*, the plaintiff in *Cahill v. Sutton* was challenging the constitutionality of

the Statute of Limitations, 1957. This was because her personal injuries claim was barred by the limitation period set out in that Act. On this basis that plaintiff was clearly adversely affected by that Act and so she certainly had *locus standi* to challenge the Act.

38. However, she was prevented by the *jus tertii* rule from challenging the constitutionality of that Act. This was because she sought to advance arguments on a hypothetical basis which did not arise from the facts of her case, i.e. she sought to argue that the Act was unconstitutional because a plaintiff, *who did not know* of the possibility of a cause of action before the expiration of the limitation period, would be adversely affected by that limitation period. However, these arguments did not arise in her case because *she did in fact know* of the possibility of the cause of action which she claimed to have, before the expiry of the limitation period. Accordingly, she was prevented by the *jus tertii* rule from challenging the constitutionality of that Act.

#### **Application of *jus tertii* rule to this case**

39. In this case, the State argues that on the facts of the plaintiff's particular case the mandatory sentence had no impact, particularly when one considers the manner in which Judge Ó Donnabháin sentenced him. On this basis, it is claimed that the plaintiff is in effect seeking to advance arguments around mandatory sentencing which do not arise in his case.
40. In this regard, the State relies on the transcript from the sentencing hearing in which Judge Ó Donnabháin states at p. 26 that:

"And coming back then to the person whom on the evidence has been identified as the principal involved in this escapade; Mr Sean McManus. Now, he has pleaded guilty. That plea was entered in early course and he made certain admissions to the garda when discovered. Now, in relation to this man, he was previously subjected to a section 15A for which in 2009 in received a seven-year sentence. Now, on hearing how that sentence was disposed of when his blood disorder was identified and he was allowed out to Beaumont hospital so that he could receive treatment and sign on either in Mountjoy or in the open prison, I mean, can you but say that **he had every facility, every indication, every prompt to rehabilitate himself? Could the State – could the system have been more lenient? Could it have put forward any more indicative response as to cause a person to rehabilitate themselves? He barely served the sentence that was imposed upon him due to leniency and the State's desire that he rehabilitate himself, medicate himself and put himself right. And the thanks for that? We're here today and he is the principal organiser. Now, the Courts at some stage are going to have to get off whatever stage they're on in relation to incentivising rehabilitation and look at the reality such as in cases like this. You cannot rehabilitate a person who does not want to be rehabilitated.** I think in relation to Mr McManus, that he is involved to an **extraordinarily high degree and has been at a level which is even for this Court, unusually involved and complicated**, given the science, as it were, of his involvement. This couldn't have happened without him and I think in his case, now, [counsel for the plaintiff] has

correctly put to me that in his case there must be a 10-year sentence, **but a 10-year sentence goes nowhere near approaching the seriousness of his involvement in this case.** In my view, **the appropriate sentence for Mr McManus is a 15-year sentence** backdated to whenever he went into prison, and I will suspend the final three years of that sentence on condition that on his release, he will keep the peace and be of good behaviour and be under the care of the probation service for three years and obey all their directions." (Emphasis added))

In its written legal submissions at para. 10, the State, put the matter as follows:

"It is submitted that the sentencing remarks set out above make it clear that whilst the learned sentencing Judge was cognisant of the 10 year mandatory minimum he considered to be largely irrelevant to the sentence that he imposed. He went so far as to identify a significantly heavier sentence as being the appropriate starting point."

41. At the very heart of the State's defence therefore is the claim that the sentencing judge identified 15 years as the appropriate starting point and in particular stated that a 10 year sentence (the mandatory minimum term) would go nowhere near approaching the seriousness of his offence. On this basis, the State argues that the plaintiff cannot advance arguments that on the particular facts of his case, he was affected by the mandatory minimum 10 year sentence. Rather, the State claims that the plaintiff is seeking to advance arguments on a hypothetical basis, and so he is not entitled to challenge the constitutionality of s. 27(3F) on the basis of the principle of *jus tertii*.
42. The logic of this argument appears to be that if the plaintiff had received a sentence of 10 years exactly, then he could clearly argue that the section was unconstitutional on the basis of the prejudice which would then have arisen in his case. However, the State argues that because the sentencing judge had identified 15 years as the appropriate sentence (and so, it is claimed, was apparently not influenced by the 10 year mandatory minimum sentence), the alleged unconstitutionality of the section had no impact on the facts of his case.
43. This Court does not accept the State's argument.
44. First, it seems to this Court that, rather than the judge having identified 15 years as the 'appropriate starting point' as suggested by the State, the term of 15 years was clearly the sentencing judge's end point when it came to sentencing the plaintiff, since this was the sentence he received, *albeit* that three years of that sentence were suspended.
45. In this regard, this submission by the State serves to highlight what, in this Court's view, is the crux of this case, namely what was the starting point in sentencing the plaintiff and in particular what, if any, was the effect of s. 27(3F) on that starting point?

46. The answer to these questions is that first, the starting point for the sentencing judge in sentencing the plaintiff was not zero years, as it was for his three co-accused. Rather the starting point or floor for the sentencing of the plaintiff was a period of 10 years, and this arose as a direct result of s. 27(3F).
47. As has been seen, the end point for the sentencing was 15 years and it seems to this Court that it is very difficult to argue that it was *not* possible that the sentencing judge was influenced, in reaching this end point, by the fact that the starting point in this exercise was 10 years, rather than zero years.
48. This is not to say that the same judge might not reach the same sentence when considering the facts of this case (in the absence of a mandatory minimum 10 year sentence). This is particularly so, when one considers that, somewhat unusually the sentencing legislation sets out the legislature's rationale for the imposition of a 10 year presumptive minimum sentence for drug trafficking offences under s. 15A and 15B (unless there are '*exceptional and specific circumstances relating to the offence*' such as to justify a reduction in that presumptive minimum 10 year sentence). This rationale is clear from s. 27(3D) which states (*albeit* in the context of presumptive minimum sentences for first-time drug trafficking offences, rather than mandatory minimum sentences for second time offences) that:

"The purpose of this subsection is to provide **that in view of the harm caused to society by drug trafficking**, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under *section 15A or 15B* of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all circumstances to do so. "

(Emphasis added)

It is clear from this explicitly stated legislative rationale that, in drafting the legislation which amended the 1977 Act (that being the Criminal Justice Act 2007), the legislature was seeking to address the serious nature of drug trafficking offences and in particular the harm caused to society by providing for significant sentences for such offences

49. In addition of course, the sentencing judge outlined the efforts made to rehabilitate the plaintiff, yet he concluded that you '*cannot rehabilitate a person who does not want to be rehabilitated*' and he noted that he was the principal organiser of what was a very sophisticated drug trafficking operation, before reaching his conclusion that 10 years would go nowhere near approaching the seriousness of the offence the plaintiff committed.
50. Thus it is possible that the sentencing judge might hand down the same sentence (in the absence of a mandatory minimum sentence of 10 years). However, the crucial point is that it is equally true to say that one cannot rule out the possibility that the sentencing judge would have reached a lesser sentence if the floor for sentencing was zero years

rather than 10 years. It is simply not possible for this Court to say that this, or any other, judge would not be influenced, in reaching his end point for sentencing, by the fact that his starting point was not zero years, but was 10 years.

51. It is for this reason that this Court cannot conclude that there is no causal connection between what happened in the plaintiff's case and the terms of s. 27(3F) of the 1977 Act. Accordingly, this Court reject the State's claim that the plaintiff is prevented by the *jus tertii* rule from challenging the constitutionality of s. 27(3F) of the 1977 Act.
52. This Court must now consider whether s. 27(3F) the 1977 Act is unconstitutional.

**Is s. 27(3F) of the 1977 Act unconstitutional?**

53. Section 27(3F) of the 1977 Act has been set out earlier and it will be noted that it is drafted in language almost identical to section 27A(8) of the 1964 Act (as amended), which was held to be unconstitutional by the Supreme Court in *Ellis*. Section 27(8) of the 1964 Act states:

"27A.— (8) Where a person (except a person under the age of 18 years)—

- (a) is convicted of a second or subsequent offence under this section,
- (b) is convicted of a first offence under this section and has been convicted of an offence under section 15 of the Principal Act, section 26, 27 or 27B of this Act or section 12A of the Firearms and Offensive Weapons Act 1990,

the court shall, in imposing sentence, specify a term of imprisonment of not less than 5 years as the minimum term of imprisonment to be served by the person."

54. In *Ellis* the Supreme Court held that s. 27A(8) was unconstitutional because it prescribed a penalty to which only a limited class of persons which committed that offence was subject, by reason of the fact that only persons convicted of a second or subsequent offence under the relevant provisions were subject to the section.
55. The Supreme Court held that while the legislature could by law determine the penalty to apply to *all* persons who committed a specific offence, when it comes to determining the appropriate sentence for a particular individual who committed that offence, that was part of the administration of justice entrusted to the courts pursuant to Article 34.1 of the Constitution.
56. Accordingly, it was held to be unconstitutional for the legislature to seek to legislate for a fixed or minimum mandatory sentence or penalty which does not apply to all persons convicted of the offence, but only to a limited class of such offenders, namely those with one or more prior relevant convictions. At p. 555 of the reported judgment Finlay Geoghegan J. concluded that:

" Accordingly, for the reasons set out in this judgment, I have concluded that in enacting s. 27A(8) of the 1964 Act, as amended, the Oireachtas has impermissibly crossed the divide in the constitutional separation of powers and sought to determine the minimum penalty which must be imposed by a court, **not on all**

**persons convicted of an offence contrary to s. 27A(1), but *only* on a limited group of such offenders identified by one particular characteristic, namely that such person has previously committed one or more of the listed offences.**

It follows from this conclusion that the appellant is entitled to a declaration that s.27A(8) of the Firearms Act, 1964 (as substituted by s. 59 of the Criminal Justice Act 2006) is repugnant to the Constitution.” (Emphasis added)

57. Because of the similarity between s. 27(3F) of the 1977 Act and s. 27A(8) of the 1964 Act, it is very difficult to argue that the *ratio* of the *Ellis* case does not apply to this case.
58. It is to be noted that the Attorney General, who is constrained to defend these proceedings as a matter of constitutional propriety and who is obliged to operate on the basis of the presumption of constitutionality applying to all legislation, did not seek to suggest that there is any significant distinction between s. 27A(8) of the 1964 Act and s. 27(3F) of the 1977 Act which would be such as to distinguish the facts of the current case from that of *Ellis*. This Court would agree with this approach.
59. On this basis it seems quite clear that this Court is obliged to follow *Ellis* and hold that s. 27(3F) of the 1977 Act is unconstitutional since that section does not apply to all persons who are convicted of the drug trafficking offence, but only applies to a *limited* class of persons who commit the offence of drug trafficking (i.e. those with previous convictions under s. 15A and/or 15B ) and accordingly that it breaches Article 34.1 of the Constitution by impermissibly encroaching on a court’s exclusive jurisdiction to determine sentencing. This is because, while the legislature can determine the penalty to apply to *all* persons who commit a specific offence, when it comes to determining the appropriate sentence for a particular individual who committed that offence (or a group of individuals who committed that offence, such as those for whom it is a second offence), that is part of the administration of justice entrusted to the courts pursuant to the Constitution, and it is not something which can be done by the legislature.

**Conclusion on the constitutionality of s. 27(3F)**

60. For the foregoing reasons, the plaintiff is entitled to a declaration that s. 27(3F) of the 1977 Act is repugnant to the Constitution. However, the Court will hear from the parties regarding the precise terms of any such order.

**Limited consequences of a declaration of unconstitutionality for the plaintiff’s case**

61. It is important to bear in mind that in this case we are dealing only with the constitutionality of the sentence handed down to the plaintiff. The grant of an order of *certiorari* quashing the sentence, which is sought, does not affect the conviction in this case. The order which will be granted therefore is, not only an order of *certiorari* quashing the sentence previously handed down but, also an order remitting the proceedings to the Circuit Court for the purpose of resentencing the plaintiff in accordance with the law.
62. To the plaintiff’s credit, it should be noted that at an early stage he pleaded guilty to the original offence. Furthermore, while his Statement of Claim in these proceedings sought

damages, his counsel confirmed that he was not pursuing this claim (in circumstances, after all, where he is still likely to receive a sentence, but not one that is calculated based on a starting point of 10 years). Counsel for the plaintiff also confirmed that he would not be seeking an order of *habeas corpus* under Article 40 of the Constitution or seeking his release from prison arising from any declaration of unconstitutionality of s. 27(3F) or arising from an order of *certiorari* quashing his sentence.

**Limited consequences of a declaration of unconstitutionality for other cases**

63. As regards the consequences for sentences handed down to other persons who have been sentenced under s. 27(3F) of the 1977 Act, it is clear from the Supreme Court decision in *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 that, where prisoners have been sentenced under a statutory provision which is subsequently declared unconstitutional, but where those prisoners did not appeal those sentences within the permitted time or where any such appeals have been finalised, then those prisoners cannot avail of this development of the law, namely the declaration of unconstitutionality, which took place *after* their case has been finalised. Accordingly, any sentencing under s. 27(3F), which has been finalised, is immune from challenge on the basis of the declaration by this Court of the unconstitutionality of that section.
64. Of course, to the extent that any person is about to be sentenced, or has been subject to sentencing which has not been finalised, pursuant to s. 27(3F), then those persons will be able to avail of the fact that the sentencing judge cannot now take account of the fact that they should be subject to a mandatory minimum sentence of 10 years because they were convicted of a previous drug trafficking offence under s. 15A or 15B of the 1977 Act.

**STATE AS A MODEL LITIGANT?**

65. Finally, it is relevant to note that this case is a good example of a suitable approach by the State to litigation when it is incurring taxpayers' money defending proceedings, particularly when one bears in mind that it was not open to the State to settle the proceedings in light of the obligation upon the State to presume that legislation that the Oireachtas has enacted is constitutional (unless and until a court declares otherwise).
66. In this regard, Murphy J., when writing extra-judicially on *The Role and Responsibility of the State in Litigation*, (2020, Irish Judicial Studies Journal, Vol. 4(1)), observed that:
- "The upshot of the ever-increasing volume of litigation and complex litigation is that the High Court and the Court of Appeal are swamped." (at p. 77)
- and that:
- "The state is the most frequent litigant appearing before our courts." (at p. 79)
67. Against this background, she states that:

**"Significant saving of court time and taxpayer's funds,** as well as a reduction in the volume of litigation might also be achieved were the state to adopt the Australian policy of the 'State as Model Litigant'." (at p. 81) (Emphasis added)

before concluding that:

“The role and responsibility of the State in litigation should be reassessed. **Policy changes of the type suggested in this paper would save the state enormous sums in costs** and would at the same time alleviate the unsustainable pressure facing the court system.” (Emphasis added) (at p. 91)

68. In the Supreme Court decision of *Zalewski v. The Workplace Relations Commission* [2021] IESC 24, the plaintiff sought to challenge the constitutionality of the Workplace Relations Act, 2015 in circumstances where he claimed to have been unfairly dismissed by his employer. At para. 18 of his judgment, Charleton J. relied upon Murphy J.’s article to comment on the absence of any proper explanation from the State regarding the fact that the plaintiff had been sent a purported ‘decision’ in relation to a hearing before an adjudication officer that never actually took place. It seems clear that Charleton J. was suggesting that this was an example of a failure on the part of the State to act as a model litigant.
69. In contrast, this is a case where the State acted in a manner which came close to that of a model litigant, with the consequent saving, as noted by Murphy J., of taxpayers’ funds. This is particularly so when one considers the restraints that the State were under in this case, namely its obligation to defend, rather than settle, the proceedings, in light of the presumption of constitutionality attaching to the 1977 Act.
70. The net effect was that a significant constitutional challenge which was listed for one day, was completed within a half day with counsel for the plaintiff remarking that he thought ‘*we might be breaking the land speed record for a plenary constitutional challenge*’.
71. This saving can in fact be attributed to the approach taken by lawyers for the State (as well as the lawyers for the plaintiff). This is because on any reasonable appraisal of this case, and notwithstanding the presumption of constitutionality, this was a case where it was very hard to argue that s. 27(3F) did not fall four-square within the ratio of the *Ellis* case and so was *prima facie* unconstitutional.
72. In these circumstances, counsel for the plaintiff rightly concluded that the correct approach to take was to shorten his opening, and in addition he concluded that it was not necessary to pursue his plaintiff’s claim that s. 27(3F) breached the European Convention on Human Rights. Instead he said he would reply to the issues, if any, raised by counsel for the State.
73. Furthermore, arising from discussions between counsel prior to the hearing, counsel for the plaintiff dropped his claim that, in the event of a finding of unconstitutionality, the matter should be remitted for re-sentencing to a judge, *other* than the judge who imposed the sentence. Logically, this seemed the only correct approach, since there was no complaint whatsoever directed against the sentencing judge *per se*, but rather the complaint of the plaintiff was directed against the legislation under which the judge was obliged to sentence him. Indeed, it is quite clear that even if the sentencing judge had

misgivings about s. 27(3F) and he had refused to sentence the plaintiff pursuant to that section, the judge would have been in danger of ignoring his oath under Article 34.6.1 of the Constitution to '*uphold the Constitution and the laws*', as the section was deemed to be constitutional at the time of sentencing.

74. Counsel for the plaintiff also confirmed that he was not pursuing the claim for damages in his Statement of Claim. Again, this was a realistic and reasonable approach by counsel for the plaintiff. This is because there was no apparent loss caused to the plaintiff, since this is not a case where he has been unlawfully deprived of his liberty, but rather a case where he is guilty of the serious offence of drug trafficking, but he hopes on re-sentencing to get a lesser sentence than that already imposed.
75. As regards the approach of the State to the litigation, it is important to note that counsel for the State did not seek to claim that there was any basis for distinguishing the facts of this case from those in *Ellis*. Thus, while not conceding that the section was unconstitutional (which the State understandably felt it could not do), counsel for the State did not seek to make tenuous arguments as to why it was constitutional, which in this Court's view was a responsible and reasonable approach to the litigation.
76. In adopting this approach, it seems to this Court that the State in this case adopted some of the requirements of a model litigant (set out at p. 84 of Murphy J.'s article cited above), namely:
- the State endeavoured '*to avoid, prevent and **limit the scope of the legal proceedings***', and,
  - the State '*where it is not possible to avoid litigation* [which was arguably the case here, since the State would not be expected to concede that legislation is unconstitutional] [kept] *the **costs of litigation to a minimum***', and,
  - the State did not **require 'the other party to prove a matter which the [State] knows to be true.'** (Emphasis added)
77. In addition, on any objective analysis, the only arguable basis for the State to defend the proceedings was to claim that because the sentencing judge felt that 10 years was '*nowhere near*' long enough for the offence committed, the sentencing judge was not influenced by the 10-year mandatory sentence. On this basis it was at least arguable that the plaintiff was not '*affected*' by the existence of the mandatory minimum sentence in s. 27(3F) and thus arguable that the *jus tertii* rule prevented the plaintiff from challenging the constitutionality of the section on the particular facts of his case.
78. This defence was duly raised by counsel for State at the hearing. However, as noted above, this Court found that the *jus tertii* rule did not prevent the plaintiff challenging the constitutionality of the mandatory minimum sentence.
79. It is relevant to note that the written submissions of the State also relied on the claim that the plaintiff did not have *locus standi* to challenge the constitutionality of s. 27(3F).

For the reasons set out above, this Court concluded that this was not even an arguable point. The State did however concede at the hearing that the plaintiff did in fact have *locus standi*. Accordingly, while it could perhaps be argued that some limited time was taken up by the plaintiff in dealing with this issue in his written legal submissions, it is nonetheless important to note that no time was taken up on this issue at the hearing of the action.

80. It is clear from the foregoing that, when one takes account of the fact that the State was more constrained in this constitutional challenge than it might have been in other litigation, the approach taken by the State to the litigation (combined with the approach of counsel for the plaintiff) led to this matter being heard within a half-day, rather than the full day allotted to it, with the consequent saving of taxpayers' funds. This is because if the State wins it is likely to get an award of costs which it is unlikely to recover from an incarcerated plaintiff, or if the State loses, it will have to pay the costs awarded against it. However, of greater significance, in view of the pressure on court resources, this approach of the State as a model litigant has the advantage of freeing-up court time (at hearing and in preparing the judgment) for other litigants to have their cases heard. For this reason therefore, this case could be said to be an example of a case where the State acted as a 'model litigant' with a consequent saving of court resources and of taxpayers' funds.

**Preliminary view on a costs order**

81. As regards the awarding of costs in this case. This issue is dealt with by s. 169 of the Legal Services Regulation Act 2015, which states:

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, **unless the court orders otherwise**, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

- (a) conduct before and during the proceedings,
- (b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings [...]" (Emphasis added)

82. It is clear that the plaintiff has been '*entirely successful*' in these proceedings and, having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties, for the foregoing reasons, this is *not* a case where this Court believes it is appropriate to '*order otherwise*' than awarding costs to the plaintiff. In particular, it is clear from the conduct of the plaintiff in his engagement with the State to narrow the issues and his decision not to pursue unnecessary issues, such as damages and the claim under the ECHR, that the plaintiff kept the legal and factual issues to a minimum and it was reasonable for him to pursue the issues that he did contest.
83. Indeed, not only that, but as noted above, this is a case where the approach taken by the lawyers for both parties has led to a situation where, instead of the taxpayer paying one day's hearing costs, the taxpayer is liable for just a half day's hearing costs.

84. Accordingly, it is this Court's preliminary view that it should award the plaintiff 100% of his legal costs against the State, including, but not limited to, the costs of a half-day hearing.
85. The foregoing represents this Court's preliminary view regarding costs, but should the parties wish to argue otherwise, this matter will be put in for mention one week from the delivery of the judgment at 10.45.