THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 84

Record No. 2018/375

Collins J.
Binchy J.
Pilkington J.

BETWEEN/

OLIVIER ALARY

APPELLANT/APPLICANT

- AND -

CORK COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 23rd day of March 2021

1. The appellant describes himself as an occasional artisan baker. He is a French national, and says that while he resides in Edinburgh, he sells his bread from time to time in Bantry, Co. Cork. The appellant was convicted at Bantry District Court, on 26th April 2017, of an offence contrary to s.3(1) of the Casual Trading Act, 1995 ("the Act of 1995"). The offence in question is that of engaging in casual trading without holding a casual trading licence issued under s.4(1)(a) of the Act of 1995. This occurred on 30th September 2016, a Friday. The District Court imposed a fine of €100 on the appellant in respect of that conviction.

2. The appellant appealed his conviction to the Circuit Court, which heard and dismissed the appeal on 21st July 2017. The appellant, who is a litigant in person, then purported to appeal that decision to the High Court and, upon becoming aware that that was not the correct procedure, he instead sought leave to apply by way of an application for judicial review seeking the following reliefs:

1) "Judicial Review of an Order of Bantry Circuit Court (sitting at the Courthouse, Skibbereen, County Cork) made on 21st July, 2017 under Record Number 2017/263CA Circuit Court Number A2017/1894.
2) An Order for Judicial Review of the Provisions of The Casual Trading Act 1995 and The Local Government Reform Act, 2014 and The Casual Trading Bye-Laws for Bantry Town 2014 made by Cork County Council on 7th July, 2014 pursuant to those Acts; and
3) An Order extending the time to apply for Judicial Review."

3. By order made on 22nd January 2018, the High Court (Noonan J.) granted the appellant leave to apply by way of application for judicial review for the reliefs sought in para. D of the statement of grounds (being the reliefs referred to above). At para. E of his statement of grounds, the appellant specifically seeks an order quashing his conviction.

4. The principal ground relied upon by the appellant at para. E of the statement of grounds is that the Bye-laws made by the respondent pursuant to the Act of 1995 (the "Bye-laws") are unlawful and unenforceable. While the conviction of the appellant was for the offence of trading without a casual trading licence, being an offence contrary to s.3(1) of the Act of 1995, the Bye-laws designate the entire town of Bantry a "Casual Trading Area" for the purposes of the Act of 1995, and set out the detailed procedures for applications and issue of casual trading licences within the functional area of the respondent. The principal argument that the appellant advances in his statement of grounds for the proposition that the

Bye-laws are unlawful is that the Bye-laws are contrary to traditional market rights subsisting under common law permitting members of the public to engage in market trading at Wolfe Tone Square, Bantry on Friday of each week. He also claims that the Bye-laws are contrary to a patent granted by King Charles II on 15th March 1679, to the Earl of Anglesey, which permits of markets or fairs in the town of Bantry on Wednesday and Saturday of each week. He also relies on a patent granted by King William III on the 10th day of the thirteenth year of his reign granting to one John Davys the right to hold one market or fair annually, on 20th November each year (both patents being hereafter referred to collectively as the "Patents"). He claims that none of the foregoing rights have been extinguished, that they are therefore all extant and that the respondent has no entitlement to interfere with or restrict these rights in any way, whether under the Act of 1995, the Bye-laws or otherwise.

5. It is not in dispute that the Patents were granted, and that the right to carry on such activities on Wednesdays and Saturdays has its origin in the patent of 1679. As far as Fridays are concerned, the appellant claims that the same rights have their origins in common law, having been exercised for centuries.

6. In his statement of grounds, the appellant refers to s.8 of the Act of 1995 which empowers local authorities in certain circumstances to extinguish market rights owned by them, and also to s.7(4) of the Act of 1995, which provides that rights that have not been exercised for ten years or more shall stand extinguished. He states that it is accepted by the respondent that it has never taken steps to extinguish the market rights in Bantry, and he claims that since they have always been exercised, they have not been extinguished by non-usage, under s.7(4).

7. In its statement of opposition, the respondent agrees that the market rights in Bantry have not been extinguished, but pleads that while a market has been held in Bantry for over two decades, that market takes place on a Friday, and the respondent claims that no trading

has taken place on a Wednesday or a Saturday in Bantry since at least 1989. However, the respondent further pleads that the market rights relating to trading in Bantry on Wednesdays and Saturdays may be extinguished by operation of law, pursuant to s.7 (4) of the Act of 1995, which I address below.

8. In its statement of opposition, the respondent also sets out in some detail the background to the adoption of the Bye-laws, which it claims have been adopted in accordance with the procedures prescribed by the Act of 1995.

The Decision of the High Court

9. The proceedings came on for hearing before Noonan J. on 24th July 2018. He firstly addressed the appellant's application to extend time within which to bring to forward the application for leave. Noting that the appellant had clearly formed the intention to bring proceedings arising out of the decision of the Circuit Court within the requisite time, Noonan J. granted the extension of time, in circumstances where this issue was not contested.

10. Noonan J. then proceeded to address a further affidavit sworn by the appellant on 14th May 2018 whereby he purported, without the leave of the court, to introduce a new ground for seeking judicial review. This new ground concerned a claim that under the terms of *Magna Carta Hiberniae* 1216, the applicant has a common law right to trade without a licence. The respondent objected to the introduction of this additional ground. In addressing the issue Noonan J. referred to O.84, r.21 of the Rules of the Superior Courts ("RSC") and also the decision of the Supreme Court in *Shell E & P Ireland Limited v. McGrath & Others* [2013] IESC 1 and concluded that the appellant had failed to advance good and sufficient reason, as the rule requires, such as would permit the court to exercise its discretion to grant the application to introduce this additional ground.

11. Noonan J. noted that the new ground was introduced some nine months after the date of conviction of the appellant, and that the only reason advanced by him for his failure to

raise this ground originally was that, as a lay litigant, he was unaware of the fact that he was required to obtain the leave of the court to introduce new grounds. This, Noonan J. held, was not a good and sufficient reason, as required by O.84, r.21 RSC to permit the appellant to rely on this additional ground outside the time permitted. He also determined that the appellant had failed to satisfy the second limb of O.84, r.21. Noting that the relevant rules of court are freely available to be consulted by anybody embarking on an application for judicial review, Noonan J. refused the application of the appellant to rely on this additional ground.

12. However, in case he was incorrect in this issue, the trial judge nonetheless addressed the point. At paras. 11 and 12 of his judgment, he stated:

> "11. Put succinctly, the applicant claims that under the terms of Magna Carta Hiberniae which is 'The Law of the Land', he has a common law right to trade without a licence. Whilst the applicant made a number of extravagant claims including matters such as the licence fee amounting to evil extortion, and that he never consented to the payment of stallage fees, in summary he claims that the right to trade which derives from Magna Carta Hiberniae cannot be overborne by the terms of the Casual Trading Act, 1995 or the 2014 Bye-laws derived thereunder. Although the applicant's original statement of grounds included a claim for what is described as judicial review of the Casual Trading Act, 1995 and other legislation, insofar as this purports to be a claim that this legislation is invalid having regard to the provisions of the Constitution, although that has not been pleaded, clearly that issue cannot be entertained in circumstances where Ireland and the Attorney General are not parties to these proceedings.
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> 12. The laws of the State derive from the Constitution and legislation such as the Casual Trading Act, 1995 enjoys a presumption of constitutionality. Insofar as the

applicant purports to assert that this legislation is in some way overborne by the provisions of Magna Carta Hiberniae, if it applies at all on which I express no view, clearly that contention is unsustainable."

13. The trial judge held that the appellant could not rely on the Patents to assert any rights for the purpose of these proceedings, since the Patents conferred rights on Wednesdays and Saturdays only. As to the appellant's claim to common law rights, the trial judge noted that such rights had been addressed by Clarke J. (as he then was) in the case of *Simmonds and Anor. v. Ennis Town Council* [2012] IEHC 281, and that Clarke J. had determined in that case that such common law rights fall within the definition of "casual trading" in s.2(1) of the Act of 1995, and accordingly it is lawful to preclude a member of the public from exercising such rights without a licence granted pursuant to s.3(1) of the Act of 1995. The trial judge held that this disposed of the appellant's case that he had a common law right to trade at Wolfe Tone Square without such a licence, and since the appellant had failed to make out any of the grounds on which leave was granted, or the additional grounds which he pleaded out of time, the trial judge dismissed the application.

Grounds of Appeal

14. As regards his reliance on *Magna Carta Hiberniae*, in his notice of appeal to this Court, the appellant says that it was only in March 2018 that he became aware that *Magna Carta Hiberniae* is "still the law of the land" by reason of the Statute Law Revision Act 2007. However, this is really only a further version of the argument that the appellant made before Noonan J. The appellant swore an affidavit raising this issue on 14th May 2018, and did not seek the leave of the court in advance of the hearing to rely on this additional ground. The fact that the appellant only became aware of the status of *Magna Carta Hiberniae* in March 2018 does not undermine the basis of Noonan J.'s conclusion on the issue.

15. On this appeal, however, in his written submissions (but not in his notice of appeal), the appellant advances a further argument as regards his entitlement to rely on this additional ground, and that is that, since it has been retained by the Statute Law Revision Act 2007, *Magna Carta Hiberniae* is a law of the State, and, as such, the permission of the court is not required to rely upon it (this point is made by the appellant at para. 27 of his submissions to this Court, where he states: "Therefore *Magna Carta Hiberniae* is the law of the land of Ireland and as such the appellant's rights should have been upheld, whether he entered them as evidence or not."). Put another way, the appellant says that he is not obliged to plead the law, and therefore leave of the court is not required for him to rely on *Magna Carta Hiberniae*.

16. This argument was not referred to in the judgment of Noonan J., and nor, as I have said above, is it referred to in the appellant's notice of appeal. It is reasonable to infer therefore that the appellant did not advance this argument in the court below. In those circumstances, the appellant would require the permission of this Court to raise it on appeal. No such permission was sought or given. In the circumstances, I consider that the appellant is not entitled to rely on this ground as far as this appeal is concerned. In my opinion Noonan J. was entitled to arrive at the conclusion that he did on this issue: that the appellant should not be permitted to rely on arguments made on the basis of rights claimed pursuant to *Magna Carta Hiberniae*, not having sought or been granted leave to do so in advance of the hearing before Noonan J., for the reasons given by him in his judgment, and referred to at paras. 10 and 11 above.

17. Nonetheless, as the trial judge went on to address the substantive point, I consider it appropriate for this Court to consider his judgment thereon. The appellant submits that the fees payable under the Bye-laws, whether for the purpose of obtaining a casual trading

licence or stallage fees, amount to evil extortion contrary to the provisions of *Magna Carta Hiberniae*, the relevant provisions relied upon by the appellant being:

> "All merchants shall have safe and secure [conduct] to depart from Ireland, and come into Ireland, and to tarry in and go through Ireland, as well by land as by water, to buy and sell, without all the evil extortions, by the old and rightful customs, except in time of war".

18. In his written submissions to the Court, he further says that, as a matter of law, he does not require a licence to trade, because he is entitled to do so pursuant to *Magna Carta Hiberniae*. Simply put, he says that he does not need permission to do something that is fully lawful.

19. I am in complete agreement with the trial judge on this issue, as quoted at para. 12 above. The fundamental law of the State is Bunreacht na hÉireann, pursuant to Article 15 of which the sole and exclusive power of making laws for the State is vested in the Oireachtas, subject to the limited exception provided for in Article 15.2.2. The Act of 1995 enjoys the presumption of constitutionality, and the Bye-laws have been made pursuant to the provisions of that Act. Whatever the status of the *Magna Carta Hiberniae* 1216 (and there appear to be differing views on that issue) any rights conferred on the appellant by that instrument were and are subject to regulation (up to and including abrogation or repeal) by or under laws made by the Oireachtas. *Magna Carta Hiberniae* does not have any form of constitutional or quasi-constitutional status and, even if it has the force of law, its provisions do not trump or override the provisions of the Casual Trading Act, 1995 or Bye-laws duly made under that Act. On the contrary, any rights that may arise under *Magna Carta Hiberniae* are necessarily modified and restricted by the Act of 1995 and by such Bye-laws.

20. I turn next to address the appellant's other arguments/grounds of appeal. It is the appellant's contention that at common law he has the inalienable right to trade freely, which

he has not waived. In support of this argument he relies on the long standing tradition of markets at Wolfe Tone Square on Fridays, and the rights granted by the Patents. He claims that the Bye-laws amount to an impermissible interference with his right to trade freely, and as such they are unconstitutional.

21. So far as the Patents and the rights granted thereunder are concerned, these are of no relevance to these proceedings, since those rights were granted for Wednesdays and Saturdays only, and the conviction which the appellant seeks to have quashed by these proceedings arose out of the appellant trading on a Friday. The Patents do not therefore avail the appellant in any way in these proceedings, and the trial judge was correct to so find.

22. The respondent accepts, however, for the purpose of these proceedings only, that for many years past, markets and fairs have been held on Fridays at Wolfe Tone Square, Bantry (where the appellant was carrying on his business on the date of the offence for which he was convicted) such that a presumption arises of a lawful market. At the hearing of this appeal, the respondent suggested that the doctrine of lost modern grant might apply to these rights. In any case, the respondent acknowledges that the appellant is entitled, on foot of such a presumed market right, however it arises, to trade at Wolf Tone Square, on Fridays, but subject to such statutory regulation as may apply to the exercise of that right. For the purpose of these proceedings, the respondent asserts that such regulation includes the obligation to hold a casual trading licence and to comply with the Bye-laws.

23. In its submissions, the respondent draws to the attention of the Court that there have been a considerable number of decisions of the Superior Courts (they refer to ten such cases in their submissions) in which the courts have been required to address matters of some considerable complexity arising out of the interaction of old market rights, and modern legislation seeking to regulate such markets, in the many varying circumstances in which such market rights were created and exercised over the years. The respondent places reliance

on two of these authorities in particular: *Byrne v. Tracey and Wicklow County Council*, a decision of Morris J. (as he then was) in the High Court, of 7th February 2001 and *Simmonds and Anor. v. Ennis Town Council* a decision of Clarke J. (as he then was) of 10th February 2012.

24. In *Byrne*, the applicant challenged Bye-laws made by the respondent County Council under the Act of 1995, claiming that the effect of the resolution adopting the Bye-laws was in breach of his constitutional right to work as a casual trader. The facts of that case were somewhat different and indeed the applicant in that case failed to establish the existence of the market rights relied upon by him in the proceedings. However, in the course of his judgment, Morris J. referred to other cases in which such a challenge had been brought to Bye-laws made under the Act of 1995, specifically *Shanley v. Galway Corporation* [1995] 1 IR 369 and *Hand v. Dublin Corporation* [1991] ILRM 556. Morris J. noted:

> "In the latter case the Supreme Court in dismissing the Plaintiff's appeal noted that it was open to the Oireachtas to provide for strict controls and regulations of casual trading having regard to common good. The Constitutional right to work relied on by the Plaintiff was not an unqualified right and was one that must be controlled by considerations of the common good. In the former case McCracken J. in considering a restriction placed on the Plaintiff's right to trade said the following: 'I do not consider this to be a breach of any natural or Constitutional right of the Plaintiff to earn a living. It is a condition imposed for the common good by the local authority who consider it unreasonable that casual trading in food should be allowed in Eyre Square. The conditions imposed by the local authority in casual trading are imposed pursuant to a statute of the Oireachtas.'"

25. In *Simmonds*, which, as mentioned above, was referred to and expressly relied upon by Noonan J. in the court below in these proceedings, Clarke J. specifically addressed the

common law right to trade at a market, a right which the respondent acknowledges exists in Bantry on Fridays. The passages relied upon by Noonan J. are succinct and it is useful to quote in full from paras. 13-15 of his judgment as follows:

> "13. The issue of common law rights to trade in public was considered in detail by Clarke J. (as he then was) in *Simmonds & Anor v. Ennis Town Council* [2012] IEHC 281. In that case, two questions were formulated by the court to be determined in the proceedings and identified at p. 3 of the judgment, the first of which was as follows:
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> > 'Whether the exercise of a common law right to trade at a market or fair comes within the definition of 'Casual Trading' in s. 2(1) of the Casual Trading Act 1995 so as to disentitle a member of the public from exercising such right unless he holds, and trades in accordance with, a Casual Trading Licence as required pursuant to s. 3(1) of the Act of 1995?'
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> 14. In answering this question in the affirmative, Clarke J. said (at p. 37):
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> > '6.22. Given that view it seems clear that the first question raised in the preliminary issue must be answered in the way suggested by Ennis Council. The second question raises some further difficulties on which it is necessary to touch. It is, of course, true that, at the level of principle, a person can only carry out casual trading with a licence. Given that I have found that trading at a franchise market is encompassed within the definition of casual trading then it follows that, again at the level of principle, a person should only be able to trade at a franchise market if they hold a casual trading licence.'
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> 15. Clarke J. went to express his conclusions in the following terms (at p. 39):
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> > '**7. Conclusions**
> >
> > 7.1 I have found that the common law right to trade at a market or fair comes within the definition of casual trading in s. 2(1) of the 1995 Act. I have further

found that a member of the public can be precluded from exercising that right where they do not hold and trade in accordance with a licence as required pursuant to s. 3(1). It would follow that Mr. Simmonds and Real Olive are not lawfully entitled, at least at the level of principle, to sell produce at the Ennis Market without holding such a licence.'"

26. Noonan J. concluded that those principles were of equal application to the circumstances of this case, and accordingly dismissed the application.

27. The second question that Clarke J. was required to consider in *Simmonds* concerned the extent to which a local authority could interfere, through Bye-laws, with rights expressly enjoyed by the beneficiaries of a franchise market, such as those granted by the Patents. Since the Act of 1995 contains, at s.8, express provisions dealing with extinguishment of such market rights, it was the view of Clarke J. that any interference with franchise market rights through Bye-laws would have to be evaluated to ensure that they did not indirectly and impermissibly abrogate the rights held. Since the rights relied upon by the appellant in these proceedings arise by presumption of law, and not by express grant, the same question does not arise for consideration in these proceedings, save to observe that it is clear that the Bye-laws do no more than regulate the manner in which the rights concerned are exercised, and if anything, the Bye-laws serve to acknowledge what was until then a right entirely dependent on long user.

28. Accordingly, I agree with the conclusion reached by the trial judge on this issue, the effect of which was to determine that the appellant was required to hold a licence issued under s.3 (2) of the Act of 1995 in order to trade at Wolfe Tone Square on Fridays.

29. In neither his submissions nor at the hearing of this appeal, does the appellant engage in any meaningful way with the authorities relied upon by the respondent. Apart from the arguments referred to above, the appellant advanced rather colourful arguments that he is a

"living man, with a soul" and accordingly he is not what he describes as a "legal entity". He claims that he has rights under "natural laws" to carry on his trade and earn a livelihood, without impediment. Accordingly, he argues, he is not a member of the public as referred to by Clarke J. in the passages cited above. The appellant is, in effect arguing, that he is exempt from the laws of the State. That submission is obviously and fundamentally misconceived.

30. The appellant also advanced other arguments, reflecting grievances that he clearly has with the respondent, most particularly that he is singled out for treatment and that other traders whom he believes may not be trading in compliance with the Act of 1995 or the Bye-laws, are allowed to do so without any interference by the respondent. It is no function of the Court in proceedings such as these to engage in an investigation of such complaints, which are concerned with the implementation of the Bye-laws, and not their validity and which are not properly within the ambit of the pleadings. Moreover, it is apparent from documents handed in to Court by the appellant during the course of the appeal, that some of the points raised by him are actually the subject of other judicial review proceedings that are ongoing in the High Court.

31. The appellant also advanced arguments to the effect that he is not bound by the Bye-laws because he did not consent to them, and that the respondent is estopped from relying upon them by reason of a notice he served on the respondent in November 2018. He also places some reliance on a notice he served on the respondent as far back as October 2015, protesting about the Bye-laws and their enforcement by the respondent. These arguments are entirely without substance or merit whatsoever.

32. For all the reasons given above, I am satisfied that the trial judge was fully correct in his conclusions, and that the appellant has failed to establish that the trial judge erred in any way in arriving at his decision. Accordingly, the appeal is dismissed.

33. As the respondent has been entirely successful in this appeal, my provisional view is that it is entitled to its costs both in this Court and the High Court. If the appellant wishes to contend for an alternative form of order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms already proposed by the Court, the appellant may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms I have proposed will be made.

34. Since this judgment is being delivered electronically, Collins J. and Pilkington J. have indicated their agreement to the same.