Judgments

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THE HIGH COURT

2010 85 SS

IN THE MATTER OF SECTION II OF THE SUMMARY JURISDICTION ACT 1857 AND

IN THE MATTER OF SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

HEALTH SERVICE EXECUTIVE

APPELLANT

AND

BROOKSHORE LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Charleton delivered the 19th day of May, 2010

1. What is a roof? This issue arises for consideration because in 2002 the Government banned smoking in a range of enclosed, as opposed to outdoor, public places, including public houses and restaurants. Some exceptions were allowed. For instance, the proprietors of establishments affected by the new law could erect an outdoor pagoda for smokers with a roof but which, under the law, had to have at least 50% of its walls missing. Another exception, the one I am concerned with, was allowed by law in relation to an unroofed area. Smoke tends to rise, after all, into the open sky. At issue here, as well, is whether a decision by a judge hearing a charge that a roof is not a roof is a finding of fact or a finding of law.

Case stated

2. The respondent runs a public house called Grace's Public House on Main Street in Naas, County Kildare. The Health Service Executive has powers of enforcement under the Public Health (**Tobacco**) Act 2002 as amended by the Public Health (**Tobacco**) Amendment Act 2004. The Health Service Executive people inspected Grace's Pub in April 2008. There was the usual bar and lounge inside, where no one was smoking. Then they went outside. They also found a completely enclosed laneway between two parts of the premises that was covered with a retractable canvas awning. It was furnished with bar stools and had nice varnished wooden counters on which there were ample numbers of ash trays. A large flatscreen television graced one of the end walls. It was here, perfectly legally as Grace's Pub contends, that its customers could while away their time watching the television, drinking pints and smoking; one might be tempted to say under other circumstances, to their hearts' content.

3. Two sets of photographs have been produced. These give a radically different picture of this attractive facility. In those produced by Grace's Pub, the awning is retracted, the bar stools are removed, ashtrays are absent, and the place looks like an alleyway on to the walls of which some narrow shelves have been attached. In the Health Service Executive photograph, from the time of the actual inspection, the area is completely enclosed; the canvas awning completely blots out the sky; bunting on strings advertises the fun of drinking Guinness porter "it's alive inside"; stools are present; and ash trays, notably absent in the other set of photographs, populate the shelves with actual cigarette stubs in them. It is clear to me that the Health Service Executive photographs represent what this area of the pub is like during business hours. The company that run Grace's Pub was charged on 16th January, 2009, with this offence:-

> "That on or about the 23rd April 2008, you, the accused, were the occupier of Grace's Public House, 1 North Main Street, Naas, County Kildare, a specified place as defined by the Public Health (**Tobacco**) Act, 2002 and 2004 within the District Court area of Naas and within the functional area of the Health Service Executive, and on or about the said 23rd April 2008, the smoking of **tobacco** product occurred in the said specified place, contrary to ss. 5, 6 and 47 of the Public Health (**Tobacco**) Act, 2002 and ss. 3 and 16 of the Public Health (**Tobacco**) (Amendment) Act, 2004 and to the form of the statute in such a case made and provided."

4. The case was heard on 23rd September, 2009 by Judge John Coughlan. The learned District Judge, realising there would be a controversy about the actual conformation of the relevant area, sensibly decided to visit the pub and inspect the precise place. Both sets of photographs had been put in front of him. He returned after his view of the scene to court and heard submissions. He then made a decision. This he records in the case he has stated to the High Court in the following terms:-

> "Having inspected the premises and heard the submissions I indicated my view that the awning in question, being made from canvas or other non solid-material was not

> and could not be a roof or a moveable roof within the meaning of the Act. I further indicated as a fact that I was satisfied following inspection that the canvas awning was not a fixed or moveable roof within the meaning of the Act. I held as a fact that the area had no roof. Having so decided that the awning could not be or was not a roof, I therefore indicated that I intended to dismiss the prosecution. I declined to hear any oral evidence in the matter. I had inspected the area and had asked that a demonstration be shown as to how the manual extension of the awning worked. I was satisfied that the awning was not a roof or a moveable roof and therefore that the area was exempt by virtue of s. 47(7)(c) of the Act, and thus was not a place where the smoking of **tobacco** product was prohibited. I was also satisfied that it was an outdoor area."

5. On the basis of these findings of fact, the learned District Judge has asked the High Court four questions:-

> (1) Was I correct in determining that the covering being made of canvas, rather than solid material, could not be a roof or a moveable roof within the meaning of s. 47(7)(c) of the Public Health (**Tobacco**) Act 2002 as amended by s. 16 of the Public Health (**Tobacco**) (Amendment) Act 2004?
>
> (2) Was I correct in determining that the material the covering is made from is a relevant and/or determining factor when deciding if the roof is a roof or moveable roof within the meaning of the Act?
>
> (3) Was I correct in dismissing the case having regard to the aforementioned facts?
>
> (4) Was I correct to make an award of costs as against the HSE in the circumstances?

The legislation

6. The penalty for this offence is provided for in s. 5 of the Public Health (**Tobacco**) Act 2002 as amended by s. 3 of the Public Health (**Tobacco**) (Amendment) Act, 2004. The amendment relevant here removes the previous possibility of a three month term of imprisonment for the offence of allowing smoking indoors in a public area and replaces the previous fine of €1,900 with a fine not exceeding €3,000. It is clear enough that this is a regulatory offence, and not a true criminal offence requiring a mental element as a constituent of the prosecution proofs. That makes no difference, however. Section 16 of the 2004 Act substitutes a new s. 47 in the 2002 Act. This provides that it is an offence to smoke **tobacco** in "a specified place". This is defined as meaning a place of work, vehicles for transporting the public, health premises and hospitals, schools and colleges, public buildings, places for indoor entertainment, registered clubs and, under s. 47(8)(h) "a licensed premises, insofar as it is a place of work". Grace's Pub is the latter. Unusually, s. 47(6) recites that the section "has been enacted for the purposes of reducing the risk to and protecting the health of persons". Section 47(7) declares that the prohibition is not to apply to a number of specified places, including a dwelling, a prison, an outdoor part of a place or premises covered by a fixed or moveable roof provided that not more than 50% of the perimeter of that structure is surrounded by one or more walls, a bedroom in hotel-type premises, living accommodation in charity hostels, living accommodation in an educational establishment, a nursing home, a hospice, and a psychiatric hospital. Then there is the particular exception relied on here. It bears this wording: "this section shall not apply to… a place or premises, or a part of a place or premises, that is wholly uncovered by any roof, whether it is fixed or moveable".

7. For the Health Service Executive it is argued that this alleyway was entirely covered by a roof. For Grace's Pub it was argued that there was no roof but an awning, similar to the kind of awning one sees outside butchers' shops to protect the window display of meats and puddings from the sun. I am at large, according to the Health Service Executive, in deciding whether this area had a roof or not, whereas it is argued for Grace's Pub that I am bound by the finding of

fact of the learned District Judge that there was no roof at all in this area of their premises.

8. Let me say here that I found the photographs produced by Grace's Pub to be unconvincing. The reality of this area is that it is clearly designed to attract smoking customers to the premises and their outside bar and lounge area and into a place where they will be comfortable, entertained, and covered overhead from the elements by a continuous sloped canvas membrane.

Statutory construction

9. I have to try and interpret the intention of the Oireachtas from the plain wording of this section, seen within the framework of the legislation. The appropriate guide to statutory interpretation here, to my mind, is the judgment of Henchy J. in *Inspector of Taxes v. Kiernan* [1981] I.R. 117 at 121 where he said:-

> "First, if the statutory provision is one directed to the public at large, rather than to a particular class who may be expected to use the word or expression in question in either a narrowed or an extended connotation, or as a term of art, then, in the absence of internal evidence suggesting the contrary, the word or expression should be given its ordinary or colloquial meaning. As Lord Esher M.R. put it in *Unwin v. Hanson* [1891] 2 Q.B. 115 at p. 119 of the report:—
>
> > "If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."
>
> The statutory provisions we are concerned with here are plainly addressed to the public generally, rather than to a selected section thereof who might be expected to use words in a specialised sense. Accordingly, the word "cattle" should be given the meaning which an ordinary member of the public would intend it to have when using it ordinarily.
>
> Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in *Tuck & Sons v. Priester* (1887) 19 Q.B.D. 629 (at p. 638); Lord Reid in *Director of Public Prosecutions v. Ottewell* [1970] A.C. 642 (at p. 649) and Lord Denning M.R. in *Farrell v. Alexander* [1975] 3 W.L.R. 642 (at pp. 650-1). As used in the statutory provisions in question here, the word "cattle" calls for such a strict construction.
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> Thirdly, when the word which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed. In regard to "cattle", which is an ordinary and widely used word, one's experience is that in its modern usage the word, as it would fall from the lips of the man in the street, would be intended to mean and would be taken to mean no more than bovine animals. To the ordinary person, cattle, sheep and pigs are distinct forms of livestock."

10. I am urged not to look at dictionaries to discern the correct meaning of words in a statutory context. I think that is perhaps too strict a view in some circumstances. What we call in Dublin "dinner hour" may be somebody else's lunchtime. Someone's "lounge" may be another person's "sitting room" or "parlour". School children may refer to felt-tipped pens as "markers" or "felt-tips". Gym shoes may be "tackies" in one part of the country and "runners" in another. Introducing a man or a woman as ones "partner" does not mean today what it did 15 years ago. Some years ago it was very common for the friends of a girl who was getting married to organise a "shower" for her; this had nothing to do with water. I feel that a dictionary may help me. The Concise Oxford English Dictionary 10th Ed. (2002) defines "roof" in this way:-

> "1. the structure forming the upper covering of a building or vehicle. the top inner surface of a covered area or space.
>
> 2. the upper limit or level of prices or wages. phrases go **through the roof** *informal* (of prices or figures) reach extreme levels. **hit** (or **go through**) **the roof** *informal* suddenly become very angry."

11. It seems to me that the relevant subsection requires very little in the way of statutory interpretation. The 2002 Act was expressly passed in the interests of public health and uses the word "roof" as an everyday expression, as opposed to a word that may have a slang meaning or one which has a technical implication to an expert. Whereas the provision creates a criminal offence, I am not entitled to construe it so as to extend the area of operation of that offence beyond that which the Oireachtas intended, nor do I propose, and I am not entitled, to so strip it of meaning that the clear purpose of the legislation is undermined. That intention is to be found from the plain words of the statute set within its proper context.

12. It is now well known that smoking can cause lung cancer and other fatal conditions. This was first clearly established in a seminal paper of 1950 by Sir Richard Doll. People are legally entitled to smoke if they wish. The problem is that when they do, the burning **tobacco** infests enclosed areas with its smoke; being present there gives the non-smoker an unhealthy dose without any compensatory pleasure. The Court would be acting in an absurd way if it did not take this reality into account. It is not possible for an argument to be accepted that any membrane covering the upper surface of a room or premises which impedes the ready dispersal of **tobacco** smoke is anything other than a roof. Even apart from that, ordinary common sense must prevail. Ireland has a markedly high level of rainfall and it seems to have increased in recent years, especially during the summer months. It is unpleasant to sit or stand outdoors smoking a cigarette and drinking a pint of porter while the rain tumbles down. People want respite from the elements. They do not want their drink to be watered down. Comfort and shelter are clearly the purposes of this awning. It is there to keep off the elements. It also impedes the dispersal of **tobacco** fumes. It is therefore a roof. It makes no difference if it is made of steel or slates, of canvas, of plastic or of glass. It is irrelevant if it leaks or it provides little in the way of insulation. What matters is that a roof is overhead and that, effectively, or less than effectively, it assists in keeping off precipitation and keeping in smoke. The area of Grace's Pub in question was covered at the material time by a retractable roof and the learned District Judge was therefore entitled to proceed to conviction for the offence charged.

Jurisdiction

13. It is inventively argued that the High Court has no power to overturn the finding of the learned District Judge, to the effect that this roof was not a roof. That is not so. The meaning of a word as set out in a statute, and the interpretation of the circumstances under which liability for a criminal offence may be established, are matters of law. I adopt as correct the remarks of Costello J. in *Proes v. The Revenue Commissioners* [1998] 4 I.R. 174 at p. 182 where he said:-

> "...When the High Court is considering a case stated seeking its opinion as to whether a particular option was correct in law, it should apply the following principles. (1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them. (2) Inferences from primary facts are mixed

> questions of fact and law. (3) If the judge's conclusions show that he had adopted a wrong view of the law, they should be set-aside. (4) If the judge's conclusions are not based on a mistaken view of the law, they should not be set aside, unless the inferences which he drew were ones which no reasonable judge could draw. (5) Whilst some evidence will point to one conclusion and other evidence to the opposite, these are essentially matters of degree and the judge's conclusions should not be disturbed, even if the court does not agree with them, unless there are such that a reasonable judge could not have arrived at them or they are based on mistaken view of the law…"

14. I do not consider myself bound by the learned District Judge's opinion. It is fair to say that, in consequence of inventive legal argument, an attractive error of law was presented to him which he was drawn into. That is understandable. Nor is there a criticism there of the advocacy involved. I do not accept the argument that an error of law can be made within jurisdiction and left uncorrected where the learned District Judge has stated a case. The purpose of this procedure is to clarify matters of importance for those who, like the learned District Judge, are considering difficult issues of law in the course of their work on a daily basis. Whereas the modern tendency in judicial review proceedings is towards errors of law causing an excess of jurisdiction, I do not need to comment on that matter. Rather, the statutory mechanism whereby the learned District Judge can seek the advice of the High Court, or whereby her or his decision can be appealed by way of case stated, clearly places a responsibility on the High Court to declare what the law is as clearly and accurately as possible.

Result

15. In the result, these are the answers to the questions raised in the case stated.

> (1) The part of the premises mentioned in the charge was covered by a moveable roof. It was not wholly uncovered by a roof or a retractable roof. The exception to the smoking ban therefore did not apply.
>
> (2) The material which makes up a roof is irrelevant. A roof is a roof.
>
> (3) The correct law is as stated in this judgment. Any further findings of facts as to whether the prosecution have proved their case beyond reasonable doubt is a matter for the learned District Judge.
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> (4) The learned District Judge was not correct in making an award of costs against the Health Service Executive. This a prosecution brought in the public interest. In consequence, the principles as to the award of costs are those as stated in *The People (D.P.P.) v. Kelly* [2007] IEHC 450 (Unreported, High Court, Charleton J., 19 December, 2007). It might also be noticed that the level of costs awarded by the learned judge in this case was too high. This was a simple argument as to whether a prosecution could succeed on a charge carrying a monetary penalty of €3,000 or less. Any legal argument was centred on the definition of a roof. It would be very difficult for a judge in the District Court to justify costs exceeding €10,000 to a defendant succeeding in securing an acquittal on a minor charge and then succeeding in obtaining an award of costs. Even a figure of one tenth of that might be queried.

Back to top of document