



**Judgment Title:** Health Service Executive -v- St. Johnston Taverns Ltd & ors

**Neutral Citation:** [2013] IEHC 69

**High Court Record Number:** 2012 1266 SS

**Date of Delivery:** 02/15/2013

**Court:** High Court

**Composition of Court:**

**Judgment by:** Kearns P.

**Status of Judgment:** Approved

Neutral Citation [2013] IEHC 69

**THE HIGH COURT**

**[2012 No. 1266 SS]**

**IN THE MATTER OF SECTION 2 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**

**ST. JOHNSTON TAVERNS LIMITED, MAURICE MARTIN TOLAND AND ANNE MARIE  
TOLAND**

**RESPONDENTS**

**JUDGMENT of Kearns P. delivered the 15th day of February, 2013**

This is an appeal by the Health Service Executive by way of case stated from the finding of the

District Court that the smoking area situate to the rear of the respondents licensed premises came within the exemption provided for by s. 47(7)(d) of the Public Health (Tobacco) Act 2002 as amended by s. 16 of the Public Health (Tobacco) (Amendment) Act 2004.

On the 15th June, 2012, District Judge Seamus Hughes stated a case pursuant to s.2 of the Summary Jurisdiction Act 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act 1961, for the opinion of the High Court in which a series of six questions were posed. The questions arose in the context of three related prosecutions brought by the Health Service Executive pursuant to the provisions of the Public Health (Tobacco) Act 2002, as amended, against each of the respondents named above. The respondents appeared before the learned District Judge to answer complaints the subject matter of summonses served on them in which they were charged, *inter alia*, with the following offences, to wit:

"(a) That on the 15th day of April, 2010 at "Fishermans Inn" Main Street, St. Johnston in the County of Donegal within the Court Area and District aforesaid, the first respondent, St. Johnston Taverns Limited, was the occupier of the "Fisherman's Inn" Main Street, St. Johnston in the County of Donegal a licensed premises in so far as it is a place of work and therefore a specified place wherein there was smoking of a tobacco product in "Fishermans Inn" contrary to s.47 (1) and (3) of the Public Health (Tobacco) Act 2002, (as substituted by s. 16 of the Public Health (Tobacco) (Amendment) Act 2004) and s. 5 (2A) of the said Act of 2002 as inserted by s. 3 of the Act of 2004.

(b) That on the 15th day of April, 2010 at "Fishermans Inn" Main Street, St. Johnston in the County of Donegal within the Court Area and District aforesaid, the second respondent, Maurice Martin Toland, was a Director of St. Johnston Taverns Limited, the occupier of the "Fisherman's Inn" Main Street, St. Johnston in the County of Donegal a licensed premises in so far as it is a place of work and therefore a specified place wherein there was smoking of a tobacco product in "Fishermans Inn" contrary to s. 47 (1) and (3) of the Public Health (Tobacco) Act 2002, (as substituted by s. 16 of the Public Health (Tobacco) (Amendment) Act 2004) and s. 5 (2A) of the said Act of 2002 as inserted by s. 3 of the Act of 2004.

(c) That on the 15th day of April, 2010 at "Fishermans Inn" Main Street, St. Johnston in the County of Donegal within the Court Area and District aforesaid, the third respondent, Ann Marie Toland, was a Director of St. Johnston Taverns Limited, the occupier of the "Fisherman's Inn" Main Street, St. Johnston in the County of Donegal a licensed premises in so far as it is a place of work and therefore a specified place wherein there was smoking of a tobacco product in "Fishermans Inn" contrary to s. 47 (1) and (3) of the Public Health (Tobacco) Act 2002, (as substituted by s. 16 of the Public Health (Tobacco) (Amendment) Act 2004) and s. 5 (2A) of the said Act of 2002 as inserted by s. 3 of the Act of 2004."

The prosecution arose out of an inspection of the premises on the 15th April, 2010 by Ms. Costello, an Environmental Health Officer employed by the Health Service Executive. According to the evidence before the District Judge, and as found by him, Ms. Costello observed smoking in a designated area of the licensed premises comprising of a wooden structure constructed within what originally appeared to have been a courtyard and was covered by a Perspex type roof.

The learned District Judge found that the smoking area, as constructed, did not offend the provisions of the relevant Act, and the charges were dismissed.

#### **BACKGROUND FACTS**

According to the Case Stated, the facts as proved or admitted or agreed or as found by the learned District Judge were as follows: -

(a) It was agreed that the Fishermans Inn was a licensed premises situate in Main Street, St. Johnston, County Donegal, which was owned by the first respondent and that the second and third respondents were directors of the first respondent. It was agreed that the Environmental Health Officer who was to give evidence was properly qualified and authorised to carry out the inspection that gave rise to the prosecution.

(b) Ms. Maeve Costello, an Environmental Health Officer employed by the Health Service Executive, inspected the premises known as the Fishermans Inn on the 15th April, 2010 at approximately 5.25pm. She was familiar with the premises and she saw two men in the designated smoking area who were not smoking at that time. She bought a drink and at about 5.30pm four other men entered the smoking area. Ms. Costello went into the smoking area and she saw five of the six men in this area smoking cigarettes which were tobacco products. She observed a strong smell of cigarette smoke in the area in question.

(c) Ms. Costello produced a map, and photographs which were taken on the 15th April, 2010. Copies of the map and photographs are attached at Appendix 2.

(d) The designated smoking area was a wooden structure constructed within what originally was a courtyard and was covered by a Perspex type roof.

(e) Within the courtyard area, a wooden structure had been erected in such a way that the courtyard was almost entirely covered by a roof, as the soffits and guttering attached to the solid stone walls overlap and overhang the Perspex roof of the wooden structure. The smoking area structure area was entered through double doors in a UPVC wall which led from the bar lounge. The wall marked as "BC" on the map appended hereto is part of the smoking structure and it runs directly along the perimeter of the UPVC wall. On one side of the structure (marked "BB" on the map) there is a gap of approximately 300mm between the edge of the smoking structure and the gutters on the courtyard building wall. Otherwise the entire courtyard area is covered by roofing.

(f) On entering the structure one enters an area which has an elevated wooden floor. There were a number of tables and chairs and there is a wooden seat with a back that is approximately 1 metre high which runs along the entire side of the structure that is marked "BB" in the map and alongside "AA".

(g) Photograph 7 showed a narrow gap between the side walls and the back of the seating which formed part of the smoking area, one could not leave the smoking area to go into the open air. The wooden structure had seating attached along two sides; this prevented any customer going past the seating in any event. The area was described by Ms. Costello as being effectively a room within a room and that it was 3.6m wide by 4.3m long. There were tables and chairs provided with ashtrays in which there was cigarette ash and butts together with empty cigarette packets. There were heaters mounted on the inside of the room on the roof and the only means of access to and from this area was from the adjoining lounge.

(h) The wall marked "AA" on the map appended hereto corresponded to photographs 1 and 7. The photographs show the distance between the wooden structure and the wall. The roof and gutters overlapped at this point. The wall marked "BB" on the map is shown in photograph 2. There was a 300mm gap between the roof edge and the gutters. The wall marked "AC" in the map is shown in photograph 5. Ms. Costello expressed the view that because the roof of the structure and the roof of the main premises overlapped it was not considered an open space.

(i) In relation to wall marked "CB", the roof and wall were in line. Photograph 9 shows the wall of the lounge, being UPVC and glass. Photograph 6 shows the roof and heaters.

(j) Under cross-examination, Ms. Costello stated that the floor was a wooden floor that measured 4.3m by 3.6m. There was a small gap between the wooden floor/structure and the courtyard wall of about one foot or one foot and a half. The gap was only on two sides of the structure, as the structure was attached to the side of the buildings on the other two sides.

(k) Mr. Paul Canning, Architect, gave evidence for the respondents and produced a map, a copy of which is attached at Appendix 3. Mr. Canning said that the smoking room had been connected to the walls in places by brackets as the structure needed support during the snow and these brackets had been removed since that time. The roof on two sides was still supported by the roof of the licensed premises to which it was attached. The area was open to the elements and that rain could get in and that it had been designed in such a way as to let the smoke out to provide ventilation – he described it as being designed like a cowl fitted to a chimney. He said that more than 50% of the area of the walls of the structure were open in accordance with the measurements he had taken.

(l) I used the description "pagoda" in respect of the smoking area, as referred to in the case of *HSE v. Brookshore Limited* [2010] IEHC 165 (Unreported, High Court, Charleton J., 19th May, 2010). I found that more than 50% of the walls of the structure were open, and that the locations of the distances of the walls of the smoking area structure from the adjacent courtyard walls were immaterial. On that basis, I dismissed count 1 in respect of the summonses."

#### **QUESTIONS POSED BY THE LEARNED DISTRICT JUDGE**

The learned District Judge posed the following series of questions: -

"(I) Whether I was correct in law in finding that the designated smoking area described above fell within the ambit of the exception contained in s. 47(7)(d) of the Public Health (Tobacco) Act 2002, as amended by s. 16 of the Public Health (Tobacco) (Amendment) Act 2004?

(II) Whether as a matter of law I was correct in holding that the smoking area is "outdoor" within the meaning of s. 47(7)(d) of the 2002 Act, as amended?

(III) Whether I was wrong in not holding that the perimeter of the smoking area was surrounded on all sides by walls or similar structures within the meaning of s. 47(7)(d) of the Act of 2002, as amended?

(IV) Whether I was correct in finding that not more than 50% of the perimeter of the smoking area was surrounded by one or more walls or similar structures within the meaning of s. 47(7)(d) of the 2002 Act, as amended?

(V) Whether, for the purposes of determining if the smoking area fell within the ambit of s. 47(7)(d) of the 2002 Act, as amended, I was wrong in considering only the wooden elements of the structure described herein?

(VI) Whether I was correct in holding that the perimeter of the smoking area was the outer edge of the wooden seating, as described herein?"

## THE LEGISLATION

The Public Health (Tobacco) Act 2002 (the "Principal Act") was enacted to give effect to, *inter alia*, the Government ban on smoking in indoor workplaces. Section 47 of the Principal Act was substituted by s. 16 of the Public Health (Tobacco) (Amendment) Act 2004 and was enacted for the purposes of "reducing the risk to and protecting the health of persons". As such, smoking a tobacco product was thus prohibited in a range of enclosed, as opposed to outdoor, public places, including public houses and restaurants.

Section 47 provides that:-

"47. – (1) Subject to subsection (7), the smoking of a tobacco product in a specified place is prohibited.

(2) A person who contravenes subsection (1) shall be guilty of an offence.

(3) Where in relation to a specified place there is a contravention of subsection (1), the occupier, manager and any other person for the time being in charge of the specified place concerned shall each be guilty of an offence."

Thus, it is an offence to smoke a tobacco product in "a specified place". The penalty for this offence is provided for in s.5 (2A) of the Public Health (Tobacco) Act 2002 as amended by s.3 of the Public Health (Tobacco) (Amendment) Act 2004 and provides that a person found guilty of an offence under section 47 of the Act of 2002 as amended shall be liable on summary conviction to a maximum fine of €3,000.

Section 47 of the Public Health (Tobacco) Act 2002 as amended by s.16 of the Public Health (Tobacco) (Amendment) Act 2004 (hereinafter referred to as "the Act of 2002 as amended"), defines "a specified place" as meaning a place of work and includes vehicles for transporting the public, health premises and hospitals, schools and colleges, public buildings, places for indoor entertainment, registered clubs, and, crucially for the purposes of the present case, s. 47(8)(h) states a specified place as being:-

"a licensed premises, insofar as it is a place of work"

Section 47 of the Act of 2002 as amended does allow for some exceptions however. Section 47(7) asserts that the prohibition shall not apply to a number of specified places, including a dwelling, a prison, 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.

The particular exception relied on by both the appellant and respondents herein is s. 47(7)(d) and provides that this section shall not apply to:-

"an outdoor part of a place or premises covered by a fixed or movable roof, provided that not more than 50 per cent of the perimeter of that part is surrounded by one or more walls or similar structures (inclusive of windows, doors, gates or other means of access to or egress from that part)".

It is this key provision that the learned District Judge had to interpret and in respect of which he has sought guidance from this Court. Accordingly, the determination of the correct answers to the questions posed by the learned District Judge turns upon its proper interpretation.

## SUBMISSIONS OF THE APPELLANT

Counsel for the appellant submitted that the smoking area in question was not compliant with the interpretation of s.47 (7)(d) of the Act of 2002 as amended, and that accordingly the learned District Judge was incorrect in dismissing the charges and making the findings that he did. It was argued that unless it is shown that a smoking area clearly falls within the exception

created by s.47 (7)(d) of the Act of 2002 as amended, the respondents in the present case cannot rely upon the statutory exception created by that subsection.

It was contended that, as is evident from the plan provided by Ms. Costello, and the facts as recorded in the Case Stated, the wooden structure, or "pagoda" (as described by the learned District Judge), is entered from the public house through double doors in a UPVC wall which is marked "BC" on Ms. Costello's plan. The UPVC wall is punctuated by the double doors through which one enters the pagoda (with glass windows in the doors) and there are also glass windows in the UPVC wall itself. The UPVC structure appears to be an extension to the public house, and the "BC" side of the pagoda runs directly along the perimeter of the UPVC wall.

On entering the pagoda through the double doors, one enters an area which has a wooden floor elevated over the ground level of the courtyard. There are a number of wooden tables and chairs and there is also a wooden seat with the back approximately one metre high which runs along the entire "BB" side of the pagoda, and for most of the "AA" side. Between them, the roof of the pagoda and the soffit/gutters of the original masonry buildings cover the entire of the courtyard save for a 300 millimetre gap running along the "BB" side between the edge of the pagoda structure and the edge of the gutters on the public house building.

On the "BB" side, there is a gap of approximately 300 millimetres between the solid wall of the courtyard and the wooden structure. On the "AA" side, the pagoda structure is placed at a small distance from the adjoining wall. At the corner of side "AA" where it meets side "AC", there is a gate. At this point the wooden fence around the base of the pagoda rises to approximately 1.2 metres. There is Perspex fitted to the top of the gate.

On side "AC" there is the gate in the corner, as mentioned above, and in addition, the Perspex roof of the pagoda overhangs the adjoining structure (which at this points appears to be no higher than one storey). In other words, the masonry wall of the adjoining structure abuts into the pagoda. Thus, it was argued, with the exception of the gate on this side, this side of the pagoda is essentially solid masonry wall.

It was then submitted that on any proper interpretation of the statute, as applied to the particular circumstances faced by the Court in the present case, it is impossible to say that just because solid walls are approximately 300 millimetres away from the wooden posts of the pagoda that the area is not surrounded by walls or similar structures. The smoking area in question is not outdoors and in any event more than 50% of its perimeter is surrounded by walls or similar structures.

As such, it was contended that the smoking area is an indoor place, and that the perimeter, being the outer solid walls of the courtyard, was completely surrounded by walls and similar structures and therefore is not entitled to exemption under the legislation.

In conclusion, it was thus submitted by the appellant that, in light of the above, the smoking area of the Fishermans Inn clearly does not fall within the ambit of s.47(7)(d). For a structure to fall within the ambit of that exemption it was argued, not more than 50% of the perimeter of the structure can be encircled by masonry walls, such as those identified in the evidence in the present case. In other words, it was reasoned, 50% of the perimeter would have to be free from such structures or walls. Therefore, the attempt to bring the smoking area within the ambit of the statutory exemption must fail. Accordingly, counsel for the appellant submitted, the answers to be provided to the learned District Court Judge in response to the questions posed should be:

- (i) No.
- (ii) No.
- (iii) Yes.

(iv) No.

(v) Yes.

(vi) No.

### **SUBMISSIONS OF THE RESPONDENTS**

Counsel for the respondents submitted that the Act of 2002, as amended is clear in that it permits a covered external area to be treated as an exception permitted by s.47(7)(d) of the aforementioned Act. It was contended that the perimeter of the area is the footprint of the raised timber patio. As there is no vertical wall standing on, inside or abutting two of the structure's four sides, on any straight forward interpretation of the section in issue, it was argued, this outdoor area is within the prescribed definition and has to be regarded as exempt.

It was further contended that although it may be the case that the section should go on to specify that the structure be a minimum distance from any other wall, as it does not do so, it was not for the Court to speculate as to whether the legislature had applied its mind to such an issue.

It was argued that the section in issue in the present case is capable of a literal meaning and should therefore be construed strictly having regard to the penal nature of the provision. Finally, it was proposed that it was not the function of this Court to determine whether or not the District Court has made the correct findings of fact *per se*, but to indicate whether or not the District Court has erred in law in its approach to fact finding. In that regard it was submitted that the District Court Judge could on the facts not only find that the smoking area was an outside area, but also find that the perimeter of the relevant area was the outer edge of the wooden area and not more than 50% of the perimeter of that part was surrounded by walls or similar structures, therefore interpreting it to be "outdoor" and come within the ambit of the exemption provided for in s. 47(7)(d) of the Act of 2002, as amended.

In respect of the questions posed by the Judge of the District Court it was submitted by counsel for the respondents that should the Court determine that there is an issue of law to answer then the answers to the questions proffered should be as follows: -

(i) Yes.

(ii) Yes.

(iii) No.

(iv) Yes.

(v) No.

(vi) Yes.

### **DECISION**

Appeals by way of case stated require by their very nature that this Court gives its opinion as to matters of law and whether findings by, in the present case, a learned District Judge, were correct. It follows that when clarifying matters of law, this Court may overturn findings if it concludes that the wrong interpretation of the law has been applied. The approach therefore to be adopted by this Court in addressing findings made by the District Judge for the purpose of answering questions in a case stated was outlined by Charleton J. in *Health Service Executive v.*

*Brookshore Limited* [2010] IEHC 165 (Unreported, High Court, Charleton J., 19th May, 2010), stating at p. 10 that: -

"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) While 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 they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law.'

I do not consider myself bound by the Learned District Judge's opinion. ...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."

As previously stated, the determination of the correct answers to the questions posed by the learned District Judge in the present case turns upon the proper interpretation of s.47(7)(d) of the Act of 2002 as amended. As such, it is helpful at this juncture to consider the correct principles of statutory construction to be applied to the interpretation of statutory provisions in general.

In *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, Blayney J. said at p. 151 that: -

"As there is no presumption either way in regard to whether the State is or is not bound by the Act of 1963, the interpretation of the Act has to be approached in the light of the general principles to be applied in the interpretation of statutes.

'The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver:

"The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view. (per Lord Blackburn in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394.)"

Craies on Statute Law (1971) (7th ed.) at page 65.

This rule expressed in very similar terms in Maxwell on *The Interpretation of Statutes* (12th



ed., 1976) at p. 28: -

"The rule of construction is 'to intend the Legislature to have meant what they have actually expressed' (per Parke J. in *R. v. Banbury (Inhabitants)* (1834) 1 Ad. & El. 136 at p. 142). The object of all interpretation is to discover the intention of Parliament, 'but the intention of Parliament must be deduced from the language used,' (per Lord Parker C.J. in *Capper v. Baldwin* [1965] 2 Q.B. 53, at p. 61) for 'it is well accepted that the beliefs and assumptions of those who frame Acts of Parliament cannot make the law.' (per Lord Morris of Borth-y-Gest in *Davies Jenkins & Co. Ltd. v. Davies* [1967] 2 W.L.R. 1139 at p. 1156)."

Similarly, and as cited by Charleton J. in *Health Service Executive v. Brookshore Limited* [2010] IEHC 165 (Unreported, High Court, Charleton J., 19th May, 2010), Henchy J. in *Inspector of Taxes v. Kiernan* [1981] I.R. 117, in construing s.78 of the Income Tax Act 1967, and in particular in determining the issue as to whether the word "cattle" as used therein included "pigs" stated at pps. 121-122: -

"Leaving aside any judicial decision on the point, I would approach the matter by the application of three basic rules of statutory interpretation. 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* 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.

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."

It is clear from the authorities cited above that the statutory exemption contained in s. 47(7)(d) as expressed in clear, unambiguous terms must be construed in its ordinary meaning. As such, the key features contained therein are:-

(a) there must be an outdoor part of a place or premises covered by a fixed or moveable roof, and

(b) not more than 50% of the perimeter of that part can be surrounded by one or more walls or similar structures.

Therefore, each of these criteria must be satisfied. Accordingly, the area must be outdoor, covered by a fixed or moveable roof and not more than 50% of the perimeter of this outdoor area must be surrounded by one or more walls or similar structures and each one shall now be dealt with in turn.

(a) Outdoor part of a place or premises covered by a fixed or moveable roof

While *Health Service Executive v. Brookshore Limited* is authority for the proposition that an "outdoor" part of a place or premises can be covered by a roof to come within the statutory exception of s. 47(7)(d), it is evident that in other respects the place or premises must be "outdoor".

As observed by Murphy J. in *Malone Engineering Products Limited v. Health Service Executive* [2006] IEHC 307 at p. 315:-

"But the second paragraph, 'an outdoor part of a place or premises' is, of course, a word that is used without any definition and clearly is a word that has to be used in its ordinary sense. The ordinary sense is open air in terms not alone of the Oxford English Dictionary, but Chambers, and indeed would correspond, I think, to what all of us would think of in terms of outdoors – the outdoor work, outdoor search, outdoor attire. ...one might say, and it does not seem to me to be sufficient to say it, that if any structure has a roof and has doors, that, by its very nature, is indoors and not outdoor, but, as I say, one has to go perhaps more searchingly into the nature of the building relative to the other definitions which we have in the particular paragraph."

Significantly, the facts as found by the learned District Judge at paragraph 3(g) of the Case Stated included, *inter alia*, that the only means of access to and from the smoking area was from the adjoining lounge of the Fishermans Inn and that one could not leave the smoking area to go into the open air. Taking this into consideration, it is extremely difficult to characterise the smoking area of the Fishermans Inn as being outdoor.

(b) Not more than 50 per cent of the perimeter of that part is surrounded by one or more walls or similar structures

The Learned District Judge in the present case came to the conclusion that he should look at what he described as the "pagoda" - namely the wooden structure itself - and he found that more than 50% of the walls of the structure were open, and that the locations of the distances of the wall of the smoking area structure from the adjacent courtyard walls were immaterial. It appears that the Learned District Judge based this finding upon the evidence given by Mr Canning, an Architect, who gave evidence for the respondents.

While there is a slight gap between the wall at "AA" and the side of the timber structure, and while there is a slightly larger gap between the wall "BB" and the side of the timber structure, the entire perimeter of the structure nonetheless can be described as "surrounded by walls" when given its ordinary meaning. The structure is encircled by walls and almost the entire of that area is roofed either by the roof of the pagoda structure or by the overhanging gutters/soffits of the original premises.

Even if the wooden pagoda structure could be taken on its own (without reference to the surrounding walls), and if one takes walls "AC" and "CB" as being the only walls which are solid, it appears that walls "AA" and "BB" are not entirely open because there is a raised timber area extending from the floor to approximately one metre high which provides seating and which runs along those two sides for almost their entire length, thus preventing customers going past the seating in any event.

In *Malone Engineering Products Limited v. Health Service Executive* Murphy J. accepted that a "wall" was capable of having a very wide meaning which was extended still further by the reference to "or similar structures". Furthermore, there is no requirement in the exemption contained in s. 47 of the Act of 2002 as amended that the wall should extend up to the roof.

Having regard to the foregoing and the description of the premises contained in the Case Stated and in the Appendices thereto, it is apparent in the present case that the smoking area situate to the rear of the Fishermans Inn is not outdoor. The "pagoda" is entirely enclosed by the stone walls. The existence of these stone walls and the extent of the roof overhanging the structure makes it impossible to describe the smoking area as either "outdoor" or that not more than "fifty per cent of the perimeter is surrounded by one or more walls or similar structures".

Consequently, I agree with the description of it as effectively being "a room within a room" (at para. (g) of the Case Stated). The legislature clearly and expressly applies the exemption to an outdoor part of the premises where not more than 50% of the perimeter of the part, is surrounded by walls or similar structures. Therefore, the smoking area of the Fishermans Inn does not meet the statutory criteria and as such falls foul of the exemption provided for in s. 47(7)(d) of the Act of 2002, as amended.

I am thus satisfied that the learned District Judge was not correct in law in finding that the designated smoking area described above fell within the ambit of the exception contained in s. 47(7)(d) of the Public Health (Tobacco) Act 2002, as amended by s. 16 of the Public Health (Tobacco) (Amendment) Act 2004. Nor was he correct as a matter of law in holding that the smoking area is "outdoor" within the meaning of s. 47(7)(d) of the 2002 Act, as amended.

I am satisfied that the learned District Judge was also mistaken in not holding that the perimeter of the smoking area was surrounded on all sides by walls or similar structures within the meaning of s. 47(7)(d) of the Act of 2002, as amended and mistaken also in finding that not more than 50% of the perimeter of the smoking area was surrounded by one or more walls or similar structures within the meaning of s. 47(7)(d) of the 2002 Act, as amended.

I am further satisfied that for the purposes of determining if the smoking area fell within the ambit of s. 47(7)(d) of the 2002 Act, as amended, the learned District Judge was mistaken in considering only the wooden elements of the structure and that he was not correct in holding that the perimeter of the smoking area was the outer edge of the wooden seating, as described therein.

Therefore, it just remains for me to answer the questions posed by the learned District Judge as follows:

(1) No.

(II) No.

(III) Yes.

(IV) No.

(V) Yes.

(VI) No.

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