

Simmonds v. Cork County Council [2002] IEHC 17 (22nd February, 2002)

Record No. 2002 No. 1262p

THE HIGH COURT

Between:

TOBY SIMMONDS AND THE IRISH ORGANISATION FOR MARKET AND STREET TRADERS LIMITED

Plaintiffs

-and-

THE COUNTY COUNCIL FOR THE COUNTY OF CORK, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND and THE ATTORNEY GENERAL.

Defendants

Judgment of Mr. Justice Aindrias Ó Caoimh delivered 22 February 2002

This is an application for

- (1) an interlocutory injunction restraining the defendants from interfering with the “public right of concourse of buyers and sellers for the buying and selling of vendible commodities at Wolfe Tone Square in the town of Bantry and County of Cork on the 1st day of February 2002 and on any Friday thereafter pending the determination of these proceedings”;
- (2) an interlocutory injunction restraining the defendants their servants or agents from disputing, disturbing or otherwise challenging the lawful holding of the said fair and market, and
- (3) an interlocutory injunction restraining the defendants, their servants or agents from interfering with the participation of the first named plaintiff in the said fair or market whether in his display of goods for purchase therein or in any other lawful enjoyment of the said fair or market.
- (4) an order restraining the Defendants or either of them their servants or agents from interfering with or disturbing the right of the public to attend at Wolfe Tone Square to buy and sell vendible commodities in the Town of Bantry as enjoyed heretofore;
- (5) an interlocutory order requiring the second named Defendant to return forthwith the first named plaintiff’s goods and in particular items specified in the notice of motion.

Background:

1. The evidence before this court shows that there has been for a long period of time a market and fair in the town of Bantry which was granted by the Crown in the seventeenth century to the First Earl of Cork. The first plaintiff is engaged in the sale of olives and olive products at Bantry and other locations within the State. He sells his merchandise from a stall during market day at Wolfe Tone Square at Bantry and has done so for upwards of five years. The Fair takes place on the first Friday of each month and the market takes

place on each other Friday. The second plaintiff is a company limited by guarantee which has been incorporated to promote and co-ordinate the interests of market and street traders on a countrywide basis and 56 traders, including the first plaintiff, who trade at the market at Bantry on the Friday of each week on a regular basis are members of the second plaintiff.

2. It appears that Mr. Simmonds and all market traders were approached by a representative of Cork County Council on the 7th of December last and informed by a written leaflet that the County Council intended to implement the Casual Trading Bye-Laws as and from the 11th of January 2002 and that there was a new area adjacent to the Square which had been designated for casual trading and that traders would henceforth require a casual trading licence to trade in this new area.

3. The plaintiffs complain that the intention of the County Council is to replace the traditional market and fair with a new market at a different location being at an area reclaimed from the foreshore which it is alleged is unsuitable, remote and forlorn. It further appears that the area has 26 bays designated and the plaintiffs, while complaining about the site, further complain that it is too small in area for traders who have traditionally used the market area in the Square.

4. The plaintiffs complain that while the new area is subject to the requirement to hold a casual traders licence the market has not been subject to any such restriction. It is agreed between the parties that Bantry market is a 'franchise market' over which a 'market right' exists. The plaintiffs complain that the restriction sought to be imposed is unlawful. The plaintiffs further complain that the restrictions in the Casual Trading Act should not apply to the 'franchise market'.

5. The plaintiffs acknowledge that, while there is provision in the [Casual Trading Act, 1995](#) to extinguish a market right, the machinery for doing so has not been invoked by the County Council, but, nevertheless, it submitted that the action of the County Council amounts in effect to an extinguishment of the market right.

6. On the 11th of January last Mr. Simmonds was approached by an officer of the County Council at the Square in Bantry where he had set up his stall and commenced trading. He was given one hour to remove his stall and cease trading in the Square. He was advised that in the event of his failing to do so the matter would be brought to the attention of the Garda Síochána. Mr. Simmonds continued trading and refused to remove his stall and one hour later two members of the Garda Síochána arrived and seized his stall, merchandise, equipment and cash. He was informed by Jerome O'Sullivan of Cork County Council that he believed Mr. Simmonds was breaching the local Casual Trading Bye Laws because he was not trading in a designated casual trading area. He had requested the gardai to enforce the law. Mr. Simmonds indicated that he sought to rely upon his public right relying upon the fact that the market was a franchise market.

7. Mr. Simmond's property was impounded by the gardai at the time and put into 3 vans belonging to the County Council. Mr. Simmonds complains that the actions have resulted in financial loss. He has refused to apply for a casual trading licence from the County Council.

The issues:

8. The issues arising on this application are essentially whether the County Council is entitled under the terms of the [Casual Trading Act, 1995](#) to act in the manner complained of. It is submitted on behalf of the plaintiffs that there is a real issue to be tried and that a public right is in issue and that in this regard damages are not an adequate remedy and that the balance of convenience must favour the plaintiffs.

9. It appears that the market right previously granted to the first Earl of Cork has been acquired by Cork County Council.

10. The Casual Trading Act, 1995 is “An Act to provide for the control and regulation of casual trading and to provide of connected matters.”

11. Casual trading is defined in section 2 of the Act as “selling goods at a place (including a public road) to which the public have access as of right or at any other place which is a casual trading area.”

12. On the face of this definition it appears that the activity in which the Mr. Simmonds is engaged falls within the definition of casual trading as it does not come within any of the exclusions contained in s.2 of the Act.

13. Section 3 (1) provides

(1) A person shall not engage in casual trading unless he is, or is the servant or agent acting as such of, a person who holds a casual trading licence that is for the time being in force and the casual trading is in accordance with the licence.”.

14. Section 1 of the Act defines a “casual trading area” to mean land standing designated by bye-laws under section 6 as an area where casual trading may be carried on.

15. “Market right” is defined as “a right conferred by franchise or statute to hold a fair or market...”

16. Section 6 of the Act provides for the making of bye-laws in relation to the control, regulation, supervision and administration of casual trading by a local authority in its functional area.

17. Section 8 (1) of the Act provides that a local authority may carry on, manage and regulate a market or fair to which a market right owned by it relates as if were a market established by it under the [Public Health \(Ireland\) Act, 1878](#) and shall have all such powers as may be necessary for those purposes.

[Section 8](#) (2) provides that a local authority may extinguish a market right owned by it.

18. In the instant case the local authority does not seek to argue that the market right in Wolfe Tone Square has been extinguished. It does submit that it is engaged in “regulating” the market right at issue.

19. What is essentially at issue in this case is whether the regulation of a market or fair such as that at issue in this case is limited to the manner in which a market established by it under the [Public Health \(Ireland\)](#)

[Act, 1878](#) is subject to regulation, or whether wider powers of regulation of the subject fair and market exist by reference to the [Casual Trading Act, 1995](#).

20. An issue exists as to whether the requirement to hold a licence under the 1995 Act applies in this case or whether the rights sought to be exercised by the first plaintiff are independent of the provisions of [the Act](#).

21. At the same time I believe that the actions of the County Council in this case extend much further than regulating the fair or market at issue, whether these powers exist under [s.6](#) of [the Act](#) of 1995 or otherwise. The bye-laws made by the County Council do not apply at all to the area of Wolfe Tone Square and clearly on their face purport to regulate trading in the adjacent area outside the Square, which is in a car park adjoining the foreshore. The bye laws purport to restrict casual trading to the freshly designated area in Bantry. In so restricting casual trading without seeking to extinguish the market right sought to be exercised by the first plaintiff I believe that this amounts to an effective extinguishment of the market right in excess of the powers contained in that behalf in [the Act](#) of 1995 and, insofar as this may be categorised as “regulating” the market right, I believe that it is not in any way directed to regulating the market right at Wolfe Tone Square as such.

22. Mr. Bland of counsel has referred this Court to a number of authorities in support of the submissions made by him including the cases of *D.P.P. (Long) v. McDonald* [1983] ILRM 223, *Skibbereen U.D.C. v. Quill* [1986] I.R. 123 and *Bridgeman v. Limerick Corporation* (Unreported, Supreme Court, 15 June 2001). I do not believe that the cases cited are directly on point with the issues raised in this case but they indicate that the right of a member of the public to trade at a franchise market is in the nature of a proprietary right, that the designation of an area for casual trading is not to be considered as synonymous with the creation of a market and that the right to regulate a market under one statutory code does not entitle the exercise of such a power to undermine a right to trade at a franchise market in the absence of clear statutory entitlement.

23. On behalf of the Commissioner of an Garda Síochána it has been indicated by counsel that the Gardai will abide by any ruling of this Court on the issues between the plaintiffs and the local authority.

24. On behalf of Cork County Council it is submitted by counsel that the market co-exists with the casual trading area recently designated by the Council. Whether a market such as the subject market can be moved at common law may arise in these proceedings, but insofar as the respondent local authority has not sought to justify its actions by reference to a power to move such a market and has only sought to justify its actions by reference to its power to regulate casual trading under [the Act](#) of 1995, it does not appear to arise. However, the power to move such a market at law is limited and accordingly the power to regulate casual trading may not extend to defeat the proprietary rights of members of the public in the absence of clear statutory entitlement.

Conclusions:

25. In conclusion I believe that plaintiffs have demonstrated that there are real issues to be tried in this action and I believe that damages do not represent an adequate remedy in the circumstances. I also believe, if it necessary to so decide, that the balance of convenience favours the plaintiffs and in the circumstances I am satisfied that they are entitled to interlocutory relief which they seek and I accordingly will grant the relief at paragraphs 1, 3 and 4 in the plaintiffs’ notice of motion insofar as the rights of the plaintiffs are concerned pending the trial of this action.