

Skibbereen Urban District Council, Complainant, v. Patrick Quill, Sheila Coggins, Peter Paul Horan, Norbert Skatikatt and Tony Coggins, Defendants [1985 No. 504 SS]

High Court

15th January, 1986

Casual trading – Whether defendants selling at a market held in pursuance of a market right – Case stated – Courts (Supplement Provisions) Act, 1961 (No. 39), s.52 – Casual Trading Act, 1980 (No.43) ss.1 and 2

Section 2. sub-s. 2 (h) of the Act of 1980, provides that casual trading does not include selling at a market or fair held in pursuance of a market right. A “market right” is defined in s.1 of the Act as a right conferred by franchise or statute to hold a fair of market, that is to say, a concourse of buyers and sellers to dispose of commodities.

In 1949 the complainant bought the franchise to hold markets and fairs on Wednesdays and Saturdays in the town of Skibbereen. Since that date they did not hold or promote any markets in the area, except for the years 1968 to 1972 when they collected tolls from two persons trading in the area on Saturdays.

Summonses were issued by the complainants against the defendants charging them with offences contrary to ss.3 and 5 of the Casual Trading Act, 1980. Alleging that the defendants had carried on casual trading in a casual trading area without a licence or permit or (in the case of some of the defendants) in contravention of the conditions contained in the permits that had been granted to them. The defendants argued that they were not engaged in casual trading within the meaning of the Act of 1980 because they were selling at a market held in pursuance of a market right and were therefore within the exception provided for in s.2, sub-s.2 (h) of the Act. At the trial of the action in the District Court the District Justice, on his own motion, stated a case for the determination by the High Court of certain questions of law raised in the action.

Held by Lynch J, in ruling the points of law, 1, that the franchise created by the charter was not terminated by the lack of exercise of it by the complainant but that there was no obligation on the complainant to hold markets in accordance with the terms of the charter.

2. That whether or not the complainant held markets under the charter those members of the public wishing to trade had rights, which were in the nature of proprietary rights, to attend at the market places on the dates specified in the charter to engage in trading and such trading was within the exception provided for in s.2, sub-s. 2 (h) of the Act of 1980.

Cases mentioned in this report: -

Duffy v. Corporation of Dublin [1974] I.R. 33

D.P.P (Long) v. McDonald and Ors. [1983] I.L.R.M 223

Islington Market Bill (1835) 3 Cl. And Fin. 513; 6 E.R. 1530

Townend v. Woodruff (1850) 5 Exchequer 506; 155 E.R. 221; 19 L.J. Ex. 315

Swindon Central Market Company Ltd v. Panting (1872) 27 L.T. 578; 37 J.P 118

Corporation of London v. Lyons Son & Co. (Fruit Brokers) Ltd [1936] Ch.78; [1935] All E.R. 540; (1935) 105 L.J. Ch. 1; 153 LT.344; 51 T.L.R. 563

Case Stated

Summonses were issued by the complainant charging the defendants with carrying on casual trading without a licence or permit contrary to ss.3 and 5 of the Casual Trading Act, 1980. The defendants elected for and the Director of Public Prosecutions consented to a summary trial. The case came on before District Justice Brendan W. Wallace on the 8th November, 1983, and subsequently on adjourned dates. On the 1st August, 1985, the District Justice pursuant to s.52 of the Courts (Supplemental Provisions) Act, 1961, stated a number of questions of law for the determination of the High Court.

Section 3, sub-ss.1-4 and s.5, sub-ss.1-3 of the Act of 1980 provide as follows: -

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

(2) A person shall not engage in casual trading in an area other than casual trading area unless he is, or is the servant or agent acting as such of, a person who holds a casual trading licence and the casual trading is in accordance with the licence.

(3) (a) Where there is a casual trading area in the functional area of a local authority, a person shall not engage in casual trading –

(i) in that functional area other than in that casual trading area, or

(ii) in the functional area of another local authority other than at a place that is more than five miles from the nearest point of that casual trading area or is in a casual trading area in the functional area of that other authority.

(b) Paragraph (a) of this subsection does not apply to an area that is in the functional area of two or more local authorities unless there is at least one casual trading area in the functional area of each of those authorities designated by each of those authorities.

(4) A person who contravenes this section shall be guilty of an offence.”

“5. (1) (a) Where there is a casual trading area in the functional area of a local authority, then, subject to the subsequent provisions of this section, a local authority shall, on the application in writing therefor of a person who is the holder of a casual trading licence for the time being in force and on payment of a fee of £20, grant to the person a permit (referred to in this Act as “a casual trading permit”), in such form and specifying such matters as the local

authority may determine, authorising the person to engage in casual trading at one place only in one specified casual trading area in the functional area of the authority on specified days.

(b) A local authority may grant more than one casual trading permit to a person in respect of casual trading in different casual trading areas or at different specified places in a casual trading area.

(2) An application for a casual trading permit shall be made to the local authority concerned not less than 30 days before the first day on which it is intended to engage in the casual trading to which the application relates.

(3) (a) A casual trading permit shall contain such conditions (if any) as the local authority concerned determines and specifies in the permit.

(b) A person who holds a casual trading permit shall comply with the conditions of the permit.

(c) A person who contravenes paragraph (b) of this subsection shall be guilty of an offence.”

Section 2, sub-s.2 (h) of the Casual Trading Act, 1980, provides that casual trading does not include selling at a market or fair held in pursuance of a market right. Section 1 of the Act of 1980 defines market right as a right conferred by franchise or statute to hold a fair or market, that is to say, a concourse of buyers and sellers to dispose of commodities.

The case stated was heard by Lynch J. on the 2nd December, 1985.

Brian McCracken S.C. (with him *Paul Sreenan*) for the complainant.

Ercus Stewart S.C. (with him *Una Keating*) for the defendants

The following cases were cited in argument: - *Duffy v. Corporation of Dublin*; *D.P.P. (Long) v. McDonald & ors.*; *Islington Market Bill*; *Townend v. Woodruff*; *Swindon Central Market Company Ltd. V. Panting*; *Duke of Newcastle v. Workshop U.D.C. and Corporation of London v. Lyons Son & Co. (Fruit Brokers) Ltd.*

Cur.adv.vult

Lynch J.

This is a consultative case stated pursuant to s.52 of the Courts (Supplemental Provisions) Act, 1961, by the learned justice of the District Court assigned to District Number 18. The

case is dated the 1st August, 1985, and came on for hearing before me in Dublin on the 2nd December, 1985.

The case sets out the facts of the matter and concludes by asking five questions. There is annexed to the case so as to form part of it copies of the District Court summonses against each of the defendants and also a translation of a grant of a franchise by King Charles II in the year 1675 to hold markets and fairs in the town of Skibbereen. This franchise was originally granted to William Prigg and Samuel Hale their heirs and assigns and was purchased from their successor in title by the complainant in the year 1949. The franchise authorised (*inter alia*) the grantees thereof to hold markets on every Wednesday and Saturday for ever “in or at the town of Newstapleton otherwise Skibbereen.” In addition it granted the right to receive tolls and other charges usually made at markets.

Since the year 1949 when they purchased the franchise the complainant has not itself held or promoted any markets although between 1968 and 1972 they collected tolls from two persons trading in Newstapleton on Saturdays. The summonses against the defendants relate to alleged offences contrary to ss.3 and 5 of the Casual Trading Act, 1980, on various dates in the summer of 1983. All these dates are in fact Wednesdays. While some of the defendants were at the material time holders of permits to trade issued by the complainant under the Casual Trading Act, 1980, such permits did not operate to validate under the Act the trading engaged in by the defendants on the dates of the alleged offences at the places alleged.

The defendants in answer to the summonses say that they were not engaged in casual trading within the meaning of the Act of 1980 because they were selling at a market held in pursuance of a market right within the meaning of the exception to that effect in s.2, sub-s.2 (h) of the Act of 1980. A market right is defined in s.1 of the Act as: - “a right conferred by franchise or statute to hold a fair or market, that is to say, a concourse of buyers and sellers to dispose of commodities.”

The complainant is entitled to the market right created by the franchise of 1675 and it says that it did not hold any market at any of the places on any of the dates the subject matter of the District Court summonses. Although not availing of its market right the complainant has never sought to extinguish it pursuant to the provisions in that behalf contained in s.9 of the Casual Trading Act, 1980.

When a franchise to hold a market is created and a market is thereafter held for many years traders may build up a good will in the market such that their livelihood may become substantially dependant on the holding of the market. Can it be said that the owner of the market can destroy a trader’s livelihood simply because he loses interest in the market and does not bother to hold it? In that case of Skibbereen there is no suggestion in the case stated that any set market place with facilities such as stalls, pens or weighbridges was ever provided by owner of the market right and counsel for the complainant conceded that it had never appropriated any particular place within the area described in the franchise for the holding of the market. The complainant has designated casual trading areas within the meaning and for the purposes of Casual Trading Act, 1980, but this does not amount in any

sense to the designation of a specified part of the area for the market as being the area within which the market must be held by persons seeking to avail of it. Moreover, the franchise of 1675 is granted expressly without metes and bounds: - “On condition that there exists in the present letters no express mention of the true yearly value or of the certain boundary of the premises or of any part of them.” Therefore the market may be held in any part of “the town of Newstapleton otherwise Skibbereen.”

In the foregoing circumstances the owner’s failure to hold the market amounts to no more than a neglect on its part to collect the tolls and other charges to which it would be entitled under the franchise. The non-user of a franchise to hold a market or fair does not extinguish the franchise or right to do so. Thus non-collection of tolls over a long period would not extinguish the right of the owner of the franchise to resume collecting proper tolls at any time if he thought fit. He could also, subject now of course to planning laws, lay out a market place with appropriate stalls, pens and weighbridges at any time even though he had not exercised his rights under the franchise for a very long time. If an owner should neglect to hold a market it seems to me that he can have no cause of complaint if traders and customers continue to assemble at an appropriate place on the appropriate dates. If they do so assemble then they would form a concourse of buyers and sellers to dispose of commodities within the meaning of the definition of “market right” which I have already quoted above. Such a concourse might be big or small and might even be constituted by one trader and such potential customers as might assemble or pass by to see his wares: see s.11 (a) of the Interpretation Act, 1937, whereby the plural includes the singular. It seems to me therefore that if a trader or traders attend at a place within the market area on a market day a market would be held in pursuance of a market right. Just because the owner of the franchise does not bother to collect his tolls could not change the fact that a market was being held pursuant to the franchise into the fantasy that it was being held wholly independently of the franchise.

This conclusion is reinforced by the provisions of s.9 of the Casual Trading Act, 1980. This section clearly recognises that other persons besides the grantee of the franchise of the market right may have an interest in the market which must be taken into account and provided for before a market right can be extinguished. The conclusion also follows from the authorities which were cited to me by counsel from which it is clear that, once a franchise to hold a market is granted, potential sellers have rights in the nature of proprietary rights to use the market apart from the proprietary right of the owner of the franchise to hold the market – see also paras.623, 683 and 684 of the 4th edition of Halsbury’s Laws of England, vol.29.

It should also be remembered that non-user by the grantee of the franchise to hold a market may be a cause for forfeiture of the franchise to the Crown (now the state). However, such forfeiture does not in itself extinguish the market which remains in existence for the benefit of the locality, the tolls (if any) being payable to the Crown or the State instead of to the owner – see paragraphs 661 and 662 of vol.29.

I find therefore that each of the defendants was on each of the occasions in respect of which a summons was issued against him or her selling at a market held in pursuance of a market right within the meaning of the exception in s.2, sub-s.2 (h) of the Casual Trading Act, 1980.

Accordingly my answers to the five questions posed in the case stated by the learned District Justice are as follows: -

Question A. “Does the franchise granted by the charter still exist, or has the lack of exercise of such franchise by the Council effectively terminated it?”

Answer: The franchise granted by the charter still exists and has not been terminated by the lack of exercise of it by the complainant.

Question B. “If it does exist, where in Skibbereen may the Council now exercise its rights thereunder?”

Answer: Anywhere in the town of Skibbereen which is within the area covered by the description in the charter namely “in or at the town of Newstapleton otherwise Skibbereen.”

Question C. “Is there an obligation on the Council to hold markets and fairs in accordance with the terms of the charter?”

Answer: No, but the State could forfeit the franchise for failure to exercise it.

Question D. “If the Council fails to hold markets or fairs under the charter, do members of the public wishing to trade have a right to attend at the market-places on the dates specified in the charter, and to engage in trading there as if the council was in fact holding a market or fair?”

Answer: Yes, on Wednesdays and Saturdays in the area covered by the description “in or at the town of Newstapleton otherwise Skibbereen.”

Question E. “If they do have such right, is the exercise thereof ‘selling at a market or fair in pursuance of a market right’ within the meaning of s.2, sub-s (h) of the Act and therefore outside the scope of the Act?”

Answer: Yes. Such trading is “selling at a market or fair held in pursuance of a market right” within the meaning of the exception contained in s.2, sub-s.2 (h) of the Casual Trading Act, 1980.

Pursuant to sub-s.2 of s.52 of the Courts (Supplement Provisions) Act, 1961, I give leave to the complainant to appeal to the Supreme Court from every determination on a question of law contained in the foregoing judgment and indeed in case that there was any point on which the defendants wished to appeal to Supreme Court I give leave to them also to do so.

Solicitors for the complainant: Wolfe & Co.

Solicitors for the defendants: Con O’Leary.

Anthony Barr, B.L.