

THE HIGH COURT
JUDICIAL REVIEW

Record Number: 2012 327 JR

BETWEEN

CARLOW TOWN COUNCIL

APPLICANT

-and-

JUDGE PATRICK CLYNE

RESPONDENT

-and-

JAYKAY LEISIURE LIMITED

NOTICE PARTY

Judgment of Mr Justice de Valera delivered on 19th day of December, 2013

1. The applicant seeks an order of prohibition by way of an application for judicial review restraining the respondent from proceeding to hear the application of the notice party for the grant of a certificate authorising the issue of a gaming licence pursuant to section 15 of the Gaming and Lotteries Act 1956.

Background

2. The licensing of amusement halls and funfairs is governed by Part III of the Gaming and Lotteries Act 1956. Section 12 of the Act provides-

This Part shall not have effect in any area unless there is for the time being in force a resolution under section 13 adopting it for that area.

3. On 25th April 2008 the notice party's solicitors wrote to the applicant asking them to confirm in writing *"that Carlow UCD has by resolution adopted part III of the Gaming and Lotteries Act 1956 in respect of the administrative area relating to the above premises"*. This letter was replied to on 28th April 2008 by Mr Joseph Watters, the then town clerk for Carlow, who advised that *"Carlow Town Council (formerly Carlow Urban District Council) has not adopted Part III of the Gaming and Lotteries Act 1956"* in respect of the administrative area relating to the notice party's premises.

4. Nevertheless, the applicant successfully applied to the District Court for a certificate under section 15 of the Act on 15th June 2008 and also in 2009 and 2010. The applicant did not appear in the District Court on any of these occasions and there was no opposition to the applications.

5 In his affidavit of 19th April 2012 Mr. Michael Brennan, town clerk, states that shortly after succeeding Mr. Watters in that role he became aware that the notice party had been successful in its applications for certificates for a gaming licence despite there being, in the applicant's view, no part III resolution in force in respect of the notice party's premises. On 17th January 2011 the applicant's solicitors wrote to the notice party's solicitors informing them that the previous certificates had been granted in error and that future applications would be contested.

6. On 1st March 2012 the notice party applied to the District Court for a certificate authorising the issue of a gaming licence in respect of its premises at The Burrin Aracde, Carlow Town. A dispute arose between counsel as to the jurisdiction of the District Court to hear the application and the respondent adjourned the matter which resulted in proceedings being commenced before this Court.

7. Leave to seek the relief was granted by order of Peart J. on 23 April 2012.

The present application

8. The primary contention of the applicant is that there is no part III resolution in force in respect of the notice party's premises and that as a result the respondent does not have jurisdiction to hear and determine the notice party's application under section 15 of the 1956 Act.

9. The affidavit of Mr. Michael Brennan sets out the history of part III resolutions in the town of Carlow. A resolution was passed on 1st May 1956 in respect of its whole administrative area. It is submitted by the applicant that this resolution was subsequently rescinded by resolution on 27th October 1981. On 24th November 1981 the applicant adopted a resolution of part III in respect of two premises in Carlow, namely 7 Charlotte Street and 26 Tullow Street. On 23rd August 1983 the applicant adopted part III in respect of premises at 14-16 Barrack Street. The applicant therefore contends that a resolution is in force in respect of the three premises at Charlotte Street, Tullow Street, and Barrack Street only and not in respect of the notice party's premises.

10. The applicant submits that the law in relation to jurisdiction to hear and determine an application under the Act is clear. In *Application of Camillo* [1988] IR 104 Griffin J. stated-

"Before any certificate can be granted by the District Court the court must be satisfied that the local authority has by resolution adopted Part III and that at the time when the application is made the resolution is still in force in respect of the area in which the premises are situated Unless the resolution is still in force, neither the District Court nor the

Circuit Court on appeal has jurisdiction to grant a certificate ".

11. The applicant further contends that the District Court is not entitled to adjudicate on the validity of the council resolution passed over 30 years ago and that this is the function of the High Court or Supreme Court under order 84 of the Rules of Superior Courts. In addition, the applicant relies on *State (Divito) v Arklow UDC* (unreported, Supreme Court, 7th June 1984) and *Comhaltas Ceoltoiri Eireann* (unreported, High Court, 14th December 1977) as authority for the proposition that the 1981 resolution enjoys a presumption of validity and that the court hearing a licensing application has a very limited role in determining the validity of a public document. Having considered these decisions, the Court finds that the facts of *Divito* are distinguishable from the present case. There, when Henchy J. referred to a presumption of resolutions "*having been made within jurisdiction*" and an onus on "*the applicant to show that in passing those resolutions the Council exceeded their jurisdiction*" as relied upon by the applicant, this was in the context of an allegation of animus against the local authority, which, if this had been so, would have resulted in jurisdiction being overstepped. Here, the suggestion made by the notice party is that the resolution is invalid or defective in other respects, and which the notice party contends the respondent is entitled to consider. *Comhaltas Ceoltoiri Eireann* is also distinguishable from the present proceedings. That case concerned the renewal of a certificate under the Registration of Clubs (Ireland) Act 1904 and a challenge to the validity of planning permission. When considering the jurisdiction of the District Judge to hear and consider evidence in that regard, Finlay J. said that it would be contrary to natural justice to do so in proceedings where the planning authority was not and could not be made a party to the case. In this case, the local authority will have opportunity to argue their case before the respondent and the case does not involve the same enumerated restrictions specifically set out in the 1904 Act.

12. Counsel for the notice party submits that the applicant has waived any entitlement that he may have had to object to the respondent hearing and determining the notice party's application and has acquiesced in and is estopped from challenging the respondent's jurisdiction mid-hearing. It is submitted that the District Court has jurisdiction to inquire whether or not there is a resolution in force under section 13 of the 1956 Act. In support of this proposition the notice party relies on the standard of proof required for an order of prohibition as set out by Finlay CJ in *Z v Director of Public Prosecutions*. The notice party also asserts that the following statement of Gannon J. in *Clune v Director of Public Prosecutions* in relation to the constitutionally guaranteed independence of the District Court applies as much to civil matters as it did to criminal matters in that case -

"An order of Prohibition directed to a Court will not be granted quia timet to prevent any Court lawfully established in the State from commencing the hearing of any cause or matter entrusted to its consideration by the Legislature. There is, and must be, a presumption that a District Justice will apply himself to his functions and duties in accordance with his oath of office and within the limits of his jurisdiction with justice and fairness to the best of his ability ... For this Court to attempt to prescribe procedures for a particular District Justice in relation to a particular cause or matter before him would be an unconstitutional breach of the judicial independence of the District Justice, and an unconstitutional usurpation of the powers and functions of the Legislature to prescribe procedures for Court. "

Decision

13. Having heard the eloquent and comprehensive submissions of counsel for both the applicant and the notice party, as well as carefully considering the written submissions and relevant case-law, it seems to me that this application is misconceived in that it is asking this Court to interfere with the jurisdiction of the respondent District Judge before he has had an opportunity to consider any of the arguments in the matter. I do not accept the arguments of the applicant that the respondent does not have jurisdiction to inquire into the validity of any of the resolutions in relation to part III of the Gaming and Lotteries Act 1956 and see no reason based in statute or in the case law why the respondent should not embark on this consideration.

14. For that reason the application is dismissed.