

THE HIGH COURT

Record No. 2014/184JR

Between:

Killarney Jaunting Cars Limited

Applicant

-and -
Kerry County Council

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 22nd October, 2015.

PART I: INTRODUCTION

1. The applicant is a company that offers jaunting-car tours of the Lakes of Killarney and their environs. It is required to hold a licence for each of its jaunting-cars. In fact it holds none. Yet it comes to court demanding that the respondent now issue more licences. Killarney Town Council, recently subsumed into Kerry County Council, had adopted bye-laws governing the issuance of jaunting-car licences. It tolerated certain breaches of those bye-laws, doubtless in the interests of good local government. Consistent with the bye-laws, it also repeatedly limited the number of jaunting-car licences that may issue annually. Historically, the reason offered for this was that only so many jaunting-cars can be accommodated at the jarveys' stand in the centre of Killarney town. More recently, Kerry County Council, the body that now has responsibility for this matter, has pointed to the present scale of traffic in Killarney town as a further issue presenting when it comes to increasing the total number of jaunting-car licences and hence the number of jaunting-cars around. Killarney Town Council was, and Kerry County Council now is, required by the bye-laws to determine the number of jaunting-car licences that may issue each year. In 2014, it failed to do this annual review. In 2015, the County Council determined matters just before the hearing of the within proceedings.

PART II: THE BYE-LAWS

2. At the centre of the present dispute are certain bye-laws entitled the 'Bye-Laws Regulating the Operation of Horse Drawn Hackney Carriages 2010' (the "Bye-Laws"). These were adopted by the elected members of Killarney Town Council on 8th October 2010. This was done pursuant to Part 19 of the Local Government Act 2001, in particular s.199(5) of same which provides that "*The approval of a draft bye-law, the consideration of submissions in relation to such draft bye-law and the making, amendment or revocation of a bye-law, are each reserved functions*", i.e. a function reserved to the elected Council members.

3. The Bye-Laws came into effect on 1st January, 2011. Since then, as mentioned, Killarney Town Council has, as of 1st June, 2014, been subsumed into Kerry County Council, pursuant to s.24 of the Local Government Reform Act, 2014, and the Local Government Reform Act (Commencement of Certain Provisions) (No. 3) Order 2014. Thus the Bye-Laws now fall to be operated by Kerry County Council. The critical segment of the Bye-Laws for the purposes of the within proceedings is Part 2. It is useful to quote Part 2 in full:

"Part 2**Licence**

4. *Licences shall be issued by the Council annually.*

5. *The Council shall determine annually the number of licences to be issued. In the event that an existing licence holder should cease to hold his/her licence, then it shall automatically revert to the Council. In re-issuing such licences or in issuing fresh licences the Council shall have regard to the provisions of Bye-Laws no. 9, 10, 11, of these Bye-laws.*

6. *Licences shall be valid for a period of twelve months from the date of their issue.*

7. *The fee for a licence shall be €65.00 or as prescribed from time to time by the Council.*

8. *Licences shall state whether the Hackney Carriage to which they relate may be stood for hire at private property or at a designated hiring stand.*

9. *Subject to the Council being satisfied that the holder of a licence has complied with the provision of these Bye-Laws such person shall have an option for a period of 2 months from the date of expiration of the licence to renew it.*

10. *A licence shall be granted only where*

(a) the applicant has paid the Council the appropriate Licence Fee.

(b) the Council is satisfied that the applicant will comply with the provisions of these Bye-Laws.

(c) The Council is satisfied that the applicant has full insurance cover to operate the hackney carriage during the period of the licence.

(d) The applicant provides Certificate of Compliance from the Revenue Commissioner.

11. *Where the number of applications for a licence exceeds the number of licences determined by the Council, the allocation of licences shall, subject to Bye-Laws nos. 9 and 10, be determined by lot.*

12. *A proprietor [the owner of a hackney-carriage] shall not operate or permit to be operated his/her hackney carriage without holding a current licence in respect of it.*

13. *A proprietor shall not operate or permit to be operated his/her hackney carriage except in accordance with the terms of the licence applicable to it and the provisions of these Bye-Laws."*

PART III: RELIEFS SOUGHT

4. The principal reliefs sought by the applicant are the following:

- (1) a declaration that the Council is in breach of its duties/powers under Bye-Law 5;
- (2) a declaration that the Council in failing to carry out its duties/powers under the Bye-Laws has acted unlawfully;
- (3) as an alternative to (2), if it is found that the Council has "*purported to exercise*" its powers/duties, that same were exercised in unlawful manner in breach of natural and constitutional justice, *ultra vires*, and contrary to the legitimate expectations of the applicant;
- (4) a declaration that in failing to require the reversion of those licences that have lapsed or ceased to be held and in failing to re-issue same, the Council has acted unlawfully, *ultra vires*, and contrary to natural and constitutional justice, and in breach of the legitimate expectations of the applicant;
- (5) an injunction requiring and directing the Council to determine the number of licences for 2014 in accordance with law and the legitimate expectations of the applicant;
- (6) an injunction requiring and directing the Council to re-issue the licences which have ceased to be held in accordance with the Bye-Laws and in accordance with law and the legitimate expectations of the applicant;
- (7) an order of *mandamus* requiring the Council to determine the number of licences for the year 2014 in accordance with law and the legitimate expectations of the applicant;
- (8) further, and in the alternative, an order of *mandamus* requiring the Council to re-issue licences which have ceased to be held in accordance with the Bye-Laws and in accordance with law and the legitimate expectations of the Applicant; and
- (9) damages and costs.

5. The 'legitimate expectations' points were not raised or argued at the proceedings, appear in effect to have been abandoned, and thus are not adjudicated upon by the court in the within judgment.

PART IV: THE 'REVERTED LICENCES' POINT

6. It appears from the above-quoted segment of the Bye-Laws that: (1) licences issued under the Bye-Laws have a one-year lifetime (Bye-Law 6); (2) existing licence-holders generally enjoy a 2-month period from expiry of a licence in which they may seek automatic renewal of their licence (Bye-Law 9); (3) subject to the comments made in paras.7 and 8 below, in the event that a licence ceases to be held, it automatically reverts to the Council (Bye-Law 5) (it seems from the submissions that there is some issue as to whether the Council must accept such a reversion or not); (4) there may be (the applicant contends that there must be) re-issuance of reverted licences; and (5) jarveys may not lawfully operate their jaunting-cars (hackney carriages) without holding a current licence in respect of same (Bye-Law 12).

7. It appears to the court from the evidence before it that the applicant and a number of other hackney-carriage owners are not in possession of a current licence under the Bye-Laws. This being so, the court considers it preferable that it decline at this time to give final judgment on whether the previous licences of the applicant have automatically reverted to the Council and whether the Council may or must re-issue such reverted licences. The court has, of course, heard the parties on this issue and will be satisfied to give judgment on this point in the event that either or both of them request in the future of the court that it do so. Pending any (if any) such request, the court would respectfully encourage the applicant and any other affected jaunting-car (hackney-carriage) operators to ensure that they obtain and continue to stand in possession of current licences under the Bye-Laws. The court would also respectfully draw the attention of operators to the fact that the Bye-Laws clearly contemplate that a licence will be held in respect of each jaunting-car.

8. In light of what the court has stated in the preceding paragraph, the court declines at this time to grant to give judgment on the reliefs referred to at points (4), (6) and (8) of para.4 of the within judgment. Moreover, nothing in the within judgment should be treated in any way as adjudicating in any way upon the issue of whether any licences previously held by hackney-carriage owners have automatically reverted to the Council and whether the Council may or must re-issue such reverted licences.

PART V: A SUMMARY CHRONOLOGY OF EVENTS

9. It is useful to give a summary timeline of the events in issue in the within proceedings:

- **8th October, 2010.** Bye-Laws adopted by Town Council.
- **7th February, 2011.** Town Council considers number of jaunting car licences. There are 38 licences. The jarvey-stand in Killarney town can accommodate 32 carriages. It is decided not to issue any additional licences.
- **24th July, 2012.** Following a meeting with Town Council officials, the applicant seeks licences for jaunting-cars additional to those operated by it. Any additional jaunting-cars will operate from private property.
- **August, 2012.** Meeting held between Town Council officials and applicant concerning letter of 24th July. It is indicated that the issue will be raised with the elected Town Council members.
- **3rd September, 2012.** Town Council considers number of jaunting car licences. There are 37 licences, of which 33 are active. The jarvey-stand in Killarney town can accommodate 32 carriages. It is decided not to issue any additional licences.
- **1st July, 2013.** Town Council in its deliberations touches briefly on the number of jaunting-car licences. Though the discussion was brief, the minutes as a whole suggest that there was no appetite for additional licences. The court has affidavit evidence before it from the then Town Clerk indicating that he "*was of the view*" from this meeting "*that the Council had determined that the number of licences would not increase for 2013*".
- **25th August, 2015.** Kerry County Council Executive determines on the basis of an engineering report which mentions the limitations on jarvey-stand usage and traffic issues arising (which are to be the subject of an already commissioned

report) not to increase the existing number of licences.

PART VI: ANNUAL DETERMINATIONS

10. There was no annual determination done under Bye-Law 5 in 2014. However, the court notes that the annual determinations done hitherto by the Town Council were essentially prospective in effect. This is because licences have a one-year lifespan. So by deciding, for example, in 2012 or 2013 on the number of licences to issue, the Town Council was in effect deciding to a great extent how many jaunting-car operators could and would be licensed in the succeeding year. Thus any decision in 2013 was in effect a decision that largely determined the number of jaunting-car operators who could and would be licensed in 2014. Likewise the executive order of Kerry County Council dated 25th August, 2015, determines that:

"Having regard to the recommendation of [a particular engineer]...dated 20th August, 2015, and the provisions of the [Bye-Laws]...that 37...jarvey licences be issued for 2015."

11. As licences issued under the Bye-Laws have a one-year lifespan, this decision is essentially prospective in effect. There is of course a potential difficulty which arises with the approach to annual determinations that has pertained to this time. Specifically, there might, for example, be a jaunting-car licence that issued in March 2015 and which will therefore expire in March 2016, subject to the right of automatic renewal under Bye-Law 9. There may also be new persons who present in 2016 looking for a first-time licence or additional licences. Given that annual determinations have previously tended to take place late in the year, Council officials presented with such applications for much of 2016 may be placed in the invidious position of not quite knowing how many licences can be issued in 2016. They will know that the number for 2015 was set at 37 and that this will largely cover matters prospectively. However, to avoid the potential for uncertainty in this regard, it seems to the court that it would be prudent for Kerry Council to determine prospectively for 2016, rather than retrospectively for 2015 how many licences will issue. The court could order that Kerry County Council so proceed. But such an order seems unnecessary at this time. There remain the better part of 2½ months to year-end and that gives the Council ample time to determine how many licences ought to issue in 2016. There is no reason why such determination cannot now be stated to have effect for the calendar year of 2016. And, lest it be suggested that Bye-Law 5 requires that there only be one determination each year: (a) the court considers that the effect of Bye-Law 5 is merely that there be at least one determination each year but that the Council is not fettered from returning to the matter in the same year, (b) any annual determination must in any event be a proper and informed determination and the Council may consider that its determination requires to be re-visited in light of this judgment, (c) the court is satisfied in any event, should the Council consider this desirable, to order that the Council re-visit its determination of 25th August and make any amendment to same or such further determination as the Council might consider appropriate following this judgment.

12. Although there is no requirement under the Bye-Laws that elected Council members make the determination arising to be made under Bye-Law 5, and although the court considers no deficiency to present in the fact that the determination of 25th August last was made by an executive of Kerry County Council, the County Council may wish to note that within Killarney Town Council the annual determination of the number of licences to be issued under the Bye-Laws was historically put before the elected Council members for their consideration.

PART VII: BREACH OF NATURAL OR CONSTITUTIONAL JUSTICE?

13. There is no evidence before the court of any breach of natural or constitutional justice arising. It was suggested that certain correspondence of the applicant had effectively gone ignored. In fact it resulted in a timely face-to-face meeting between Town Council officials and the applicant. It was suggested in oral submissions that when the Town Council met to consider the appropriate level of licences in 2012, the applicant ought to have been invited to make submissions at same. But this ignores the fact that in the applicant's face-to-face meeting with Town Council officials it had been agreed that the desire for some for more licences to issue would be raised at the relevant Town Council meeting. This appeared at the time to be satisfactory to the applicant, the Town Council officials saw that the issue was raised before the elected Town Council members and those members voted as they did and as they were entitled to do. There is no breach of natural justice in this. The applicant's request to the council may not have received the response for which it hoped for but neither that nor any of the other circumstances or issues to which the court's attention has been brought yield the conclusion that there has been any breach of natural or constitutional justice.

14. Particular reliance was placed by the applicant on the decisions of the Supreme Court in *East Donegal Co-operative Livestock Mart Ltd. v. Attorney-General* [1970] I.R. 317 and *O'Neill v. The Minister for Agriculture* [1998] 1 I.R. 539. The court struggles to see that either decision assists the applicant's case. *East Donegal* was concerned in essence with the obligation of a public official or body to consider each case on its merits. But leaving aside for the moment any issue as to reverted licences which, for the reasons stated in paragraph 7, the court declines to adjudicate upon at this time, what was being sought here was the issuance of a superfluity of licences in excess of the maximum number determined by the Council to be available. So what was being sought was something that just could not be provided. It is not clear to the court how one can be arbitrary in the non-exercise of a power that one is not competent to exercise. As to *O'Neill*, that was a case concerned with the fettering of discretion and the issue of *ultra vires*. But here the issue as to 'fettering of discretion' is not a matter in respect of which leave to seek review has been granted. And when it comes to the issue of *ultra vires*, there is nothing in the evidence to suggest that the Town Council or County Council have ever acted outside their powers as regards the matters in issue in the within proceedings.

PART VIII: DISCRETIONARY NATURE OF RELIEFS SOUGHT

15. Judicial review and the reliefs sought through such proceedings are discretionary and depend on the circumstances of the case. (See *State (Cussen) v. Brennan* [1981] 1 I.R. 181). As noted in Professor Biehler's *Judicial Review of Administrative Action* (3rd edition, 2013), at 379:

"The public law remedies and the private law remedies of declaration and injunction...are all discretionary in nature and although a plaintiff may succeed in proving his case, he may nevertheless be refused relief on discretionary grounds. So, in addition to establishing a ground for judicial review the applicant must satisfy the court that 'it would be just and proper in all the circumstances' to grant the relief sought. It would appear that such discretion should be exercised on the basis of established principles irrespective of the nature of the proceedings."

16. The court has been referred in this regard to the judgment of Denham J. in *de Róiste v. Minister for Defence* [2001] 1 I.R. 190 and also to the more recent decision of the Supreme Court in *L.M. v. Judge O'Donnabháin* [2011] IESC 52, in which, having cited the judgments of both Denham J. in *de Róiste* and O'Higgins C.J. in *The State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R.381, Fennelly J. observes as follows, at 14:

"Apart from delay in applying to the court, the matters which are particularly open to consideration by the court are: firstly, whether the order would unfairly affect the rights or interests of others; secondly, the behaviour of the appellant. Very often these matters need to be considered in combination. On the first point, the decision in State (Cussen) v. Brennan is further authority for the general proposition that there is discretion to refuse an order or certiorari. As Henchy J. expressed at page 195 of the report:-

'Since these orders [mandamus and certiorari] are discretionary in the circumstances of this case, the court must be satisfied not solely as to matters such as default in the performance of a public duty and jurisdictional error, but also that it would be just and proper in all the circumstances to grant those orders'".

17. In the within proceedings, the applicant does not seek an order of certiorari, but rather declaratory relief, along with injunctive relief, *mandamus* and damages. In *Joyce (a minor) v. Watkins* [2007] 3 I.R. 514, Clarke J., in the High Court, accepted that declaratory relief is itself a discretionary matter, noting as follows:

"My attention has been drawn to two lines of authority in comparable jurisdictions on the so called exercise by the court of its discretion based on utility or, as it is sometimes referred to, futility. In the United Kingdom there are a number of authorities which are relevant. In R. v. Birmingham City Juvenile Court [1988] 1 W.L.R. 337, the court granted a declaration setting out the true legal position for future guidance, even though it was clear that on the facts of that case no effect, so far as the prosecutor was concerned, would be achieved.

However, in the United Kingdom it is also clear that an alternative approach has been to give judgment, specifying the true legal position without making any formal declaration. That approach was adopted in R. v. Bromley Magistrates Court, Ex P Smith (D.C.) [1995] 1 W.L.R. 944 and in R. (Sacupima) v. Newham LBC [2001] 1 W.L.R. 563. This latter approach is in substance the approach adopted by the Supreme Court in Barry v. Fitzpatrick [1996] 1 I.L.R.M. 512, where the true legal position was set out but no formal order was made."

18. In the within proceedings, having particular regard to the features touched upon in paragraph 7 above, the court does not consider that it is just and proper in all of the circumstances to grant any of the reliefs that (a) have been sought and (b) the court has indicated itself in that paragraph to be satisfied to adjudicate upon at this time.

PART IX: CONCLUSION

19. For the reasons stated above, the court declines to grant any of those reliefs that (a) have been sought by the applicant, and which (b) the court is satisfied to adjudicate upon at this time. The court respectfully draws the attention of the parties to paragraph 7 of this judgment in which it indicates those reliefs which have been sought of it but in respect of which the court makes no adjudication at this time. The court has of course now heard the argument in respect of these reliefs on which adjudication is not now being made and grants leave to either and/or both of the parties to return to court and seek that the court issue judgment in respect of same. In this regard, the applicant and any other affected parties are respectfully encouraged to pay careful heed to the court's observations in paragraph 7.

20. Finally, the court notes that the genesis of these proceedings lies in the applicant's laudable desire to develop an expanded, licensed jaunting-car business. To this end, the applicant has sought to engage with the relevant public authorities. The court notes from the evidence that a detailed traffic management study has now been commissioned by Kerry County Council for Killarney town. So, to the extent that traffic is a perceived bar to what the applicant seeks (and the number of jaunting-cars at the jarveys' stand cannot be a bar given that the applicant proposes to make no additional use of same), it is to be hoped that this study will be finished soon and allow a more accurate determination by reference to the data contained in the study as to whether, and to what extent, the applicant and others who seek to expand their jaunting-car business in and around Killarney can in the future be facilitated, if at all.