

THE HIGH COURT

2006 No. 2115 P

BETWEEN

MALONE ENGINEERING PRODUCTS LIMITED

PLAINTIFF

AND
HEALTH SERVICE EXECUTIVE

DEFENDANT

Judgment of Mr. Justice Roderick Murphy delivered 21st July, 2006.

1. This is a matter that was heard by the court on Wednesday and Thursday, yesterday, and it raises some points which the court would deal with by, first of all, referring to the endorsement of claim and then the factual matters in the two technical reports and submissions made by counsel, and then that will lead to an interpretation, then, of the relevant legislation.

2. Firstly, the plaintiff, by plenary summons of the 17th of May last, sought, among other matters that were not proceeded with, a declaration that the structure known as Freshwall is subject only to the appropriate conditions of its placement and installation at the place or premises at which it is situate, in compliance with s. 47(7)(d) of the Public Health (Tobacco) Act, 2002, as inserted by s. 16 of the Public Health (Tobacco) Act, 2004, and, as I say, the other reliefs were not pursued.

3. The parties to this plenary summons, Malone Engineering Products Limited, was the designer and manufacturer of the particular structure known as Freshwall. The defendant, as Health Service Executive, is the defendant in relation to the issue of the declarations, but the court should say in passing that, while not a party to these proceedings, the Office of Tobacco Control, through its solicitor, Mr. Roughan, did make an observation to the court, and the court allowed him and the parties were happy that he should so make, that there was no question of any undertaking given by the Office of Tobacco Control with regard to what action they might or might not take in relation to the licensed vintners that had used this structure known as Freshwall in relation to the prohibition on smoking within public houses and indeed in relation to the matters to which I will now refer.

4. Mr. Roughan referred to a letter of the 21st of March, 2006, which preceded the summons, the plenary summons, and that stated:

"As stated previously, there is no approval process in respect of the exemption of structures under the relevant sections. Ultimately, this is a matter to be determined by the courts.

"It follows that the Office of Tobacco Control shall not be issuing a statement regarding the approval of any product or its compliance with legislation.

"This is not to be taken in any way as an indication that the relevant enforcement agencies will not take action to prosecute an offence in an appropriate case."

5. Now, evidence was given on behalf of the plaintiff by Michael Buckley, and who also furnished a report to the court, and I might just summarise that by way of his conclusion. He says, "I consider that evidence shown above is proof that 50% of the perimeter of the enclosed area is fully and permanently open and as such fully complies with s. 47(7) of the" relevant legislation.

"I also consider that the ventilation effect caused by the openings being spread evenly and consistently around the full perimeter of the area and as proven by BSRIA as achieving average air change rates of 369 air changes per 1.24 metres per second wind velocity, 401 air changes at 2.39 metres per second wind velocity and 632 air changes at 4.24 metres per second wind velocity. These exceptional air change rates result in a highly ventilated area which ensures a dilution of any pollutants so as to comply with the intent of Section 47(6)."

6. Perhaps I should say in passing that that particular subsection is one that deals with the purpose of the section, and it says as follows: "This section has been enacted for the purpose of reducing the risk to and protecting the health of persons."

7. Mr. Buckley continues,

"I further consider that the Freshwall panel has been manufactured in substantial compliance with established engineering guidelines and codes of practice. Each component is cut and folded in a computer controlled press and then the sections are assembled in a jig which maintains the accuracy of construction."

8. Now, that conclusion is at the end of a lengthy report which looks at the background and gives the section of the assembly which the court has already designated as a series of panels of 500 millimetres in an N, L and S shape, and these are fixed to a base and to a top and are tied in two areas horizontally on the vertical panels. The court has had the benefit of the model which was in court, which was a model of approximately a half a metre in height and, therefore, gave a representation in that smaller area of what the full structure would look like.

9. Now, Mr. Buckley then having given those details, and particularly the sectional diagram, also then dealt with his witnessing the ASEP Kinsealy tests, and there are two matters that the court wants to deal with on that.

10. The first is that the emphasis that was put, as we see, in the conclusion on the air quality monitoring, and these were tests that were carried out by Mr. R.A. Patrick and were done in a full report which is referred to.

11. Secondly, there were calculations on the open area calculations and these are in a lot more detail in terms of the actual structure in Kinsealy, in the Kinsealy Inn, and it refers also to a comparison with the New Zealand legislation, which I understand is the subject which is introduced by the Smoke-Free Environments Act of 1990 in that jurisdiction. And Mr. Buckley concludes that the minimum total area allowed under New Zealand legislation is 20 percent of the floor area, and the Freshwall system is 160 percent of the floor area, or eight times better than is required.

12. So it seems to me that there are three elements within the report of Mr. Buckley: One is the general one relating to the openings on the panels. The second is the number of air changes. The third is the floor area, and that seems to me, and I so commented, that it was akin to some of the building regulations in relation to ventilation on rooms within buildings which had to be related to the actual floor area. So what is being dealt with by Mr. Buckley would seem to me to be a linear area and volume appraisal of the functioning of

this structure.

13. The BSRIA report carried out for the Freshwall -- carried out for the plaintiff, and was dealt with by Nigel Potter, and Mr. Potter gave evidence, and he was not familiar with the actual structure in situ in the Kinsealy Inn, but he had a model and dealt with the model in a wind tunnel and was able to give certain results in relation to that. Again, it seems to me that the thrust of the report of Mr. Potter is on the basis of ventilation and of the testing, then, of the various particles -- sorry, not with the particles, but rather with the performance of the model, rather than of the actual structure in Kinsealy Inn.

14. The court has also considered the report of Tony O'Keeffe & Partners, who is the engineer that gave evidence on behalf of the defendant health authority, and Mr. O'Keeffe of that firm gave evidence of having inspected the Kinsealy Inn and of taking some 23 photographs, some of which were basic to the structure and others which showed the actual structure with certain furnishings. And it is clear from that that there was a floor in the area where skirting boards and indeed pelmet boards on the roof, with one beam running across the roof, radiators affixed to the structure and certain heaters of an infrared variety mounted on the ceilings -- sorry, mounted on the beam going across the ceiling. The ceiling was a normal structure of framework with acoustic tiles, certain lighting, and there were a number of television sets, it seems, some perhaps five television sets. The photographs, particularly that of 8, 9 and 10, showed bar furniture in the structure, a side bar counter, together with an ornate mirror on that, and certainly the ambience did seem to be that of a pub, insofar as the furnishings were concerned.

15. Now, Mr. O'Keeffe, having dealt with all of those photographs, came to the following conclusions; he says,

"It would appear that the argument which has been put forward by the manufacturers"

16. that is the Plaintiff --

"is that the surface area of the 'Freshwall' modular walls is 50% open, thus allowing the passage of air from the inside of the room to the outside of the room through approximately 50% of the surface area of the modular walls, which the manufacturers have clearly assumed is tantamount to 'not more than 50% of the perimeter' being surrounded by walls or similar structures.

"In my opinion, this argument is fundamentally flawed.

"Having examined the 'Freshwall' smoking room I am satisfied that 100% of its perimeter is surrounded by the aforementioned modular walls.

"I do not believe that because the areas of each of the three layers of which the modular walls comprise are 50% solid and 50% open that it can be argued this is a building which is substantially open to the elements along 50% of its perimeter.

"In my opinion, the modular walls which comprise the boundary of the room are structures which are similar to a wall and surround 100% of the perimeter of the 'Freshwall' smoking room.

"Therefore, I am not satisfied that this building is in compliance with the requirements of the legislation.

"If these layers were truly independent as the Plaintiff suggest, then one should be in a position to remove one of them without affecting the others.

"Clearly, this is not possible here.

"There is no doubt but from inspecting the premises erected at the Kinsealy Inn, that this room is furnished like a typical lounge bar room and therefore couldn't be considered to be an outdoor premises in my opinion."

17. Now, the court notes that in the evidence given by the three witnesses, that certain questions were put to them regarding these opinions. References were also made to ASHRAE, and ASHRAE is the American Society of Heating, Refrigerating and Air-Conditioning Engineers, of which Mr. Buckley is a member, and in relation to their position document of the 30th of June, 2005, entitled "Environmental Tobacco Smoke," they say in their executive summary, and I quote:

"For more than three decades, researchers have investigated the health and irritant effects among non-smokers exposed to tobacco smoke in indoor environments. The preponderance of credible evidence links passive smoking to specific diseases and other adverse health effects in people. A number of national and global review groups and agencies have concluded that exposure of non-smokers to tobacco smoke causes adverse effects to human health. No cognisant authorities have identified an acceptable level of Environmental Tobacco Smoke (ETS) exposure, nor is there any indication that further research will identify such a level."

18. And the document concludes, among other matters, that

"At present, the only means of effectively eliminating health risks associated with indoor exposure is to ban smoking activity. Although complete separation and isolation of smoking rooms can control ETS exposure in non-smoking spaces in the same building, adverse health effects of the occupants of a smoking room cannot be controlled by ventilation."

19. There was some evidence before the court which emanated from the pleadings for the injunction proceedings which did not go ahead, and while there was some objection originally to these matters being dealt with, it does seem to me that the court indicated that if they were in - there were exhibits to documents which the court already had - that they should be admitted, and indeed it does seem that, by consent, they were so admitted. Again, I refer to these very, very briefly as, first of all, a plan by the plaintiffs dated the 2/12/2005 of the Kinsealy Inn Freshwall plan, and the court assumes that this was a preliminary drawing which showed what the photographs have shown, and that is a structure built outside the licensed premises, between the licensed premises and what was known as a boundary wall. The dimensions are given, and it seems to me to, on a rough calculation, to be under 30 square metres, or 320 square feet - again, that is a rough calculation - rectangular in shape with two doors of similar construction to the Freshwall structure itself. And inside, there are no furnishings, but an indication is given to the scale of possible patrons. I don't think anything turns on a brochure in relation to the infrared heaters, but I have also got a product design sheet which emanated from the

plaintiff and refers to the section which we will deal with regarding outdoor smoking areas, and it says, among other matters:

"This concept provides an actually highly ventilated area for the occasions where employees are required to provide a service. In addition, by dramatically reducing the ingress of the harshest natural elements, such as high winds, rain, frost or snow, the area provides, from a health and safety at work perspective, a safer working environment for employees."

20. The third matter that the court has to consider is a single sheet, a publicity from the plaintiff entitled "Maximum Revenue Minimum Smoke," and asks, "What is Freshwall?" And answers as follows:

"A unique modular system that provides for an indoor environment outdoors with protection from the elements. Each model is designed to allow air to flow freely yet keeps the wind and rain out. Freshwall can provide you with an outdoor room of any shape or size. Freshwall's design allows an external four-sided room to be provided within the law, providing a comfortable, warm, dry environment."

21. It then gives the advantages, and the advantages include a -- well, matters which I don't think are relevant to the arguments that were made. But in relation to the options, it said it can be fitted with a range of features, including "heaters, plasma screen, furniture and Dado Cable trunking."

22. And the last matter by way of promotion is a four-paged brochure called "Clear the air. Keep your customers and your business covered." And the subtitle is "The indoor profitable solution to smoking regulations." And that, again, deals more extensively with the four-sided fully-roofed room, answers how it works, how it's constructed, how it's delivered and how it's installed, and includes data to which I have already referred in the single-page brochure. The last page has the blurb: "Creates profitable indoor space," and continues, "The indoor solution to the smoking regulations offers real choice to smokers/mixed groups," and, *inter alia*, "guarantees extra business, satisfies legal requirements, year-round weather protection and increased profitable floor space."

23. Now, the question then is what the -- first of all, whether the court has got to deal with what is on the plenary summons or what has been given in evidence, and the court then, having considered the very helpful outline submissions on behalf of the plaintiff and the defendant, has got then to look at the act and see to what extent the evidence before the court corresponds to the act as interpreted.

24. I should perhaps go briefly through the submissions on behalf of the plaintiff, whose counsel helpfully defines the words which I will come to in a moment, relies on sub-s. 6 of s. 47 in terms of the purpose of the legislation and refers indeed to the long title, and concludes that the literal rule of interpretation should be applied with the precise words and that the -- it must be construed by reference to the clear words contained and the court should not have regard to the intention or purpose -- let me not just refer to that last paragraph because I don't think it is helpful. I will come again to the submissions.

25. The submissions on behalf of the defendant also look at the canons of interpretation, and again I will come to those, but analyses, as well, the question of outdoors perimeter, surrounding and walls, and the court has then got to consider the very helpful references made both by the plaintiff and by the defendant with regard to the interpretation of the section in question. That section is, of course, as we now know, a relatively short section which amends the section in the 2002 Act. The court should point out that, of course, the first subsection says: "Subject to subsection 7" -- which is the one at issue -- "the smoking of a tobacco product in a specified area is prohibited." And on sub-s. 2, it says: "The person who contravenes subsection 1 shall be guilty of an offence." So the court then has got, clearly, to bear in mind that there is a penal element to this section, and, indeed, that it has fairly wide target, a person who contravenes the section which prohibits the smoking of a tobacco product in a specified place.

26. Subsection 7 reads as follows. "The section shall not apply to a dwelling, a prison."

27. And then at (c): "Subject to paragraph (d), a place or premises or a part of a place or premises that is wholly uncovered by any roof, whether fixed or moveable."

28. And then (d): "An outdoor part of a place or premises covered by a fixed or moveable roof, provided that not more than 50% 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)."

29. Now, the first matter that the court should examine is the word 'outdoor', because both subsection -- paragraph (c) and paragraph (d) of subsection 7 are relevant there. First of all, a place which "is wholly uncovered by any roof" is clearly exempt. While the word 'outdoor' is not used in that paragraph, it is clear that without a roof, that, clearly, that is outdoor. 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. And then the interesting phrase in the Oxford English Dictionary, "Somebody who is more involved in outdoor searches than indoor examination," seems, again, to give a contrast between somebody inside a building and somebody outside. One might say, and it doesn't seem to me to be sufficient to say it, that if any structure has a roof and has doors, that, by its very nature, it is indoor 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.

30. The court has got to take, however, before we leave this, that reliance has been made in the promotional literature to the extent that it was then made, and, again, I understand it, it may indeed have been withdrawn, though no proof in relation thereto was stated, but the court has referred to the four or five items already, some of which indicate an outdoor solution to the smoking regulations -- sorry, "The indoor solution to the smoking regulations," which is contained in the four-paged brochure to which I have already mentioned.

31. There is really no other matter, looking through the long definitions of the Oxford English Dictionary, that seems to me to be relevant to that consideration.

32. The second word that comes in the section is that "provided that not more than 50% 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)." So what we are dealing with, as we will see more particularly later, is that one includes in "walls or similar structures," "windows, doors, gates or other means of access to or egress from that part." I don't think anything turns on it because, clearly, the doors in the structure have already the same design as the particular walls, and, again, I don't think it's for the court to speculate on whether the jambs to those doors, examining each of those, that 50% of those is open to the air or not. No evidence was given in relation

thereto, nor, indeed, does the court think it necessary to speculate. The 50%, of course, is of the perimeter, and that does seem to me to be an important element in interpretation. 'Perimeter' comes from the *perimetros* in Greek, as indeed we see from the Oxford English Dictionary. It's in Italian and French as well as, indeed, in English, and it has the sense of "The continuous line or lines forming the boundary of an enclosed geometrical figure." And indeed, every matter that is dealt with is consistent with that boundary of an enclosed geometrical figure. One might say that the Freshwall structure is not a continuous figure, but it does seem to me that in relation to the word 'perimeter', in terms of a line, that the court certainly could interpret that as being the line on the base, the line on the top and, indeed, the intermediary ties as being a continuous line or lines, even if it could be argued by the plaintiff that this was *de minimus* in terms of the overall 50% openings and 50% closure. But, in any event, the defendant has also relied on the perimeter as being a more abstract concept as indicated in the Primary School Curriculum where it is defined as "The sum of the length and the size of a figure or shape." And in the body of that requires pupils in the fourth class "to understand, estimate and measure the perimeter of regular two-dimensional shapes." Again, it doesn't say anything about continuity; it simply says "shapes". And again, it might be argued that discontinuous shape is not a shape in the sense of something that forms a wall, which is the third matter which the court has got to take into account.

33. And 'wall' is one of the most widely-used words, that extends in the Oxford English Dictionary to some 20 pages. It comes from the *vallum* in Latin, it's contrasted with the *murus*, both of which are defects as indeed in the English language of being "Defensive ramparts or mounds or embankments". And it does seem to me that that concept of 'wall', going back to the year 1000 indeed, is important to bear in mind in terms of what surrounds, what defends, what bounds a structure. And in particular, the court has been asked to look at the definition at 4, which is "An enclosing structure composed of bricks, stones or other similar materials laid in courses." And again, this corresponds to the building and construction understanding of what a wall is. But the court has got to consider that that is just the fourth matter of some 12 definitions that are given, and, again, does not use the word 'continuous', though one can apply that if it is an enclosing structure comprising those materials or similar materials laid in courses of most likely is going to be continuous. But within the same fourth definition is the following: "An enclosing structure built around a garden, field, yard or other property, also each proportions between the angles of such an enclosure." Just taking the first phrase first, of "An enclosing structure built around a garden, field, yard or other property," clearly is a much looser definition to the courses, "stone, brick or other similar structure".

34. What does seem to me to be important are two matters:

35. First of all, what is relied on by the plaintiff as being a 'structure', as we have already seen in terms of its promotional literature, and that word is used also in the pleadings. The court is asked to - if I just refer back to the pleadings - it is asked to deal with whether the Freshwall structure corresponds. I have already referred to it before. But it does seem that any enclosing structure around a field, for example, would not necessarily be continuous in the sense that is mentioned in definition 4a.

36. The other definitions to which reference has been made is that of a wall considered with regard to its surface, and this, of course, has been given, then, an extended definition of "The interior wall of an apartment" or "The writing on a wall." And while in the English language we use the word 'wall' to mean both outside and inside wall, though I think in the building trade they would probably be talking about partitions as distinct from outside walls, where, most commonly, we would refer to a wall as including a partition, but, here, again, it is probably being too detailed.

37. Finally, the court should look at the transferred uses; that is, "something which resembles a wall in appearance." And that seems important in interpretation. There is very, very -- the wide definition that is given, and, indeed, reference has been made in the hearing to "The military wall in a battalion extended and one continuous line like a wall," and, again, there seems to be two matters there, without being too pedantic about it, that one is a transferred use, and when you talk about a continuous line of an opposing force, you are not, of course, talking about them being arm in arm or coursed in the sense of a wall; one is dealing with just that, a transfer use. And probably a more illustrative use is the line of defence players who defend their team's goal during a free kick in soccer, are, of course, also a wall as we know it, and one would expect that, again, to be a -- while it may be called continuous in the battalion, we wouldn't be regarding that as being something that was of the same continuous surface, not admitting any air.

38. When really we come into the definition of 'indoor', Mr. Potter has been very helpful in saying there are two characteristics of 'indoors'; one has to do with thermal installation and the other has to do with protection against adverse weather and water ingress, and so on. And it is clear from that point of view that the Freshwall would not correspond to building regulations for an internal wall. But it does seem to me to be equally clear that a 'wall', certainly in its transfer use but also in its direct use, is very wide indeed. Indeed, if we were just relying on the word 'wall' in its ordinary sense as indeed "inclusive of windows, doors, gates," we would also have to look at the extended element within the paragraph, "walls or similar structures".

39. Now, as I have already indicated, the summons does deal with a structure, asked the court to deal with a structure.

40. If I can just, at this stage, raise a preliminary point, having gone through the evidence there, and that is whether the court is being asked to deal with something in the abstract without a factual matrix, or not. The pleadings certainly would lead the court to believe that it is being asked to do something which, probably in a teasing way, the court had said was an endorsement of a product, and raised the question: was this an attempt to get some protection for an intellectual property right; that is, the design in this which clearly is a matter which is abstract in the way one deals with certain filing for patent purposes, is, of course, to deal with it in the abstract, and the test of whether -- the amount of detail one gives to get greater protection without giving away, perhaps, all of the inventive novelty, is a matter that need not concern us. The matter was raised in the submissions on behalf of the defendant in raising whether, indeed, the issue before the court was a general one or a particular one, and it does seem to me that during the hearing, while we were given a lot of information about the particular structure, the Kinsealy Inn, and indeed about brochures that were available at that time, that it does seem that the court has been asked to deal with it more in the abstract, but the court cannot deal with something in the abstract without the factual matrix. And it does seem to me, clearly, on the factual matters before me, that the court, for a number of reasons, cannot accede to the declaration sought.

41. First of all, it doesn't seem to me that this structure is outdoor; that it is, in very common sense, indoor. As I said, even going to the very basic point about having doors to get into a structure, it is called a structure in the pleadings, it is called a structure, it is called an indoor structure.

42. The 50% panelling thing has got to be considered in two ways: First of all, is it, in fact, 50% panelling if you have fixtures to it? And then I am asked, well, I shouldn't really have to deal with the structures, and then we are away from the factual matrix and into what I said it seems to me that the court cannot deal with, but I have also got to consider the ventilating evidence that was given and the evidence that there was a baffling effect caused by the particular design of the structure. This is clearly in the promotional literature. Dr. Potter mentioned it and I think Mr. Buckley agreed that, clearly, the positioning of the particular panels was such as to at least reduce the harshest weather conditions; at most, to provide an indoor atmosphere. But even if I were to consider dealing

with the declaration in relation to a structure other than the Kinsealy Inn, which clearly does not have 50% of air space and 50 percent of solid because of the -- because of the fixtures and fittings there to because of the positioning of the counter, the mirror, the radiators, even if I were to go and deal with the structure in abstract, which I said doesn't seem to me that the court can or should do, that it does seem to me that, on the common understanding of the words of 'outdoor', the common understanding of 'perimeter', the common understanding particularly of 'walls', that this is a wall, it presents as a wall and it presents as, indeed, a continuous structure, and that it does seem to me that, in dealing with the concept of having air coming in, albeit it baffled or muffled as it does come in, which, of course, does seem to me to actually reduce the airflow, not that that, as I said, is the criteria to be used, that it does seem to me that it is a wall and that it is outdoor.

43. Finally, I should add that the section in the act does not -- the subsection in the act does not require the court to deal, in fact, with the areas, nor indeed with volume, and, because of that, then, the question of ventilation really doesn't arise. I mean, it may be a promotional matter, it may not be, but it doesn't seem to me that it is a matter which arises for the purpose of the interpretation of the section.

44. Accordingly, I refuse the reliefs sought.