

**THE HIGH COURT  
JUDICIAL REVIEW**

[2005 No. 611 J.R.]

**BETWEEN****CORK OPERA HOUSE PLC****APPLICANT****AND****THE REVENUE COMMISSIONERS****RESPONDENT****Judgment delivered by Mr. Justice Hedigan on the 21st day of November 2007****Facts**

1. The applicant party is the only opera house in the State and has over many years, held a spirit retailers on-licence (the on-licence) issued by the respondent under s. 7 of the Excise Act, 1835 hereafter ("the 1835 Act"). That licence has been issued by the respondent on foot of a licence issued annually by Cork City Council under s. 172 of the Cork Improvement Act, 1868 hereafter "the 1868 Act").

2. The applicant seeks to quash the respondents decision that a licence issued under s. 172 of the 1868 Act is not a licence valid for the purpose of s. 7 of the Act.

3. Section 7 of the 1835 Act provides:

"It shall be lawful for the Commissioner and Officers of Excise, and they are hereby authorised and empowered, to grant Retail Licences to any person to sell Beer, Spirits and Wine in any Theatre established under Royal Patent, or in any Theatre or other Place of Public Entertainment licensed by the Lord Chamberlain or by Justices of the Peace without the Production by the Person applying for such Licence or Licences of any certificate or Authority for such Person to keep a Common inn, Alehouse or Victualling House, anything in any Act or Acts notwithstanding."

4. Section 172 of the 1868 Act, provides:

"It shall not be lawful for any Person to have or keep any House or other Place of Public Resort within the Borough for the Performance of Stage Plays or other Theatrical Representations or any Circus or any Place for Entertainment in the Nature of Dramatic Entertainment or any other Place of Public Resort kept or used for Public Dancing, Music or other Entertainment of a like kind,( all which Places are hereinafter shortly described or referred to as 'Theatres or other Places of Public Amusement') into which Admission is obtained by payment of Money, without being duly licensed by the Corporation."

5. The applicant bases its claim for judicial review on the grounds of legitimate expectation and the fact that Cork City Council enjoys the statutory power to grant a licence. The respondent contends that Cork City Council does not enjoy the power to grant such a licence, that no legitimate expectation of the applicant can confer that power on the Council, and that the applicant delayed in seeking judicial review of the decision of the respondent.

**The applicant's submissions**

6. Two enactments are involved – the 1835 Act and the 1868 Act. The former is a Public Act of Parliament, the latter a private Act.

7. The applicant submits that the 1868 Act falls to be considered with the 1835 Act and in that context established a local law for what is now described as Cork City Council. It further submits that s. 7 of the 1865 Act when read with s. 172 of the 1868 Act have been correctly interpreted up to recent date by the respondent and that that interpretation should be upheld.

8. The applicant further contends that the 1835 Act in its description of "justices of the peace" encompasses a reference to local authorities generally. This applies *a fortiori* to the Borough of Cork where the charters of the city provided that the Mayor and Aldermen are *ex officio* justices of the peace, as per the Charters of Elizabeth I of 1st December, 1574, James I of 10th March, 1608, Charles I of 5th April, 1631 and George II of 2nd January, 1785.

9. The applicant emphasises the importance of the 1868 Act, as a private Act of Parliament, applicable specifically to its Borough. This Act is part of the local law for the City of Cork and is to be read with the public legislation otherwise applicable and Cork's licensing provisions fully satisfy the requirements of s. 7 of the 1835 Act. Evidence is submitted to that effect detailing the theatre licences wherein a theatre licence is granted by Cork City Council up to and including the 29th September, 2007.

10. The applicant relies upon the respondent's Excise Licences Manual describing Customs and Excise staff instruction relating to the processing of all revenue aspects of excise licenses and submits that this confirms there interpretation of the subsequent licensing regime. This is published on the respondent's website with regard to Theatre and other Places of other Entertainment as follows:

"Excise Act 1835, section 7, [has been] adopted into Irish law by the Adaption of Enactments Act, 1931. Three categories of premises qualify for Intoxicating Liquor Licences, referred to herein as Theatre Licences under this legislation: theatres established under Royal Patent; theatres licensed by the Lord Chamberlain or by justices; and places of public entertainment licensed by the Lord Chamberlain or by justices ... there is now no theatre operating under Letters Patent. The Everyman (Palace) and Opera House theatres in Cork are licensed by Cork Corporation under the Cork Improvement Act, 1868, and the Excise Licence for these premises may be renewed provided the premises continue to be used as theatres and are licensed by the Corporation."

**The respondent submissions**

11. The respondent submits that whilst until 2004 the Revenue Commissioners had not questioned the applicant's entitlement to a licence under s. 7 of the 1835 Act, following a review of the requirements of s. 7, it seemed clear to them that the applicant does not satisfy these requirements. In the result, the Revenue Commissioners consider they have not the power to grant a licence under s. 7. They further submit that the applicant's reliance on the doctrine of legitimate expectation cannot succeed, because the doctrine cannot prevail against a statute. In the result, they submit that unless the applicant can show that it has satisfied the requirements

of s. 7 of the 1835 Act, the Revenue Commissioners have no power to grant a licence as sought.

12. The respondent submits that pursuant to s. 7 there are certain requirements to empower the Revenue Commissioners to issue a licence only one of which arises here, i.e. where the applicant is a theatre or other place of public entertainment licensed by justices of the peace. The central question, therefore, is as to whether the applicant is the holder of a licence issued by a justice of the peace. The Revenue Commissioners submit that it is not, but note that having regard to the decisions in *Point Exhibition Company Limited v. The Revenue Commissioners* [1993] 2 I.R. 551, Geoghegan J., *Royal Dublin Society v. Revenue Commissioners* [2001] 1 I.R. 270, Keane J. and *Kivaway Limited v. Revenue Commissioners* [2005] 2 I.L.R.M. 274, Quirke J., it would be a relatively easy matter for the applicant to come within the requirements of s. 7 of the 1835 Act and obtain an on-licence. All that is required to enable the respondents to issue an excise licence is that the applicant should be the holder of a licence issued by the District Court under s. 51 of the Public Health Acts Amendment Act, 1890. The applicant is not the holder of such a licence.

13. The respondents submit that the applicant's case in this regard relies on the argument that the functions of justices of the peace in this context were transferred to Cork City Council by virtue of the provisions of Towns Improvement (Ireland) Act, 1854 Adaptation Order 1947. However none of the relevant provisions affected by the order deal with the transfer of the functions of justices of the peace in the licensing of places of public entertainment. In the result the respondents submit Cork City Council never had the power to grant a public entertainment licence and consequently the Revenue Commissioners have no power under s. 7 to grant a licence.

14. Dealing with the applicant's claim of legitimate expectation, the respondents submit that the past practice of the Revenue Commissioners cannot confer by way of legitimate expectation a statutory power upon a statutory authority which it does not have under the relevant statute. They rely upon the principles as expressed by Finlay C.J. in *Wylie v. Revenue Commissioners* [1994] 2 I.R. 160 at pp. 166 to 167. The respondents further submit that the proceedings were not commenced within the six month period limited by O. 84, r. 21(1) where an order of *certiorari* is sought and that no good reason has been shown to extend the time.

### The decision

15. I will deal firstly with the question of delay. It is clear the proceedings which were not commenced until 13th June, 2005 are out of time since the views expressed by the Revenue Commissioners were clearly set out in their letter dated 30th August, 2004 and exhibited in the affidavit of Mary Fenton exhibit "COH4" sworn herein. Order 84, r. 21 provides that in certain circumstances the court has discretion to extend the time if it considers there is good reason. As stated by Denham J. in *DeRoiste v. Minister for Defence* [2001] 1 I.R. 190 at p. 203:

"The Rules of the Superior Courts 1986, Order 84 Rule 21, state that an application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose or six months where the relief sought is *certiorari*. However, the Court has discretion to extend time if the Court considers there is good reason. The onus is on the applicant to meet the condition. It is for the applicant to show that he has made the application promptly and within the time limit or that there is a good reason to extend the time within which the application may be made. The conditions are not as rigid as judicial review is a discretionary remedy. There remains in the Court an inherent discretion to be exercised according to the requirements of justice in the circumstances of each case."

16. It is submitted by the applicants that notwithstanding the above letter of 30th August, 2004 the respondent did in fact award a licence to the applicant on 24th October, 2005 and again on 18th June, 2006. The last licence was to expire on the 30th September, 2007. This no doubt was because everyone involved wished to maintain the status quo whilst trying to sort out the problem that had arisen. The applicant pleads there were negotiations going on in the light of the long practice that had been followed and proceedings against it in the District Court had resulted in acquittal by direction on a number of charges and adjournment of other summonses pending further argument. It had hoped that the District Court proceedings might resolve matters and it was trying to avoid invoking the jurisdiction of the High Court for as long as it could.

17. I consider that the court should be slow to extend time in judicial review because the uncertainty or lack of finality involved where decisions may be challenged long after they are made is not in the general interest and runs counter to the requirement that the law be certain. In this case however, it seems to me that any uncertainty or lack of finality present was inevitable and understandable. It seems to me that the parties were making every effort to sort things out in the light of a sudden change in a long established practice in providing Cork Opera House with an on-licence. In all these circumstances it seems to me that the requirements of justice suggest I should extend the time to seek judicial review and I do so.

18. Turning to the issues in this case I will deal firstly with the question as to whether the Revenue Commissioners have power to issue a licence to the applicant in circumstances where they do not have a licence issued by the District Court under s. 51 of the Public Health Acts, Amendment Act 1890 but have a theatre licence granted by Cork City Council.

19. It is worth noting at the outset, if for no other reason than to assuage the concerns of the music loving patrons of Cork Opera House, that there is little doubt that wines and spirits will continue to be served at its functions for the foreseeable future. The question is as to whether Cork Opera House must apply to the District Court like all other applicants for such a licence or whether it can continue the practice of almost 150 years of being licensed by the Corporation.

20. The statutory scheme relating to the licensing of places of public entertainment ordinarily provides that application is made to the District Court under s. 51 of the 1890 Act. Where a licence is granted thereby the Revenue Commissioners are then authorised by s. 7 of the 1835 Act to grant a retail licence to sell beer, wine and spirits. In the applicants case for almost 150 years by virtue of a private Act of the Parliament in Westminster in 1868, they have applied to Cork City Council for their licence as a "theatre or other place of public amusement". This practice has now been challenged by the Revenue Commissioners who maintain that Cork City Council has no entitlement to issue such a licence. Their power to issue on-licences arises strictly from s. 7 of the 1835 Act. This provides as follows:

"It shall be lawful for the Commissioners and Officers of Excise, and they are hereby authorised and empowered, to grant retail licences to any person to sell beer, spirits and wine in any theatre established under a Royal Patent, or in any theatre or other place of public entertainment licensed by the Lord Chamberlain or by justices of the peace without the production by the person applying for such licence ... of any certificate or authority for such person to keep a common inn, ale house..."

21. As submitted by the respondents, it is clear that the relevant requirement here is that the applicant must be licensed by justices of the peace because Cork Opera house is not established under a royal patent nor was it licensed by the "Lord Chamberlain". Have the functions of justices of the peace been transferred to Cork City Council? It seems to me that the only way they can have been is if those functions were transferred by virtue of the provisions of the Towns Improvement (Ireland) Act, 1854 Adaptation Order 1947.

The operative provision thereof is as follows:-

"Sections 4, 6, and 21 of the Towns Improvement (Ireland) Act 1854 shall have effect as if, for the references to justices of the peace resident within ten miles of a town, there were substituted references to the County Manger for the county in which the town is situate."

22. This transferred the functions of justices of the peace but in respect only of sections 4, 6, and 21 of the 1854 Act. None of these sections referred to the licensing of places of public entertainment. It is clear to me that the powers of justices of the peace were never transferred to Cork City Council. This being so, it has no power to licence any place to be a theatre or other place of public entertainment and only the District Court may do so pursuant to s. 51 of the 1890 Act. It follows that the Revenue Commissioners have no power under s. 7 to grant to Cork Opera House a retail licence to sell beer, wines and spirits unless it is licensed as a theatre or other place of entertainment by the District Court.

23. As to the applicant's case that it can rely upon a legitimate expectation that the Revenue Commissioners will continue to act as they have to date, I have been referred to two cases. The first of these relied upon by the applicants is *Glencar Explorations plc v. Mayo County Council* (No. 2) [2002] 1 I.R. 84, 162-163 Fennelly J.:

"In Order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

24. Thus the applicant claims there are three requirements in order to establish a legitimate expectation. These are:

1. a representation
2. reliance thereon
3. reasonableness.

25. It is certainly arguable that the continual issuing of a licence from year to year constitutes a representation. It is also clear that the applicants would have reasonably relied upon the representation. However, the only way pleaded in which the applicants have in some material way relied upon this is, admittedly only by way of example, in investing in their bar facilities. The high probability must be that these facilities will continue to be used by the patrons of Cork Opera House. It is difficult indeed to see any way in which the applicant will be prejudiced by having to apply like everyone else in the District Court for its theatre licence. In this context it may well be thought unreasonable to expect to rely upon a pre-existing regime now shown to be other than in accordance with the norm. The matter, however, is concluded in my view by the proposition put forward at the outset by the respondent that legitimate expectation cannot prevail against a statute. It cannot operate to confer upon a statutory authority a power which that authority does not have under the terms of the relevant statute. The principle was enunciated by Finlay C.J. in *Wylie* (cited above):

"An additional feature however, in my view, also arises in this case which would independently defeat the applicant's claim. The Revenue Commissioners are a statutory body who can only act pursuant to statutory powers vested in them. As of 1987, they did not have any statutory power to grant repayments by way of concession of excise duties, otherwise than in accordance with the scheme which they have put in operation and which had received, one presumes, the consent of the Minister for Finance, for them to repay excise duty on a motor car to a person who was disabled but who did not come within the approved scheme, would be ultra vires and a breach of their statutory obligation to collect excise duties, except where they were validly exempted or avoided. There is in this case no question of a promise by the Revenue Commissioners to do any particular thing in 1987, and I am satisfied that quite independently of the more generally applicable principle of legitimate expectation and the limit it may impose on that doctrine, that this applicant could not pursue on the basis of expectation a remedy which would involve the carrying out by the statutory authority, the Revenue Commissioners, of activities which they were not empowered to carry out, and the payment or repayment of monies which they were not empowered to pay or repay."

26. Relying upon this principle, I am satisfied that the applicants cannot pursue on the basis of their expectation a remedy which would require the statutory authority, the Revenue Commissioners, to act in a way unauthorised by statute. For these reasons I must refuse the relief sought.