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THE HIGH COURT

[2006 No. 1814 S.S.]

IN THE MATTER OF THE SECTION 52 OF THE COURTS (SUPPLIMENTAL PROVISIONS) ACT 1961 (NO. 39 OF 1961)

BETWEEN

SOUTHERN HOTEL SLIGO LIMITED

APPLICANT

AND

IARNRÓD ÉIREANN

RESPONDENT

Judgment of Mr. Justice Hedigan delivered on the 13th day of July, 2007.

1. This is a consultative case stated by Judge Oliver McGuinness of the District Court who is assigned to the District Court area of Sligo. It arises from an issue as to costs which emerged at the end of proceedings taken before him under s. 108 of the Environmental Protection Agency Act 1992.

2. The facts of the case were as follows; the applicant is the owner of the former Great Southern Hotel which is situated beside the railway station in Sligo town. The applicant complained under s. 108 against the respondent who over many years has made a practice of leaving its trains with their engines running all night beside the above hotel. The reason it did this was apparently because the train engines took a very considerable length of time to warm up. If they turned the engines off at night then early morning train services would be badly delayed.

3. The applicants argued that this practice was a nuisance and greatly detracted from the enjoyment of the hotel by its guests and damaged the hotel's business. The District Judge set out the case stated as follows:

> "1. This is a consultative case stated by me Oliver McGuinness, Judge of the District Court assigned to the District Court area of Sligo, District No. 2 pursuant to Section 52 of the Courts (Supplemental Provisions) Act 1961.
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> 2. At Sligo District Court on the various dates referred to below I heard a complaint brought by the Complainant under section 108 of the Environmental Protection Agency Act 1992. 11 arose from the then practice of the Respondent of leaving train engines running overnight at Sligo Railway Station. The Applicant operates a hotel nearby. A copy of the Notice of Application to the Court is annexed hereto.
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> 3. On the 8th of July 2004 the matter was listed before me for hearing. There was no appearance for the Respondent.
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> 4. While the first witness for the Plaintiff was giving evidence a representative from Messrs. Hegarty & Armstrong Solicitors, Sligo came into Court and informed me that the leg al department of C.I.E. had contacted them and said that they had understood that the case would be adjourned by agreement with the Applicants solicitor. Some misunderstanding had evidently occurred as they had been informed by an employee of the Respondents who was actually in court that the case was proceeding.
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> 5. In view of what had happened they were requesting that the matter be adjourned although the case had in fact started, I agreed to the adjournment on the basis that the costs of the day were to be awarded to the Applicants.
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> 6. The matter was adjourned for mention to the 15th of July 2004 and later for hearing on a special date of the 19th of July 2004.
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> 7. The substantive hearing of the matter took place on the 19th of July 2004 and I heard evidence from both parties.
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> 8. The Complainant is the owner of a hotel (formerly the Great Southern Hotel) which is situated adjacent to the Railway Station in Sligo.
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> 9. The Respondent, at the time of the proceedings, had a practice whereby the trains parked overnight at the railway station in readiness for the journey the following morning, were left running.
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> 10. The Complainant claimed that the noise made by the train engines prevented its guests from sleeping and was the subject of considerable complaint to the detriment of its business.
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> 11. The position adopted by the Respondent was that the practice of keeping the trains running had been in place virtually since the railway station in Sligo had opened and that the particular trains had been commissioned in the 1970's and they were always kept running over night when in Sligo Station. For technical reasons it was not possible to shut them down and there was no realistic alternative to leaving them running at the station. The Respondent also argued that the Complainant had worsened the impact of the noise by extending the Hotel in the direction of the station.
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> 12. In the course of the hearing I was told that the trains were due to be replaced with more modern rail cars in December 2005 and it would not be necessary to keep them running in the same way. In the meantime the Respondent would commence a practice of detaching the locomotives from the trains and would park them at the location in the station which was at the greatest distance from the Hotel.
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> 13. On this basis I adjourned the proceedings initially for 7th October 2004 and there were further adjournments up to the 27th of April 2006.
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> 14. When the matter was listed on the 27th of April 2006 I was informed that in the intervening period the replacement of the trains had in fact taken place and that the Complainant was not looking for any further relief from the court other than its costs of the proceedings.
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> 15. 1 indicated to the Solicitors that they should sort out the matter of costs between themselves and if they could not I would adjudicate on the costs myself.
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> 16. The solicitor for the Respondent indicated that an order for costs would be opposed but without prejudice to this position he requested details of the Applicants costs. I adjourned the matter to the 8th June 2006 for further argument.

17. When the case resumed the solicitor for the respondent submitted that I do not have jurisdiction to make an award of costs in a case such as this on the following grounds:-.

a) Section 108 of the Environmental Protection Agency Act 1992 which created the jurisdiction which the complainant had sought to use provides that:-

> 'the Court may order the person or body making, causing or responsible for the noise to take the measures necessary to reduce the noise to a specified level or to take specified measures for the prevention or limitation of the noise and the person or body concerned shall comply with such order.'

b) The Section does not provide for any additional or consequential order and if there was to be a jurisdiction to order payment of costs it would have to be provided for in the Section.

c) The intention of the Legislature in introducing this procedure was to provide a simple and informal method of resolving such noise issues between neighbours (which would commonly involve barking dogs or playing music excessively loud or the like). The absence of provisions entitling the Court to order payment of costs was consistent with this approach. The use of the Section to resolve this case which involved issues of public importance relevant to the provision of a train service was never appropriate.

d) Order 51 Rule 1 of the District Court Rules gives jurisdiction to make an award of costs in Civil Matters. Order 36 Rule gives a similar but more limited jurisdiction in Criminal matters. He submitted that the subject case did not fall into either category.

e) The form of the Order to be made by the Court was specified in Order 96 Rule 3 of the District Court Rules which reads

f) 'Where upon hearing such complaint, the Court makes an order under the said Section 108(1), the order shall be in the Form 96.16 Schedule C.'

g) The Rule is mandatory in its terms and the form in question, a copy of which is attached to this case stated, makes no reference to costs. This is consistent with the Section of the Act.

h) Furthermore, neither the Act nor the rules of court provided any mechanism for the collection of any costs which might be awarded and the court would not make an order which was incapable of enforcement.

18. The solicitor for the Claimant argued as follows:-

a) As the District Court had entertained this matter on the 8th July 2004 and I had in fact made an order for costs on that day the Court should continue to have jurisdiction in that regard. (In response to this the Respondents solicitor pointed out that at that particular time all they were trying to do was rescue the situation which arose from the non appearance of the Respondent in the proceedings. They had no knowledge of the issues then and could not be said to be prepared to adequately represent the Respondent and in fact their instructions to deal with the substantive hearing only came later.)

b) The Applicant's Solicitor also indicated that costs in this matter should follow the event as the Applicant had succeeded to the extent that the Respondent had agreed to the relocation of the engines to the part of the Station which was at the greatest distance from the hotel. Also the Respondent had replaced the engines, albeit for reasons not connected with the proceedings.

c) The spirit of the legislation is such that it would not be envisaged that a successful Applicant would be prejudiced by not having the opportunity to allow the court to award costs irrespective of the behaviour of any Respondent. It would be inequitable if the Applicant would be left with no redress for the costs he has incurred in bring such an application.

The Opinion of the High Court is sought on the following Questions:

1. In an application for an Order under Section 108 of the Environmental Protection Agency Act 1992 does the District Court have jurisdiction to award costs to either party to the proceedings.

2. In the absence of any specific provision in the legislation creating the procedure, is there an inherent jurisdiction in the Court to order payment of costs

3. If the answer to either question 1 or 2 is yes, how does such jurisdiction arise.

4. If the answer to either question 1 or 2 is yes, what is the appropriate form of Order to be made and how would such an order be enforced.

Dated this 23rd day of November 2006."

4. In its submissions to the High Court, the applicant while noting that s. 12 of the Environmental Protection Act of 1992 allows the Environmental Protection Agency to recover costs from a person convicted of an offence under the Act, acknowledges that there are no specific provisions within the legislation to allow the District Court to order payment of costs. They argue that the court has an inherent jurisdiction arising from O. 51(1) of the District Court Rules. They also maintain their position in relation to costs arising from the delay caused by the respondent's solicitors in the District Court and further argue that costs must follow the event. They urge upon the court that where, as in this case, an applicant is forced to take proceedings in order to bring about the desired result the court should in any event take a pragmatic approach to costs and urge on the court that it would be an injustice to deny the applicants in this case their costs bearing in mind that they had achieved what they set out to do in the first place.

5. In support of their argument that the District Court has an inherent jurisdiction to award costs they cite two Irish cases. *Brennan*

v. O'Brien [1960] 103 ILTR 36 in the Supreme Court dealt with the case where the High Court in a case stated concluded that convictions against the defendant could not be sustained but made no order as to costs. In considering whether the High Court had exercised its discretion correctly, Maguire CJ stated that:

> "There would appear to have been no grounds on which the court was entitled to deprive the defendant of his costs."

6. And the order of the High Court on the issue of costs was reversed.

7. In *Southern Health Board v. Reeves-Smith* [1980] I.R. 26 at p. 31, Kenny J. cautioned that:

> "Those charged with carriage of a case stated or conducting appeals should bear in mind that their duty to the court and to their client is to move with reasonable expedition and that, if they fail to do so, they may be liable in costs or may be made answerable in some other way."

8. The applicant also refers to the powers of magistrates in England to award costs and referred to the Magistrates Court Act 1980 s. 64(1)(a).

9. The applicant further argues that in the absence of specific provision within the legislation creating the s. 108 procedure, there is an inherent jurisdiction in the court to order payment of costs. They argue that this jurisdiction arises out of O. 51(1) of the Consolidated District Court Rules. They question whether an applicant visited with a nuisance as presented in this situation should be penalised in respect of his own costs when at all times the delays that occurred i.e. the adjournment of the first hearing was the result of the respondent's solicitors "trying to rescue the situation that arose from the non-appearance of the respondent in the proceedings." They further argue that as the respondent had agreed to the relocation of the engines, they had in effect succeeded in their application and were entitled to their costs. They claim that it would fly in the face of common sense, would be unjust, oppressive and inequitable if the applicant in this situation were left with the burden of bearing his own costs.

10. The respondents for their part argue that the District Court is a court of "local and limited jurisdiction" within the meaning of Article 34.3.4 of the Constitution. While the current District Court was established by the Courts Act 1961, this carried over the functions and jurisdiction of the District Court as defined in the Courts Act 1924. The District Court is therefore a creature of statute and the extent of jurisdiction is defined by statute.

11. As to the applicant's argument in relation to costs and the District Court Rules, the respondents argue that the power to make rules is contained in s. 91 of the Courts Act 1924 which includes the practice and procedure relating to costs.

12. The particular rules concerning costs are O. 51 generally and O. 36 in relation to criminal matters. Order 51 r. 1 states:

> "Save as otherwise provided by statute or by rules of court, the granting or withholding of the costs of any party to civil proceedings in the court shall be in the discretion of the court."

13. They argue that O. 51 r. 1 does not purport to confer any power in relation to costs, but governs how that power to award costs is to be exercised. Order 51 expressly refers to "civil proceedings". The power to make rules such as the District Court Rules 1997 is confined to practice and procedure; it does not extend to making rules regarding substantive law.

14. The rules cannot therefore create a power to award costs where there is no jurisdictional basis to do so. As regards the meaning of "civil proceedings" in *Ex parte Waldron* [1985] 3 WLR 1090, the phrase "civil proceedings" was considered not to include judicial proceedings as they are public law proceedings. Ackner L.J. at p. 1101:-

> "…the words 'civil proceedings' unless specially defined, are apt only to cover civil suits involving claims in private law proceedings. The words are not apt to include proceedings for judicial review."

15. A complaint under s. 108 of the 1992 Act is not a claim in private law proceedings but is more in the nature of a public law complaint. A complainant may be the local authority, the Environmental Protection Agency or a person in the neighbourhood. The relief in a s. 108 claim is an order to take measures to prevent noise which is of general public interest; there is no provision for damages as in private law proceedings. Even when not so they argue, O. 51 does not necessarily apply to all civil proceedings and they note that the Environmental Protection Agency Act 1992 did not attempt to add complaints under s. 108 of the 1992 Act to the list of civil cases as listed under s. 77(a) of the 1924 Courts Act.

16. As to s. 108 of the 1992 Act itself, the respondents claim that nowhere in the relevant section is there provision for costs. They note that specific provision is made for costs in many other proceedings under the Act and that it is deliberately omitted in relation to s. 108. They note also that the court order forms which in other cases make explicit provision for claiming costs make no provision for costs in relation to an order under s. 108.

17. As to the claim of inherent jurisdiction, the respondents argue that it follows from the fact that the jurisdiction of the District Court is defined and limited by statute that it has no inherent jurisdiction. They cite *The Attorney General v. Crawford* [1940] I.R. 335 where a divisional court of the High Court decided that in proceedings for the recovery of a penalty under s. 186 of the Customs Consolidation Act 1886 brought at the suit of The Attorney General, the District Justice on dismissing the matter had no jurisdiction to award costs. The findings of the court were summarised as follows:-

> "1(a) Rule 37 of the District Court Rules of 1926 which then applied to those proceedings both prohibited the awarding of costs against the Attorney General in a case of any summary jurisdiction and was expressly inapplicable to summary proceedings under the Customs Consolidation Act.
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> 2(b) That there was no inherent jurisdiction in the District Court to award costs in the absence of express statutory power, and
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> 3(c) That apart from the provisions of r. 37 there was no other possible statutory jurisdiction to award costs unless s. 5 of the Customs and Inland Revenue Act 1877 applied and that since that section was referable to proceedings at the suit of the crown and since it had not been adapted it could not be applicable."

18. Hanna J. said at p. 340, that there was no other rule than r. 37 dealing with costs and that:

> "There is no other rule as to costs and counsel for the Attorney General relies on the submission that the rules are self contained and provide no jurisdiction over costs in this case.
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> Counsel for the defendant on the other hand submitted that the obvious implication was that the costs in revenue cases were to be left as before the making of these rules. This may have been intended, but the court cannot imply a power to give costs from such an unsubstantial speculation, for it is well established that costs must be a creation of a statute."

19. Maguire C.J. further said at p. 342 that:-

> "It is well established that there is no inherent power or jurisdiction to grant costs, and that costs can only be granted under the provisions of some statute or rules…"

20. The respondents further argued that the above was affirmed by Finlay P. in *The State (Attorney General) v. Shaw* [1979] I.R. 136. Also in *Dillane v. Ireland and the Attorney General* (Unreported, High Court, 31st July, 1980) where the Supreme Court rejected a claim that the inability to claim costs against a prosecuting Garda was unconstitutional, Henchy J. p. 2239:-

> "The Courts of Justice Act 1924 which originally established the District Courts cannot be held to have invested it with any inherent jurisdiction to award costs, for s. 91 of that Act reserved the question of costs to the rule making authority and that statutory reservation has not been varied by any subsequent Act."

21. Counsel for both parties in this case have indicated to the court that there is in fact no decision in relation to s. 108 and the power of the District Court to award costs in an application thereunder. Turning to the questions asked by the District Judge in this case it appears to me that the answer to question 1 is that in an application under s. 108 the District Court does not have any jurisdiction arising from the Act to award costs to either party. This seems to reflect the very nature of the s. 108 procedure as a "public watchdog" charter. The section seems to envisage applications in the public interest and also the private interest by, inter alia, private individuals. As the section does not provide for an order for costs it can be seen as protective of this "public watchdog" role. This is because, absent provision for a costs order, the watchdog will not be frightened to bark by the prospect of a large order for costs against him in the event of an unsuccessful application. Moreover, if I may be forgiven for mixing my metaphors, what is sauce for the goose is sauce for the gander. If the losing applicant cannot be made a target for costs, so neither ought the respondent. It seems to me that the intention of the legislature was to create such a watchdog procedure and making no provision for costs either for or against any party is an essential part of that procedure.

22. As to whether there is a power provided by O. 51(1) of the Consolidated District Court Rules I accept the submissions of the respondents that O. 51 r. 1 does not confer any power in relation to costs, but governs how that power to award costs is to be exercised. Order 51 expressly refers to "civil proceedings". The power to make rules such as the District Court rules 1997 is confined to practice and procedure; it does not extend to making rules regarding substantive law. In *The State (O'Flaherty) v. O'Floinn* [1954] I.R. 295 dealing with a District Court Rule which allowed a judge to remand an accused for fifteen days while statute only allowed eight days, Kingsmill Moore J. said at p. 304:-

> "What is meant by the words 'practice and procedure'? broadly I would answer 'the manner in which or the manner whereby effect is given to a substantive power which is either conferred on a court by statute or inherent in its jurisdiction'".

23. In *Kerry County Council v. McCarthy* [1997] 2 ILRM 481, O'Flaherty J. at p. 483 noted that the words "pleading, practice and procedure generally" referred to matters which are "strictly procedural in the narrow sense". O'Flaherty J. found that the issue of summary summons by a clerk was administrative, stating at p. 485 that the matter was:-

> "…fairly and squarely one of administrative procedure only with no consequences affecting the liberty or any right of the citizen."

24. The Rules cannot therefore create a power to award costs where there is no jurisdictional basis to do so. As regards the meaning of "civil proceedings", in *Ex parte Waldron* (cited above), the phrase "civil proceedings" was considered not to include judicial proceedings as they are public law proceedings. Ackner L.J. at p. 1101:-

> "…the words 'civil proceeding' unless specially defined, are apt only to cover civil suits involving claims in private law proceedings. The words are not apt to include proceedings for judicial review."

25. I consider that a complaint under s. 108 of the 1992 Act is not a claim in private law proceedings but is more in the nature of a public law complaint. The relief provided by s. 108 is an order to take measures to prevent noise which is of general interest; there is no provision for damages as in private law proceedings. This being so it appears to me that s. 108 of the Environment Protection Act is not a civil proceeding within the meaning of O. 51 r. 1 of the District Court Rules. I would note further that, even were it so, it is hard to imagine that the court would exercise its discretion in such a way as to negate what appears to be the clear intention of the legislature in excluding costs from a s. 108 procedure.

26. As to the second question raised by the District Judge, in my view it is well established that there is no inherent power in the District Court to award costs. This follows from the fact that the jurisdiction of the District Court is defined and limited by statute. In *The Attorney General v. Crawford* [1940] I.R. 335 as submitted by the respondents, a divisional court of the High Court decided that in proceedings for the recovery of a penalty under s. 186 of the Customs Consolidation Act 1886 brought at the suit of the Attorney General, the District Justice on dismissing the matter had no jurisdiction to award costs specifically, the divisional court found that there was no inherent jurisdiction in the District Court to award costs in the absence of express statutory power. At p. 342 of the report, Maguire C.J. observed:-

> "It is well established that there is no inherent power or jurisdiction to grant costs, and that costs can only be granted under the provisions of some statute or rules; *Garnett v. Bradley*; O'Conner's Justice of the Peace 2nd Edition Volume 1 p. 198; Paley on Summary Convictions, 7th Edition p. 227. The District Court was established by the courts of Justice Act 1924 and is the creature of that statute."

27. This finding that the District Court has no inherent jurisdiction to award costs in the absence of an expressed statutory power was affirmed by Finlay P. in *The State (Attorney General) v. Shaw* [1979] I.R. 136.

28. In my view therefore the answers to the first two questions stated by the District Judge are in the negative and consequently

questions three and four do not arise.

29. I would further be of the view that the order which was made for costs of the day was an order which was made within proceedings taken under s. 108 of the Environmental Protection Act and therefore is an order that was made without jurisdiction.