

## THE HIGH COURT

[2003 No.535 SP]

**IN THE MATTER OF  
THE RESTRICTIVE PRACTICES ACT, 1972 – 1987 (AS AMENDED)  
AND  
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 13(3) OF THE RESTRICTIVE PRACTICES ACT, 1972  
(AS AMENDED BY SECTION 18 OF  
THE RESTRICTIVE PRACTICES (AMENDMENT) ACT 1989)**

BETWEEN:

DUNNES STORES

PLAINTIFF

AND  
DIRECTOR OF CONSUMER AFFAIRS

DEFENDANT

**Judgment of Ms.Justice Finlay Geoghegan delivered on the 14th day of July 2005.**

1. On the 2nd December, 2003, Dunnes Stores, the plaintiff, advertised that it was reducing the price of disposable nappies by 40% for one day only. On that day Mr. Michael McEneaney, an officer in the office of the Director of Consumer Affairs, the defendant herein, purchased three packets of disposable nappies in the St. Stephen's Green premises of the plaintiff. He then sought net invoice information from an assistant manager of the plaintiff in its St. Stephen's Green shop in relation to the three products purchased. That information was not available on the shop premises and he was referred to the plaintiff's head office.

2. Mr. McEneaney subsequently went to the head offices of the plaintiff and met with a Mr. Haughton, head of food finance. The information sought was not made available to Mr. McEneaney.

3. It is common case that the information was sought by Mr. McEneaney as part of an investigation into the question as to whether the disposable nappies were being sold below cost on the 2nd December, 2003, allegedly contrary to the provisions of the Restrictive Practices (Groceries) Order, 1987, and that Mr. McEneaney was exercising powers conferred on him by s.15 of the Restrictive Practices Act, 1972 (as amended by s.18 of the Restrictive Practices (Amendment) Act, 1987).

4. On the 5th December, 2003, the plaintiff issued the special summons herein seeking primarily:

"A declaration that disposable nappies are not "grocery goods" within the meaning of that term in Article 2 of the Restrictive Practices (Groceries) Order, 1987 as they are not "*household necessities*" which are "*ordinarily sold in grocery shops*".

5. The application is brought pursuant to s.15 (3) of the Act of 1972. This subsection provides:

(3)(a) The owner of premises which an authorised officer proposes to enter and inspect, or a person on whom an authorised officer has made a requirement under this section, may apply to the High Court for a declaration under this section.

(b) Where the owner of premises which an authorised officer proposes to enter and inspect, or a person on whom an authorised officer has made a requirement under this section, refuses access to the officer or refuses to comply with the requirement (as the case may be), the owner or other person shall within seven days thereafter apply to the High Court for a declaration under this section.

(c) The High Court, having heard such evidence as may be adduced and any representations that may be made by the [Director] and a person referred to in paragraph (a), may at its discretion declare that the exigencies of the common good do not warrant the exercise by the [Director] of the powers conferred on him by this section, and upon the making of such a declaration the [Director] shall either cease to effect the relevant entry or inspection or (as the case may be) withdraw the relevant requirement under this section.

6. At the time of the hearing of the action the parties were in agreement that there was only a single issue to be determined by the court. The issue is whether or not disposable nappies are "grocery goods" within the meaning of that term in article 2 of the Restrictive Practices (Groceries) Order, 1987 ("the 1987 Order"). The plaintiff accepts that if disposable nappies are grocery goods then it is not entitled to any of the reliefs sought. The defendant accepts that if disposable nappies are not grocery goods within the meaning of the 1987 Order then it follows that the exigencies of the common good do not warrant the exercise by the authorised officer of the powers conferred on him under s.15 (as amended) and the plaintiff is entitled to the declarations sought.

7. The current definition of "grocery goods" is contained in article 2 of the 1987 Order and insofar as relevant is in the following terms:

"grocery goods" mean goods for human consumption ...and such household necessities (other than foodstuffs) as are ordinarily sold in grocery shops ..."

**Applicable principles of statutory interpretation**

8. The submissions of the parties as to the relevant principles of statutory interpretation were similar. However they differed somewhat in their submissions as to the application of those principles to the definition of "grocery goods" in article 2 of the 1987 Order. I propose, therefore, setting out my conclusions on the principles applicable to the construction of the definition of "grocery goods" and in particular as to whether it includes disposable nappies.

9. The starting point is that the statutory definition should be construed according to the intention expressed by the words of the relevant provision. In *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 Blayney J., in the Supreme Court quoted with approval from *Craies on Statute Law* (1971) (7th Ed.) at p.65:

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can

be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view' [per Lord Blackburn in *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394]."

10. Later in the same judgment at p.153 Blayney J. cited with approval from a further passage from the same edition of *Craies on Statute Law* at p.66:

"...In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication. After expounding the enactment, it only remains to enforce it, notwithstanding that it may be a very generally received opinion that it 'does not produce the effect which the legislature intended,' or 'might with advantage be modified'. The meaning which words ought to be understood to bear is not to be ascertained by any process akin to speculation: the primary duty of a court of law is to find that natural meaning of the words used in the context in which they occur, that context including any other phrases in the Act which may throw light on the sense in which the makers of the Act used the words in dispute."

11. As appears from the foregoing a word or expression in a statute, or in this case a statutory instrument, must be given its natural meaning in the context in which it occurs. In *Inspector of Taxes v. Kiernan* [1981] I.R.117 Henchy J., in construing s.78 of the Income Tax Act, 1967 and in particular in determining the issue as to whether the word "cattle" as used therein included pigs stated at p.121:

"A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."

12. Applying the above principles to the statutory provisions at issue herein I am satisfied that the expression "household necessities ...as are ordinarily sold in grocery shops ..." should be given its meaning and scope in accordance with the relevant statutory context i.e. as appearing in an order made under s.8 of the Act of 1972. I will return to a consideration of such statutory context.

13. The next issue is whether the phrase used should be given a special meaning by reason of the fact that the 1987 Order is directed to a particular trade namely the grocery trade. The relevant rule as stated by Lord Esher M.R. in *Unwin v. Hanson* [1891] 2 Q.B.115 and cited with approval by Henchy J. in *Inspector of Taxes v. Kiernan* [1981] I.R.117 at 121 is:

"...if the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

14. I am satisfied that the 1987 Grocery Order and the earlier Grocery Orders are statutory provisions made with reference to a particular trade or business. The phrase whose meaning is at issue is "household necessities ...as ordinarily sold in grocery shops". I am not satisfied on the affidavit evidence that this is a phrase which "everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it". Whilst the defendant sought to rely on evidence given on affidavit that persons conversant with the grocery trade treated disposable nappies as subject to the Grocery Orders and that disposable nappies were sold in shops considered to be grocery shops for the purposes of the Grocery Orders, such evidence appears to me to be different to evidence which would show that persons conversant with the grocery trade understood either "household necessities" or "household necessities....as ordinarily sold in grocery shops" to have any special meaning or to be considered to be a term of art in the grocery trade.

15. The court's attention was drawn to the uncertainty surrounding this phrase referred to in the 1980 Report of Enquiry into the retail sale of grocery goods below cost. This report refers to a number of earlier enquiries. At paragraph 1.4 of the Report it purports to explain why "household necessities" ordinarily sold in grocery shops which had been covered by the 1955 Enquiry were excluded from the 1971 public enquiry. The reasons given were:

"There were two main reasons for limiting the 1971 enquiry: first, the vast majority of the complaints received by the Commission in the years prior to the holding of the enquiry related to foodstuffs and *secondly the inclusion of 'household necessities' would, in the opinion of the Commission, have presented difficulties in regard to definition* [emphasis added] and would have led to a considerable extension of the range and duration of the enquiry without adding significantly to the effective consideration of the broad issues involved."

16. The issue which the court has to determine essentially turns on the meaning of "household necessities". I have concluded in applying the above principles that the court should seek to determine the meaning of the phrase "household necessities" in accordance with the ordinary meaning of that phrase as used in the particular statutory context of a Grocery Order made under s.8 of the Act of 1972 as amended.

17. The last relevant principle of statutory interpretation is what counsel referred to as the presumption against doubtful penalisation or the obligation to construe a word in a penal statute strictly. In *Inspector of Taxes v. Kiernan* [1981] 1 I.R.117 Henchy J. at p.122 expressed this rule in the following terms:

"Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language: see Lord Esher M.R. in *Tuck & Sons v. Priest* (at p.638); Lord Reid in *Director of Public Prosecutions v. Otwell* (at p.649) and Lord Denning M.R. in *Farrell v. Alexander* (at pp.650-1). As used in the statutory provisions in question here, the word "cattle" calls for such a strict construction."

18. In *Director of Public Prosecutions v. Tivoli Cinema Limited* [1999] 2 I.R.260 Barron J., in the Supreme Court at p.268 explained the rationale for the principle:

"...The sections are penal sections in that they provide a criminal sanction. Accordingly, before a criminal sanction can be applied the defendant is entitled to know by clear and unambiguous language that such sanction will be applied in

specified circumstances ...”

19. I am satisfied that the definition of “grocery goods” in article 2 of the 1987 Order must be considered to be words used in a penal statute. Article 11 of the 1987 Order prohibits the selling below cost of grocery goods. Article 12 prohibits the advertising of grocery goods below costs. Those provisions are relevant to the facts giving rise to these proceedings. Section 20 of the Act of 1972 makes it an offence for a person to act in contravention of a provision of a Grocery Order.

20. Accordingly it appears that the court must construe the phrase “household necessities ...ordinarily sold in grocery shops” strictly and in seeking to determine whether or not that phrase when construed in accordance with the above principles includes disposable nappies would have to be satisfied that it has a meaning which demonstrates by clear and unambiguous language that it includes disposable nappies.

#### **Statutory context**

21. The 1987 Order was made by the Minister pursuant to powers conferred on him by s.8 of the Act of 1972 as amended “having considered the report of the Restrictive Practices Commission being a special review under s.10 of the Restrictive Practices Act, 1972, of the operation of the Restrictive Practices (Groceries) Order, 1981”. Whilst the 1987 Order is not so expressed it is in substance an amendment to the 1981 Order. This follows from the express wording of s.8 (1) of the Act of 1972. That subsection confines the power of the Minister to make orders to a situation where he has considered a report of the Commission under s.5 (i.e. following the holding of an enquiry under that section). Also, and more importantly, he may only make an order in relation to any goods or services to which the report relates. The 1987 Order does not on its face refer to any report of the Commission under s.5 of the Act of 1972. There is no evidence of any such report prior to the 1987 Order. Rather, as indicated, it refers to a report of a special review of the 1981 Order carried out pursuant to s.10 of the Act of 1972.

22. The importance of this statutory framework for the question of interpretation at issue is the following. The Minister appears constrained by s.8(1) of the Act of 1972 to make orders only in respect of goods which have been the subject matter of a report of the Commission under section 5 of the Act of 1972. Where a special review is conducted under s.10 of the Act of 1972 and the Commission are of the opinion that the Minister should amend the order which is the subject of the special review they are obliged under subs.10(6) of the Act of 1972, in their report of the review, to recommend accordingly and indicate the recommended form of amending order. Insofar as the Minister is given a general power of amendment of a grocery order under subs.8(2) of the Act of 1972, it appears that such power must be construed in the context of s.10(6) of the Act of 1972 and the limitation in s.8(1) of the Act of 1972 as to the goods which may be the subject of the order.

23. The above statutory scheme means that a court seeking to construe the meaning of a phrase which determines the goods to which an order made under s.8 of the Act of 1972 relates should consider any relevant reports of the Commission either of an enquiry under s.5 of the Act of 1972 or of a special review under s.10 of the Act of 1972 to ascertain the goods to which the report relates.

24. The 1986 Report of the special review of the 1981 Order following which the 1987 Order was made does not contain any proposed amendment to the relevant portion of the definition of “grocery goods” in the 1981 Order. The relevant portion of the definition of “grocery goods” in the 1981 Order contained one small difference to that in the 1987 Order. In the 1981 Order it read:

“...as such household necessities ...as are ordinarily sold in grocery *and provision* shops” [difference underlined].

25. Whilst the plaintiff sought to rely on the deletion of the words “and provision” in the 1987 Order, I do not consider that anything turns on this. The amendment does not follow from any part of the Report of the special review.

26. Accordingly I have concluded that the relevant portion of the definition in the 1987 Order was intended to have the same meaning as that contained in the 1981 Order. The 1981 Order was made under s.8(1) of the Act of 1972 and following consideration of a report by the Commission of an enquiry held under s.5 of the Act of 1972 into the retail sale of grocery goods below cost. Such report was submitted in 1980 (“the 1980 Report of Enquiry”). As the 1981 Order may only relate to goods which were the subject matter of the 1980 Report of Enquiry, it is relevant to ascertain whether any assistance may be got from the 1980 Report of Enquiry in identifying the goods of the nature described by the words “such household necessities...as are ordinarily sold in grocery and provision shops” in the 1981 Order.

27. The 1980 Report of Enquiry is an interesting historical document which traces the development of the Grocery Orders from the 1956 Order to that date. However, insofar as the non-foods goods to which it was intended to apply relates, the only conclusion which can be drawn is that the classes of non-foodstuffs intended to be included in the definition of grocery goods in the 1980 Report of Enquiry are the same classes as included in the 1978 (No.2) Order. Further the classes of non-foods goods in the 1978 (No.2) Order were intended to be the same classes as those included in the 1956 Order.

28. Accordingly, insofar as assistance may be obtained from the Reports of Enquiries and Reports of Special Reviews since 1956, I have concluded that no report has recommended either an addition to or a deletion from the classes of goods included in the definition in the 1956 Order which insofar as relevant were “...such household necessities ... as are ordinarily sold in grocery and provision shops”.

29. The 1955 Report of Enquiry sets out at paragraph 5 the broad classification of the goods coming within the scope of the enquiry. The first three classes relate to foodstuffs and then it states:

“4. household requisites such as soap and polish which are generally branded. (See Appendix V for complete list of commodities).” Appendix V insofar as relevant is in the following terms:

#### “APPENDIX V

##### DETAILED EXPENDITURE PER HOUSEHOLD ITEMS COMING WITHIN THE SCOPE OF THE ENQUIRY

1. Food:

...

2. Sundries:

Household soap  
Soap powders  
Starch, dye, etc.  
Polish

Source:- Household Budget Inquiry, 1951."

30. The plaintiff submits that the phrase "household necessities" as used in the definition in the 1956 Order and all subsequent orders must be construed in a context that it relates to classes of goods (albeit updated to their modern counterparts) represented by the items listed in Appendix V of the 1955 Report of Enquiry.

31. Counsel for the plaintiff submitted that the classes of goods to which the 1955 Report related within the definition of "household necessities" are those goods necessary for the running and maintaining of a house and all the members of the household living therein. It was submitted that the defining criteria was that of communal use of a product by all members of a household necessarily in every day living. It was submitted that such classes of goods do not include items which might be used even necessarily by individual members of the household for their personal care but not all such members and which would vary depending on whether they were an infant, toddler, child or adult, female or male. It was submitted that disposable nappies fell into the latter rather than the former category.

32. Counsel for the plaintiff sought to explain the distinction in practical terms by the following example. If a family went on holidays to a rented house stated to be fully equipped they might expect to find in the house items such as cleaning products, soaps etc. of the type which come within the definition of "household necessities". However, they would not expect to find and would be expected to have packed in their suitcases and bring with them items necessary for the personal care of individual members of the family including, if applicable to the family disposable nappies.

33. Counsel for the defendant disputed this limitation. He sought to submit that "household necessities" included any item which might be necessary for use by an individual in his or her everyday living.

34. In each instance it is accepted that the relevant submission was also limited by the phrase "as ordinarily sold in grocery shops". However I am satisfied on the specific goods at issue nothing turns on this limitation as disposable nappies are items which are now ordinarily sold in shops which come within the definition of grocery shops.

35. Applying the principles of statutory interpretation set out above, I have concluded that having regard to the ordinary meaning of the words in and the phrase "household necessities" when used in the context of the statutory framework of the Acts of 1972, 1987 and Orders made thereunder; having regard in particular to the classes of goods (other than foodstuffs) to which the 1955 Report of Enquiry related as set out above; the similarity of the definition in the 1987 Order to that in the 1956 Order; the fact that classes of goods covered by the 1956 Order do not appear to have been substantially altered following any subsequent Report of Enquiry or amendment to the definition prior to the 1987 Order I am not satisfied that the definition "household necessities (other than foodstuffs) ...as ordinarily sold in grocery shops" indicates in clear and unambiguous language that it covers a class of goods which includes disposable nappies. I cannot be satisfied that it clearly and unambiguously includes goods beyond such goods ordinarily sold in grocery shops as are necessary for the running and maintaining of a house and commonly used for that purpose by all members of the household living therein. Disposable nappies only being used by or for very young children for their personal care do not come within such class of goods.

36. Accordingly the plaintiff is entitled to the declaration sought.