

THE HIGH COURT

[2007No. 909 SS]

IN THE MATTER OF SECTION TWO OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF SUPERINTENDENT GERRY CADDEN)

PROSECUTOR

AND
BARRY CALLAGHAN

DEFENDANT

Judgment of O'Neill J. delivered the 31st day of January, 2008.

1. This matter comes before the Court as a consultative case stated pursuant to s. 52 of the Courts (Supplemental Provisions) Act, 1961. The questions posed by the learned District Court judge concern the application of s.20 of the Intoxicating Liquor Act, 2003 [the Act of 2003] This section is in the following terms:

"(1) A licensee shall not supply intoxicating liquor on the licensed premises at a reduced price during a limited period on any day

(2) In subsection (1), "reduced price" means a price less than that regularly being charged for the intoxicating liquor during an earlier period after 10.30am (12.30pm on a Sunday) on the day concerned.

(3) A person who contravenes subsection (1) is guilty of an offence under this section and liable on summary conviction to a fine not exceeding -

(a) for a first offence, €1,500, or

(b) for a second or any subsequent offence, €2,000."

2. The facts as proved, admitted or agreed and recited in the case stated may be summarised as follows.

3. The defendant appeared before the District Court at Kells, County Meath, on the 14th day of December 2006 to answer a complaint set out in a summons bearing Case Number 2006/664425 on which he was charged with having unlawfully sold intoxicating liquor at a reduced price during a limited period on the 25th June, 2006, at The Arches, Farrell Street, Kells, County Meath, a licensed premises, he being the holder of an on-licence attaching to the said premises contrary to s. 20 (1) of the Intoxicating Liquor Act, 2003.

4. The licensed premises in question consisted of two distinct parts. One of these was a lounge bar known as The Arches which was arranged in the normal fashion for a lounge bar with tables and comfortable chairs, banquette seating, an open fire and the like. The other portion of the premises was arranged as a nightclub known as Kactus and it connected to the lounge bar portion of the licensed premises. The nightclub portion was arranged and furnished in an entirely different manner to the lounge bar. There was no natural light, the seating was not of the comfortable type in the lounge bar and from the time it opened at 11.00pm at night, loud music was played. The two portions of the premises were all part of the one licensed premises and the defendant was the nominee of the licensee, Jacunda Limited. He had been running the premises for three or four years. The two portions of the premises were run on a different basis. Each had its own storeroom for the alcohol sold on each portion of the premises. Stocktaking was done separately in respect of the two portions of the premises and management accounts in respect of each portion of the premises were compiled separately but were merged into one set of accounts at the year end. There was some overlap of staff between the lounge and the nightclub, but extra staff were required to service the nightclub portion of the premises.

5. On the night of the 24th June, 2006, Garda Finn and Garda Stynes were on plainclothes duty. At approximately 11.00pm on that night, they entered The Arches portion of the licensed premises on Farrell Street and ordered two drinks, a bottle of Smirnoff Ice and a pint of Budweiser. Garda Stynes paid for the drinks; the bottle of Smirnoff Ice cost €4.70 and the pint of Budweiser cost €3.80, a total of €8.50. When they finished these drinks, they ordered a second round of the same drinks, which again cost a total of €8.50. After they had finished these drinks, they exited The Arches portion of the premises through the front doors and entered the basement portion, i.e. the Kactus nightclub, through a separate door. They paid an entry charge of €10.00 each. They arrived in the nightclub portion at approximately 12.30am in the early hours of Sunday 25th June, 2006 and when they got there, they ordered the same drinks again, namely a bottle of Smirnoff Ice and a pint of Budweiser. On this occasion they were charged a total of €5.00 for the two drinks, €2.50 for each drink.

6. Sergeant Martin Barrins was on duty in the early hours of Sunday morning the 25th June, 2006, when he received a call from Garda Finn who informed him that prices charged on the ground floor of the Arches licenses premises were different to the prices being charged in the basement nightclub portion of the same premises. Sergeant Barrins entered the licensed premises in uniform at 1.16am on Sunday 25th June, 2006. There he met the manager of the premises, Mr Peter Molloy. Mr Molloy confirmed the prices of drinks being charged in the Kactus nightclub portion of the licensed premises and directed Sergeant Barrins' attention to a sign at the back of the bar setting out that all drinks in that portion of the premises were €2.50. Mr Molloy then brought Sergeant Barrins upstairs to the ground floor lounge area of the licensed premises. On the wall of this portion of the premises, there was a list detailing all drinks for sale in that portion of the premises and their respective prices. All the prices upstairs were different and greater than the €2.50 being charged for all drinks downstairs in the nightclub portion of the premises.

7. Sergeant Barrins stated that once a patron entered the nightclub portion of the premises, drinks were the same price during the entire time that portion of the premises was open. He also stated that prices of drinks on the ground floor lounge portion of the premises also remained constant all through the day and a patron had a choice of moving between the two portions of the premises and availing of the lesser price for alcohol sold in the basement nightclub portion of the premises.

8. Arising out of the foregoing, the learned District Judge poses the following four questions to this Court:

"(a) Is there sufficient evidence to allow me to convict the defendant of committing an offence on Sunday the 25th June 2006 contrary to section 20(1) of the Intoxicating Liquor Act, 2003?

(b) Is it contrary to the provisions of section 20(1) of the Intoxicating Liquor Act, 2003 for a licensee to charge different prices for intoxicating liquor in different portions of his premises?

(c) For the purposes of deciding whether intoxicating liquor was supplied at a reduced price during a limited period on the day, am I entitled to treat separate and distinct portions of the licensed premises in isolation when considering the pricing of such intoxicating liquor, or must I compare the price in issue with the prices charged throughout the premises, throughout the day?

(d) Is it possible to commit an offence contrary to section 20(1) of the Intoxicating Liquor Act, 2003, before 12.30 on a Sunday?"

9. I propose first to deal with questions (b) and (c) together.

10. For many years, a standard feature of the licensed trade has been the charging of different prices for the same drink sold in different parts of a licensed premises. For example, in a hotel, it is common that a different price will be charged for the same drink in four different situations, namely, in the restaurant, the lounge bar, a public bar and a function room. In general, the different price charged reflects the different economic cost and the different economic opportunity associated with the sale and supply of the intoxicating liquor in each of these specific parts of a hotel. Similarly, in public houses, it has long been the practice to charge a higher price for drinks supplied in the lounge bar compared to the public bar, again for the same reasons.

11. The foregoing feature of the trade was the subject matter of the following passage from the judgment of Henchy J. in the case of *Cassidy v. the Minister for Industry and Commerce* [1978] 1 I.R.297 at p. 309 where he says:

"The lounge bar is a well recognised and widespread feature of the licensed trade in this country. A member of the public would probably recognise the term as meaning a secluded or segregated area, usually within or annexed to a public bar where in consideration of prices somewhat higher than those charged in a public bar, patrons are provided with amenities such as seclusion, comfortable seating and tables and varying from premises to premises, extras such as a carpeted floor, waiter service, television, service of food and the like. Many licensees of public houses have concentrated on this aspect of the trade. Some licensees have spent large sums in equipping lounge bars and have committed themselves to the heavy running expenses and staffing them and supplying the services expected by those who patronise them. The proprietors have built up a valuable goodwill for their lounge bars - a goodwill that would obviously be devalued if by reason of common maximum prices (which invariably become common minimum prices), the prices in lounge bars are reduced to those in public bars. While common maximum prices would put all public bars on an equal footing, as regards gross profits on sales, it would bear hard on lounge bars, where, in the absence of a maximum price order, patrons are expected and are willing, to pay 1p, 2p and 3p extra for each drink. It is not unlikely that common maximum prices would affect lounge bars by reducing employment in them, diminishing profits and lowering their capital values"

12. Whilst this passage occurs in a judgment on the validity of a maximum prices order relative to lounge bars, and notwithstanding the passage of time, it clearly establishes that a statutory restraint on the charging of different prices in different parts of a licensed premises, which did not take into account the real economic cost of supplying intoxicating liquor in different parts of a licensed premises would be vitiated on the ground of unreasonableness or irrationality. It necessarily follows that it is lawful to charge different prices for the same drink in different parts of a licensed premises.

13. The lawfulness of charging different prices for the same drink in different portions of a licensed premises is recognised in Art.3 (2) of the Retail Price (Beverages in Licensed Premises) Display Order S.I. No. 263 of 1999 which obliges a licensee to display a notice in each part of a licensed premises where different prices are charged for the same drink, setting out the price charged in each part of the premises.

14. Section 20 (1) of the Act of 2003 does not alter that state of the law nor indeed could it without falling foul of the principle stated above which is the *ratio decidendi* of the judgment of Henchy J. in the *Cassidy* case.

15. For the purposes of s. 20 (1), it is not legitimate to compare a price charged in one part of the licensed premises to that charged in another where there are manifest differences in the nature of and the facilities provided in both parts and significantly different economic considerations attaching to the pricing of same drinks in both parts.

16. Thus, for establishing whether or not for the purposes of s. 20 (2), a "reduced" price has been charged during a limited period on any day, the only relevant comparison is with prices charged in the same portion of the licensed premises. It necessarily follows, therefore, that if the same price is charged for a drink during the whole of the licensing day in the same portion, an offence is not committed under s. 20 (3), notwithstanding the fact that a higher price is charged for the same drink in a different portion of the licensed premises which as said earlier, is significantly different in terms of its layout and facilities.

17. The next question which arises is whether or not for the purposes of avoiding a criminal liability under s. 20, it is necessary for a licensee who is charging a lower price for drink in a specific part of its licensed premises, to keep that specific part of the licensed premises open during the same hours as the other part or parts of the licensed premises where the same drinks are sold for higher prices.

18. If it is permissible to charge different prices in two different parts of a licensed premises as discussed above, there is nothing in my view in s. 20 which should be construed as requiring that different portions of licensed premises be kept open during the same hours each day. It is a common practice in licensed premises for parts of the licensed premises to be closed during portions of the licensing day. For example, the restaurant in a hotel may only be open at certain times and similarly the function room. Also, in large public houses it is common for parts of the premises to be closed, particularly during the quieter trading periods of the day. A particular example of this type of practice can be seen in licensed premises which have, as in this case, a portion of the premises set aside as a "nightclub" and which generally only open late in the evening. In my opinion, the language used in s. 20 is not so extensive or precise so as to potentially criminalise legitimate trading practices in the license trade. Were it intended by the Oireachtas to prohibit these trading practices by criminal sanction, it would have been necessary to do so in clear and express terms. Section 20 does not do that.

19. I am satisfied that it remains permissible for a licensee to keep portions of the premises closed during the licensing day.

20. Thus, for the purposes of s. 20, a shorter trading period in a portion of a licensed premises which is separate from the rest of the

licensed premises because of the difference in layout and facilities, does not of itself constitute a "limited period" for the purposes of s. 20 (1).

21. A "limited period" for the purposes of s. 20 (1) is a period of time which is less than the time during which a particular portion of the premises is open on a particular licensing day.

22. In this case, the evidence establishes that for the entire period of time that the nightclub portion of the premises was open, the same price was charged for the same drinks. Therefore, in my view, the evidence does not establish that the defendant charged a reduced price during any limited period on the day in question.

23. Mr O'Higgins for the Prosecutor submitted that where different prices were charged in different portions of a licensed premises, this could only be done if the trading hours of both portions of the premises were the same, and in support of that submission raised the apprehension that if the defendant's contention was correct, it would be open to a publican to partition off a room at the back of his lounge which he could open up as a "cheap pints zone" for one hour or so every day, where he could sell pints for €1.00 each for a limited period, i.e. a happy hour.

24. The underlying principle as set out in the judgement of Henchy J. in the *Cassidy* case which justifies that charging of different prices in different portions of a licensed premises is that there exist bona fide real and significant differences in the nature and layout and services provided in the different portions of the premises so that the economic cost and economic opportunity associated with the supply of the same drink in different portions of the premises are different. Such a situation is a world apart from the contrived artificial creation of a "zone" within a licensed premises which has no other purpose than the circumventing of s. 20 of the Act of 2003. If the evidence in a particular case demonstrates that the purported separate portion is that kind of artificial contrivance, then manifestly it will not shield the licensee from the force and affect of s. 20. It will be a matter of evidence in each case as to whether or not the separation of different portions of the premises has the kind of real and significant economic basis discussed above or whether it is a contrived artificiality to circumvent s. 20.

25. I have come to the conclusion, therefore, that question (b) should be answered "no". The answer to question (c) is that for the purpose of deciding whether intoxicating liquor was supplied at a reduced price during a limited period of each day, the learned District Judge was obliged to treat separate and distinct portions of the premises in isolation in considering the pricing of such intoxicating liquor and secondly, should not compare the price in issue with prices charged throughout the premises throughout the day.

26. Having regard to the fact that the evidence was that the price charged for the drinks purchased in the nightclub portion of the premises was the same at all times when that portion was open, in my view it follows that question (a) must be answered "no".

27. This brings me to question (d). The answer to that question depends entirely on how the word "day" as used in s. 20 (1) and (2) is to be construed. For the defendant, it was submitted that the word "day" must be construed as a calendar day, that is the period of time running from midnight to midnight and that no wider or different meaning should be given to it other than this, its ordinary meaning.

28. For the prosecutor, it was submitted that "day" in the context in which it is used in s. 20 must mean a licensing day rather than a calendar day because otherwise the purpose of the Act would be defeated and absurd results would ensue, in that if the Defendant is correct, it would mean that it would be open to a licensee to have a "happy hour" starting at midnight and going on for the rest of the licensed period, at a time when the social consequences of binge drinking are most acute. It was submitted that the intention in the legislation was to prohibit cheap prices during "happy hours" and it could never have been the intention of the Oireachtas in this legislation to have permitted the very thing it set out to prohibit at the very worst possible time and as such, such an interpretation of the Act would be simply absurd.

29. Section 20 (2) begs the question which is asked at question (d) in the case stated, namely can an offence be committed under s. 20(1) before 12.30pm on a Sunday. It arises if "day" is to be interpreted as ending at midnight and having regard to the fact that the licensing day on a Sunday commences at 12.30pm, it would not be possible to have a "limited period" prior to 12.30pm on a Sunday or indeed 10.30am on a weekday. An offence could only arise if "day" was to be interpreted as the licensing day, thus extending beyond midnight up to the conclusion of the permitted licensed hours. In that circumstance, a "limited period" could arise in the early hours of Sunday morning during permitted licensed hours and if drink was sold at a reduced price during that limited period, relative to the price charged before midnight but during the same licensing day, it would be a contravention of s. 20(1) and an offence would have been committed. In this case, the offence would have been committed on the calendar day of the 25th June, 2006, but within the licensing day extending from opening hours on the 24th June 2006 to final closing hour on 25th June, 2006.

30. Neither the Interpretation Act of 1937 or the Interpretation Act of 2005, defines the word "day". The word "midnight" is defined as meaning the point of time at which day ends. The word "week" is defined without qualification as the period between midnight on any Saturday and midnight on the next following Sunday.

31. Section 12 of the Interpretation Act, 1937 provides that:

"In every Act of the Oireachtas and every instrument made wholly or partly under any such Act, every word and every expression to which a particular meaning, construction, or effect is assigned in the Schedule to this Act, shall, unless the contrary intention appears, have the meaning, construction or effect so assigned to it."

32. The Interpretation Act, 1937 was repealed in its entirety by s. 3(1) of the Interpretation Act, 2005. Section 21(1) of the Interpretation Act, 2005 is in the following terms:

"(1) In an enactment, a word or expression to which a particular meaning, construction or effect is assigned in Part 1 of the Schedule, has the meaning, construction or effect so assigned to it."

33. As the Act of 2003 was in existence prior to coming into force of the Interpretation Act of 2005, it would appear to me that s. 21(1) has precisely the same affect in relation to the Act of 2003 in respect of the relevant words used in the Act of 2003 as did s. 12 of the Interpretation Act, 1937.

34. Although the expression "midnight" is defined in exactly the same way in both interpretation Acts, the absence of a definition of the word "day" in my opinion leaves the question of the interpretation of that expression outside the terms defined in Interpretation Acts. No doubt the definition of the expression "midnight" can influence an interpretation of the expression "day" but it must be borne in mind that the non-inclusion of a definition of "day" in the Interpretation Acts perhaps expresses an intention or understanding on

the part of the Oireachtas that a wide variety of circumstances can have relevance to the use of the expression "day" and hence the Oireachtas has left the interpretation of that expression to be a matter of construction of the particular Statute in which the expression is used.

35. In the Act of 2003, manifestly in my view, the expression "day" is used in the context of the Licensing Code and in the context of permitted licensing hours. Permitted licensing hours frequently straddle two calendar days as happened in this case. When one considers that if the expression "day" were to be confined to a calendar day and end at midnight, permitted licensing hours after midnight until closing time would, in effect, be excluded from the force and effect of ss.(1) and (2) of the Act of 2003. Such an interpretation would produce, in my opinion, plainly absurd results in that the selling of drink at a reduced price, i.e. a "happy hour" would be permitted at the worst possible time. In an enactment which clearly intended to prohibit the practice of selling drinks at a reduced price known colloquially as "happy hours" , it was clearly not intended that such a result would ensue.

36. I have come to the conclusion that the expression "day" must be construed as meaning the licensing day commencing at the opening hour on a particular day and continuing until closing time notwithstanding that closing time will occur on the following calendar day.

37. If the price of drink was reduced for a limited period occurring after midnight, as compared to a higher price charged before midnight, the offence as created in s. 20(1) of the Act of 2003 would have been committed. As said earlier, whilst the offence might have been committed on what was in this case the calendar day of the 25th June, 2006, the offence relates to the licensing day which commenced at opening time on 24th June 2006 and ends at closing time on 25th June, 2006.

38. It follows that the answer to Question (d) is "yes". In summary, therefore, the answers to the questions posed are as follows:

Question (a) No

Question (b) No

Question (c) First part: Yes

Second part: No

Question (d) Yes