

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 312 J.R.]

BETWEEN

JAMES STAKEM AND MARGARET STAKEM

APPLICANTS

AND

WICKLOW COUNTY COUNCIL

RESPONDENT

AND

IRISH POPCORN AND SNACK FOOD COMPANY LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice White delivered on 1st of June, 2017

1. The applicants have sought the following,

- (i) an Order of *certiorari* quashing the Respondent's decision to issue a Casual Trading Licence to the Notice Party;
- (ii) an order of *certiorari* quashing the Respondent's decision to permit the Notice Party to engage in casual trading outside the Casual Trading Area in the Upper Car Park in Glendalough as designated in the Wicklow County Council Casual Trading Bye-Laws 2012;
- (iii) a Declaration that the Respondent is not entitled to permit the Notice Party to trade outside of the Casual Trading Area in the Upper Car Park in Glendalough as designated in the Wicklow County Council Casual Trading Bye-Laws 2012;
- (iv) an injunction restraining the Notice Party from trading outside of the Casual Trading Area in the Upper Car Park in Glendalough as designated in the Wicklow County Council Casual Trading Bye-Laws 2012;
- (v) an Order of *mandamus* directing the Respondent to prosecute the Notice Party for an offence under s. 3 of the Casual Trading Act 1995 and the Wicklow County Council Casual Trading Bye-Laws 2012;
- (vi) a Declaration that the Respondent is not entitled to permit the Notice Party to trade in breach of the terms of the Respondent's contract with the Notice Party which only allows the Notice Party to trade from one self contained mobile food outlet with no run off and discharges;
- (vii) an Order of *certiorari* quashing the Respondent's decision to permit the Notice Party to engage in casual trading in breach of the terms of the Respondent's contract with the Notice Party by permitting the Notice Party to trade not only from one mobile food outlet but also from an ice-cream van, one covered seating area and from outside seating;
- (viii) a Declaration that the Respondent is not entitled to permit the Notice Party to trade in breach of the terms of the Respondent's advertised tender which only allows a Notice Party to trade from one self contained mobile food outlet with no run off discharges; and
- (ix) an Order of *certiorari* quashing the Respondent's decision to permit the Notice Party to engage in casual trading in breach of the terms of the Respondent's advertised tender by permitting the Notice Party to trade not only from one self contained mobile food outlet but also from an ice-cream van, one covered in seating area and from outside seating.

2. The grounds upon which the relief is sought are set out in the amended statement required to ground an application for judicial review of 6th May, 2016. The application was grounded on the affidavit of Margaret Stakem sworn on 5th May, 2016, together with exhibits. Leave was granted by this Court on 9th May, 2016. The statement of opposition of the respondent was filed and served in June 2016. The affidavit of Helena Dennehy, Senior Executive Officer of the respondent verifying the statement of opposition together with exhibits was sworn and filed on 1st July, 2016. Further affidavits on behalf of the Applicants were deposed by the second applicant and Patrick O'Neill solicitor. Helena Dennehy deposed two further affidavits on behalf of the respondent, and Paddy McCauley deposed an affidavit on behalf of the notice party.

The History of the Relationship between the Applicants and the Respondent

3. There are legal proceedings pending in Wickow Circuit Court on their legal relationship over a number of years in respect of the use by the first applicant and subsequently both applicants of a trading venue at the upper car park in Glendalough, Co. Wicklow. The Court does not wish to trespass on these proceedings. The applicants claim they are entitled to a lease

4. The applicants have traded from a venue at the upper car park in Glendalough, Co. Wicklow providing food and refreshments for the benefit of visitors to the car park and walkers who visit the national park. Initially, this was a temporary pitch which permitted the parking of a fast food van for the purposes of sale of food and refreshments. The applicants constructed a permanent structure without planning permission but enforcement proceedings have not been commenced.

5. The respondent granted a lease for a term of three years from 1st March, 2011 with the right of the applicants not later than six months before the expiry of that term to seek an extension to the term granted for a further period of two years only. The applicants separately signed a deed of renunciation of past and present rights to a new tenancy. The applicants exercised their right to extend the term and a further lease was executed on 11th March, 2014, for a period of two years commencing on 7th March, 2014 and expiring on 7th March, 2016. That lease indicated that there would be no further extension period granted after the expiry date of 7th March, 2016.

6. The respondent had a duty to issue a casual trading licence pursuant to the Casual Trading Act 1995, to regulate trading at the upper car park. The respondent also adopted casual trading bye-laws for the County of Wicklow approved by the Council on 5th March, 2012, and operative from 5th April, 2012. The designated casual trading area is that area upon which the applicants have constructed their permanent structure.

7. In anticipation of the applicants vacating the site on the expiry of the lease on 7th March, 2016, the respondent advertised a tender. The tender stated:-

"Tenders are invited for the following for the period 1st March, 2016 to 28th February, 2017.

(1) TENDER FOR PARKING OF FOOD VAN/ICE-CREAM VAN AT UPPER CAR PARK, GLENDALOUGH.

The tender for the parking of the food van/ice-cream van must indicate particulars of food stuffs to be sold and should give the registration number and type of van to be parked.

(2) TENDER FOR OPERATION AND MAINTENANCE OF OVERALL CAR PARK OPERATION, INCLUDING OPERATION AND MAINTENANCE OF BARRIER AND OPENING AND CLOSING AND GENERAL MAINTENANCE OF PUBLIC TOILETS. Applicant shall be responsible for opening/closing/maintaining the car park barrier, maintenance of car park in a clean condition including emptying of all litter bins within the car park and disposal of the waste during the term of this Franchise. Applicants shall be responsible for opening/closing/maintaining the public toilets situated in the car park during the term of this Franchise and shall ensure that the said toilets are maintained in a clean and hygienic condition and kept properly supplied with toilet requisites.

Wicklow County Council is subject to the provisions of the Freedom of Information ROI Act. If you consider that any of the information supplied by you is either commercially sensitive or confidential in nature this should be highlighted and the reason for its sensitivity specified. In such cases the relevant materials will in response to FOI requests be examined in the light of the exemptions provided for in the FOI Act.

All tenders may include an option to extend for a further period of three years.

Individual tenders for each section in sealed envelopes marked

(1) TENDER FOR PARKING FOOD VAN/ICE-CREAM VAN GLENDALOUGH.

(2) TENDER FOR OPERATION AND MAINTENANCE OF OVERALL CAR PARK OPERATION INCLUDING OPERATION AND MAINTENANCE OF BARRIER, GLENDALOUGH OPENING AND CLOSING AND GENERAL MAINTENANCE OF PUBLIC TOILETS

should be lodged with the Senior Executive Officer Water and Environmental services, Wicklow County Council, County Buildings Wicklow not later than 12pm on Thursday, 14th January, 2016.

Further particulars and requirements of these Franchises are available from senior Executive Officer Water and Environmental services.

Successful applicants will be required to meet the requirements set out in various legislation such as the Waste Management Acts, Casual Trading Acts etc. which may be subject to additional fees as applicable."

8. The applicants and the notice party were among those who tendered for the franchises. The notice party was successful in its tender for both franchises which was accepted by the respondent on 29th January, 2016. Formal acceptance of the tender was notified by letter to the notice party on 1st February, 2016, and formal notice also issued to the applicants on 1st February, 2016, notifying them their tender had not been successful. The formal director of services order was executed by the respondent on 1st March, 2016. The order issued on 8th March, 2016, the date after the previous casual trading licence issued to the applicants for 2015/2016 had expired.

9. The applicants Solicitors on 11th January 2016 served a notice of intention to claim relief seeking a new tenancy under Part II of the Landlord and Tenant (Amendment) Act 1980 and in the alternative compensation for disturbance.

10. On 3rd March, 2016, the solicitors for the applicants served a Landlord and Tenant Civil Bill which issued on 1st March, 2016. In their letter the solicitors stated:-

"Our clients' current lease terminates on 7th March, 2016. Kindly note that pursuant to s. 28 of the Landlord and Tenant (Amendment) Act 1980, they are exercising their right to continue in occupation of the tenement from that date until their application for a new lease is finally determined."

11. On 8th March, 2016, the applicants' solicitors wrote to the respondent calling upon it to issue a casual trading licence under the Casual Trading Act 1995, The applicants reserved the right to take legal action including injunctive relief if not issued.

12. The applicants' solicitors wrote to the respondent on 11th March, 2016, complaining that the notice party was parking its van directly in front of their premises and was seriously interfering with their rights to continue in occupation of their business and that it was unlawful because the notice party was operating outside the casual trading area.

13. The applicants issued High Court proceedings [2016 No. 2515 P.] on 21st March, 2016, and applied *ex parte* for injunctive relief. An order was granted by Haughton J. on 21st March, 2016 directing the respondent its servants or agents or licensees to prohibit the notice party from locating its van directly in front of and within 10 metres of the Applicant's premises at the upper car park Glendalough, Co. Wicklow until Thursday 24th March, 2016, and from using any waste bins or other equipment belonging to the plaintiffs.

14. On 7th April, 2016, it was acknowledged before Gilligan J. that the defendant had given an undertaking to provide an interim casual trading licence to the applicants.

15. The application for injunctive relief on notice was heard before O'Regan J. on 21st April, 2016 who granted the following orders:-

(i) That the said order dated 21st March, 2016, made herein (Haughton J.) do continue pending the determination of the plaintiffs' claim for a new lease in the Circuit Court proceedings bearing record number [2016 No. 68].

(ii) That no obstacle or obstruction of any kind whatsoever is to be placed within the 10m separation distance to be maintained at all times between Irish Popcorn and Snack Food Company Limited vans and the plaintiffs' premises upper car park Glendalough, County. Wicklow.

(iii) That the Defendant will require Irish Popcorn and Snack Food Company Limited to operate their snack food business from either of the shaded areas marked A and B in the western area of the upper car park Glendalough, Co. Wicklow as shown on the map attached as a schedule hereto as soon as all health and safety requirements are put in place and in that regard, the defendant will put these requirements in place as soon as reasonably practicable.

(iv) The Defendant undertakes to issue a temporary casual trading licence to the plaintiffs not later than close of business on 22nd April, 2016, which licence shall continue in force until the determination of the Plaintiffs' claim for a new lease in the aforementioned Circuit Court proceedings.

16. There was an allegation in the course of these proceedings that the notice party had not complied with the High Court order of 21st April, 2016 but it is now accepted by the Applicants that there is now full compliance with that order by the notice party.

17. In exercising any discretion to grant judicial review and as a result to deprive the notice party of the rights it has acquired by acquiring the casual trading licence after successful tender, the court has to ask the straightforward question: Was the respondent obliged or was it appropriate to stop the tender process on receipt of the notice of intention to claim relief of 11th January, 2016?.

18. Section 28 of the Landlord and Tenant (Amendment) Act 1980 states:- "Where an application is pending under this Part for a new tenancy or to fix the terms of a new tenancy and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court or, in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, but without prejudice to such recoupments and readjustments as may be necessary in the event of a new tenancy being granted to commence from such termination."

19. The notice party's tender had been accepted on 29th January, 2016 prior to the issue of the Landlord and Tenant Civil Bill. The respondent was not obliged to stop the tender process on the date of the notice of intention to claim relief of 11th January, 2016. The right of a tenant to remain in occupation pending an application for a new lease before the Circuit Court having served a notice of intention to claim relief arises from the date of the issue of the Civil Bill and not from the date of the notice of intention to claim relief.

20. The applicants obtained effective relief in the High Court plenary proceedings by injunctive relief pending the determination of the Circuit Court proceedings.

21. The notice party submitted a tender which was accepted by the respondent. It was entitled to take action on foot of its successful tender and on payment of the tender sum. It could not act because the applicants had not vacated the casual trading area. For the purposes of the determination of this judicial review, the court determines that the notice party acted legally. It complied with the High Court order in the plenary proceedings having been unable to trade in the casual trading area designated.

22. It was not unreasonable for the respondent to consider that the deed of renunciation signed by the applicants on 15th March, 2011 on the independent legal advice of Mr. Ken J. Byrne, Solicitor, enabled it to put the franchise out for tender in December 2015, . This would have been reinforced by the decision of the applicants to tender for the franchise.

23. On receipt of the notice of intention to claim relief from 11th January, 2016, the respondent could have proceeded with more caution. However, it was legitimately open to the respondent to decide that it would be difficult to revoke the tender process once it had started and that the suspension of the process could prejudice their assertion that the applicants were bound by the deed of renunciation.

24. Legitimate expectation does not arise. There was no promise actual or inferred held out to the applicants that a future lease or casual trading licence would be granted.

25. The consequence of the reliefs sought by the applicants would be to deprive the notice party of its casual trading licence. The notice party was obliged to comply with the order of O'Regan J. of 21st April, 2016. At the date the notice party submitted the tender for both franchises, it was entitled to assume that on successful tender and payment of the sum due, possession of the designated area would be afforded to it to operate its business. That did not arise because subsequent to the tender by the notice party and its acceptance by the respondent on 29th January, 2016, the applicants issued Circuit court proceedings on 1st March 2016.

26. The discretion of the Court favours the innocent notice party. In those circumstances all the reliefs sought by the applicants are refused.