Neutral Citation No. [2005] IEHC 56

THE HIGH COURT

RECORD NO. 2005 50 SS

IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857.
AND IN THE MATTER OF SECTION 51 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961.

BETWEEN

LEISUREPLEX (BLANCHARDSTOWN) LIMITED,
LEISURPLEX (TALLAGHT) LIMITED,
LEISUREPLEX (STILLORGAN) LIMITED, AND
LEISUREPLEX (COOLOCK) LIMITED

APPELLANTS

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Clarke delivered 4th March, 2005.

1. This matter comes before the court as a case stated from the District Court under s. 2 of the Summary Jurisdiction Act, 1857 as extended by s. 51 of the Courts (Supplemental Provisions) Act, 1961.

2. The issue is a net one and the relevant facts may be simply stated.

3. Each of the appellants was charged with an offence which was described in the following terms:-

> Did make one gaming machine to wit "Grand Casino" push-penny machine available for play in a public place without displaying thereon a licence granted under section 43 of the Finance Act, 1975 (as amended), contrary to section 43(3)(5) of the Finance Act, 1975 as amended by section 71(1)(b) of the Finance Act, 1993 and section 114 of the Finance Act, 1995.

4. The dates and locations of the alleged commission of such an offence varied as and between each of the appellants. However, the substance of the offence alleged was the same.

5. Having heard evidence the learned District judge was satisfied that the following facts were proved:-

> (a) That the push-penny machine found at each of the premises on each of the four occasions referred to in the charges was a gaming machine within the meaning of s. 43 of the Finance Act, 1975 as amended.
>
> (b) That on each of the four occasions specified in the charges the said gaming machine was made available for play in a public place without displaying thereon a licence granted under s. 43 of the Finance Act, 1975 (as amended), contrary to s. 43 as amended.
>
> (c) That the adoption of Part III of the Gaming and Lotteries Act, 1956 had been rescinded by the local authorities for all of the Dublin areas in the late 1980s and accordingly, it would not have been possible for the appellants to obtain either a gaming licence or a gaming machine licence under s. 43 of the Finance Act, 1975 (as amended).

6. At the hearing before the District Court and relying on the matter referred to at (c) above counsel for the appellants sought a dismissal of the charges on the grounds that it was impossible for the appellants to obtain the relevant gaming machine licence under s. 43 of the Finance Act, 1975 (as amended). On that basis it was submitted that a criminal conviction ought not lie for failing to do something which it is legally and factually impossible to do. Reliance was placed on *Stockdale –v- Coulson* [1974] 3 All E.R. 154 as support for that proposition.

7. The learned District judge ruled as follows:-

> "I held that impossibility did not afford the accused a defence in these cases. I expressed the view that there are many cases in statutes which specify the commission of an offence. It is a question then of voluntary conduct. Voluntary behaviour must be viewed within the context of the offence charged. One must look at whether *mens rea* is relevant. These are statutory measures which impose a strict liability. When I look at the penalties provided for in this case, I am of the view that these are offences of strict liability, the accused either has or has not got a gaming machine licence attached to the machine. In this case it was proved that he had not. In my opinion impossibility does not come in to the picture at all. It is in the background but it does not affect that situation where the offences are ones of strict liability. Accordingly the appellants were convicted in relation to each of the four charges respectively."

8. On that basis the learned District judge stated a case seeking the opinion of this court

> "As to whether a defendant can be convicted of an offence under s. 43(5)(a) of the Finance Act, 1975 (as amended) in circumstances where he has a gaming machine on his premises but in an area where the local authority has rescinded the adoption of Part III of the Gaming and Lotteries Act, 1956, thereby rendering impossible an application to the Revenue Commissioners for a gaming machine licence under s. 43(4)(a) of the said Act of 1975 (as amended)".

9 The net question for determination is, therefore, as to whether a defence of impossibility may be said to exist in the circumstances of this case.

The Law

10. The appellants placed particular reliance on the case of *Stockdale –v- Coulson*. In that case the High Court in England held that a defendant could not be convicted of failing to annex to the annual return of a company a written copy duly certified of every balance sheet laid before the company in general meeting during the period to which the return related. This was because it transpired that during the relevant years in question no general meeting had been held by the company and no accounts of the company were, therefore, prepared or audited by its auditors. It was held that "you cannot annex to a return a document which does not exist" (see p. 158). It would appear that *Stockdale* has not been followed on any occasion in this jurisdiction and does not appear to have been the subject of judicial consideration thereafter in the United Kingdom. Counsel for the respondent was able to point to the fact that modern company law texts do not refer to it but that there is a reference in the 22nd Edition of *Palmer's Company Law (1976)* at

para. 65-06 which makes it clear that in the opinion of the author no offence is committed if "without fault of the defendant", no balance sheet is in existence and he therefore files an annual return without annexing a balance sheet because nobody can be punished for failing to annex something which does not exist.

11. Counsel also drew attention to a commentary on *Stockdale* in the 1974 Criminal Law Review. That review noted that it "seems to be a rare instance of a genuine defence of impossibility being allowed". The commentary continues by citing professor Glanville Williams for the general proposition that "where it is impossible to carry on an undertaking in accordance with the law, the general rule is that the undertaking must be abandoned rather than the law violated".

12. There are many instances where a variety of forms of activity require a licence or permission so as to enable them to be carried on in a lawful manner. Frequently there are requirements for the grant of such licence or permission which have the effect of excluding certain categories of person from being entitled to obtain same.

13. For example, persons are not permitted to drive mechanically-propelled vehicles without a licence. Persons are only entitled to obtain such a licence when they reach the appropriate age referable to the mechanically-propelled vehicle in question. There is a sense in which, therefore, it is impossible for a fifteen year old to obtain a licence which would enable such person to drive a motor car. If he were to be subject to a charge of driving without a licence could he plead impossibility based upon the fact that by virtue of his age it was impossible for him to obtain a licence. It could hardly be said that such a defence would be available.

14. In answer to that point, counsel for the appellant seeks to distinguish cases such as that and other like examples from the instant case by referring to the fact that the restriction in the case of a licence required to drive a car is one of general application whereas the restriction on being able to obtain the appropriate licence under s. 43 of the Finance Act, 1975 is, for the reasons set out above, geographical, being dependent upon whether the local authority in whose functional area the machine is located has adopted Part III of the Gaming and Lotteries Act, 1956. This does not seem to me to be a material difference. The regime in respect of the granting of licences or permissions to carry out activity may be such that qualifications under a whole variety of headings may have to be complied with in order that an applicant may be permitted to apply. The fact that some may relate to age, some relate to geography, and others relate to a range of different circumstances, does not seem to me to be material. The fact is that the carrying-on of the activity without having the relevant licence (or on the facts of this case without displaying same) remains unlawful even though one may not be able to get a licence because one may fail to meet some appropriate criteria necessary for the grant of the licence.

15. There was an interesting debate in the course of the hearing as to the extent to which the defence of impossibility may, as a general proposition, form part of our law. It does not seem to me to be necessary to resolve that question in this case. Whether or not a general defence of impossibility lies it does not seem to me to have any application to a case where the offence charged concerns not having or failing to display a licence and the impossibility contended for stems simply from the fact that the person does not qualify, for whatever reason, for the licence.

16. On one reading *Stockdale* may be taken to imply that a defence of impossibility may be available in circumstances where a person through no fault of their own does not comply with a requirement of the law. It seems to me that the question as to whether an offence may nonetheless be said to have occurred is dependent on whether the offence concerned is one of strict liability or not. In the former case the fact that no fault may lie upon the defendant is not, clearly, a defence. In the latter case it may, arguably, provide a defence. Whether the offence is one of strict liability is a question of the proper construction of the statute in each case.

17. Insofar as it may be argued that *Stockdale* suggests that persons may be entitled to rely upon a defence of impossibility in circumstances where there were steps which they could have taken so as not to place them in breach of the requirements of the law (whether such steps would have involved refraining from engaging in the activity in its entirety, the obtaining of some necessary permission or the like required for the activity to be lawful, or the doing of some act which they could have done) then to such an extent I would not consider *Stockdale* persuasive and would not propose to follow it.

18. I would therefore answer the question in the case stated "yes".