Neutral Citation [2013] IEHC 185

THE HIGH COURT

[2011 No. 653 J.R.]

BETWEEN

Gerard Burke

Applicant

V.

South Dublin County Council

Respondent

Judgment of Mr. Justice Hedigan delivered on the 23rd day of April, 2013.

Application
1. In these proceedings the applicant is seeking judicial review of the actions of the respondent in the seizure, detention and destruction of horses belonging to him.

Specifically the applicant seeks orders of *certiorari* quashing the decision of the respondent to withhold his horses on the basis that impound fees had not been paid in advance and quashing its decision to ultimately dispose of his horses. He furthermore seeks a declaration that the respondent acted *ultra vires* by refusing to return his horses to him on the stated basis that impound fees were unpaid and a declaration that the policy implemented by it of detaining and disposing of horses where fees have not been paid does not respect the applicant's constitutional rights to fair procedures. In addition the applicant seeks damages arising from the wrongful and unlawful slaughtering of his horses.

Parties
2. The applicant is a farmer who also operates a livery in Rathfarnham, Dublin 14. The respondent is the county council with responsibility for the administrative area of South County Dublin.

Factual background
3.1 The applicant operates a livery and farm at Woodstown Manor, Stocking Lane, Rathfarnham, Dublin 14. On Monday the 13th June, 2011, the applicant inspected his lands and discovered that five horses that had been on the lands were missing. Four of the horses were owned by the applicant himself. The applicant contends that three of these were prize Connemara ponies and the fourth was a showjumper. The fifth horse belonged to Mr. Kevin Dunne with whom the applicant had a livery arrangement. As soon as he realised that the horses were missing, the applicant notified the Gardaí. He also inspected the perimeter fencing of the lands and could find no breach. Nor did he see any sign of horse manure on the road around the fields. Mr. Dunne also inspected the perimeter fencing and found it to be intact. The Gardaí attended the lands and the applicant states that they were satisfied that the escape was not due to negligence on his part. They concluded that it was likely that the horses had in fact been stolen.

3.2 Meanwhile, the respondent had received a report of stray horses on a public road at Old Court Road, Rathfarmham in South County Dublin. Since they constituted a serious danger to the public the horses were rounded up by the DSPCA. The horses were then passed on to the council's contractor Cantor Equine Ltd. who is appointed by the respondent for the seizure and impoundment of horses under the Control of Horses Act 1996.

3.3 On the 14th June, 2011, the applicant contacted the respondent and informed it that he owned the horses. He was advised that the horses were in the possession of the respondent and he was advised in regard to the procedures for reclaiming the horses. He was informed that if he wished to have the horses released he would have to produce their licenses and passports and also pay an impound fee for their release. This fee related to the seizure and detention of the horses and is provided for under the Control of Horses Act 1996. The respondent indicated it would not release the horses until this fee was discharged.

3.4 The applicant was informed by the respondent that only two of the five horses were micro-chipped (one of the micro-chipped horses belonged to Mr. Dunne). This is a matter of dispute between the parties as the applicant argues that all of his horses were chipped with the exception of a foal. The applicant was also informed that his horses did not have licences.

3.5 On the 15th June, 2011, Mr. John Murphy, chief veterinary officer of the Environmental Services Department of South Dublin County Council, was sent to the applicant's lands to inspect them. Such an inspection is a requirement under the South Dublin County Council Horse Bye-Laws and is necessary prior to horse licenses being issued in accordance with s.20 of the 1996 Act and prior to the return of the horses to their owner. Its purpose is to ensure that the facilities for maintaining the horses are adequate and that the owner is fit to take care of them. The veterinarian found that everything was in order.

3.6 On the 17th June, 2011, Mr. Dunne reclaimed his horse. The applicant discharged his impound fee on the basis that they had a livery arrangement. His horse was returned to him on the 20th June.

3.7 On the 28th June, 2011, the applicant applied for licences, paying for one licence in cash and the others by cheque. The four licences were issued to him immediately. However, on the 5th July, 2011, the cheque was returned to the respondent unpaid and marked "return to drawer". The applicant contends that he did not know that the cheque for the licences had "bounced" and he was not made aware of this by his bank.

3.8 From the outset a significant exchange of correspondence ensued between the applicant's solicitors and the respondent seeking the return of the horses, wherein the applicant argued that he should not be held liable for payment of the round-up and impound fees as he was not culpable for the escape of the horses, whose disappearance could only have been brought about by criminal action. He argued that the respondent's requirement to pay fees up front was unfair and such a policy should not be applied rigidly in his case given the particular circumstances of it. On the 6th July, 2011, the applicant's solicitors in a letter to the respondent inquired if there was a facility for him to make representations either orally or in writing to this effect. The respondent replied, also on the 6th

July, indicating that it had already disposed of the horses by way of manager's order of the 1st July, 2011.

3.9 The applicant sought leave to apply for judicial review of the council's decision to dispose of the horses on the 25th July, 2011 Mr. Justice Peart inquired at the leave stage as to whether or not the horses in question were still alive. Neither the applicant nor the respondent were in a position to answer this. However, in a letter dated the 28th July, 2011, the respondent informed the applicant that the horses were indeed alive and had been "re-homed" on the 2nd July, 2011, and thus were then in the possession of new owners. It indicated however that it would not reveal the identity of the new owners. This information was given to Mr. Justice Peart who granted the applicant leave to seek judicial review on that basis. However, it subsequently transpired that the information in this regard was incorrect and that the horses had in fact been killed.

3.10 The applicant was first made aware of this fact when the respondent indicated in a letter to his solicitors dated the 22nd November, 2011, that Cantor Equine Ltd had disposed of one horse on the 5th July, 2011, and the remainder of them on the 30th July, 2011. Subsequently by letter of the 7th December, 2011, the respondent then indicated that it had spoken with Mr. O' Hanlon, the Managing Director of Cantor Equine Ltd. on the 9th November, 2011, who had informed it that as Cantor Equine Ltd. had been unable to find a home for the horses that they had all been destroyed on the 15th July, 2011.

Applicant's Submissions
4.1 The respondent's entitlement to seek up-front payment of impound fees;

The applicant submits that the respondent was not in law entitled to refuse to release the horses as the applicant had not paid the fees the respondent claimed were owing.

Despite the fact that the applicant was not responsible for the horses exiting his lands the respondent insisted that he pay the impound fees in advance of the horses being returned to him. The applicant was not agreeable to this. However, from letters passing between the parties, it is clear that the applicant was agreeable to the question of liability for the impound fees being dealt with in an identical manner to any other regular debt, namely that the respondent could sue for the sum owing by way of a simple contract debt. The respondent rejected this proposal. The applicant argues that it should not have refused this proposition particularly in view of the fact that s.39(3) of the Control of Horses Act 1996 makes express provision for a local authority recovering as a simple contract debt any amount which it maintains is due and owing to it under the legislation. This section provides:-

> "A local authority may recover as a simple contract debt in any court of competent jurisdiction from any person by whom it is payable any amount due and owing to it under this section."

The applicant contends that Bye-Law 6 of the South Dublin County Council (Control of Horses) Bye-Laws 1997 is also highly relevant in this regard and he argues that it is of note that the Bye-Laws make no mention of upfront payment of impound fees. Under Bye-Law 6(e) a horse seized under s.37 of the Control of Horses Act 1996 may be released to the owner or keeper of the horse on proof being provided of his ownership or right to keep the horse and on production of a horse license. The section provides:-

"Subject to section 39(5) of the Act a horse seized under section 37 of the Act may be released to the owner or keeper of the horse, on proof being tendered of his ownership or right to keep the horse and on production of a horse licence for the time being in force granted by the Council if the horse is kept in the declared control area or by another local authority if the horse is kept in the control area declared by that local authority".

While the horses did not initially have licenses these were procured by the applicant while the horses were being held by the respondent.

The applicant contends that the wording of Bye-Law 6 (g) is also important. This states that if the owner of the horse is known and can be readily found, but on request by the council, within 5 days of demand being made, fails to pay fees due or fails to produce a horse license granted by the council and fails to remove the horse then the council may dispose of the horse in accordance with Bye-Law 7 of the Bye-Laws and the Act. The use of the word "and" in Bye-Law 6 (g), the applicant submits, indicates that the council can only dispose of the horse where the owner "fails to remove the horse" i.e. the jurisdiction to dispose of the horses appears only to arise where the owner fails to pay the fees due within 5 days of a demand being made for same or fails to produce a horse license and thereafter fails to remove the horse.

Taking into account all of the above the applicant contends that the respondent is incorrect in its core assertion that it was entitled to withhold the horses until the impound fees were paid to it. The applicant argues that he was at all times ready to remove the horses but was impeded from doing so by the respondent's insistence on the upfront payment of the impound fees.

4.2 Non-compliance with notice provisions set out in The Control of Horses Act 1996 and related Bye-Laws;

The respondent purported to act pursuant to the Control of Horses Act 1996 and the South Dublin County Council (Control of Horses) Bye -Laws, 1997, which regulate the manner of disposal of the horses and set out the notification requirements in respect of same.

The applicant asserts that there have been a number of material breaches of the Bye-Laws by the respondent in respect of the notification procedures. He argues that in fact none of the notice requirements where adhered to correctly by the respondent despite being a legal prerequisite to the disposal of the horses.

Pursuant to Bye-Law 6 (a) where a horse is seized under s. 37 of the 1996 Act and the owner of the horse is known a notice in relation to the seizure of the horse (Form I) is to be served on the owner of the horse as soon as possible. The Form 1 under the Bye-Law was never served by the respondent. The applicant argues that once the respondent knew that the applicant was the owner of the horses on the 14th June, 2011, it should then have sent the notice directly to him and in the form provided. However this was not done.

Ms. Jackson indicates in her affidavit that she did send a notice to Tallaght and Rathfarnham garda stations on the 15th June, 2011, but this was not in fulfilment of the requirements of Bye-Law 6 (a) and was more akin to a disposal notice and an attempt to comply with Bye-Law 7(b) (i). Moreover, the notice is dated the 15th June, 2011, and the applicant notes that the notice requirements give the owner 5 days to pay the fee outstanding under Bye-Law 6(g). Those 5 days had not yet elapsed when the notice was posted.

Bye-law 7 (b) (i) states:-

> "Where it is proposed to dispose of a horse under this Bye-Law the Council or the Superintendent shall cause a notice as

> set out in Schedule D describing the animal and stating where it was seized, where it is being held, and the nature of the proposed disposal, to be displayed at the Garda Station for the area in which the horse was seized and at the place where it is to be disposed from".

The respondent appears to have made the decision to dispose of the horses on the 1st July, 2011, as per Mr. Quinlivan's order. Even if the notice was intended to fulfil Bye-Law 7 as asserted by Ms. Jackson, the applicant contends that the respondent also failed in this regard and points to the fact that the applicant's legal advisors attended at both garda stations and checked the notice board for any disposal notice but could not identify same. Enquiries were made at the front desk and the applicant's solicitors were informed that the Gardaí had no knowledge of any such notice. The applicant contends that Ms. Jackson's faxing of the notice without any cover letter is inadequate and cannot be seen as complying with Bye-Law 7 (b) (i) or the requirement of posting in a garda station. In addition, although Ms. Jackson contends that she sent the notice to the garda stations the notice was not sent to, nor displayed at, the location where the horses were disposed from i.e. "The Kennels", as is a requirement under the Bye-Law. Thus the respondent breached Bye-Law 7.

Likewise, the actual contents of the notice sent by the respondent, the applicant contends, does not fulfil the requirements of the Bye-Law in that it does not state where the horses were seized, where they were held or the nature of the proposed disposal . Nor does the notice mention the place from where the horses were to be disposed. It merely sets out the date the horses were impounded and provides a description of the horses and thus lacks the vital information.

The applicant argues that irrespective of the Bye-Law requirements natural justice would dictate that he should have been given all this information. He submits that the notice requirements exist for a good reason and adherence to them could have assisted, where for example the applicant may have wished to prevent the horses being disposed of or where he may have known a potential buyer himself. The applicant also submits that it is well settled law that in respect of administrative acts the person affected by such acts must ordinarily be given notice of the decision that is to be taken, of the grounds upon which it is being taken, all information relevant to the issue and the possible consequences of the decision. The applicant was not informed of any of this as he should have been.

As a result of this failure on the respondent's part confusion ensued surrounding everything about the disposal of the horses. This confusion remains to this day and is added to by the failure of Mr. O'Hanlon of Cantor Equine Ltd., who had knowledge of the killing of the horses, to swear an affidavit. Therefore the applicant remains uncertain as to what eventually became of his horses.

4.3 The respondent acted *ultra vires*;

The applicant submits that there has been a breach of the Bye-Laws and that the respondent has acted *ultra vires* since by refusing to return the horses on the grounds of non-payment of impound fees it is guilty of non-compliance with its own procedures.

The horses were first detained by the DSPCA and were then passed on to Cantor Equine Ltd. who acted as agents of the respondent. The applicant argues that it is a fundamental obligation of the respondent to demonstrate that the disposal of the horses was by an authorised person within the meaning of the act. It is clear from Bye-Law 7 that the decision to dispose of the horses by sale or by destruction is one that can only be taken by the council and that it cannot be delegated to a contractor. Article 7(a) states:-

> "Where the Council or the Superintendent decides to dispose of a horse they may do so by way of sale or destruction. Sale may be by market or public auction or in any other manner considered appropriate by the Council or the Superintendent."

The fact the section makes reference to "any other manner considered appropriate" makes it clear that it is the council's decision how the horses will be disposed of and not that of Cantor Equine Ltd.

In the affidavit of Ms. Jackson dated the 30th March, 2012, at para. 12 she refers to the manager's order dated the 1st July, 2011, and says that the respondent instructed Cantor Equine Ltd. on the 1st July, 2011, to rehome the horses and it believed they had in fact been rehomed. The respondent's position seems to be that no sanction or direction had been given for the disposal by killing of the horses. The evidence in this case is that Cantor Equine Ltd., in breach of the respondent's instruction, killed the horses. Thus, it follows that their killing was not directed by the council, was therefore not in accordance with the Bye-Laws and consequently must be *ultra vires*. This evidence equally demonstrates that the respondent breached the *delegatus non potest delegare* principle see *Thompson v. Minister for Social Welfare* [1989) I.R.618.

The applicant further contends that the respondent acted *ultra vires* by refusing to release the horses once a request for their release had been made by the applicant. Section 39(5) of the 1996 act provides for the circumstances in which the council may refuse to release horses. It states :-

> "A local authority or a Superintendent or a person referred to in subsection (4) may refuse to release any horse detained under section 37 where it or he or she, as the case may be-
>
> (a) is not satisfied that adequate accommodation and sustenance, or if detained under section 37 (2) adequate veterinary attention, will be provided for the horse, or
>
> (b) has reason to believe that the horse will be cruelly treated."

No such issues arose in this case. On the contrary the applicant's lands were inspected by the respondent's vet at the relevant time and the all clear was given.

4.4 Unreasonableness & breach of the *audi alteram partem* principle;

Fees had been demanded from the applicant who requested a hearing in relation to the issue and who also requested to appeal the decision of the council to dispose of the horses The fees demanded by the respondent were not fees that had been specified in any council Bye-Law. It is the applicant's opinion that in the absence of an impound fee being specified therein the only way in which the fees could be recouped by the respondent is through s.39(3) of the Control of Horses Act 1996, which provides that:-

> "A local authority may recover as a simple contract debt in any court of competent jurisdiction from any person by whom it is payable any amount due and owing to it under this section."

Relying on this section, from as early as the 21st June, 2011, the applicant, through his solicitor, maintained that the only fair way to

litigate the issue was for the respondent to pursue the sum being claimed by it as a simple contract debt. The respondent refused to entertain this. Instead, the applicant contends, the respondent applied a fixed and inflexible policy in relation to the payment of the impound fees. He contends that the respondent was not required to follow such an inflexible policy and relies on Bye-Law 6 (d)which provides that:-

> "The Council or the Superintendent may recover from the owner or the keeper of the horse all fees in respect of the seizure and detention of the horse, together with all or any other expenses, including fees for keep, veterinary fees and transportation fees incurred by the Council or the Superintendent."

The respondent argues that it is a matter of strict liability but the applicant disputes this and argues if it had been the intention of the legislators they would have stipulated this. The applicant submits that Bye-Law 6 (d) makes it clear that the council is conferred with discretion in relation to the recovery of fees and argues that the respondent did not employ this discretion and instead applied a blanket policy of demanding payment in every case, irrespective of the individual circumstances applying. The adoption of such an inflexible policy, when a state body has been conferred with discretion in the exercise of such power amounts to a fettering of discretion and is unlawful. The applicant relies on *East Donegal Co-operative v Attorney General* [1970] I.R. 317 and *Loftus v Attorney General* [1979] I.R. 22l.The applicant contends that the policy was particularly unfair in his case since the escape of the horses had been brought about by the unlawful act of a third party.

The applicant maintains that the respondent sought to hold him to ransom, by not just withholding his horses until such time as the impound fees were paid but also in fact threatening to slaughter the horses unless that was done and he argues that this action was arbitrary and unfair.

The applicant complains that at no stage did the respondent answer his basic question of why it did not sue on a contract debt.

The applicant maintains that the respondent has failed to comply with s.40 of the Control of Horses Act 1996 and in particular subsection 5 thereof which outlines the right to make representations and subsection 6 which deals with the right of appeal. He contends that there was an absence of fair procedures since the respondent refused to allow him to make representations to it as to why he should not be compelled to pay impound fees in order to secure the return of the horses in question and why the council should depart from its rigid policy in his case. Nor did the respondent at any stage allow him to attend an oral hearing where he could make the case that he should not be compelled to pay the costs of impounding the horses and that given the specific circumstances it should exercise its discretion in favour of not requiring the payment of fees. He argues that requests made through his solicitor as to whether there was a facility for him to make representations either orally or in writing in relation to the issue of fees in a letter of the 61h July, 2011, never appear to have been meaningfully dealt with. Thus, he claims the respondent breached the principle of *audi alteram partem* and argues that the rights identified in *In re Haughey* [1971] I.R.217 were not afforded to him.

The applicant refers the Court to *Dellway Limited v NAMA* [2011] I.E.S.C. 14. where Hardiman J. stated that the trigger for the right to fair procedures was that the person claiming the right was affected by the decision. The right to be heard was a fundamental right of common law and was also a principle of natural justice, together with the principle that no-one might be a judge in his own cause. The court was of the view that the particular value underlying the principle of *audi alteram partem* related to the principle that the individual affected by the decision should have a meaningful opportunity to present his case fully and clearly in having a decision affecting his rights, interest or privileges made using a fair and impartial process. The applicant asserts that the fixed and inflexible policy followed by the respondent is a breach of this principle.

He argues that certain other basic principles were also breached. He sought to inspect his horses while they were detained. He argues that his request to do so was a reasonable one, especially given Mr. Dunne's claims (which appear in his affidavit) that his horse when returned to him was in a bad state. The applicant argues that the refusal by the respondent to permit him or his veterinary surgeon inspection facilities for the purpose of checking the condition of the horses was unreasonable, unjust and entirely unfair. He also contends that had he been permitted to inspect the horses the confusion surrounding the assertion by Mr. Mulcahy that one particular horse (reference no.154) was not micro chipped, despite the passport from the veterinary surgeon indicating it was, could have been solved as he could have checked the horses himself.

The applicant also argues that if his horses were destroyed then pursuant to Bye-Law 7(b) (iv) he should have received the balance of the value of the horses following disposal.

The Bye-Law provides:-

> "Where a horse has been disposed of under this Bye-Law, the Council or the Superintendent shall retain out of the proceeds of sale an amount equivalent to all costs, fees and expenses of any kind in relation to the horse, incurred by the Council or the Superintendent and any balance shall be remitted to the owner or keeper of the horse if known, or if unknown shall be retained by the Council."

The applicant submits that the respondent breached its own bye-laws as no monies were remitted to the respondent. Nor was there any accounting of costs and proceeds of sale ever made to him.

4.5 Concerns regarding the contractor;

The applicant harbours serious concerns regarding the role of Cantor Equine Ltd. in this matter especially in view of the affidavit of Mr. Kevin Dunne in relation to the condition of his horse when returned to him. The applicant further finds it of concern that no explanation has been provided for the refusal of inspection facilities to the applicant's veterinary surgeon for the purpose of ensuring the horses were in good health. His solicitor wrote to the respondent on the 29th June, 2011, requesting confirmation that he would be allowed to inspect his horses and a further letter was sent on the 5th July, 2011, asking for inspection facilities for his veterinary surgeon to assess the horses. However this request was not acceded to. The applicant also believes that the respondent's contention that no purchaser could be found for the horses is dubious.

The applicant submits the court should likewise have serious misgivings about the role of Cantor Equine Ltd., especially in light of the fact that blatantly incorrect information was conveyed to the High Court as to the status and health of the horses in question and no proper explanation as to this misinformation regarding the end the horses met has been furnished. The applicant submits that it is also of concern given the impound fees system operated by the respondent which is open to abuse in that it extracts payment from horse owners on a strict liability and "money upfront" basis.

The applicant contends that the information surrounding the apparent slaughter of the horses is inadequate and is of the view that

the respondent has not ensured that the European Union (Knackery) Regulations 1996 were followed in the destruction of the horses as it is obliged to do. Regulation 10 of those regulations provides that:-

> "The owner of a knackery shall keep records:-
>
> (a) in the manner outlined in Regulation 6(3) of all animal waste which is collected for delivery or delivered to the knackery;
>
> (b) and in the case of animals, every record shall include the following-
>
> (i) the name and address of the owner of the animal and the lands or place on which the animal was maintained immediately prior to its debility, casualty or death;
>
> (ii) the species and, in the case of cattle, the numbers of the ear tags;
>
> iii) the date on which the animal was collected and delivered to the knackery;
>
> (c) of the manner of disposal of dead animals or parts thereof and the name and address of each person to whom they were sold or disposed of and the business carried on by that person; and in any case, such other particulars as an authorised officer shall direct to be included.
>
> (2) Records kept and maintained by a knackery owner for the purposes of these Regulations shall be readily available at the knackery and shall be produced for inspection at all reasonable times on request by an authorised officer. Records must be retained for a minimum period of 2 years."

The applicant argues that the receipt provided by Cantor Equine Ltd. from the slaughterhouse which is known as "The Kennels" is inadequate and uninformative having regard to Regulation 10, in that it does not identify what animals have been destroyed merely referring to "5 large and 4 small horses" and gives no details that can identify the applicant's horses.

A letter of the 7th December, 2011, from the respondent to the applicant's solicitors mentions the horses having been destroyed in Co. Meath. Mr.Mulachy's affidavit dated the 7th December, 2011, indicates that the horses were taken to Cantor Equine Ltd.'s pound in Kildare Town but there is no pound there. To add to the confusion the reference in the executive business and manager's disposal order dated the 1st July, 2011, states that the horses were detained at the council's pound in Urlingford and gives the impression that they were to be disposed of there, however the horses were not killed there.

No affidavit has still been filed by the council in respect of how, when and where the horses were destroyed. The applicant argues that there therefore is still no explanation as to how his horses died and submits that the onus is on the respondent to ascertain what became of them.

Respondents' Submissions
5.1 Construction of Bye-Law 6 (g);

Many of the reliefs sought by the applicant are now moot as the respondent, pursuant to the provisions of the Control of Horses Act 1996, has disposed of the stray horses at issue by way of destruction. The respondent denies that it operates an inflexible and/or unreasonable policy as alleged by the applicant and it is submitted that at all times it applies a lawful, fair and proportionate system for managing and dealing with stray horses in its functional area by adhering to and complying with its obligations under the relevant legislation.

The respondent's powers are mainly contained in the Control of Horses Act 1996 and its Bye-Laws. Section 37 (1) of the 1996 Act permits the respondent to seize and detain horses which are straying, unlicensed or which may cause injuries. Bye-Law 6(d) allows the respondent to recover all fees from the owner in respect of seizure and detention of the horse and any other expenses e.g. veterinary fees incurred by it.

Bye-Law 6 (g) sets out the conditions under which a horse may be disposed of. It is clear that for someone whose horse is detained, where he, within 5 days of demand of the fee being made, does not pay the fee due or does not produce a license for the horse and does not remove it then the horse may be disposed of in accordance with Bye-Law 7 of the Control of Horses Act 1996. The respondent contends that as the applicant did not have the required documentation nor did he pay the requisite sum it was entitled to dispose of the horses in the manner in which it did. The respondent rejects the applicant's argument that even if he had not paid the fees and did not produce a license he could still remove his horses and submits that this Bye-Law has to be constructed strictly and to interpret the act in the way the applicant does would be contrary to the Bye-Law and the Act.

To bring it a step further, the respondent argues, the applicant's argument would mean that if someone tired of their horse and abandoned it and it was taken in by the respondent, the respondent could not then destroy it. The respondent argues therefore that Bye-Law 6 (g) should be construed as meaning that the council can dispose of a horse if the owner does not pay, show the licence and take the horse away i.e. he needs to fulfil all three conditions to ensure that the horse is not disposed of.

The respondent likewise submits that it would be wholly inconsistent with the plain language of the Control of Horses Act 1996 and unjust and disproportionate to interpret that Act and the Bye-Laws made thereunder on the basis that if the owner of stray horses refuses to pay for the costs of recovery of his horses then the respondent must pursue him by way of contract debt rather than by retaining the horses pending the payment of all charges. After a reasonable time and process of affording the owner of the horses an opportunity to defray the cost of having the horses impounded the respondent must be allowed to dispose of the horses. That is clearly the intention and purpose of s.39 (2) (e) (i) of the Act which authorises the respondent to make Bye-Laws for the disposal of the stray horses in circumstances where the owner does not pay fees on request of the respondent and also s.39 (3) of the Act which provides in addition that the respondent may recover as a simple contract debt any amount remaining due and owing to it. The respondent contends that it would be impractical and uneconomic to seek to compel it to issue proceedings as a normal contract debt to recover the fees due.

5.2 Notification procedure;

The applicant takes issue with the respondent's notification procedure. Firstly he takes issue with the respondent's failure to adhere to the notice requirements under Bye-Law 6 (a).This requires a notice to be served on the owner of the horses at the outset when the horses are seized and detained under s.37 of the 1996 Act. The respondent accepts that the notice was not served but contends that this has no consequence on the case since all of the information that would have been in such a notice was given to the applicant in correspondence.

The second notice that the applicant complains of is that required under Bye-Law 7(b) (i). The respondent argues that although the notice does not include all the information in that it does not state the nature of the proposed disposal, nothing turns on this omission. It argues that the proposal to dispose can mean a number of things and the interpretation section of the Horses Act 1996 s.2 defines dispose of as including "to sell or to give away or have destroyed". Once an order authorising the disposal of the horses is made the horses can therefore be sold, destroyed or given away. Thus, it was automatically obvious to the applicant that he was at risk of having his horses destroyed. The respondent argues that the applicant could have sought an injunction to prevent this from happening at the time but he did not do so. It contends he cannot now argue that had he known the horses would have been killed he would have done something as he was already aware of the situation by virtue of correspondence to his solicitor and he was left in no doubt that the horses would be returned to him on payment of all fees or likewise disposed of in the absence of discharge of fees. The respondent relies on the case of *Julie O'Driscoll & Mary Mc Carthy v. Limerick County Council* [2012] IEHC 594, where Feeney J. held that the failure to serve a notice under s.10 of the Housing & Miscellaneous Provisions Act did not have any material consequences in that case and the court therefore should not grant the relief sought.

5.3 Principle of *audi alteram partem*;

The respondent denies the applicant's assertions that he was not given the opportunity to make representations and that no higher authority was engaged to deal with the matter. The applicant did make oral representations by telephone to the respondent's employees and the respondent argues that it did listen to his arguments culminating in Ms. Jackson approaching her superior Mr. Quinlivan in relation to the matter. The outcome of this was a decision to relax the system by offering the applicant the possibility to pay the fees owing in instalments. Evidence of this offer is contained in a letter to the applicant's solicitors of the 21st June, 2011, wherein he was informed that a suitable payment plan involving monthly payments could be arranged in regard to the outstanding seizure and impound fees due and it was proposed that he could pay €500 up front for the release of the horses and the remainder in instalments. The applicant declined this offer and made no counter offer. The respondent notes that at no point did the applicant deny that he owed the sums sought by the respondent.

5.4 Strict Liability;

The applicant claims that it was not his fault that his horses strayed and the respondent should have looked at this when deciding to impose the impound fee. However, the respondent submits it is important to note that the Act does not provide the owner of stray horses with a defence to a claim for the recovery of such charges on the grounds that his horses escaped from his lands through no fault or negligence on his part. The Actimposes strict liability and moreover the respondent does not in its statement of opposition admit that the horses escaped due to the unlawful act of the third party or that the field was secure.

It is submitted that it would not only be futile, but wholly disproportionate and unworkable to seek to impose on the respondent an almost semi-judicial function in the investigation of the cause of escape of the hundreds of horses detained under the provisions of the act annually, as contended for on behalf of the applicant.

The respondent submits that to do so would place an unjustifiable burden on the ratepayer for the administration of the scheme provided for under the Act to deal with the problem of horses straying dangerously in urban areas.

It also submits that it would be unfair, unjust and inconsistent with the provisions of the Act to impose upon the ratepayer the burden of the cost of the keeping of such horses, even where the owner thereof could show that the animals escaped without fault or negligence on his part, especially if the period of detention were to be extended to allow for a lengthy quasi-judicial enquiry into the cause of the escape of the animals and an appeal from the determination arising from such enquiry. The respondent in this vein points to the fact that the horses in question were seized on the 13th June, 2011, but it was only on the 28th June, 2011, that the applicant purported to pay for the horse licenses. If the scheme were to be followed as the applicant's suggests the horses would have had to be maintained by the council at the ratepayers' expense for those 15 days since they could not be returned to owner in absence of licences.

The respondent notes that in fact to date the applicant has not paid for all the horse licences or for the impound fee. He did purport to pay for three horse licences by cheque and the fourth in cash and the licences were granted to him on the same day. However, on the 5th July, 2011, the respondent received a letter from its bank to say that the applicant's cheque was returned marked unpaid and no payment has still been received from the applicant. It is denied therefore that the respondent acted in an unfair or disproportionate manner in implementing the statutory scheme in relation to stray horses and in the circumstances the respondent was entitled to dispose of the horses in the manner it did.

5.5 *Ultra Vires*;

The respondent submits that it did not act *ultra vires* and Cantor Equine Ltd. was authorised to act in the manner it did. The Control of Horses Act 1996 defines "authorised person" to mean a person appointed as an authorised person under section 3.That section provides:-

> "3-(1) A local authority may appoint in writing such and so many persons as it sees fit to be authorised persons for the purposes of this Act.
>
> (2) An authorised person may exercise any of the functions conferred on an authorised person under this Act-
>
> (a) within the functional area of the local authority which appointed the authorised person, or
>
> (b) in the functional area of another local authority with which an agreement exists for the exercise or performance by authorised persons of the first mentioned authority in the functional area of that other authority of the functions of an authorised person.
>
> (3) Every authorised person appointed under this section shall be furnished with a warrant of his or her appointment as an authorised person and when exercising any power conferred on him or her by this Act as an authorised person shall, if

requested by a person affected, produce the warrant or a copy thereof to that person.

(4) An authorised person may be assisted in the exercise of his or her functions under this Act by such persons as the authorised person considers necessary."

The respondent contends that it acted in good faith in informing the applicant that the horses had been re-homed as advised by Cantor Equine Ltd. and it contends that to the best of its knowledge the horses have now been destroyed.

Decision
6.1 Two issue arise in this case:

a) Was the respondent entitled to withhold the applicant's horses until he paid the impound fees,

b) Was the disposal of the horses by the respondent in this case done in accordance with law.

6.2 Withholding of the applicant's horses;

The applicant considers that it is unfair that he should have been required to pay the substantial fees sought by the respondent before it released his horses. He argues that on the evidence the horses ended up straying onto the road through no fault of his own. Accepting that he was not at fault however does not mean that he was not obliged to pay the costs of rounding up the horses and stabling them. The local authority was not at fault either for the horses being loose on the public roads within their jurisdiction. It was however under a duty to ensure that the horses were speedily rounded up and removed to safety. The presence of such large animals loose on the road is, it hardly needs pointing out, a grave danger to the public. Obviating that danger as quickly as possible is a heavy duty upon the local authority.

One might readily sympathise with an owner whose horses were either stolen or released or strayed deliberately by persons unknown. However, that does not mean that the tax payer should have to bear the cost of rounding up the loose horses. The applicant was the owner and had the enjoyment of the use of the horses. The tax payer did not. On a merits based argument therefore the applicant must lose on this point. It is upon him that the cost of rounding up and stabling must fall.

6.3 The power of the local authority to detain straying horses is provided by Section 37 of The Control of Horses Act 1996 which provides that;

"(1) An authorised person or a member of the Garda Síochana may seize and detain any horse that the person or member has reason to suspect is-

(a) a stray horse, or

(b) causing a nuisance, or

(c) not under adequate control, or

(d) posing a danger to persons or property, or

(e) posing a threat to the health and welfare of persons or other animals, or

(f) being kept in a control area, without a horse licence in respect of it entitling the horse to be kept in that area, or

(g) not identifiable or capable of identification as may be required by section 28 , or

(h) in or being kept or ridden or driven in an area contrary to any bye-laws made under section 47.

(2) An authorised person or a member of the Garda Síochana may seize and detain a horse in relation to which a requirement has been made under section 33 and the person or member has reasonable cause to suspect that the necessary veterinary attention has not been or is not likely to be obtained.

(3) A horse seized under this section may be detained in a pound anywhere or in such other place as may be specified by the local authority in whose functional area the horse was seized or by the Superintendent, as the case may be.

(4) A person who without lawful authority removes a horse while it is being detained under this section shall be guilty of an offence.

Section 29 of the act provides for the making by the local authority of Bye laws in relation to horses detained under Section 37.

Bye-Law 6 of the Control of Horses Bye-Laws 1997 provides:-

"6. Where a horse is seized under section 37 of the Act within the declared control area and detained pursuant to that section the following provisions shall apply:

a. Notice of the seizure and detention of the horse in the Form 1 set out in Schedule C hereof shall be served on the owner or keeper of the horse, where known, as soon as possible.

b. Where the owner or keeper of the horse is not known, notice in Form 2 set out in Schedule C hereof shall be displayed in the office of the Garda Síochana for the area in which the horse was seized and in the place where the horse is detained, as soon as possible.

c. Appropriate services of a veterinary surgeon, where required, may be provided.

d. The Council or the Superintendent may recover from the owner or the keeper of the horse all fees in respect of the seizure and detention of the horse, together with all or any other expenses, including fees for keep, veterinary fees and transportation fees incurred by the Council or the Superintendent.

e. Subject to section 39(5) of the Act a horse seized under section 37 of the Act may be released to the owner or keeper of the horse, on proof being tendered of his ownership or right to keep the horse and on production of a horse licence for the time being in force granted by the Council if the horse is kept in the declared control area or by another local authority if the horse is kept in the control area declared by that local authority.

f. If the owner or keeper of the horse fails to make himself known to the Council or cannot be found within a period of 5 days from the date of seizure and detention of the horse the Council or the Superintendent may dispose of the horse in accordance with Bye-Law 7 of these Bye-Laws and the Act.

g. If the owner or keeper of the horse is known and can be readily found but on request by the Council, the Superintendent or the person in charge of the place where the horse is kept, within five 5 days of demand being made, fails to pay fees due hereunder or fails to produce a horse licence for the time being in force granted by the Council if the horse is kept in the declared control area or by another local authority if the horse is kept in the control area of that authority and fails to remove the horse the Council or the Superintendent may dispose of the horse in accordance with Bye-Law 7 of these Bye-Laws and the Act.

6.4 Thus pursuant to the Act the local authority is entitled to hold the horses until the licenses for them are produced. Are they entitled to hold them until the fees are paid? The applicant argues that the wording of Bye-Law 6(g) must be carefully read. It provides that the right to dispose of the horses arises if upon demand being made, the owner fails to pay the fees or fails to produce a horse licence and fails to remove the horse. Section 37(1) (f) provides for the right to detain where there is no licence. This is quite logical because s.18 provides that it is an offence to keep a horse without a licence. No provision of the Act however specifically empowers the local authority to detain the horses until the fees are paid. Moreover the wording of the Bye-Law seems to support the argument of the applicant that the power to dispose only arises if all three elements are present i.e. failure to produce a licence, failure to pay the fees and failure to remove the horses. On a literal interpretation this means that where the licence is produced and the owner is prepared to remove the horses, the local authority should release the horses to the owner and if the owner does not pay the fees incurred then the local authority should pursue the remedy provided by s. 39(3) of the Control of Horses Act 1996 i.e. it should sue him. Here the applicant did obtain licences for the horses and produced them to the local authority. He quite clearly demanded the release of the horses but did not obtain that. He was ready, willing and able to remove the horses, but the local authority refused to release them until payment of the fees.

6.5 The power to dispose of the horses is a draconian power albeit one necessary in certain circumstances. It is not a criminal sanction but a remedy available where the owner fails to remove the horses. Absent clear statutory provision I cannot see how an owner's property rights in his horses can be arbitrarily removed in order to enforce a debt save by the order of the Court. Thus, it seems to me that in this case the action of the respondent in disposing of the horses was *ultra vires* and not in accordance with law.

While this disposes of the applicant's case I do not think I can ignore the second issue that arises in the light of the strange train of events that followed.

6.6 Was the disposal of the horses done in accordance with law? There is a clear procedure provided for under the Act and the Bye-Laws for the seizure and subsequent disposal of stray horses. There should firstly be served as soon as possible on the known owner a notice pursuant to Bye-Law 6 (Form 1).This was not done here. It is correct that no prejudice accrued to the applicant as a result. However, the point of such formal notice is to avoid the need to subsequently prove that the owner was actually notified of the seizure of his horses. Failure to serve the notice leaves open the possibility of being unable to prove an owner had notice. Such failure is fraught with the possibility of problems and is inefficient administration. No explanation has been proffered to explain the failure to abide by their own rules.

Bye-Law 7(b) cited above provides that where it is proposed to dispose of a horse there should be a notice displayed at the area garda station describing the animal and where it was seized and setting out the nature and details of the proposed disposal. Ms. Jackson swears that she did send the said notice by fax to Tallaght and Rathfarnham garda stations. However the uncontradicted evidence of the applicant is that no notices were displayed at either garda station and the gardaí at both stations were unaware of any such notices. Moreover, the notice alleged to have been faxed does not comply with the

Bye-Law as it also was not sent to or exhibited at the place from where the disposal was to take place. The notice allegedly sent also does not state where the horses were seized, where they were held nor from where they were to be disposed. No explanation for these administrative failures has been proffered either.

It is thus no surprise that even at this stage there is uncertainty and confusion as to how, or even whether, the horses were rehomed or killed. It is unacceptable that no full, detailed and credible account of the disposal of the horses has been furnished by the respondent. It is admitted by the respondent that the High Court was misled when it was told by it in answer to a direct question that the horses had been rehomed. Subsequent to this the applicant was given a number of different accounts of the disposal of his horses culminating in the information that the horses had all been killed on the 15th July, 2011.

Bye-Law 7(6) cited above provides that where a horse has been disposed of the costs, fees etc. which have been incurred by the local authority may be retained out of the proceeds of sale, and any balance remaining shall be remitted to the owner. This implies some form of accounting to the owner. This should show how much, if anything, was realised by the disposal. If a balance remains then it should be paid to the owner. No such accounting to the owner occurred here and nothing consequently has been remitted to him. Both he and the Court are left completely in the dark in this respect.

Of further concern to the Court is the apparent complete failure of the respondent or its nominated disposers Cantor Equine Ltd. to ensure that the European Union (Knackery) Regulations 1996, cited above, were complied with. The only information produced to the Court as to how, when and where the horses were killed is a receipt from a slaughterhouse known as "The Kennels" which simply indicates that five large and four small horses were killed there. This is completely inadequate information. Had the slaughterhouse complied with the regulations far more information would have been readily available. As it is, neither the applicant nor the Court have any reliable evidence as to what became of the horses or where they ended up. We are told they were slaughtered in a knackery but that is all we are told. In an age when traceability and transparency are bywords in the production and integrity of the food chain, this complete dearth of information is unacceptable. I expect that there will be a thorough investigation by the appropriate unit of the department of agriculture of the curious and disturbing manner in which these horses were disposed of.

6.7 It goes without saying that the duty of the local authority to round up stray horses is a vitally important one. The danger posed to the public by the presence on the roads of stray animals is very real. In the case of larger animals such as horses, that danger may be of serious injury or even death. The local authorities have responsibility for this unsought task and the Court is well aware of

the problems posed thereby. However, in rounding up and where necessary disposing of animals such as horses, the local authority is engaging in an activity that may impact on the property rights of citizens. Thus, by statute and bye laws the law has provided for a certain process in order to assist the local authority whilst engaged in this procedure. It is a relatively simple but vitally important process. It is designed to balance any conflict that may arise between the rights of the public to safety on the highway with the property rights of horse owners. It is essential that this process is carefully followed in each case. This is not difficult and where done properly obviates substantial difficulties that might otherwise arise. This simple process provided by law was almost entirely ignored in this case. The direct consequence is the needless trail of confusion that inevitably followed.

6.8 As noted above the answer to the first issue is dispositive of the case. The act of the respondent in detaining and subsequently disposing of the applicant's horses was *ultra vires*. There must therefore follow a declaration of *certiorari* quashing the decision to withhold the horses and the subsequent decision to dispose of them, together with an order that damages be assessed for breach of the applicant's property rights in the horses.