

THE HIGH COURT

2007 No. 988 S.S.

**IN THE MATTER OF SECTION 52 (1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961
THE DISTRICT COURT AREA OF CORK CITY DISTRICT NUMBER 19
THE SAFETY, HEALTH AND WELFARE AT WORK ACT, 2005,
SECTION 66 (7)**

BETWEEN

CORK COUNTY COUNCIL

APPELLANT

**AND
THE HEALTH AND SAFETY AUTHORITY
AND
VINCENT D'ARCY OF THE HEALTH
AND SAFETY AUTHORITY- INSPECTOR**

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered on the 7th day of October, 2008.

1. This is a consultative case stated for the High Court by District Judge David Riordan, Judge of the District Court, Cork District which was transmitted to the High Court on 11th July, 2007. The case stated as set out by the District Judge is as follows:-

CONSULTATIVE CASE STATED**I. Preliminary**

1.1 This is a case stated pursuant to Section 52 (1) of the Courts (Supplemental Provisions) Act, 1961, whereby I, District Judge David Riordan, assigned to District No. 19, the area of Cork City, hereby refer the questions of law identified below to the High Court for determination.

1.2 The questions referred arise in the context of an appeal by Cork County Council ("the County Council") against an Improvement Notice served on the County Council by the Health & Safety Authority ("HSA") on January 29th 2007. The Improvement Notice was served pursuant to Section 66 (1) of the Safety, Health & Welfare at Work Act, 2005 ("the 2005 Act"). Pursuant to Section 66 (7) of the 2005 Act, a person aggrieved by an Improvement Notice may appeal such Notice to the District Court. County Council appealed the Improvement Notice by Notice of Appeal dated February 9th 2007. That Notice of Appeal is attached as Appendix 1 to this case stated.

1.3 The appeal was returnable before me on Monday March 5th 2007. At that stage it was apparent that a number of legal issues arose. Accordingly, I adjourned the appeal to May 23rd 2007, for argument of those issues.

1.4 On May 23rd 2007, the parties attended before me to make legal submissions. The County Council was represented by David Holland S.C. (with whom Eileen Barrington BL appeared) instructed by Mary Roche, Cork County Solicitor. The HSA was represented by Jarlath Fitzsimons B.L. instructed by Matheson Ormsby Prentice solicitors.

1.5 The parties agreed that, with a view to making legal submissions, it was necessary to hear some limited evidence.

2. Facts as found on Evidence Adduced

In the light of the evidence adduced, I found the following facts.

2.1 Mr. Vincent Darcy is an inspector for the purposes of the 2005 Act. He gave evidence as to the chain of events culminating in the issuing by the HSA of the Improvement Notice in respect of which the appeal was brought. The documentation generated by the HSA and the County Council is attached at Appendix 2 and can be summarised as follows:-

Chronology**April 5th 2006**

The HSA wrote to Cork County Council raising concerns regarding the use of dense bitumen macadam ("DBM") road surface on roads outside the 50km or 60km speed limit zones.

The HSA stated, *inter alia*, that:

- Allowing the situation where roads had not yet received the final intended surface without appropriate control measures in place is unacceptable and may give rise to an unsafe situation which not only endangers the safety of the councils employees but also of all road users.
- Roads which have not had their final surface applied i.e. not surface dressed constituted an "incomplete project" coming within the scope of the Safety, Health & Welfare at Work (Construction) Regulations, 2001.

The HSA requested the Council to ascertain whether any such roads exist in County Cork, and if such roads exist what control measures are in place in these roads. The HSA asked the Council to confirm the procedures and control measures it has in place which deal with issues of concern outlined in the letter and for future projects of this type.

April 6th 2006

Mr. M. Moloney, Cork County Manager, wrote to the HSA indicating that he had received the letter dated April 5th 2006 and stated that he was arranging to have the issue as to whether there were any dense bitumen macadam overlays on roads in Cork County Council's area that lay outside the 50kph speed limit zone that were not surface dressed] examined and that he would revert to the HSA as soon as possible

May 24th 2006

HSA write again to County Council raising the same concerns contained in its letter dated April 5th 2006. In total, the HSA raised five queries.

June 27th 2006

Mr. Maurice Moloney, Cork County Manager, County Council replies to the letter dated May 24th, 2006 and confirms that 2 sections of unsurfaced dense bitumen macadam, base course roads had been identified in the functional area of Cork County Council as at June 7th 2006, and had been surfaced dressed by June 27th 2006. Moreover, Mr. Moloney identified a further four local tertiary roads with unsurfaced DBM overlay. It was indicated that this latter category of roads would be surface dressed within two weeks of June 27th 2006.

August 11th 2006

The HSA, per Inspector Vincent Darcy ("Mr. Darcy") issued a "*Direction for Improvement Plan*" ("the Direction") pursuant to *Section 65 of the 2005 Act*.

- The Direction stated Mr. Darcy's opinion that "the following activities outlined in the addendum, are *likely to occur and are likely to involve a risk to the safety, health and welfare of persons.*"
- In the addendum the activity identified is "*Road works/Operation of Safety Management System for Roadworks*"
- The addendum identifies "Defects Observed" as follows:

"The procedures and control measures that Cork County Council have in place to deal with the use of unsurface (sic) dressed Dense Bitumen Macadam roads and other incomplete surface dressings outside the 50km speed limit zones are inadequate."

- Three categories of "Remedial Action" were required - being (in summary), the following:-
 1. The identification of the hazards and the assessment of risks associated with the use of vehicles on temporary surfaces such as DBM and other incomplete surface dressings at speeds greater than 50km/hr;
 2. The identification of appropriate control measures for use of vehicles on such temporary surfaces;
 3. The development of procedures for the identification and provision of adequate traffic management systems for different stages of road works.

September 8th 2006

Mr. John Walsh, Head of Personnel, Cork County Council responds, making an "interim proposal" indicating that it will

1. conduct an "immediate survey" to establish the existence of the relevant surfaces within its area
2. arrange for the dressing of such surfaces within 2/3 weeks
3. suspend the use of such temporary surfaces pending the production of procedures and control measures for the HSA's approval - which were expected to emerge at national level.

October 6th 2006

HSA issues *Section 65 (4) Notice*, asserting that Mr. Darcy is "*not satisfied that the Improvement Plan as submitted by you is adequate*" and directing it be revised "*as specified in the addendum to this Notice and resubmitted...*"

The addendum identifies "Defects Observed" in summary terms as follows:

- Inadequate identification of the hazards and the assessment of risks associated with the use of vehicles on temporary surfaces such as DBM and other incomplete surface dressings
- Inadequate procedures and control measures for use of vehicles on such temporary surfaces outside the 50Km/hr speed limit zone
- Inadequate identification of specific traffic management systems for different stages of road works including, pre-commencement, construction phase, interim phase (including any time gap between laying base and final road surface) and identification of competent persons.

October 10th 2006

The HSA writes to the County Council enclosing a flowchart document entitled "A Short Guide to Traffic Management for Realignment, Strengthening or Maintenance Works on Roads" ("the Flowchart"). This is provided on the basis that it "*may assist you in the development of your revised improvement plan*". The flowchart contains general guidance on procedures and control measures in relation to issues raised in the *Section 65(4) Notice* issued on October 6th 2006.

November 16th 2006

The County Council (*per* Mr. John Walsh, Head of Personnel) submits its revised Improvement Plan – the covering letter setting out certain reservations in relation to the speed regulation of the Flowchart and giving detailed reasons for those reservations.

January 24th 2007

HSA issues the *Section 66 Improvement Notice*

- Asserting Mr Darcy's opinion that Cork County Council failed to comply with a direction under *Section 65(4)(b) of the Safety, Health and Welfare at Work Act, 2005*
- thereby contravening a provision of the 2005 Act

· on the basis that (1) the Hazard Identification and Risk Assessment contained in the Revised Improvement Plan of November 16th 2006 was inadequate, in that it failed to identify the hazards associated with the use of vehicles on temporary surfaces for the different stages of the project and the control measures identified were inadequate, and (2) the Revised Improvement Plan failed to adequately identify the specific traffic management systems for the different stages of the project.

The Improvement Notice directed that the contravention" be remedied by February 28th 2007 and that the measures in the attached schedule be taken to remedy the contravention.

February 9th 2007

The county Council appeals pursuant to *Section 66(7)* against the Improvement Notice.

2.2 The correspondence established and Mr Darcy confirmed that the HSA had written to the road authorities by reason of a particular concern regarding the use of Dense Bitumen Macadam ("DBM") as a road surface having regard to the fact that such a road is viewed by the HSA as having lesser skid resistance. DBM is a temporary surface - to be covered by a wearing surface. The HSA's concern related to the lapse of time which may occur between the laying of a DBM surface and the subsequent laying of the permanent or "wearing" surface - during which time the road is open to traffic. The HSA was also concerned about the use of DBM road surfacing by road users during roadworks.

2.3 The HSA has served similar Improvement Notices on many roads authorities and the present appeal to the District Court is one of a number pending, and the first to come to trial.

2.4 Mr. O'Mahony gave evidence on behalf of the County Council. He gave evidence that in respect of the roads for which it has responsibility, the County Council conducts approximately 50% of all work directly itself. The remainder are carried out by independent contractors for the County Council. This percentage breakdown is based on the financial cost of the works.

2.5 As of the date upon which the Improvement Notice issued, there was within the functional area of Cork County Council, no stretch of road with a DBM surface upon which works were "active" or ongoing. Further, it is no longer the practice of Cork County Council to carry out road works by way of one phase during which the road surface would be dressed with DBM and then to later conduct a second and distinct phase of work, during which the road would be fully surface dressed. This is, however, a practice which occurs in the functional areas of other road authorities - resulting in DBM road surfacing being left on the road and trafficked for significant periods of time prior to the road being surface dressed.

2.6 Under cross-examination, Mr. O'Mahony gave evidence that in relation to construction and maintenance of national roads within the county, Cork County Council acted, in effect, as the agent of the national roads authority. In addition, Mr. O'Mahony testified to the fact that most roadworks, including re-surfacing works, were seasonal in nature and most were carried out during the summer months.

3. Submissions of the Parties

3.1 At the outset it was indicated to the Court that the legal issues arising on the appeal were numerous, complex and significant - with the potential to affect issues arising in many similar appeals brought by other local authorities. The parties' written submissions to the Court are attached as Appendix 3 to this case stated and set out the legal issues arising for determination in the Appeal. In light of those submissions, of oral submissions by Counsel and on the application of counsel for the HSA with the concurrence of counsel for the County Council, I determined that the following questions should be stated for the opinion of the High Court.

4. Questions for Determination

4.1 In the light of the submissions made to me, I am of the opinion that the following questions of law arise in the instant case which I respectfully ask the High Court Judge to determine:

1. Whether Section 66 of the Safety, Health and Welfare at Work Act 2005 applies to a local authority.
2. Whether the Health and Safety Authority ("HSA") has the power to direct a roads authority (as defined in the Roads Act 1993) as to the manner in which it performs its duties under that Act, whether in circumstances where the National Roads Authority has overall responsibility for the planning and supervision of works for the construction and maintenance of national roads, or at all.
3. Whether the Improvement Notice issued by the HSA and served on Cork County Council complied with the provisions of the Safety, Health and Welfare at Work Act 2005, and in particular section 66 thereof, whether on the basis that the Improvement Notice is sufficiently precise, or otherwise.
4. May the HSA serve an Improvement Notice on the basis that the contents of a Revised Improvement Plan are inadequate?
5. Does the HSA have power under the 2005 Act to issue an Improvement Notice in respect of works not in being at the date of issue of Improvement Notice?
6. Does the HSA have power under the 2005 Act to issue an Improvement Notice in respect of works to come into being after the date of issue of Improvement Notice?
7. Does the HSA have power under the 2005 Act to issue an Improvement Notice to Roads authorities in respect of the exercise of their statutory functions with respect to the performance of roadworks?
8. Does the HSA have power under the 2005 Act to issue an Improvement Notice applicable to a type of activity generally as opposed to an actual instance(s) of that activity?
9. Is a road on which works have ceased for a significant period between phases of surfacing works and opened to traffic during that period, "a place of work" within the meaning of the 2005 Act?
10. Does the HSA have power under the 2005 Act to issue an Improvement Notice in respect of a locus which is not a "place of work" within the meaning of the 2005 Act?

11. Is a road on which works have ceased for a significant period between phases of surfacing works and opened to traffic during that period a place at which work is "being carried on" within the meaning of the 2005 Act?
12. Does the HSA have power under the 2005 Act to issue an Improvement Notice in respect of a locus at which works are not in the course of being carried on?
13. Does the HSA have power under the 2005 Act to issue an Improvement Notice in respect of risks to persons where such risks arise other than in the course of work being carried on?
14. Does the HSA have power under the 2005 Act to issue an Improvement Notice in respect of risks to members of the public where such persons' presence at the locus is not connected to the performance of works thereat?
15. Does the HSA have power under the 2005 Act to issue an Improvement Notice to a roads authority in respect of works by an independent contractor to such roads authority?
16. Does Section 66(1) of the 2005 Act confer on the HSA an entitlement to serve an Improvement Notice on a person who is not the addressee of Section 12 of the 2005 Act?

Signed:

DAVID RIORDAN

JUDGE OF THE DISTRICT COURT

Dated this 11th July, 2007.

2. The Health and Safety Authority (HSA) argue that the roads upon which Cork County Council (CCC) have laid a Dense Bitumen Macadam (DBM) surface but not yet surface dressed constitutes a "workplace" for the purposes of the Safety, Health and Welfare at Work Act 2005 (the Act of 2005). This is so, they argue, because until the final road surface is applied, the relevant part of the roadway is "a work in progress". They argue they served a direction for the preparation of an improvement plan. They received this but did not consider it adequate to meet their safety concerns. They directed a revised improvement plan. When they received it, they did not consider that it met their concerns, was not adequate and as a result served an improvement notice.

The appellant argues firstly that the Act does not apply and that the type of roadworks which are a cause of concern to the respondents are not a workplace because all works have ceased thereat. The site has been demobilised (i.e. all roadworks staff have gone) and it may be years before the final surplus dressing is applied. Moreover, the appellant further argues that the respondents are limited by the Act of 2005, to the improvement in health and safety of workers at work and not to the safety and health of road users, however laudable that might be. It seems clear that the appellant initially dealt with the intervention of the respondents in a co-operative manner. The directions of the respondents were almost entirely adopted by the appellant. The points on which they disagreed involved the management/monitoring of the speed limits at the work site.

The question lying at the heart of the dispute giving rise to this case stated is one involving the extent of the powers given to the first named respondent by the Act of 2005.

The Statutory Framework

3. The long title of the 2005 Act, provides as follows:-

"An Act to make further provision for securing the safety, health and welfare of persons at work and for the enforcement of the relevant statutory provisions, to give further effect to Council Directives 89/391/EEC of 12th June, 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work and Council Directive 91/383/EEC of 25th June, 1991, on measures to improve the safety and health at work of workers with a fixed - duration or temporary employment relationship, to provide for the further regulation of work activities, to continue in being and confer additional functions on the National Authority for Occupational Safety and Health and rename that body as the Health and Safety Authority, to repeal the Safety, Health and Welfare at Work Act 1989, to provide for the repeal of certain other enactments and the amendment at the National Standards Authority of Ireland, Act 1996 and to provide for related matters."

4. The functions of the HSA are set out in s. 34 of the Act of 2005 Act as follows:-

"34(1) The general functions of the Authority are -

(a) to promote, encourage and foster the prevention of accidents, dangerous occurrences and personal injury at work in accordance with the relevant statutory provisions,

(b) to promote, encourage, foster and provide education and training in the safety, health and welfare of persons at work,

(c) to encourage and foster measures promoting the safety, health and welfare of persons at work,

(d) subject to subsection (2) and section 33, to make adequate arrangements for the enforcement of the relevant statutory provisions,

(e) to monitor, evaluate and make recommendations to the Minister regarding implementation of and compliance with -

(i) the relevant statutory provisions, and

(ii) best practice relating to safety, health and welfare at work, and the review and maintenance of relevant records by employers,

(f) to promote, encourage and foster co-operation with and between persons or bodies of persons that represent

employees and employers and any other persons or bodies of persons, as appropriate, as regards the prevention of risks to safety, health and welfare at work in accordance with the relevant statutory provisions,

(g) to make any arrangements that it considers appropriate for providing information and advice on matters relating to safety, health and welfare at work,

(h) to make any arrangements that it considers appropriate to conduct, commission, promote, support and evaluate research, surveys and studies on matters relating to the functions of the Authority and for this purpose -

(i) to foster and promote contacts and the exchange of information with other persons or bodies of persons involved in safety, health and welfare at work in and outside the State, and

(ii) as it considers appropriate, to publish in the form and manner that the Authority thinks fit, results arising out of such research, studies and surveys,

(i) in accordance with section 43, to prepare and adopt a strategy statement and to monitor its implementation,

(j) in accordance with section 44, to prepare and adopt a work programme,

(k) to comply with any directions in writing, whether general or particular, relating to its functions, that the Minister may from time to time give to the Authority,

(l) to give to the Minister any information relating to the performance of its functions that the Minister may from time to time require, and

(m) to perform any additional functions conferred on the Authority by order under section 35."

5. The County Council is a Road Authority for the purposes of s. 13 of the Roads Act 1993. Section 13 provides as follows:-

"13(1) Subject to Part III, the maintenance and construction of all national and regional roads in an administrative county shall be a function of the council or county borough corporation of that county.

(2) It shall be a function of the council of a county, the corporation of a county or other borough or the council of an urban district to maintain and construct all local roads -

(a) in the case of the council of a county — in its administrative county, excluding any borough or urban district,

(b) in the case of any other local authority - in its administrative area.

(3) The local authorities referred to in subsections (1) and (2) shall be road authorities for the purposes of the roads referred to in those subsections and shall, subject to Part III and in respect of those roads, perform all the functions assigned to road authorities by or under any enactment (including this Act) or instrument.

(4) The expenses of the council of a county in respect of its functions under subsection (2) shall be charged on the county exclusive of any borough or urban district.

(5) In the performance of their functions under subsections (1) and (2), a road authority shall consider the needs of all road users.

(6)(a) A person or group of persons may, with the consent of a road authority, carry out maintenance works on a local road.

(b) A consent under paragraph (a) may be given by the road authority subject to such conditions, restrictions and requirements as it thinks fit.

(c) Where a road authority gives its consent under paragraph (a) and the works have been carried out in a bona fide manner and in accordance with every condition, restriction or requirement specified under paragraph (b) -

(i) the works shall be deemed to have been carried out by the road authority, and

(ii) the person or group (and each member thereof) who carried out the works shall be indemnified by the road authority against all actions and claims howsoever arising in respect of the works and the carrying out of works.

(d) A road authority may provide materials, plant, equipment and the services of its staff to a person or group carrying out works under this subsection.

(7) A road authority may do all such things as arise out of or are consequential on or are necessary or expedient for the performance of its functions under this Act or otherwise in relation to public roads or are ancillary thereto."

6. Section 10 of the Road Traffic Act 2004 provides as follows:-

"10.(1) The manager of a county or a city council may, where he or she considers it is in the interests of road safety, on a road or motorway or part of a road or motorway where road works are being carried out in the administrative area of the county or city council for which he or she is the manager, by order ("road works speed limit order") apply to the road or motorway or part of it a special limit ("road works speed limit") being a speed limit of not less than 30 kilometres per hour, as the speed limit on the road or motorway for mechanically propelled vehicles, in lieu of the speed

limit provided or having effect under this Act in respect of the road or motorway or part of it.

(2) A road works speed limit order is in force for the duration of the road works, subject to no such order having effect for a period of more than 12 months from the date of its making

(3) A road works speed limit order shall not be made in respect of a national road or a motorway, without the prior written consent of the National Roads Authority.

(4) Before making a road works speed limit order the manager concerned shall notify the Commissioner in writing of his or her intention to make the order.

(5) The manager shall consider any representations made in writing by the Commissioner received by the manager within one month of the notification.

(6) When a road works speed limit order is made the manager concerned shall publish a notice in one or more newspapers circulating in the county or city council to which the order relates indicating the location where the order will have effect, the period for which it will have effect and the speed limit being applied through the order. The manager shall have regard to any representations that are made to him or her in relation to the road works speed limit order.

(7) A manager may at any time within the period specified in subsection (2) revoke or amend a road works speed limit order made by him or her.

(8) A document which purports to be a copy of a road works speed limit order which has endorsed on it a certificate purporting to be signed by the manager making the order or an officer of the local authority concerned designated by the manager stating that the document is a true copy of the order and that the order was in force on a specified day, shall, without proof of the signature of such manager or officer or that he or she was in fact such manager or officer, be evidence, until the contrary is shown, in every court and in all legal proceedings, of the order and of the fact that it was in force on that date."

Under s. 10 above, a county manager "where he or she considers it is in the interests of road safety" may make a "road works speed limit order". Further he or she may only make such an order in respect of a "national road or a motorway" with prior written consent of the National Roads Authority (NRA). Moreover, before making any such order the manager must notify and consider any representations by the Garda Síochána. He must consider any subsequent representations by the public. He is given express power to "revoke or amend" the order.

7. It is to be noted at this point that the appellant submits that the inherent tendency and inevitable effect of the HSA notice as contended for by them is to:-

(i) Interfere in and/or fetter the statutory competence and discretion of county managers under section. 10.

(ii) Interfere in and/or fetter the statutory entitlements of the NRA, the Gardaí and the public with respect to speed limits at road works.

*(iii) Apply a general statute to a subject for which provision is made in a particular statute in breach of the principle *generalia specialibus non derogant*.*

It is further submitted in this regard, that the HSA's course of action is an unlawful attempt to interfere in and fetter the exercise of the statutorily assigned competences and discretions of road authorities in light of the fact that the Council's substantive objection to the HSA "flow chart" centred around the additional hazards of complying with its necessary implications as to traffic calming measures – the use of horizontal and vertical deflections – as expressed in the Council's letter of the 16th November, 2006, enclosing its revised improvement plan.

Section 38 of the Road Traffic Act 1994 defines "traffic calming measures" as:-

"[M]easures which restrict or control the speed or movement of, or which prevent, restrict or control access to a public road or roads by, mechanically propelled vehicles ... and measures which facilitate the safe use of public roads by different classes of traffic (including pedestrians and cyclists) and includes the provision of traffic signs, road markings, bollards, posts, poles, chicanes, rumble areas, raised, lowered or modified road surfaces, ramps, speed cushions, speed tables or other similar works or devices, islands or central reservations, roundabouts, modified junctions, works to reduce or modify the width of the roadway and landscaping, planting or other similar works."

Relevant rules of statutory interpretation

8. Penal statutes are required to be interpreted strictly. In *Inspector of Taxes v. Kiernan* [1981] I.R. 117, Henchy J. set out the rule (at page 122) as follows:-

"if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language"

In *Director of Public Prosecutions v. Tivoli Cinema Limited* [1991] 2 I.R. 260, Barron J. (at page 268), set out the rationale for the principle:-

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

Section 5 of the Interpretation Act 2005 provides as follows:-

"5.(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)...the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament

concerned, as the case may be, where that intention can be ascertained from the Act as a whole.”

The clear principle binding the Court therefore is that where the statute is a penal statute it must be interpreted strictly and no purposive interpretation is possible.

9. Section 77 of the Safety, Health and Welfare at Work Act 2005 Act provides, inter alia, that it is an offence to:-

“(i) Contravene any requirement of a s. 66 Improvement Notice,

(ii) Fail to discharge a duty imposed by s. 8, 9, 10, 11(1) to (4), 12, 13 and 15 to 23,

(iii) Contravene the relevant statutory provisions.”

It is clear, therefore, that the Act of 2005 is a penal statute and the applicable rule is one of strict interpretation.

10. I am further referred to the rule of statutory construction “*generalia specialibus non derogant*”. In Halsbury’s Laws of England, 4th ed., Volume 44(1), (London, 1995) paragraph 1486 this principle is explained as follows:-

“Construction of general and particular enactments. ... Whenever there is a general enactment in an Act which, if taken in its most comprehensive sense, would override a particular enactment in the same Act, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the Act to which it may properly apply.”

In *Keane v. Western Health Board* [2007] 2 I.R. 555; 2000 No. 8232P [F.L. 13256], Quirke J. noted at p. 559:-

7. “The rule of statutory construction known as “*generalia specialibus non derogant*” is defined as a rule which requires that “general things do not derogate from special things” (see *Murdoch’s Dictionary of Irish Law* (4th ed.)).

8. In summary the rule provides that where an earlier statute deals expressly and precisely with a particular issue, a later statute, enacted in general terms will not repeal the earlier instrument unless the contrary intention is indicated within the legislation.

9. The rule has been considered in this jurisdiction on a number of occasions (see *DPP v. Grey* [1986] I.R. 317 and *National Authority for Safety and Health v. Fingal County Council* [1997] 2 I.R. 547). In summary it has been argued, approved and accepted by the Irish courts as a maxim of legislative interpretation. However, most of the cases reported in this jurisdiction concerned conflicts between the provisions of two separate instruments.”

11. The relevant facts herein have been set out in the case stated, and may be summarised as follows. The respondents, commencing in April 2006, expressed concern in relation to the use of DBM on Cork County Council’s roads. The basis of their concern was that this surface, not intended as a final surface, was left in place without appropriate control measures in place. Their concern was, firstly, that such a surface was unsafe for road users, and secondly, that workers “on site” would be, or could be, endangered when the final surface was applied if correct traffic control measures were not in place. They claimed that roads which were DBM dressed, but not yet given the final surface dressing, constituted “an incomplete project” within the meaning of the Act. The response from CCC’s County Manager was a co-operative one. He undertook to identify if there were such “incomplete project” roads within the functional area of the CCC. CCC wrote back to the respondents on 26th June, 2006, and identified two such roads which by that letter’s date had in fact received their final dressing. Four local tertiary roads were also identified and would be surface dressed within two weeks of this letter.

12. The response of the respondents made 11th August, 2006, was the issuing of a “direction for improvement plan” setting out likely risks which were specified in an addendum to the direction.

13. On 8th September, 2006, the CCC responded with what it calls “an interim proposal”. The respondents took this to be an improvement plan and wrote back on the 6th October, 2006, expressing dissatisfaction with it and directing a revised improvement plan. Their complaint related to inadequate identification of the hazards associated with vehicles using DBM surface roads including inadequate identification of traffic management systems to be used during the different stages of roadworks.

The respondents subsequently wrote to CCC enclosing a flow chart advising how traffic should be managed at the site of and during road maintenance operations.

14. On the 16th November, 2006, CCC submitted its revised improvement plan. This took issue with some of the recommendations contained in the flow chart. These related to vehicle speed regulations. The response of the respondents on the 24th January, 2007, was to issue a s. 66 improvement notice. This notice asserted that the CCC had failed to comply with a direction for the preparation of a revised improvement plan, thereby contravening provisions of the Act of 2005. The failings identified were that the hazards involved had not been properly identified and the control measures identified were inadequate and there was a failure to adequately identify specific traffic management systems

15. The improvement notice required the alleged contravention be remedied by the 28th February, 2007, and that the measures scheduled should be taken to remedy the alleged contravention.

The issuance of this notice precipitated an appeal to the District Court pursuant to s. 66(7) of the 2005 Act. From that appeal arose the questions posed to the High Court herein.

16. It is clear that the main concern of the HSA is the use of DBM as a “temporary” surface, which in fact may remain in place for a long time. Because it is considered to have less skid resistance than a final surface dressing, it is identified as a risk. A number of similar notices have been issued on other road authorities arising out of broadly the same complaints.

It is found as a fact by the District Judge that at the date of the issuance of the improvement notice there was no stretch of road within the functional area of CCC with a DBM surface and upon which works were active or ongoing. It is also found as a fact that CCC no longer follows a practice of having a gap in time between DBM and final dressing. However this does happen within the functional area of other road authorities. Finally 50% (in cost terms) of all roadworks for which CCC has responsibility are conducted by itself and 50% by independent contractors.

17. It is clear that the Act in question insofar as the present case is concerned is a penal statute because it imposes a criminal sanction for non-compliance. This being so it must be strictly construed. Furthermore, any improvement notice issued must be so clearly drafted as to leave the recipient in no reasonable doubt as to what actions are required for compliance. As O'Neill J. put it in *Dundalk Town Council v. Lawlor* [2005] 2 I.L.R.M. 106, at p. 112, where he considered the validity of a planning enforcement notice:-

"[I]t [is] imperative that the precise steps required by the council be set out with precision and clarity because in the absence of that being done it becomes difficult to the point of impossible for a person served with the notice to know how far they must go in order to ensure compliance with an enforcement notice and hence the avoidance of criminal liability. If the steps required are not set out with precision and clarity the person served with the notice may find themselves having to guess or speculate as to what they must do to achieve compliance."

In this case the improvement notice which was served on CCC in effect condemned its revised plan of the 16th November, 2006, as inadequate. The notice was in the following terms:

HEALTH & SAFETY AUTHORITY

SAFETY, HEALTH AND WELFARE AT WORK ACT, 2005

IMPROVEMENT NOTICE (SECTION 66)

Reference No: INIVIN014/07

Cork County Council
Model Business Park
Model Farm Road
Cork

**For the Attention of Mr John Walsh, Head of Personnel
Safety, Health and Welfare at Work Act, 2005
Section 66
Improvement Notice**

Dear Sir

I, Vincent Darcy, Authorised to be an Inspector and furnished with a Certificate of Authorisation pursuant to section 62 of the Safety, Health and Welfare at Work Act 2005, of the Health and Safety Authority, Metropolitan Building, James Joyce Street Dublin 1, Tel: 1890 289 389, and entitled to serve this Notice, hereby give notice that Pursuant to Section 66 of the said Act, I am of the opinion that Cork County Council, at offices located at Model Business Park, Model Farm Road have failed to comply with a direction under Section 65(4)(b) as such have contravened a provision of the Safety, Health and Welfare at Work Act 2005. Should you wish to discuss any of the issues contained within this notice please contact the undersigned.

The reasons for my said opinion are:

1. The Hazard Identification and Risk Assessment identified in your revised Improvement Plan of the 16th November, 2006, are inadequate and fail to identify the hazards associated with the use of vehicles on temporary surfaces, such as Dense Bitumen Macadam (DBM) and other incomplete surface dressings, at speeds greater than 50Km/hr, having regard to the surface in question. In this context:

- You have failed to identify the hazards and risks associated with the use of vehicles on incomplete road surfaces for different stages of the project, including:

1. The initial construction phase including the laying of base / regulation course;
2. Interim phase including the any time gap between laying of base / regulation course; and the application of the wearing course; and
3. The actual application of the wearing course.

- The control measures identified in your revised Improvement Plan of the 16th November, 2006, are inadequate. In particular you have failed to identify the appropriate control measures, that is to say the necessary traffic management systems to require road users to travel at the appropriate speed, as identified by you on foot of your risk assessment, including control measures for:

- The pre commencement phase,
- Initial construction phase,
- Interim phase, including the any time gap between laying of base / regulation course and the application of a wearing course.
- Application of wearing course.

2. Your revised Improvement Plan, of the 16th November, 2006, fails to adequately identify the specific traffic management systems for the different stages of the project including pre commencement, construction phase, interim phase including any time gap between laying of base course / regulation and application of surface finish, and the identification of relevant competent persons.

I hereby direct you to remedy the said contravention 28th February, 2007, and I further direct that the measures in the attached schedule, which forms part of the notice, shall be taken to remedy the said contraventions

Issued by Vincent Darcy

24th January, 2007.

**Safety, Health and Welfare at Work Act, 2005
Section 66 Improvement Notice**

Schedule

1. Identify the hazards and assess the risks associated with the use of vehicles on temporary surfaces such as Dense Bitumen Macadam (DBM) and other incomplete surface dressings at speeds greater than 50 Km/hr having regard to the surface in question. In particular identify the hazards and risks associated with the use of vehicles on incomplete road surfaces at speeds greater than 50 Km/hr for the following three different stages of the project:

- Initial construction phase including the laying of base / regulation course.
- Interim phase including the any time gap between laying of base / regulation course and the application of a wearing course.
- Application of the wearing course.

2. Identify appropriate control measures, associated with the use of vehicles on temporary surfaces such as Dense Bitumen Macadam (DBM) and other incomplete surface dressings, that require road users to travel at appropriate speeds. In particular identify the appropriate control measures associated with the use of vehicles on incomplete road surfaces for the four different stages of the project:

- The pre commencement phase,
- Initial construction phase, including the laying of base / regulation course,
- Interim phase, including the any time gap between laying of base / regulation course and the application of a wearing course.
- Application of wearing course.

3. Develop procedures for the identification and provision of adequate traffic management systems for four different stages:

- The pre commencement phase,
- Initial construction phase, including the laying of base / regulation course.
- Interim phase, including the any time gap between laying of base / regulation course and the application of a wearing course.
- Application of wearing course.

18. It is the appellant's case that in the first place the claim made by the respondents that CCC failed to comply with the direction to submit a revised improvement plan is quite simply incorrect. It did do so even if the respondents considered the plan to be inadequate. The contravention alleged is of s. 65(4)(b) of the Act of 2005, yet this section requires only that a revised improvement plan be submitted. Section 66(1)(b) provides that an improvement notice may be served where a person has "failed to comply with the direction . . . to submit . . . in the case of a notice under s. 65(4)(b) a revised improvement plan." CCC did submit one and hence claims there was no power to issue an improvement notice. It relies upon the necessity for strict interpretation of the penal s. 66 under which the improvement notice was issued.

19. It may be that criminal liability could arise where a revised improvement plan directed under s. 65 is so inadequate as not to constitute a revision at all. However in this case, the revised improvement plan submitted was a document of considerable weight and detail. It demonstrated in the clearest terms a substantial attempt to comply with the s. 65(4)(b) requirement and therefore in my view did constitute compliance with the strict requirements of the Act.

20. The appellant further argued that the terms of s. 66(2) provide clearly that the HSA must specify what the appellant must do to remedy the alleged contravention. The HSA does not do so but merely reiterates the requirement set out in the s. 65 direction to which the revised improvement plan was the response. In so doing, the appellant argues, the respondents have failed to particularise exactly what is to be done in order for the appellant to avoid incurring criminal liability.

21. It seems to me that the appellant is correct in this and that the particularity required by the judgment of O'Neill J. in *Dundalk Town Council v. Lawlor* [2005] 2 I.L.R.M. 106, is absent from their notice which essentially charges inadequacy of the proposals made. That is not enough. More specific detail is required, so the recipient of the notice may be in no doubt as to what is required to avoid criminal liability.

22. The appellant further argues that the purpose of the Act, relates to the health and safety and the protection of workers at work as expressed in the directives. The functions of the respondents are set out in s. 34 and are clearly aimed at this very specific protective role. No role is given to the respondents either in the legislation or the regulations made thereunder in relation to road safety or the protection of road users. Yet it is to just that, the respondents directed their attention when they addressed themselves to the situation existing here. They addressed themselves to safety issues arising while DBM surfaces were in use between phases of work i.e. after the site of roadworks that had existed had been demobilised and the road opened to traffic but before a final surface was laid. During that period of time no road workers would be on site. In fact no site would exist. The respondents are characterising a road as a "place of work" when according to the appellant, on any sensible the view, it is not one.

23. Moreover, the appellant argues that the court should consider that the dominant purpose of the respondents' action herein was the safety of road users. Whilst this may of itself be laudable it is outside the scope of the Act of 2005. In this regard I have been referred to the cases of *Cassidy v. The Minister for Industry and Commerce* [1978] I.R. 297, in re: *Crowley* [1964] I.R. 106 and

Kennedy v. Law Society of Ireland (No. 3) [2002] 2 I.R. 458. In these cases the Supreme Court has held that the dominant purpose of the exercise of an administrative power must be warranted by the scope of that power. The dominant purpose in action must be within the purpose for which those powers were granted. In *McDowell v. Roscommon County Council* (Unreported, High Court, Finnegan P., 21st December, 2004), Finnegan P. held that it was not permissible to use powers conferred by certain provisions of the Planning and Development Act 2000, for purposes even of other parts of the same Act.

24. It seems to me that this argument must be correct. It is clear that the dominant purpose for which the respondents have issued the improvement notice is the protection of road users from a DBM surface which it considers to be unsafe, because it does not have sufficient skid resistance. The concentration on traffic control and monitoring on the site of possible future works whilst indeed a laudable concern is, it seems to me, essentially governed by the purpose of ensuring a certain final road dressing is laid. This dominant purpose has nothing to do with the safety and welfare of workers at work and is not in my judgment, a purpose within the scope of the Act.

25. Some of the questions posed, however, do contemplate the circumstances where there are in fact roadworks in existence and *ipso facto* there is in existence a workplace and workers present thereat, as well as other persons who may be affected. It seems to me that where there are roadworks in progress, their *locus in quo* constitutes a workplace within the meaning of s. 2 of the Act, which provides that:-

"place of work' includes any place..., land or other location at, in, upon or near which, work is carried on whether occasionally or otherwise".

The Act at such time and place is therefore, in my view, applicable and the HSA may give such directions as are within the scope of the Act and for a purpose prevailed therein, i.e. the health and safety of workers at work. Conversely, it is not applicable when there are no roadworks in train and the site has been demobilised and opened up to the unimpeded flow of traffic. This may be so even where it is intended that at some future time there may be a final surface dressing.

Answers to the questions submitted

26.

Q.1. *Whether s. 66 of the Safety Health and Welfare at Work Act 2005, applies to a local authority.*

It is agreed that this question should be amended by the addition of the words "in respect of roadworks carried on by it or on its behalf".

The answer to this question is yes but only where there are roadworks in being or imminent and only in respect of the safety of workers on site and road users present or likely to be present at the locus in quo.

Q. 2. *Whether the Health and Safety Authority ("HSA") has the power to direct the roads authority (as defined in the Roads Act 1993) as to the manner in which it performs its duties under that Act, whether in circumstances where the National Roads Authority has overall responsibility for the planning and supervision of works for the construction and maintenance of national roads, or at all.*

Q. 7 *Does the HSA have power under the 2005 Act to issue an improvement notice to roads authorities in respect of the exercise of their statutory functions with respect to the performance of the roadworks?*

Whilst it is the case that s. 17 of the Roads Act 1993 grants overall responsibility to the NRA for the planning and supervision of works for the construction and maintenance of national roads, nonetheless, s. 13(1) of the 1993 Act expressly provides that, subject to Part 3, the construction and maintenance of all national and regional roads shall be a function of the Council of that county. Thus, whilst planning and supervision of works are a duty assigned to the NRA, maintenance and construction of roads remain a function of the County Council.

Thus, the answer is yes but subject to the same conditions as set out in answer 1.

Q. 3. *Whether the improvement notice issued by the HSA and served on Cork County Council complied with the provisions of the Safety, Health and Welfare at Work Act 2005, and in particular s. 66 thereof, whether on the basis that the improvement notice is sufficiently precise or otherwise.*

As reasoned above the answer is no.

Q. 4. *May the HSA serve an improvement notice on the basis that the contents of the revised improvement plan are inadequate?*

As reasoned above the answer is no.

Q. 5. *Does the HSA have power under the 2005 Act, to issue an improvement notice in respect of works not in being at the date of issue of improvement notice?*

Q. 6. *Does the HSA have power under the 2005 Act to issue an improvement notice in respect of works to come into being after the date of issue of improvement notice?*

It being a necessary pre-condition that an activity (in this case roadworks) is occurring or likely to occur, there must be some clear prospect of activity about to commence. The mere possibility of such activity is not enough.

The answer therefore, is yes but on condition the activity the subject matter of the notice is clearly in prospect and is not merely a possibility.

Q. 8. *Does the HSA have power under the 2005 Act to issue an improvement notice applicable to a type of activity generally as opposed to an actual instance(s) of that activity?*

Because an improvement notice carries a penal sanction for non-compliance, it needs to specify clearly what action is required to be taken in order to avoid incurring criminal liability. A notice addressing itself to a type of activity generally as opposed to a specific

activity does not seem capable of doing so.

The answer therefore is no.

Q. 9. *Is a road on which works have ceased for a significant period between phases of surfacing works and opened to traffic during that period, "a place of work" within the meaning of the 2005 Act?*

Q.11. *Is a road on which works has ceased for a significant period between phases of surfacing works and opened to traffic during that period a place at which work is "being carried on" within the meaning of the 2005 Act?*

For the reasons set out above the answer to these questions is no.

Q.10. *Does the HSA have power under the 2005 Act to issue an improvement notice in respect of a locus which is not a "place of work" within the meaning of the 2005 Act?*

It is agreed by the parties that the answer to this question is no.

Q. 12. *Does the HSA have power under the 2005 Act to issue an improvement notice in respect of a locus at which works are not in the course of being carried on?*

As noted above where an activity (such as roadworks) is occurring or is clearly in prospect, then the HSA does have power to issue an improvement notice. As further noted above it is not enough that such activity is a mere possibility, it must be clearly in prospect.

The answer therefore is yes, subject to a condition of clear imminence.

Q. 13. *Does the HSA have power under the 2005 Act to issue an improvement notice in respect of risks to persons where such risks arise other than in the course of work being carried on?*

In the light of the above other answers and the reasons therefore, the HSA may issue an improvement notice in respect of risks to persons which are likely to arise from a course of work which is likely to be carried on. As further noted above this means work that is clearly in prospect as opposed to work which is a mere possibility.

Q.14. *Does the HSA have power under the 2005 Act to issue an improvement notice in respect of risks to members of the public where such person's presence at the locus is not connected to the performance of works thereat?*

Section 12 of the 2005 Act requires employers to manage their undertaking in such a way as to avoid risk to individuals at the place of work who are not his or her employees. Section 65(1) provides for the power of an Inspector to require an improvement plan where of the opinion there is a risk to the safety, health and welfare "of persons".

In both cases it seems clear that whether it is the individual contemplated by s. 12 or the person provided for by s. 65(1), no requirement, exists that their presence be connected to the performance of works at the *locus in quo*. The power of the HSA to issue an improvement notice arises simply from their presence at the locus in quo under s. 12 and their existence simpliciter under section 65. The answer therefore is yes.

Q. 15. *Does the HSA have power under the 2005 Act, to issue an improvement notice to a roads authority in respect of works by an independent contractor to such roads authority?*

The power to issue an improvement notice is provided by s. 66(1) of the 2005 Act.

This provides as follows:-

"66(1) An inspector who is of the opinion that a person –

(a) is contravening or has contravened any of the relevant statutory provisions, or

(b) has failed to comply with a direction under section 65(1) to submit an improvement plan or, in the case of a notice under section 65(4)(b), a revised improvement plan, or has failed to implement the improvement plan or revised improvement plan,

may serve a written notice (in this Act referred to as an 'improvement notice') on the person who has or may reasonably be presumed to have control over the work activity concerned."

The person, upon whom the notice may be served therefore, is the person who has control over the activity concerned. In this case that means the roadworks in question. It is well established law that an independent contractor is a person who contracts to perform a particular task for another and is not under the other persons control as to the manner in which the task is performed: *Lynch v. Palgrave Murphy* [1964] I.R. 150. Whilst it may well be that the local authority is responsible for the maintenance and construction of all public roads in its functional area, the District Judge has indicated at para. 2.4 of this case stated that he received uncontradicted evidence that 50% (in value terms) of roadworks for which CCC is responsible is carried out by independent contractors. By definition it is these independent contractors who are the persons who have control over the manner in which these roadworks are carried out. In circumstances therefore, where roadworks are being carried out by independent contractors, the local authority in question is not "a person . . . who has control over the activity concerned" and there is consequently no power to issue an improvement notice under section 66(1).

Q. 16. *Does s. 66(1) of the 2005 Act confer on the HSA an entitlement to serve an improvement notice on a person who is not the addressee of s. 12 of the 2005 Act?*

The addressee of s. 12 is every employer who is managing and conducting his or her undertaking. The purpose of s. 12 is to extend the duties imposed on employers by the Act, to persons who although present at the place of work are not employees. Its clear reference is to those employers who are exercising such level of control that enables them to meet the obligations imposed by those duties. There would seem little point in serving an improvement notice on a person who is not in a position to comply therewith and

the Act should not be interpreted thus.

The answer therefore to this question is no.