

STATE (DIVITO)

THE STATE (JOSEPH DIVITO)



-v-

ARKLOW U.D.C. AND THOMAS BYRNE

Judgment of Mr. Justice McWilliam delivered on the 29th day of July, 1983.

The Prosecutor is a restaurant owner carrying on business with his wife in the town of Arklow at premises in Upper Main Street. The first-named Respondent (hereinafter called the Council) is a Local Authority within the meaning of the Gaming and Lotteries Act, 1956. The second-named Respondent is the Town Clerk employed by the Council.

The Prosecutor and his wife are both citizens of Ireland and were both born in the State. They appear to have moved to Arklow about six or seven years ago where they commenced business in premises at No. 23, Upper Main Street which they called the Roma Cafe. They extended this business to the adjoining premises, No. 22, Upper Main Street, intending to develop a fast food and convenience food business there.

They found, however, that this business was not sufficiently successful as to require separate premises and they applied to the Council for planning permission for change of user to use as an amusement centre. This application was refused by the Council but, on appeal, was granted by An Bord Pleanála on 25th February, 1982.

Having obtained this planning permission, an application was brought to the District Court for a certificate authorising the issue of a gaming licence under the provisions of the 1956 Act, and the Prosecutor expended money to comply with requirements made by the County Fire Officer and the Health Authority.

The matter came before the District Court on 19th April 1982, and a certificate was granted notwithstanding objection by the Council. The Council then appealed to the Circuit Court and, on 24th June 1982, the appeal was heard and the certificate was refused. The grounds of objection to the granting of this certificate appear to have been the same as those advanced on the objection to the granting of planning permission with the additional grounds that there were

sufficient, or too many, licences already in the locality and the unsuitability of the premises and the class of persons likely to attend the premises.

Part III of the Act deals with the licensing of amusement halls and funfairs. Sections 12 and 13 provide that Part III shall not have any effect in any area unless there is a resolution of a Local Authority adopting Part III in respect of the whole or a specified part of its administrative area and may by resolution rescind such adoption. Part III was adopted by resolution of the Council of 28th June 1956, in respect of the whole of its administrative area.

Section 15 provides that the District Court may grant a certificate for the issue of a licence permitting gaming at an amusement hall which shall specify the period in the particular year to which it relates for which the certificate is granted. It appears to follow from this that a certificate for a licence can only be granted for one year at most and that a new application must be made each year.

Section 17 provides that, in considering an application for a certificate, the District Court shall have regard to

the following matters:-

- (a) the character of the Applicant,
- (b) the number of gaming licences in force in the locality,
- (c) the suitability of the premises,
- (d) the class of persons likely to resort to the premises,
- (e) the kinds of gaming proposed to be carried on.

I have not been furnished with a copy of the Order of the Circuit Court but it appears from an Affidavit of the Prosecutor that the Circuit Court Judge, in refusing to grant the application, had regard to the number of licences already in force in the locality, the suitability of the premises and the class of persons likely to resort thereto.

This decision having been made by the Circuit Court, the Prosecutor decided to make a further similar application to the District Court having, apparently, made some unspecified modifications to the premises to increase security and to control the attendance of customers, presumably to meet some of the grounds on which the Circuit Court had refused the certificate. Notice of this further application was duly published in the Irish Independent of

5th February, 1983, and was posted to the Council and others on 3rd February. Subsequently the premises were again inspected by the fire officer who required certain additions to be made to comply with new regulations which had recently come into effect. These alterations were completed by the Prosecutor.

Notice by the Council of intention to rescind the adoption of Part III of the Act had been published in the Irish Press and in the Wicklow People at the end of October, 1982.

On 9th February, 1983, the Council passed a resolution rescinding the adoption of Part III with respect of the entire of its administrative area. Notice of this resolution was published in the Wicklow People on 18th February, 1983. The Council explains that the delay between October and February, 1983, was because two applications had been received on 7th December, 1982, from two existing licensees for renewals of their licences which were not to be heard by the District Court until 17th January, 1983. Presumably this was done because section 15 provides that a

certificate shall not be invalidated by the subsequent rescission of a resolution adopting Part III.

At the same meeting on 9th February, 1983, the Council also resolved to adopt Part III of the Act in respect of specified parts of its administrative area. These specified parts did not include Upper Main Street but did include the areas in which the four premises already licensed for gaming are situate.

On 7th March, 1983, the Prosecutor's application for a gaming licence came before the District Court but was adjourned in view of the resolution of 9th February rescinding the adoption of Part III of the Act.

On 11th March the Council published a notice of intent to consider passing a resolution adopting Part III in respect of the specified parts of the administrative area as I have mentioned above.

The Prosecutor brings this application for an Order of Certiorari for the purpose of having the resolution of 9th February quashed. He alleges that the Council has at all times obstructed him in his efforts to try to establish

himself in business, first by objecting the granting of planning permission and then by adopting the procedure to exclude his premises from the areas for which a licence may be granted, and that the resolution was passed specifically to prevent him obtaining a licence and not in the proper exercise of the statutory power. He also argues that the passing of the resolution after he had applied for a certificate is an unwarranted interference with the administration of justice by the Courts as established by Article 34 of the Constitution, and also offends against the concept of constitutional and natural justice.

I have been referred to a great many cases and I append a list of them to this judgment. I do not propose to refer to them all but I accept the propositions that it is an abuse of a statutory power to exercise that power for improper motives, and that the ground that the powers given to any authority must be exercised in accordance with the principles of constitutional justice. See East Donegal Co-Operative Livestock Mart -v- Attorney General (1970) I.R. 317 per Walsh, J., at p. 341. Glover -v- B.L.N. Ltd. (1973)

I.R. 388.

With regard to this aspect of the case it seems to me that the Prosecutor has no legal right to obtain a gaming licence although he has a right to apply for one. Once he has applied and been refused a licence on grounds advanced by the Council and considered by the Court, I can see nothing improper in the Council furthering its policy of restricting gaming in its administrative area in the manner in which it has done. Whatever may be the attitude of individual members of the Council towards the Prosecutor, there is nothing that I can see to suggest that the Council does not genuinely hold the view that there are already sufficient gaming premises in Arklow and that the residential nature of Upper Main Street, such as it may be, ought to be preserved.

The second submission on behalf of the Prosecutor presents more difficulty. Again, I accept the proposition that a statutory order or resolution made after the commencement of proceedings and which determines the issues in those proceedings cannot stand. See Buckley and Others -v- The Attorney General (1950) I.R. 67. But the facts of

this case must be considered closely. The Plaintiff's first application was heard in the District Court on 19th April, 1982. If granted this could not have been for more than a year and probably was granted for a year by the District Court, although this certificate was not before me. It must be very unusual to make a fresh application within a year from the time when an application for the same licence has already been refused unless there has been a significant change in circumstances. However this may be, it has not been suggested on behalf of the Council that the refusal of an application is any bar to a further application immediately after such refusal.

Notice of intention to rescind the adoption of Part III was published by the Council in October, 1983, but it was not until either 3rd or 5th February, 1983, that notice of the Prosecutor's new application was given.

While I would have had no hesitation in making the conditional order absolute had the resolution rescinding the adoption of Part III been made during the course of the proceedings concerning the first application to the Courts,

I cannot see that an applicant who has been refused a certificate by the Court can prevent the operation of resolutions under the Act by serving successive notices of application for a certificate after notices of intention to pass such resolutions have been advertised. The position would be different had there been any material change in circumstances since the hearing of the first application, but no material change has been specified in the Affidavit before me.

Accordingly, I will refuse the Prosecutor's application.

James H. Williams

LIST OF CASES CITED

State (Aberglen Properties Ltd.) .v. Dublin Corporation	(1982) I.L.R.M. 590
Donegal Livestock Mart .v. A.G.	(1970) I.R. 317
Lubrizol Corporation Pty. Ltd. .v. Leichhardt Municipal Council	(1961) N.S.W.R. 11
Boyd Builders .v. City of Ottawa	45 D.L.R. (2nd) 211
Re. Burns & Township of Haldimand Chipendale Estates Pty. Ltd. .v. Council of the City of Sydney	52 D.L.R. (2nd) 101
Buckley & Ors. .v. A.G.	(1960) N.S.W.R. 536
Dunne .v. Hamilton (1982) ILRM	(1950) I.R. 67
D.P.P. .v. Walsh	(1982) I.L.R.M. 290
State .v. Clein	(1981) I.R. 424
Glover .v. B.L.N.	(1981) I.L.R.M. 465
Re. Haughey	(1973) I.R. 388
State (Gleeson) .v. Minister for Defence	(1971) I.R. 264
	(1976) I.R. 280