Neutral Citation No. (2002) NICA 16

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref:	COGC3516
Delivered:	08/03/2002

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

LIDL (UK) GmbH

(Applicant) Appellant

and

CURLEYS LIMITED and SEAMUS KEARNEY

(Objectors) Respondents

COGHLIN J

This is an application on behalf of the appellant company, in accordance with Order 3 rule 5 of the Rules of the Supreme Court (Northern Ireland) 1980, for an order extending the time permitted for the appellant to apply to the High Court to state a case for the opinion of the Court of Appeal in accordance with Article 62 of the County Courts (Northern Ireland) Order 1980 and Order 61 rule 5 of the Rules of the Supreme Court. Mr Deeny QC and Mr Beattie appeared on behalf of the appellant while the objectors were represented by Mr McSparran QC and Mr Dermot Fee QC. We are grateful to each set of counsel for their helpful and succinct submissions.

BACKGROUND FACTS

The background to this application may be set out within a fairly brief compass.

The appellant company is a subsidiary of a very large European business which seeks to market products at highly competitive and discounted prices. The appellant stocks a much narrower range of convenience food items than larger superstores, such as Tesco, Sainsbury or Safeways, and its objective is to achieve savings in terms of scale and space which may then be passed on to the consumer.

In order to be able to market intoxicating liquor at its premises at Unit 1, Station Square, Cookstown, Co Tyrone the appellant company applied to the County Court for the provisional grant of an intoxicating liquor licence. Curley (Dungannon) Limited and Seamus Kearney, whose premises are known as "Vintage Wines", objected to this application. After a hearing, which the court was informed lasted approximately four days, His Honour Judge Lockie gave judgment on the 6 October 2000 refusing the application. The appellant company then appealed to the High Court and, following a further hearing, again lasting some four or five days, Nicholson LJ gave judgment on the 29 June 2001 affirming the Order of the learned County Court Judge and refusing the application.

It seems that the appellant company then wished to apply to Nicholson LJ to state a case for the opinion of the Court of Appeal in relation to a number of points of law. These have been set out in the Notice of Appeal

although, during the course of the application, Mr Deeny QC indicated that the appellant intended to abandon point (3) and that points (1) and (2) should really be read together. The judgment of Nicholson LJ was delivered on the final day of the Trinity term and, it appears that, as a result of the holiday arrangements of the appellant's legal representatives, it was not possible to arrange a consultation until 7 August 2001. A Notice of Appeal was lodged by the appellant's solicitors on the 10 August 2001 but, unfortunately, this appears to have been done on the incorrect assumption that the appropriate procedure was to lodge an appeal in accordance with the provisions of Order 59 rules 3 and 4 rather than by way of application to Nicholson LJ to state a case in accordance with the provisions of Order 61 rule 5. The time for appealing under the former provisions is 6 weeks whereas, under the latter, the time is 24 days. Mr Deeny QC candidly accepted that the appellants were in default.

THE SUBMISSIONS

On behalf of the appellant company Mr Deeny QC submitted that the Notice of Appeal had been lodged within some 17 days of the expiry of time in accordance with Order 61 rule 5 and that, despite the incorrect form, the points of law set out in the Notice of Appeal which had been lodged were precisely the same as those in respect of which Nicholson LJ was to be asked to state a case. He further argued that since the appeal concerned points of law of substance with a potentially wide application and that, in practical terms, neither of the respondents had been prejudiced, it was in the interest of

justice that an extension of time should be granted. Mr McSparran QC and Mr Fee QC, on behalf of the objectors relied upon the provisions of the Rules of the Supreme Court and emphasised the fact that two lengthy and expensive hearings on the merits had already taken place.

CONCLUSIONS

The two points of law in respect of which the applicant seeks a case stated are:

(1) Did the learned Lord Justice properly exercise his discretion in holding the appellant's application inappropriate by reason of the appellant's limited range of own label products, the manner of setting out those products, lack of trained staff and terms of opening?

(2) Was the learned Lord Justice correct in law in holding that Article 7(4)(*e*)(*i*) of the Licensing (Northern Ireland) Order 1996 did not contravene Article 30 of the EC Treaty?

In the course of giving judgment the learned Lord Justice exercised his discretion against the appellant but went on to say that, even if his exercise of discretion was wrong, he would have found in favour of the respondents on the issue of inadequacy. A careful reading of his judgment confirms that, having reviewed a number of relevant factors, the learned Lord Justice did not make any finding in favour of the appellant on the issue of inadequacy nor did he give any indication that he was inclined to do so. In such circumstances, bearing in mind that the onus is upon the appellant to

establish inadequacy, it is difficult to conceive of any useful purpose being served by a further debate of this issue on appeal.

Mr Deeny QC drew our attention to Girvan J's consideration of the question as to whether the equivalent provision of the Licensing (Northern Ireland) Order 1990 infringed Article 30 of the EC Treaty in F A Wellworth & Company v Philip Russell [1997] NI 175 at 182. In that case the applicants, F A Wellworth & Company Limited, sought to rely upon passages from the opinion of Advocate General Jacob in Société d'Importation Édouard Leclerc-Siplec v TFI Publicité (Case – 412/93) [1995] ECR 1 – 179. However, as Girvan J pointed out in the course of giving his judgment, the eventual determination of that case by the European Court of Justice appears to imply that this part of the Advocate General's opinion was rejected. While we note that Girvan J was not inclined to hold that the doctrine of acte claire was applicable, it seems to us that the decision of the learned Lord Justice is consistent with the ruling of the Court of Justice in Criminal Proceedings against Keck (Joined Cases C-267/91 and C-268/91) [1993] ECR 1 – 6097 the correctness of which, as Girvan J stated, does not appear to have been questioned in the TFI Publicité case.

Mr Deeny QC also referred us to the well known decision of Lord Lowry LCJ in Davis v Northern Ireland Carriers [1979] NI 19 at 20, as supplemented by the judgment of Kerr J in Graham v Quinn [1997] NI 338 at 353, with regard to the principles to be adopted by a court when exercising the discretion to extend a time limit imposed by rules of court. The additional

principle added by Kerr J in Graham v Quinn was "that the rules of court are there to be observed" and we would simply observe that this principle is not a mere expression of rigid adherence to formality but reflects the important values of "certainty" and "finality" which are essential components of our legal system.

We have given careful consideration to the propositions advanced on behalf of both applicant and objectors, taking into account the relevant principles and bearing in mind that, in this particular case, the appellant has had a full opportunity to develop its arguments, both in relation to merits and in relation to law, not only before the learned County Court Judge but also on appeal before the learned Lord Justice. Having done so, we do not consider that the balance favours exercising our discretion in favour of an extension of time and, accordingly, we dismiss the application.

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