The Mayor, Aldermen and Burgesses of the County Borough of Limerick v Mary Sheridan

In the Matter of the Courts of Justice Acts, 1924-1947

High Court.

18 September 1952

[1956] 90 I.L.T.R 59

Davitt P.

April 23, September 18, 1952

Local government—Sanitary authority—Order prohibiting erection or retention of temporary dwelling—Whether such order ultra vires the powers of the enabling statute—Case stated—Local Government (Sanitary Services) Act, 1948 (No. 3 of 1948), s. 31, sub-ss. (1) and (2).

Section 31, sub-ss. (1) and (2) of the Local Government (Sanitary Services) Act, 1948, provides as follows:—

> "(1) A sanitary authority may by order prohibit the erection or retention of temporary dwellings on any land or water in their sanitary district if they are of opinion that such erection or retention would be prejudicial to public health or the amenities of the locality or would interfere to an unreasonable extent with traffic on any road.
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> "(2) A prohibition under this section may relate either to specified land or w#ter or all land or water of a specified class and, in particular, may relate to all land or water within a specified distance of the centre line of any road or a specified road."

The complainants were the sanitary authorities for the County Borough of Limerick. By an order dated 11th October, 1951, they, by virtue of the powers conferred on them by section 31 of the said Act, prohibited the erection or retention, without their previous written consent, of any temporary dwelling on any street or roadway within the area of the County Borough of Limerick, being of opinion that any such erection or retention would interfere to an unreasonable extent with traffic on such street or roadway, or on any land in said County Borough situate within the distance of three hundred yards from the centre of any such street or roadway or from any occupied dwellinghouse therein, being of opinion that any such erection or retention thereof would be prejudicial to the amenities of the locality. The defendant resided in a wheeled caravan which she maintained on waste ground at the rere of 49 Parnell Street in the County Borough of Limerick. This caravan was within three hundred yards from the centre line of a street or road and she was therefore clearly contravening the order in question. She was, accordingly, charged at the suit of the Corporation before District Justice Gleeson, at Limerick, on February 20th, 1952, with an offence under section 31 (4) of the 1948 Act. The District Justice dismissed the complaint, being of opinion that the order of the 11th October, 1951, was ultra vires the powers conferred by section 31. He stated a case for the opinion of the High Court, under the provisions of section 83 of the Courts of Justice Act, 1924, pursuant to notice lodged by the complainants. The only question submitted was whether the District Justice was correct in point of law in determining that the order in question was ultra vires.

Held, that the order was ultra vires the powers conferred on a sanitary authority by section 31 and was, accordingly, bad. The order, if good, would have the effect of constituting the corporation a licensing authority for the erection or retention of temporary dwellings and if it had this effect sections 30 and 34 of the Act would be unnecessary. Moreover, if the order were good, its wide effect would involve oppressive and gratuitous intereference with the common law rights of those affected by it.

Case Stated.

This is a Case Stated by me, Dermot F. Gleeson, Justice of the District Court, pursuant to Notice, dated 20th day of February, 1952, in accordance with Rule 199 of the District Court Rules, 1948, lodged by the said complainants, who are dissatisfied with my determination (hereinafter set forth) as being erroneous in point of law, for the opinion of the High Court of Justice. ***59***

The defendant, Mary Sheridan, residing on waste ground at rere of 49 Parnell Street, Limerick, was charged at the sitting of the District Court for the City of Limerick on the 15th day of February, 1952, that she did, on the 7th day of January, 1952, erect or retain within the area of the County Borough of Limerick a temporary

dwelling (to wit, a caravan) in contravention of an order made by complainants as the Sanitary Authority for said County Borough and in force under section 31 of the Local Government (Sanitary Services) Act, 1948, whereby she has become liable to a fine not exceeding twenty-five pounds.

The facts proved or admitted are as follows:—

Section 31 of the Local Government (Sanitary Services) Act, 1948 (No. 3 of 1948), has been brought into operation as the result of an Order made by the Minister for Local Government pursuant to section 3 of the Act, and is now applicable to the County Borough of Limerick. The Order of the Minister is dated 26th day of February, 1948 (S.I. No. 72 of 1948).

On the 28th day of August, 1951, pursuant to section 31 of the said Local Government (Sanitary Services) Act, 1948, the complainants, *i.e.*, The Mayor, Aldermen and Burgesses of the County Borough of Limerick made an order in the following terms:—

> "The Mayor, Aldermen and Burgesses of the County Borough of Limerick, being the Sanitary Authority for the said County Borough by virtue of the powers conferred upon them by section 31, sub-sections 1 and 2 of the Local Government (Sanitary Services) Act, 1948, hereby prohibit the erection or retention, without the previous written consent of the said Sanitary Authority, of any temporary dwelling on any street or roadway within the area of the County Borough of Limerick, being of opinion that any such erection or retention thereof would interfere to an unreasonable extent with traffic on such street or roadway, or on any land in said County Borough situate within the distance of 300 yards from the centre of any such street or road, or from any occupied dwellinghouse therein, being of opinion that any such erection or retention thereof would be prejudicial to the amenities of the locality."

The original Order was proved and retained by the complainants.

The complainants duly complied with the provisions of sub-section (9) and (10) of section 31 of the said Act by making the publications of the Order required therein. No objection was taken by any person pursuant to sub-section (3) of the said section 31 within the prescribed time.

The defendant, Mary Sheridan, is the owner and occupier of a temporary dwelling (to wit, a wheeled caravan) used for human habitation in which she was living, and which, on the 7th day of January, 1952, she retained on waste ground at rere of 49 Parnell Street in the County Borough of Limerick. The waste ground at rere of 49 Parnell Street on which the temporary dwelling was situate was within 300 yards of the centre of a street or road within the County Borough of Limerick.

The expression "or any land in said County Borough situate within the distance of 300 yards from the centre of any such street or roadway" (*i.e.*, within the area of the County Borough of Limerick) "or from any occupied dwellinghouse" would include or comprise practically the entire of the said County Borough (except for a few areas of private land on which it is unlikely that any temporary dwelling would be allowed to be erected or retained).

Objection having been taken by counsel for the defendant that the Order of the 28th day of August, 1951, was *ultra vires* the powers conferred on the complainants by section 31 of the said recited Act, it was argued for the complainants (I) that the Order was *intra vires* the said section 31, even though it was applied to "any street or roadway" since it may be related to "all land or water within a specified distance of the centre line of any road", *i.e.*, that "all land or water of a specified class" must be held to include, if so thought advisable, all land within the County Borough situate within 300 yards from the centre of any street or road; (II) for the complainants it was further argued that the expression in section 31 of the said Act "may by Order prohibit" etc., must be held to include a limited prohibition or a qualified prohibition and that the limitation in the Order of the 28th day of August, 1951, "without the previous consent of the said Sanitary Authority" was such a qualified or limited prohibition and in no way rendered the Order *ultra vires* the powers conferred by the said enabling statute; (III) that the "reasonableness" of of the Order could not be inquired into.

For the defendant it was argued (1) that the effect of the Order of the 28th day of August, 1951, was to prohibit the erection or retention of any temporary dwelling as defined by section 2 (1) of the said Act at any place within the County Borough of ****60*** Limerick except for some few private lands to which it was unlikely that any owner or occupier of a tent, caravan, hut or shed would be likely to gain access; that tourists would be unable to legally retain a caravan in the County Borough without the written consent of the complainants, and that, notwithstanding what is contained in section 34, sub-s. 12 (b), the owner of land adjoining a dwellinghouse could not erect or retain a tent or other temporary dwelling on his own land adjoining. It was further argued that if all the Sanitary Authorities in the country made several orders of the same nature, the effect would be, in practice, to prevent the erection or retention of any temporary dwelling at any place in the State, and that such a

situation was not contemplated by the said Act.

It was further argued for the defendant that the effect of the insertion of the words "without the previous written consent of the said Sanitary Authority" was, in effect, to make of the complainants a licensing authority, and that no such power was given to them in the enabling statute, which solely entitled them to "prohibit". If it had been intended to entitle the complainants to give power to licence, it was argued that some such provisions as to licensing as are given to them by section 34 of the said Act in relation to camping sites would have been included.

It was further argued by the defendant that the complainants having as they are bound to do by section 31 of the said Act, found as a fact that a temporary dwelling "on any street or roadway within the area of the County Borough of Limerick" would "interfere to an unreasonable extent with traffic on such street or roadway" it would be *ultra vires* the enabling powers of section 31, for them to take power to licence in particular cases something which they had so found generally, and that having found that the erection or retention of any temporary dwelling on any land in the County Borough within 300 yards of any such street or roadway "would be prejudicial to the amenities of the locality" it would be *ultra vires* the powers of the enabling statute for them to take power to licence any such erection or retention which they had deemed to be so prejudicial.

I was of opinion that the Order in so far as it took power to licence as distinct from "prohibiting" by including the words "without the previous written consent of the said sanitary authority" and in so far as it took power to licence something which it had found in advance to be either an interference with traffic to an unreasonable extent or to be "prejudicial to the amenities of the locality" was *ultra vires* the powers of the enabling statute, *viz.*, section 31 of the said Act Accordingly I dismissed the complaint on the merits, and awarded the sum of four guineas (£4-4-0) for costs to the defendant.

The question for this Honourable Court is:

Whether the order of the Mayor, Aldermen and Burgesses of the County Borough of Limerick made the 28th day of August, 1951, and a copy of which is included in the case,[1] is *ultra vires* the powers conferred by section 31 of the Local Government (Sanitary Services) Act, 1948, pursuant to which it is expressed to be made?

Dated this 7th day of March, 1952.

Dermot F. Gleeson, Justice of the District Court.

Representation

W. Binchy for the Complainants

J. F. Miley, S.C., and M. Fitzgerald for the defendant

Cur. Adv. Vult.

Davitt, P., in the course of his judgment said that Part IV of the Local Government (Sanitary Services) Act, 1948, comprising sections 30 to 34 inclusive, conferred upon sanitary authorities powers to control and regulate the erection and use of temporary dwellings upon land within these sanitary districts.

The expression "temporary dwelling" was defined in section 2 as including any (a) tent; (b) van or other conveyance (whether on wheels or not); (c) shed, hut a similar structure, used for human habitation or constructed or adapted for such use.

Section 30 empowered the Sanitary Authority to make bye-laws regulating the use of temporary dwellings within the district and in particular to provide for all or any of the matters mentioned in the second schedule to the Act. These include securing that their condition will be habitable and cleanly; preventing injury to the amenities of any locality by reason of filth, refuse, litter or other debris, or noise; securing orderly and decent behaviour by their inhabitants; and preventing nuisances in relation to them.

Section 32 applied the provisions of sections 107 and 110 of the Public Health Act, 1878, to a temporary dwelling which had become a nuisance, and section 33 extended the powers of the Court before which certain proceedings are brought in relation to temporary dwellings. ***61**

Section 34 provided in a comprehensive way for the licensing of land for use as camping ground. It did not come into operation until the Minister for Local Government had made an order to that effect. In such order he might specify the day on which the section is to come into force and the particular sanitary district, or part of district, to which it is to apply. It provided that the sanitary authorities might grant a licence to an occupier of land within the district authorising the use of such land for camping during a specified period of twelve months. Each licence must contain conditions in respect of certain matters which were set out in the section, designed to

prevent overcrowding, to control the lay-out, size and appearance of the temporary dwellings; to preserve amenities; secure public health, decency and orderly behaviour; and to provide adequate supervision. When an occupier of land has been granted such a licence he cannot without committing an offence under the Act, use or allow it to be used for camping on more than eighteen consecutive days, or more than thirty-six days within a period af twelve conmonths. Failure to comply with any condition attached to a licence is also an offence. Section 12 provided that nothing in the section shall prohibit or restrict the use of land for camping (a) if the land is agricultural land and the camping is carried on during the same seasons in each year by persons engaged in farming operations on the land, or (b) if the land is occupied in connection with a permanent dwelling situate on or in the vicinity of such land, and the camping is carried on by no persons other than the occupier of the permanent dwelling and members of his household.

His Lordship stated that section 31 was the section with which the Court was concerned in the present case. It provided by sub-section (1) that a sanitary authority might by order prohibit the erection or retention of temporary dwellings on any land within their sanitary district if they were of opinion that such erection or retention would be prejudicial to public health or the amenities of the locality, or would interfere to an unreasonable extent with traffic on any road. Sub-section (2) provided that a prohibition under the section might relate either to specified land or to all land of a specified class, and, in particular, might relate to all land within a specified distance of the centre line of any road or a specified road.

Sub-sections (8), (9), (10) related to the publication and coming into force of any such order, and sub-section (3) provided that an aggrieved person might apply to the Minister to have an order annulled. Sub-section (4) made it an offence for any person to erect or maintain a temporary dwelling in contravention of such an order and rendered him liable to a penalty not exceeding £25, and in the case of a continuing offence a further fine of £5 a day. Sub-section (5) related to persons convicted of second or sub-sequent offences; and sub-sections (6) and (7) dealt with coastal waters.

By Order made on the 26th February, 1948, under the provisions of section 3 of the Act by the Minister, the Act (apart from Section 34) was brought into operation and made applicable to the County Borough of Limerick. On the 28th August, 1948, Limerick Corporation, pursuant to the provisions of section 31 of the Act, made an order in the following terms:—

> "The Mayor, Aldermen and Burgesses of the County Borough of Limerick, the Sanitary Authority for the said County Borough, by virtue of the powers conferred on them by section 31, sub-section (1) and (2) of the Local Government (Sanitary Services) Act, 1948, hereby prohibit the erection or retention, without the previous written consent of the said Sanitary Authority, of any temporary dwelling on any street or roadway within the area of the County Borough of Limerick, being of opinion that any such erection or retention thereof would interfere to an unreasonable extent with traffic on such street or roadway, or on any land in said County Borough situate within the distance of 300 yards from the centre of any such street or road, or from any occupied dwellinghouse thereon, being of opinion that any such erection or retention thereof would be prejudicial to the amenities of locality."

This order was duly made and published and no application was made to the Minister to annul it.

The defendant, Mary Sheridan, on January 7th, 1952, was living in a wheeled caravan which she maintained on some waste ground at the rere of No. 49 Parnell Street in the County Borough of Limerick. This was within three hundred yards from the centre line of a street or road and she was therefore contravening the order in question. She was, accordingly, charged at the suit of the Corporation, before District Justice Gleeson at Limerick on February 20th, 1952, with an offence under section 31 (4).

The District Justice was of opinion that the order in question was *ultra vires* the powers conferred upon the Corporation by section 31 of the Act, and dismissed the com ***62*** plaint upon the merits, awarding four guineas costs against complainants. He had stated a case for the opinion of the High Court under the provisions of section 83 of the Courts of Justice Act, 1924, pursuant to notice lodged by the complainants under Rule 199 of the District Court Rules. The only question submitted was whether the District Justice was correct in point of law in determining that the order in question was *ultra vires*.

The District Justice found as a fact that, with the exception of some areas of private land which were not within a distance of three hundred yards from any occupied dwelling or the centre line of any road the Order affected all land within the County Borough. It hardly required his finding to make it apparent that if this Order were held to be good any sanitary authority, by the simple expedient of adopting a distance sufficiently great, could bring every square yard of land in its district within the ambit of an order such as the one in question Section 31 did not in his Lordship's opinion confer such wide and drastic powers upon a sanitary authority.

That section gave power to a sanitary authority to prohibit the erection or retention of temporary dwellings on any land in their district provided that they were of opinion:

(a) that such erection or retention would be prejudicial to public health, or

(b) that it would be prejudicial to the amenities of the locality; or

(c) that it would interfere to an unreasonable extent with the traffic on any road.

His Lordship read the sub-section as meaning that the requisite opinion should precede the prohibition; in other words, that it was a condition precedent to the making of any prohibition that the authority should have the requisite opinion. Had sub-section (2) not been added he thought the sanitary authority would have been obliged to form the requisite opinion with regard only to all or any of the following matters, *viz.*:—a particular dwelling, or group of dwellings, or, perhaps, a particular class of dwelling; a particular area or piece of land; a particular locality; or a particular road. Sub-section (2) did widen their scope somewhat, but not to the extent which the complainants assumed. It provided that an order might be made in relation to a specified piece of land, or to land of a specified class. The phrase "land of a specified class" connoted that there might be in any one sanitary district several separate and distinct areas or pieces of land, which had one or more characteristics in common sufficiently clearly to differentiate them from other land in the district. The circumstance that certain land adjoined a highway would not normally be considered sufficiently characteristic, but by sub-section (2) the phrase "land of a specified class" was made to include "land within a specified distance of the centre line of any road or a specified road". Taken by itself, the expression "within a specified distance" was capable of meaning any distance; but it could be made to affect all the land in the county. It was, of course, never intended to have any such significance. If any considerable distance were intended to be covered by the phrase "specified distance" his Lordship did not think that the distance line selected would have been the centre line of the road. The fact that the centre line was selected, and not just the road itself, indicated that the distance was a short one to be measured in feet or yards and certainly not in hundreds of yards. Before making an order relating to specified land or to land of a specified class the sanitary authority should form the opinion that the erection of temporary dwellings on that particular piece of land, or on that particular class of land, would be prejudicial to public health, or to the amenities of the locality in which such land is situate, or that it would interfere to an unreasonable extent with the traffic upon some roads. The sub-sections could not be read as enabling a sanitary authority to say, "In our opinion all temporary dwellings are prejudicial to public health; they are all found to be prejudicial to the amenities of any locality; they are all bound to interfere to an unreasonable extent with traffic on the road; therefore we will not allow any in our district" Nor were they entitled to add, "Nevertheless we reserve the right to permit them in certain circumstances."

In his Lordship's view, there was ample evidence in the words themselves used in sub-sections (1) and (2) of the section 31 to show that the order in the case was *ultra vires* the powers conferred upon a sanitary authority. The terms of the order certainly did not indicate that before it was made the Corporation had formed any of the requisite opinions with regard to any particular dwelling or group of dwellings; any particular area or piece of land; any specified or particular class of land; or any particular locality. In fact, they indicated the contrary.

The matter did not rest there. The order, if good, had the effect of constituting the Corporation a licensing authority generally for the erection or retention of temporary ****63*** dwellings. When the legislature wished to provide for a licensing system in relation to camping ground it made the necessary provision in no indefinite or uncertain terms in section 34. But if section 31 had the effect for which the complainants contended it would give sanitary authorities such control over all land in their several districts that not merely section 34, but also section 30 would be quite unnecessary. The circumstance that the legislature considered it necessary to enact sections 30 and 32 tended very clearly to show that section 31 had not the effect for which the complainants contended.

Moreover, if the order were a good one, then it made it illegal for anyone to erect or retain a temporary dwelling anywhere or, particularly, anywhere in the County Borough, without the written consent of the Corporation. Without such consent, nobody could camp out in a tent or a sleeping porch in his own garden. Harvesters could not camp on agricultural land on which they are working. Yet if section 34 had been brought into operation and applied to the County Borough and bye-laws made thereunder, such bye-laws could not affect such common law rights. They were guaranteed by sub-section (12). Certain other exceptions from the operation of section 34 were created by sub-section 10. If the complainants were correct the common law rights sought to be safeguarded to a limited extent by that sub-section, might also go by the board. Their order was manifestly unjust, and involved such oppressive gratuitous intereference with the common law rights of those affected as could find no justification in the minds of reasonable men. It might be well said that the legislature never intended to give authority to make such an order. It was unreasonable, and therefore *ultra vires* (*Kruse v. Johnson [1898] 2 Q. B. 91*). Judged both from this standpoint and from that of the words themselves of sub-sections (1) and (2) of section 31, his Lordship was of opinion that the order was not within the competence

of the Corporation to make and was, accordingly, bad.

In his Lordship's opinion the District Justice was correct in his decision and the question submitted should be answered in the affirmative.

Representation

Solicitor for the Complainants: J. T. Sexton.

Solicitor for the Defendants: J. Dundon.

Reported by Mary J. Neylon, Barrister-at-Law.

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1. Omitted from this report