

THE HIGH COURT

1983 No. 2450 P

BETWEEN:

DONAL BRENDAN O'CONNELL

PLAINTIFF

AND

SOUTH WESTERN REGIONAL FISHERIES BOARD
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Carroll delivered the 15th day of April 1986.

This case concerns the power of a Fisheries Board to refuse to issue a Salmon Dealer's Licence where a Certificate of Fitness has been granted by a District Justice in accordance with section 158 of the Fisheries (Consolidation) Act 1959 (the 1959 Act).

The facts are as follows:-

In 1978 the Plaintiff, Mr. O'Connell, acquired the company, Waterfall Foods Limited which had a Salmon Dealer's Licence. In 1981 he applied for the licence in his own name. This licence expired on the 31st of December 1981 as specifically provided by section 159 (5) of the 1959 Act. A notice dated the 1st February 1982, addressed to the Plaintiff personally, was sent saying that the closing date for renewal of applications had passed on 31st of January and he was advised that he was not entitled to buy or sell, etc., salmon or trout at any place. He was told that if he required a Salmon Dealer's Licence for the 1982 season he should apply for a new Dealer's Licence under section 159 of the 1959 Act as amended by section 14 of the Fisheries (Amendment) Act 1962 (the 1962 Act).

On the 24th of May 1982 he applied in the name of the company

to the District Court for a Certificate of Fitness under section 158 of the 1959 Act. Under section 14 of the 1962 Act notice had to be given to the Fisheries Board fourteen days before the hearing. The application was returnable for the 15th of June 1982 and there was no appearance by the Board. The Certificate of Fitness was granted by the District Justice. The Plaintiff applied on the 28th of June 1982 for the renewal of a licence enclosing an application in the name of the company and the Certificate of Fitness and a cheque for £25-00 to cover the fee. The application was for a renewal and was not in the required form for a new licence as set out in the Fisheries (Salmon Dealer's Licence) Regulations 1981 (S.I. No. 36 of 1981).

The Plaintiff sent a reminder to the Board on the 13th of July 1982 and telephoned on the 15th of July 1982 when he was told that no decision would be taken until the 14th of August 1982. No licence was in fact granted.

Criminal proceedings dated the 8th of February 1983 were commenced in the District Court against the Plaintiff by the Defendant on foot of eight summonses with the following charges (summarised)

- (1) buying 210 salmon between the 13th of August 1982 and 20th of August 1982 without a licence
- (2) having in his control on the 20th of August 1982 210 salmon unlawfully captured
- (3) keeping for sale 590 salmon without a licence on the 20th of August 1982
- (4) buying 111 salmon between the 20th of August 1982 and the 25th of August 1982 without a licence
- (5) obstructing fishery officers in the exercise of their statutory powers on the 20th of August 1982
- (6) having in his possession on the 25th of August 1982 111

salmon unlawfully captured

- (7) keeping for sale 111 salmon without a licence on the 25th of August 1982
- (8) obstructing fishery officers in the exercise of their statutory powers on the 25th of August 1982.

In these proceedings, which were commenced on the 12th of April 1983, the Plaintiff originally claimed that section 182 (2) (b) of the 1959 Act was invalid having regard to the provisions of the Constitution and contrary to natural justice in placing the onus of proving innocence on the Plaintiff, and further that section 309 of the 1959 Act as amended by section 49 of the Fisheries Act 1980 (the 1980 Act) was invalid having regard to the provisions of the Constitution in purporting to deprive the Plaintiff of a trial by jury. He also claimed that the Defendant was obliged to issue the licence to the Plaintiff and sought an Order restraining the Defendant from prosecuting the charges in the District Court.

The Plaintiff abandoned his claim that the named sections of the Act were unconstitutional and the action against Ireland and the Attorney General was struck out by consent.

A single issue was agreed between the parties for the Court to decide namely:-

"Whether the words "may issue" in section 159 of the Fisheries (Consolidation) Act 1959 are mandatory or whether in the alternative, the Board of conservators are left with a discretion under the Act to refuse to issue a licence, notwithstanding compliance by the applicant with all the matters prescribed in section 159 (1) (a) and (b) of the Act."

The company was joined as a co-plaintiff by Order of the Court.

The following are sections 158 and 159 of the 1959 Act as amended by the 1980 Act with the amendments as set out in the table to the Fourth Schedule of that Act, paragraphs 28 and 29, and with the deletions

specified in section 6 (1) and First Schedule of the 1980 Act.

Section 158

Where a person who carries on or proposes to carry on the business of selling salmon and trout or of exporting for sale salmon and trout in a particular Court District applies to the District Justice for the time being assigned to that Court District for a certificate under this section, such District Justice, if satisfied that such person is a fit and proper person to hold a Part X licence, shall grant him a certificate in writing to that effect.

Section 159

(1) Where-

- (a) a person to whom a certificate of fitness has been granted applies, within twenty-eight days after such grant, to the regional board for the issue to him of a licence authorising him to carry on the business of selling salmon and trout at any specified place or places within such board's fisheries region and
- (b) there is sent with the application-
 - (i) such certificate of fitness, and
 - (ii) the sum of £25,

then, such board may issue to such person such licence.

(2) Where-

- (a) a person to whom a certificate of fitness has been granted applies, within twenty-eight days after such grant, to the regional board for the issue to him of a licence authorising him to carry on the business of exporting for sale salmon and trout from any specified place or places within such board's fisheries region,
- (b) there is sent with the application -

(i) such certificate of fitness, and
(ii) the sum of twenty five pounds,
then, such board may issue to such person such licence.

(3) Every application for a Part X licence to a board shall-

(a) be made in writing

(b) be in the prescribed form and contain the prescribed particulars.

(4) Every Part X licence shall be in the prescribed form.

(5) Every Part X licence shall, unless it is previously terminated, continue in force until the 31st day of December of the year in which it was issued and shall then expire."

The Plaintiff submitted that the policy of Part X of the 1959 Act is to restrict dealing in salmon to licence holders. Therefore the licence confers a benefit on the holder. A District Justice is given the widest discretion to grant a certificate if he is satisfied the applicant is a fit and proper person to hold a Part X licence. If an applicant gets a Certificate of Fitness, there are no other criteria laid down in the Act for the grant of a licence. Therefore, once the Certificate of Fitness is granted and the applicant applies in the prescribed form in accordance with Section 159 (1) (i.e. applies within twenty-eight days from the grant in the prescribed form containing the prescribed particulars, sends the Certificate of Fitness and the sum of £25) then the power to issue a licence must be exercised and the Board has no power to refuse. Since the object of the power to issue a licence is to effectuate a legal right, namely to deal in salmon, the enabling words must be construed as compulsory (see Application of Dunne 1968 I.R. 105).

The Defendant agreed that there are cases where there may be something in the context which leads to the inference that the word

"may" was intended to be obligatory, but claims that this is not one of those cases. The word is prima facie permissive and the onus is on the Plaintiff to prove there is something in the context of the Act as amended which makes it mandatory.

The Defendant submitted that the 1959 Act is a consolidation Act in which only one part, Part X, deals with salmon. One cannot look at Section 159 in isolation, or even at Part X; the entire Act as amended must be considered. The scheme of the Act is to protect fisheries. Every holder of a Salmon Dealer's Licence has a duty to keep a register in the prescribed form of every salmon as provided by the Salmon Levy, Licence Salmon Dealers Registers and a Salmon and Trout Records, Regulations 1980 (S.I. No. 142 of 1980), the purpose being that an inspector can trace the origin and destination of every fish. The purpose is a public benefit which is the control of illegal fishing not to confer benefit on some person to sell fish. The duty to protect fisheries is on each Board of conservators not on the District Justice. The function of the District Justice in issuing a certificate is confined to the personal fitness of the applicant. There may be other considerations, apart from personal fitness, connected with the protection of fisheries and which it would be proper for the Defendant to take into consideration and refuse a licence to a person who had been granted a Certificate of Fitness. At present the particulars required in the prescribed form under the 1981 Regulations (S.I. No. 36 of 1981) are the name of the Regional Board, the address at which the business of selling salmon and trout is to be carried on and the name of the region. It must be signed by the applicant and dated. If an applicant applied to sell fish from the back of a van, the Board would be entitled to refuse as the Section is for authorisation to sell salmon at a specified place or places and there is an

obligation to display the licence and keep the register at a specified place.

Also, if the word "may" in Section 159 is to be construed as mandatory, it would mean that everyone would be entitled to a licence on obtaining a Certificate of Fitness. If a hundred thousand fit and proper persons applied for licences it would make the Act unworkable from the point of view of inspectors checking the registers.

Two cases where the word "may" was construed as mandatory in character were relied on by the Plaintiff in support of his argument.

The first is the case of Dolan .v. Neligan 1967 I.R. 247. This concerned the interpretation of section 24 of the Customs Consolidation Act, 1876 under which the Revenue Commissioners were authorised to return any money overpaid as Customs duties at any time within 6 years after such overpayment on its being proved to their satisfaction that it was paid in error.

It was held in the Supreme Court that it was beyond dispute that the Customs Authorities were in error in charging the duty and that it would have been impossible for the Revenue Commissioners to arrive at a different conclusion. Therefore the case had to be treated as one in which it had been proved to the satisfaction of the Revenue Commissioners that the Customs Authorities were in error and the duties were charged and paid on foot of that error. Since it was stated in Court on behalf of the Revenue Commissioners that even if they had power to return the money, they would not do so, it fell to be considered whether they had any choice in the matter.

It was stated by Walsh J. in his judgment at page 274

"The words in section 25 of the Act of 1876 "hereby authorise to return any money which shall have been over-paid as duties of customs" are the relevant words so far as the section is concerned. The question is whether

these words are obligatory or merely permissive. If they are permissive only then the words import a discretion. Prima facie, the words "hereby authorised" import a discretion. However, the general context must be examined to see if there is anything in the subject matter to indicate that these words are intended to be imperative."

The judgement goes on to state that it would be difficult to conceive that the legislature would authorise a refusal to return moneys wrongly exacted as taxes or duties.

"One must assume, until the contrary is clearly expressed, that a statutory power authorising the repayment or the return of overpayments of customs duties authorises that repayment for the sake of justice or for the good of the person for whose benefit the provision exists." (at p.275)

And later

"The correct construction of the provision in question is that, upon the fulfilment of the conditions laid down by the section, the customs authorities are not lawfully authorised to do otherwise than to return the overpayment." (at p.275)

The second case cited by the Plaintiff was a licensing case - Application of Dunne 1968 I.R. 105. That case concerned the interpretation of section 19 of the Intoxicating Liquor Act 1960. The effect of section 19 (1) and (2) was to give the holder of a hotel licence an option to apply for the right to have a public bar by arranging to extinguish an ordinary 7 day licence anywhere within the State and applying to the District Court for an Order under subsection (1) for such extinguishment. Where the subsection was availed of, there was no provision for giving notice to any person or persons. The application was to be made ex parte and could be made at any sitting of the District Court for the Court area where

the hotel was situated. Subsection (1) provided that the District Court "may order" the extinguishment of an appropriate 7 day licence if the applicant shows to the satisfaction of the Court that he has procured the consent of the holder thereof to its extinguishment. The question arose whether there was any discretion to refuse an Order.

It was held by the Supreme Court that where a statute employs the words "may order" to confer on a Court jurisdiction, subject to the fulfilment by a defined applicant of certain statutory conditions precedent, to make an Order which would result in the applicant acquiring a right or benefit by the provisions of the statute, the said words should be construed as imposing on the Court an obligation to make such Order once the Court is satisfied that those conditions have been fulfilled by the applicant.

In the course of his judgment Walsh J. says at page 116 "It is a well-recognised canon of construction, as Lord Cairns said in Julius .v. Lord Bishop of Oxford (5 A C 214,225) that "where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised." At page 244 of the report Lord Blackburn said:- "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

He then goes on at page 117 to say as follows:

"In my view this canon of construction is applicable to the present case. Section 19 quite clearly exists for

the benefit of persons holding hotel licences. If such holders comply with the requirements of the section they can obtain the right to have a public bar. The section provides the matters upon which the Court must be satisfied before such right can arise. The section does not make any provision for the consideration of any other matters by the Court in question upon such an application, or for the consideration of the views of any other person or persons upon the application. The requirements of the section also produce the result that in any such case the number of licensed premises in the State is reduced by one. It has been the consistent policy of the Licensing Acts since the year 1902 to limit, and in many cases to effectively reduce, the number of licensed premises in the State. Apart from s. 19 of the Act of 1960 the same result in reducing the number of premises is also achieved by the provisions of s. 13 of that Act. Having regard to the general policy of the Acts and the requirements of obtaining new licences, it is remarkable that in this section the Oireachtas has made no provision whatever for the giving of notice of the hearing of objections. This, in my view, is a very strong indication that the extinguishment of the licence in applications under s. 19 of the Act of 1960 was not intended to be a matter of discretion. This was also emphasised by the fact that such an application could be made at any sitting of the District Court."

At page 118 he says:

"In my view, when one has regard to the context in which the use of the word "may" appears in s. 19, and when one has regard to the object of the section and to the fact that

the persons to benefit from the section are clearly identifiable to the absence of requirement as to notice, to the absence of any reference to objections and to the informality of the procedure, one cannot but conclude that the correct construction of the section is that, upon the giving of the proofs required by the section in the particular case, there is no discretion in the Court to decline to make the order sought, namely, that the ordinary seven-day licence in question be extinguished."

The cases cited where the word "may" was construed with its prima facie meaning as being permissive in character (in re Royal Kilmainham Hospital 1966 I.R. 451 and Irish Family Planning . v. Ryan 1979 I.R. 295) are cases where the internal evidence of the Acts in question led to that conclusion, in contrast to other cases mentioned where the internal evidence led to the opposite conclusion. It appears to me that in order to decide the issue in this case, one must look at the whole Act as amended to determine if there is anything in the Act to indicate whether "may" in Section 159 is intended to be imperative.

The general purpose of the Fisheries Acts is to protect fisheries and the functions of the Regional Fisheries Boards as set out in Section 11 of the 1980 Act are generally to conserve, protect, develop and improve fisheries in their respective regions. The power of a Regional Fisheries Board to issue other licences is dealt with under different sections in the Act.

In relation to ordinary fishing licences, the Board is not left with any discretion to refuse once the requirements of the Act are complied with. Under Section 71, if application is made and the licence duty tendered, then it is provided that the Board shall issue such licence to that person.

Under section 72, relating to draft and drift nets, if a moiety of the duty is tendered it is provided that the Board "shall issue the licence". In that case the licence is to last only for thirty days. It lapses if the second moiety is not paid.

Under section 76 in relation to local licences where the Minister has authorised the same under section 74, the Board has no discretion to refuse. In such a case section 76 provides that the Board shall, subject to the provisions of the Act, issue such person with such local licence.

Section 83 concerns trout rod licences. If application is made and the sum of money specified is tendered, the section provides that the Board shall, subject to the provisions of the Act, issue the appropriate trout rod licence.

Under section 280 relating to oyster fishing licences, the Board has no discretion. If a person applies and tenders the licence duty, the section provides that the Board shall issue such licence.

The grant of an oyster bed licence is not given to the Board. It is reserved to the Minister. Section 245 provides that the Minister "may" grant an oyster bed licence but there is provision under section 247 that the Minister "shall" hold a public inquiry.

Section 159 relating to the granting of a salmon trader's licence and section 160 relating to the renewal of such licences are the only sections where the Board prima facie has a discretion in relation to the grant of a licence.

Section 161 deals with the termination of a Part X licence. Subsection (1) provides that such a licence shall terminate on the death of the holder or on revocation by the Minister and may be terminated by surrender by the holder thereof. Subsection (2) provides that if the holder of a Part X licence is convicted of offences under the Act, the Minister may revoke the licence within three months after conviction. Subsection (3) provides for notice

to be given of intention to revoke.

Where a salmon dealer's licence is issued under section 159, the licence authorises the holder to carry on the business of selling salmon and trout at a specified place or places within the district. The application form must specify the address. Under section 162 the holder must display the licence prominently during business hours at that place (and display copies thereof if it relates to more than one place). Under section 163 there is duty on every holder to keep a register at each "place". This is an in-and-out register showing purchases, receipts, sales, disposals, removals etc. It must be entered up within a very limited time and must show the name of the person who bought, sold, or received the salmon or trout etc., or the place to which the fish were removed. Subsection (3) provides that the Register may be inspected at any time during which the "premises" to which the Register relates are open for business. There are penalties for failing to observe the requirements of the Act.

In my opinion the scheme of the Act shows that the decision as to personal fitness for the grant of a licence rests solely with the District Justice under section 158. The Board are entitled to appear before him and make representations (section 14 of 1962 Act). But once that matter is decided, the question of personal fitness no longer arises in relation to the grant of a licence and in my opinion the Board are precluded from reconsidering this aspect.

But it seems to me that there may be matters related to the conservation, protection, development and improvement of fisheries or the implementation of its duty to ensure compliance with the requirements of the Act, unconnected with the personal fitness of an applicant, which would be relevant for the Board to consider.

Such matters might be related to the place or places where the applicant intends to carry on business (e.g. the back of a van) or

a Board might take the view that it would be impossible to monitor the movement of salmon in and out if more than one licence was applied for in relation to the same premises. Another matter might be related to the inability of the Regional Board to inspect the registers through sheer weight of numbers.

There is no provision for restriction in the number of salmon dealer's licences unless implied in a discretion given to the Board. If there is no discretion, salmon dealer's licences would have to be issued without limitation and without regard to the ability of the Board to supervise their operation. There may be many more considerations of which I am unaware unrelated to the personal fitness of an applicant but related to the protection of fisheries which the Board might legitimately take into consideration in deciding whether to grant a licence. If personal fitness were the only criterion, the Act could have provided that the District Justice would issue the licence, instead of just a Certificate of Fitness.

In my opinion it is significant that in the case of all fishing licences no discretion is given to the Board but in the case of salmon dealer's licences the word "may" is used in contrast to the word "shall" in the other cases.

This is not simply a power deposited with a Regional Fisheries Board for the benefit of persons who have obtained a Certificate of Fitness. In my opinion the power to grant the licence must be exercised with the general policy of the Fisheries Acts in mind. It would be ludicrous if the Defendant were obliged to issue licences if the effect would be to undermine or destroy the very purposes for which it was set up. In the Dunne case the Supreme Court held that the general policy of the Licensing Acts was in harmony with the interpretation favouring the obligatory exercise of the power. Under the Fisheries Acts the general policy of protecting fisheries does not appear to be in harmony with the same

interpretation. In my opinion the interpretation favouring a discretion is the correct one.

Insofar as the issue pertains to the facts of this case, the documentary evidence produced shows that the Plaintiff applied in the name of the Company on the form suitable for a renewal of licence. Therefore the Plaintiff did not comply with the requirements of section 159 (1). The application was not in the prescribed form. It was for the renewal of the licence when the Company did not hold a licence. It should have been for the issue of a licence.

Nelle Caswell,

Approved.

18th April 1986.