THE COURT OF APPEAL

UNAPPROVED
Record Number: 2021/19

Whelan J.
Noonan J.
Binchy J.

Neutral Citation Number [2023] IECA 184

IN THE APPLICATION OF GALFER FILLING STATION LTD

BETWEEN/

GALFER FILLING STATION LIMITED

RESPONDENT/APPLICANT

- AND –

SUPERINTENDENT PATRICK O'CALLAGHAN

APPELLANT/NOTICE PARTY

JUDGMENT of Ms. Justice Máire Whelan delivered on the 24th day of July 2023

Background

1. On the 17th June, 2019 Galfer Filling Station Limited (Galfer) brought an application before the District Court pursuant to s. 2(1) of the Licencing Ireland Act, 1902 as amended for an order to revive wine, beer and spirits off licences attaching to a premises known as Spar, Hill Street, Cloghan, County Offaly.

2. Previously, an application in like terms in the name of Triode Newhill Cloghan Limited with Galfer as nominee had been pending before the District Court from the 17th September, 2018 and had been adjourned from time to time and ultimately had been the subject of a judgment of the Court of Appeal on the 15th November, 2018 Record No. 2018/102 [2018] IECA 356.

3. Following the outcome of that appeal the notice of application under the 1902 Act as amended was amended to the sole name of Galfer on the 20th May, 2019. Same was served on Superintendent Patrick O'Callaghan, the notice party, on behalf of An Garda Síochána and was stamped and lodged together with the necessary declaration of service at Tullamore District Court on the 20th May, 2019.

4. Section 2 (as amended) provides: -

> *"2. From and after the passing of this Act, no licence shall be granted for the sale of intoxicating liquors, whether for consumption on or off the premises, except—*
>
> *(1) For premises (not being premises which were licenced by virtue of paragraph 2 of this section) which were licensed at any time during the period of five years immediately before the day on which notice of an application for a grant of a certificate entitling the holder to receive a licence in respect of the premises is given, pursuant to Rules of Court, to the appropriate County Registrar or to the appropriate District Court Clerk, as the case may be: …"*

The other subsections of s. 2 are not relevant. It was incumbent on Galfer to serve notice of the application on the notice party pursuant to law.

Position of the notice party before the District Court

5. It is clear from the face of a consultative case stated signed by District Judge Staines on the 17th July, 2019 that the stance of the Gardaí was that they had no objection to the application.

> *"The Gardaí stated to the Court that there was no garda objection to the application."*

6. However, the District Judge of her own motion was not satisfied to grant the application for the licences on foot of a franchisee agreement which had been presented to

her. Her reservations stemmed from the judgment of the Court of Appeal in *Triode Newhill LHP Limited & Ors. v Superintendent Murray* [2018] IECA 356. She stated:-

> *"On reading the said case I was not satisfied to grant the application for the licences on foot of which the franchisee agreement, which was referred to in the said Judgement at paragraphs 81 and 82 thereof, without the benefit of the advice of the High Court. The Court of Appeal left over two questions unanswered and did not reach a conclusion on same having only addressed the nominee issue."*

Accordingly, of her own motion the District Judge forwarded two questions relating to the proceedings for the opinion of the High Court:

(1) Is the franchise agreement sufficient estate or interest in the premises to allow me to grant the application to revive the licence in the name of the franchisee/applicant.

(2) Is lawful occupation as set out in the franchise agreement sufficient to entitle the franchisee to apply for a licence in its sole name.

The substantive consultative case stated before the High Court

7. It appears from the documentation furnished in connection with this application that the evidence before the High Court judge in the consultative case stated was that a company Triode Newhill Cloghan Limited was the registered owner of the lands on which the Spar supermarket the subject of the transfer of licences stood in the village of Cloghan, County Offaly. That property is comprised in Folio 3043F County Offaly. Clearly it was the District Judge who took the initiative and proceeded to canvass the opinion of the High Court under the consultative case stated process.

8. The comprehensive written legal submissions filed on behalf of the notice party engaged with the two specific questions posed by the District Judge for the opinion of the High Court, correctly noting that the case raised a mixed question of law and fact which

required an assessment of the terms of the agreement and the transaction as a whole. Furthermore, that it was necessary for the High Court judge to consider carefully the judgment in *Triode Newhill LHP Limited v Superintendent Murray*. The various procedural and evidential challenges that confronted Triode in the latter case were briefly outlined, together with the relevant excepts from the judgment of Peart J. in this court. The relevant case law, Irish and English, on the distinction between a lease and a licence and the significance, or otherwise, of "exclusive possession" by a party in occupation as determinative of their legal status was set out with great clarity. At para. 81 the submission observes: -

> *"While there are different outcomes through the cases, whether a lease or mere licence is created is fundamentally a matter of construction of the intention of the parties from the review of the contract and transaction as a whole."*

At no point in the written submissions was it contended on behalf of the notice party that the court should take any particular course of action and in particular it was not contended that the answer to either of the questions posed by the District Judge was in the negative.

9. In the context of the hearing of the consultative case stated in the High Court the applicant acknowledged in writing (para. 4): -

> *"There was no objection to the application by the statutory notice party who is the Notice Party in this court, or any other person."*

The respondent posited that the parties to the franchise agreement –

> *"…have intended and effected the sufficiently robust agreement so as to satisfy the purposes behind the judicially developed principles regarding a licensee having the 'lowest estate or interest' in the premises. According (sic) the provisions of Section 2(1) of the Licencing Ireland Act, 1902 (as amended) may be invoked so as to permit of the grant of the application now pending before the District Court. It is therefore*

respectfully submitted that the answers to the questions posed are (a) yes, (b) yes." (Para. 46)

10. The submissions filed on behalf of the applicant before the High Court emphasised that Clause G which had formed part of the agreement the subject matter of the *Triode* judgment in the Court of Appeal in 2018 had been excised from the relevant Franchise Agreement in issue in this application (para. 9 of submissions). *"There is no such clause in the Agreement provided to the District Court in support of the Applicant's current application."* (Para. 15) There does not appear to have been any comprehensive analysis or engagement with Clause 2.31 of Galfer's franchise agreement on foot of which it sought to contend that it held the lowest estate or interest in the premises for the purposes of s. 2(1) of the 1902 Act. That clause provides: -

> *"2.31 – To acknowledge (in writing) at all times upon being requested to do so by the Licensor, that he has no Estate, Rights or Entitlements whatsoever in the Premises, the business carried out therein (being the Permitted Business or otherwise) or in the Goodwill of the said business which are the sole and exclusive properties of the Licensor."*

<u>The judgment</u>

11. The matter came on for hearing before the High Court and judgment was delivered by Mr. Justice Meenan on the 8th July, 2020. At para. 10 of the judgment the judge noted that counsel appearing for the notice party *"in her submissions took a neutral stance as to the answers to the questions posed by the District Judge."* He then proceeded to consider the issues, observing: -

> *"13. Having considered the terms of the agreement, I conclude that, though the applicant may not be stated to be a tenant, it does have a clear entitlement to occupy*

the premises. Such an entitlement is a sufficient estate or interest in the premises necessary for the grant of the licence sought."

12. Galfer sought costs against the notice party. The arguments advanced on behalf of Galfer in support of a claim for costs against the notice party Superintendent Garda included the notice party himself having not objected to the application in the District Court, that the State authorities who instructed counsel *"took a more nuanced position in the High Court". "The Notice Party before the High Court did not consent to the High Court answering the questions posed in the manner argued for on behalf of the Applicant but adopted a 'neutral' position."* (para. 3, applicant's submissions on costs)

13. It was further argued that the normal rule is to be found in s. 169 of the Legal Services Regulation Act, 2015 and that a party who is entirely successful in civil proceedings is entitled to an award of costs against the party who is not successful in those proceedings unless the court orders otherwise. It was further contended that since the Court of Appeal had made an order awarding the State 50% of the costs of the appeal and of the High Court hearing in *Triode Newhill LHP Limited v Superintendent Alan Murray* contending: -

"In this case, the reality is the parties are the same. Triode Newhill was the franchisor in the earlier case and is also the franchisor of Galfer, a Superintendent again represents the State Authorities."

It was contended that such an order for costs was warranted in order to treat 'like cases' alike and in light of s. 169, that *"the Applicant, who is to be identified for this purpose with Triode Newhill, is entitled to its costs."*

14. The notice party strongly contested the applicant's contention that these constituted public interest proceedings, asserting that as notice party he was entirely neutral on the questions addressed in the case stated and as such therefore he neither won nor lost the

proceedings, there was no "event" from the perspective of the notice party and that accordingly the appropriate costs order in the case was to be no order as to costs.

15. It was asserted that the purpose of the proceedings was to obtain the grant of licences which were for the private and commercial interests of Galfer.

16. Reliance was placed on the decision in *Dunne v Minister for the Environment* [2008] 2 IR 775 in support of the contention that these are not public interest proceedings but were brought and pursued to protect the private interest of Galfer. Reliance was also placed on *Cork County Council v Shackelton* [2007] IEHC 334 and *Sinnott v Martin* [2004] IEHC 3 in regard to the principle that where a litigant seeks to protect his own direct commercial interests, the courts will not generally characterise such litigation as a public interest challenge.

17. It was further contended that the status of the respondent as notice party was significant and that the jurisdiction to award costs against a notice party is limited. It was pointed out in particular that the notice party did not conduct or engage with the proceedings in such a manner as could be said to have engaged in defending or opposing the application.

> *"…the Notice Party had no interest in the Licence Application and has no interest in the outcome of these proceedings. Moreover, there would have been no 'default outcome' in the absence of the involvement of the Notice Party. On the contrary, the Notice Party sought to assist the Court and did not advocate for one outcome or another."*

It was argued that it was difficult to identify the "event" which costs should follow in the case since the licence application was not opposed. It was contended that no basis was identified for the awarding of costs against the notice party in light of the limited role of the notice party who could not be characterised as a "true defendant".

18. On the 29th September, 2020 the judgment on costs was delivered where the judge concluded: -

> *"6. I am satisfied there was an 'event' in that the outcome of these proceedings allowed for the applicant's application for the wine, beer and spirits off licence to now proceed in the District Court. It is correct that the notice party took a 'neutral' position. However, if the notice party had accepted the submissions which were made by the applicant, then these proceedings in this Court would have been unnecessary.*
>
> *7. By reason of the foregoing, the applicant is entitled to an Order for the costs of these proceedings (including any reserved costs) to be adjudicated in default of agreement."*

The appeal

19. The notice party appealed on four grounds:

(1) That the High Court judge erred in awarding costs without having due or any regard to the fact that the appellant was a statutory notice party with no interest in the application.

(2) That he erred in finding that there was "an event" as against the appellant in respect of which costs should be awarded.

(3) That he failed to have due regard to the fact that the appellant did not oppose the respondent's application at the District Court or High Court and was not "an 'unsuccessful party'" for the purpose of a decision as to the allocation of costs but participated solely with a view to assisting the court.

(4) That the judge erred in finding that the proceedings in the High Court would have been "unnecessary" if the appellant took a different approach.

The respondent fully contested each ground of appeal and further asserted that the judge applied the relevant legal principles and in particular relied on s. 169 of the Legal Services Regulation Act, 2015 and that there was such an event and the submissions made on behalf of the applicant to the court had been accepted and resulted in a positive outcome.

20. Additionally, the respondent contended in relation to the Court of Appeal decision in *Triode Newhill LHP Limited*: -

> *"…the Court of Appeal had stated that there was no exception to the rule that costs followed the event and the Notice Party who was, as here, the legitimus contradictor and not merely a Notice Party to litigation, was entitled to his costs as against the Applicant in that case. No special costs regime pertains to the involvement of a 'statutory party', an officer of An Garda Síochána or the Chief State Solicitor in the conduct of litigation before the Superior Courts."*

21. Section 52(2) of the Courts (Supplemental Provisions) Act, 1961 provides: -

> *"(2) An appeal shall lie by leave of the High Court to the Supreme Court from every determination of the High Court on a question of law referred to the High Court under subsection (1) of this section."*

Galfer contends that such leave ought to have been obtained by the notice party in the first instance.

22. However, it is noteworthy that the notice of appeal does not seek to challenge or appeal in any manner the determination by the High Court judge with the questions posed in the consultative case stated forwarded by the District Judge to the High Court for its opinion. It is demonstrable that the appeal is confined to the issue of costs.

23. I am not satisfied that the language contained in s. 52(2) extends to the distinct issue of costs in circumstances such as the present. It will be recalled that in *Hanafin v Minister for the Environment* [1996] 2 IR 321 Hamilton C.J., reviewing the jurisprudence including

Minister for Justice v Wang Zhu Jie [1993] 1 IR 426, observed that the authorities being relied on did not impact upon –

> *"... the fundamental position that if it is the intention of the legislature to oust, except from or regulate the appellate jurisdiction of this Court to hear and determine appeals from the decisions of the High Court, such intention must be expressed in clear and unambiguous terms and it is a matter for interpretation by the court as to whether or not any provision of any law which purports to except from or regulate the appellate jurisdictions of this Court is effective so to do."*

24. Section 52(2) is confined to *"a question of law referred to the High Court under subsection 1 of this section."*

25. A like issue was addressed by Kearns J. in his judgment in *Canty v Private Residential Tenancies Board*, Supreme Court, 30th April, 2008. [2008] 4 IR 592. Kearns J. observed: -

> *"...I think any statute which purports to altogether remove even a limited right of appeal on an issue such as costs should be so phrased as to make that intention clear. That is not to say that express wording in a statute is a prerequisite for this purpose, but rather that the overall intention that no further appeal should lie from any aspect of the decision of the High Court judge should be obvious from a reading of the provision in question.*
>
> *In The People (AG) v Conmey [1975] 1 I.R. 341 this Court stated at page 360:-*
>
> > *'Any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of this Court, or any particular provision seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous.'"*

26. Certainly, s. 52(2) is not clear and unambiguous insofar as the issue of the costs of the consultative case stated is concerned. In my view that ambiguity arising from the precise

words of s. 52(2) warrants that the appeal be allowed to proceed, it not being demonstrated that this court lacks jurisdiction to entertain the appeal in connection with the costs.

Jurisdiction

27. Article 34.4.1 of the Constitution, operative from the 29th October, 2014, provides: -

> *"1. The Court of Appeal shall –*
>
> *(i) save as otherwise provided by this Article and,*
>
> *(ii) with such exceptions and subject to such regulations as may be prescribed by law,*
>
> *have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."*

28. In considering this provision O'Malley J. in the Supreme Court in *Director of Public Prosecutions v H.* [2018] IESC 32 observed: -

> *"The terms of Article 34 are clear – the Court of Appeal has jurisdiction in respect of all decisions of the High Court, save where such jurisdiction is excluded or regulated by law. ... The jurisdiction created by the Constitution cannot be limited save by clear and express language."*

This statement clarifies that any legislative measure seeking to fetter or impede this court's appellate jurisdiction must be clear and unambiguous in its terms. It accords with the language of O'Higgins C.J. in *The People (Director of Public Prosecutions) v O'Shea* [1982] IR 384 where at 403 – 404 he observed:

> *"A law which regulates by subtraction from the Supreme Court's appellate jurisdiction must do so expressly ..."*

Legislative history

29. The predecessor provision to s. 52 of the Courts (Supplemental Provisions) Act of 1961 was s. 83 of the Courts of Justice Act, 1924. The latter provision was expressly repealed by s. 3 of the 1961 Act and Column 3 of its Schedule.

30. Section 83 of the 1924 Act operated as a clear ouster provision.

> *"83.— A Justice of the District Court shall (if requested by any party to any proceedings before him unless he consider the request frivolous) and may (without request) refer any question of law arising in any case before him to the High Court for determination, and the determination of the High Court thereon shall be final and conclusive and not appealable."*

31. It is clear that the Supreme Court in interpreting statutory provisions which ostensibly oust the right of appeal have adopted a restrictive approach. Thus for example the Supreme Court in *Attorney General (Fahy) v Bruen* [1936] IR 750 was concerned with a decision of the High Court on a case stated brought pursuant to s. 6 of the Summary Jurisdiction Act, 1857 which statutory provision specified that such a decision of the High Court was "final and conclusive". The Supreme Court observed that the case stated had been brought under the 1857 Act rather than s. 83 of the Courts of Justice Act, 1924. In circumstances where under Art. 66 of the 1922 Constitution an appeal to the Supreme Court lay from all decisions of the High Court ".. with such exceptions as may be prescribed by law.." and in light of earlier jurisprudence including the decision of the Supreme Court in *Warner v Minister for Industry and Commerce* [1929] IR 582 that "such exceptions" must be found in a law passed subsequent to the adoption of the 1922 Constitution and since there was no such law prohibiting an appeal from a decision of the High Court on a case stated pursuant to s. 6 of the Summary Jurisdiction Act, 1857, such an appeal did lie. Nowhere does s. 52 of the Courts Supplemental Provisions Act, 1961 state that the decision of the High Court in a case

stated on a question of law is final and conclusive. It does not embody, as such, an ouster of jurisdiction. Subsection 2 is enabling in its tenor:

> *"(2) An appeal shall lie by leave of the High Court to the Supreme Court from every determination of the High Court on a question of law referred to the High Court under subsection (1) of this section."*

It embodies a right of appeal subject to a qualification and the question arises as to the precise ambit of that qualification. Leave must be sought where the appeal is directed to the *"determination of the High Court on a question of law referred to the High Court under subsection 1 of this section*".

32. The questions referred by the District Judge to the High Court pursuant to s. 52(1) are to be found within the four corners of the consultative case stated document itself two pages long dated the 17th July, 2019 and signed by District Judge Staines.

33. In effect, s. 52(2) substantially re-enacted s. 56 of the Courts of Justice Act, 1936:

> *"56.—Notwithstanding anything contained in section 83 of the Principal Act, an appeal shall lie by leave of the High Court to the Supreme Court from every determination (pronounced on or after the date of the passing of this Act) of the High Court on a question of law referred to the High Court under that section."*

In *Minister for Industry and Commerce v Healy* [1941] IR 545 leave to appeal was not sought prior to the appellant appealing the opinion of the High Court on a case stated. The Supreme Court found that it had no jurisdiction to hear the appeal, leave not having been obtained from the High Court. Notwithstanding that, by consent, the case had been treated in the High Court as a case stated pursuant to s. 6 of the Summary Jurisdiction Act, 1857.

34. That decision was followed in *Sullivan v. Robinson* [1954] IR 161 where again, leave to appeal had not been obtained from the High Court from a decision on a case stated

pursuant to s. 83 of the Courts of Justice Act, 1924, as amended. O'Byrne J. in delivering the judgment of the court observed:

> *"In the case of the Minister for Industry and Commerce v. Healy it was decided by the Supreme Court that, on a case stated under s. 83 of the Act of 1924, as amended by s. 56 of the Act of 1936, no appeal lies from the decision of the High Court except by leave of the High Court. No such leave was obtained from the High Court in that case nor was any such leave obtained in the present case. So far the position is clear and beyond controversy. I should, however, point out that though the foregoing case was decided in 1940, no reference was made to the existing Constitution ... and no reliance was placed thereon.*
>
> *Article 34 of the Constitution deals with the Courts and clearly contemplates that Courts are to be established thereunder. The Courts, so to be established, include a High Court and a Court of final appeal, to be called the Supreme Court."*

He further noted that –

> *"The effect of Article 58 is to carry over the existing Courts with their pre-existing jurisdictions, subject (and subject only) to the provisions of the Constitution relating to the determination of questions as to the validity of any law."*

35. *In Bonis Morelli; Vella v Morelli* [1968] 1 IR 11 Walsh J. observed at p. 20:

> *"It is unnecessary here to describe the growth of the appeal jurisdiction in respect of the non-appealable discretionary order, that is to say where leave to appeal had not been given by the court or by the judge. It is sufficient to indicate that appeals against such orders were entertained and decided, notwithstanding the absence of leave to appeal, if it could be shown that the judge had acted arbitrarily, capriciously or recklessly, or that he had based his decision upon grounds which the law did not*

recognise, or that there was no evidence of the existence of any lawful ground for his decision."

36. The key issue in the case was that the defendant contended it was well-established that a discretionary order as to costs made in the High Court would not be interfered with on appeal unless shown to have been made on some wrong principle or error of law. The Supreme Court held that the appeal against costs, in light of the provisions of the Constitution was *"a full and open appeal untrammelled and unfettered by such principles and practice as previously applied to appeals against discretionary orders; and that applies notwithstanding also to the provisions of the Rules of the Superior Courts which state that the costs of proceedings shall be in the discretion of the court."*

37. The decision in *Canty* is noteworthy insofar as the decision of Kearns J., with which Macken and Finnegan JJ., expressly agreed had to consider the language of s. 123(4) of the Residential Tenancies Act, 2004 in the context of earlier jurisprudence including *Vella v Morelli* [1968] and *People (AG) v Conmey* [1975] IR 341.

38. Section 123(4) of the said Act provided: -

"(4) The determination of the High Court on such an appeal in relation to the point of law concerned shall be final and conclusive."

At issue was whether the said provision denied a right of access by the appellant to the Supreme Court to argue the appropriateness or otherwise of an order for costs made against him by Laffoy J. in the High Court. Kearns J. observed regarding s. 123 that it was clear from its wording that *"[n]o appeal lies to the High Court from a determination of the tribunal on the merits or on the facts. It is a limited entitlement to appeal on a point of law only"*. In exercising his jurisdiction, the High Court did not purport to determine points other than various points of law which had been canvassed by the appellant. Its ruling therefore is "final and conclusive". He then posited the question *"Can a costs order in these*

circumstances have a quality or character which puts it outside the determination of the point of law so as to permit a limited appeal to the Court?" (para. 8).

39. Having considered Art. 34.4.3 of the Constitution and noting that it is not unusual for an appeal to come before the Supreme Court solely confined to the issue of costs and the entitlement of an appellant to same, Kearns J. noted the arguments of Counsel for the first respondent that the said Constitutional provision makes it clear that the Oireachtas may restrict the appellate jurisdiction of the Supreme Court subject to the qualification in Article 34.4.4 which pertains to the constitutionality of any law noting that Canty was not a case involving a determination by the High Court of any constitutional issue. Having considered the decision of the Supreme Court in *Minister for Justice v Wang Zhu Jie* [1993] 1 IR 426, Kearns J. observed that *"...the question can only be resolved by considering the precise wording of any statute which purports to limit the right of appeal to this court"* (para. 13).

40. It will be recalled that the Supreme Court decision in *Wang Zhu Jie* was concerned with a refusal on the part of a High Court judge to grant leave to appeal and was not addressed to the ambit of s. 52(2) or the identification of circumstances where leave of the High Court is not required to bring an appeal under s. 52(2). It is of significance that Kearns J. having considered *Wang Zhu Jie* noted *"I find nothing in either judgment which addresses the specific point under consideration in the instant case. I believe therefore the Court is to some degree in uncharted waters."*

He observed –

> *"In my view the question could only be resolved by considering the precise wording of any statute which purports to limit the right of appeal to this court."*

41. Kearns J. had no difficulty in accepting the line of jurisprudence concerning s. 39 of the Courts of Justice Act, 1936 as re-enacted by s. 48 of the Courts (Supplemental Provisions) Act, 1961 as altogether precluding any further appeal, even one confined to

costs. However, he contrasted the language of s. 123(4). He observed that s. 123(4) *"is unsatisfactorily drafted in a number of respects"*. It will be recalled that the key words in s. 123(4) of the Residential Tenancies Act, 2004 were "*The determination of the High Court on such an appeal in relation to the point of law concerned"*. That formulation is very close to the language in s. 52(2) which refers to *"... every determination of the High Court on a question of law referred to the High Court"*. In particular he noted that *"the wording contextualises the determination of the High Court by reference specifically 'to the point of law concerned'"*. Likewise, the formulation in s. 52(2) of the 1961 Act could be characterised as contextualising the determination of the High Court by reference specifically to the *"question of law referred to the High Court"*. It certainly falls far short of the requirement for "clear and express language" that one would expect where a qualification or ouster of jurisdiction is intended to take effect. In my view, in light of the views expressed by Kearns J. which represented the unanimous view of the Supreme Court in *Canty* at para. 18 to the effect that: -

> *"...the overall intention that no further appeal should lie from any aspect of the decision of the High Court judge should be obvious from a reading of the provision in question."*

42. The following observations can be made: -

(a) Section 52(2) contemplates that appeals can lie to the Supreme Court from a determination of the High Court on a case stated under s. 52(1).

(b) The language indicates that two categories of appeal are contemplated:

(i) Appeals which are subject to an application to the High Court for leave to appeal; and

(ii) Appeals in respect of which leave is not required.

(c) This does not appear to be a provision which regulates by subtraction from the appellate jurisdiction of the kind contemplated by O'Higgins C.J. in *The People (DPP) v O'Shea* [1982] IR 384 at p. 403. Such a regulation by statute is required to be done expressly as that decision illustrates. Rather, as McCarthy J. observed in *Wang Zhu Jie* at p. 437 –

"…it is simply regulation in that the right of appeal is identified but made subject to leave being obtained."

The language contemplates that the determination in respect of which leave of the High Court must be sought in advance is the question of law referred to the High Court under subsection 1.

43. In my view, had the ambit of the limitation been intended to extend to consequential orders such as the costs order the provisions should have expressly so stated. The appellant has no interest in appealing the determination of the High Court on the consultative case stated, nor indeed could such an appeal be maintainable in circumstances where he maintained an entirely neutral position in the course of the hearing. The procedural pre-requisite specified in s. 52(2) requiring leave of the High Court lacks sufficient clarity and is ambiguous as to whether the legislative intent of the subsection extended to an appeal on the issue of costs alone where the appellant raised no issue regarding the determination of the High Court on the questions of law referred by the District Judge to the High Court under subsection (1) of s. 52 in the first instance. That ambiguity and lack of clarity in my view can only be satisfactorily resolved, particularly in light of the decisions of the Supreme Court in *The People (AG) v Conmey* [1975] IR 341 and *Canty*, in favour of the appellant and accordingly, the jurisdictional point raised on the part of the respondent is rejected.

44. The decision sought to be relied upon by the respondent of the Supreme Court in *Attorney General v Simpson (No. 2)* [1959] 1 IR 335 is wholly distinguishable. It considered

the issue as to whether a District Judge in certain circumstances had jurisdiction to state a case in the first instance and determined on the facts that he did not. Likewise, decisions such as *Eamonn Andrews Production Limited v Gaiety Theatre Enterprises* [1973] IR 295 are distinguishable and concern statutory provisions to the effect that in certain circumstances decisions of the High Court are final and conclusive and not amenable to appeal at all. This is not such a case and I do not find that line of jurisprudence of material assistance. At most, s. 52(2) imposes a qualified prohibition on appealing the determination of the High Court on the question of law as was referred to the High Court unless in the first instance leave of the High Court has been obtained. The ambit of this appeal does not seek to challenge or interfere with the determination of the High Court judge on the two questions of law posed by the District Judge and it is noteworthy that in cases such as *The People (AG) v Conmey* [1975] and *B. v B.* [1975] IR 54 the ambit of the appeal under consideration by the Supreme Court in both cases sought to challenge the determination of the High Court judge on the questions of law posed by the judge and accordingly are not directly on point. Had subsection 2 the statutory intent which the respondent contends, it could have been achieved by the use of a formulation such as "*No appeal shall lie to the Supreme Court from a determination of the High Court under subsection 1 of this section except by leave of the High Court."*

45. In my view the decision of Murray J. in this court in *Bank of Ireland v Gormley* [2020] IECA 102 is distinguishable in circumstances where at issue was the operation of s. 39 of the Courts of Justice Act, 1936, a provision to be found in Part IV of that Act which operates as a prohibition or preclusion on further appeals from decisions of either the High Court or the High Court on circuit; the latter's decisions being *"final and conclusive and not appealable".*

46. Indeed it is noteworthy that Finlay Geoghegan J. in *Kelly v National University of Ireland Dublin (UCD)* [2017] IECA 161 was at pains to delimit the apparently absolute preclusion, determining that it did not apply to an *Isaac Wunder* type order which sought to restrain a plaintiff from bringing further proceedings. The observation of Finlay Geoghegan J. in *Kelly*, as reiterated by Murray J. in *Gormley*, bears further repetition, namely that a legislative exclusion on the right of appeal must be expressed in clear and unambiguous terms. I am not satisfied that the language in s. 52(2) clearly and unambiguously extends to the order for costs made which I note was the subject of separate legal arguments, separate legal submissions and a separate judgment of the High Court, delivered some months subsequent to his judgment and the two questions of law referred to the High Court under s. 52(1) by District Judge Staines.

47. Given the ambiguity it cannot be said with certainty that the right to appeal against the order for costs made in the High Court was conditional or contingent upon the appellant obtaining leave to appeal from the High Court himself.

48. The policy of the court as exemplified in the operation of the presumption against ouster of jurisdiction and the requirement that any statutory attempt to impose a qualification on the general right to appeal in the absence of clear and express language is illustrated in s. 57CM(4) of the Central Bank Act, 1942 as inserted by s. 16 of the Central Bank and Financial Services Authority of Ireland Act, 2004 providing that a decision of the High Court in respect of an appeal from a decision of the Financial Services Ombudsman *"shall be final … except that a party to the appeal may apply to the [Court of Appeal] to review the determination on a question of law (but only with the leave of either of those courts)."* In *Governey v Financial Services Ombudsman* [2015] IESC 38 leave to appeal under this section had been refused by the High Court. Clarke J. (as he then was) held that the Supreme Court was entitled to make its own independent determination as to whether leave ought to

be granted or not in the absence of any criteria being specified in the legislation and would do so where *".. a stateable basis for appeal has been established"*.

49. Clarke J. in *L.O'S v Minister for Health and Children* [2015] IESC 61 was obliquely critical of different formulations of language to be found in various statutory provisions seeking to either oust or qualify the right to appeal to the Court of Appeal: -

> *"...it could not be suggested that only one formula of words should be used, for the desired legislative result may itself be different from case to case. However, it does have to be said that use of different language in different legislative measures designed to achieve the same end is a recipe for confusion."*

50. In the case *Minister for Justice, Equality and Law Reform v McPhillips* and *Minister for Justice, Equality and Law Reform v McGinley* [2015] IESC 47 the Supreme Court had to consider the qualifications on the right to appeal imposed pursuant to the European Arrest Warrant Act, 2003 section 16. Section 16(11) of the Act provided: -

> *"An appeal against an order under sub-section (1) or (2) or a decision not to make such an order may be brought in the Supreme Court if, and only if, the High Court certifies that the order or decision involves a point of law of exceptional public importance, and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."*

Murray J. observed –

> *"16. It is common case that the High Court did not certify any point of law for the purposes of an appeal to this Court, in either case. No application was made for any such certificate. Indeed it is difficult to envisage a discretionary and fact specific question of legal costs ever constituting a point of 'exceptional public importance', which it is desirable in the public interest should be appealed. Absent a certificate*

there can be no appeal against the 'decision', within the meaning of the section, of the High Court. That is self-evident.

17. An issue was raised in these appeals on behalf of the respondents as to whether the appellant was entitled to appeal only that part of the decision of the High Court which concerned the question of costs, notwithstanding the provisions of sub-section (11) and the absence of any certificate. "

51. In analysing the impact of the restriction on s. 16(11) Murray J. observed that it was:-

"...quite broad and emphatic. It says that the appeal may be brought against the High Court 'decision', 'if, and only if' the High Court certifies for an appeal. The provision, enacted in 2003, enjoys the presumption of constitutionality. As indicated, the Oireachtas clearly intended to preclude an appeal, even for important questions of law, unless such questions also fell into the category of being a point of law of 'exceptional public importance'. Even that is not is not enough in itself, it must also be 'desirable in the public interest' that an appeal should be brought. This is for the High Court to decide. Can it be said that the Oireachtas contemplated that insofar as the High Court decision included a decision related to costs in one form or another that there could be separate litigation and a distinct appeal without any of the limitations in the section on an issue concerning only the legal costs aspect of the decision, important as that may be in itself?" (emphasis in original)

Murray J. continued –

"24. The same, or similar, issue was considered in a judgment (ex tempore) of this Court delivered 24th March, 2014 (Unreported) in Browne v. Kerry County Council. In that case the provision in question was s. 50A, sub-section 7, of the Planning & Development Act, 2000, as inserted by s. 13 of the Planning & Development (Strategic Infrastructure) Act, 2006."

He then cites the provision which states –

> *"The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."*

The judgment then continues –

> *"26. In that case the Court concluded, as regards s. 50A(7), as follows: -*
>
> > *'The Court considers that the determination of the question of costs following a decision on the merits of a case in judicial review is an intrinsic and inherent part of the proceedings, and that the determination of the judicial review, as referred to in s. 50A(7), and in particular the reference to the 'decision' of the court in that section, encompasses the decision of the court on costs that necessarily follow in one form or the other as part of the determination of the proceedings. Therefore, the Court considers that the question of costs is not an issue which the legislature intended should be capable of being treated as separate from the High Court decision and the subject of a separate appeal without the necessity of a certificate from the High Court to that effect.'"*

52. Murray J. noted that in the *Browne* case the Supreme Court had considered its decision in the case of *Canty v Private Residential Tenancies Board*. He observed that in that case, the Court was considering s. 123(4) of the Residential Tenancies Act, 2004 and he noted –

> *"28. That section, s. 123(4), of the Act of 2004, is in manifestly different terms to the provision in this case, namely s. 16(11) of the Act of 2003.*

Section 123(4) is also fundamentally different in its terms from s. 50A(7) of the Act of 2000, as was explained by Kearns J. in his judgment in the Canty case. Thus the interpretation of the Court, in the Canty case, of s. 123(4) of the 2004 Act is not relevant to the issue in this case. This appears clearly from the judgment of Kearns J. and the appellants have made no reference to the terms of s. 123(4), no doubt for that reason.'"

53. As noted above there is significant alignment between the language in s. 50(2) of the 1961 Act which the subject of this appeal and s. 123(4) of the Act of 2004 the subject of the appeal in *Canty*. Thus lines of authority where the language is derived from cases where the statutory limitation or preclusion on appeal is quite broad and emphatic do not assist in the instant case for the reasons identified by Murray J. who drew a clear distinction between the principles in *Canty* and those in statutory iterations which were drafted in manifestly different terms. Section 52(2) cannot be said to impose a severe and express restriction on the bringing of an appeal from a decision of the High Court in regard to the costs without leave of the court being obtained. It fails to identify explicitly the category of circumstances and determinations in respect of which no leave of the High Court is required. It refrains from asserting that leave of the High Court is to be obtained in every case where an appeal is sought to be brought. For these reasons I consider that s. 52(2) must be given a similar interpretation as the Supreme Court did in *Canty*. It is unclear whether the legislature intended to encompass decisions with regard to costs. The language differs fundamentally and materially from that to be found for instance in s. 50A(7) of the Planning and Development Act, 2000 as amended, s. 16(11) of the European Arrest Warrant Act, 2003 and other such statutes.

54. The subsection is enabling in its terms *"an appeal shall lie…"* Taking the subsection in its ordinary meaning having due regard to its own terms it says that leave of the High

Court is required to appeal *".. from every determination of the High Court on a question of law."* That is not synonymous *with "from every determination of the High Court under subsection 1 of this section".* On the facts of the instant case the *"question of law referred to the High Court"* relates back to the consultative case stated signed by District Judge Staines on the 17th July, 2019. The Oireachtas has expressly restricted the requirement to obtain leave of the court to appeals concerning a determination of the High Court on a question of law. It cannot be said that the subsection contains clear and express language that could lead one ineluctably to a conclusion, particularly in light of the decision in *Canty*, and having due regard to the fact that the word "decision" does not appear in subsection 2 in light of the lack of clarity and the opaqueness of the language having due regard to the presumption against the ouster of jurisdiction and the principles governing such clauses. I conclude following from the above principles that prior leave of the High Court was not required to pursue the within appeal in this case.

Statutory notice party

55. It is significant that the appellant was not a substantive party to the litigation, he was merely served with proceedings as required by law having regard to the statutory regime governing the revival of licences in respect of wine, beer and spirits off-licences pursuant to s. 2(1) of the Licensing Ireland Act, 1902 (as amended). I am satisfied that it is not correct to assert as the respondent does that *"the parties were in essence the same"* in this and the earlier case involving Triode Newhill. The companies were entirely separate legal entities and held different interests. The respondent herein being a franchisee, Triode Newhill being the franchisor.

56. Given that the legislature has repeatedly recognised – at least from the coming into force of s. 4 of the Licensing (Ireland) Act, 1833 and s. 10 of the Spirits (Ireland) Act, 1854, the crucial role of the Superintendent of the relevant district and of An Garda Síochána in

the proper operation and enforcement of licensing law, it is both a legal requirement and in the public interest that the Superintendent be put on notice of applications and it is clear under the current statutory regime that the Oireachtas has provided for same.

Not a *lis inter partes*

57. Each case must be considered on its own facts. It is of central importance that the notice party was not seeking any private personal advantage and that the issues raised in relation to the granting of the licence sought were of special and general public importance. The citizens are stakeholders in the application process for a licence for the sale of intoxicating liquor and the public interest is served by the proper performance by the Superintendent of his or her functions under the Act. These proceedings cannot be equated to civil proceedings between two private litigants. The scheme of the legislation contemplates that a Judge considering such an application may need the assistance of the Superintendent in the proper exercise of their statutory function which can in appropriate cases include the bringing of material information by way of objection before the licencing judge.

58. The respondent contends that the Superintendent was the "true defendant". The statutory scheme does not reflect that but more importantly, the conduct of the notice party in these proceedings as acknowledged by the trial judge is inconsistent with such characterisation. Furthermore, an evaluation of the status of the issue as to whether in fact the notice party crossed the line and became a "defendant" is not assisted by a consideration of the entirely separate proceedings in *Triode Newhill*. In that regard the decision of Murray C.J. in *Dunne* is of assistance and it is noteworthy that he cited with approval the decision of Dyson J. in *R. v Lord Chancellor ex parte Child Poverty Action Group* [1999] 1 WLR 347:-

> *"The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."*

59. The respondent has not pointed to any private interest that the notice party had in the proceedings. As acknowledged at para. 10 of the main judgment, a neutral stance was maintained on behalf of the notice party as to the answers to the questions posed by the District Judge. That finding of fact has not been the subject of a cross-appeal by the respondent. That being so in my view the judge gave insufficient consideration to the statutory role of the appellant and the risk of a chilling effect on the proper discharge of that function were an order for costs to be made against the notice party in the absence of any suggestion that the notice party had either acted unreasonably or acted in bad faith in any respect. The decision in *Kingston v Licencing Act* [2006] IEHC 93 (Murphy J.) suggests that taking account of the nature of the application and the statutory process to be followed and the obligations of the Garda Síochána in relation to same, noting that the application was not litigation in the nature of a *lis inter partes*, there should be no order as to costs against a party who was fulfilling a statutory function in relation to the application.

60. The decision of Clarke J. in *Cork County Council v Shackelton & Anor.* [2007] IEHC 334 is instructive. The questions posed by the District Judge did not arise by virtue of any engagement, submissions or arguments advanced by or on behalf of the notice party. In fact the notice party had indicated that there was no objection to the application. Accordingly, the notice party cannot reasonably be characterised as an opposing party on the facts of this case having due regard to the manner in which it was conducted before the District Court

and before the High Court in the course of the consultative case stated. In coming to this view I have due regard to the public interest function being discharged under the licensing statutory regime, but more importantly to the stance adopted by and on behalf of the notice party throughout the litigation. In my view it is significant that the notice party had no private interest in the litigation or its outcome. The substance of the consultative case stated hearing before the High Court was not a contest on legal argument as between the respondent and the notice party, and the notice party, acting perfectly properly but entirely neutrally, put relevant authorities before the court but did not contend for one outcome or another. That approach was both appropriate and also necessary in light of the concerns embodied in the consultative case stated and the questions which the District Judge required to be answered.

61. The contention was advanced that had the submissions not been made on behalf of the notice party:-

> *"The matter could have been dealt with on a Monday in the Monday morning list with much less expense had the Respondent acknowledged the correctness of the arguments which ultimately the Respondent appears not to have 'opposed'."* (para. 61, respondent's submissions)

This is contended notwithstanding the very particular concerns raised by the District Judge who had actively considered the decision of the Court of Appeal in *Triode Newhill* and was *"not satisfied to grant the application for the licences on foot of the franchisee agreement… without the benefit of the advice of the High Court*". It is surprising to suggest that the issue could have been dealt with in a summary fashion "*in the Monday morning list".* The events in this case contrast completely with the events in *Triode* where the Superintendent fully contested the consultative case stated and successfully did so and demonstrated to the satisfaction of the Court of Appeal that *Triode Newhill* was not a party entitled to obtain orders renewing spirit, beer and wine licences in the manner sought.

62. It cannot be fairly asserted that the notice party so conducted themselves in the course of these proceedings as to be *".. the true opposing party"* since the notice party neither benefitted nor lost from the decision and accordingly, to use the language of Clarke J. in *Telefonica O2 Ireland Limited v Commission for Communications Regulation & Ors.* [2011] IEHC 380 the *"substance of the situation"* in the context of this litigation is that it was not a suit *"between the applicant and the notice party"*. The stance of the notice party in having no objection to the application in the ordinary way in the District Court and maintaining a neutral stance as expressly acknowledged by the trial judge is inconsistent with such characterisation.

The event

63. The appellant did not "bring about" a consultative case stated. In fact the appellant had no objection and therefore the path was clear for the District Court to make the order sought had she been satisfied that the proofs were in order, and in particular that she had jurisdiction to grant the application for the licenses on foot of the franchisee agreement which Galfer was presenting to the court. That she was not so satisfied prior to obtaining the opinion of the High Court on two distinct issues cannot in any way be laid at the door of the notice party.

64. The filing of written submissions on the part of the notice party in my view was appropriate and did not undermine their neutrality in circumstances where the consultative case stated had been signed on the 17th July, 2019 and no submissions had been filed on behalf of the applicant half a year later. The notice party's submissions were filed on the 17th January, 2020 but those of the applicant and moving party were not filed until the 21st April, 2020, over four months later. In light of the decision in *Triode Newhill* and the tenor of the questions raised by the District Judge by way of consultative case stated, it is difficult to see how this matter could have been disposed of on a Monday morning list. The contents

of the submissions made on behalf of the notice party were necessary and appropriate in all the circumstances. Whilst the recast O. 99 reiterates the general discretion of the court in connection with costs O. 99, r. 1(3) provides that the costs of every *"action, question and issue tried"* follow the event as observed by Murray J. in this court in *Chubb European Group SE v The Health Insurance Authority* [2020] IECA 183 at para. 19(a): -

> *"The general discretion of the Court in connection with the ordering of costs is preserved (s. 168(1)(a) and O. 99, r. 2(1)).."*

The event in this instance is the determination of the two questions in an opinion of the High Court furnished to the District Judge. In substance, the answers were favourable to the respondent's position and accordingly in my view the respondent was *"entirely successful in those proceedings"* within the meaning of s. 169(1) of the Legal Services Regulation Act, 2015. The question is whether the notice party can be characterised as a party who *"is not successful in those proceedings"*. In my view, having regard to the stance adopted throughout from the initial occasion when a position was taken that the notice party had no objection to the application I am satisfied that given the particular nature of this case, given the circumstances that obtained and given the conduct of the proceedings on behalf of the notice party it cannot be fairly characterised that he was *"not successful"* in the proceedings within the meaning of s. 169(1).

65. Even if he could be so characterised, consideration of the nature and circumstances of the case and the conduct of the proceedings by the parties, particularly on the part of the notice party calls in this instance, I consider the following factors to be relevant and necessitating a refusal of an order for costs:

(a) As regards the conduct of the notice party before and during the proceedings. Firstly, the notice party did not bring about the consultative case stated. The notice party did not object in the District Court and that is recorded in the

consultative case stated itself at para. 6 thereof. Even had the notice party brought about the consultative case stated it is clear from the decision in *DPP v Parker* [2015] IECA 296 of Kelly J. that that factor would not necessarily have resulted in an order for costs having been made against the notice party.

(b) Conduct during the proceedings included the fact that the consultative case stated itself was drafted by the respondent without any input from the notice party. The fact that it was over half a year later before the notice party quite properly put in written submissions to ensure that the High Court judge had the necessary information to enable an opinion to be provided as sought by the District Judge. In addition, the High Court acknowledged the neutrality of the notice party throughout the conduct of the proceedings. Therefore I am satisfied that the conduct before and during the within proceedings warrants that no order as to costs be made against the notice party.

66. The notice party was discharging a statutory function and did not elect to join in the proceedings in any other capacity. No benefit enured to the notice party from the outcome of the proceedings and no loss was suffered by him and therefore he was a position of entire neutrality *vis á vis* the outcome of the consultative case stated.

67. It is necessary to have regard to the nature and circumstances of the case and this is provided for by s. 169(1) of the 2015 Act. It is a matter of compelling public interest to ensure that licences for the sale of spirits, beers and wine and the renewal of same are properly granted and that same are not the subject of summary decisions without an appropriate consideration of the necessary proofs. Having regard to the nature and circumstances of the case and the fact that the respondent did not make any written submission for approximately nine months after the consultative case stated was signed by

the District Judge, the behaviour of the appellant in filing written submissions of a wholly factual and neutral nature was warranted and necessary in the public interest in my view.

68. I am satisfied that the decision in *Triode* is wholly distinguishable. There was indeed a fully adversarial hearing where the notice party stepped into the fray and actively opposed the application by Triode. The stance adopted was ultimately proven to be correct and it was demonstrated to the satisfaction of the Court of Appeal that Triode never had a legal entitlement and didn't meet the necessary criteria for the granting of the renewal of the licenses in question for the benefit of the property. Its basic proofs were not in order. Triode had sought to acquire a valuable interest in the renewing of the extinguished licenses for the sale of intoxicating liquor in circumstances where as it transpired it had no entitlement to same. Counsel for the notice party in that case demonstrated the unstateability of the application and the Court of Appeal accepted same. There is no basis for the contention being advanced on behalf of the respondent in this appeal that there is some sort of interchangeability as between the franchisor Triode in the earlier case and the franchisee Galfer in this case. They are and have been held out to be separate legal entities and that fact has been pivotal to the outcome.

69. Even if the Superintendent could be characterised as "*a party*" within ss. 168/169 of the Legal Services Regulation Act, 2015 Part 10 (and I am satisfied for all the reasons stated above that he could not), a proper evaluation of the costs application required an assessment of the nature and circumstances of the case and the entirely reasonable and appropriate conduct of the Superintendent throughout the process. S.169 (1) attaches importance to conduct and an assessment of the facts in light of s.169 (1) (a), (b) and (c) all point inexorably against the making of the order for costs "*having regard to the particular nature and circumstances of the case*". In the context of the operation of the Intoxicating Liquor legislation it is vitally important that the Garda Superintendent be free to make and stand by

honest, reasonable and evidently sound assessments and decisions in the public interest – irrespective of the ultimate decision of the court on the issue - without fear of exposure to orders for costs which represent an untoward exposure to financial pressure. In this instance insufficient regard was had to the risk of prejudice to the public interest that the making of such an order might ultimately have, the nature and circumstances of this case, the fact that the appellant was not a party to a *lis inter partes,* the necessary discharge of statutory duties in the public interest involved and the reasonableness and *bona fides* of the conduct of the Superintendent throughout.

70. Accordingly I am satisfied that the trial judge erred in his approach insofar as he observed that *".. If the notice party had accepted the submissions which were made by the applicant then these proceedings in this court would have been unnecessary"*. Such an approach is to misunderstand the nature and purpose of a consultative case stated and the fact that it was always necessary for the High Court Judge, particularly in light of the decision of this court in *Triode* to engage with the facts and concerns of the District Judge as articulated in her consultative case stated and having due regard to same furnish an opinion on the issues raised. Indeed, it would have been quite inappropriate to suggest that the notice party should have been pushed in one direction or another in relation to the issue or that such a stance would have a bearing on costs. Had the notice party actively engaged as a *legitimus contradictor* in the manner as occurred in *Triode* the position would be materially different. He was not a *legitimus contradictor*. The trial judge fell into error in determining that the proceedings in his court would have been unnecessary.

71. Sight must not be lost of the purpose of a consultative case stated as observed by Finlay C.J. in *Dublin Corporation v Ashley* [1986] IR 781 at 785: -

> *"The purpose and effect of a consultative case stated … is to enable [the judge] to obtain the advice and opinion of the … Court so as to assist him in reaching a correct legal decision."*

Given the regime as provided for under s. 52 a hearing in the High Court was always necessary for otherwise the High Court Judge would not be in a position to supply the opinion as sought.

Conclusions

72. The trial judge erred for the reasons stated in making an order for costs against the notice party. The notice party was entirely neutral throughout the proceedings. Whereas the respondent was entirely successful in the proceedings on the facts of this case, having due regard to the statutory regime the notice party was not unsuccessful in any sense in the proceedings. Whereas the general principle is that costs follow the event, the event was the answering of the two questions posed by the judge. Since the notice party was not an unsuccessful party, there is no equitable basis on which he could be fairly affixed with an order for the respondent's costs in all the circumstances. Accordingly it is necessary that the order of the High Court Judge in regard to costs be set aside and that there be no order as to costs.

Costs of this appeal

73. The respondent has actively asserted throughout that in effect the facts in this case are on all fours with the decision as to costs in *Triode* in respect of which 50% of the costs of the High Court and 50% of the appeal were to be borne by Triode. However, that decision is wholly distinguishable. It was demonstrated that Triode had no lawful basis to seek the *ad interim* transfer of certain wine, beer and spirit off-licences attaching to premises. In fact it is noteworthy that Triode sought leave to appeal to the Supreme Court against the order for costs made in this court and perfected on the 3rd December, 2018. Triode had argued

that it ought to be granted leave to appeal on the basis that the award of costs was unfair because the case had proceeded by way of a consultative case stated. The basis for Triode's application to the Supreme Court is characterised in the determination [2019] IESCDET 122 as follows: -

> *"The applicant indicates that at no point during these proceedings did they seek to challenge the decisions of the District Court, the High Court or the Court of Appeal. The applicant contends that, in those circumstances, it was unfair to be asked to pay 50% of the costs of both the High Court and the Court of Appeal, and that it is therefore in the interests of justice necessary that there be an appeal to this Court."*

It was also contended that the resolution of the issue (around the right of a franchisor to seek the renewal of a license) was *"of general public importance as it will have significant consequences for future licensing applications, for both off-licences in the District Court and on-licenses in the Circuit Court"*.

74. The respondent (notice party's) position in *Triode* was, *inter alia*, that the Court of Appeal had *"decided in favour of the respondent of the substantive issue in the appeal, and therefore that costs in the High Court and Court of Appeal should "follow the event*". They went on to argue that *"... not only has the applicant not been penalised by the costs order, but has benefitted from having been ordered to pay only 50% of the total costs."*

75. This demonstrates the fundamental distinction between the facts in this case and the facts in *Triode*. On no construction of the facts or the judgment of the High Court in the instant case could it be said that the High Court decided the issues in the consultative case stated against the appellant/notice party on the substantive issue. Accordingly it is, in my preliminary view, appropriate that costs follow the event and the respondent pay the costs of the appellant/notice party of this appeal when ascertained. If the respondent contends for a different order as to costs a written submission (no longer that 2,000 words) in regard to

same to be made within 21 days identifying each issue and ground relied on in support of same, the appellant/notice party entitled to make a like submission within a further 21 days of receipt of the respondent's submission aforesaid.

76. Noonan and Binchy JJ. agree with the within judgment.