

## THE HIGH COURT

THOMAS LYONS &amp; ORS

.v.

THE MAYOR ALDERMEN &amp; BURGESSES OF THE BOROUGH OF KILKENNY

Judgment of Mr. Justice Barron delivered on the 13th day of February  
1987.

The Plaintiffs are casual traders. They are the holders of casual trading licences issued pursuant to the provisions of Section 4 of the Casual Trading Act 1980 and are also the holders of casual trading permits issued by the Defendants pursuant to the provisions of Section 5 of the same Act which entitle them to trade in a specified portion of a Corporation car park at John Street, Kilkenny. A dispute has arisen between them and the Corporation in relation to a charge which the Corporation purported to levy for use of this designated area by reason of an Order of the County Manager made on the 21st December 1984 that each casual trader should pay a fee of £100 a year for each car space allotted to him for casual trading in accordance with the terms of his permit.

Section 7 of the 1980 Act empowers a local authority in effect to adopt the provisions of the Act and to designate casual trading areas for the purposes of the Act. In the present case, the Corporation has designated portions of the car park at John Street as a casual trading area. The Plaintiffs by virtue of the licence and permit issued to them by the Minister and Corporation respectively are entitled to

carry on casual trading in certain specified car parking spaces on specified days.

Section 7(8) empowers the local authority to make bye-laws

"in relation to the control, regulation, supervision and administration of casual trading in casual trading areas in its functional area, including bye-laws specifying the maximum area that may be occupied in a casual trading area by a person engaged in casual trading."

In pursuance of its power to make bye-laws, the Defendants on the 10th December 1984 made certain bye-laws of which only No.25 is material to this case. It is as follows:-

"Charges for rental of trading bays will be decided from time to time by the County Manager in accordance with the Local Government (Financial Provisions)(No.2) Act 1983."

Section 2 of the 1983 Act is as follows so far as is material:-

"2.(1) Subject to section 4 of this Act, any existing enactment which requires or enables a local authority to provide a service but which, apart from this subsection, does not empower the authority to charge for the provision of the service shall be deemed so to empower that authority.

(2) Subsection (1) of this section shall have effect as regards an enactment notwithstanding the inclusion in the enactment of a provision which either precludes a local authority from charging for the provision of a service or requires that a service be provided by such an authority free of charge

(3) Subject to Section 4 of this Act, notwithstanding any provision in any existing enactment whereby there is specified -

(a) the amount of the charge which may be made by a local authority in respect of a service which the authority is required or enable to provide, or

(b) an amount which a charge described in paragraph

(a) of this subsection is not to exceed,

the local authority may make a charge which exceeds the amount so specified, and any charge made by virtue of this subsection shall for all purposes be deemed to have been duly made under the enactment."

Section 4 of the Act is not material so far as the present proceedings are concerned.

On the 21st December 1984 the County Manager in purported pursuance of bye-law No.25 ordered as follows:-

"Casual Trading Act, 1980.

The Corporation having formally designated portions of the John Street - Wolfe Tone Street car park as a designated area in accordance with section 7 of the above Act at their meeting held on 14th May 1984 and having designated a portion of the parking area at the parade as a designated area at their meeting held on 5th November 1984, and having made bye-laws under section 8 of the Act at their meeting held on 10th December 1984, I hereby Order that in accordance with Article 25 of the said by-laws the following charges be implemented from 1st January 1985:-

"A charge of £100 per annum payable in advance for each car bay occupied in accordance with section 2 of

the Local Government (Financial Provisions)(No.2) Act 1983. This charge to be additional to the fee of £20 payable for permits."

The Plaintiffs submit that this Order is ultra vires the Defendant and the County Manager. The Defendants contend that it is intra vires and is intended to cover the cost of providing services for the traders such as the provision of bins, lighting, security etc.

Essentially, a bye-law is a regulation which specifies limitations on those entitled to use the area subject to such bye-laws. In the present case the Plaintiffs by virtue of the permits issued to them by the Defendants are entitled to use the car park in accordance with the bye-laws. This permit is granted pursuant to the provisions of Section 5 (1) (a) which is in the following terms:-

"Where there is a casual trading area in the functional area of a local authority, then, subject to the subsequent provisions of this section, a local authority shall, on the application in writing therefor of a person who is the holder of a casual trading licence for the time being in force and on payment of a fee of £20, grant to the person a permit (referred to in this Act as "a casual trading permit"), in such form and specifying such matters as the local authority may determine, authorising the person to engage in casual trading at one place only in one specified casual trading area in the functional area of the authority on specified days."

Section 7 (a) of the Act must be construed in conjunction with this latter provision. While the bye-laws are to be made in relation to the control, regulation, supervision and administration of casual trading in "casual trading areas", such bye-laws must nevertheless recognise the right of permit holders to use such area. To impose a further charge is a denial of this right. For this reason, the bye-law is ultra vires the Corporation. This is not to suggest that a bye-law cannot impose a charge as for example the requirement to display a ticket for which the driver has paid when parking in designated areas. The choice is between parking and paying the charge or not parking. That is a totally different situation from the present where the Plaintiffs are entitled to park and have in effect paid for the right to do so but are now being compelled to pay a further sum.

In any event, the Defendants alone have the power to make bye-laws. They have no power to delegate this function. Accordingly, the purported imposition of a charge made by the County Manager is invalid.

The impugned bye-law is in effect an attempt to combine the provisions of Section 7 (8) with the provisions of the Local Government (Financial Provisions) (No. 2) Act 1983. Although not strictly arising on the pleadings, the proceedings were also argued upon the basis that the County Manager had power to impose the impugned charge under the powers vested in him by virtue of the provisions of Section 2 of the 1983 Act. Counsel for the Defendant was in effect representing the County Manager and was fully authorised to argue this issue on his behalf. I intend therefore to express my views on this aspect of the case so far as they bear on the validity of the charge

on the basis that it was in reality imposed under the 1983 Act.

The condition precedent to the making of such a charge is set out in section 2(1), and is that there must be an "existing enactment which requires or enables a local authority to provide a service". A service as defined by section 1(1) means:-

"Any service, facility, licence, permit, certificate, approval or other thing which a local authority may render, supply, grant, issue or otherwise provide in the performance or exercise of any of its functions, powers or duties to any person or in respect of any premises and includes the processing of an application for such a licence, permit, certificate or approval."

Once the condition precedent is fulfilled, then the charge for the service may be imposed even though the particular statute does not authorise the making of a charge, precludes the making of a charge or requires it to be provided free. Equally, where a charge or maximum charge is specified, this may be exceeded.

In the present case, the Order of the County Manager dated the 21st December 1984 is headed Casual Trading Act, 1980. The services for which it is contended that the charge is being made are the provision of litter bins, lighting, security etc. None of these services is however provided under the provisions of the 1980 Act. On this basis also the proposed charge is ultra vires and invalid. Nevertheless insofar as any service as defined by the 1983 Act is provided by the Defendants, the County Manager would be entitled subject

to the other provisions of Section 2 of the 1983 Act to apply the terms of that section.

There will be an Order accordingly declaring bye-law Number 25 and the Order of the County Manager dated the 21st December, 1984 made in purported pursuance of such bye-law to be invalid.

*Henry Garner*  
*13/2/87.*