

THE HIGH COURT

On appeal from/

THE CIRCUIT COURT

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961  
IN THE MATTER OF THE LICENSING ACTS, 1833 TO 1986  
AND IN THE MATTER OF THE INTOXICATING LIQUOR ACT, 1960 SECTIONS 14  
AND 15  
AND IN THE MATTER OF THE APPLICATION OF BRENDAN McGRATH

Judgment of O'Hanlon J., delivered the 4th day of August, 1987.

This appeal relates to an application made to the Circuit Court on the 7th May, 1987, by the Applicant, Brendan McGrath, pursuant to the provisions of Sections 14 and 15 of the Intoxicating Liquor Act, 1960, in respect of premises situate at 33 Upper O'Connell Street, in the City of Dublin. The Applicant proposed to reconstruct the said premises, which had been substantially damaged by fire, and to secure the extinction of a seven-day on-licence held in respect of licensed premises in the immediate vicinity of the new premises, in compliance with the requirements of Sec. 14 of the Intoxicating Liquor Act, 1960, such other premises having been demolished or to be demolished not more than two years before the date of the application to the Circuit Court. He took the unusual course of offering for consideration by the Court two alternative premises for demolition and extinction of the licence attached to such premises - one of them being the

Hamlet Lounge formerly situate at the corner of Summerhill and Middle Gardiner Street, and the other being the Elbow Inn, 32 Mary Street, Dublin 1. The application was refused by the learned Circuit Court Judge, and from this decision an appeal has been taken by the Applicant to the High Court.

The application was contested in the Circuit Court, and again in the High Court, by a substantial number of publican-objectors, in reliance upon two grounds which are referred to in Sec. 14 of the Act of 1960. They claimed, in the first place, that the application should fail on the ground that neither of the two licensed premises marked for demolition should be regarded as being within the immediate vicinity of the site of the premises at No. 33 Upper O'Connell Street. Secondly, they claimed that the Applicant had failed to show to the satisfaction of the Court that the location of the new premises at 33 Upper O'Connell Street rather than on the site of either of the original premises was unlikely of itself to have a materially adverse effect on the business carried on by the objectors, or some one or more of them, in licensed premises in the neighbourhood.

The objecting publicans were all located in Parnell Street, just around the corner from No. 33 Upper O'Connell Street, and a good deal closer to that premises than to the Hamlet Lounge or the Elbow Inn. The distance of the Hamlet Lounge from 33 Upper O'Connell Street was given as approximately 421 yards, and the Elbow Inn from 33 Upper O'Connell Street as approximately 645 yards (ordinary walking distance in each case). The objectors included the licensees of the Shakespeare (76 yards from 33 Upper O'Connell Street), the Parnell Mooney (82 yards),

the Metro (109 yards), Judge's (142 yards), and the Welcome Inn (153 yards).

I have no doubt that the new premises, if licensed, would be much more suitable than either of the original premises for the business of selling intoxicating liquor, as the Applicant wishes to provide a luxurious, up-market-type premises suitable for the city's principal thoroughfare in substitution for a premises with very restricted accommodation and facilities at the Elbow Inn or a premises catering very much for the lower end of the market at the Hamlet Lounge.

As to the expression "immediate vicinity", this was construed by the Supreme Court in the case of Leo Ward, Applicant, 101 ILTR 161, which involved a move of some 312 yards from Cork's Coal Quay round into Patrick Street. Replying in favour of the Applicant on a Case Stated, the Supreme Court (per O'Daly C.J.) said:

"The term 'immediate'... does say close vicinity or close neighbourhood but, as the dictionary entry indicates, this is still a loose usage and signifies a distance which is of no account.

In its policy of encouraging the abandonment and demolition of old and unsuitable licensed premises, the Oireachtas did not wish to lay down any very precise test of propinquity and considered that this was a matter that could in each case be decided by the Courts, with the safeguard that licensing of the new premises should not be unreasonably detrimental to other licensed premises in the neighbourhood of the new premises."

This judgment has been cited in numerous cases ever since but the manner of its application has varied considerably from case to case. In the case of James Walls, Applicant, 103 ILTR 113,

Mr. Justice McLoughlin refused to sanction a move from the Cosmo Bar (on demolition) situate at the corner of Hawkins Street and Townsend Street, to the Savoy Cinema, O'Connell Street, a distance of some 733 yards. He felt that someone enquiring outside the Savoy Cinema site about the whereabouts of the Cosmo Bar, would be told that it was in a different neighbourhood altogether, involving a journey up the length of O'Connell Street, across the Liffey and on up to the end of D'Olier Street. A later application seeking to extinguish the same licence for the purpose of obtaining a new licence for the premises known as "Jonathan's Restaurant" situate in Upper Grafton Street, was similarly refused on the basis that the two premises (which were some 720 yards apart) were located in completely different trading areas of the city and could not be regarded as being in the immediate vicinity of each other. Butler J. allowed an application in Limerick involving a move of some 300 yards from the Imperial Hotel to the Savoy Cinema at the corner of Bedford Row/Henry Street, both being situate within the business and commercial centre of Limerick. (Irish Cinemas Ltd., Applicant, 106 ILTR 17). A later application brought on behalf of 19 Upper O'Connell Street, which had failed in its effort to avail of the Cosmo licence, was successful when the alternative offered for demolition was No. 42 Parnell Street, the distance involved being some 420 yards.

The latter application should form the most cogent precedent in support of the Applicant's contention in the present case that the Hamlet Lounge should be regarded as being in the immediate vicinity of No. 33 Upper O'Connell Street. What was involved in the earlier case was a short journey down O'Connell Street, a

turn to the left and a somewhat longer journey down Parnell Street to No. 42 on that street. What is involved in the present case is a very short journey of a few yards only, to the corner of Parnell Street, a turn this time to the right, and a journey down that street to the point of the intersection with Gardiner Street. The over-all distance in each case is virtually the same. The journey in each case involves a sudden move from the still spacious and impressive surroundings of O'Connell Street into the narrow and much less impressive shopping areas of Parnell Street. I have come to the conclusion that the circumstances of the present case are so similar to those which arose in the case of James Walls, Applicant, and in the case of the transfer from No. 42 Parnell Street to No. 19 Upper O'Connell Street, both as regards the distance intervening between the demolished premises and the new premises and as regards the move from a street of a particular character into an adjoining one of superior character from the trading point of view, that I feel I am coerced into holding that in the present case also, the two premises - the Hamlet Lounge and No. 33 Upper O'Connell Street - should be regarded as being in the immediate vicinity of each other for the purposes of Sec. 14 of the Act of 1960. I reach this conclusion not without some difficulty, and it appears to me that in doing so I am pushing the interpretation of "immediate vicinity" to the limit, or very close to the limit, to which it can go in relation to an Urban area without doing violence to the language of the Section. I would have difficulty, for example, in justifying in principle the move from Lower Sean MacDermott Street to Fleet Street on the other side of the Liffey, (a distance of about 1500 yards), which was one of the examples cited to me in which an application under Sec. 14

had been successful in the past, and I would have the same initial reaction in relation to another move which, I am informed, took place as between City Quay and the Irish Life Centre in Lower Abbey Street, a distance of almost half a mile.

If the Applicant in the present case had to rely on the demolition and extinction of the licence held in respect of the Elbow Inn, I feel that I should have decided that it could not be regarded as being within the immediate vicinity of No. 33 Upper O'Connell Street, by reason of the greater distance separating the two premises.

There remains for consideration the question whether it has been established to the satisfaction of the Court that the location of the new premises at 33 Upper O'Connell Street as a licensed premises rather than on the site of the Hamlet Lounge is unlikely of itself to have a materially adverse effect on the business carried on in any licensed premises in the neighbourhood.

In dealing with this question it appears to me that the Court should have regard not merely to the stated intentions of the Applicant as to the manner in which he proposes to carry on his business and utilise the premises, if licensed, but also to the potential for the future in the hands of the Applicant or of any assignee to whom he might see fit to dispose of the premises. In addition the Court cannot close its eyes to the fact that the premises, once licensed, may at any time become the subject of an application for an extension of the licensed area under Sec. 6 of the Licensing (Ireland) Act, 1902, as amended by the Intoxicating Liquor Act, 1960.

In the present case I have no difficulty in coming to the conclusion that a licensed premises on the O'Connell Street site would attract a much bigger and better business than if located on the site of the old Hamlet Lounge, which is located in a dingy and derelict part of the city, although only a stone's throw away from the heart of the metropolis. However, there appear to be significant limitations on the potential of the site for the purposes of the licensed trade. When completed it will be a tall, rather narrow building, comprising three storeys over basement with a total floor area of approximately 5109 square feet; but of this area I was informed that only 1981 square feet would be available for the accommodation of the public - the remainder being swallowed up in service areas, toilets, stock rooms, and facilities required to satisfy the requirements of the local authority and Fire Officer. The evidence was to the effect that the public area would only comprise 36% of the total floor area, and I did not form the impression that there was any real scope for expansion for the future in relation to the premises now held by the Applicant.

The estimate made by the Applicant's Architect of the number of customers that could be accommodated with comfort at any one time was 160, but this estimate was hotly contested by the Architect called on behalf of the objectors - his estimate being a total somewhere between 262 and 344.

Other evidence on this aspect of the case was to the effect that the licensed trade had experienced a serious falling-off in business on a nationwide basis for some years past; that

a total of 24 public-houses had been closed down or demolished in that part of the inner city in which O'Connell Street and Parnell Street are situate - 11 of them being in Parnell Street itself, and that, of those remaining in Parnell Street, staff had to be reduced and profits were declining. Some have diversified into providing disco entertainment and have built up a new clientele by this means. As regards passing traffic, I was informed that between 8 a.m. and 6.30 p.m. 61,338 persons passed along that part of O'Connell Street north of Abbey Street.

The final impression left with me by the evidence is that there is huge, potential passing trade in the area, both by day and by night; that there are still very many licensed premises in Parnell Street, ready to siphon off any trade, whether local or passing that may be available; that an up-market premises in O'Connell Street would certainly have a better trading position than any of its competitors in Parnell Street, but that the majority of those likely to patronise a new licensed premises of the type proposed for No. 33 would not be attracted to Parnell Street, save perhaps to the Parnell Mooney and the Shakespeare. In the case of these two premises, I believe that No. 33 Upper O'Connell Street, because of the limitations of its size and capacity, should not present a serious threat, and that the volume of potential custom for all three is of such magnitude as to offer a good return on their investment to all concerned.

For these reasons I conclude that the application should succeed, and I propose to reverse the Order made by the learned Circuit Court Judge and to make a declaration as sought by the Applicant



under Section 15 of the Act of 1960 on the basis that the licence formerly held in relation to the Hamlet Lounge is extinguished for the purposes of the present application (if still subsisting).

*R. J. O'Hanlon*

R. J. O'Hanlon.

3rd August, 1987.

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Cases cited:-

Leo Ward, Applicant - 101 ILTR 161

James Walls, Applicant - 103 ILTR 113

Irish Cinemas Ltd., Applicant - 106 ILTR 17