

Neutral Citation No: [2023] NICA 89

Ref: HOR12102

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 22/78564

Delivered: 20/03/2023

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**IN THE MATTER OF AN APPLICATION FOR AN ORDER DIRECTING THE
COUNTY COURT JUDGE TO STATE A CASE TO THE COURT OF APPEAL**

**AND IN THE MATTER OF A DECISION OF HIS HONOUR JUDGE KINNEY
DATED 30 MAY 2022**

**Andrew Drummond, Company Secretary, acted for the Appellant
Ashleigh Jones (instructed by the Departmental Solicitor's Office) for the Respondent**

Before: Horner LJ and Fowler J

HORNER LJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against the decision of Judge Kinney to refuse to state a case for the Court of Appeal arising out of the alleged failure on the part of Metro Inns Ltd ("Metro") to pay rates in respect of premises at 657 Antrim Road, Belfast, otherwise known as the Lansdowne Hotel.

[2] The amounts claimed by the respondent in respect of three different periods were:

- (a) £40,407.30.
- (b) £112,204.06.
- (c) £66,121.99.

[3] We were told that the only amount disputed in respect of rates was the sum of £40,407.30, which we will refer to as the relevant amount. We were told that the unpaid rates are disputed on the basis that during the period under discussion the hotel was not occupied by Metro but by one or probably two other operators on foot of separate operating agreements.

[4] Judge Kinney refused the requisition to state a case from Metro for the following reasons:

- (i) The judge, having considered the requisition and on assessment of the papers, has been unable to identify a point of law in which the Court of Appeal should properly be asked to give an opinion.
- (ii) The judge is of the opinion that the application is frivolous, vexatious and unreasonable by virtue of Article 146(4) of the Magistrates' Court (Northern Ireland) Order 1981 and Article 61(4) of the County Courts' (Northern Ireland) Order 1980, he is not obliged to state a case.
- (iii) The judge is satisfied that the requisition contains unfounded assertions which do not reflect the evidence in the case and the appellant seeks to engage in a merits review of the case by a generalised contention that the decision reached by the court was not open to it and that the facts could not have led to the decision reached.

[5] Metro was represented before us, with the permission of the court, by Mr Andrew Drummond, the Company Secretary.

Background Facts

[6] The circumstances of whether Metro occupied the premises during the disputed period is of central importance. It was suggested by Mr Drummond that other persons had been in occupation of the hotel premises on foot of various operating agreements, including Metro Inns (Belfast) Ltd and Kirkpatrick Management. Therefore, Metro could not be liable for rates in respect of the disputed period.

[7] The judgment of District Judge Mullan makes interesting reading given that the issue of who occupied the Lansdowne Hotel was an issue before her in respect of the renewal of the hotel licence.

[8] She concluded:

“The evidence provided by persons who testified on behalf of the applicant company (Metro) was far from satisfactory. It is clear that either this court was lied to, or the Land Property Agency was lied to. I am not satisfied that the applicant company, has satisfied the court that it is a fit person to hold a licence. A number of letters and agreements have been produced by LPS which asserts that the business of the hotel was transferred on a number of occasions. The affidavit of Mrs Kirkpatrick-Stagg does not

deal with the material issue of control. No director appointed by the company and registered as a director with the Companies Registry has attended court to explain the situation, the only evidence is the affidavit of Mrs Kirkpatrick-Stagg and it is concerning that the company proffered Mr Browne as a director of the company when he was not, in fact, a director.

Mr Drummond, who was a disqualified director, was proffered by the company to attend the County Court and provided misleading information.

For the reasons set out above, I am not satisfied that the applicant nor those directors recorded in the Companies Registrar are fit to hold a licence within this jurisdiction. Accordingly, I refuse the application for the renewal of the licence.”

[9] Obviously, the issue of who was in control of the Hotel was going to be of great importance for Judge Kinney following a hearing before the Departmental Court sitting on 14 May 2021 which ordered Metro to pay £218,743.16 in respect of rates together with an award of costs in the sum of £1,500.

[10] It would appear that before His Honour Judge Kinney:

- (i) Metro did not produce an appeal bundle and the matter had to be adjourned for one week.
- (ii) At the recommenced hearing, claimed that a witness who was in attendance could not be called and a further adjournment was requested.
- (iii) No reason was given to the judge as to why the witness could not give evidence save, that there was some implied suggestion that it was for legal reasons.

[11] Unsurprisingly, the further adjournment application was refused, the LPS witness, Mr McMahan, gave evidence and was not cross-examined. No case was put to him that the rates were not due and owing by Metro.

[12] The judge refused the adjournment application, and it seems to us that he was perfectly entitled so to do. At the very least, there is no basis for any suggestion that he exercised his discretion other than in a proper way. On the basis of what the learned trial judge was told, it seems to us that he had no reason to grant any adjournment.

[13] The evidence was then given to the court by Mr McMahan of LPS and he was not cross-examined. It would appear that the basis of Metro’s defence amounted to

no more than some unsubstantiated assertions from Mr Drummond. As we have pointed out, Metro should have anticipated that the issue of who occupied the hotel premises was going to be central. It was not as if this issue had not arisen before. There was a lamentable failure on the part of Metro to ensure that there was any witness available to give evidence, or at the very least, to ensure that Metro's case was put to the witness called by LPS.

[14] Metro now want to case state His Honour Judge Kinney because following this hearing and following the inevitable conclusion that all the sums claimed by LPS were due and owing, on the basis that:

- (a) There was insufficient evidence before the County Court Judge to grant a decree in the sum of £218,743.25.
- (b) The judge had failed to exercise his discretion properly in refusing the adjournment application.
- (c) The learned trial judge failed to properly consider and address the issue of costs.

[15] It seems to us that:

- (a) The decision of the learned trial judge not to grant an adjournment was lawful, and we can see no basis for interfering with his discretion given the circumstances outlined above.
- (b) Metro had an opportunity to lead evidence or, at the very least, challenge the evidence of LPS but failed to do so.
- (c) There are no scale costs. The costs awarded were calculated on the basis of the time expended by LPS employees and reflected the costs which LPS had incurred.

[16] We are satisfied, like the learned trial judge, that:

- (a) No point of law has been identified in which the Court of Appeal should properly be asked to give an opinion.
- (b) The application is frivolous, vexatious and unreasonable.
- (c) The evidence, when examined, is indicative of Metro failing to adduce any evidence for the judge or to challenge LPS's evidence, and then trying to rely on their own failures to escape the consequences of the evidence put before the judge.

[17] This is a hopeless appeal. It is without merit. It is frivolous, vexatious and unreasonable. It appears to this court that Metro is trying to manipulate the court processes.

[18] There has been some discussion about whether the application was made within the 14 days which are required by Order 61 Rule 4 of the County Court Rules from the date of the refusal of the judge to state the case.

[19] Judge Kinney's decision was made on 11 August 2022. The application to the Court of Appeal was stamped 30 August 2022 outwith the mandatory time limit. Although we have ruled on the substantive merits of the application, we also are satisfied that this would not be an appropriate case for the court to extend time.

[20] We will hear the parties on the issue of costs.