

THE HIGH COURT

722 S.S./89

IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS)
ACTS 1961 TO 1986

AND IN THE MATTER OF THE AIR POLLUTION ACT 1987

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF CORK

COMPLAINANT/RESPONDENT

AND

ANGUS FINE CHEMICALS LIMITED

DEFENDANT/APPLICANT

Judgment of Mr. Justice Blayney delivered the 15th day of
February, 1990.

This Consultative Case Stated turns on the construction of Section 30 subsection (3) of the Air Pollution Act 1987 (the 1987 Act) but before setting out the section for the purpose of construing it, it is necessary first to consider the facts giving rise to the case. These are set out in paragraphs 1 and 2 of the Case Stated as follows:

"(1) At a sitting of the District Court held at the Courthouse Mitchelstown, on the 21st day of July 1989, the County Council of the County of Cork charged the said Angus Fine Chemicals Limited with the following offence:

"That you did on the 31st day of January 1989 at Loughbeg, Ringaskiddy, in the County of Cork in the Court area and district aforesaid, being the occupier of factory premises, contrary to the provisions of Section 29 of the Air Pollution Act, 1987, fail to notify the prosecutor being the local authority for the area of the occurrence of an incident likely to cause air pollution."

(2) At the hearing of the said complaint, inter alia, the following facts were proved or admitted.

- (a) That the Defendant operated existing industrial plant within the meaning of the Act of 1987.
- (b) That the Defendant was the occupier of premises not being a dwelling, within the meaning of Section 29 of the said Act and that the Defendant operated the existing industrial plant in question in the said premises.
- (c) That on or about the 31st day of January 1989 there was an accidental emission, amounting to an incident within the meaning of Section 29 of the said Act, on the said premises.
- (d) That the Defendant had made an application for a licence pursuant to Section 30 of the Act of 1987 and that the application was valid having regard to the provisions of Section 30(3) and Section 31 and in particular that it had been made prior to

the date specified in the relevant regulations but after the date of the alleged offence."

Section 29 of the 1987 Act provides as follows:

"29 (1) The occupier of any premises, other than a private dwelling, shall as soon as practicable after the occurrence of any incident which may cause air pollution notify the relevant local authority of the incident.

(2) In this section "incident" includes an accidental emission."

The Defendant's contention is that while, prima facie, it committed an offence under Section 29, Section 30 subsection (3) furnishes it with a complete defence to the charge. The two questions in the Case Stated, on which the opinion of the Court is sought, ask in effect whether this contention is correct. They are as follows:

"(1) Does the period referred to in Section 30(3) commence on:

(a) the 1st September 1987, or

(b) the 1st November 1988, or

(c) the date of a valid application:

(2) Do the provisions of Section 30(3) apply to an offence under Section 29 of the Act of 1987."

Section 30 of the 1987 Act is as follows:

"30 (1) A person shall not operate industrial plant, other than existing industrial plant, on or after such day as may be prescribed unless a licence under this Act is in force in relation to the plant.

(2) The Minister may, by regulations, provide that existing industrial plant of such class as

000274

may be specified in the regulations shall not be in operation on or after such date as may be so specified unless a licence under this Act is in force in relation to the plant.

(3) Where regulations under subsection (2) come into operation, the operation of existing industrial plant to which the regulations relate shall, in the period before a licence in relation to the plant is granted or refused, be deemed not to have contravened the provisions of this Act: provided that, before the date specified in those regulations, an application has been made for a licence in respect of that plant and the requirements of regulations made under section 31 in relation to the application for the licence have been complied with by the applicant therefor."

Section 30 was brought into force on the 1st November 1988 by the Air Pollution Act 1987 (Commencement) Order 1988 (S.I No. 265 of 1988), and paragraph 5 of the Air Pollution Act 1987 (Licensing of Industrial Plant) Regulations 1988 (S.I. No. 266 of 1988), which also came into force on the 1st November, 1988, provided, pursuant to the powers contained in Section 30 subsection (2) that:

"existing industrial plant of any class specified in the First Schedule shall not be in operation on or after the 1st day of March 1989 unless a licence under the Act is in force in relation to the plant."

The Defendant's existing industrial plant came within one of the classes specified in the First Schedule and so paragraph 5 applied to it. Subsection (1) of Section 30 does

not apply to the Defendant's plant so it is only subsections (2) and (3) of Section 30 that are relevant.

The Defendant's full contention was as follows:

- (1) That it applied for a licence before the date specified in the relevant regulations.
- (2) That the offence occurred in the period before the licence was granted.
- (3) That by virtue of Section 30 subsection (3) the operation of existing industrial plant during that period was to be deemed not to have contravened the provisions of the Act.
- (4) It followed, accordingly, that its operation of existing industrial plant at the time of the alleged offence was to be deemed not to have contravened Section 29 of the Act, and so it was entitled to have the charge dismissed.

The County Council, on the other hand, contended:

- (1) That the exemption in Section 30 subsection (3) was confined to the offence of operating existing industrial plant without a licence and did not extend to an offence under Section 29, and
- (2) that the period during which the exemption was in force did not commence until the 1st March 1989, or alternatively until the date of the application for the licence, and as the offence had been committed prior to the earlier of these dates, it was not covered by the exemption.

In my opinion the County Council's contentions are well founded.

Section 29 of the 1987 Act was brought into force on the 1st September 1987 by the Air Pollution Act 1987

000276

(Commencement Order) 1987 (S.I. No. 201 of 1987). It clearly applied to the Defendant as "the occupier of any premises other than a private dwelling". So, as and from the 1st September 1987, the Defendant would have contravened the section if it failed to notify the County Council as soon as practicable of the occurrence of any incident which might cause air pollution. And this was the position for the 14 months up to the 1st November 1988 when Section 30 and the regulations contained in S.I. No. 266 of 1988 were brought into force.

The effect of Section 30 subsection (2) of the 1987 Act and of paragraph 5 of S.I. No. 266 of 1988, made under it, was that the Defendant, in order to continue to be entitled to operate its existing industrial plant, had to apply for a licence before the 1st of March 1989, as after that date it would be illegal to operate such plant without a licence. Neither the section nor the regulations had any immediate effect on the Defendant's right to operate its existing industrial plant. Paragraph 5 of the regulations provided that its plant should not be in operation after the 1st March 1989 unless a licence under the Act were in force. But there was no prohibition on continuing to operate existing industrial plant up to the 1st March 1989. So, insofar as operating such plant was concerned, there was no distinction between the period from the 1st November 1988 to the 1st March 1989 and the 14 month period prior to the 1st November 1988, and since Section 29 had applied to the Defendant during the 14 month period there would not appear to be any reason why it should not have continued to apply during the later period when the offence with which the Defendant is charged was committed.

It is against this background that Section 30 subsection (3) has to be construed. Although there does not seem to be any reason why a failure to report an emission, which would have been an offence under Section 29 if it had occurred between the 1st September 1987 and the 1st November 1988, should not also be an offence if it occurred between the 1st November 1988 and the 1st March 1989, the Defendant contends that Section 30 subsection (3) protects it from being so. It seems to me that it would be very surprising if this were correct, and I am satisfied that it is not.

Two questions arise on the construction of the subsection, firstly, the commencement date of the period of exemption, and secondly, the extent of the exemption granted.

As to the commencement date, Mr. Shanley submitted that the most sensible construction was that it should be taken to be the 1st November 1989, the date on which the regulations contained in S.I. No. 266 of 1988 (Licensing of Industrial Plant) came into effect. He based this submission principally on the opening words of the subsection: "Where regulations under subsection (2) come into force" But it is not the date of the coming into force of the regulations that is important. It is their provisions that one has to look to. And the most important provision is that by paragraph 5 the operation of existing industrial plant without a licence would be illegal after the 1st March 1989. In my opinion this was the relevant date for the commencement of the period of exemption. It was the date after which operating the plant without a licence would be illegal, and so the date after which the exemption would be required if no licence had been obtained.

As the offence with which the Defendant was charged

occurred before the 1st March 1989, it follows that it cannot get the benefit of the exemption in subsection (3).

But even if this were not so, I consider that the Defendant would still have no defence to the charge based on the subsection as in my opinion the exemption does not extend to an offence under Section 29.

Under the subsection what is to be deemed not to contravene the provisions of the Act is "the operation of existing industrial plant to which the regulations relate." So the question is, what meaning is to be given to "the operation of existing industrial plant"? In particular, does it extend to a failure to comply with Section 29? In my opinion it does not. The operation of industrial plant is something totally distinct and separate from failing to give notice of an emission from the plant. The operation of the plant simply involves setting it in motion and keeping it in motion. And this is what is exempt from contravening the provisions of the Act. The operation of the plant which otherwise would be unlawful because of the absence of a licence is made lawful. But the subsection does not touch upon what is to happen if, in the course of the operation, an incident occurs which may cause air pollution. That is a separate matter and remains covered by Section 29.

Mr. Shanley submitted that what the operation of the plant was deemed not to contravene was "the provisions of the Act", and not the regulations made under the Act, and if the subsection was construed in the manner contended for by the County Council, the operation was being deemed not to contravene the regulations, whereas if it was construed as relieving the Defendant from Section 29 it would be exempting the Defendant from contravening the Act. This is undoubtedly

so, but it does not get over the Defendant's difficulty which is to find clear words in Section 30 subsection (3) exempting it from liability under Section 29. As I have already pointed out, what is deemed not to contravene the provisions of the Act is the operation of existing industrial plant, and that could not include a failure to report an incident likely to cause pollution.

Mr. Shanley also submitted that as this was a criminal charge, Section 30 subsection (3) should be construed strictly, and if there were two possible constructions open, that favouring the Defendant should be adopted. I have considerable doubt if that principle applies in the present case. The offence with which the Defendant is charged is not imposed by Section 30 subsection (3). It is imposed by Section 29 in terms which admit of no doubt. Section 30 subsection (3) is being relied on by the Defendant as a defence to the charge. In view of this it seems to me that the Defendant cannot call in aid the principle of construction which would apply if it was the section which created the offence that was being construed.

I would accordingly answer the two questions in the Case Stated as follows:

- (1) The period referred to in Section 30 subsection (3) commences on the 1st March 1989 provided that a valid application for a licence has been made before that date.
- (2) The provisions of Section 30 subsection (3) do not apply to an offence under Section 29 of the Act of 1987.

