

**THE HIGH COURT**

**[2019 No. 859 SS]**

**IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS)  
ACT, 1961**

**BETWEEN**

**GALFER FILLING STATION LIMITED**

**APPLICANT**

**AND**

**SUPERINTENDENT PATRICK O'CALLAGHAN**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Meenan delivered on the 8th day of July, 2020**

**Introduction**

1. This is a consultative case stated which concerns an application pursuant to s. 2(1) of the Licensing (Ireland) Act, 1902 (as amended) (the Act of 1902) to revive wine, beer and spirits off licences attaching to a Spar premises at Cloghan, County Offaly (the premises). The questions posed in the consultative case stated are the following: -
  - (1) Is the franchise agreement sufficient estate or interest in the premises to allow the District Judge to grant the application to revive the licences in the name of the franchisee/applicant; and
  - (2) Is lawful occupation as set out in the franchise agreement sufficient to entitle the franchisee/applicant to apply for a licence in its sole name.
2. All necessary statutory proofs were adduced in evidence before the District Court. There was no objection to the application by the statutory notice party, who is the notice party in this Court, or any other person.

**Franchise Agreement (The Agreement)**

3. Whatever estate or interest that the applicant has in the premises arises from the agreement.
4. The relevant terms of the agreement are as follows: -
  - (i) The applicant has a right to use the premises for the purpose of carrying on the business specified in the first schedule therein;
  - (ii) The applicant agreed not to assign, transfer or in any way deal with the benefit of the franchise agreement without the written consent of the licensor (Triode Newhill Cloghan Limited);
  - (iii) The applicant agreed to promptly pay and discharge all outgoings (including electricity bills, telephone bills, rates bills, gas bills);
  - (iv) The applicant agreed to discharge the cost of all insurances;
  - (v) For a period of one year after the determination of the agreement, the applicant agreed not to be engaged either directly or indirectly in any business in the field of

the sale of groceries or any allied business within a radius of five miles of the premises; and

- (vi) The applicant agreed 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... which are the sole and exclusive properties of the licensor.
5. The agreement further provided that it would cease on the happening of certain events: -
- (i) The effluxion of ten years from 27 May 2018;
  - (ii) In the event of the applicant failing to observe and perform any of the stipulations in the agreement and if they “*shall not comply with the said stipulations and agreements within fourteen days of receiving written notice by the licensor of such failure*”.
6. It is clear from the agreement that the applicant did have an interest in the premises, but, the question is, is such interest sufficient for a grant of licence under the Act of 1902? To answer this question, it is necessary to consider a number of legal authorities.

#### **Legal authorities**

7. Mr. Feichín McDonagh SC, on behalf of the applicant, referred the Court to a number of authorities. The following passage from the judgment of Holmes J. in *The Queen (at the prosecution of Ellen Murphy) v. Recorder and Justices of Cork* [1895] 2 I.R. 104 states the general principle: -

“It is, I believe, now firmly settled as a cardinal principle of the licensing law that the holder of a license must have such an estate or interest in the licensed premises as entitles him to occupy them. The Vice-Chancellor in *Brennan v. Dorney (1)* gives a singularly clear and complete analysis of this branch of the law: and the first three of the four propositions with which he concludes have never, as far as I am aware, been questioned. It is there laid down that no right to the benefit of a publican’s license can exist apart from the ownership and possession of the licensed premises, and that the rightful possession of the licensed premises carries with it the right of transfer or renewal, subject to the statutory requirements applicable to such cases.”

8. Though Holmes J. refers to “*ownership and possession*”, it appears to be the case that the estate or interest in a licenced premises required for a licence is an entitlement to occupy the premises.
9. More recently, this issue was considered by the Court of Appeal in *Triode Newhill LHP Ltd v. Superintendent Alan Murray* [2018] IECA 356. This was an appeal against an Order of the High Court in answer to a consultative case stated by a District Judge arising from an application for a transfer of two wine, beer and spirit off licences. The question posed was: -

"Does a franchise agreement between the applicant for an ad interim transfer and its nominee, in the terms presented to me, preclude the grant of the applications before the [District] Court?"

Peart J. stated: -

"9. ... the question arises as to whether what is sought to be done by way of application to the District Court for the *ad interim* transfer is within the statutory scheme. It is different because, while Triode has a leasehold interest in the premises, it does not occupy the premises since it has granted that right of occupation to the franchisee. Neither is Triode the entity that sells the intoxicating liquor from the premises. Conversely, the entity selling the intoxicating liquor from the premises (the franchisee) does not, at least on the face of the franchise agreement hold any estate or interest in the premises. It merely has permission to use the premises."

and: -

"12. ... By Triode naming a nominee on each application, it is sought to meet the triple requirements under the licensing code that the licensee should hold the lowest estate and interest in the premises, be in lawful occupation of the premises, and (iii) that the licensee carries on the licensed trade in the premises. But Triode itself, as the applicant for the licence, does not fulfil (ii) and (iii), since its nominee is not its employee or agent (see Clause E set forth in para. 10 above) and is trading in the premises solely on its own account."

This passage succinctly sets out the requirements for a licence. In this case, the applicant itself did not fulfil the requirements in that it was not in lawful occupation of the premises and did not carry on licenced trade in the premises. This situation was reflected in further passages from the judgment of Peart J.: -

"81. I stated earlier that I would leave over two further questions until I had addressed the nominee issue, those being (i) whether the trial judge was correct to conclude that the franchise agreement constitutes only a bare licence allowing the franchisee to use the premises, and does not constitute a lease (or tenancy), and (ii) the further question whether or not actual lawful occupation, although falling short of possession on foot of a lease or tenancy, would be sufficient to entitle the franchisee to apply for a licence in its sole name, given that it is the entity that satisfies the first requirement that it carries on the trade from the premises."

and: -

"82. ... There could well be arguments capable of being advanced by the franchisee, under the principles stated by Lord Templeman in his judgment in *Street v. Mountford* [1985] UKHL 4, that the terms of the franchise agreement in fact, regardless of the label given to the occupation by the terms of the agreement, create more than a bare licence, amounting in reality to a tenancy in the premises

for the purpose of satisfying the requirement that they hold the lowest estate or tenancy in the premises. In my view this Court should not advance any view as to the quality of such potential arguments. Any view should await any case in which it arises directly for decision, and after full legal arguments have been made.”

Mr. McDonagh contends that the instant case is such a case.

10. Ms. Peggy O'Rourke SC, appearing for the notice party, in her submissions took a neutral stance as to the answers to the questions posed by the District Judge. Ms. O'Rourke referred the Court to a number of authorities on the distinction between a lease agreement and a licence agreement (*Gatien Motor Company v. Continental Oil Company* [1979] 1 I.R. 406, *Irish Shell and B.P. Limited v. John Costello Limited* [1981] I.L.R.M. 66 and *Board of Management of St. Patrick's School v. Eoghan O'Neachtain Limited* [2018] IEHC 128). Ms. O'Rourke also referred the Court to the following passage from “*Cassidy on the Licensing Acts*” (3rd ed., Clarus Press, 2010) at page 39: -

“Holmes J. in *R(Murphy) v. Cork Justices* stated:

‘...the holder of a license must have such an estate or interest in the licensed premises as entitles him to occupy them.’

and referred to the principles enunciated by Chatterton V-C in *Brennan v. Dorney*, vis, that no right to the benefit of a publican's licence can exist separate and apart from the ownership and possession of the licenced premises and the right of possession of the licenced premises carries with it the right of transfer or renewal, subject to the relevant statutory requirements.

Neither a licence nor a caretaker's agreement confers sufficient estate or interest in a licenced premises for the purpose of satisfying the above principles. The estate or interest must be such that the holder thereof is entitled to evict persons from the premises for trespass. The licence, in contrast to a lease, merely permits the licensee to be upon the premises: his presence thereon would otherwise be unlawful. A licensee has no estate or interest entitling him to remain on the premises. A caretaker's agreement confers no interest upon the caretaker: he is merely entitled to enter into possession on behalf of the true owner. The essence of a lease, in contrast, is that the tenant is given the right to exclusive possession, i.e. the right to exclude all other persons from the premises.”

### **Consideration of issue**

11. It is necessary to consider the terms of the agreement. The provision in the agreement (referred to at para. 4 above) which requires the applicant to acknowledge (in writing) at all times upon being requested to do so that he has “*no estate, rights or entitlements whatsoever in the premises...*” does indicate that the applicant does not have the necessary interest in the premises for a licence. Were this to be the only relevant term of the agreement, I would conclude that the applicant did not have an estate or interest in

the premises sufficient for the grant of a licence. Further, the applicant has not been called on to give such acknowledgement in writing.

12. However, other terms of the agreement point to the applicant having considerably more than just a bare licence. The agreement provides for a term of ten years which may only be determined earlier should the applicant fail to perform certain terms and stipulations of the agreement. This is a clear restriction on the right to terminate the agreement. The applicant is clearly entitled to occupy the premises and carry on trade during the currency of the agreement. Further, there is a specific provision to the effect that the applicant may not assign or transfer the benefit of the agreement without the written consent of the licensor. This would imply that there is something tangible to assign or transfer.
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.

#### **Conclusion**

14. By reason of the foregoing, I am satisfied that the applicant has sufficient estate or interest in the premises that will allow the District Judge to grant the application to revive the licence in the name of the franchisee/applicant. Therefore, the answer to the two questions raised in the consultative case stated is "yes".