

NORTH WEST REG.

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Henchy J.
Hederman J.
McCarthy J.

THE SUPREME COURT

(1985)

NORTH WESTERN REGIONAL FISHERIES BOARD

v.

SEAN McKEON

Judgment of Henchy J.
delivered the 15 December 1986

The defendant, Sean McKeon, was convicted in the District Court on a summons brought against him by the complainants (the above Fisheries Board) in respect of a charge of using a "fixed engine" in breach of s. 97 of the Fisheries (Consolidation) Act, 1959 ("the 1959 Act"). On the hearing in Sligo Circuit Court of the defendant's appeal against his conviction, Judge O'Malley stated this case.

The primary question raised in the case stated is whether the net in respect of which the defendant was convicted is, on the facts as found, a "fixed engine" as defined in s. 3(1) of the 1959 Act.

That definition is as follows:

- "the expression "fixed engine" means any engine, being -
- (a) a stake net, or
 - (b) a bag net, or

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- (c) a fixed draft net, or
- (d) a head weir, or
- (e) any net, implement, engine or device, fixed to the soil or secured by anchors or held by hand or made stationary in any other way and used solely for the purpose of taking or facilitating the taking of fish, not being a fishing weir or fishing mill dam."

For the purpose of the interpretation and application of the definition in this case, the relevant facts concerning the net in question are as follows.

The net, which was the property of the defendant, was used by him in the tidal waters of Killala Bay for the purpose of catching salmon. It was 260 yards long and at one end was tied to a buoy which was fixed to the sea bed by means of a weight or anchor. The other end was attached to a buoy which was not fixed to the sea bed. The result was that the net was free to move in response to the movement of the water. Apart from the end which was connected to the sea bed, the net was free and unattached but weighted downwards by means of a rope on which there were lead weights tied at regular intervals. The net was thus able to swivel up to 360° on the fulcrum of the large buoy by means of which it was fixed to the sea bed at one

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end, and could move laterally and vertically within the limits of the play afforded by the rope mooring the large buoy. Because of its capacity to move in that way, it was less efficient for catching fish than if it were used as a drift net by persons in boats drifting with the net.

It is to be noted that (save for the words "or secured by anchors", which were inserted by s. 3(1) of the Fisheries (Statute Law Revision) Act, 1949) the definition of a "fixed engine" has, for all practical purposes, remained the same in the Irish fisheries statutes from the Fisheries (Ireland) Act, 1860, until the enactment of the 1959 Act. The 1959 Act, being a consolidating statute, must be read subject to the well-recognised rule that, as such, it did not intend to change the existing law, whether statutory or as stated in authoritative decisions of the courts. It is proper, therefore, to see how the statutory definition has been interpreted in the courts prior to the enactment of the 1959 Act, for there seem to be no authoritative cases on the matter since 1959.

I find none of the cases to which we were referred in any way conclusive as to whether a net of this kind is captured by the statutory definition. Those cases seem to me to be decisions as to

particular kinds of nets, none of which could be said to be identical with or even closely similar to the net in question here. The most authoritative of those decisions is Irish Society v. Harold 1912 A.C. 287 in which the House of Lords affirmed the decision of the Irish Court of Appeal (reported sub. nom. Irish Society v. Fleming 1911 1 I.R. 323) holding that the drift nets in question there, which were worked from boats and were not in any way attached to the soil, were not "fixed nets" or "fixed engines." While that decision was based on the fact that the nets in question were - and were being used as - drift nets (which were thus radically different from the net in this case), I find the following passage from the speech of Lord Atkinson in the House of Lords helpful in interpreting the statutory definition. He says, at pp. 297-8 of the report:

"I do not think that a drift net which is altogether unattached to the soil and is allowed to drift up and down a river or estuary as the tide may carry it in one direction or the other is a "fixed net" within the definition contained in [s. 1 of the 1860 Act] inasmuch as the words are a net "fixed to the soil" "or made stationary in any other way." It would appear to

me that those words necessarily imply that the net must be made stationary in relation to something and that something is the soil. It may be erected on the soil as stake nets are; it may be made stationary by being held by a man who is himself walking on the soil and thus be indirectly fixed to the soil; or it may be fixed to the soil indirectly by being held by the hand of a man in a boat which is itself anchored; but it must in all cases be fixed not with reference to the current in which it is carried, but to the soil".

I would respectfully adopt that approach insofar as it seems to hold that the words "or made stationary in any other way" impliedly qualify the foregoing requirements in that part of the definition. The words "or made stationary in any other way" must, in my view, mean that the foregoing adjectival expressions ("fixed to the soil", "secured by anchors" and "held by hand") must have the effect of requiring the net to be stationary. Otherwise why would the draftsman have followed those expressions with the words "or made stationary in any other way"? Indeed, I think it was common ground in this case that this net was "fixed to the soil" (by being moored at one end to the buoy which was fixed to the sea bed) and that the only contentious issue in the case is whether it was thereby "made

stationary".

It seems to me that it does not necessarily follow that, because a net is fixed to the soil, it is also stationary. It is a question of fact and degree. A ship riding at anchor is fixed to the soil, but its freedom of movement by wind and tide may be so great that it would be an abuse of language to describe it as stationary. To take a more extreme example, a kite the string of which is held by a man may be said to be fixed to the soil, but it would be a distortion of the facts to say of it, as it flies through the air, that it is stationary.

It is probably safer to avoid examples and analogies and to stick to the facts of this case. The net was unquestionably fixed to the soil by one of its ends being attached to the soil. But it was about 260 yards long and was free to swing from the large buoy to which it was connected in arcs up to 360° , depending on the force of the tide and the wind. This meant that the net could range over an area of over 200,000 square yards of the tidal waters of Killala Bay. In those circumstances, while the net was fixed at one end, was otherwise only weighted down by means of lead weights and did not come in contact with the soil, so it had the extensive freedom of

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movement I have described. It was undoubtedly fixed to the soil, but, as I read the statutory definition, it cannot rank as a "fixed engine" unless it is also "stationary". I consider that this net, which was so arranged that it could move so extensively around Killala Bay without any intervention other than from tide and wind, could not with any sense of reality be said to be "stationary". It was fixed, moored, tethered, made fast, or secured to the soil at one end, but apart from the limitation thereby imposed, it was a non-stationary, indeed a widely moving net.

Accordingly, in my opinion this net is outside the statutory definition, so that the conviction of the defendant in the District Court for fishing for salmon with it as a "fixed engine", contrary to s. 97 of the 1959 Act, should be set aside in the Circuit Court. The two other District Court summonses (for breaches of the relevant by-laws) which were disposed of in the District Court in the course of the conviction by being "taken into consideration", will of course fall with the conviction on the summons under s. 97.

In the result, it is necessary to deal only with the first question in the case stated: was the defendant's net a "fixed

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engine" within the meaning and for the purpose of the Fisheries Acts,

1959 to 1980? To that question I would give a negative answer.

*Approved
H.P. 87
16-12-86*

Henchy J.
Hederman J.
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THE SUPREME COURT

NORTH WESTERN REGIONAL FISHERIES BOARD

v.

SEAN MCKEON

JUDGMENT OF MCCARTHY J. delivered the 15th DAY OF DECEMBER 1981

The definition of fixed engine, so far as relevant, refers to any net, implement, engine or device, fixed to the soil or secured by anchors or held by hand or made stationary in any other way. The question as to whether or not a particular net comes within the definition seems to me to be a mixed question of law and fact; one form or size of net, implement, engine or device, might well be made stationary even if only secured at one point; another, such as here, as is made clear in the judgment of Henchy J., would not be so described; as Henchy J. has said, the true test is, not the actual nature of the fixing or securing or holding, but is the net etc. stationary in the ordinary meaning of the word. It may be that one end of it is stationary, but that does not qualify it under the definition section.

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In the result, I would agree with the conclusion and the
answer proposed.

Approved.

[Signature]

17. 12. '86