Neutral Citation Number: [2010] IEHC 288

THE HIGH COURT

2010 3695 P

BETWEEN

DUBLIN CITY COUNCIL

PLAINTIFF

AND

TECHNICAL ENGINEERING & ELECTRICAL UNION AND DERMOT GANNON AND TOM CUMMINS

DEFENDANTS

Judgment of Ms. Justice Laffoy delivered on the 27th day of April, 2010.

The application

1. On this application the plaintiff seeks interlocutory relief formulated in six paragraphs of the notice of motion which issued on 20th April, 2010. In essence, the plaintiff is seeking to have the defendants restrained, pending the trial of the action, from picketing ten apartment blocks at Ballymun in Dublin (hereinafter referred to as "the Ballymun location"), which are owned by the plaintiff and occupied by tenants of the plaintiff. Interim relief was granted to the plaintiff on an application made *ex parte* on 20th April, 2010 and has been continued by consent of the first defendant until this judgment is given. The motion for interlocutory relief was heard on 23rd April, 2010.

2. The first defendant (the Union) is a trade union which holds a negotiation licence and is a "trade union" within the meaning of that expression in s. 8 of Part II of the Industrial Relations Act 1990 (the Act of 1990). The second and third defendants are members of the Union. The second and third defendants were not served with the notice of motion and were not individually represented at the hearing of the interlocutory application. On the application of the plaintiff, the application was adjourned generally with liberty to re-enter as against the second and third defendants.

The factual background

3. There is little or no conflict between the parties as to the material facts.

4. For a number of years Pickerings Lifts Limited (Pickerings) was engaged under contract by the plaintiff to maintain and repair the lifts in ten apartment blocks at the Ballymun location. One of the blocks is fourteen storeys high and each of the remaining nine blocks is eight storeys high. The second and third defendants are employed by Pickerings and both have worked exclusively servicing the lifts at the Ballymun location, in the case of the second defendant, since 1987 and, in the case of the third defendant, since 2000.

5. In November 2009 a dispute arose between Pickerings and the Union as a result of three of the Union's members employed by Pickerings, not including the second and third defendants, having been laid off. On 17th December, 2009 a secret ballot was held of the members of the Union employed by Pickerings. The ballot paper described the ballot as being for "Protective Industrial Action" and stated that industrial action could take any of the forms stipulated, including "the placing of pickets on the Company's premises". The result of the ballot was in favour of industrial action. On 27th January, 2010 the Union gave seven days notice of industrial action to Pickerings. Subsequently, Pickerings was informed by the Union that "pickets will be placed on your company premises and sites" on 4th February, 2010. On 4th February 2010, without prior notice to the plaintiff, a picket was placed at the Ballymun location. There have been attempts to resolve the dispute through the Labour Relations Commission and the Labour Court as between the Union and Pickerings. The Labour Court issued a recommendation on 7th April, 2010 following a hearing on 31st March, 2010 which was not attended by Pickerings. Accordingly, the position is that the dispute between Pickerings and the Union and its members is ongoing.

6. As a result of the picketing at the Ballymun location, the maintenance and repair of the lifts has ceased in the apartment blocks. Currently, only two of the twenty seven lifts which service the ten blocks are working. As a result, the occupiers of the blocks, about 450 families, are being greatly inconvenienced and are suffering intolerable hardship. Those affected include families with young children whose parents have to carry small children and bring prams and buggies up the stairs, elderly people and wheelchair users.

7. By letter dated 19th February, 2010 the plaintiff, having stated that due to industrial action by the staff employed by Pickerings the maintenance service for the lifts in the apartment blocks at the Ballymun location had not been provided since 4th February, 2010, gave fourteen days notice to Pickerings of its intention to terminate its contract with Pickerings. The evidence before the Court indicates consensus on the part of both contracting parties, the plaintiff and Pickerings, that the contract has terminated.

8. According to the Union, pickets were placed on Pickerings' registered office at Dunboyne, County Meath and at Pickerings' "premises at Ballymun, consisting of a store and lockup". The position of the plaintiff is that, since the termination of its contract, Pickerings no longer has any connection with the plaintiff's Ballymun location. While the plaintiff recognises that Pickerings did "operate a form of base" at the plaintiff's Ballymun location, its contention is that it no longer has a presence there, as it no longer has any contract with the plaintiff.

9. It has been averred on behalf of the plaintiff that it is in a position to have a new contractor maintain and repair the lifts in the apartment blocks and that the new contractor is in a position to start work forthwith, save that it has expressed the view that it will not do so in circumstances where a picket is in place at the apartment blocks. By letter dated 19th February, 2010 the Union informed the plaintiff that it would continue to picket the apartment blocks even if the contract was passed on to another lift

company.

Statute law and the authorities
10. In the case of trade disputes, the common law principles applicable to the grant of an interlocutory injunction are subject to the provisions of Part II of the Act of 1990, and, in particular, to the restrictions contained in s. 19. The substantive law on picketing in the context of a trade dispute is contained in s. 11. Section 8 is the definition section for the purposes of Part II. Picketing comes within the definition of "industrial action" in s. 8.

11. Section 19(2) provides:

> "Where a secret ballot has been held in accordance with the rules of a trade union as provided for in section 14, the outcome of which … favours a strike or other industrial action and the trade union before engaging in the strike or other industrial action gives notice of not less than one week to the employer concerned of its intention to do so, a court shall not grant an injunction restraining the strike or other industrial action where the respondent establishes a fair case that he was acting in contemplation or furtherance of a trade dispute."

It is accepted by the plaintiff that –

> (a) there probably is a *bona fide* trade dispute between the Union and Pickerings,
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> (b) a secret ballot was held as required by s. 19(2), and
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> (c) notice of industrial action was given to Pickerings in accordance with s. 19(2).

However, counsel for the plaintiff emphasised that there is no dispute between the Union and the plaintiff and that that is accepted by the Union. Further, he emphasised that the picketers were never employed by the plaintiff, which is also accepted by the Union.

12. Section 11 deals with picketing. It was made clear by counsel for the Union that the Union is relying on subs. (1) of s. 11, and not on subs. (2), which deals with secondary picketing. Sub-section (1) provides:

> "It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, to attend at, or where that is not practicable, at the approaches to, a place where their employer works or carries on business, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working."

It is common case that the picketing which has occurred at the apartment blocks at the Ballymun location has been peaceful picketing. The core issue is whether those premises are "a place where [the picketers' employer, Pickerings] works or carries on business".

13. A similar issue was considered by this Court (McCracken J.) in *Malincross v. Building and Allied Trades Union* [2002] 3 I.R. 607. The facts of that case are pithily summarised in the headnote in the report. The fifth defendant had been employed by a building company ("the employer") to carry out building work on the plaintiff's building site. The dismissal of the fifth defendant by the employer gave rise to a dispute between the defendants, the first defendant being a trade union, and the employer, in furtherance of which the defendants placed a picket on the site. In separate proceedings, the employer had obtained an injunction restraining the defendants from picketing the site save in certain circumstances. The employer ultimately vacated the plaintiff's site in October 2001 and no further work was carried out there by the employer. Notwithstanding this, the defendants continued to picket the plaintiff's site. The plaintiff sought an injunction restraining the defendants from continuing to picket the site. The defendants invoked s. 11(1) and also claimed protection under s. 19(2).

14. Against that background, McCracken J. stated (at p. 609) that he had no doubt that there was no work being carried on at the site by or on behalf of the employer or any of its employees. On the question of the application and construction of s. 11(1) he stated as follows:

> "This section provides that it is lawful for persons, in contemplation or a furtherance of a trade dispute, to attend at 'a place where their employer works or carries on business'. While the defendants accept that the employer no longer works or carries on business at the site, they say that, on the proper construction of this phrase, they are entitled to picket at any place where the employer did work or carry on business in the past. While, to my mind, this is a very strained construction of the present tense used in the section, counsel for the defendants referred me to the Dáil Debates which disclose that an amendment was moved to add the words 'or, at the commencement of the dispute, had normally worked and had normally carried on business'. This amendment was withdrawn following a statement by the then Minister for Labour that that situation was already covered by the wording used, which the Minister called 'the historic present tense'. While I do not think that the views of a Minister in a Dáil debate should determine the construction of this section, nevertheless I think that I can have regard to them in determining whether, at the hearing of this action, there is a fair question to be tried as to the construction of the section. I have no doubt that the hearing of an interlocutory injunction is not the time to enter into a detailed discussion on grammar. I am satisfied, however, that there is a fair case to be tried as to the construction of s. 11(1)."

15. McCracken J. then went on to consider the application of s. 19(2) to the case before him. He stated that he was satisfied that the union held a secret ballot in accordance with its rules and that the rules were as provided for in s. 14 of the Act of 1990. He was also satisfied that the union gave notice of not less than one week to the employer of its intention to take industrial action. He was also satisfied that the union had established a fair case that it was, and he emphasised that the subsection uses the past tense, acting in contemplation or furtherance of a trade dispute, as there was clearly a trade dispute in existence at the time the ballot was held. However, he identified a problem which arose out of the wording of the proposal which was to be balloted on, in that the ballot paper referred to engaging in industrial action with the employer "including the placing of pickets on company's site", which was the plaintiff's building site. McCracken J. identified a remaining question as to whether the ballot authorised the placing of pickets at the site when it ceased to be the company site of the employer. Having quoted from the judgment of Hamilton C.J. in *G. & T. Crampton Ltd. v. B.A.T.U.* [1998] 1 I.L.R.M. 430, and having stated that the issues before him were almost identical to those which arose in that case, he stated (at p. 612):

> "The sufficiency of the secret ballot is clearly a condition precedent to the right of the defendants to resist the interlocutory injunction under s. 19(2). While the members of the first defendant clearly authorised strike action at the employer's premises and, therefore, direct strike action against the employer, I think there is a serious issue as to whether that, in itself, is sufficient to justify strike action in relation to what were once the employer's premises but no longer remain so. … I think there is a serious issue to be tried, but no more, as to whether the picketing of the plaintiff's premises once the defendant has left those premises is authorised by the ballot and, until that question has been determined, in my view, the condition precedent to s. 19(2) has not been established by the defendants."

McCracken J. then went on to apply the principles set out in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88. He granted the injunction sought on the basis that the balance of convenience strongly lay in favour of the plaintiff.

16. It is well settled that the onus of proving compliance with the pre-conditions as to the secret ballot and the service of notice of industrial action set out in s. 19(2) is on the party resisting the interlocutory injunction, in this case, the Union: *cf. Kerr on The Trade Union and Industrial Relations Acts* (3rd Ed.) at p. 205.

Submissions of the parties on the law and its application to the facts

17. Despite the similarity of the facts of this case and the facts in the *Malincross* case, counsel for the Union submitted that the prohibition on the grant of an injunction provided for in s. 19(2) did apply in this case because the Union only has to establish a fair case and here the pre-condition in relation to the secret ballot has been complied with. On the latter point, counsel relied on the decision of this Court (Clarke J.) in *P. Elliott & Co. Ltd. v. Building & Allied Trades Union* [2006] IEHC 320. In that case, the proposition which the Union members were invited to vote either for or against was: "To engage in industrial action with P. Elliott …. up to and including the placing of pickets on company premises". The passage from the judgment to which counsel for the Union referred is to be found in paragraph 6.15, where Clarke J. stated:

> "Just as it has often been said that the text of conditions attached to planning permissions should not be read as if they were statutes or statutory instruments, so also, it seems to me, that a practical approach to the text of issues put to ballot by trade unions should be adopted. The test must be as to whether a reasonable member of a trade union concerned would know what they were voting for or against. The text should not be parsed and analysed as if it were a formal legal document."

18. As the focus of the submission of counsel for the Union was on s. 19(2), with a view to demonstrating that the Union had established a fair case that it was acting in contemplation or furtherance of a trade dispute, so that the Court has no discretion as to whether to grant or refuse an interlocutory injunction, he submitted, obviously with a view to avoiding the difficulty created by the decision in the *Malincross* case on the application of s. 19(2), that, as of 4th February, 2010, when the picketing commenced at the Ballymun location, it commenced at "the Company's premises". Because of the presence of its employees and of the existence of the stores and lock-up, it was submitted that Pickerings had a physical presence in Ballymun. Therefore, as I understand the argument, the pre-condition in relation to the secret ballot was complied with, and the Union has established a fair case that it was acting in contemplation or furtherance of a trade dispute and, accordingly, the Court is precluded from granting an injunction to the plaintiff.

19. Counsel for the plaintiff submitted that the approach of the Union to the Act of 1990 was to treat s. 19 as a standalone provision and to disingenuously ignore s. 11(1), which, it was submitted, is a fundamental part of the framework of Part II. Counsel for the plaintiff relied on the decisions in both the *Crampton* case and the *Malincross* case as being on "all fours" with this case, although he did not develop the argument on s. 19(2) in the manner in which it had been developed in either of those cases. His argument was that s. 19, as he put it, is not "hermetically sealed" and that it has to be viewed against all of the provisions of Part II and, in particular, s. 11(1).

20. In my view, the reality is that the plaintiff has ignored s. 19(2), which has been the primary focus of the Union. On the questions which arise on the application of the totality of Part II of the Act of 1990, to adopt the language of Kipling, "the twain" have not met.

Conclusions on application of law to the facts

21. In considering whether the interlocutory relief sought by the plaintiff should be granted, the Court must consider the application of s. 19, which specifically deals with applications for interim and interlocutory relief, against the provisions of Part II of the Act of 1990 as a whole. Where, as here, the basis of the plaintiff's complaint is that the picketing is unlawful and the relief sought is an injunction restraining that activity, the provision which governs the substantive rights and liabilities of the plaintiff, on the one hand, and the Union and the picketers, on the other hand, is s. 11. However, whether the plaintiff is entitled to an interlocutory injunction as a remedy for its complaint pending the trial of the action is governed by s. 19.

22. In applying s. 11 to the facts here, and in determining whether the plaintiff can obtain interlocutory injunctive relief having regard to s. 19, the following questions fall to be considered in the following order and the answers to them are as set out:

> (a) For the purposes of s. 11, is the Union acting in contemplation or furtherance of a trade dispute?

There is no controversy between the parties that the Union is so acting, but, as the plaintiff emphasised, the Union's dispute is with Pickerings, not with the plaintiff.

> (b) Given that the Union invokes the immunity conferred by subs. (1) of s. 11 only, is the picketing taking place at "a place where [the Union members'] employer works or carries on business"?

This is the principal area of controversy between the parties. The plaintiff's position, emphasising the present tense, is that, by reason of the termination of its contract, as of now, Pickerings neither works at nor carries on business at the Ballymun location. The Union's position is that, as of 4th February, 2010, when the picketing commenced at the Ballymun location, Pickerings did work and carry on business there and continues to do so. Having regard to those contrary positions, whether the picketing is lawful in accordance with s. 11(1) turns on the meaning of the word "works" and the phrase "carries on business" in subs. (1), in the context of s. 11 and Part II as a whole. In particular, the issue is whether the fact of Pickerings having worked or carried on business, as the case may be, at the Ballymun location in the past generally, or specifically at the commencement of the picketing, brings that location within the requirement as to the location of lawful picketing in s. 11(1). That difficult question of construction cannot be determined on this interlocutory application. However, there is absolutely no doubt that the plaintiff has established that there is a serious issue to be tried that, since Pickerings' contract was terminated, the Ballymun location is not a place "where [the Union

members'] employer works or carries on business". Therefore, unless the grant of an interlocutory injunction is restricted by s. 19, the Court should proceed to consider the other issues on which the Court must be satisfied before granting an interlocutory injunction – that damages would be an adequate remedy for the defendant and that the balance of convenience lies in favour of the grant of the injunction.

> (c) Has the Union discharged the onus of establishing that the pre-conditions to the restraint on the Court's discretion to grant an interlocutory injunction provided for in s. 19(2) have been complied with?

In relation to the two pre-conditions, the position is as follows:

> (i) As I understand the position, the plaintiff accepts that the pre-condition in relation to holding a secret ballot has been complied with and that the outcome favoured picketing. It was counsel for the Union who urged the Court to construe the ballot paper as having properly sought to ascertain the wishes of the members of the Union on the industrial action which has been engaged in as a matter of fact at the Ballymun location, that is to say, picketing as and from 4th February, 2010, when Pickerings was working on and carrying out business at that location, and subsequently after the termination of Pickerings' contract. Adopting the practical approach advocated by Clarke J. in the *P. Elliott & Co. Ltd*. case, in my view, it is reasonable to conclude that, in voting in favour of "the placing of pickets on the Company's premises", the members of the Union were voting in favour of picketing at the Ballymun location until the resolution of the dispute with Pickerings irrespective of any change in the contractual relationship between Pickerings and the plaintiff.
>
> (ii) The plaintiff also accepts that strike notice was given to Pickerings in accordance with s. 19(2).

By way of general observation, both pre-conditions in s. 19(2) relate to matters which are required to have been addressed before industrial action is engaged in. To apply s. 19 meaningfully, the Court has to be in a position to make a determination as to whether they have been complied with on the hearing of the application for the interlocutory injunction. If a union has to anticipate the type of third party intervention which has arisen here (termination of Pickerings' contract by the plaintiff a month after the commencement of the industrial action) and has to specifically put every such eventuality to the members in the secret ballot, it is difficult to see how the scheme envisaged in s. 19(2) could be effectively operated. Having regard to the circumstances of this case, I am satisfied that it is possible to make the determination required at this stage by virtue of s. 19(2). Further, I am satisfied that it is appropriate to determine, on the balance of probabilities, that both pre-conditions stipulated in s. 19(2) were complied with before the Union engaged in industrial action.

> (d) Has the Union established a fair case that it is acting in contemplation or furtherance of a trade dispute?

The answer to that question is that it has, although it is a dispute with Pickerings and not with the plaintiff, which is not material to the application of s. 19(2).

23. The consequence of the findings I have made – that the pre-conditions to engaging in industrial action stipulated in s. 19(2) were fulfilled by the Union before 4th February, 2010 when the industrial action complained of by the plaintiff was commenced and that the Union has established a fair case that it was acting in contemplation or furtherance of a trade dispute – is that, by reason of s. 19(2), the Court must not grant an injunction restraining the industrial action irrespective of the fact that the injunction is sought by the plaintiff, who is not, and never has been, the employer of the members of the Union involved in the industrial action and is not a party to the trade dispute in issue. I am conscious that, although, in essence, there is very little difference between the circumstances which existed in the *Malincross* case and the circumstances of this case, the approach I have adopted to the application of s. 19(2) and the result differs from the approach adopted and the result reached in the *Malincross* case. However, I am of the view that the conclusion I have reached that the plaintiff's application must be dismissed, even though the plaintiff has raised a serious issue to be tried on the application of s. 11(1), accords with the intention of the Oireachtas in enacting s. 19(2), which is explained by Clarke J. in the *P. Elliott & Co. Ltd*. case at para. 6.4.

Order and future conduct of the case

24. There will be an order recording that the interim order made on 20th April, 2010 has lapsed and refusing the application for an interlocutory injunction.

25. Because of the adverse effect of the picketing on the occupants of the apartments at the Ballymun location, the Court will accommodate the parties with the earliest possible plenary hearing of the substantive action or, alternatively, the hearing of a preliminary issue, on agreed facts, as to the proper construction and application of s. 11(1) to the agreed facts.