Neutral Citation Number: [2010] IEHC 289

THE HIGH COURT

2010 3695 P

BETWEEN

DUBLIN CITY COUNCIL

PLAINTIFF

AND

TECHNICAL ENGINEERING & ELECTRICAL UNION, DERMOT GANNON AND TOM CUMMINS

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 9th day of June, 2010.

1. Introduction

1.1 The factual background to these proceedings is outlined in my judgment of 27th April, 2010 on the plaintiff's application for an interlocutory injunction restraining the defendants, pending the trial of the action, from picketing ten apartment blocks at Ballymun in Dublin (the Ballymun premises), which are owned by the plaintiff and occupied by its tenants. Following the refusal of that application, steps were taken by the parties to bring the matter to trial as expeditiously as possible. The third named defendant was served with the proceedings and is represented by the legal team representing the first defendant. The second named defendant was not served. At the hearing of the action, on the application of the plaintiff, the proceedings against the second defendant were adjourned generally with liberty to re-enter. In referring to the defendants in this judgment, I am referring to the first defendant (the Union), which is a registered trade union, and to the third defendant, who is a member of the Union.

1.2 Both sides are to be commended for co-operating to have this matter ready for trial just three weeks after the interlocutory application was refused. The hearing of the substantive action commenced on 20th May, 2010, the plaintiff having delivered its statement of claim on 28th April, 2010 and the defendants, without objection from the plaintiff, having delivered an amended defence on 19th May, 2010. The plaintiff had already delivered a reply, which contained the usual joinder of issue, on 10th May, 2010. The Court has had the benefit of an issue paper prepared on behalf of the plaintiff, which addresses the issues which arise between the parties, and the defendants' response in relation to those issues, and it also has had the benefit of outline written submissions from both sides.

1.3 The action was heard on oral evidence, which elaborated on, but was not substantially different from, the affidavit evidence which was before the Court on the interlocutory application. I propose only referring to the evidence as necessary.

1.4 I propose outlining the pleadings in detail to give a comprehensive overview of the respective positions of each side, although I consider some of the issues arising from the pleadings to be of peripheral relevance to the determination of the primary issue – whether the picketing is lawful.

2. The pleadings and observations thereon

2.1 It is pleaded that the plaintiff, in addition to being a statutory corporation established pursuant to the Local Government Act 2001, is a housing authority within the meaning of the Housing Acts and is a provider of low rent accommodation to tenants in accordance with its statutory remit. It is further pleaded that the plaintiff is under an obligation to provide adequate accommodation for its tenants and, in particular, it is under an obligation to repair and maintain lifts and elevators in its rented accommodation. The defendants deny that the plaintiff is under such an obligation. To that denial the plaintiff specifically responds in the reply that the plaintiff's duties to its tenants derived from the Housing Acts and the common law require it to provide an efficient lift service, as was determined by the Supreme Court in *Heeney v. Dublin Corporation* [1998] IESC 26, to which I will refer later. The defendants' denial, in my view, is wholly unsustainable and, at the hearing of the action, counsel for the defendants acknowledged that the plaintiff is under an obligation to its tenants to keep the lifts and elevators in working order, although stressing that such obligation as exists arises between the plaintiff and the tenants, and that the form of order made in the *Heeney* case suggests that it is not an absolute obligation.

2.2 The core of the plaintiff's case, as pleaded, is that the industrial action by the defendants, that is to say, picketing at the Ballymun premises, is unlawful and in breach of the provisions of the Industrial Relations Act 1990 (the Act of 1990), so as to deprive the defendants, and, in particular, the Union, of the immunities conferred by that Act. That plea, as particularised, and the defendants' response to it, may be summarised as follows:

> (i) The plaintiff asserts, and the defendants admit, that there is no dispute or trade dispute between the plaintiff and the defendants and that there is no nexus, contractual or otherwise, between the plaintiff and the defendants.
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> (ii) The plaintiff asserts that any alleged trade dispute is between Pickerings and the Union and that any picketing by the defendants at the Ballymun premises is not, and cannot be, in furtherance of a trade dispute in the absence of any actionable controversy between the plaintiff and the defendants. In answer to those pleas, the defendants reiterate that there is a trade dispute with Pickerings and that the attendance of the Union's members at the Ballymun premises is, and was, in contemplation and/or furtherance of such dispute, notwithstanding the absence of any actionable controversy, other than these proceedings, between the plaintiff and the defendants. In particular, the defendants assert that the attendance of Union members employed by Pickerings at the Ballymun premises is not unlawful and they contend that the attendance of the second and third defendants and other members of the Union employed by Pickerings is lawful both

under s. 11(1) of the Act of 1990 and at common law.

(iii) As regards the application of s. 11(1) of the Act of 1990, the plaintiff pleads that it confines lawful picketing to the place where the picketers' employer works or carries on business and makes a number of assertions arising from that limitation. First, it is asserted that, since the plaintiff is not, and never was, the employer of the second defendant or third defendant, any picketing of the Ballymun premises by those individuals is unlawful. Secondly, it is asserted that, since Pickerings "are not working" at the Ballymun premises, the defendants are precluded from picketing there. Thirdly, it is asserted that Pickerings never worked or carried on business at the Ballymun premises within the true meaning of the expression. In response, the defendants deny that the attendance of the Union members employed by Pickerings at the Ballymun premises is unlawful because the plaintiff is not, and never was, the employer of the second defendant or the third defendant. The defendants assert that, at the commencement of the Union's attendance at the Ballymun premises, that is to say, on 4th February, 2010, their employer, namely, Pickerings, worked and/or carried on business at those premises and that those premises have not ceased to be a place where Pickerings works or carries on business within the meaning of the Act of 1990, to which the plaintiff's reply is that the plaintiff's contract with Pickerings was lawfully terminated with effect from 19th February, 2010. It is further asserted by the defendants that, even if Pickerings had ceased to work or carry on business at the Ballymun premises as of the date of the initiation of these proceedings, that is to say, 19th April, 2010, the continued attendance of the Union members at the Ballymun premises remains lawful both at common law and under s. 11(1) of the Act of 1990. While I will deal with the issues of fact arising out of those pleas in greater detail later, I am satisfied that the Ballymun premises was a place where Pickerings worked and carried on business when the picketing commenced on 4th February, 2010 and that the contract between Pickerings and the plaintiff was not terminated on 19th February, 2010, although it was definitely terminated with effect from 25th March, 2010.

(iv) As regards the defendants' reliance on the common law, the plaintiff in its reply specifically asserts that there is no right at common law to engage in industrial action in the circumstances which prevail here.

(v) The plaintiff pleads that the only basis on which the defendants could legitimately picket the Ballymun premises in the circumstances which prevail here is pursuant to s. 11(2) of the Act of 1990, which, it is asserted, does not arise. While the defendants deny that proposition, they reiterate that they are basing their entitlement to picket on common law or, alternatively, on s. 11(1) of the Act of 1990. In the interests of clarity, it is worth recording that the defendants have never relied on the entitlement to maintain a secondary picket under s. 11(2) of the Act of 1990. Accordingly, in my view, s. 11(2) is something of a "red herring", save to the extent that it may throw light on the proper interpretation of s. 11(1).

(vi) The plaintiff makes a broad plea that any picketing by the defendants at the Ballymun premises is an infringement of the plaintiff's rights and does not attract the immunities conferred by the Act of 1990 where the picketing engaged in is alleged to have the characteristics outlined, the following being the characteristics which the plaintiff stood over at the hearing:

(a) that it is directed at a party who is not in dispute with the Union and was not the "employer concerned" for the purposes of s. 19(2) of the Act of 1990, meaning the employer on whom strike notice was served;

(b) that it involves unlawful entry on the plaintiff's property such as to constitute a trespass;

(c) that it is an unlawful interference with the plaintiff's statutory obligations to its tenants and its business and commercial relations with contractors;

(d) that it is calculated to intimidate any contractors engaged by the plaintiff for the purpose of repairing and maintaining the lifts in the Ballymun premises;

(e) that it has as its sole or primary objective the inducing of breaches of the plaintiff's contracts of tenancy;

(f) that it constitutes an actionable conspiracy to injure the plaintiff and its tenants; and

(g) that the actions of the defendants have been embarked on and maintained for the purpose of interfering with the plaintiff's undertaking and interfering with the peaceful enjoyment of the plaintiff's tenants and of causing them hardship, inconvenience and distress.

The defendants have traversed all of those allegations and they deny that picketing by Union members employed by Pickerings at the Ballymun premises is an infringement of any of the plaintiff's rights. Specifically they deny that the picketing is directed at the plaintiff.

2.3 In relation to the allegation of trespass, that the defendants have during picketing unlawfully entered on the property of the plaintiff, this was not an issue at the hearing of the interlocutory injunction and subs. (4) of s. 19, which disapplies subs. (2) of s. 19 "in respect of proceedings arising out of or relating to unlawfully entering upon any property belonging to another", was not invoked by the plaintiff. I am satisfied that the evidence adduced at the hearing of the action establishes that the picketing to date has occurred within the boundaries of property of which the plaintiff is the owner in fee simple and has possession. Further, although the property is used, apparently without objection from the plaintiff, by members of the public for car parking purposes when attending the nearby school and other facilities in the neighbourhood, I am satisfied that members of the public are not entitled as of right to use it and it remains the private property of the plaintiff, in the sense that the plaintiff can control access of the public to it. However, the reality of the situation on the ground is that the defendants could easily move the picket to a nearby public pavement, which would mean that the picketers would be attending "at, or …, at the approaches to" the Ballymun premises as required by s. 11(1). Therefore, even though the plaintiff has established that the location of the picket *prima facie* constitutes a trespass on its property, to seek to have these proceedings determined solely on that ground would not provide a solution to the problem which they are intended to resolve. The finding of *prima facie* trespass, whether or not the defendants have an immunity in respect thereof under s. 13, does not resolve the real issues between the parties. Therefore, I am of the view that the fact that currently the defendants are *prima facie* trespassing does not obviate further consideration of the other allegations made against the defendants.

2.4 The plaintiff asserts that the defendants will continue to cause the plaintiff serious damage and disruption by virtue of their activities. While the defendants deny that they will continue to cause the plaintiff "any actionable damage", significantly, they admit

that the members of the Union will continue to picket in the event that the plaintiff engages new contractors in substitution for Pickerings, but reiterate that such continued attendance is in contemplation and/or furtherance of a trade dispute or, alternatively, in the reasonable belief that it is in contemplation and/or furtherance of such a dispute.

2.5 The defendants specifically plead that:

(a) the Union, as a registered trade union, is entitled to the benefit of the application of s. 13 of the Act of 1990;

(b) it is the reasonable belief of the Union members and officials that the picketing was and remains in contemplation and/or the furtherance of a trade dispute;

(c) the picketing by the Union members at the Ballymun premises was and is peaceful at common law; and

(d) the picketing at the Ballymun premises is lawful under common law and does not constitute a nuisance at common law, so that no injunctive relief can be granted at the suit of the plaintiff.

On the evidence, I accept that the picketing by the members of the Union at the Ballymun premises has been peaceful.

2.6 As regards the defendants' invocation of s. 13 of the Act of 1990, the plaintiff specifically replies that continuing picketing at the Ballymun premises in the event that the plaintiff engages a new contractor would be unlawful at common law and by virtue of s. 11(1) and would deprive the defendants of the immunities conferred by the Act of 1990 and, in particular, by s. 12 thereof.

2.7 In the statement of claim the plaintiff claims a variety of reliefs, declaratory and injunctive, and also damages. Counsel for the plaintiff informed the Court that the plaintiff is not pursuing the remedy of damages, nor it is seeking injunctive relief. Therefore, save to the extent that it assists in the interpretation of the provisions of Part II of the Act of 1990 generally, s. 19(2) does not come into play and it is not necessary to consider whether that sub-section governs the grant of a permanent injunction, as well as the grant of an interlocutory injunction, so that, at the trial of the action, the Court is prohibited from granting a permanent injunction restraining a strike or other industrial action where the "fair case" test as to "activity in contemplation or furtherance of a trade dispute" is satisfied by the defending union and its members. As I understand the plaintiff's position, it is prepared to rely on declaratory relief on the basis that the Union, as a registered trade union, will conduct its affairs in accordance with any declaration the Court may see fit to grant.

2.8 As to the form of the declaration which the plaintiff now seeks as an alternative to the various reliefs sought in the statement of claim, it was not formulated with any precision and, indeed, it is true to say that it was left very vague. Counsel for the plaintiff made it clear that the plaintiff's objective is that the picketing of the Ballymun premises should cease and what it requires is a declaration that the picketing at the Ballymun premises is unlawful.

3. The facts

3.1 In my judgment of 27th April, 2010 I outlined the facts which were not in dispute when the application for the interlocutory injunction was heard on 23rd April, 2010. The evidence adduced at the trial elaborated on the facts and brought matters up to date.

3.2 It is clear on the evidence that since 1989 Pickerings has serviced, maintained and repaired the lifts in all of the apartment blocks at Ballymun, some of which have been demolished in recent years under the Ballymun regeneration project, under a number of successive contracts with the plaintiff, which were granted following a public procurement process. As I understand it, each of the contracts was for a fixed term. Pickerings' most recent contract would have expired on 30th June, 2010, if it had not been already terminated by the plaintiff because of the impact of the picketing by the members of the Union. There have been industrial relations problems between Pickerings and its employees in the past, which have resulted in industrial action being taken by the Union and its members – in 1998 and 2002. On both occasions, pickets were placed at Ballymun. The earlier dispute led to proceedings referred to in the plaintiff's reply, *Heeney & Ors. v. Dublin Corporation*, in which an *ex tempore* judgment was delivered by O'Flaherty J. on 17th August, 1998. During the 2002 industrial action, an accommodation was reached between the plaintiff and individual employees of Pickerings, who provided an emergency maintenance and repair service over the seven weeks duration of the industrial action.

3.3 The genesis of the current dispute between the Union and Pickerings was a decision made by Pickerings in November 2009 to make redundant three of its employees. The dispute apparently centers on the failure of Pickerings to implement the "last in first out" principle in the selection of employees for redundancy and the refusal to pay extra-statutory redundancy to the employees who are being let go. On the evidence I am satisfied that there exists between the Union and its members and Pickerings a "trade dispute" within the meaning of s. 8 of the Act of 1990, which defines that expression as meaning "any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment, of any person". If authority is necessary to support that finding, it is to be found in the decision of the Supreme Court in *Goulding Chemicals Ltd. v. Bolger* [1977] I.R. 211, which involved the application of the Trade Disputes Act 1906 (the Act of 1906) in the context of workers having been made redundant. As was clear on the hearing of the interlocutory application, the Union balloted its members on 17th December, 2009 in accordance with the provisions of the Act of 1990 and the ballot sanctioned industrial action, including "the placing of pickets on the Company's premises". On a plain reading of the ballot paper, the "Company's premises" means "Pickerings' premises". I am satisfied that the members of the Union who voted would have regarded the Ballymun premises as Pickerings' premises in the context of the proposal which was being put to them on the ballot paper. The Union gave strike notice to Pickerings in accordance with the Act of 1990 and commenced picketing at the Ballymun premises on 4th February, 2010. No prior notice had been given to the plaintiff that there was to be picketing at the Ballymun premises.

3.4 The effect of the industrial action between the Union and Pickerings as regards the Ballymun premises was that no servicing, maintenance or repairs were carried out to the lifts in the remaining ten apartment blocks after 4th February, 2010. When the plaintiff applied *ex parte* to this Court for an interim injunction on 20th April, 2010, only two of the twenty seven lifts which service the ten apartment blocks were working. Following the grant by the Court of an interim injunction on 20th April, 2010 restraining the picketing, which remained in place until judgment was given on the plaintiff's application for an interlocutory injunction on 27th April, 2010, the plaintiff retained a company, the name of which was given in evidence, obviously imprecisely, as "Dimension", on a short term contract to do repair and maintenance works to the lifts. The arrangement with "Dimension" was strictly on condition that there would be no picket at the Ballymun premises. It is not clear from the evidence whether the personnel of "Dimension" are members of the Union or of some other union. In any event, the interim injunction lapsed on 27th April, 2010 and, when the Union re-commenced picketing, "Dimension" ceased to provide services for the plaintiff.

3.5 It is clear on the evidence that the plaintiff will find it impossible to engage a contractor to service and repair the lifts in the Ballymun apartment blocks while the Union and its members maintain a picket at the Ballymun premises. In consequence, it has been necessary for the plaintiff to obtain the services of the Army, which commenced work on the lifts in late April 2010 after picketing re-commenced. There have been six Army personnel involved in repairing and servicing the lifts since then. When Mr. Desmond Feeney, the plaintiff's Inspector at the Ballymun premises, testified on 20th May, 2010, there were nine lifts out of the total of twenty seven lifts in the ten apartment blocks working due to the efforts of the Army. Mr. Feeney, on the basis of his experience, estimated that it would take the Army personnel, who are not experienced lift engineers, six months to repair all of the twenty seven lifts. If the plaintiff was in a position to retain a lift contractor, who brought in six to ten people, Mr. Feeney estimated that it would take six to eight weeks to have all of the lifts repaired.

3.6 Mr. Feeney, who is a member of a trade union, IMPACT, testified that he was instructed by his union not to assist the Army and that he has obeyed that instruction. Mr. Arthur Hall, the assistant general secretary of the Union testified that it was the Union which conveyed to IMPACT that Mr. Feeney, as it was put to him in cross-examination, would be regarded as "a scab" if he co-operated with the Army. It is only fair to record that Mr. Hall's position was that the Union had offered the plaintiff an opportunity to engage Pickerings' employees at Ballymun on a temporary basis to alleviate the situation during the industrial action, but the offer had not been taken up by the plaintiff. In my view, neither the fact of the offer nor the fact that it was not taken up has any bearing on the issues which the Court has to decide.

3.7 The evidence as to Pickerings' places of work and business was given by Mr. Hall and by a member of the Union, Dick Roche, who started working for Pickerings in 1988 and since 1989 has worked for that company exclusively in the Ballymun premises, where he has fulfilled the role of supervisor. Pickerings' head office is in an industrial estate in Dunboyne, County Meath. It operates throughout the country at various locations, such as office blocks and shopping centres, installing, servicing, maintaining and repairing lifts and escalators. For instance, it services lifts in the shopping centre known as The Square in Tallaght. Mr. Hall's evidence in relation to that type of location was that Pickerings carries out a number of services during the year and operates on a "call out" basis as necessary. His evidence was that it would be impracticable for the Union to place a picket at that type of location because it would have to have prior information as to when a member of Pickerings' personnel would be carrying out work at the location.

3.8 Apart from the Dunboyne headquarters, the evidence established that the base operated at the Ballymun premises is the only location at which Pickerings has had a permanent base. In recent years that base, as Mr. Feeney verified, has comprised a vacant flat on the first floor in one of the blocks, which contains an office, a so-called canteen, and a bathroom, and two basement areas, which comprise a workshop and stores. Photographs of those areas, as they were on 7th May, 2010, were put in evidence. An extract from the invitation to tender under which Pickerings was awarded its most recent contract was also put in evidence. It provided that the plaintiff would endeavour to make available to the successful contractor a premises for use as a store in the Ballymun premises, but that the successful contractor would have to provide its own security and telephone and fax. The invitation to tender also stipulated that the contractor should at all times employ sufficient staff on site to efficiently carry out the work detailed in the specification. It is common case that in recent years Pickerings has employed six personnel exclusively at the Ballymun premises. In my view, it is beyond question that Pickerings worked and carried on business at the Ballymun premises when picketing commenced on 4th February, 2010.

3.9 While it is not in dispute that the plaintiff has terminated Pickerings' contract, there is controversy as to when that occurred – whether it occurred when the letter of 19th February, 2010 giving notice of termination to Pickerings was served, or on 5th March, 2010 when that notice expired, or 25th March, 2010 when the plaintiff acknowledged in writing to Pickerings that the contract was at an end. Although I have found that it was terminated with effect from 25th March, 2010, that controversy is of no materiality for present purposes, because the contract was in existence when picketing commenced and it had been definitely terminated when these proceedings were initiated. It is the case that since 25th March, 2010 Pickerings has not provided any service to the plaintiff, under contract or otherwise, at the Ballymun premises and, apart from attending for the purposes of picketing, their employees have not been in the Ballymun premises.

3.10 However, on 7th May, 2010, as the photographic evidence confirms, property of Pickerings, for example, filing cabinets, files, a fax machine and suchlike in the office, a hob and microwave oven and other items in the kitchen, and tools and equipment, for example, an angle grinder, and spare parts in the workshop and storage areas, remained in the vacant flat and basement areas which had been used by Pickerings under its contractual arrangement with the plaintiff. Although no evidence was adduced on this point, the Court was informed that subsequent to 7th May, 2010 Pickerings' property has been removed from the areas it formerly used for the purpose of its contract. The absence of evidence on that point is not significant because, in any event, the Court would be entitled to infer that it would be a simple matter for the plaintiff to move Pickerings' property out of the Ballymun premises and into storage at a different location. The mere presence of goods or chattels of Pickerings at the Ballymun premises after 25th March, 2010, in my view, did not mean that the location was a place where Pickerings was working or carrying on business within the meaning of those words in s. 11(1). Its contract was terminated, its contractual obligations were at an end, and whatever express or implied licence it had to enter the plaintiff's premises while the contract was in existence was also at an end.

3.11 While recognising the hardship which the fact that so many lifts in the apartment blocks in the Ballymun premises are not operating is causing to the plaintiff's tenants, it was Mr. Hall's position, standing over the Union's position as pleaded, that the picketing will continue at the Ballymun premises until the dispute with Pickerings is resolved. His evidence was that the Union has been trying to resolve it and has sought assistance from the Minister of State for Labour Affairs, from local politicians, and from IBEC. However, he acknowledged that Pickerings cannot be forced to concede to the Union's demands and that there is no mechanism for achieving that outcome, which I understand to mean no mechanism for legal enforcement.

3.12 Counsel for the plaintiff conceded that the picketing presence at the Ballymun premises is unobtrusive and that the picketers are not creating a nuisance, in the ordinary sense of that word, and that there is no disorder or blockading of the premises or the accesses thereto. That is consistent with the evidence of Mr. Roche, who has been personally involved in the picketing, which involves one, or sometimes two, members of the Union walking back and forth carrying a placard which states that there is an official trade dispute in being.

3.13 As Mr. Hall acknowledged, the Ballymun premises are effectively "blacked". The reality is that no other lift contractor is going to operate in the Ballymun premises while the Union's picket is in place. The situation which prevails has given rise to a serious dilemma for both the Union and the plaintiff and, as outlined in my judgment on the interlocutory application, it has arisen from the failure of Pickerings to engage in the statutory industrial dispute resolution processes.

4. The issues

4.1 While, in the plaintiff's issue paper and in the defendants' response to it, the parties outlined a series of issues of fact and law, having already eliminated some of the issues raised, it seems to me that all of the issues raised on the pleadings can be distilled into three broad issues, namely:

> (a) whether the picketing at the Ballymun premises is lawful by virtue of the application of s. 11(1) of the Act of 1990 on which the defendants rely;
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> (b) if the picketing is not lawful by virtue of s. 11(1), whether it is lawful at common law, as the defendants contend, which, I understand to mean that the attendance by the picketers at the Ballymun premises, having regard to the manner in which they are conducting themselves, does not constitute a nuisance at common law; and
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> (c) whether, by their conduct, the defendants have committed a tort, aside from the tort of nuisance, whether it be one of the so-called economic torts or a wrongful interference with the obligations of the plaintiff to its tenants and breach of the rights of the tenants at common law, under statute or under the Constitution, which is not immune from suit by virtue of the Act of 1990, or to which the defendants do not have a statutory defence.

4.2 The issue at (a) is the primary issue. The ancillary issue at (b) only falls for consideration if the picketing is not lawful under s. 11(1).

4.3 Having regard to the position adopted by the plaintiff at the hearing that the relief it seeks is a declaration that the picketing is unlawful, it is difficult to understand the relevance of the ancillary issue at (c), if the picketing is lawful under s. 11(1). However, it is convenient to make some observations in relation to that issue at this juncture, because the statutory protection which the defendants invoke, and which the plaintiff asserts is not applicable in the circumstances which prevail, is to be found alongside s. 11(1) in Part II of the Act of 1990.

4.4 The defendants rely on the various statutory immunities conferred on an authorised trade union, which for the time being is the holder of a negotiation licence, which the Union is, and its members and officials (s. 9 of the Act of 1990). In particular, the defendants invoke the protection afforded by s. 13 of the Act of 1990. However, the plaintiff's position is that such immunities and, in particular, that the protection afforded by s. 12 of the Act of 1990, cannot apply in circumstances where the continued picketing results in the plaintiff being unable to engage a new contractor to service the lifts.

4.5 Sub-section (1) of s. 13 provides:

> "An action against a trade union, … or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act committed by or on behalf of the trade union in contemplation or furtherance of a trade dispute, shall not be entertained by any court."

Sub-section (2) provides that, in an action against any trade union or person referred to in subsection (1) in respect of any tortious act, it shall be a defence that the act was done in the reasonable belief that it was done in contemplation or furtherance of a trade dispute.

4.6 Section 12 provides:

> "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that —
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> > (h) it induces some other person to break a contract of employment, or
> >
> > (i) it consists of a threat by a person to induce some other person to break a contract of employment or a threat by a person to break his own contract of employment, or
> >
> > (j) it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

5. Application of s. 11 generally

5.1 Peaceful picketing, in the context of a trade dispute, was governed by the the Act of 1906 for over eight decades. The Act of 1906 was repealed by the Act of 1990. Section 11 of the Act of 1990, which deals with peaceful picketing, replaced s. 2 of the Act of 1906. It fundamentally altered the law on picketing and differentiated between what has come to be known as primary picketing, which is dealt with in subs. (1), and secondary picketing, which is dealt with in subs. (2). Although the defendants' case that their attendance at the Ballymun premises is lawful is based exclusively on subs. (1), for the purposes of construing subs. (1) it is instructive to consider subs. (2) as well.

5.2 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."

5.3 On an analysis of subs. (1), the following elements are identifiable as necessary ingredients of a lawful primary picket:

> (a) the persons whose conduct is rendered lawful – one or more persons acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute;
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> (b) the type of conduct which is rendered lawful – attendance by those persons at, or at the approaches to, a certain place, provided they so attend merely for the purpose of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working; and
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> (c) the place in question – where the picketers' employer works or carries on business.

5.4 Sub-section (2) 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 an employer who is not a party to the trade dispute works or carries on business if, but only if, it is reasonable for those who are so attending to believe at the commencement of their attendance and throughout the continuance of their attendance that that employer has directly assisted their employer who is a party to the trade dispute for the purpose of frustrating the strike or other industrial action, provided that such attendance is merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working."

As the words to which I have added emphasis in subs. (2) indicate, the distinguishing feature between the two sub-sections is the place at which the picketing may lawfully take place. In the case of subs. (1) it is at the place where the picketers' employer "works or carries on business", whereas in the case of subs. (2) it is a place where an employer who is not a party to the trade dispute "works or carries on business", but in circumstances only where there is continuous reasonable belief on the part of the picketers that the employer in question has directly assisted the picketers' employer for the purposes of frustrating the industrial action.

5.5 Notwithstanding the differences between subs. (1) and subs. (2) of s. 11, what they have in common is that, to come within the protection afforded by either, the target of the picketing must be an employer and the picketing must be conducted at the place where the employer works or carries on business. That is in contradistinction to s. 2 of the Act of 1906, which rendered lawful picketing "at or near a house where a person resides or works or carries on business or happens to be". By their reliance on subs. (1) of s. 11 solely, the defendants must establish that the Ballymun premises is a place where their employer, Pickerings, "works or carries on business" within the meaning of that sub-section. In my view, the authorities on the application of s. 2 of the Act of 1906 cited by counsel for the plaintiff - the decisions of the High Court in *Ellis v. Wright* [1976] I.R. 8 and in *Cleary v. Coffey* (Unreported, High Court, 30th October, 1979) – are of little or no assistance in determining the proper application of s. 11 in this case. Likewise, for present purposes, little or no assistance is to be derived from the authorities which pre-date the Act of 1990 cited on behalf of the defendants – the decisions of the Supreme Court in *Ferguson v. O'Gorman & Ors*. [1937] I.R. 621 and in *Goulding Chemicals Ltd. v. Bolger* referred to earlier.

5.6 In enacting s. 11, the Oireachtas obviously deliberately set out to curtail what had been the broad scope of s. 2 of the Act of 1906 as regards the locus of picketing and has limited it to a place where the employer who is the target of the picketing "works or carries on business". Although twenty years have elapsed since the enactment of the Act of 1990, this is the first occasion on which a court has been faced with determining the true meaning of s. 11, which raises a difficult question of construction, in a substantive action.

5.7 As regards the application of subs. (1) of s. 11 to the facts here, on the case made on behalf of the plaintiff, two sub-issues arise, namely:

> (i) whether the defendants are acting "in contemplation or furtherance of a trade dispute", which the plaintiff asserts is not the case; and
>
> (ii) whether they are picketing at "a place where their employer works or carries on business", which the plaintiff also asserts is not the case.

While I propose considering each of the above sub-issues separately, obviously the Court, in applying s.11(1), must do so on the basis of the proper construction of the sub-section as a whole in the context of Part II of the Act of 1990.

6. Defendants' action "in contemplation or furtherance of a trade dispute"?

6.1. In my judgment on the plaintiff's application for an interlocutory injunction I stated that there was no controversy between the parties at that stage that the Union was acting in contemplation or furtherance of a trade dispute, albeit a trade dispute between the Union and Pickerings. Whether I represented the then position of the plaintiff correctly or not, at the trial of the action its position was that, in picketing at the Ballymun premises, the members of the Union are not acting in contemplation or furtherance of a trade dispute. It was submitted on behalf of the plaintiff that the current situation in which the Union is persisting in the continuation of picketing in the knowledge that it has resulted, and will inevitably continue to result, in the plaintiff being unable to retain a contractor to provide repair and maintenance services for the lifts at the Ballymun premises, is tantamount to an embargo, in circumstances where there is nothing which the plaintiff can do to bring about a resolution of the dispute between the Union and its members and Pickerings.

6.2 That, as it contends is the case, the plaintiff does not have any clout as against Pickerings in relation to the settlement of the dispute with the defendants is consistent with the evidence. However, in my view, the plaintiff's further proposition that the defendants' reason for picketing the Ballymun premises is clouded in obscurity is not consistent with the evidence. It is perfectly clear why the defendants initiated the picketing at the Ballymun premises. Six members of the Union involved in the industrial action against Pickerings were employed exclusively at the Ballymun premises and some of them, like Mr. Roche and the second and third defendants, have been continuously and exclusively employed there and it has been their sole place of work for a long number of years. Moreover, there is a historical precedent for the Union picketing at the Ballymun premises: picketing occurred there in 1998 and in 2002 during trade disputes between Pickerings and its employees. In my view, there can be no doubt that when the picketing commenced on 4th February, 2010 it was the case that the defendants were acting in furtherance of a trade dispute. Therefore, it seems to me that the fundamental question which arises in applying the element of s. 11(1) which renders lawful conduct in contemplation or furtherance of a trade dispute is whether the changed circumstances arising from the termination of Pickerings' contract by the plaintiff, and the acceptance of such termination by Pickerings, mean that the defendants cannot be found to be acting in contemplation or furtherance of a trade dispute since 25th March, 2010.

6.3 Although I consider that the approach which the Court should adopt in determining whether the current actions of the defendants are in "furtherance of a trade dispute" is to be gleaned from Part II of the Act of 1990, and that the authorities to which the Court was referred by the parties, which were decided in this jurisdiction by reference to the Act of 1906 and in the United Kingdom by reference to amended legislation introduced in that jurisdiction in 1974, are of little relevance, for completeness I propose to consider those authorities.

6.4 The only authority from this jurisdiction which counsel for the plaintiff cited in support of their argument that the defendants are not acting in contemplation or furtherance of a trade dispute was the decision of the Supreme Court in *Bayzana Ltd. v. Galligan* [1987] I.R. 238. It was submitted that, although that decision arose in the context of an application for an interlocutory injunction, it does assist in comprehending the expression "in contemplation or furtherance of a trade dispute". Apart from the fact that it was

concerned with an interlocutory application, that decision pre-dated the Act of 1990. There, the interlocutory injunction was sought by the plaintiff, which had purchased a meat plant in County Kildare from Irish Meat Producers Limited (I.M.P.). The plaintiff purchased with notice of a dispute between the defendants, who were former employees of I.M.P., and I.M.P., and of picketing at the Kildare premises, as a result of I.M.P. having ceased to trade there and having made its entire workforce there redundant. Matters came to a head when the plaintiff, which was described as the gratuitous bailee of a quantity of frozen meat stored on the premises, which was destined for EEC intervention, could not remove the frozen meat because it could not be certified by officials of the Department of Agriculture, which was a prerequisite to it being taken into intervention, as long as pickets remained at the Kildare premises. The Supreme Court, applying the principles laid down in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88, granted an interlocutory injunction. In the course of his judgment, Finlay C.J., having commented that the defendants had conceded that a fair question existed as to whether their actions "were in *bona fide* furtherance of a trade dispute" between them and I.M.P., continued (at p. 243):

> "Even if that concession had not been made, and I think it was proper that it should have been made, I am satisfied on the affidavits and having considered the evidence, that there is a fair question to be tried on that issue. The plaintiff does not concede any connection between it and I.M.P. and asserts a total incapacity to influence I.M.P. in regard to the trade dispute existing between that company and the defendants. If that evidence were accepted it seems to me that a consequence of it would be, on the full hearing of the action, that a court could properly reach the conclusion that the picketing of the premises was not at present within the ambit of the statutory protection created by the [Act of 1906]."

However, the foregoing comments were *obiter*, as Finlay C.J. made clear in the following paragraph, in which he stated that, at that stage, on an interlocutory application, it was neither possible, nor would it be proper for the Court to seek to decide that issue, the only test being whether there was a fair question to be tried.

6.5 Counsel for the plaintiff also relied on a decision of the Court of Appeal of England and Wales in *Associated Newspapers Group v. Wade* [1979] 1 WLR 697 and, in particular, the judgment of Lord Denning M.R. The statutory provision in issue in that case was a section of a 1974 statute of the United Kingdom Parliament, which was intended to give immunity from action in tort in respect of certain acts, for example, inducement of breach of contract, if done "in contemplation or furtherance of a trade dispute". The defendant was the general secretary of a trade union which, with the object of achieving recognition by a publisher which employed its members and was much used by advertisers, began a campaign to halt or reduce the supply of advertisements to the newspaper by sending circular letters to all its advertisers asking them to stop that advertising and warning that if they did not do so all their other advertisements in national, provincial and in local newspapers, magazines and periodicals would be "blacked" by union members. Many advertisers complied with the demand. As regards sixteen advertisers who did not comply, the general secretary instructed all members that no material from those advertisers should be handled anywhere until further notice. The advertisers affected brought proceedings claiming injunctions restraining, *inter alia*, unlawful interference with business, intimidation, conspiracy, inducing breaches of contract and of statutory duty (one of the plaintiffs being a water authority and another being a health authority). The union's defence was that its acts were "in furtherance of a trade dispute" and so immune from actionability in tort under the statutory provision in question. The plaintiffs were successful at first instance and in the Court of Appeal. On the construction of the words "in furtherance of" a trade dispute, Lord Denning M.R. stated (at p. 713):

> "… I would put it simply on the question of remoteness. Some acts are so remote from the trade dispute that they cannot properly be said to be 'in furtherance' of it. When conduct causes direct loss or damage to the employer himself (as by withdrawing labour from him or stopping his supplies) it is plainly 'in furtherance' of the dispute with him. But when trade unions choose not to cause damage or loss to the employer himself, but only to innocent third persons – who are not parties to the dispute – it is very different. The act may then be so remote from the dispute itself that it cannot reasonably be regarded as being done 'in furtherance' of it. The trade union may believe it to be in furtherance of it, but their state of mind is by no means decisive. It is the fact of 'furtherance' that matters, not the belief in it."

In that passage Lord Denning was advocating that an objective test be applied in determining whether the actions were in furtherance of a trade dispute. In applying the objective test to the facts before him, he concluded that there was "a good argument" for saying that the acts done were not in furtherance of a trade dispute. The other members of the Court of Appeal considered that the construction of the words "in contemplation or furtherance of a trade dispute" was not a matter for an interlocutory appeal and, in essence, decided that the injunction should continue on the basis that the balance of convenience favoured that course.

6.6 The test advocated by Lord Denning was not applied by the House of Lords in *Express Newspapers Ltd. v. McShane* [1980] A.C. 672 on an appeal from a decision of the Court of Appeal, of which Lord Denning was also a member, and in which the same statutory provision was in issue as had been in issue in the *Associated Newspapers Group v. Wade*. That case arose out of a dispute over pay between the proprietors of local newspapers and journalists employed by them, the majority of whom were members of a trade union, the N.U.J. Strike action was taken against the local newspapers. Those newspapers received news copy from the Press Association, a London based news agency staffed by journalists. In order to make the strike more effective, the N.U.J. called on the journalists in the Press Association to come out on strike, an action which would affect national newspapers, with whom there was no dispute, as well as local newspapers. When about half of the journalists on the Press Association remained at work, the N.U.J. called on its members working for national newspapers, including the plaintiffs' newspapers, to refuse to use copy which came from the Press Association. The N.U.J. defended an application for an interlocutory injunction on the basis that it was acting in "furtherance of a trade dispute" within the meaning of the relevant statutory provision. The plaintiffs were successful both at first instance and in the Court of Appeal. However, the House of Lords allowed the appeal, holding that the acts of the defendants were not actionable since they were done in furtherance of a trade dispute.

6.7 As the head note indicates, the majority in the House of Lords, including Lord Diplock and Lord Scarman, held that the expression "in … furtherance of a trade dispute" in the section in issue "refers to the subjective state of mind of the person doing the act and means that he so acts with the purpose of helping parties to the dispute to achieve their objectives in the honest and reasonable belief that it will do so". Lord Wilberforce dissented and held that the test was objective and to an extent was based on remoteness, but, as the head note indicates, his view was that the proper objective test is whether the act done, pursuant to the general intention, is reasonably capable of achieving its objective. The speeches of both Lord Diplock and Lord Scarman highlight the difficulties which a court would encounter in endeavouring to objectively assess what is in "furtherance" of a trade dispute having regard to the dynamics of industrial action in a particular context.

6.8 The rationale behind the subjective test approach is explained in the following passage from the speech of Lord Diplock (at p. 686):

> "Given the existence of a trade dispute (the test of which, though broad, is nevertheless objective …), this makes the

> test of whether an act was done 'in … furtherance of' it a purely subjective one. If the party who does the act honestly thinks at the time he does it that it may help one of the parties to the trade dispute to achieve their objectives and does it for that reason, he is protected by the section. I say 'may' rather than 'will' help, for it is in the nature of industrial action that success in achieving its objectives cannot be confidently predicted. Also there is nothing in the section that requires that there should be any proportionality between on the one hand the extent to which the act is likely to, or be capable of, increasing the 'industrial muscle' of one side to the dispute, and on the other hand the damage caused to the victim of the act which, but for the section, would have been tortious. The doer of the act may know full well that it cannot have more than a minor effect in bringing the trade dispute to the successful outcome that he favours, but nevertheless is bound to cause disastrous loss to the victim, who may be a stranger to the dispute and with no interest in its outcome. The act is none the less entitled to immunity under the section."

6.9 Counsel for the plaintiff referred the Court to a passage from the speech of Lord Scarman, who expressed himself in agreement with Lord Diplock. Lord Scarman stated (at p. 693):

> "The words, 'An act done by a person in contemplation or furtherance of a trade dispute' seem to me, in their natural and ordinary meaning, to refer to the person's purpose, his state of mind. The Court must satisfy itself that it was his purpose, and, before reaching its decision, will test his evidence by investigating all the circumstances and applying the usual tests of credibility: that is to say, it will ask itself whether a reasonable man could have thought that what he was doing would support his side of the dispute, or whether the link between his actions and his purpose was so tenuous that his evidence is not to be believed. But, at the end of the day, the question for the Court is simply: is the defendant to be believed when he says that he acted in contemplation or in furtherance of a trade dispute?"

Later, Lord Scarman reiterated that the test was subjective, stating (at p. 694):

> "It follows, therefore, that once it is shown that a trade dispute exists, the person who acts, but not the court, is the judge of whether his acts will further the dispute. If he is acting honestly, Parliament leaves to him the choice of what to do. I confess that I am relieved to find that this is the law. It would be a strange and embarrassing task for a judge to be called upon to review the tactics of a party to a trade dispute and to determine whether in the view of the court the tactic employed was likely to further, or advance, that party's side of the dispute. … It would need very clear statutory language to persuade me that Parliament intended to allow the courts to act as some sort of a backseat driver in trade disputes."

6.10 Turning to Part II of the Act of 1990, the expression "in contemplation or furtherance of a trade dispute" is to be found not only in subs. (1) and subs. (2) of s. 11 but also in subs. (1) and subs. (2) of s. 10, in s. 12, in subs. (1) and subs. (2) of s. 13 and in subs. (2) of s. 19. That expression is not defined in the Act of 1990, nor was it defined in the Act of 1906. However, the provisions of s. 13 of the Act of 1990, in my view, cast some light on what the Oireachtas intended by the expression in enacting Part II of the Act of 1990. Sub-section (1) of s. 13, which I have quoted earlier, gives immunity to a trade union, and its trustees, members, and officials, against an action in tort where the alleged tortious act was committed "in contemplation or furtherance of a trade dispute". Sub-section (2) of s. 13 makes it a defence to an action in tort against a trade union, its trustees, members, or officials, that the alleged tortious act was done "in the reasonable belief that it was done in contemplation or furtherance of a trade dispute". That provision indicates that, in the particular context which arises in this case, where the defendants invoke the provisions of subs. (1) and subs. (2) of s. 13, which they are entitled to do as a trade union and a member of a trade union, it was the intention of the Oireachtas that, in determining whether the act in issue, in this case the picketing, is in furtherance of a trade dispute, the Court should adopt a *via media* between the application of an objective test (as advocated by Lord Denning and Lord Wilberforce) and the application of a subjective test *simpliciter* (as advocated by Lord Diplock and Lord Scarman).

6.11 In this case, the sole basis on which the plaintiff brings the action, and seeks relief, against the defendants is that they have committed torts. The defendants defend on the basis that their actions are lawful pursuant to s. 11(1) and that, as a trade union and a member of a trade union, they have immunity from a suit in tort and a defence to the plaintiff's action under s. 13. Given that context, it seem to me that, in applying the provisions of Part II of the Act of 1990 to the defendants, including s. 11(1) and s. 13, the question for the Court is whether, in maintaining the picket, the defendants are acting in the reasonable belief that their actions are in furtherance of the trade dispute between Pickerings and the defendants.

6.12 In my view, there is no doubt on the facts that the only objective behind the picketing by the defendants of the Ballymun premises from the outset has been, and is, to achieve a resolution of the trade dispute with Pickerings which is favourable to the Union and its members. While it is an unfortunate consequence of the implementation of that objective that extreme hardship has been, and is being, inflicted on the tenants of the apartments in the Ballymun tower blocks, that outcome is not the defendants' objective and it is a matter of regret to them. On the basis of Mr. Hall's evidence, I am satisfied that, in initiating the picketing, the defendants acted in the reasonable belief that picketing at the Ballymun premises would have the effect they aim for. I am satisfied that they continue to act in that belief, notwithstanding that the contractual relationship between Pickerings and the plaintiff has ceased.

6.13 I reach that conclusion notwithstanding that, because of the changed circumstances, it may be reasonable to infer that the plaintiff may have even less clout against Pickerings since the 25th March, 2010, when the contractual relationship ceased, than it had between the commencement of the picketing and that date in relation to bringing about a settlement of the defendants' trade dispute with Pickerings which is favourable to the defendants. However, the officers of the Union are in a position to assess whether picketing the Ballymun premises, where their members as employees of Pickerings provided services in relation to the lifts for over twenty years, and which services are required on an ongoing basis, has the effect, to use the terminology used in one of the earliest cases in which the meaning of "furtherance" of a trade dispute in the Act of 1906 was considered, *Conway v. Wade* [1909] A.C. 506, of promoting the interest of either party, that is to say, Pickerings or the defendants, to the trade dispute. I am satisfied on the evidence of Mr. Hall that, notwithstanding the termination of the plaintiff's contract with Pickerings, the defendants have continued picketing at the Ballymun premises in the reasonable belief that their actions will have the effect of promoting the interests of the Union and its members in the dispute with Pickerings.

6.14 Therefore, I conclude that the picketing at the Ballymun premises is in furtherance of the trade dispute between Pickerings and the defendants within the meaning of s. 11(1) of the Act of 1990.

7. Picketing at a place where Pickerings "works or carries on business"?

7.1 To recapitulate on the factual position in relation to Pickerings' presence at the Ballymun premises and, in particular, whether,

within the ordinary meaning of the concept of an employer working or carrying on business, they were doing so at the Ballymun premises on various dates which may be relevant for the purposes of the application of s. 11(1), I have found as follows:

> (a) when the defendants commenced picketing at the Ballymun premises on 4th February, 2010, Pickerings was working or carrying on business there;
>
> (b) on and from 25th March, 2010 the contractual relationship between Pickerings and the plaintiff had definitely terminated and Pickerings was no longer obligated to provide services for the plaintiff at the Ballymun premises, nor had Pickerings any entitlement to enter or remain on the Ballymun premises and after 25th March, 2010 Pickerings did not work or carry on business there, irrespective of the fact that some of its goods and chattels remained in the premises; and
>
> (c) on 19th April, 2010, when these proceedings were initiated, Pickerings was not working or carrying on business at the Ballymun premises and that remains the position to the present day.

7.2 In order to find that, as a matter of law, the picketing by the defendants at the Ballymun premises is lawful by virtue of s. 11(1), as the defendants contend, the Court must be satisfied that the Ballymun premises are "a place where [Pickerings] works or carries on business" within the meaning of that sub-section. The difficult question of construction to which these proceedings give rise is whether, in using the present tense in the expression "works or carries on business" in s. 11(1), the Oireachtas intended the picketers to have the protection of s. 11(1) if the picketers' employer was working or carrying on business at the location of the picketing when the picketing commenced even if, for whatever reason, the employer ceased to be working or carrying on business at that location at a point in time thereafter before the Court is required to adjudicate on the matter.

7.3 Counsel for the plaintiff referred the Court to two authorities on the use of the present tense in a statutory provision which I have not found to be of any assistance in construing s. 11(1).

7.4 The first was the decision of the Supreme Court in *Iarnród Éireann v. Holbrooke* [2001] 1 I.R. 237. That decision concerned the construction of the definition of "excepted body" in s. 2 of the Trade Union Act 1942, which definition includes a requirement that the body is one "which carries on negotiations for fixing wages or other conditions of employment of its own members (but of no other employees)". One of the defendants in the action, the Irish Locomotive Drivers' Association, was a registered trade union and the position of the defendants was that it was an "excepted body" within that definition. It was not recognised by the plaintiff employer, which would not negotiate with it. In his judgment, with which the other members of the Supreme Court agreed, Fennelly J. stated:

> "As I see it, the issue is whether a body can claim that it 'carries on negotiations' (noting the use of the present tense) where patently it does not and cannot do so because the employer refuses to negotiate."

On that issue, Fennelly J. found that the trade union in question could not be an "excepted body". Clearly, there was no other application of the definition open, as the trade union had only been registered in July 1999 and it had never carried on negotiations.

7.5 The second authority was a decision of the Judicial Committee of the Privy Council in *Maradana Mosque Trustees v. Mahmud* [1967] A.C. 13. That was an appeal from the Supreme Court of Ceylon, which raised an issue of the construction of a statute which regulated the governance of "unaided" schools in what was then Ceylon. The provision in issue empowered the relevant Minister to make an order which effectively amounted to State takeover of the management of the school in the circumstances stipulated - that the Minister was satisfied that the school "is being so administered in contravention of any provisions of this Act". The Act required that teachers' salaries be paid not later than the 10th of the month following that in respect of which they were due. The appellants, in 1961, having failed to pay certain teachers' July salaries by 10th August, were invited on 11th August to show cause why the school should not be taken over. The appellants showed cause on 15th August, undertook to pay the teachers by 18th August and followed through on that undertaking. On 21st August the Minister made an order under the section and the validity of the order was challenged by the appellants. On the use of the present tense in the relevant section, Lord Pearce, delivering the judgment of the Privy Council, stated (at p. 25):

> "Before the Minister had jurisdiction to make the Order he must be satisfied that 'any school … *is* being so administered in contravention of any of the provisions of this Act'. The present tense is clear. It would have been easy to say 'has been administered' or 'in the administration of the school any breach of any of the provisions of this Act has been committed', if such was the intention of the legislature. But for reasons which common sense may easily supply, it was enacted that the Minister should concern himself with the present conduct of the school, not the past, when making the Order."

What distinguishes the provision under consideration in that case from the aspect of s. 11(1) with which the Court is now concerned is that it was expressly provided in the section under consideration by the Privy Council that the conduct of the appellants was to be assessed at a particular point in time, namely, the date on which the Minister was making the order, whereas s. 11(1) is concerned with the existence of a state of affairs which renders picketing lawful without expressly identifying the point in time at which the existence of the state of affairs is to be assessed.

7.6 An unusual feature of this case, to which I have alluded in my judgment on the interlocutory application, is that the proper construction of s. 11(1) was considered, on the hearing of an interlocutory application, by McCracken J. in *Malincross Ltd. v. Building and Allied Trades Union* [2002] 3 I.R. 607. In the passage from his judgment (at p. 610), which I quoted in my earlier judgment, and which I consider it useful to quote now, McCracken J. stated:

> "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)."

While it was not suggested by counsel for the defendants (properly, in my view, having regard to the decision of the Supreme Court in *Crilly v. T. & J. Farrington* [2001] 3 I.R. 251) that the Court should have regard to the views expressed by the Minister in a Dáil Debate in endeavouring to ascertain the proper construction of s. 11(1) and while the Court was not subjected to submissions on grammar, in the light of the comments of McCracken J. on the history of the passage of the Act of 1990 through the Houses of the Oireachtas, it would be remiss not to consider whether there is some grammatical rule or convention which bears on the interpretation of the use of the present tense in s. 11(1).

7.7 In Fowler's "*A Dictionary of Modern English Usage*" (Wordsworth Editions Ltd., 1994) in dealing with technical terms it is stated (at p. 608):

> "*H[istoric present*] is, in any language, the present indicative used instead of a past to give vividness in describing a past event.
>
> (He says nothing, but ups with his fist & hits me in the eye)."

In "*The Shorter Oxford English Dictionary*" (3rd Edition) in Volume 1 at

p. 968, the epithet "historic" is referred to as applying in Greek and Latin grammar to tenses used in the narration of past events and "generally, to the present tense, when used instead of the past in vivid narration 1845". I think it is abundantly clear that, in using the present tense in the expression "works or carries on business" in s. 11(1), the Oireachtas was not endeavouring to do what the "historic present" is aimed at – to create a vivid narrative – as in the example given by Fowler, or in the example frequently given in relation to titles, "The Empire Strikes Back". Therefore, in my view, the proper construction of s. 11(1) is not to be achieved by resorting to an arcane rule of grammar.

7.8 The proper construction is to be found in the language used in s. 11. To constitute lawful picketing for the purposes of s. 11, it is a requirement that the picketing is engaged in at the place where the targeted employer "works or carries on business". Clearly, at the time the picketing commences that requirement must be fulfilled. Accordingly, picketing cannot lawfully be engaged in at a place where the targeted employer had worked or carried on business, say, a week, or a month or a year previously. The question which the factual situation which arises in this case raises is whether, as a matter of construction of subs. (1) of s. 11, picketing which meets the requirement that the picketers' employer "works or carries on business" at the location of the picketing when it commences will only continue to be lawful if the requirement continues to be complied with up to the time the application of s. 11 is considered by the Court. To put it in another way, if the picketers' employer ceases to work or carry on business at the location of the picketing after commencement of the picketing, does that mean that the picketing ceases to be lawful?

7.9 Sub-section (2) of s. 11 gives an indication of what the Oireachtas intended in imposing in both subs. (1) and subs. (2) of s. 11 the requirement of the targeted employer working or carrying on business at the location of the picketing to render it lawful. This flows from the manner in which the Oireachtas dealt with the additional elements which require to be present to render secondary picketing lawful under subs. (2) – that the picketers must believe at the commencement of the picketing and throughout its continuance that the employer who is not a party to the trade dispute has directly assisted the picketers' employer for the purposes of frustrating the industrial action. As regards that additional element – the presence of a certain state of mind on the part of the picketers – the Oireachtas has expressly addressed the possibility that it may not continue. If it changes post-commencement, the picketing will cease to be lawful.

7.10 Having regard to the manner in which the Oireachtas has treated that additional requirement to render secondary picketing lawful, if it was the intention of the Oireachtas that the requirement as to the targeted employer working or carrying on business at the location of the picketing should apply not only at the commencement of the picketing but also throughout the continuance of the picketing, it is strange that this was not spelt out in both subs. (1) and subs. (2). The fact that it was not suggests that such was not the intention of the Oireachtas. It suggests that it is to be implied that the use of the present tense in both sub-sections, in imposing the requirement as to the targeted employer working or carrying on business at the location of the picketing, indicates that the requirement is to be complied with when the picketing commences. In other words, although the present tense is used, it is open to the construction that the point in time at which the state of affairs which is required to exist in order to render the picketing lawful – that the targeted employer "works or carries on business" at the location of the picketing – is to be assessed when the picketing commences.

7.11 There are multifarious factual scenarios in which s. 11(1) may fall to be applied and in which the question whether the picketers' employer "works or carries on business" at the location of the picket at a particular time may arise. The picketers' employer may work or carry on business in his own premises or, as was the position of Pickerings at the Ballymun premises, in the premises of a third party to whom he is under contract. Likewise there are multifarious circumstances in which the picketers' employer may cease to work or carry on business in premises which are the subject of the picket. He may do so through his own actions (for example, by ceasing to trade there or by surrendering a lease). The situation may be brought about by the actions of a third party (for example, in the case of a company, by a winding up order made by a court, or by the forfeiture of a leasehold interest in the premises by the landlord, or by the termination by the other contracting party of a contract for services, as occurred in this case, or a franchise agreement, or a building contract, as happened in the *Malincross* case). Another possibility is that the cessation may be due to the term of a fixed term contract expiring, as would have happened in this case on 30th June next, or to the term of a lease expiring by effluxion of time. The application of s. 11 may be further complicated by the existence of special legislation which is applicable to the circumstances in which the picketers' employer has ceased to work or carry on business at the location of the picketing, for example, the special rules which govern the transfer of undertakings derived from Council Directive 2001/23/EC and the regulations made to transpose it.

7.12 It is not practicable to consider the implications of each of the very many different circumstances in which the picketers' employer ceases to work or carry on business at the location of the picketing after it has commenced which a court may have to consider in the application of s. 11(1). However, it seems to me that, whatever the implications are, they should not give rise to a situation which would be at variance or inconsistent with the obvious purpose of the Oireachtas in confining lawful picketing to the location where the relevant employer in subs. (1) or subs. (2) "works or carries on business" when replacing s. 2 of the Act of 1906 by s. 11 of the Act of 1990, if the expression is interpreted as referring to the state of affairs at the commencement of the picketing. The obvious purpose was to exclusively link the location of lawful picketing to the work or business environment of the relevant employer. Further, without analysing the multiplicity of scenarios which may arise, it is highly probable that such interpretation, in certain scenarios, would avoid frustrating the intention of the Oireachtas in enacting subs. (1) of s. 11, which is to clearly define the circumstances in which picketing is lawful.

7.13 The requirement in s. 11(1) that the picketers' employer "works or carries on business" at the location of the picketing is only

one of the strictures imposed in s. 11(1) on trade unions and workers who wish to engage in lawful picketing. The other strictures are that, where the trade dispute is in existence, the picketers' objective must be the furtherance of the trade dispute and their purpose must be merely to peacefully obtain or communicate information or to peacefully persuade any person to work or abstain from working. Those additional strictures, it seems to me, sit comfortably with a construction of s. 11(1) under which the requirement is that the picketers' employer works or carries on business at the location of the picketing when the picketing commences rather than throughout the continuance of the picketing. The necessity to comply with the additional strictures must, even as a matter of common sense, narrow the circumstances in which lawful picketing may continue once the picketers' employer has departed the scene, and must reduce, if not entirely eliminate, the possibility of picketing for a useless or an illegitimate purpose.

7.14 For all of the foregoing reasons I have come to the conclusion that, in applying s. 11(1), the relevant date at which to test whether the picketers' employer "works or carries on business" at the location of the picketing is the date when the picketing commences and, if the test is satisfied at that date, the picketing is lawful, provided the other requirements of s. 11(1) are complied with, even if the picketers' employer is no longer working or carrying on business at the location at the time the Court is considering the application of s. 11(1). In this case, accordingly, as Pickerings was working or carrying on business at the Ballymun premises on 4th February, 2010 when the picketing commenced, the test is satisfied.

8. Ancillary issues

8.1 In view of the manner in which I consider s. 11(1) is to be construed and the finding I have made that, on its application in the present case, the picketing at the Ballymun premises is lawful by virtue of that provision, the ancillary issues outlined earlier at (b) and (c) of paragraph 4.1 do not arise. While I consider that it is neither necessary nor appropriate to determine those issues, I have some general observations to make, which are largely explanatory.

8.2 The interesting argument that, irrespective of s. 2 of the Act of 1906, peaceful picketing confined to persuasion or communication of information is not unlawful at common law, the position advocated on behalf of the defendants, did not receive judicial approbation in this jurisdiction before the enactment of the Act of 1990. For instance, in *Esplanade Pharmacy Ltd. v. Larkin & Ors*. [1957] I.R. 285, O'Daly J., as he then was, stated (at p. 298):

> "But picketing, otherwise watching and besetting a premises is lawful only in the conditions defined in the Trade Disputes Act 1906; and the Act, being in derogation of common law rights, has no wider scope than is found clearly marked out in it."

The Oireachtas, in enacting the Act of 1990, which followed a period of economic downturn and industrial unrest in the 1980s, and, in particular, in enacting ss. 8 to 19 inclusive in Part II, which deal with trade disputes, set out to reform and codify the law on trade disputes, strikes and other industrial action, picketing and the involvement of trade unions. In my view, it would require a very convincing argument to lead to a conclusion that, in the context of a trade dispute within the meaning of s. 8 of the Act of 1990, peaceful picketing by a trade union and its members, which is not lawful under s. 11(1) of the Act of 1990, does not give rise to civil liability at common law. However, whether a suitably convincing argument can be made is for another day.

8.3 Insofar as the plaintiff's case is based on the interference with the plaintiff's tenants' rights, it is somewhat vague and a question must arise as to what standing the plaintiff has to invoke its tenants' rights in these proceedings. The formulation of the issue at (c) in relation to such interference was prompted by the plaintiff's reliance on the following decisions of the Supreme Court:

> (a) the *Heeney* case, which was an action by tenants of flats in the Ballymun tower blocks against the plaintiff during the strike by members of the Union against Pickerings in 1998; and
>
> (b) *Talbot (Ireland) Ltd. v. ATGWU*, which was decided by the Supreme Court on 30th April, 1981 and was reported in the Irish Times on 1st May, 1981, the Irish Times report being reprinted in *Casebook on the Irish Law of Torts* by McMahon and Binchy (Professional Books 1983) at p. 450.

8.4 The decision of the Supreme Court in the *Heeney* case, in my view, is of no assistance in determining the issue as to the legality or otherwise of the defendants' current action. The purpose of the following outline of the decision is merely to illustrate that. In his *ex tempore* judgment delivered on 17th August, 1998, O'Flaherty J., having outlined Mrs. Heeney's circumstances - that she was 76 years of age, that she lived alone on the seventh floor of an eight storey tower block in Ballymun, that, because of her physical condition, during a period of approximately six weeks during which the lift servicing her flat had not been working she had been unable to leave her flat except to go out onto the balcony, and that she regarded herself as a prisoner in her own home - O'Flaherty J. stated:

> "It is beyond debate that there is a hierarchy of constitutional rights and at the top of the list is the right to life, followed by the right to health and with that the right to the integrity of one's dwellinghouse. The Constitution expressly provides that the dwelling of every citizen is inviolable and cannot be forcibly entered save in accordance with law. In my judgment, the corollary of that guarantee must be that a person should be entitled to the freedom to come and go from his dwelling provided he keeps to the law. So there is here a very serious situation from the point of view of the plaintiffs."

What is clear from the judgment is that, "after a process of debate", the plaintiffs' predecessor, Dublin Corporation, intimated that it was prepared to comply with the consent order made by the Supreme Court to "take all reasonable steps within their power and authority to explore every means so as to repair or have repaired and when repaired keep maintained the lifts in the Ballymun complex so that the plaintiffs and each of them may enjoy the use thereof in accordance with their rights under the law and their tenancy agreements pending the hearing of the action".

8.5 The decision of the Supreme Court in the *Talbot* case was given on an appeal by the Irish Congress of Trade Unions and Matthew Merrigan, an official of the Amalgamated Transport and General Workers Union, against an interlocutory injunction which had been granted in the High Court some weeks previously. The proceedings arose out of a total embargo by all members of unions affiliated to ICTU on the importation and movement of Talbot cars, spare parts and other components, and also services in connection with the company's activities throughout Ireland. The newspaper report records that one member of the Supreme Court, Kenny J., said that the Act of 1906 had no application in the case. The observations of Henchy J., delivering an *ex tempore* judgment, with which the other members of the Court agreed, were reported as follows:

> "Whether there was a trade dispute or not, a body or bodies must operate within the constitutional framework and the

> constitutional guarantees in Article 40, and it would have to be borne in mind that innocent persons could not be damnified … persons such as dealers who had no dispute with anybody, or the owners of vehicles who had no dispute with anybody but who, because of this embargo could not get their cars serviced …
>
> In this case it was clear that there had been an inducement of the various workers and the various unions affiliated to Congress to procure breaches of contract between the company and the persons and bodies mentioned, and that was a tort, and that it had not been done with any lawful excuse.
>
> …
>
> It was quite clear that the legitimacy of the trade dispute that existed was not in question. It had been suggested that what had happened was an embargo only in name and that the effect was no more than an all-out strike.
>
> But what had happened had gone far beyond that – far beyond any picket; far beyond any strike, far beyond any legitimate industrial action. …"

It was reported that the Supreme Court made an order restraining the respondents pending the trial of the action "from inducing or procuring any breach of a commercial contract between the company and any third party and in particular between the company and Talbot (U.K.) Ltd. and between the company and its dealers".

8.6 The decision of the Supreme Court in the *Talbot* case has been the subject of much academic debate, not only in the sphere of industrial relations but also in the sphere of constitutional law. Although it has something in common with this case, in that the genesis of the dispute between the A.T.G.W.U. and Talbot was redundancies, the conduct at issue there, an outright embargo, was considered by the Supreme Court not to constitute "legitimate industrial action", unlike this case, in which the defendants are exercising their rights under s. 11(1) of the Act of 1990. Insofar as the conduct of the defendants amounts to the tort of inducement of breach of contract, *prima facie*, the defendants are immune from suit by virtue of s. 13(1) of the Act of 1990, which is a post-1937 statute, which carries the presumption of constitutionality.

9. Summary of conclusions

9.1 I am satisfied that the defendants are *prima facie* trespassing on property owned by the plaintiff. If the defendants are not immune under s. 13 of the Act of 1990, they can rectify that situation by moving the picket onto the nearby public pavement. The interface between s. 11, s. 13 and s. 19(4) was not fully explored at the hearing.

9.2 I am satisfied that picketing by the defendants on the public pavement leading to the Ballymun premises would be lawful in accordance with s. 11(1) of the Act of 1990, being in furtherance of a trade dispute and being at the approaches to a place where the picketers' employer, Pickerings, worked or carried on business at the commencement of the picketing on 4th February, 2010, and being for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or to abstain from working.

9.3 The issue as to whether the defendants are entitled at common law to picket does not arise for determination.

9.4 *Prima facie*, the defendants are entitled to the protection afforded by s. 13 of the Act of 1990, so that, even if their conduct constitutes the tort of inducement of contract, they are immune from suit.

10. Order

10.1 I propose hearing further submissions as to the form of order to be made.