

THE HIGH COURT**[2006 No. 572 P]****BETWEEN****COLLEN CONSTRUCTION LIMITED****PLAINTIFF****AND****BUILDING AND ALLIED TRADES UNION, JOSEPH DOYLE, WILLIAM McCLURG, KEITH KELLY AND ANDREW CLARKE****DEFENDANTS****AND****[2006 No. 760 P]****BETWEEN****COLLEN CONSTRUCTION LIMITED****PLAINTIFF****AND****BUILDING AND ALLIED TRADES UNION AND DANIEL O'CONNELL****DEFENDANTS****Judgment of Mr. Justice Clarke delivered 16th May, 2006.****1. Introduction**

1.1 These two actions involve connected events in which building sites at which the plaintiff ("Collen") was engaged as contractor were subjected to a campaign designed to bring about a change in the manner in which Collen engaged persons to work on their sites. There is little doubt on the evidence but that some of the methods used in furtherance of certain aspects of the campaign were unlawful. Indeed some personal defendants were committed for contempt arising out of the breach of orders made restraining unlawful activity.

1.2 However the issues between Collen and the various personal defendants are not, currently, before the court. The contempt which gave rise to committal has been purged and the relevant parties released. Collen's application for an interlocutory injunction as against the personal defendants has been disposed off.

1.3 What is now before the court is an application on behalf of Collen for an interlocutory injunction against the first named defendant in each of the proceedings ("BATU"). BATU, as its name implies, is a trade union which has a representative role in respect of workers in the building area and in particular brick layers. When the proceedings were commenced a slightly different course of action was followed in each of the two cases. However on 13th February, 2006 an undertaking was given on behalf of BATU to refrain from:-

"1(a) breaching the grievance and disputes procedures as embodied in the registered agreement

(b) directing and/or sanctioning the participation of its membership in industrial action against the plaintiff

(c) providing funding or other financial assistance to its members engaging in industrial action against the plaintiffs

2. interfering with the performance of the plaintiff's commercial contracts and economic relations

3. Engaging in industrial action against the plaintiff

4. Watching or besetting or picketing the plaintiff's sites situated at Wyattville Road/Laurel Avenue, Ballybrack, Co. Dublin.

5. Interfering with access or egress from the plaintiff's said sites situated at Wyattville Road/Laurel Avenue, Ballybrack, Co. Dublin.

6. Portraying or communicating whether by recourse to pickets or posters or otherwise that they have a trade dispute with the plaintiff

7. Trespassing on the plaintiff's said sites situated at Wyattville Road/Laurel Avenue, Ballybrack, Co. Dublin".

That undertaking was given in proceedings 2006 No. 572 P.

1.4 While the case as against the individual defendants was progressing, the matter as against BATU rested on foot of those undertakings with the interlocutory application being adjourned from time to time.

1.5 It would now appear that the agitation which gave rise to these proceedings has abated. However Collen now seeks an interlocutory injunction in the terms of the undertaking previously given by BATU pending the hearing of the interlocutory application. It is BATU's case that it had no involvement in the matters complained of by Collen and in those circumstances BATU contends that it is not appropriate that it should be required to give any continuing undertaking to the court. In those circumstances it is necessary to determine whether Collen is entitled to an interlocutory injunction.

2. Fair Issue to be Tried

2.1 As indicated above there is no doubt but that significant unlawful activity took place directed against Collen. For the purposes of this interlocutory application it is sufficient to state that Collen has established a fair issue to be tried as to the unlawfulness of much of the activities directed against it. I did not understand counsel for BATU to contend otherwise. However so far as the issue of there being a fair question to be tried is concerned, the dispute between the parties is as to whether Collen has put before the court sufficient evidence as to an involvement on the part of BATU to warrant a conclusion that there is, at present, shown to be a fair issue to be tried as to the involvement of BATU in any unlawful activity and as to a reasonable apprehension of BATU being involved in future similar activity sufficient to warrant court intervention at this stage.

2.2 Between the two sets of proceedings the following matters appear to be identified as evidence which, it is contended, establishes

a connection between BATU and the unlawful activity complained of.

2.3 Firstly it would appear that some brief period prior to the commencement of the protests and other actions directed against Collen, it is common case that a Mr. Andrew Smith, a Regional Organiser of BATU, attended at the site office of Collen at UCD and, subsequently on the same day, also at the site office of Collen at Goatstown and indicated to the respective site managers that he would be seeking, on behalf of BATU, the agreement of Collen to an arrangement concerning the direct employment of union members only in the terms of a draft written agreement which he left with the site manager in each case. There was, of course, nothing improper in seeking such an agreement. BATU was perfectly within its right to seek to negotiate such an arrangement with Collen, just as Collen was perfectly within its legal rights to reject (as it did) the proposal.

However it is now suggested by Collen that there was a very significant overlap between the issues sought to be negotiated by Mr. Smith and the issues which were at the forefront of the actions taken against Collen which have led to these proceedings. There is some limited truth to that contention. There is ample evidence that amongst the matters being agitated in the actions taken against Collen was a suggestion that Collen should directly employ only union members. That contention needs to be seen against a background of the fact that it would appear that Collen has a practice of only engaging sub contracting firms and does not employ brick layers directly at all.

2.4 However two matters need also to be noted in this context.

The issue of the direct employment of personnel actually working on building sites (rather than sub contracting) is one which has been the subject of significant public debate and controversy over a long number of years. The suggestion that building contractors should directly employ their workforce (rather than engaging in the employment of sub contractors) has been a matter pressed by trade unions and also by political groups (particularly of the left) for quite some time. Apparent Revenue abuses associated with the practice of employing persons as sub contractors rather than as direct employees have been highlighted and have, indeed, being met with revised Revenue practices. The suggestion by Mr. Smith that it would be appropriate for Collen to commit itself to the direct employment of union labour is hardly a novel matter for a trade union to press. In those circumstances the fact that that the issue was also one pressed by those who appeared to play a central role in the agitation which followed does not necessarily lead to a conclusion of union involvement.

Furthermore, on the evidence currently before me, it would seem that a central aspect of the issue being agitated by those directing the action against Collen was a desire that only local workers should be employed. This formed no part of the issues which Mr. Smith sought to negotiate.

2.5 Secondly some evidence, or purported evidence, of actual BATU involvement is put forward. There is a suggestion that one man at one of the protests was wearing a yellow vest turned inside out with "BATU" printed on the back. There were also comments attributed to named and unnamed persons which sought to suggest an involvement on the part of BATU personnel. In addition it is suggested that certain persons who were members of BATU were engaged in actions against Collen and that some of those persons were shop stewards. Firstly I should state that it is well established that it is permissible to include hearsay evidence in affidavits sworn for interlocutory applications. However it does not seem to me that the court should, ordinarily, place any reliance upon hearsay attributed to unnamed persons. At the end of the day, if this matter goes to trial, the court will have to assess the evidence presented as to an involvement on the part of BATU. There can be no doubt that the evidence of comments made by third parties would not be admissible at that stage. Where statements are attributed to a named third person and where it is reasonable to infer that that person will be available to give the relevant evidence at trial then the court should lean in favour of accepting that evidence as material at an interlocutory stage.

2.6 While it is easy to understand why, in the undoubtedly fraught atmosphere which resulted from the events giving rise to these proceedings, persons may not wish to have been identified, nonetheless it seems to me that a court is constrained to act on evidence. Hearsay, attributed to unnamed persons, could not, even at an interlocutory hearing, be regarded as meaningful evidence in any proper sense of the term. In those circumstances it does not seem to me that I can place any reliance on the comments attributed to unnamed third parties.

The position in respect of the involvement of members (including shop stewards) of BATU is somewhat different. There is undoubtedly evidence of that involvement with lists of the relevant individuals having been set out in affidavit evidence. However the question which I have to address is as to whether a fair issue has been established to be tried in relation to the involvement of BATU as an organisation rather than individual members. A trade union, like any other incorporated or unincorporated body, is governed by the persons or bodies specified in its constitution or rules as having control. The mere fact that individual members of the union are involved in an activity does not, of itself, establish the involvement of the union itself. The involvement of union officials may give rise to a greater possibility of an inference being drawn as to the involvement of the union itself. However the level of the personnel involved would also, necessarily, be a material factor. Should there be evidence of an involvement on the part of senior officials same might well, in an appropriate case, amount to *prima facie* evidence of involvement on the part of the union. It would certainly give rise to a sufficient argument in that regard to satisfy the fair issue test.

2.7 Against the involvement of named individuals, to which I have referred, needs to be set the actions taken by the union leadership since the issues which have given rise to these proceedings first occurred.

On 10th February, 2006, Denis Farrell, the Deputy Secretary General of BATU, wrote a letter in the following terms to the members of the union:-

"Dear Member,

I would refer to the unofficial picketing which has taken place at the sites of the above named company at Ballybrack, Co. Dublin and which is presently the subject of High Court proceedings against the union and other persons.

I wish to make it perfectly clear in the strongest possible terms that the union is not in dispute with Collen Construction Limited and that any members taking part in unofficial picketing is instructed to desist from same forthwith.

As a result of the unofficial picketing of the sites in question legal action has been taken against the union and failure by members to comply with this construction will leave the union open to further legal action as well as legal action against individual members of the union involved in such activities.

I would reiterate in the strongest possible terms that members of the union must obey the High Court injunction.”

2.8 While there is some suggestion that a small number (two) of members of the union may not have received the letter, there is no evidence currently before the court to suggest that the letter was not, in the round, sent to each member of the union.

Secondly criticism is made of the union for its failure to take disciplinary action against those persons named in the affidavits as having been involved in unlawful activity.

2.9 However the state of the evidence currently is to the effect that each of the persons concerned have been written to, indicating that a suggestion has been made to the effect that they were in breach of the union’s instruction not to engage in the activities concerned. As was pointed out on behalf of the union, any disciplinary proceedings against its members require to conform with the principles of natural justice. Given that requirement it does not seem to me to be appropriate, certainly at this stage, to draw any inference from the fact that disciplinary action has not, as yet, been taken.

2.10 While it is, of course, possible in any particular case that those who exercise control over the affairs of a body such as a trade union may adopt a formal and public position of compliance with their obligations, but nonetheless engage in covert action through junior officials and ordinary members to a different effect, in order for a conclusion to be reached that the true position of the body concerned was different from that formally taken by it, there would have to be sufficient evidence to warrant a conclusion that the body concerned had acted in consort with those junior officials or members. At an interlocutory stage there would have to be sufficient evidence to establish a fair issue to be tried in relation to the contention that such a conclusion should be reached.

2.11 On the basis of the evidence currently before the court I am not satisfied that Collen has made out a fair case to be tried to that effect. That is not to say that at the trial of the action it may be possible that Collen will be in a position to put before the court further evidence which would satisfy a court, by inference if necessary, that there was, on the balance of probabilities, a sufficient connection between those charged with the central control and management of the union on the one hand and those actively involved in the protests on the other hand, to warrant a conclusion that BATU itself was involved.

2.12 In coming to that view I have taken into account the fact that there was a significant body of evidence before the court (not least contained in affidavits filed on behalf of Collen) which suggested that those who were principally involved in directing and leading the actions complained of were politically motivated. A number of individuals were identified in the evidence. There was no evidence to suggest any connection between the leadership of BATU and the named persons who appeared to have a leadership role in the events.

3. The Absence of Continuing Agitation

3.1 Having concluded that there is not a fair issue to be tried, that disposes of the matter. While it would be clear that if there were be a fair issue to be tried, damages would not be an adequate remedy and that the balance of convenience would, in the ordinary way, favour Collen in a case such as this, there is one further issue which I should address in the event that I might be wrong concerning the question of whether a fair issue has been shown to exist.

3.2 It is clear that the events which gave rise to these proceedings have, to a large extent, abated. There is no longer any agitation. In the circumstances there is a sense in which the injunction now sought resembles a *qui timet* injunction in that there is currently no unlawful activity or, it would appear, is any such activity likely to occur. It is, of course, also true to state that Collen are entitled to point to the fact that apparently serious breaches of the law have occurred in the recent past. In that context interlocutory injunctions have been obtained by Collen against individuals who were, admittedly, involved in the relevant activities. However the question that would now arise is as to whether it is reasonable to apprehend that BATU would be involved in unlawful activities into the future. In one sense it might be said that that question is the same as the “fair issue to be tried” question, in that if it could be established that BATU were involved in the past then, it might be argued, it would be reasonable to assume that they might be involved in the future.

3.3 However, where, as here, the stated published and formal position of BATU is one which is in opposition to unlawful activity, it would, in my view, be necessary for a plaintiff to put before the court evidence sufficient to satisfy the court that there was a real risk of overt or covert future wrongful actions on the part of BATU before it would be appropriate to grant an interlocutory injunction in circumstances where the agitation which led to the difficulty in the first place had abated.

3.4 Finally I had regard to the fact that, as BATU do not assert a right to do any of the acts complained of, no prejudice would be caused by restraining the union from carrying out such acts. However a party should not be subjected to a court order, even one which restrains it from doing acts which it states it does not intend to do, unless there is a proper legal and evidential basis for the making of the order concerned.

3.5 In all the circumstances I refuse the order sought.