

170 POST v KELSH

THE HIGH COURT

1983 No.8626P

AN POST v KELSH

J U D G M E N T

DELIVERED BY THE HONOURABLE MR JUSTICE FRANCIS MURPHY
ON WEDNESDAY, 22 JANUARY 1986

When this matter came before me yesterday, Counsel then appearing on behalf of the Defendant informed me that his instructions had been withdrawn. This was confirmed by the Defendant, Mr Kelsh.

Counsel was properly concerned that the Court should be made aware that the matters in issue in this action are also the subject matter of criminal proceedings. In fact, my attention had already been drawn to that aspect of the matter. On the call-over of the list last Thursday Counsel appearing on behalf of the Plaintiff suggested that the civil action should be adjourned because of the pending criminal proceedings. At that stage the Defendant did not appear nor was the application for an adjournment supported nor, indeed, was consent forthcoming to the adoption of that course. Accordingly, the case was left in the list.

Yesterday morning I enquired from Mr Kelsh as to his attitude. He confirmed to me that he was anxious that the civil action should proceed notwithstanding the pending criminal proceedings and in the absence of any legal advice to him. Accordingly, the matter proceeded to hearing.

The case itself arises from the fact that the Defendant, Mr Kelsh, was appointed postmaster in the Cappagh Branch of the Post Office in Finglas on 26 June 1982 in pursuance of a written agreement of that date. That written agreement contains a clause in the following terms

"I acknowledge that I am responsible for the whole of the official cash, stock of stamps etc. both as regards those I hold myself and those I entrust to a subordinate officer and that I am liable to make good without delay any loss or default which may occur from any cause whatsoever. I also acknowledge that my financial responsibility does not cease when I relinquish office and that I will be required to make good any loss incurred during my term of office which may subsequently come to light."

In the month of May 1983 officials of the Plaintiff Bord commenced an investigation into the finances of the Post Office at Cappagh. On the 27th of that month Mr Kelsh was suspended from his office with the Plaintiff Bord. It is material to add that Mr Kelsh was at all

material times carrying on the business of a newsagent either on his own account or through a company owned and controlled by him from premises adjoining the Post Office.

Having conducted their enquiries, the Plaintiffs claimed that a loss had been sustained in the business of the Post Office and that Mr Kelsh was responsible to make good that loss under the clause already quoted. The loss claimed by the Plaintiffs as set out in the Statement of Claim amounted to £171,025. This, according to the Statement of Claim, was made up of £51,025 in cash and £120,000 in respect of what was described as missing documents.

The evidence called on behalf of the Plaintiffs included that of Mr Joseph Giles and Mr Frank Ennis. Mr Giles is an overseer in the Survey Branch of the Bord and its predecessors, the Department of Posts and Telegraphs, and Mr Ennis is an accountant employed by the Plaintiffs.

Mr Giles gave evidence that he took stock and made up accounts of the business of this branch post office as of 25 May 1983. He then reconstructed the accounts of the business as from February 1983 taking into account the dealings between the Defendant and the Plaintiffs from that period until 25 May 1983. So as to construct accounts as they should have been on that date he compared the accounts as he says they should have been with the accounts based upon the actual stocktaking and he found a gross discrepancy of £86,518. However, against that he recognised that the Defendant was entitled to credit for moneys paid in respect of social welfare payments for a period of three days for which no credit had been given to the Defendant because the appropriate documents were not available. Mr Giles said that the credit to which the Defendant would be entitled in respect of such payments over that three-day period is £32,000. Accordingly, the loss is approximately £54,000.

Mr Ennis carried out a more detailed investigation of which he gave evidence. As a result of his investigation the gross deficiency was reduced from £86,518 to £83,725. Again, he recognised that Mr Kelsh was entitled to credit for the social welfare payments in the sum of £34,923. Accordingly, the net default was calculated in the more

detailed calculations as £48,082. In addition to that, however, Mr Ennis explained that credits had been allowed to Mr Kelsh from time to time in respect of payments alleged to have been made by him in his scapacity as postmaster and that it subsequently appeared that there were inadequate documents to verify such payments and that, accordingly, there had been excessive credit allowed to him. The excess credit amounted to £18,350. Accordingly, the loss resulting from the absence of vouching documents or, more correctly, the excessive credit given together with the cash deficiency amounts to £67,152.

These two witnesses and others were cross-examined by Mr Kelsh. In his cross-examination Mr Kelsh sought to establish, and did establish, firstly, that the day-to-day work of the post office and the maintenance of the books and records of the branch involved difficult and time-consuming work. Secondly, that moneys were required for the working of the Post Office over and above moneys remitted to him by the Plaintiffs and that he borrowed to an extent which was not established in evidence moneys from the newsagency business carried on by him or his company. Those two facts were established in cross-examination.

In addition Mr Kelsh sought to establish in cross-examining Mr Cassidy that the terms of his appointment were not made known to him. That contention and the question directed to establishing it were rejected by Mr Cassidy who said that he read the entire document to Mr Kelsh on his appointment.

The position remains, therefore, that evidence has been given that there is a loss or default on the business for reasons which have not been established, or the cause of which has not been shown, but there is a loss or default of which prima facie evidence has been given of £67,152.

Mr Kelsh has not called any evidence to rebut this prima facie case established by the Plaintiffs. Mr Kelsh made it clear to me that he does have documentary evidence available to him and a number of witnesses that he could call but that he has decided not to put in

such documentary evidence or to call any witnesses as he intends to reserve that evidence for the criminal proceedings pending against him. He also explained that he is not unduly concerned about any judgment obtained against him. Having regard to the fact that numerous judgments have already been obtained, whatever the reason may be, no evidence was called to rebut the evidence tendered on behalf of the Plaintiffs which, I am satisfied, establishes a prima facie case of a loss of £67,152. Accordingly, the Plaintiffs are entitled to judgment in that figure.

MR LEE: I would ask your lordship for costs.

JUDGE: If they win their case they are entitled to costs. Mr Kelsh, have you anything to say as to why they should not have their costs?

MR KELSH: No, my lord.

Francis D. Kelly

I certify the foregoing to be a true and accurate transcript of the shorthand note taken by me.

A. Kenny
Official Stenographer