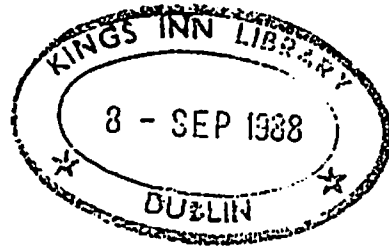


THE HIGH COURT

1987 No.6966P



BETWEEN

JOHN LOVETT AND KEVIN O'NEILL
(t/a Lovett Transport)

PLAINTIFFS

v

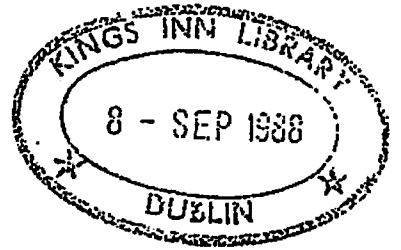
ROBERT GOGAN AND OTHERS

DEFENDANTS

J U D G M E N T

DELIVERED BY THE HONOURABLE MR JUSTICE DECLAN COSTELLO
ON 5 NOVEMBER 1987

APPEARANCES



Ciaran O'Loughlin, BL) For the Plaintiffs

Peter Shanley, SC)
Terry O'Sullivan, BL) For the Defendants

At the hearing of this action the main issue which the Court will have to consider is whether the Defendants have been operating a road passenger service in breach of the provisions of the Road Transport Act 1932.

The second legal issue which will arise is whether the Plaintiffs, assuming that the first issue is answered against the Defendants, are entitled to injunctive relief.

A third issue would appear to be whether or not the Plaintiffs' constitutional right to earn a livelihood has been interfered with by an illegal act on the part of the Defendants so as to entitle the Plaintiffs to an injunction.

On this interlocutory motion I do not have to decide these issues, issues partly of law and fact.

The Defendants' case is that the manner in which they operate the road passenger service is a lawful one and they rely on certain obiter dicta in the judgment of Hanna J. in *The Attorney General v Pratt* [1942] I.R. 478.

I do not have all the facts at this interlocutory stage of the case and I am not required to express any view as to whether or not a club, as referred to in the Affidavit, if established, would result in the non-application of the Act to the service which members of the club have given to them by the Defendants.

All I have to decide at this stage of the action is whether or not a serious issue has been raised by the Plaintiffs and that they have a right to an injunction. It seems to me that they have raised a serious issue.

I do not have to determine the facts of the way in which the operation has been carried on, but on the affidavit evidence before me I think the Plaintiffs have raised a serious issue: that the Defendants are in breach of the Transport Act 1932. Similarly, I think they have raised a serious issue on the second point in the case.

There is some difference of opinion between Counsel as to the legal principles to be applied. It has been submitted by Mr O'Loughlin on behalf of the Plaintiffs that I should rely on the principles in the Gouriet case and hold that the Plaintiffs' business has been interfered with by the wrongful act of the Defendants and so the injunction would lie.

Mr Shanley, on behalf of the Defendants, suggests that the correct principles are to be found in Lonrho Ltd v Shell [1982] A.C. 173, which have been applied and approved by Blayney J. in Upjohn Ltd v Mediform and Others.

Again, I do not think it is necessary for me to decide the correct principles which I have to apply because, whichever are the correct ones, it seems to me that the Plaintiffs have made out that a serious issue exists.

It seems to me that on the interpretation of the facts and of the statute the Plaintiffs may very well be able to establish at the hearing - I express no final view on this point now - that the statute was enacted not just for members of the public generally to regulate the transport services but that they are of a class of persons who have obtained licences under the Act and that the statute was passed for the benefit of such licenceholders. If this is correct then the Plaintiffs would have a right to obtain an injunction, a fortiori a right to obtain an injunction if the principles applicable are those set out in the Gouriet case.

Again, without expressing a final view on the matter, the Plaintiffs have raised the serious question that, apart from the general principles applicable on the authorities on which injunctions are granted for breach of a statutory obligation, there is a further principle, namely, that where a constitutional right is adversely affected by an illegal act this gives a right to an injunction. I am merely stating that a serious issue has been raised on this point also.

This brings me to the question as to whether or not the Court should grant an injunction at this stage of the case.

The Plaintiffs have limited their claim to stopping the Defendants' operations on Fridays and on Sundays, being the two days on which the Plaintiffs themselves operate and in respect of which they have a licence.

In my view I think I should approach the question of the exercise of the discretion of the Court according to the well established principle, namely, that I should say what would be the effect upon the Plaintiffs if the order is refused today and it ultimately transpires that the Plaintiffs are entitled to relief, and then consider what would be the effect if an order is granted today and at the trial of the action it transpires that the Plaintiffs were not entitled to relief. Applying that test, it seems to me that the evidence as it stands indicates that if such relief is not granted to the Plaintiffs very serious damage will be done to the Plaintiffs' business. The Plaintiffs are in a small way of business and the evidence would indicate that very serious damage could be done to their business if the injunction is not granted.

On the other hand, the injury which the Defendants would suffer should an injunction be granted today and should it later transpire that it should not have been granted would not be very great. They have apparently built up a big business since 1975 and this business is a flourishing one, and a restriction on this business on two days to the areas that are mentioned in the Notice of Motion would not adversely affect the Defendants to any great extent.

Other matters have been raised by Mr Shanley on the Defendants' behalf by which it is suggested that an injunction should not be granted. It is suggested that there has not been disclosure of certain facts in the Affidavit sworn by the Plaintiffs. I express no view as to whether non-disclosure has occurred. However, it does not appear to me to be of such a serious nature as to justify the Court's refusal to exercise its discretion in the Plaintiffs' favour.

It is also said that the licence under which the Plaintiffs operate will expire at the end of this month. This is so, but I will give liberty to the parties to apply, and if, in fact, the licence is not renewed then the situation can be revised in the light of the new facts.

In the meantime it seems to me that the Plaintiffs have made out a claim for interlocutory relief and I propose to make an order in the terms of the Notice of Motion but limiting the restriction on the Defendant's passenger service to Fridays and Sundays.

I think Mr O'Loughlin is correct in his view that once a serious issue has been raised the operation of the Defendants is an illegal one and it then seems to me that he is entitled to an injunction in the form which he seeks on the days which have been suggested.

I propose to reserve the costs of the application to the trial.

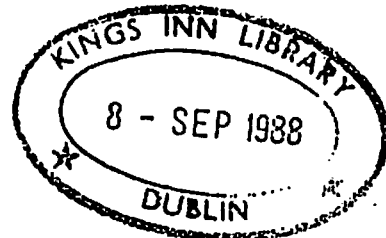
I will facilitate Counsel if they wish to get an early trial as it seems to me to be desirable that there should be a speedy conclusion of this dispute. The pleadings should be served immediately. I will make an order for discovery and will put the case in the list for a date to be fixed early next term.

I will put a stay on my order until Monday next, which will allow any persons who have made bookings between now and the weekend to have their bookings fulfilled. I do not think there should be a stay for a longer period.

As to a stay in the event of an appeal to the Supreme Court, I refuse that application. It seems to me that because of delays in hearing appeals in the Supreme Court, for which the Supreme Court is in no way responsible, the effect of such a stay would be to stultify the order. The Defendants, of course, are at liberty to apply to the Supreme Court itself to have a stay imposed pending the appeal.

ADJOURNED

A. Kenny
Official Stenographer
6 November 1987



approved

dc

15-7-88