

THE HIGH COURT

[2023] IEHC 705

Record No. 2023 / 4057 P

Between/

CAREY GLASS U.C. AND CAREY GLASS HOLDINGS U.C.

Appellants

AND

UNITE THE UNION

Respondents

Ex- Temp Judgment of Mr. Justice David Nolan delivered on the 23rd November 2023:

Introduction

1. This is an application brought by the plaintiffs seeking various prohibitory orders to prevent the defendant carrying out, what the plaintiffs have described as unlawful picketing at the plaintiffs' premises at Limerick Rd, Nenagh, Co. Tipperary. The defendant is a registered union operating in Ireland, Northern Ireland and in the rest of the UK.

Background

2. The plaintiffs in this action are manufacturers and suppliers of glass products. The first named plaintiff operates a glass manufacturing plant at its premises at Limerick Road, Nenagh, Co. Tipperary. The second plaintiff is a wholly owned subsidiary of the first named plaintiff and is also the owner of a business in Northern Ireland known as Vista Therm Ltd, having its place of business at Silverwood Business Park Lurgan, Craigavon, Co. Armagh. It too is involved in the business of manufacturing and selling glass products.
3. In July of this year, the union in Northern Ireland balloted its members to seek authority to take strike action against its employer Vesta Therm. On 7th July 2023, Neil Moore, a regional officer of the defendant, wrote to Rachael Moriarty, the H.R. manager in Vista Therm at the Lurgan premises, giving notice of the industrial action.

4. By letter dated 27th July 2023, Mr Moore wrote to William Carey, CEO of Carey Glass, at its Nenagh premises, asking him to intervene and put an end to a dispute between the members of his unit and Vista Therm.
5. The first time the plaintiffs heard that there may be a demonstration outside their premises was when they were notified through the local media. Tipperary Live carried a report that workers at the Lurgan facility would be travelling to Nenagh the following day, Wednesday the 16th of July 2023 at a time between 1:30 PM and 3:30 PM to hand in a letter urging the company to intervene with local management in Lurgan to resolve the ongoing industrial dispute. The article went on to quote Mr Moore saying that Vista Therm's ultimate parent company was Carey Glass, which engages collectively with its workforce through a union. The purpose of the trip was to "*step up to the plate and intervene to ensure that the Lurgan workers which generation (sic) Vesta firm's massive profits are treated with respect they deserve*".

Correspondence

6. By letter dated 15th August 2023, solicitors for the plaintiff's wrote to the defendant at its Dublin office, noting that the union intended to picket the company's premises at Nenagh, Co. Tipperary. It went on to say that it would appear to be the case that the proposed picket would be unlawful. The employees involved in the trade dispute were employees of a different legal entity in a different jurisdiction. It pointed out that as far as the company was aware, it did not employ any members of the union.
7. It noted that limited provisions of the Industrial Relations Act 1990 (the 1990 Act) permitted secondary picketing in certain circumstances, but only if there was primary picketing within the State, and only if an employer was directly assisting the employer to the trade dispute for the purpose of frustrating the strike or other industrial action. Carey Glass had provided no such assistance. Rather, it requested a written undertaking to confirm that members of the union would not attend the premises at Nenagh. It added that if it didn't receive such an undertaking then, injunctive relief would be sought.
8. In what seems to me to be an important letter, Neil Gillam of the United Legal department wrote to the plaintiff's solicitors stating that the media reports were inaccurate. He went on to say as follows:

"Contrary to any inaccurate media reporting, our members intend to visit the premises of your client and hand deliver a letter for the attention of your client, seeking their intervention in an ongoing lawful trade dispute.

There is no intention to picket the premises nor seek to persuade any persons, whether employees of your client or otherwise, from either working or abstaining from work.

The provisions of the industrial relations act 1990 are not engaged in the circumstances and respectfully the rights guaranteed under the Constitution and the European Convention of human rights are more likely so.

Whilst we note your concerns, we believe these to be misplaced and your request for an undertaking will not be complied”.

9. On the same day, solicitors for the plaintiff responded pointing out that the union’s members had no entitlement to attend the plaintiff’s premises and that if they did so they would be trespassing. Again, they requested a written undertaking that the members would not attend the plaintiff’s premises. No further response was received.

The Events of 16 August

10. On the 16th of August 2023, members of the defendant attended the premises and hand delivered a letter, signed by Mr Moore. It is headed “*request for you to intervene in dispute between Vista Therm and unite*”. The letter was addressed to Mr Jim Carey, CEO of Carey Glass. The letter goes on to deal with the dispute in the Vista Therm facility in Lurgan and, that notwithstanding a previous collective agreement between the parties, in the North of Ireland, the local management had refused to negotiate with workers through their union. The letter concluded by pointing out that the plaintiffs’ recognised a union for collective bargaining purposes and says: “*we feel sure you will agree workers at your subsidiary Vista Therm should also be able to negotiate the terms and conditions collectively*”. It concluded by asking Mr Carey to intervene with the local Vista Therm management and instruct them to sit down with Unite to negotiate pay increase for the workers who have made Vista Therm a highly successful and profitable enterprise.

11. Exhibited in the grounding affidavit is a photograph of at least 20 people some in hi viz jackets with a banner containing the words “*Vista Therm – workers demand respect*”.

12. In his affidavit, Mr Carey says that the defendant’s members attended at the premises and placed a letter in a letterbox, after that the members set up a picket at the approaches to the plaintiff’s premises and stayed there for about 90 minutes. During this time, they handed out leaflets detailing the dispute between the defendant and Vista Therm. A copy of the leaflet is exhibited in the affidavit. It says as follows: –

“We are raising awareness of our strike in Nenagh because Carey Glass owns Vista Therm and we’d like them to use whatever influence they may have with Vista Therm to bring our strike to a reasonable conclusion and to ensure reinstatement of our members were being dismissed.”

13. It concludes by saying as follows: –

“We are also asking the public to show support for Vista Therm strikers and would appreciate it if you could make Carey Glass aware of your position.”

14. Thereafter, the defendant's members attended the car park of a local supermarket and asked members of the public to sign a petition.

Events of 25th August 2023

15. On the 25th August 2023, approximately 20 people carrying unite banners attended at the plaintiffs' premises and sought to distribute leaflets to employees of the plaintiffs. A second leaflet was handed out to members of the public. It set out a timeline of the union's interaction with the Vesta Therm management. It complained that they were met with an incredibly over-the-top response with security guards deployed and the absurd spectacle of managers standing on the roof looking down on them in response to delivering a letter. They then walked past the premises in silence.

The Proceedings

16. In the meantime, a plenary summons was issued on the 17th August 2023. Mr Carey swore his affidavit on 28th August 2023, and an *ex parte* docket issued on the same day, returnable for 31st August 2023.

17. He swore that he was concerned the defendant would seek to involve customers and suppliers in the trade dispute between the defendant and Vesta Therm. He set out that the two companies were separate legal entities in separate jurisdictions. The plaintiff was not involved in a trade dispute with the defendant, nor were any of the Carey Glass employees' members of the defendant.

18. He had a significant concern that the defendant would seek to involve customers and suppliers in relation to trade dispute which would have a negative impact on its business, and he gave the necessary undertaking as to damages.

The Replying Affidavits

19. In his replying affidavit, sworn on 6th September 2023, Mr Moore set out the inter-connection between the two companies. He stated that there was a bona fide trade dispute arising between Unite members who worked in the production facility at what he called the "Carey Glass /Vista Therm" production facility, in Northern Ireland. He said that Mr Carey owed a duty in regard to a company's workforce on the basis that he was a company director of both companies.

20. In order to illustrate the practical reality of the close nature of the Carey Glass and Vista Therm operational entities, he referred to the company website which says “our factories”, a press release referring to charitable fundraising activities, the joint accounting purchasing and human resource activities that are in Nenagh and the fact that all the main directors of Vista Therm are members of the Carey family and that the Carey Glass group of companies is ultimately a 100% family owned business.
21. Thereafter, he set out his version of the events which took place on 16th August 2023 and 25th August 2023 and stated that the union members’ actions were peaceful, lawful and carried out in furtherance of a subsisting trade dispute given, inter alia, that the Carey family, as owners and directors of Vista Therm, have the power and influence to resolve trade dispute. Whilst the affidavit admits the activities, Mr Moore denies that the defendant is engaged in any unlawful attendance or picketing at the plaintiffs’ premises in the manner alleged.
22. In late September 2023, Mr Carey filed a replying affidavit pointing out that Vista Therm remained a separate legal entity to the plaintiff companies and operates outside the jurisdiction. He then set out the events that took place on 21st of September 2023.

The Events of 21st September 2023

23. On 21st September 2023, notwithstanding that the matter had been before the court on a number of occasions, members of the defendant union turned up at the plaintiffs’ premises again. On this occasion, some 20 to 30 persons attended, dressed in a similar manner, namely jeans or chinos and white T-shirts. With them were some people in hi viz jackets. They wore covid type facemasks with black masking tape in the form of an x. They carried a placard which they rested on the grass verge in front of the premises. An article from Tipp FM quoted Mr Moore as saying that he was outraged by attempts by the parent company, who were seeking to ‘*silence them through an injunction in the High Court in the south*’. He is quoted as saying as follows: –

“Vista Therm were successful seeking a temporary injunction in the North effectively attacking not just members rights to have an effective strike but also to protest in relation to their strike away from the factory as well. So there is absolute in the local area Lurgan we want to bring this message down to the people of Tipperary as well.”
24. In a photograph accompanying the piece, it seems there are messages written on the white T-shirts. This article refers to a silent protest. It went on for one hour and 20 minutes.

Applications before court

25. The matter was first mentioned before Phelan J. in late August, who gave liberty for short service of a notice of motion. When the matter returned to court on the 30th of August 2023, counsel for the defendant gave an assurance that the defendant did not have any intention of attending near the plaintiffs' premises, pending the adjourned date. The matter was adjourned to 6th October 2023. Sadly, that assurance was misplaced. Counsel can only act on instructions, and I have no doubt whatsoever that he did not know what was planned. To be fair, the plaintiffs do not take any issue on this point either.
26. However, the fact remains that notwithstanding such an assurance, the defendant went ahead, in a clearly pre-planned manner, to do the very thing they assured the court they would not do, in order to continue the pressure upon the plaintiffs and their directors. Following this visitation, further correspondence passed between the parties and ultimately by letter dated 25th September 2023, the defendant's solicitor gave an undertaking that the defendants would not attempt at or near the plaintiffs' premises, pending the determination of the interlocutory injunction.
27. While further affidavits were filed, they relate to the ownership of the grass verge outside the plaintiff's premises.

The Plaintiff's Submissions

28. Mr Connaughton SC, in his submissions, having set out the factual background, makes three points. First, that industrial disputes are governed in this jurisdiction by the 1990 Act. In regard to picketing, he points out that the Act does not define picketing *per se* but that section 11 allows for peaceful picketing. That section also provides for secondary picketing in connection with a trade dispute in certain limited circumstances.
29. He argues that the provisions of the 1990 Act does not apply to trade disputes outside of the jurisdiction. In particular, he says that the court must presume that, unless specifically identified in very limited circumstances, legislation is not intended to have extra territorial effect. Indeed, it seems both parties are of that view. Therefore, there is no statutory protection which can justify secondary picketing in these circumstances.
30. Thirdly, he says that what took place on the three occasions was picketing as opposed to protesting, as argued by the defendants. He cites various authorities as to the definition of picketing and in particular *Esplanade Pharmacy Limited v. Larkin and others* [1957] IR 285, where the Supreme Court stated that picketing is clearly unlawful and constitutes a watching and the setting of the premises, unless it is justified by the provisions of the Trade

Disputes Act 1906, the forerunner of the 1990 Act. See also: *Dublin City Council v. Technical Engineering & Electrical Union* [2010] 4 IR 667.

31. As regards the test to be applied when seeking introductory injunctive relief, he argues that the plaintiffs have established a fair issue to be tried and that even if the higher threshold applied, the plaintiff had established a serious issue to be tried: the attendance at the plaintiffs' premises was an unlawful attendance. Further, the picketing by the defendant's members is having a detrimental impact upon the business of the plaintiffs and is likely to have a detrimental impact upon good industrial relations between the plaintiffs and their employees. On that basis, the balance of convenience favoured the court granted the relief sought.

The Defendant's Submissions

32. Mr Kirwan SC, on behalf of the defendants makes three points in reply. Firstly, he argues that the matter had to be seen outside the context of the 1990 Act and should be seen through the prism of the common law, unfettered by statute. He relies on the case of *Hubbard v. Pitt* [1976] Q.B. 142. And the dissenting judgement of Lord Denning. He argues that what took place was no more than a protest in circumstances where the controlling mind of the Vista Therm company is in Nenagh. This, he describes as the unusual feature of the dual jurisdictional aspect of the dispute. I do not find that case helpful in circumstances where the majority of the Court of Appeal found against the appellants, who had sought to set aside the injunction granted to stop picketing.
33. Secondly, he argues that what took place was a protest and not a picket and relies upon the decision of Leffoy J. in *Dublin City Council v. Technical Engineering & Electrical Union* [2010] 4 IR 667. He argues that the defendant was entitled to protest in furtherance of a trade dispute and indeed to keep protesting, since such an action was not actionable unless tortious and wrongful acts occurred. Here no unlawful activities took place. Further, he argues that there was no loss suffered.
34. Finally, if I were to come to the view that the matter can be seen through the prism of the 1990 Act, Mr Kirwan SC argues that, in the unusual circumstances of the dual jurisdictional aspect of the dispute, the activities within the jurisdiction, to a limited extent, can be seen as secondary picketing. To this extent he refers to section 11(2) of the 1990 Act.
35. As far as the test to be applied, he believes that the threshold test is the strong case threshold and, initially seemed to be of the view that the interlocutory hearing would be determinative of the case. However, when questioned, he accepted the hearing of the case would not take

particularly long and would deal with the right of union to protest at this jurisdiction in circumstances where Vista Therm are owned by the Carey family.

36. He argues that the plaintiff has not established a strong case. He believes that the balance of conveniences does not rest with the plaintiffs and that there was no concrete evidence of any detrimental impact on the business.
37. He argues that the court should give due regard to the memberships' right to peaceful protest action to secure their industrial objectives. In that light, the balance of convenience favoured the refusal of the relief sought, given that if the relief sought was granted it is unlikely that the matter would proceed to a full hearing as the matter would be effectively determined.

The issues

38. It seems to me there are three distinct issues in this case. The first relates to the definition of a picket. The second relates to the characterisation of what took place on the three visits to the factory at Nenagh, and the third issue relates to the 'strong issue to be tried' versus 'fair issue to be tried' thresholds, together with the balance of conveniences and the adequacy of damages.

The Law

39. In order to find a definition of the phrase '*to picket*', the starting point seems to me to be the 1990 Act. Both parties in their written submissions point out that the definition of a picket is not clear. However, it seems to me, having regard to the section 11, which is headed "peaceful picketing", that the definition is clear in context of this case. It is remarkable that whilst this section is headed "peaceful picketing", the word picket does not appear in it at all. However, peaceful does, by reference to the word 'peacefully'.

40. It is worth setting out:

"11.—(1) 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."

41. This section sets out several ingredients for a gathering to be regarded as a peaceful picket. These are first: one or more persons. Secondly: that they are acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, thirdly: that they are attending at or at the approaches to a place where their employer works or carries on business. Finally: that they are attending for the purpose of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working and only that.

42. As Mr Kirwan has pointed out regarding section 11(2) of the 1990 Act, that if I were to find the Act to be applicable then the actions of his client's members were of not unlawful.

43. Section 11(2), dealing with secondary picketing, says as follows: –

(2) 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.

44. As the submissions for both sides point out, what the section permits that when attending at the premise of an employer, who is not a party to the trade dispute, it is reasonable for those so attending to believe at the commencement of attendance that that employer, namely the employer occupying secondary premises, has directly assisted their employer who is a party to the trade dispute, for the purpose of frustrating the strike or other industrial action.

45. Both parties have referred to *Dublin City Council v. Technical Engineering & Electrical Union*, and in particular the decision of Laffoy J. dealing with the interlocutory application. That case primarily concerned section 19 of the 1990 Act. Reference is made to a judgement of McCracken J. in *Malincross v. Building and Allied Trades Union* [2002] 3 IR 607, dealing with section 11(1). In that case, the defendants had placed a picket on a site where the employer seeking the injunction had withdrawn his employees and no further work was being carried out. He felt that there was a fair issue to be tried as to the construction of section 11 (1). I have to say I don't find that case helpful in the context of this case.

46. Further Laffoy J. said at [paragraph 68] as follows:

“[68] 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 and Others* [1957] IR 285, O’Daly J. 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.” (emphasis added)

47. In *Esplanade Pharmacy Ltd v. Larkin, & others* [1957] IR 285, a case which sounds as if it came from an entirely different epoch, the defendant union decided to picket the plaintiff’s small pharmacy due to its failure to abide by certain trading hours on a Sunday. The Supreme Court, and in particular Budd J, said as follows:

“The parades or demonstrations which took place were— to use an expression the meaning of which is well known—a form of picketing, or, to be more technical, constituted a watching and besetting of the plaintiff Company’s premises, and what took place was illegal unless it can be justified in some way, as the defendants say it can, either under the provisions of the Constitution or the Trade Disputes Act, 1906. The defendants accept the position that the onus is on them to show that their conduct was so justified.”

48. Budd J. found that the dispute which arose between the defendants and the employees’ plaintiff company’s trading hours was a trade dispute, but the picketing of the premises had been unlawful in that the picketing was by an unreasonable number of persons and some of the placards recommend the public to support their concerns. Whilst this is an interesting case, as I say, it comes from an entirely different era, its relevance in this matter 1990 Act applies.

49. There is one other case I would like to mention namely *Marine Terminals Ltd v. Loughman* [2009] IEHC 620, to which Mr Kirwan referred. That case related to a protest march which took place in Dublin, organised by the SIPTU trade union in which robust language was used. Feeney J.'s views in relation to the right of freedom of expression must be seen in that context. That is a very different type of case to the matter before this court.

Discussion

50. It seems to me that there are several matters which I should refer to before I give my decision. Prior to any action being taken by either of the parties, a letter was written by Mr Moore, the deponent on behalf of the defendant, to Rachel Moriarty, the H.R. manager at the Lurgan premises at Vista Therm. This was to notify her that industrial action was going to take place following a ballot, pursuant to Northern Irish law. There was no reference to the alleged joint entity Carey Glass/Vista Therm referred to subsequently. Further, the correspondence was addressed to Lurgan and not Nenagh.

51. Thereafter, another letter was written by Mr Moore, on the 27th July 2023, to Mr William Carey, referring to what he now described as the "*Carey Glass – Vista Therm Craigavon site*". The purpose of this letter was to request Mr Carey to engage in a dialogue to find a resolution to the dispute. Therefore, when he subsequently said that the purpose of visiting the Tipperary premises was to deliver a letter, he had already done so.

52. When Mr Carey wrote back pointing out that the two companies are separate legal entities and that the union wasn't in dispute with Carey glass, he did not respond.

53. The second point which I think is worthy of comment is the use of media in the dispute. The first time that the plaintiffs learned that there was going to be a visitation was from Tipperary live on 15th August 2023, the day before the first visit. However, that wasn't the only time the defendant used the media. After the third visit, on 21st September 2023, the local paper carried a photograph of over 20 employees of Vesta Therm standing in line on the grass verge of Tipperary premises and carried an interview with Mr Moore. In that interview he made clear that the purpose of the visit was to point out "*the attempts by the parent company of Vista Therm – Carey Glass – seeking to silence them through an injunction in the High Court in the south*". But by this time, the matter was before the High Court.

54. Thirdly, at every stage the defendant was engaged in an orchestrated attempt to influence, by the various visits, the employees, customers and suppliers of the plaintiffs in relation to the trade dispute, in another jurisdiction. Indeed, they make no secret of what they are trying to do. In his replying affidavit, Mr Moore stated, at paragraph 31 of his first affidavit that the activities were carried out "*in furtherance of the subsisting trade dispute*". This is to

ignore the fact that Carey Glass Ltd is not and never can be Vista Therm Ltd. It may be owned by the same people, may have the logo of Vista Therm on the premises, but it is a subsidiary company governed by different law in a different jurisdiction. The fact that there may be communality of directors and shareholders does not allow the union to ignore the facts.

55. The fourth point worthy of comment arose when the company wrote, through its solicitors, to the Unite union in Dublin on 15th August 2023. In response, the union, through its legal department, denied that it intended to picket at the premises or seek to persuade any persons for working or abstaining from work. I find this letter very surprising since it seems to have been written by somebody with legal training. The definition of peaceful picketing is contained in the Industrial Relations Act 1990. It does not simply refer to seeking to persuade persons from working or abstaining from work. As noted above, it also includes the phrase: “*purpose of peacefully obtaining or communicating information*”. That was clearly the intent of the union when they turned up outside the plaintiffs’ premises. Anybody who cared to look at the section would have understood that.
56. Finally, I would like to comment upon the third visitation. The photographs show a group of in excess of 20 people, all wearing hats with facemasks and an X marked with tape on the masks, dressed in a like fashion. They are standing in a line beside the grass verge, resting a banner on the grass verge. The defendant attempts to justify this by challenging the ownership of the grass verge. This is to ignore the provisions of section 11 of the 1990 Act, which specifically refers to a place of work or “*the approaches to a place of work*”. There is little no doubt in my mind that the members of the union were attending at the approaches to a place of work. It will be an issue for the trial as to whether the Plaintiffs own the grass verge but in the event that they then it seems to me that a trespass took place.

Findings

57. As I set out above, one of the issues in this case relates to the definition of a picket. A picket in the context of this dispute, in my view can be said to be one or more persons, acting on their own behalf or on behalf of a trade union, in contemplation or in furtherance of a trade dispute, who attends at, or where it is not practical, approaches to, a place where their employer works or carries on business, so long as they attend merely for the purpose of peacefully obtaining and communicating information or of peacefully persuading any person to work or stay for working.
58. On the three occasions when the members of the union attended at the plaintiffs’ premises, they were clearly acting, by their own admission, as members of a trade union, in contemplation or furtherance of a trade dispute.

59. They attended at a place of work which was not that of their employer. They did so for the purposes of, by their own admission, communicating information to members of the public, workers, customers suppliers or any person with a vested interest, to call for an end to a trade dispute.
60. The trade dispute in question was not in this jurisdiction. Therefore, it is not a trade dispute which is covered by the Industrial Relations Act 1990. Therefore, I find that based on the evidence before me, the defendant was picketing not protesting. Further they were picketing in furtherance of a trade dispute at a premises which was not that of their employer. Finally, that trade dispute was outside the jurisdiction. In those circumstances o the picketing was not lawful. There clearly is a serious issue to be tried regarding the activities of the defendant on the three occasions they attended at the plaintiffs premises.
61. As Laffoy J. said in *DCC V TEEU*, picketing which is not lawful can potentially give rise to civil liability at common law. She added that it would require a very convincing argument to lead to an alternative conclusion. The trial of the action is the opportunity to argue that case.
62. Turning to the test to be applied for the granting of injunctive relief, I am happy to adopt the '*serious issue to be tried*' threshold as enunciated by O'Donnell J (as he then was) in *Merck Sharp & Dohme*. An interlocutory injunction is a flexible remedy. Its essential function is to find a just solution pending the hearing of the action. I do not believe that granting an interlocutory injunction will in any way prohibit the full hearing of this case. Indeed, I think such a hearing would be welcome. An early trial can be obtained since the issues in this matter are in my view not primarily factual but legal.
63. Given the way the defendants' members attended on the third occasion before the premises of the plaintiffs, whilst the matter was before the court, it seems to me that such actions were a deliberate attempt to, at best, forcibly persuade Mr Carey and the other directors, that they were not going away. Indeed, their counsel confirmed that the union has the right to protest and keep protesting. I have found that they were not protesting, they were picketing. They do not have the right to picket either under section 11(1) or section 11(2), of the Industrial Relations Act 1990, for the reasons set out above.
64. As far as the balance of conveniences is concerned it clearly rests with the plaintiff, since the case is not determined and will go to trial, unless of course the defendants decide that it is not in their interest to proceed or appeal this judgement. That is their right. However, if they are not prohibited by an order of this court, they may well continue to attend at the plaintiffs' premises with the potential of incalculable loss to the plaintiffs' name, their reputation, their standing in the local community, and their relationship with employees, customers and suppliers. As I have said above, the manner of the third visitation causes me

great concern as does the actions of the defendant in ignoring this court and breaking the assurances given on their behalf by their counsel. However, these will be matters for the trial judge.

65. Finally, I do not think damages are an adequate remedy in circumstances where the reputational loss, as I set out above, is incalculable.

Conclusion

66. The plaintiffs have persuaded me that they are entitled to the orders that they seek. I will hear from counsel as to the precise mechanism of the order is required.