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*(subject to editorial corrections)**

2008 No. 062305

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

RODNEY McCOMB (and Four Others)

Plaintiffs;

-and-

1. ALEC ROGAN, Trading as Value Coaches and
2. BENN THOMAS ALLEN, Trading as Allen Tours

Defendants.

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McCLOSKEY J

I INTRODUCTION AND HISTORY

[1] This short judgment determines two outstanding matters in dispute between the parties, namely:

(a) The terms in which a final injunctive order of the court, about which the parties are substantially agreed, should be framed.

(b) The costs of these proceedings.

[2] At the outset, for the avoidance of any doubt, I shall deal with two other matters. Firstly, the Plaintiffs are given permission to make the amendments enshrined in the amended Statement of Claim served on 1st September 2009 [these are clearly highlighted by appropriate red underlining]. Secondly, pursuant to Order 21, Rule 3(1) of the Rules of the Supreme Court, permission is given to the Plaintiffs to discontinue their claim against the first-named Defendant.

[3] In the events which occurred, when this action was listed for substantive trial (on 9th and 10th November 2009), the Plaintiffs proceeded against the second-named Defendant only. He no longer had the benefit of legal representation, his solicitors (Messrs. Campbell & Caher) having successfully applied to the Master for an order pursuant to Order 67, Rule 5. The court was informed that the second Defendant attended the hearing of such application and made clear that he did not oppose it.

[4] The court has previously given an interlocutory judgment in these proceedings: see ***[2008] NIQB 144*** and the conclusions enshrined in paragraphs [15] and [16]. In short, at that stage, the court acceded *in part* to the Plaintiff's request for interim injunctive relief and an order of the court, dated 12th December 2008, ensued. The effect of this was that the conduct of *both* parties was restrained, in specified respects, by two mechanisms. The first was a series of formal mutual undertakings, executed in writing by the parties, dated 15th September 2008. The second was the aforementioned interlocutory order. The restraints contained in these two mechanisms remained in existence, without modification or discharge, until the substantive trial and served to regulate, and restrain, the business and business related activities of the two protagonists viz. the five Plaintiffs (on the one hand) and the second-named Defendant (on the other).

[5] The interim period was not entirely free of alleged incident or controversy. However, it is clear that, by and large, the two mechanisms mentioned above were substantially efficacious and contributed to securing the goal expressed in paragraph [17] of the court's earlier judgment, which was that the parties would "*… continue to coexist peacefully, albeit in the context of legitimate business competition, in a responsible, mature, reasonable and, fundamentally, law-abiding fashion*". My assessment of this matter is essentially confirmed by an invaluable chronology of events, prepared by Mr. Valentine, counsel for the Plaintiffs. This makes clear that the vast majority of the contentious events and incidents belong to the period July 2007 to 13th September 2008. In the period April/May 2009, there were ten contentious incidents. Significantly, the last of these occurred on 11th May 2009 and the only complaint of any substance made by the Plaintiffs about the conduct of the second-named Defendant or his servants and agents relates to a recent conversation between two of their respective employees at the Giant's Causeway, on 6th November 2009.

[6] Having regard to the foregoing, the court is driven to conclude that, at this point in time, there is little live dispute between the parties, a factor which has some bearing on the court's resolution of the two outstanding issues identified above. Based on this assessment and the matters highlighted in the immediately preceding paragraph, at the outset of the substantive trial the court strongly encouraged the parties to make determined efforts to resolve consensually their dispute, on a final basis. In this respect, paragraph [18] of the court's earlier judgment may be highlighted:

> *"It is the court's sincere wish and expectation that there will be no necessity for a substantive trial of this matter, with the attendant increase in costs thereby occasioned. At this juncture, I have the distinct impression that disproportionate costs have already been incurred and it would be a matter of grave concern if further substantial costs were to be expended. The solution lies exclusively in the hands of the parties. In the highly unfortunate event that the dispute between the parties should continue, I would urge them to have resort to mediation. I would also strongly encourage the parties to reflect positively on two matters in particular. The first is the most recent phase of this dispute, which has been marked by harmonious co-existence. The second is the previously successful resort to mediation."*

With the agreement of the parties, the court was able to provide some degree of assistance in the formulation, modification and deletion of certain drafts. The parties, admirably, set about their task diligently and the drafts which evolved progressively, coupled with submissions advanced to the court, demonstrated the existence of a real spirit of compromise. This was exemplified by the Plaintiffs' willingness, ultimately, not to pursue their claim for damages in addition to final injunctive relief. The second Defendant, for his part, secured the benefit of this concession and the further advantage of the inclusion of certain Plaintiffs' undertakings in the proposed final order of the court.

II FINAL INJUNCTION

[7] The final order of the court will take the form of an injunction, coupled with a series of undertakings (given mainly by the Plaintiffs) the net effect of which will be to restrain the conduct of the parties and their servants and agents in several respects. The parties have submitted to the adjudication of the court the question of whether the injunction should incorporate the following clause:

> "*The second Defendant, his servants and agents will not stand or loiter on the footpath on that side of the Donegall Road where the Plaintiffs' premises are situate, within a distance of 25 metres of either side of the frontage of the said premises*".

I consider that the propriety of incorporating this clause into the final injunction falls to be evaluated from the perspectives of fairness, proportionality and enforceability. I also take into account the basic right of every member of the public to avail of public rights of way for lawful purposes. Furthermore, I weigh in the balance the various other restraints applicable to the second-named Defendant and his servants and agents which *will*, by consent, feature in the final injunction. Balancing all of

these factors, I conclude that it would be inappropriate to incorporate the clause in question [currently No. 4].

III COSTS

[8] Against the above background, I turn to consider the further issue to be determined by the court, namely costs. The resolution of this issue must be informed by, *inter alia*, the fact that the final outcome of these proceedings will be in the form of an injunctive order, largely consensual, which has two main features. The first is that it embodies a series of restraints applicable to the second Defendant and his servants and agents. The second is that it contains certain undertakings on behalf of the Plaintiffs.

[9] Mr. Valentine, in an admirably compact submission, contended that the primary relief sought by the Plaintiffs from the outset of the proceedings has been secured, with the result that costs should follow the event. He highlighted further the absence of any counterclaim by the second Defendant and the lack of any "Calderbank" offer. He also pointed out that many of the allegations contained in the second Defendant's affidavit evidence are directed to persons other than the Plaintiffs, their servants and agents. He reminded the court of the principles governing the exercise of its discretion summarised in The Supreme Court Practice 1999, Volume 1, paragraphs 62/2/10-11.

[10] Representing himself, Mr. Allen opposed an order for costs, emphasizing that there had been no full trial of the issues, in circumstances where most of the allegations contained in the Plaintiffs' affidavit evidence were strongly disputed. He asserted that the proceedings were vexatious, designed solely to intimidate him and to stifle legitimate business competition. He pointed out that he was no longer able to afford legal representation, given the drain on his resources occasioned by this litigation and he complained that excessive and disproportionate costs had been incurred by the Plaintiffs.

[11] The legal framework within which the issue of costs is to be resolved by the court is constituted by (a) Section 59 of the Judicature (Northern Ireland) Act 1978 (which invests the court with a discretion and contemplates that this will be subject to Rules of Court), (b) RSC Order 62, Rule 3 (which establishes the general, but not inflexible, rule that costs should follow the event) and (c) the principles summarised in the Northern Ireland Court of Appeal in ***Re Kavanagh's Application*** [1997] NI 368, which, properly analysed, is an illustration of the operation of the general rule: see per Carswell LCJ, p. 382A – 383A. The decision in ***Kavanagh*** also serves as a reminder that the general rule is more difficult to apply in a case such as the present, where there is no judicially determined "*event*" viz. no final judgment of the court following a contested trial.

[12] This latter consideration prompts me to focus firstly on what the parties have achieved at the conclusion of these proceedings. It seems to me that benefits have

been secured by both parties. While, on a purely numerical analysis, the Plaintiffs may appear to be the winner, I consider a crude approach of this kind inappropriate. Rather, the matter must be considered in the round and, in this respect, it is clear that the five undertakings given by the Plaintiffs, which form part and parcel of the final resolution of the dispute, are a matter of substantial benefit to the second-named Defendant.

[13] Secondly, I must take into account that this dispute involved a series of highly contentious allegations and counter-allegations about which no concession was made and which, ultimately, were not the subject of judicial determination. Thirdly, it is appropriate to observe that the second Defendant deserves special credit for his part in the consensual resolution of these proceedings, bearing in mind that he did not have the benefit of legal representation during their most crucial phase. Fourthly, following full argument, the court has already ruled that the Plaintiffs do not enjoy a good arguable case with regard to their claim for certain aspects of the final injunctive relief pursued: see paragraph [15] of the earlier judgment. I also take into account that the main mechanism regulating and restraining the conduct of both parties throughout these proceedings was a series of undertakings which were *mutual in nature* – in circumstances where there was no counterclaim by the second Defendant.

[14] Weighing this series of considerations, I conclude that it would be fair, equitable and proportionate to order each of the parties to be responsible for their respective costs. Accordingly, there will be no order as to costs *inter-partes*.

IV CONCLUSION

[15] To reflect the above conclusions:

(a) The draft order should be reformulated by the Plaintiffs' legal representatives, adopting the outline appended hereto. This should then be forwarded to both the second-named Defendant and the Court Office, by close of business on 16th November 2009.

(b) It is proposed that the formal, final order of the court will issue on 18th November 2009.

(c) Any further desired representation by any of the parties can be forwarded to the court, in writing, during the intervening period.

[16] The parties are to be strongly commended for the efforts which they have invested in achieving a substantial consensual resolution of their differences. Furthermore, the court is indebted to Mr. Valentine for the valuable chronology of events and the meticulously prepared bundles. Finally , I record that Mr. Allen confirmed unequivocally , twice , to the court his consent to the final order and his appreciation of it`s implications .

APPENDIX

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Plaintiffs:

-and-

1. ALEC ROGAN, Trading as Value Coaches and
2. BENN THOMAS ALLEN, Trading as Allen Tours

Defendants:

_____

It is hereby ordered that, upon the undertakings given by the Plaintiffs and the second-named Defendant contained in the Schedule hereto:

Injunction

[1] The second Defendant, his servants and agents … (etc) …

[14] The second Defendant, his servants and agents shall not incommode or restrict any vehicle owned by the Plaintiffs …

Discontinuance

The Plaintiffs are granted leave to discontinue their action against the first-named Defendant.

Costs

There shall be no order as to costs inter-partes.

Liberty to Apply

The Plaintiffs and the second-named Defendant shall have liberty to apply.

Duration

This injunction shall remain in force until future discharge or modification by the court.

Warning

If you, Benn Thomas Allen, disobey this order you may be held in contempt of court and liable to imprisonment or fine. Any other person who knows of this order and facilitates any breach of its terms may also be held in contempt of court and may be liable to imprisonment or fine.

SCHEDULE – UNDERTAKINGS

[1] The Plaintiffs, their servants and agents … (etc) …

[6] If any persons enquire of the second Defendant … (etc).