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Ref: **McCL7351**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **10/12/08**

2008 No. 062305

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

RODNEY McCOMB (and Others)

Plaintiffs:

-and-

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

Defendants:

McCLOSKEY J

[1] The question to be determined by the court at this stage of these proceedings is whether the Plaintiffs have established an entitlement to the grant of interim injunctive relief and, if so, in what terms. This interlocutory application arises in the following way.

[2] There are five Plaintiffs in total. In their Statement of Claim, the first-named Plaintiff (Rodney McComb) is described as a licensed coach operator who trades as "McComb Executive Travel and Tours". He claimed to have operated out of the premises at Belfast International Youth Hostel, 22 Donegall Road, Belfast ("*the Youth Hostel*") since the year 2000. His business provides services to the public which include outings to the North Antrim area, incorporating the Giant's Causeway and other destinations. The remaining four Plaintiffs are described as employees of the first-named Plaintiff,

[3] There are two Defendants. The Plaintiffs' case is that the Defendants are the partners in a firm trading as "Allen's Tours". Until 8th December 2008, the Defendants had the same legal representation, provided by the firm of Campbell & Caher, Solicitors. However, on 8th December 2008, the court acceded to an application that Messrs. Campbell & Caher be granted an order pursuant to RSC Order 67, Rule 5. In the affidavit grounding the application sworn by Mr. Prenter, a partner in the solicitors' firm, there are averments to the effect that the Defendants no longer carry on business as a partnership; that the first-named Defendant did not attend a meeting conducted on 27th November 2008 (in compliance with an earlier direction of the court); that, during the most recent phase of this litigation, the first-named Defendant has provided no updated instructions to his solicitors; and, finally that the solicitors would be compromised in continuing to represent both Defendants by virtue of a conflict of interest. This latter suggestion was not particularised and, in my view, is unsubstantiated on the basis of the evidence presently assembled. However, I considered that there was sufficient substance in the other averments to warrant the exercise of the court's discretion and I made the order accordingly. The upshot is that Messrs. Campbell & Caher will cease to be the solicitors on record for the first-named Defendant when they have complied with the requirements of RSC Order 67, Rule 5.

[4] Having made this order, it was necessary for the court to reflect on the propriety of conducting the full trial of this action on 8th December 2008. I considered that there were two factors of particular significance, in this respect. Firstly, the first-named Defendant was not in attendance, for reasons unexplained. Secondly, he no longer had the benefit of legal representation. Having considered submissions on behalf of the Plaintiffs and the second-named Defendant and taking into account the current state of affairs generally, I determined that it would be potentially unjust to the first-named Defendant to proceed in his absence, in the changed circumstances prevailing. It was within this context that the question of granting interim injunctive relief arose.

[5] This action was commenced by Writ of Summons issued on 2nd October 2007. The relief claimed is an injunction and damages. The unlawful conduct attributed to the Defendants and their servants and agents includes trespass to the first-named Plaintiff's property; interference with the first-named Plaintiff's car; inducing customers of the first-named Plaintiff to act in breach of contract; intimidation of the first-named Plaintiff and his customers; passing off; nuisance; injurious falsehood; defamation; and harassment contrary to Articles 5 and 6 of the Protection from Harassment (Northern Ireland) Order 1997. The extensive affidavit evidence before the court takes the form of allegation and counter-allegation. Some of the allegations relate to behaviour which, if proven, would constitute serious criminal misconduct. There are indications in the affidavits of reports to the police and consequential criminal investigations. There is no current evidence relating to either prosecutions or convictions.

[6] Following the initiation of proceedings, an application for interim injunctive relief was made. By order dated 5th November 2007, this application was dismissed. It would appear that, at this stage, the parties had, very sensibly, struck a mediation arrangement. However, it seems that this broke down in mid-2008. Further disagreements between the parties provided the impetus for a second application for an interim injunction, dated 20th June 2008. Once again, the court was not required to adjudicate, having regard to the terms of a series of mutually agreed written undertakings which were executed by the parties on 15th September 2008. In particular, the parties undertook, mutually, to refrain from conduct constituting harassment; entering each other's respective properties; assaulting each other; and parking their vehicles at certain locations. The undertakings also addressed certain related issues. Although the thirteenth (and last) of the undertakings recited that they would be made an order of the court and would operate until further order, on the basis of the materials presently available, and having reviewed the court file, it would seem that this step was not taken. In light of the undertakings, the application for an interlocutory injunction was adjourned.

[7] It is appropriate to highlight, at this juncture, the fifth and sixth of the thirteen undertakings:

"5. Each party, their servants and agents will not cross Donegall Road on foot or by vehicle to the footpath on the side of the road where the other party's premises are situate within a distance of 25 metres either side of the frontage of each other's respective premises.

6. The Defendants, their servants and agents [are] not to enter at all the Belfast International Youth Hostel premises".

The effect of these two undertakings was to impose on both the Plaintiffs and the Defendants exclusion zones, defined and measured by reference to their respective business premises. As will become clear presently, the contents of these undertakings constitute the main matter presently in contention between the parties. To reflect this, these two undertakings were, by a distance, the main focus of the submissions addressed to the court.

[8] On 16th September 2008, one of the directions made by Stephens J required the parties to meet on 24th November 2008 and to provide a minute of their meeting to the court. In the event, this meeting proceeded on 27th November 2008. The minute supplied to the court includes the following passage:

"... the Defendant would agree to an injunction but would insist on the removal of clauses 5 and 6, currently embodied in the undertakings ...

The Defendant's representatives argued that the court cannot order the exclusion of the Defendant and his representatives from the hostel building and from using the Causeway café ...

It was suggested by counsel for the Plaintiffs that a representative of Allen's Tours be allowed to enter the hostel at 9.45am to alert any of Allen's customers as to the readiness of their tour coaches to depart the area. This was intended to reduce capacity for any confrontation. Consensus as to this could not be reached".

On 8th and 9th December 2008, notwithstanding urgings by the court, the parties, regrettably, were unable to overcome their differences. The case made by the second-named Defendant is that the fifth and sixth undertakings are inappropriate and unfair as they impact adversely on his business activities. In short, the second-named Defendant contends that he has reasonable and legitimate grounds for entering the public areas on the ground floor of the youth hostel premises. This is opposed by the Plaintiffs, who contend in particular that undertakings numbers five and six have been especially instrumental in the harmonious co-existence of the parties' respective business operations which has been the hallmark of the last three months.

[9] The ground floor of the youth hostel premises has become something of a battle ground in which the dispute between the parties has unfolded, in a variety of respects. It is unnecessary to detail these *in extenso* at this juncture. There is one particular feature of the youth hostel premises which should be highlighted. The landlord of these premises is the Youth Hostel Association of Northern Ireland Limited ("*the Association*"). The evidence before the court includes a lease (undated), the parties to which are the Association (on the one hand) and the first-named Plaintiff, Rodney McComb, trading as "Mini Coach Executive Travel and Tours" (on the other). The lease establishes a tenancy of three years' duration, beginning on 1st January 2006 and scheduled to expire on 31st December 2008. The annual rent payable is £5,000 plus VAT. The effect of the lease is that the first-named Plaintiff is entitled to occupy a small office situated on the ground floor of the youth hostel premises for the purposes of his business. I refer particularly to clause 15 of the agreement, whereby the first-named Plaintiff covenants as follows:

"not to use the premises for any purposes other than as a coach hire shop for the sale of coach tours during usual business hours"

The lease also contains two "Additional Clauses", in the following terms:

"Area to Advertised Tours

This will be within the area shown yellow on map i.e. circulation space. One freestanding leaflet dispenser, the property of Mini Coach would be located here, the size to be agreed by the landlord.

Advertising Tours

It is agreed that no other private coach tour operator should be allowed to advertise in the premises of the youth hostel".

[10] The principles governing the exercise of the court's power to order interim injunctive relief are almost too well known to bear repetition. In short, the court enquires into three matters in particular. The first is whether there is a serious question to be tried. The second is the balance of convenience. The third is whether damages would be an adequate remedy. See *American Cyanamid -v- Ethicon* [1975] AC 396. I would highlight that in this kind of litigation, the court does not conduct a trial on the merits. The evidence before the court consists of affidavits and exhibited documentary materials. There has been no cross-examination of any deponent. The evidence has been duly supplemented by the submission to the court of certain additional agreed facts, as outlined above. As the parties have been unable to strike a suitable consensual arrangement, it is necessary for the court to apply the governing principles to the extant evidential matrix.

[11] On behalf of the Plaintiffs, Mr. Valentine adopted and reiterated the stance maintained by his clients during the recent *inter-partes* meeting. He also drew attention to the decision in *Daichi UK Limited -v- "Stop Huntington Animal Cruelty" and Others* [2004] 1 WLR 1503. This was a decision at first instance in which the court determined an application for injunctive relief under Section 3 of the Protection Against Harassment Act 1997. The offending conduct on the part of the Defendant organisation and its supporters was motivated, apparently, by their opposition to the experimental use of live animals in the Plaintiff's research operations. The offending conduct included, allegedly, threatening letters, intimidatory telephone calls and home visits, assaults on the Plaintiff's employees and the dissemination of malicious letters. In his judgment, Owen J drew on the earlier decision of the Court of Appeal in the *Burris -v- Azadani* [1995] 1 WLR 1372, which he considered to be of direct relevance given that each of the Plaintiffs was seeking an interim injunctive order excluding the Defendants from specified zones around the Plaintiff's business premises and the homes of their employees. In *Burris*, Sir Thomas Bingham MR posed the question of whether an injunction could be properly granted *only* to restrain conduct which is in itself tortious or otherwise unlawful. He continued:

"I do not, however, think that the court's power is so limited. A Mareva injunction granted in the familiar form restrains a defendant from acting in a way which is not, in itself, tortious or otherwise unlawful. The order is made to try and ensure that the procedures of the court are in practice effective to achieve their ends. The court recognises a need to protect the legitimate interest of those who have invoked its jurisdiction ...

It would not seem to me to be a valid objection to the making of an exclusion zone order that the conduct to be

restrained is not in itself tortious or otherwise unlawful, if such an order is reasonably regarded as necessary for the protection of a plaintiff's legitimate interest".

[Emphasis added].

The court determined to grant interlocutory injunctive relief incorporating so-called "exclusion zone" provisions. Owen J expressed himself satisfied that "... *the imposition of such zones is necessary for the proper protection of the named Claimants and the employees of the Claimant companies from unlawful harassment*", to the extent that this outweighed the rights to freedom of speech, assembly and association asserted by the Defendants: see paragraph [36]. I would observe that there are evident parallels with the present case.

[12] On behalf of the second-named Defendant, Mr. Henry emphasized the distinction between the small office demised by the association to the first-named Plaintiff on the ground floor of the youth hostel premises (on the one hand) and the remainder of the ground floor (on the other). His submission was to the effect that most of the ground floor of the youth hostel premises is open to and used by members of the public and, further, lies within the exclusive ownership and occupation of the Association, which is not a party to these proceedings. This consideration, it was argued, means that the court lacks jurisdiction to grant final injunctive relief in favour of the Plaintiffs imposing restrictions or controls on the Defendants' use of any part of the public area of the premises. He further highlighted the Association's preference that there should be no inhibition of the kind reflected in the fifth and sixth undertakings. This is expressed in a letter dated 4th December 2008, written by one Mr. Canavan (who seems to have management responsibilities in the youth hostel) to the second-named Defendant's solicitors:

"The Youth Hostel Association would wish to make you aware that neither Allen's Tours nor Mini Coach has any jurisdiction over the premises of the youth hostel at 22/32 Donegall Road, Belfast BT12 5JM, save for the office accommodation rented by Mini Coach from the Youth Hostel Association. Any restriction placed on the general public from entering the premises of the youth hostel runs contrary to the ethos of the International Youth Hostel Management of which we are a member".

[13] In determining this application I take into account the following factors in particular:

- (a) The Plaintiffs are apparently willing to continue to abide by all of the undertakings.
- (b) The second-named Defendant is willing to continue to abide by all of the undertakings, save numbers five and six. The second-named

Defendant will decline to comply with undertakings five and six, by formally revoking them at some time on 11th December 2008.

- (c) The restrictions embodied within undertakings five and six vis-à-vis access to and use of the ground floor of the youth hostel premises are opposed by the management of the premises (and, presumably, the Association).
- (d) It is represented on behalf of the second-named Defendant that the only purpose for which he or his employees would enter the youth hostel premises is to meet and collect customers who have made arrangements to travel in one of his vehicles.
- (e) There is no history of recent trouble or strife between the parties, albeit in the context of the undertakings.
- (f) The parties have honoured the terms of their mutual undertakings during a period of some three months.
- (g) Bearing in mind the nature of the underlying dispute, the affidavit evidence is now somewhat dated. There is no *current or recent* affidavit evidence laying the ground for a real risk of offending behaviour on the part of the Defendants and their servants or agents if permitted to enter the public areas of the Youth Hostel premises.
- (h) The second-named Defendant's complaint of adverse commercial impact on him flowing from the fifth and sixth undertakings has not been challenged.
- (i) While the trial of this action proper did not proceed, as scheduled, on 8th December 2008, on account of the application and order detailed in paragraph [3] above, the court is proposing to relist this case for trial in the near future, by February 2009 at latest, with a resulting short period of intervening delay.

[14] I note in particular that the terms of the injunction sought in the Plaintiffs' summons dated 16th June 2008 seek to restrain the Defendants and their servants and agents from (*inter alia*):

"Trespassing or entering in any way the premises of the Plaintiffs at Belfast International Youth Hostel, 22 Donegall Road, Belfast".

I have emphasized the words "*the premises of the Plaintiffs*" in order to highlight the distinction between the small office on the youth hostel ground floor occupied by the first-named Plaintiff as tenant for the purposes of his business and the remainder

of the youth hostel premises. I do not overlook the terms in which subparagraphs (iii) and (viii) of the Plaintiffs' motion are couched. I acknowledge that these purport to extend to certain parts of the youth hostel premises other than the demised office. However, I have substantial reservations about whether an injunction framed in these terms would be enforceable, give the vagueness and breadth of the language employed. Furthermore, the court would normally be reluctant to grant an injunction tending to restrict legitimate and lawful commercial competition.

[15] I consider that it is within the court's powers to grant interim injunctive relief entailing the imposition of "exclusion zones", as in *Burris* and *Daiichi*. Conversely, I have reservations about the correctness of the argument that the court will not possess jurisdiction to grant final injunctive relief, in the form of "exclusion zones" relating to the public areas of the youth hostel premises, on the ground that the owner viz. the Association is not a party to these proceedings. No authority in support of this contention was cited and, for present purposes, it is sufficient for me to hold that the contrary seems clearly arguable. Whether it becomes necessary for the court to resolve this issue at a substantive trial remains to be seen. However, having regard to the considerations highlighted in paragraphs [13] and [14] above, I am not persuaded that the Plaintiffs enjoy a good arguable case with regard to their claim for final injunctive relief as couched in paragraphs (iii), (vii) and (viii) of their motion dated 16th June 2008. The considerations highlighted in paragraphs [13] and [14] above impel me to the conclusion that, at the trial of this action, it is quite unlikely that the Plaintiffs will secure final injunctive relief in these terms. If I had held otherwise, I would not have been persuaded, essentially for the same reasons, that the balance of convenience is in favour of the grant of such interim injunctive relief. I would add that I am satisfied that, in the particular circumstances of this case, damages are unlikely to provide the Plaintiffs with an adequate remedy in the event that they establish any of their causes of action.

[16] I have concluded, applying the governing tests and principles, and having regard particularly to paragraphs [13] and [14] above, that a more limited form of injunctive relief is appropriate. I propose to make an order permitting the second-named Defendant and a named employee to attend the public areas (only) of the youth hostel premises (a) for the specific and limited purpose highlighted in the case made on behalf of the second-named Defendant (cf. paragraph 13(d) above) and (b) at specified times and, if appropriate, on specified days of the week. The court has not yet been addressed by the parties in sufficient detail regarding these matters to enable a suitable order to be formulated. Accordingly, the parties are invited to formulate an order reflecting this conclusion. In the absence of agreement, the terms of the order will be formulated by the court. With or without agreement, the court will of course be the final arbiter. I would make clear that I have reached this conclusion on the basis that, having regard to the presentation of their respective cases to the court, (a) the Plaintiffs will continue to abide by the undertakings executed on 15th September 2008 and (b) the second-named Defendant will continue to abide by all of the extant undertakings, save numbers five and six.

[17] I consider this to be a fair, measured and proportionate resolution of the current dispute between the parties. Furthermore, it has the attraction that it provides the parties with the opportunity to continue to co-exist peacefully, albeit in the context of legitimate business competition, in a responsible, mature, reasonable and, fundamentally, law-abiding fashion. Any failure on behalf of any of the parties to do so will give rise to a stricter and more Draconian form of intervention by the court and will be liable to attract the sanctions of the criminal law.

[18] 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.

[19] It appears to me inappropriate to involve the first-named Defendant in the proposed order of the court, given that (a) the court has been informed that he is no longer in partnership with the second-named Defendant and (b) he is not presently the beneficiary of legal representation and has taken no active part in the most recent phase of this litigation. Finally, the parties should be aware that any failure to comply with the order of the court will constitute a contempt of court, giving rise to potentially grave consequences, including possible loss liberty.