Neutral Citation no. [2002] NICh 11 | *Ref:* **WEAJ3231**

Judgment: approved by the Court for handing down | *Delivered:* **11/10/2002**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

BETWEEN:

MOST REVEREND PATRICK WALSH
MOST REVEREND ANTHONY FARQUHAR
RIGHT REVEREND MONSIGNOR COLM McCAUGHAN
and
REVEREND JOSEPH GLOVER
(as Trustees of St Malachy's College)
and
JANE CRILLY
P/A FRANCIS CRILLY SOLICITORS

Plaintiffs

and

THE AMICUS AMALGAMATED ELECTRICAL & ENGINEERING UNION

Defendant

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WEATHERUP J

[1] The defendant's application is to enforce an undertaking given to the Court by the plaintiffs on 26 April 2002, upon an ex parte injunction being granted to the plaintiffs in relation to demolition works proposed on behalf of the defendant at its premises at 26/34 Antrim Road, Belfast.

[2] The first plaintiff as trustees of St Malachy's College are owners and occupiers of school premises on the country side of the demolition site. The second plaintiff is the owner and occupier of premises on the city side of the demolition site where she conducts a solicitor's practice. On Friday 26 April 2002 the plaintiffs made

an ex parte application claming an injunction as a matter of urgency by reason of three areas of concern relating to the demolition works. The first concern related to the use of the side of the second plaintiff's property and the use of the access to the first plaintiffs property. The second concern related to the impact of the demolition on the structure of the second plaintiff's property. The third concern (which was not set out in the second plaintiff's grounding affidavit but raised at the hearing) related to the risks arising from the possible presence of asbestos in the boiler room on the demolition site.

[3] The Order of the Court provided that the defendant:

(a) be restrained from demolishing the building;

(b) secure and safeguard access and egress to and from the respective premises of the plaintiffs;

(c) secure and safeguard the second plaintiff's building;

(d) protect against any risk from asbestos products.

The plaintiffs gave an undertaking to the Court in the usual form that if the Court later found that the Order had caused loss to the defendant and the Court decided that the defendant should be compensated for that loss, the plaintiffs would comply with any Order the Court may make.

[4] On Monday 29 April 2002 the injunction was discharged by agreement of the parties.

[5] The defendant submits that (a) there was no "urgency" which required the plaintiffs to proceed ex parte and (b) the plaintiffs should be required to pay

damages on foot of the undertaking by reason of loss sustained by the defendant by reason of the grant of the injunction.

[6] Under Order 29 rule 1 of the Rules of the Supreme Court an application for the grant of an injunction may be made ex parte on affidavit and before the issue of the writ where the case is one of urgency. Paragraph 29/1A/21 of the Supreme Court Practice (1999) states that a case may be one of urgency either (1) because the matter is too urgent to await a hearing on notice eg where property is in danger of being lost of destroyed or (2) because the very fact of giving notice may precipitate the action which the application is designed to prevent.

The present case was said by the plaintiffs to fall into the first category.

[7] Delay by the plaintiff in making the application for the grant of the injunction may impact on the entitlement of the plaintiff to proceed without notice to the defendant. In Bates v Lord Hailsham of St Marylebone [1972] 1WLR 1373 at 1380 Megarry J stated-

> "Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion. The present case does not fall into that category. Accordingly, unless perhaps the plaintiff had had an overwhelming case on the merits, I would have refused the injunction on the score of insufficiently explained delay alone."

In that case the plaintiff had applied for an ex parte injunction to restrain the holding of a meeting. The meeting had been known about for three weeks and the plaintiff "must have a most cogent explanation if he is to obtain an injunction or an ex parte application made 2 ½ hours before the meeting is due to begin."

In the present case the defendant contends that the plaintiffs should have communicated the concerns to the defendant at an earlier date and that proceedings were unnecessary.

[8] In relation to the enforcement of undertakings Neill LJ in Cheltenham and Gloucester Building Society v Ricketts [1993] 4 AER at 276.281 sets out the following guidance-

> "(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.
>
> (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.
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> (3) The undertaking is not given to the party enjoined but to the court.
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> (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains discretion not to do so.
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> (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued.
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> (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before

the conclusion of the trial. Even then, as Lloyd LJ pointed out in *Financiera Avenida v Shiblaq* [1990] CA Transcript 973 the court may occasionally wish to postpone the question of enforcement to a later date.

(7) Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities. (a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems probable that it will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available. It is to be noted, however, that in *Columbia Pictures Industries Inc v Robinson* [1987] 3 All ER 338, [1987] Ch 38 Scott J was able, following the trial of an action, to make an immediate assessment of damages arising from the wrongful grant of an Anton Piller order. He pointed out that the evidence at the trial could not be relied on to justify ex post facto the making of an ex parte order if, at the time the order was made, it ought not to have been made (see [1987] 3 All ER 338 at 378, [1987] Ch 38 at 85). (b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry. In the light of the decision of the Court of Appeal in *Norwest Holst Civil Engineering Ltd v Polysius Ltd* [1987] CA Transcript 644 the court should not order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced. A decision that the undertaking should be enforced is a precondition for the making of an order of an inquiry as to damages. (c) The court can adjourn the application for the enforcement of the undertaking to the trial or further order. (d) The court can determine forthwith that the undertaking is not to be enforced.

> (8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. This matter has not been fully explored in the English cases though it is to be noted that in *Air Express Ltd v Ansett Transport Industries (Operations) Ltd* (1979) 146 CLR 249 Aicken J in the High Court of Australia expressed the view that it would be seldom that it would be just and equitable that the unsuccessful plaintiff 'should bear the burden of damages which were not foreseeable from circumstances known to him at the time'. This passage suggests that the court in exercising its equitable jurisdiction would adopt similar principles to those relevant in a claim for breach of contract".

[9] First, it is necessary to determine whether the ex parte injunction ought to have been granted i.e. whether the matter was too urgent to await a hearing on notice. Second, if satisfied that the injunction ought not to have been granted, it is necessary to determine whether to exercise the discretion not to enforce the undertaking. Third, if the undertaking is to be enforced, it is necessary to determine the manner of inquiry as to damages.

[10] From January 2002 there had been meetings and correspondence between the parties in relation to various concerns that the plaintiffs had raised about the proposed demolition. The second plaintiff had engaged structural engineers to advise on certain aspects of the works. It had been indicated on behalf of the defendant that the demolition work would be undertaken over a weekend and the works had been postponed on a number of occasions in March and April 2002. From time to time the second plaintiff indicated in correspondence that unless the defendant addressed the difficulties that were being identified, legal proceedings would be undertaken on behalf of the plaintiffs. At one stage draft

proceedings were forwarded to the defendant. It is necessary to consider the development of the three areas of concern.

[11] The plaintiffs first concern related to the safety of access to and egress from their respective premises. The first plaintiff's entrance was separated from the defendant's building by Adela Place but there was concern for the safety of those using the entrance to the school. There was no specific remedy required in relation to those using the school entrance and the matter was not pressed with the defendant beyond a general concern. The second plaintiff's building was separated from the defendant's building by Adela Street but the side window shutters needed to be pulled down manually each evening and in operating the burglar alarm for the building the only available exit and access was via the side door in Adela Street. Initially it was suggested by the defendant that a fence would be erected around the demolition site but that never materialised. The defendant's contractor proposed that when the second plaintiff's staff required access to the side window shutters or the side door they should make mobile phone contact with the defendant's contractors so that work would be stopped. The defendant believed that that was an agreed solution.

[12] On the other hand the second plaintiff in her grounding affidavit described the defendant's proposal for the use of mobile phone contact as ridiculous. On the hearing of the present application the defendant protested that the second plaintiff had not made known her rejection of the defendant's proposal at any date prior to the application for the injunction. However, the issue was addressed in correspondence when the contractor's letter to the second plaintiff of 2

April 2002 asked for the office opening and closing times when the side door would be used and the second plaintiff replied on 5 April 2002 that it was impossible to give a fixed time for opening or closing and added "Indeed I wonder why demolition works would have to stop whilst personnel are still entering or leaving my firm's building. Surely the operations on site should be sufficiently safe at any time for personnel to enter or exit at any time during the day." It is apparent from the reply of 5 April 2002 that the second plaintiff had not consented to a proposal for mobile phone contact between the staff of the second plaintiff and the defendant when the side of the building would be used and that there were ongoing concerns about the impact of the demolition work on the use of the side of the building.

[13] The plaintiffs second concern was in relation to damage to the second plaintiff's building. The report of the second plaintiff's engineer had indicated that the building was structurally sound and that damage was likely to be limited to further cracking due to vibration and collision damage from vehicular movement or falling debris. The report stated that any risk of collapse of the second plaintiff's building would be minimised by a well planned and organised method statement. On 5 April 2002 the defendant's architect forwarded a copy of a structural survey report that the defendant had commissioned on the second plaintiff's premises and this report was said by the defendant's architect to cast serious doubts on the structural soundness of the second plaintiff's building. The architect required an amended method statement for the demolition of the defendant's building and tell-tale monitoring devices on the second plaintiff's gable walls were recommended along with various structural tests. The second plaintiff and her engineer did not

agree with the interpretation of the defendant's engineer's report nor did they consider there to be any structural defect in the building. The second plaintiff arranged for inspection of the building by officials from Belfast City Council, which inspection took place on 18 April 2002 and satisfied the officials that there was no cause for concern about the structure of the building. Thus there were different views on the part of the defendant and the second plaintiff as to the soundness of the second plaintiff's building.

[14] Although the second plaintiff and her engineer were satisfied as to the structural soundness of the second plaintiff's building they were concerned that demolition might have an impact on the building by reason of vibration and falling debris. In any event a revised method statement was directed by the defendant's architect to address the security of the second plaintiff's building. The second plaintiff required sight of that document so that it could be considered by her engineer, that being the method by which she sought reassurance that her building would be protected. The second plaintiff raised the issue with the Health and Safety Executive for Northern Ireland who stated on 19 April 2002 that a revised method statement was to be made available to HSENI but they had no statutory role to approve the same. On 22 April 2002 the second plaintiff notified the defendant's architect that she awaited confirmation of the matter of the revised method statement from HSENI. The document was not available to the second plaintiff prior to the injunction.

[15] An additional issue in connection with this concern arose at the hearing of the defendant's application for enforcement of the undertaking. In April 2002

there was correspondence on behalf of the defendant dealing with measures proposed by the defendant to address the security of the second plaintiff's building, and that correspondence was not exhibited by the plaintiffs on the ex parte application. The defendant objected that the second plaintiff's affidavit did not make full and frank disclosure. It is necessary that an application to the Court should be based on full and frank disclosure and in the present case it would have been appropriate that all correspondence relevant to the plaintiffs' concerns should have been produced. On the concern about the security of the building the second plaintiff directed her attention to the revised method statement to allow her engineer to be satisfied that the method of work did not put the building at risk. Accordingly the focus of attention at the ex parte application was on a comprehensive assessment of the overall method of work rather than the specific items dealt with in the correspondence. I am satisfied that the omission of the correspondence did not mislead the Court on the substance of the concern and was not intended to mislead the Court and while it ought to have been disclosed it was not such as would have justified the discharge of the injunction by reason of its omission.

[16] The plaintiffs third concern relating to asbestos arose out a meeting at St Malachy's College on 27 March 2002. The second plaintiff contacted the Health and Safety Executive and the defendant was required to obtain an asbestos report. The defendant obtained a report from a laboratory specialising in the monitoring and identification of asbestos. That report dated 9 April 2002 stated that it had not been possible to determine the contents of inaccessible voids or other such areas in the

defendants building and did identify certain asbestos products which while not notifable were covered by asbestos regulations. However, the second plaintiff continued to be concerned about asbestos in the defendant's building and questioned whether it was present in the boiler room. The second plaintiff took up this question with the HSENI and a representative spoke to the author of the asbestos report and established that the boiler was relatively new and there appeared to be no asbestos present. On 19 April 2002 the HSENI wrote to the second plaintiff with the assurance that the problem of asbestos had been managed in an acceptable way. However the assurance was undermined on 25 April 2002 when the second plaintiff was informed that the defendant's architect had discovered that the original boiler was still present in the building.

[17] On 22 April 2002 the defendant's contractor notified the second plaintiff that written instructions had been received from the architect to commence work although no date of commencement was specified. The second named plaintiff sent a fax to the defendant's architect stating that written confirmation was awaited from HSENI on the defendant's revised method statement and that a copy would be referred to the second plaintiff's engineer. On 25 April 2002 the first plaintiff received notice of commencement of the demolition works on that date but no such notice was sent to the second plaintiff. By Friday 26 April 2002 some preparatory work had been undertaken prior to demolition and tyres had been placed on the ground around the building and a part of the rear exterior wall had been demolished.

[18] The second plaintiff was most immediately involved with the defendant on behalf of the plaintiffs. By 26 April 2002 the second plaintiff's view of the position was that the defendant was about to commence demolition works without having given notice to the second plaintiff of a specific commencement date, without provision for the protection of those using the entrance to the school or those using the side of the second plaintiff's building, without providing the second plaintiff with confirmation that the revised method statement was sufficient to address the security of the second plaintiffs building and apparently without regard to the change in circumstance arising from the discovery of the original boiler in the defendant's building creating an additional risk from asbestos. On Friday 26 April 2002 it was the second plaintiff's view that there was an urgent need to stop the commencement of the demolition works as it appeared that the defendant proposed to undertake the demolition works immediately and without a resolution of the concerns.

[19] The defendant's view of the position as at 26 April 2002 was that on the first concern there was no issue about access to the school and the mobile phone scheme had been agreed with the second plaintiff. On the second concern the defendant' view was that the second plaintiff did not accept that there was any structural problem with her building and that with the specific steps proposed by the defendant in correspondence she need not have had any cause for concern. On the third concern the defendant's view was that asbestos was not a problem on Friday 26 April 2002 as no asbestos had been discovered in the defendant's building.

[20] I do not accept the defendant's view of matters at that time. The second named plaintiff's letter of 5 April 2002 makes it clear that the access arrangements for the Adela Street side of the building were not agreed. Further there remained the issue as to whether the manner of demolition would affect the second named plaintiff's building with the second plaintiff's engineer awaiting confirmation of the adequacy of the overall plan for the works in relation to the protection of the second plaintiff's building. In addition the discovery that the original boiler remained in the building required re-examination of the asbestos problem. With impending demolition there was urgent need to deal with the concerns that had been debated for some weeks and raised genuine and serious issues that needed to be addressed.

[21] Although the concerns remained unresolved it remains necessary to determine whether the appropriate response was for the plaintiffs to apply to the Court. The defendant submitted that it was unnecessary to proceed to obtain an ex parte injunction on 26 April 2002 and that notice ought to have been given to the defendant. It was submitted that had the plaintiffs given early notice in writing to the defendant of the nature and extent of the outstanding concerns, they would have been addressed without the need for the injunction.

Had the second plaintiff been given sufficient advance notice of the commencement date she could and should have put the complaints to the defendant, preferably in writing. However I am satisfied that it was not until 26 April 2002 that the second plaintiff was aware that commencement was imminent. There had been several false starts and the general notice of 22 April 2002 was not sufficient to confirm a start date of the following weekend. The general notice did

however prompt the second plaintiff to take up again with the defendant her requirement for confirmation that the method of work was sufficient to protect the second plaintiff's building. Such confirmation was not forthcoming prior to the injunction.

[22] Even if the second plaintiff should have set out the complaints earlier in the week after she received the general notice of commencement, that would not have embraced the asbestos problem which only re-emerged at the end of the week. The defendant contended that it is not relevant to the present application that asbestos was later discovered in the boiler room, which necessitated a further delay as a consequence of the need to remove that asbestos prior to the commencement of demolition. I find that it is relevant that it was only on 25 April 2002 that the risk of asbestos re-emerged with the discovery that the original boiler was in the building and it appears that the defendant proposed to commence demolition works in any event. The demolition ought not to have taken place on 27 and 28 April 2002, with the asbestos position unresolved.

[23] I find that by reason of the absence of confirmation as to the nature of the revised method statement and the presence of the renewed risk of asbestos the plaintiffs were entitled to obtain an ex parte injunction on 26 April 2002 on the ground of urgency. I am satisfied that the second plaintiff had the authority of the first plaintiff to make the application on behalf of the school. Accordingly, the plaintiffs are not required to meet any undertaking as to damages.

[24] Alternatively, if I am wrong in finding that there was urgency which justified the grant of the ex parte injunction the court retains the discretion to

determine whether the undertaking should be enforced. In those circumstances I would exercise my discretion against enforcement of the undertaking on the basis that the defendant should not have completed the demolition on the 26 to 28 April 2002 in any event because they ought to have re-investigated the asbestos problem on discovery that the original boiler remained in the building. Further, the costs alleged to have been incurred by the defendant relate to the expenses of responding to the plaintiffs injunction and of enforced idle time for the demolition work. These costs are matters that would largely have been incurred in any event, in the former case by the need to address the plaintiffs concerns and to occupy the time of the defendant's representatives in so doing and in the latter case in postponing the demolition because of the need to make further inquiry about asbestos.

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