IRISH SHELL v RYAN

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THE HIGH COURT
1985 584OP

BEFORE HS HONOUR MR. JUSTICE MURPHY
ON FRIDAY 19TH JULY, 1985

IRISH SHELL LIMITED / PLAINTIFF

and

DAN RYAN LIMITED AND
ESSO (IRELAND) PUBLIC
LIABILITY COMPANY / DEFENDANT

Certified true record
of shorthand note:

B. Smiet
(Official Stenographer)

APPEARANCES

MAURICE GAFFNEY S.C.
M. DURACK B.L.

(FOR PLAINTIFF)

(Instrd. by McKeever & Son,
5 Foster Place, Dublin 2)

P. GILLIGAN S.C. (FOR 1ST. NAMED DEFENDANT)
(DAN RYAN LTD.)

D. SELIGMAN B.L. (Instrd. by H.J. O'Hagan Marc
& Co.,
94 Lr. Baggot Street,
Dublin 2.)

K. FEENEY B.L. (FOR 2ND NAMED DEFENDANT)
(ESSO (IRELAND) PLC)
(Instrd. by T.P. Robinson
& Co. Solicitors)

JUDGE: This matter came before me in the course of the Chancery List on Monday last, and having regard to the importance of the matter to the parties, I felt it appropriate to reserve my judgment until today; but, having regard to the urgency of the matter, I felt unable to postpone the matter until I would have an opportunity of delivering a written judgment.

I am conscious of the fact that important applications of this nature are taken, as was this case, as one of some 80 cases in the day, and I do feel one has to exercise a measure of care in ensuring that the appropriate principles are given adequate consideration.

The application is for an injunction restraining the defendants from taking any further steps towards the completion of an agreement for sale of certain premises at Punches Cross, Limerick, to Esso (Ireland) PLC. The plaintiffs, Shell, entered into an agreement with the first defendant Dan Ryan Ltd. (Ryans) on 27.5.81. That agreement related to the user of the premises in Punches Cross and was expressed to be for a period of five years from 1.5.81. The agreement to which I shall refer as the Solus agreement does not contain any term prohibiting Ryans from selling or alienating the premises, nor does it require them to purchase any minimum supplies of petroleum products from Shell Ltd. What it does require is that first Ryans should purchase only Shell brands of motor fuel. Secondly that it should purchase automotive lubricant marketed by Shell; thirdly that Ryans should exhibit on the site Shell signs, fourthly that it should be decorated in Shell colours if so required by Shell. Presumably Shell were satisfied that the cumulative effect of these contractual

obligations would result in Ryans using the site as a filling station carrying on business to the best advantage, and then of necessity retailing Shell products therein. Clause 8 of the Solus agreement provides as follows: "the buyer shall not ..... shall not apply."

By successfully operating that clause Ryans might relieve themselves of the burden imposed upon them by the agreement. It is however clear that it is not the intention of Ryans to invoke that clause or to transfer the benefit of the Solus agreement to Esso. This is expressly stated in the affidavit sworn by Mr. Michael Ryan on behalf of Ryans, so there is therefore no question of Ryans being relieved from their contractual obligations by virtue of clause 8. It appears to me these obligations will persist until the expiration of the agreement on 1st May next year.

It is contended by Shell that an outright sale of the site to Esso or any other party would make it impossible for Ryans t perform their contractual obligations under the Solus agreement, and that accordingly the proposed disposition wou d constitute a breach, indeed a repudiation, of the Solus agreement. Having regard to the fact that this is an interlocutory application in which it would be impossible to decide disputed questions of fact and impracticable to resolve contentious questions of law, it is sufficient at this stage for me to say that I accept that this is a fairly arguable contention and that the plaintiffs have a statable case in that regard.

However, it is pointed out on behalf of Ryans, and rightly so, that the Solus agreement expressly prohibits Ryans from purchasing petroleum product other than that marketed by Shel

and that it follows that the Solus agreement is an agreement in restraint of trade and prima facie illegal. It follows too that the onus is on Shell to establish that the restraint is reasonable, that is reasonable in the interests of the parties to the agreement and reasonable in reference to the interests of the public. This is a question which has been canvassed in many cases and in particular in the judgment of the late Mr. Justice Budd in Irish Shell BP and Ryan 1966 Irish Reports page 75. Notwithstanding the fact that those proceedings were of an interlocutory nature and extended over five days and were the subject of a careful judgment it does seem to me that some of the comments of that distinguished Judge fall to be reviewed and considered in the light of subsequent legal decisions. (Cites p. 99 of Judgment of Mr. Justice Budd "so far therefore as a supply agreement ..... sale").

Therefore he was apprehending that Irish Shell might be the unsuccessful party and that Ryans the defendants would be the successful one, based on the proposition that the Judge apprehended that the contract was unlawful restraint of trade. However, that issue and the decision of Mr. Justice Budd was reviewed in subsequent cases, in particular by Mr. Justice Kenny in Continental Oil and Moynihan. In that case Kenny J. pointed out that the decision of Mr. Justice Budd was based on certain decisions of the Court of Appeal in England which were subsequently overruled by the House of Lords (1968 Appeal Cases page 269, Esso and Harper). It must be recognised too that Mr. Justice Kenny was not, unlike Mr. Justice Budd, dealing with an interlocutory application. He had heard the case in full and was giving a final decision

on the issue with regard to whether or not the agreement under consideration in that case did or did not constitute an unlawful restraint of trade. Mr. Justice Kenny held that the agreement was not such restraint. Of course the validity of the restraint must be considered by reference to facts which may vary in case to case. However, having regard to the fact that all oil companies carry on business in this country under a regime determined by and in pursuance of statutory regulations made following various enquiries, it is clear that there is a great deal in common between one agreement and another, and above all the need for such agreements. It seems to me, having regard to the decision given by Mr. Justice Kenny as a final decision in a case of this nature, and having regard to the particular facts averred in the affidavit of Mr. Fallon sworn on behalf of Shell dealing with the nature of the investment by Shell in the Irish market and the manner in which they carry on business that I am entitled and would properly conclude that the plaintiffs have a reasonable case to make to the effect that the contract is not an unlawful restraint of trade and illegal as such. Whether this is so or not will be determined finally when the proceedings come for hearing.

At this stage, it is necessary to turn to a consideration of the nature of the damages which would flow to either of the parties depending upon whether an injunction is granted or withheld. If the injunction is not granted Shell may lose considerable sales through the outlet. They contend, and it would seem to me rightly, that they may lose valuable renegotiating rights on expiration of the present agreement, but most of all they would suffer a blow to their reputation

and prestige, and this is a type of loss it would be impossible to quantify in money terms. In the event of the injunction being granted the immediate effect would be to deprive Ryans of a sale of the site for a very substantial sum indeed. It is an attractive and immediate sale and the loss of it would be of significance to Ryans. On the other hand it does seem that this is a type of loss which can be numbered in damages. It is proved that as well Ryans might suffer financial loss from the continuation of the existing business until the termination of the present agreement, and that the loss suffered under that heading might be more difficult to calculate. It is nonetheless the type of loss which does not defy calculation in monetary terms.

In these circumstances it seems to me this application, like so many others, falls to be determined by a consideration of where the balance of convenience lies. Both parties are companies of considerable substance. There is no comparison between the defendant in the present case, also by coincidence called Ryan, and the defendants in the case in which Mr. Justice Budd gave judgment some twenty years ago. There is no suggestion that the defendants in the present case would suffer the type of hardship which Mr. Justice Budd apprehended in the 1966 case. On that occasion, as appears from page 103 of the report, there was reason to apprehend that the defendants would suffer very considerable hardship. The Filling Station was their only means of livelihood, and in the second paragraph page 103 Mr. Justice Budd says "after paying ..... despite working long hours". It seemed therefore that the fear in that case was that the retailer of the petroleum products would be locked into a

situation where he had no income and might lose money. In the present case the hardship of which the defendants Ryans complain, is set out at paragraph 22 of the affidavit (quotes para. 22). However, as I see it, whilst there is reason to apprehend serious financial loss to the defendants Ryan there is no reason to fear, as did Mr. Justice O Dalaigh in his decision in Esso and Fogarty 1969 Irish Reports page 531, or Mr. Justice McWilliam in Irish Shell and Burrell 17.6.81, that the retailer would "wither away". As I see it all the indications are that Ryans in the present case are a company of considerable substance and if the present sale is not consummated at the present time Ryans will remain the owners of a very substantial and valuable asset. They will be free to dispose of that without reference to any burdens created by the Solus agreement in May of next year. If at that stage as Michael Ryan fears, the market may have altered or the sale price may have fallen, the loss under that heading and any other loss sustained by Ryans would presumably be covered by the undertaking which Shell Ltd. would be required to give as a term of granting the injunction. It seems to me that Shell are entitled to their interlocutory injunction only subject to the ordinary condition that they give an undertaking as to damages which would adequately protect the defendants in the event of it emerging on the hearing of the case that the plaintiffs were not entitled to the relief now claimed by them.

COUNSEL FOR PLAINTIFF: I am authorised to give the undertaking required.

JUDGE: Very good. Reserve costs.