Texpack Ltd. v. Rowley et al.

[1972] 1 O.R. 528-535

ONTARIO
[HIGH COURT OF JUSTICE]
MOORHOUSE, J.
10th AUGUST 1971.

Labour relations -- Picketing -- Interim injunction -- Affidavit evidence -- Right of cross-examination -- Whether restricted -- Judicature Act, R.S.O. 1960, s. 17.

By virtue of s. 17(4) of the Judicature Act, R.S.O. 1960, c. 197 (now s. 20, R.S.O. 1970, c. 228), as amended by 1970, c. 91 (No. 2), s. 1, "evidence in support of an application for an injunction to restrain a person from any act in connection with a labour dispute shall be provided by way of affidavits. . . but any party may by notice to the party filing such affidavit, together with the proper conduct money, require the attendance of the deponent to be cross-examined at the hearing of the motion". This right of cross-examination is not, however, unrestricted. Where the purpose of the cross-examination is simply to establish that the applicant is not coming to the Court with "clean hands" and that it has by its acts provoked the defendants into what is now complained of against them, the cross-examination is irrelevant. The primary purpose of the type of order sought is the protection of property and upon occasion the rights of parties to engage in their lawful business. Cross-examination should be restricted to matters in issue or maters of credibility. The question whether the plaintiff has "clean hands" is not an issue on such an application.

APPLICATION for an injunction to restrain picketing.

I. Goldsmith, Q.C., for plaintiff.

P.D. Copeland, for defendant, Pamela Clark.

F.W. Park, for defendants, Kent Rowley, Ray Parton and Jean Neily.

MOORHOUSE, J. (orally):-- This is a motion for an injunction in a matter arising from a labour dispute. The action was commenced on July 20, 1971. The Court was moved on July 27 1971, for relief in the same terms. The motion was heard by Grant, J. Judgment was reserved by him and delivered on July 29, 1971. For the better understanding of the matter I quote his reasons for judgment in full:

> On all the evidence I am convinced that there was improper conduct on the part of the defendants at the plaintiff's premises on the 16th and 19th days of July last, a continuance of which ought to be restricted by the Court if there were (sic) reasonable apprehension of a renewal thereof. Since July 19th there has not been damage to property or threats or injury to persons on the part of the defendants which would justify the issue of the order requested. I think this is a case where I should follow the unreported decision of Osler, J., of this Court dated December 23, 1970, in the case of Reliance Electric Ltd. v. Haddaway et al., wherein he stated:
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> > "It must never be forgotten that the primary purpose of the type of order now sought is the protection of property and upon occasion the rights of parties to engage in their lawful business and that the purpose of such an order is not the preservation of the peace or the enforcement of criminal or quasi- criminal law."
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> As was done in that case, to guard against repetition of the acts complained of, I will dismiss the application for

the restraining order but with leave to the applicant to renew such application on the material now filed together with any additional material that may be relevant, upon 12 hours' notice at any time. costs of the motion will be to the trial Judge.

Those reasons are dated July 29, 1971.

The motion returnable before me was served on August 16, 1971, and was stated to be pursuant to leave granted by the aforesaid order of Grant, J., and that order was in these terms:

> UPON MOTION made by counsel for the Plaintiff on the 27th day of July, 1971, for an interlocutory injunction in the terms of the Notice of Motion herein in the pressence of counsel for the Defendants, AND UPON hearing read the Writ of Summons, the Notice of Motion herein dated the 20th day of July, 1971, the Affidavits of Kenneth F. Dafoe, Frederick R. Long, Arthur Beatty, Robert Marvin Kenney, Kenneth Douglas Roe (2), Donald Hardcastle, Garry Wayne Gee, Robert Thomas Bidwell, all sworn on the 20th day of July, 1971, the Affidavit of Trevor John Semple, sworn on the 21st day of July, 1971, and the Affidavits of Kent Rowley, Ray Parton, Ann Atfield, Frances Beatrice Knight, Ronald Edward Stockdale, all sworn on the 24th day of July, 1971, and of Jean Neily and Pamela Clark, and the further Affidavit of Kenneth Douglas Roe, sworn the 26th day of July, 1971, and the exhibits thereto, filed; AND UPON hearing what was alleged by counsel aforesaid:--
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> l. THIS COURT DOTH ORDER that the Application be dismissed with leave to the Applicant to renew it upon the present and any additional relevant material at any time on twelve hours' notice.
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> 2. AND THIS COURT DOTH FURTHER ORDER that the costs of this Application be reserved to the trial judge.

Grant, J., as I understand his reasons, found that:

> ... there was improper conduct on the part of the defendants at the plaintiff's premises on the 16th and 19th days of July last, a continuance of which ought to be restricted by the Court if there were (sic) reasonable apprehension of a renewal thereof.

It is abundantly clear upon the evidence before me that there has been both damage to property and threats and injury to persons on the part of the defendants, since the hearing of that motion, and I refer particularly to the affidavit of K.F. Dafoe sworn on August 6, 1971, paras. 3 and 5; the affidavit of K.D. Roe sworn on August 5, 1971, paras. 9, 15, 16, 17, 26 and 29. Evidence before me seems clear that the incident to which I refer, and there were many

others participated in by one or more of the defendants and by unnamed persons who were there present. At the opening counsel for the defendants both requested an adjournment to cross-examine upon affidavits filed. Both the plaintiff and defendants asked and were granted leave to file affidavits recently sworn and I permitted it. An affidavit filed by the plaintiff of K.D. Roe sworn on August 9, 1971, and the following affidavits filed on behalf of the defendants, Jean Neily, Kent Rowley, Ray Parton, Judy Johnson, John Dockree, Madeleine Parent, Agnes McGhie, all sworn on August 7, 1971, and that of Harvey Storm sworn on August 10, 9171. All these were in addition of the affidavits copies which were earlier served.

No firm objection was made in respect of the late filing and service. I thought it advisable to have the whole material on the record. At the opening counsel for Rowley, Parton and Neily informed the Court that he had given notice and paid conduct money for the purposes of cross-examining K.D. Roe pursuant to s. 17(4) of the Judicature Act, R.S.O. 1960, c. 197 [now s. 20, R.S.O. 1970, c. 228], as amended by 1970, c. 91 (No. 2), s. 1, assented to on November 13, 1970. Since it would be necessary for me to refer to other parts of that section I set it out in full:

> 17(1) In this section, "labour dispute" means a dispute or

difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(2) Subject to subsection 7, no injunction to restrain a person from any act in connection with a labour dispute shall be granted ex parte.

(3) In every application for an injunction to restrain a person from any act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry upon or exit from the premises in question, or breach of the peace have been unsuccessful.

(4) Subject to subsection 7, evidence in support of an application for an injunction to restrain a person from any act in connection with a labour dispute shall be provided by way of affidavits confined to statements of facts within the knowledge of the deponent, but any party may by notice to the party filing such affidavit, together with the proper conduct money, require the attendance of the deponent to be cross-examined at the hearing of the motion.

(5) An interim injunction to restrain a person from any act in connection with a labour dispute may be granted for a period of not longer than four days and, subject to subsection 7, only after two days notice of the application therefor has been given to the person or persons named in the application.

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(6) At least two days notice of an application for an interim injunction to restrain a person from any act in connection with a labour dispute shall be given to the person

affected thereby and not named in the application,

(a) where such persons are members of a labour organization, by personal service upon an officer or agent of the labour organization; and

(b) where such persons are not members of a labour organization, by posting the notice in a conspicuous place at the location of the activity sought to be restrained where it can be read by any persons affected.

and service and posting under this subsection shall be deemed to be sufficient notice to all such persons.

(7) Where notice as required by subsection 5 and 6 is not given, the court may grant an interim injunction where,

(a) the case is otherwise a proper one for the granting of an interim injunction; and

(b) notice as required by subsections 5 and 6 could not be given because the delay necessary to do so would result in irreparable damage or injury, a breach of the peace or an interruption in an essential public service; and

(c) reasonable notification, by telephone or otherwise, has been given to the persons to be affected or, where any of such persons are members of a labour organization, to an officer of that labour organization or to the person authorized under section 63a of The Labour Relations Act, to accept service of process under that Act on behalf of that labour organization or trade union, or where it is shown that such notice could not have been given; and

(d) proof of all material facts for the purposes of clauses a, b, and c is established by viva voce evidence.

(8) The misrepresentation of any fact or the withholding of any qualifying relevant matter, directly or indirectly provided by or on behalf of the applicant for an injunction under this section, constitutes a contempt of court.

(9) Any judgment or order in an application under this section may be appealed to the Court of Appeal.

This section is new and I am informed has not been the subject of a reported judicial interpretation. Save that it was in effect at the date of the Osler, J.'s judgment herein referred to, I should say, however, that I hsave no knowledge when those proceedings were commenced. By s. 2 of the amendment it did not apply to action commenced before the Act comes into force.

It appears to me this section will place a very heavy burden upon Weekly Court Sittings and unless there is full cooperation by counsel, and I am not suggesting any lack here, the operation of that Court will be subjected to an almost unmanageable burden. I must say that counsel stated they had inquired about the necessity of a reporter beforehand. That alone will not be sufficient as the officers of that Court will need to be informed in advance, amongst other things, of an estimate of the time required in order to distribute the burden upon the bench. In my opinion, Weekly Court is not a place for a long trial.

I concluded in this particular case, counsel for the three named defendants having given a notice had available to him the right of cross-examination purportedly given. Counsel for the defendant Clark not having given notice asked to have the right to cross-examine. Having regard to the general operation of the Weekly Court I did not grant him that privilege. He then gave a written notice of such desire during a short recess and I said that the notice not having been given before the hearing commenced I would not validate it if, indeed, that was necessary.

I then asked counsel for the three defendants to indicate to me the specific matters upon which he desired to cross-examine.

Both counsel argued the right was unrestricted. Their arguments were substantially the same; they argued clearly, frankly and notwithstanding many admonitions, repetitiously. I think I fairly summarize their presentation when I say they were not interested in refuting the allegations of fact appearing in the plaintiff's material but seem intent upon attempting to show how unfair the plaintiff had acted in the labour dispute. Upon the theory the plaintiff was seeking an equitable remedy and was not coming to the Court with "clean hands" and that it had by its acts provoked the defendants into what is now complained against them.

Admittedly, the defendants have sought recourse to other tribunals in respect of many of their complaints. Does the effect of the new s. 17 of the Judicature Act turn a motion for an interlocutory injunction into a full scale trial of the dispute? I do not so read the legislation. Counsel indicated no intention to impeach the credit of the deponents whose affidavits were filed.

It became abundantly clear from the argument that counsel for the defendants did not wish to cross-examine in respect of any of the alleged acts of violence and improper conduct attributed to the defendants. Instead they proposed an examination in the nature of discovery dealing with alleged actual provocation on the part of the plaintiff and the subject of withholding relevant material in failing to disclose all material facts. There are many allegations against the plaintiff's employer which the defendants claim was provocation for the acts so charged against them and which were not denied. It was said the plaintiff had refused to give vacation pay but admittedly that matter was now before another forum. It was said five picketers have been discharged but that too is before another tribunal and, in any event, it has not been denied.

The defendants wished to cross-examine one Roe with respect to instructions given by the plaintiff to an investigation service, the affidavits of some of the investigators having been filed. I was not satisified the terms of the retainer were relevant to the issue before me. It was argued that the picketline disturbance was caused because of the attitude set

by the plaintiff. For all defendants counsel maintain they have unrestricted right of cross-examination; I cannot agree with that view.

It was said the plaintiff advertised under a name other than its own for employees. It suggested that that is a great sin. There is no evidence before me of any new employees who are unaware of a labour dispute. I cannot agree this was non-disclosure.

In respect of the alleged unrestricted right of cross-examination, the ground and the intended proof must, I think, be open to the Court for examination and if it appears not relevant to the issue before the Court they are not entitled to a delay of justice in order to give them an opportunity of making an experiment in due form which, in the opinion of the Court, would be deficient in substance. Those words I obtained from the judgement of Chief Justice Abbott in the case of The King v. Edmonds (1821), 4 B. & Ald. 471 at p. 475, 106 E.R. 1009. That case has no bearing on the issue here but the words were more appropriate than any words of mine.

In my respectful opinion the right of cross-examination must not be used in these cases for a fishing expedition. The purpose of cross-examination, as I understand it, is to obtain the truth. Here no relevant facts are in dispute. Counsel want the Court to have the background. There is no suggestion of impeachment of credibility and I have ruled against the relevancy of the proposed cross-examination. It was not suggested there were other matters which I consider relevant. Cross on Evidence, 2nd ed. (1963), pp. 214-5, says:

> The object of cross-examination is twofold, first, to elicit information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and secondly to cast doubt upon the accuracy of the evidence-in-chief given against such party.

(The italics are mine.). It is not suggested there is an issue respecting disputed facts in this case and I see no need for

cross-examination in respective matters which are not in issue.

In my respectful opinion the new section is an attempt by the Legislature to permit the Courts to hear evidence and observe witnesses in respect of matters in issue.. It is said that the disposition by the Courts of applications for injunction in matters such as is before me too often are final judgments. The parties may so treat them. In my respectful opinion a motion such as this is not a final disposition of the case unless the parties choose to make and treat it as such.

The fallacy of the argument for the defendants seems to me to stem from the fact that it completely negates the purpose of an order as here sought which was so ably set forth by Osler, J., and quoted by Grant, J.

Counsel for the defendants argue there is no evidence before me of irreparable damage. Evidence of that nature was before Grant, J., and he, I am satisified, gave effect to it when he said:

> ... I am convinced that there was improper conduct on the part of the defendants at the plaintiff's premises on the 16th and 19th days of July last, a continuance of which ought to be restricted by the Court if there were (sic) reasonable apprehension of a renewal thereof.

The alleged acts of violence since July 27, 1971, were in no manner challenged by the defence. The plaintiff admittedly hired new employees which it is argued they had the right to do. Counsel for the defence, when asked whether it was alleged the company did not have this right, did not concede but did not deny.

It was complained the plaintiff did not stop and delay a bus load of new employees being brought into the plant until a picketer could enter the bus and talk with each and every of them. I do not know of any law placing such an onus upon the employer or giving a picketer such right and I was referred to none other than is to be inferred from the statutes and I am not prepared to make such inference.

It is argued the evidence before me is not sufficient to satisfy the Court and I quote from s-s. (3) of s. 17:

> 17(3) ... reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry upon or exit from the premises in question, or breach of the peace have been unsuccessful.

On the evidence before me which is not refuted nor it is suggested is untrue, I have no hesitiation in saying I am abundantly satisfied. In fact, the evidence of the defendants and affidavits on their behalf conclude the matter beyond doubt.

It is suggested the granting of an injunction here amounts to condonation of the plaintiff's attitude. I do not so regard any decision I make. For the defendants it is argued an action is a remedy which should not be granted to one who does not come into Court with "clean hands". The Legislature has not seen fit to deal with that particular philosophy if such it be.

I return to what was said by Osler, J., as quoted by Grant, J.:

> It must never be forgotten that the primary purpose of the type of order now sought is the protection of property and upon occasion the rights of parties to engage in their lawful business ...

In this case after the hearing before Grant, J., property has been damaged or destroyed. The lawful business of the plaintiff and those employees who desire to work for it has been interfered with. The executive have the duty of preserving the peace in the enforcement of criminal law. That is unnecessary for me to deal with for my conclusion.

It is argued that the description of a meeting mentioned in one manner by Dafoe and another manner by Parent amounts to non-disclosure. I do not think it does nor do I think it

relevant to the issue before me. If I felt it was material I should have been prepared to allow cross-examination, if requested, so that I could come to a decision on a question of credibility.

I have considered the memorandum of fact and law filed on behalf of Rowley, Parton and Neily, and I can add nothing further.

The defendants by repetition of their improper acts have brought on themselves the injunction which Grant, J., thought proper but refused because a week elapsed prior to hearing by him without repetition. Similar and other acts were repeated almost before the ink had time to dry upon his order. The injunction sought is now granted. Grant, J., reserved the costs of the motion before him to the trial Judge but in view of the repetition of the improper acts the costs before me shall be the plaintiff's in the cause.

Order accordingly.