AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2023:000046
[2024] IESC 8

O'Donnell C.J.
Woulfe J.
Hogan J.
Murray J.
Donnelly J.

BETWEEN/

H.A. O'NEIL LIMITED

PLAINTIFF/RESPONDENT

-AND-

UNITE THE UNION, PATRICK JAMES GOOLD, WILLIAM MANGAN AND DAMIAN JONES

DEFENDANTS/APPELLANTS

Judgment of Mr. Justice Brian Murray delivered on the 6th day of March 2024

The context

1. Prior to the enactment of the Industrial Relations Act 1990 (‘*the 1990 Act’*), trade unions and workers presented with an application for an interlocutory injunction to restrain them from engaging in industrial action, faced an overwhelming challenge. The difficulties have been frequently described, perhaps most passionately by McCarthy J. in the course of his dissenting judgment in *Bayzana Ltd. v. Galligan* [1987] IR 238 at at p. 252-253 (‘*Bayzana’*). In order to obtain such relief, the plaintiff was required to establish no more than that it had a ‘*fair’*, ‘*arguable’* or ‘*stateable’* case that the action was unlawful, whereupon the Court would conventionally move to assess whether – if the injunctive relief was refused, the case went to trial and the plaintiff succeeded in establishing illegality – damages would be an adequate remedy. From there, the Court proceeded to determine whether the balance of convenience otherwise favoured the grant of the relief claimed. The low threshold applicable to the first of these questions was easily met: the economic torts engaged where industrial action was undertaken remain notoriously uncertain in scope, and the point at which the immunities conferred by the Trade Disputes Act 1906 (‘*the 1906 Act*’) bit at those causes of action was obscured by a dense fog of case law (and from the early 1960s, various constitutionally derived claims). Just about every claim in this arena is, it seems, ‘*arguable’*.

2. Once such an ‘*arguable’* case was established, the burden on the plaintiff was not in practice heavy: industrial action could invariably be said to cause economic loss of uncertain dimension and in an irrecoverable amount. The

assertion of such financial loss was often combined with claims of damage to the employer's reputation, the amorphous nature of which eluded not only calculation, but also refutation. When matched against the interests of the defendants in undertaking that industrial action, the balance between the parties was more often than not viewed as leaning in favour of granting the relief claimed. This has been candidly acknowledged in the case law: the '*normal outcome'* of an interlocutory hearing where it was found that there was a fair case to be tried as to whether there was a trade dispute, Clarke J. (as he then was) said in *P. Elliot & Company Ltd. v. Building and Allied Trades Union* [2006] IEHC 320 at para. 6.4, was that the balance of convenience was taken to favour the employer and an injunction invariably followed

3. When interim or interlocutory prohibitory orders were granted, the industrial action was halted: the cases rarely, if ever, came to trial. The rights of the defendants in such claims – to assemble, to protest, to publicly and effectively express their opinions as to the matters giving rise to the dispute and to vitalise by collective industrial action the rights of association and to form unions provided for in Article 40.6.1(iii) of the Constitution, appear usually to have been given little weight or attention.

4. As the law has developed, the decision of this Court in *Merck Sharp and Dohme v. Clonmel Healthcare* [2019] IESC 65, [2020] 2 IR 1 ('*Merck'*) suggests that the approach adopted to applications for interlocutory injunctions of this kind in many of these cases may not have always been correct – a point to which I later return. This, however, was not understood in 1990. Thus, it was that s. 19

of the 1990 Act was seen as extending a novel statutory privilege to trade unions, having as its object the redrawing of the battle lines between employer and worker on what, at the time, was an acutely contentious field. The provision was, as is suggested in the judgment of the Chief Justice, part of a carefully calibrated settlement for industrial peace, with *inter alia* measures directed to enhancing democratic processes within the unions being traded for limitations on the right of employers to seek certain reliefs in law when, as McCarthy J. forcefully put it in *Bayzana*, it may have been perceived by the trade unions that '*the dice are loaded against them in the Law Courts'*.

5. Section 19(1) imposes significant limitations on the ability of an employer to obtain *ex parte* interim relief where a trade union has complied with its own rules governing pre-industrial action ballots in advance of taking industrial action. Section 19(2) addresses the conditions under which an interlocutory injunction may be granted in the same context. At the most general of levels, s. 19(2) means that when faced with an application for an interlocutory injunction to restrain such action, the Court is concerned to ascertain (a) whether a secret ballot has been held in accordance with the applicable rules, (b) that the outcome of the ballot favours the industrial action sought to be enjoined, (c) that the required notice was given, and (d) whether there is a '*fair case'* that the defendants are acting in contemplation or furtherance of a trade dispute. If all of these are established to the standards envisaged by the provision, an interlocutory injunction cannot issue restraining the industrial action. Properly applied, s. 19 should have significantly limited the circumstances in which

interlocutory injunctions restraining industrial action that might reasonably have been thought to comply with these conditions, could be granted.

The question in this appeal

6. The experience in this case and as evidenced by some of the authorities opened to this Court in the course of these proceedings, suggests that this objective has not been achieved. The order granting the interlocutory injunction against which this appeal is brought was granted – essentially – on the theory that the workers proposing to engage in the industrial action which prompted the application were acting in breach of an agreement not to undertake that action without first exhausting an agreed resolution procedure. There was, it was said, an arguable case that those who broke an agreement of this kind could not lawfully engage in such industrial action and, thus, that through a variety of complex legal constructs, s. 19(2) did not preclude the grant of such an injunction.

7. The agreement giving rise to this argument was said to derive from the provisions of the Industrial Relations (Amendment) Act 2015 ('*the 2015 Act*'). That Act provides for the making by the Minister for Jobs, Enterprise and Innovation of '*Sectoral Employment Orders'*. These Orders are binding on workers and employers to which they are expressed to apply and impose certain terms on contracts of employment to which they are parties. The plaintiff relied upon one such Order ('*the SEO'*) which, since the decision of the High Court the subject of this appeal, was quashed by the High Court in separate proceedings involving different parties (and for reasons unrelated to the

questions arising in this case). The SEO included a provision that purported to prevent the taking of industrial action by workers to which it applied until an agreed dispute resolution procedure prescribed by the Order had been exhausted. That '*statutory contract'* (as it was described in submissions) represented the foundation of the argument that industrial action which it could be argued was undertaken in breach of its terms was, to all intents and purposes, outside the scope of s. 19(2).

8. Before this Court, the parties have operated on the basis that the threat of industrial action giving rise to the application for that relief was (save for one point briefly mentioned in the course of oral submissions) preceded by the required ballot, and that the plaintiff was given the requisite notice. The issue is whether the defendants were entitled to rely on s. 19(2) at all and/or whether it could be said that there was a '*fair case'* that the defendants were acting in contemplation or furtherance of a trade dispute. The judge granting the order did not refer in the course of her judgment to s. 19(2), or for that matter any other provision of the 1990 Act.

Some relevant facts, s. 19(2) and the plaintiff's case

9. The facts are outlined in detail in the judgment of the Chief Justice and I gratefully adopt his account. For the purposes of this judgment, they can be reduced to the following:

(i) The defendants (the second, third and fourth of whom are employees of the plaintiff) proposed to engage in industrial action comprising picketing at various third-party properties at which the plaintiff had contracted to provide building services works.

(ii) The underlying dispute revolves around the defendants' agitation for payment of the first hour of '*travel time payments*' which, they say, are required where their members must travel to construction sites for the purposes of discharging the various obligations imposed under their contracts of employment. The plaintiff relies upon the fact that in 2011 an agreement was reached between the first defendant and another Union representing members in the same sector ('*Connect*'), and the Mechanical Engineering and Building Service Contractors Association ('*MEBSCA*') which provided that the entitlement to a travel allowance for the first hour of travel time would be incorporated into increased standard hourly rates.

(iii) The SEO (which does not make provision for travel time payments) incorporated a dispute mechanism the exhaustion of which it purported to mandate as a precondition to the taking of any form of industrial action. In outline, that mechanism involved the raising of the grievance with the employer, reference to the Conciliation Service of the Workplace Relations Commission, and if the dispute was still unresolved after that, onward reference to the Labour Court for investigation and recommendation.

(iv) In May 2019, the first defendant and Connect made a claim for *inter alia* a separate travel time payment. This was the subject of a reference to the Workplace Relations Commission and the Labour Court. The Labour Court did not recommend concession of the claim. It is the plaintiff's case that there was no collective decision to reject this recommendation.

(v) Following that Labour Court recommendation (which issued on 8 November 2022), the first defendant organised a ballot of its members employed by the plaintiff and another company in common ownership with the plaintiff. That ballot supported the taking of industrial action in support of the first defendant's stance on the travel time payments. On 28 February 2023, the first defendant wrote to the plaintiff giving notice of industrial action pursuant to s. 19 of the 1990 Act. The application for an interlocutory injunction issued shortly thereafter. On 23 March 2023 the High Court Judge granted the injunction, giving her reasons in a short *ex tempore* judgment.

10. Section 19(2) provides as follows:

'*Where a secret ballot has been held in accordance with the rules of a trade union as provided for in section 14, the outcome of which or, in the case of an aggregation of ballots, the outcome of the aggregated ballots, favours a strike or other industrial action and the trade union*

before engaging in the strike or other industrial action gives notice of not less than one week to the employer concerned of its intention to do so, a court shall not grant an injunction restraining the strike or other industrial action where the respondent establishes a fair case that he was acting in contemplation or furtherance of a trade dispute.'

11. Based on the foregoing facts as applied to this provision, the plaintiff says that the effect of the SEO was to adapt the contracts of employment of the workers in question so that no industrial action could take place until the Dispute Resolution procedure had been exhausted. It says that s. 19(2) could not preclude the grant of injunctive relief to enforce that agreement. The plaintiff said, basically, that the exhaustion of the Dispute Resolution procedure required acceptance or rejection of the Labour Court recommendation by Connect and Unite, and that if there was to be an industrial action it had to be submitted to the dispute resolution process.

12. In this way, underpinning the plaintiff's submissions are three questions of law around the correct interpretation of s. 19(2): (a) does the restriction on the grant of injunctive relief provided for in s. 19(2) apply where the claim against the defendants is for breach of contract rather than in tort; (b) are workers precluded from contending that there is a trade dispute for the purposes of these provisions when industrial action is embarked upon in breach of an agreed resolution procedure; and/or (c) may workers who have agreed not to engage in such industrial action participate in the ballot referred to in s. 19(2) by which the industrial action was authorised. If the first or third of these questions is

answered in the negative, or the second in the affirmative, the plaintiff will (if it is to obtain the relief it sought) still have to satisfy the test generally applied in determining whether to grant an interlocutory injunction as most recently explained in *Merck* but it will be in a position to surmount the significant obstacle put in the way of such relief by the provisions of s. 19(2).

The application of s. 19(2)

13. The first, and critical, question is how these various issues fit into the proper application of s. 19(2) and, in particular, to what standard, and by whom, the burden of establishing the components of the provision must be discharged. Some of the terminology used in describing the operation of the provision in decisions of the High Court, and of this Court, has generated understandable confusion (see, in particular, the decision in *G.&T. Crampton Ltd v. The Building and Allied Trades Union* [1998] 1 ILRM 430). The issues and errors that were emerging in that regard were identified some time ago (see Costello *The Labour Injunction and the Burden of Proof* (1997) 19 DULJ 197).

14. By the time this appeal came for hearing, the parties had agreed that (as a result of the order of the High Court quashing the SEO) the interlocutory injunction granted by the High Court should be set aside. The Court determined that having regard to the general importance of the issues disclosed by this appeal, it should proceed to decide whether the injunction had been properly granted. It has done so with the luxury of greater time than is usual in such cases (and, it should be said, with the assistance of written and oral submissions of great

clarity and erudition from Mr. Dowling SC and Mr. Sweetman BL for the plaintiffs, and Mr. McCullough SC and Mr. Ryan BL for the defendants, for all of whose expertise and industry I am grateful).

15. Where an application is made for an interlocutory injunction to restrain industrial action the plaintiff will (subject to what I have to say later on this issue) have to establish the usual pre-requisites to such relief – at least an arguable case, and that the balance of justice favours grant of the relief – while the defendant will, if those matters are proven and if it is to nonetheless successfully resist the application, have to satisfy the Court that the test prescribed by s. 19(2) is met. There may well be cases in which a judge hearing an application for interlocutory relief of this kind feels that he or she can go directly to s. 19(2), because if it applies to an application, the consequence will be to negate any entitlement to an injunction irrespective of whether the plaintiff has established the criteria required by the general law. In some cases, judges may feel that different aspects of the inquiry should be prioritized. How this is to be done in any given case is, clearly, a matter for the trial judge in his or her management of the application.

16. For present purposes, however, it is convenient to start with s.19(2). Here there are several components. The defendant must establish that a secret ballot has been held in accordance with the rules of a trade union as provided for in s. 14, the outcome of which favours the industrial action in question and that the trade union before engaging in the strike or other industrial action has given notice of not less than one week to the employer concerned of its intention to do so.

There is no doubt but that the onus is on the defendants to establish each of these matters, and there is nothing in the provision to suggest that they do so by proving merely that there is an arguable case that the ballot took place in the manner mandated by the provision, or that notice was given. Much as the employer must establish on the evidence the requirements that damages are not an adequate remedy and the various other case specific aspects of the balance of convenience, the union and/or workers who rely upon s. 19(2) must prove the ballot and notice to a standard of probability (*Nolan Transport (Oaklands) Ltd. v. Halligan* [1998] IESC 5, [1999] 1 IR 128, at p. 160 per Murphy J.).

17. At the same time, it is emphatically not enough for the plaintiff to establish that there is an '*arguable case'* or '*serious issue'* that the notice was not given or that the ballot was not properly held (and it is here that confusion has crept into some of the earlier judgments in this area). That would convert the onus on the defendants from one based on probabilities, to a requirement of establishing a near certainty. This was not what the section envisaged. Nor does the provision require that the defendant, in order to avail of the section, has to negate every possible objection to the ballot. Instead, and bearing in mind that the subsection is intended to operate in a context in which, by definition, there will usually be limited capacity to resolve conflicting fact, it is appropriate to adopt a more pragmatic approach, requiring that the defendant establish by way of admissible evidence the fact and terms of the rule governing the ballot, the conduct of a ballot supporting the industrial action in question that complies with those rules and to negate to a standard of probability any obvious objection to the ballot, or any objection notified in good time by the plaintiff. While reserving how the

Court would, in such an application, resolve a significant factual controversy relevant to the question of whether a qualifying secret ballot had occurred, this was how Clarke J. (as he then was) suggested the matter should be approached in *P. Elliott & Company Ltd. v. Building and Allied Trades Union* at para. 6.7 and I fully agree with his consideration of that aspect of the provision.

18. In order to rely upon s. 19(2) the defendants must then establish a '*fair case'* that they were acting in contemplation or furtherance of a trade dispute. The effect of this, as the Chief Justice puts it in his judgment, is to reverse the balance set by the pre-existing case law. While there was some discussion in the course of this appeal as to whether this requirement was satisfied on proof of a *bona fide* belief that the actions in question were undertaken in contemplation or furtherance of a trade dispute, I am not certain that this proposition (if it is appropriate to apply it to s. 19(2)) will usually add much. It seems reasonable to assume that in using the phrase '*fair case',* the Oireachtas was deliberately repeating the terminology developed by the authorities around the grant of an interlocutory injunction, and thus meaning a claim that is not frivolous or vexatious. This interpretation of the provision was accepted by both of the parties to this appeal. It is hard to my mind to envisage cases in which that (low) threshold would be significantly eased by enabling the defendants to focus on their reasonable belief as opposed to whether, in fact, the actions in question were undertaken in contemplation or furtherance of a trade dispute.

Breach of contract and s. 19

19. It is clear – and has been often observed – that certain of the provisions of the 1906 Act that were ultimately re-enacted with modification in the 1990 Act conferred immunity against actions in tort, but not in contract. This is a consequence of the fact that the 1906 Act was primarily addressed to the position of trades unions, for whom liability in tort usually presented the only practical concern (save, perhaps, for instances of sectoral agreements between unions and employers, in the ordinary way trade unions had, of course, no contractual relationships with the employers of their members). The effect of 1906 Act was to reverse the consequence of four decisions of the Courts (*Quinn v. Leathem* [1901] AC 495, *Lyons v. Wilkins* [1896] 1 Ch. 811, *Taff Vale Rly. Co. v. Amalgamated Society of Railway Servants* [1901] AC 426, and *Lumley v. Gye* (1853) 2 E&B 216) and to ensure that another (*Allen v. Flood* [1898] AC 1) was not thereafter, as Professor Heuston put it, '*held not to have meant what it said'* (*Trade Unions and The Law* (1969) 4 Ir. Jur. (ns) 10, 14). This, respectively, was achieved by ss. 1, 2 the first part of s. 3, 4, and the second part of s. 3. Each of these decisions was concerned with tortious liability. The provisions reversing them fell into two parts, one (ss. 1-3) dealing with acts done in contemplation or furtherance of a trade dispute by any persons and granting immunities to anyone who does acts of the description specified with the intention specified, while the second part (s. 4) conferred immunity not in respect of a class of acts, but for all tortious acts, whether or not done in furtherance of a trade dispute, if committed by a union as distinct from its members (Heuston *op. cit.* at p. 14).

20. There are differences between these provisions of the 1906 Act and their analogues in the 1990 legislation, none of which are relevant to the issues here. Section 10(2) (almost directly mirroring s. 1 of the 1906 Act) provides that an agreement or combination by two or more persons to do, or procure to be done, any act in contemplation or furtherance of a trade dispute shall not be actionable unless the act if done without any such agreement or combination would be actionable, and it has been held that if a strike is in breach of contract, that protection is not available. This is because a breach of contract is actionable if committed by one person (*Becton, Dickinson Ltd. v. Lee* [1973] IR 1 ('*Becton, Dickinson'*). Section 11 replaces s. 2 of the 1906 Act, and declares peaceful picketing to be lawful where undertaken in contemplation or furtherance of a trade dispute. Section 12 (which reflects s. 3 of the 1906 Act but which supplemented the earlier provision in an important respect arising from the decision in *Rookes v. Barnard* [1964] AC 1129) provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces a person to break a contract of employment, consists of a threat by a person to induce some other person to break a contract of employment or a threat by a person to break his own contract of employment, or is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or his labour as he wills. Section 13 (similar in parts to s. 4 of the 1906 Act) provides that an action shall not be entertained by a Court where it is taken against a trade union, or any members or officials thereof on behalf of themselves and other members of the union in respect of any tortious act committed by or on behalf of the union in contemplation or furtherance of a trade dispute.

21. The essential point made by the plaintiff was that the Court should proceed on the basis that the Oireachtas, in enacting s. 19(2) and placing it alongside the other immunities in Part II of that Act which addressed only actions in tort, intended the protection afforded by that provision to be similarly limited: that contention was urged noting in particular the repetition in s. 19(2) of the phrase defining the other immunities – '*in contemplation or furtherance of a trade dispute'*.

22. Although presented with some skill by Mr. Dowling SC, this was on any view a challenging argument. The entitlement to picket granted by s. 11 is not referenced to any particular cause of action and there is strong authority for the proposition that the forerunner of that section (s. 2 of the 1906 Act) applied where the defendants were said to have acted in breach of contract (see *Kire Manufacturing Company Ltd. v. Finbar O'Leary and ors.* Unreported High Court 29 April 1974 at p. 24 per O'Higgins J., as he then was – '*[b]ecause those picketing are doing so having broken their own contract of employment would appear … wholly irrelevant once they are doing so in furtherance of a trade dispute'*). So, the starting point for the argument was wrong: the common feature of these provisions is not their limitation to claims in tort, but the phrase '*in contemplation or furtherance of a trade dispute'*. The focus is on the object of the impugned action, not the legal characterisation of the cause of action by reference to which it is challenged.

23. But putting this to one side, the very fact that some of these provisions are restricted to claims in tort, while s. 19(2) contains no such limitation, makes it difficult to argue that, in some sense, it should be read down to incorporate a constraint that is expressly provided for in other provisions in Part II of the 1990 Act, but is not mentioned in s. 19(2) itself. And, in truth, it would be surprising were such a restriction envisaged by the Oireachtas. The provisions of ss. 10, 12, and 13 are reasonably described as '*immunities'* insofar as they use language ('*shall not be actionable',* or '*shall not be entertained*') that removes specified actions from the scope of general tortious liability in the circumstances identified in the relevant provisions, while s. 11 ('*shall be lawful'*) achieves a similar effect but by positively declaring the legality of the action in question. Section 19(2) differs from these provisions insofar as it confers neither an immunity nor an entitlement, but instead withdraws a specific remedy if certain conditions are met. There is no reason whatsoever why the Oireachtas would have wished to limit the circumstances in which that remedy would be withdrawn to actions in tort, and many why it might have been concerned to ensure that once the actions it was sought to injunct were '*in contemplation or furtherance of a trade dispute'* that an injunction should not be issued. Had it been intended to limit the immunity by reference tortious acts, the legislation would have had to have said so, not the other way around. This aspect of the argument, in my view, did not present even a fair issue viewed from the plaintiff's perspective. By definition, the defendants have established a case on this point to this threshold in the opposite direction.

The preclusion on the workers asserting that there was a trade dispute

24. The second argument – that workers should be precluded from contending that a dispute in which they have engaged in breach of agreed resolution procedures is a '*trade dispute'*– suffers from the same initial difficulty. The phrase '*trade dispute'* is defined in s. 8 in deliberately broad terms: '*any dispute between employers and workers which is connected with the employment or non-employment, or the terms and conditions of or affecting the employment, of any person'*. On its face, this captures *any* dispute, irrespective of whether the employee has contracted not to, or might otherwise be said by their conduct to be, precluded from engaging in industrial action.

25. The plaintiff's argument in the teeth of that language focused on two propositions – one based upon the specific provisions of the 2015 Act, and the other on the general law.

26. The argument as to the 2015 Act was based on the contention that it mandated the incorporation of '*no strike*' clauses into certain contracts of employment. Accordingly, it was said, it necessarily followed that the 1990 Act (which falls to be construed as one with the 2015 Act) envisaged that the normal enforcement mechanisms – including enforcement by interlocutory injunction – would be available for breach of contractual provisions mandated by the Act itself.

27. That contention carries an initial attraction. The 2015 Act provides for a class of collective agreement, referred to as Registered Employment Agreements

('*REA*'), which may be registered by the Labour Court. When registered, the REA applies to every worker of the class, type or group to which it is expressed to apply, with rates of pay and other conditions of employment specified in the REA being substituted into the contracts of employment of those workers. Section 8(3)(d) of the 2015 Act requires that such an agreement provide:

> '*that if a trade dispute occurs between workers to whom the agreement relates and their employers, industrial action or a lock-out shall not take place until the dispute has been submitted for settlement by negotiation in the manner specified in the agreement'.*

28. The plaintiff also claims that the Act envisages a similar prohibition being incorporated into an SEO. The effect of s. 16(6) of the 2015 Act is that an SEO must '*include procedures that shall apply in relation to the resolution of a dispute concerning the terms of a sectoral employment order'.* The plaintiff says that it necessarily follows from the requirement to include such procedures, that the SEO may in so doing also prohibit the taking of industrial action until the procedures have been complied with.

29. It is not a matter for this Court on an interlocutory application to which the Minister is not a party to determine whether this interpretation of s. 16(6) is correct in any final sense. There is, without question, a reasonable argument that if it had been intended to confer the power to include in an SEO a restriction on the taking of industrial action, that this would have been expressly stated having regard to the significance of that obligation (and this, it might be said, is

particularly so if the effect of the incorporation of such a provision is to deprive the workers in question of the benefit of the legal rights (e.g., in s. 11) and immunities (e.g., in s. 13) from certain types of legal action which they would otherwise enjoy). That argument derives some support from the fact that express provision to that effect permitting precisely this type of clause was made in the case of REAs by s. 8(3)(d) of the 2015 Act.

30. However, for present purposes what is significant is that the 2015 Act does impose such a requirement for at least some classes of employment contract. It might not be unreasonable to assume that this being so, the same Act would not neuter the ability of an employer who was a party to such an agreement to enjoy the right enjoyed by any other party to a binding contract with mutual promises and obligations, to proceed to Court to seek injunctive relief to restrain a breach of the contract.

31. Several features of the background, however, militate against that construction of the legislation, not least of all when it is sought to rely upon it to displace the plain meaning of the words in s. 19(2). The obligation to work imposed by a contract of employment, because it comprises a quintessentially personal obligation, will not – generally – be enforceable by injunction. So, the overall context is in this respect, unusual. More importantly, at the time the 1990 Act came into force, the regime then governing REAs (the Industrial Relations Act 1946), envisaged a dedicated mechanism for the enforcement of obligations of this kind which, on its face, is fundamentally inconsistent with the suggestion that the Act implicitly qualified *other* provisions of the legislative code

regulating industrial relations for the purposes of enabling a further and additional remedy to be sought before the Courts.

32. Thus, the REAs for which provision was first made in that Act contained a provision similar to s. 8(3)(d) of the 2015 Act, requiring that the agreement stipulate that if a trade dispute occurs between workers to whom the agreement relates and their employers, a strike or lockout should not take place until the dispute has been submitted for settlement by negotiation in the manner specified in the agreement. Section 32 of the 1946 Act enabled employers complaining of a breach of such a provision by way of a strike which had as its object the enforcement of a demand on an employer to grant a worker remuneration or conditions other than those fixed by the agreement to proceed to the Labour Court. If it found the complaint well-founded it could direct a union to refrain from assisting from its funds in the maintenance of the strike or cancel registration of the agreement. Breach of such a direction was a criminal offence.

33. Apart from the fact that nothing in the 1946 Act suggested that breach of provisions in such an agreement deprived those participating in industrial action of the immunities in the 1906 Act (in fact, as with the 2015 Act, it referred to the matter to be submitted to settlement or negotiation as a '*trade dispute'*), built into the statutory scheme was a self-contained enforcement mechanism for at least certain types of industrial action undertaken in breach of the REA.

34. That is relevant here in two related respects. First, it shows that there was, originally, *a* mechanism by which an employer could directly and immediately

enforce an agreement of this kind. Second, it demonstrates a preference that that enforcement would *not* at first occur through the medium of the Courts. Instead, the theory was, clearly, that the industrial relations machinery put in place by the 1946 Act would be, at least to some extent, self-contained and would not – at least at first – involve the parties proceeding to litigation. This was the structure in place when the 1990 Act was enacted. It follows that it is less than likely that it was envisaged that any of the immunities would be further abated where there was a breach of a '*no strike*' clause of this kind: the legislative intent was that enforcement of such agreements would occur within the industrial relations framework provided for in the 1946 legislation in which the '*no strike*' clause found expression.

35. When the 2015 Act was introduced following the striking down of various provisions of the 1946 Act in *John Grace Fried Chicken v. The Labour Court* [2011] IEHC 277, [2011] 3 IR 211 and *McGowan v. The Labour Court* [2013] IESC 21, [2013] 3 IR 718 and while provision was made in that legislation for a new type of REA, the enforcement mechanism provided for in s. 32 of the 1946 Act was not re-introduced. But there is no basis on which it could be plausibly contended that in introducing s. 8(3)(d) and *not* providing an express mechanism for enforcement of the '*no strike'* clause in the REA, it followed that any of the pre-existing immunities, entitlements, or restrictions provided for in the 1990 Act were to be reduced. That would require express language in the 2015 Act, and there was none that even vaguely suggested any such change to the scope of these provisions in the 1990 legislation.

36. An employer who contends that there has been a breach of such an agreement is not necessarily without remedy; whatever about losing the benefit of interlocutory injunctive relief, it remains arguable that the employer is free to claim damages for breach of such an agreement. Counsel for the plaintiffs contended that this state of affairs would run counter to the harmonious industrial relations envisaged by the 2015 Act. While this may be true, it is difficult to see how proceeding to Court to seek interlocutory injunctive relief could do much more to promote those relations. Generally, it is clear that the entire structure of industrial relations regulation since 1946 has been directed to minimising the involvement of the Courts in policing agreements entered into between employers and workers for the purposes of regulating industrial action. Section 19(2) is clearly aligned with that objective and should be interpreted accordingly.

Becton, Dickinson

37. The second point made by the plaintiff arises from comments made in the course of the decision of this Court in *Becton, Dickinson* to which I have earlier referred. This case arose from (as it was described in the judgments) a '*recognition dispute'*. The plaintiff had agreed with two unions (the ITGWU and the NEETU) that it would employ only members of those unions and gave effect to this agreement by including stipulations to that effect in the contracts of employment it entered into with its workers. Five of the six defendants agreed to accept employment with the plaintiff on these terms, but thereafter upon commencing employment refused to leave a third union (the AEF) in order

to join one of the other two. The plaintiff declined to recognise the AEF appointed shop steward to the company, AEF served strike notice, and pickets were placed on the plaintiff's premises.

38. The plaintiff's application for an interlocutory injunction to restrain the picketing was unsuccessful before the High Court and, following an appeal to this Court, an agreement was entered into to discontinue the picket pending a full hearing. At the trial of the action before the High Court (McLoughlin J.), it was held that the plaintiff was entitled to the final injunction sought. He found that s. 2 of the 1906 Act did not protect the pickets, because there was no '*trade dispute'*, a conclusion he reached because *inter alia* the effect of the employment agreement was that the defendant workers had undertaken as a condition precedent to their becoming employees of the plaintiff to join one of the two unions identified in their contracts of employment. Stressing that a dispute between an employer and a union as such could not be a trade dispute, he noted the contention of the defendants that there was a dispute between the plaintiffs and the employee defendants, the former insisting that they become members of NEETU. He said (at p. 11-12):

> '*... the employees are precluded from raising this contention as a trade dispute. In effect, by agreeing to this condition the employees agreed not to raise it as a trade dispute. To decide otherwise would involve this anomaly: the circumstances which would entitle the plaintiffs to bring an action for breach of contract against the defendant employees would*

justify them in claiming the protection of the Act for what would otherwise be unlawful watching and besetting.'

39. The appeal was allowed, a majority of the Court (for reasons explained in a judgment of Walsh J. with which Ó Dálaigh CJ and Butler J. agreed: Henchy and FitzGerald JJ. dissenting), holding that the dispute was a trade dispute and that the defendants were not estopped from asserting that they were entitled to rely upon the relevant provisions of the 1906 Act. The basis for the first of these conclusions was that the AEF was acting on behalf of the employee defendants who were members of the AEF and that the dispute was one raised by the employees, and was concerned with the terms of their employment. Henchy J. disagreed: the dispute was intended to induce the plaintiffs to break their contracts with NEETU and ITGWU, and actions to that end were not, in his view, protected by the 1906 Act.

40. Walsh J. found that a strike, if accompanied by the notice period required to terminate the contract of employment, was not unlawful as it merely suspended the contract of employment. What is important for present purposes is that at two points in his judgment he expressly reserved the question of whether a withdrawal of labour in breach of contract (whether or not there is a '*no- strike*' clause in the contract) constitutes a trade dispute within the meaning of the 1906 Act and of whether picketing in furtherance of it is, or is not, lawful within the meaning of s. 2 of that Act (at p. 31 and 39). He did not feel it necessary to decide the issue, because a '*no strike'* clause would, to be effective, have to be clearly expressed in the contract, or a necessary implication, and on the facts of

that case it was neither. So, all the majority in *Becton, Dickinson* decided on this issue, was that it would not decide it.

41. In contrast Henchy J., although dissenting on the actual issue in the case, did express a firm view on this question. He vehemently disagreed with the suggestion that withdrawal of labour in breach of a contract was other than a trade dispute under the Act. He put the position in terms that I find compelling (at p. 44):

> '*This Court has not been referred to any case where a party relying on a trade dispute to justify industrial action was debarred from doing so because of his prior conduct. On the contrary, some of the cases cited are ones where a trade dispute was held to exist notwithstanding that it was based on a wilful breach of a basic condition of the employment … It seems clear from the authorities that, if the facts fall within the statutory definition of a trade dispute, the person relying on the trade dispute is entitled to do so. Once a dispute is between the parties specified and is connected with any of the matters specified, it ranks as a trade dispute for the purposes of the Act.* ***It would be an unwarranted restriction of the scope of the words "any dispute" to read them as connoting only certain kinds of disputes by invoking estoppel by conduct, or waiver, or rules for the interpretation of contracts.***'
>
> (Emphasis added)

42. In the course of his oral submissions to this Court, counsel for the plaintiff suggested that the *obiter* reservation by Walsh J. of his position as to the effect of a '*no strike'* clause on the entitlement of a worker engaged in industrial action to rely upon the immunities contained in the 1990 Act may have resulted in the view being adopted in the High Court (not only in this case, but in others) that it was '*arguable'* that the protection afforded by s. 19(2) did not extend to disputes in which it was '*arguable'* that the industrial action had proceeded in breach of an agreed procedures. If this is correct, it is unfortunate as it is wrong.

43. Suffice to say that the *only* clear and unequivocal statement in this Court on the issue comes in the form of Henchy J.'s comments in *Becton, Dickinson*. It is very difficult not to be struck by the fact that over fifty years after that decision was delivered, the plaintiff here was similarly unable to point to a single authority from any jurisdiction adopting analogous legislation that had found that the right to assert a trade dispute could be lost by agreement in the manner contended for here – an arresting fact when placed in a period that included a decade and a half of scarring and rigorously litigated industrial strife in the neighbouring jurisdiction. While they appear in a dissent, in circumstances in which the majority expressly declined to address the issue, the remarks of Henchy J. must carry considerable authority. They establish – at the very least – that there is a '*fair question'* that a dispute remains a trade dispute irrespective of what agreements or representations proceeded it, and that there is nothing in the legislation to justify a constraint on some workers invoking the protections provided for by the Act for industrial action by reference to prior agreements.

44. Were the position otherwise, s. 9(2) of the 1990 Act (which had no equivalent in the 1906 Act) would be otiose. It is consistent with the conclusion that a person who agrees to a dispute resolution procedure and who proceeds to engage in industrial action without exhausting that procedure, is nonetheless both involved in a trade dispute for the purposes of the Act, and (unless within the particular situation identified in that provision) is entitled to invoke the benefit of the immunities provided for in that legislation:

> *'Where in relation to the employment or non-employment or the terms or conditions of or affecting the employment of one individual worker, there are agreed procedures availed of by custom or in practice in the employment concerned, or provided for in a collective agreement, for the resolution of individual grievances, including dismissals, sections 10, 11 and 12 shall apply only where those procedures have been resorted to and exhausted.'*

45. Counsel for the plaintiff sought support in this provision – and in particular in the fact that s. 19 is not one of the provisions disapplied in this situation – for his contention that the restriction in s. 19 on the grant of an injunction was connected to the entitlements provided for in ss. 10, 11, and 12. If these protections were taken away in the circumstance contemplated by s. 9(2), he argued, the employer should be able to obtain an injunction. As I read the legislation, the omission of s. 19 from s. 9(2) points in the opposite direction: the legislative assumption was that s.19(2) provided a protection which even

when the other immunities or entitlements were not available, should operate to prevent the grant of interlocutory injunctive relief. But whatever about its relationship with s. 19(2), what s. 9(2)(b) makes clear beyond any doubt is that industrial action that is in breach of an agreed procedure does not for that reason alone cease to constitute a '*trade dispute'*. On any version, the defendants had established a '*fair issue'* that they were acting in the course of or furtherance of a trade dispute.

The balloting issue

46. That conclusion, I think, also disposes of the final point made by the plaintiff. This was to the effect that the union ought in its rules to have prevented those members who had agreed to exhaust dispute resolution procedures from balloting on industrial action. This was grounded on the fact that s. 14 of the Act requires that the ballot provided for in that section to extend to those who '*it is reasonable at the time of the ballot for the union concerned to believe will be called upon to engage in the strike or other industrial action'.* It could not, counsel asserted, be reasonable for the union to call upon persons who were precluded by a '*no strike*' clause from engaging in a strike or industrial action.

47. However, once it is understood that the fact that industrial action is in breach of a contract does not deprive those embarking upon that action from the specific limitations attending the grant of an injunction specified in s. 19(2), the proposition that the balloting requirements have opened a back door to the same destination is shown to be untenable. To accede to that contention would

fundamentally undermine the entitlements expressly provided for in the Act. Insofar as this issue required the defendants to establish on the balance of probabilities that they had conducted a ballot in the manner required by their rules and s. 14 of the Act, they surmounted that hurdle.

48. This is, I think, put beyond doubt by the provisions of s. 17 of the 1990 Act. This disapplies the provisions of ss. 10 to 12 (but not s. 13) in respect of proceedings arising out of or relating to a strike or other industrial action by a trade union or a group of workers in disregard of, or contrary to, the outcome of a secret ballot relating to the issue or issues involved in the dispute. This section describes the *only* circumstance in which those provisions are affected by a ballot, and they are strikingly limited to situations in which the industrial action is in '*disregard of or contrary to'* the '*outcome'* of the ballot.

Conclusion on s. 19(2)

49. It follows from the foregoing that the defendants have surmounted the burden imposed upon them in relying upon s. 19(2). For the reasons I have outlined, they established, to the standard required by that provision, that the industrial action was conducted following a ballot as referred to there. They have also established that there was a '*fair case'* that their proposed industrial action was in contemplation or furtherance of a trade dispute. I say this because I am satisfied that it was arguable that a claim for an injunction grounded on a breach of contract is captured by s. 19(2), that a trade dispute may arise notwithstanding

such a contract and that s. 19(2) may be asserted by workers who may have agreed to be bound by a dispute resolution procedure of the kind in issue here. I have also concluded that there was a fair case that there was no such valid agreement in this case having regard to the fact that there is no such stipulation authorised by s. 16(6) of the 2015 Act and, even if one disregards this factor, that (for the reasons further explained by the Chief Justice) there was a '*fair case'* that the instant dispute did not, in fact, engage the SEO at all. It is to be stressed that here there are three distinct bases on which the defendants had brought themselves within this aspect of s. 19(2) – (a) application of s. 19(2) to a claim of breach of contract, (including, as I explain shortly, their refutation of the claim that the first defendant was a party to any contract), (b) the potential invalidity of that part of the SEO purporting to prevent industrial action, and (c) the issue of whether this dispute was within the provisions of the SEO at all.

50. The plaintiff has, however, also established an arguable case that the actions of the defendants in proceeding to industrial action without exhausting the dispute resolution procedures provided for in the SEO constituted a breach of contract to which the immunities in ss. 10(2) and 12 of the 1990 Act would not apply. However, had I ordered the inquiry in this case so that s. 19(2) fell last for consideration, I would still have concluded before reaching that provision that it was not appropriate to grant an injunction in this case. It is, I think, important to explain why.

Merck

51. The central point stressed by the Court in *Merck* was that the essential features of the decision in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 and thereafter *Campus Oil v. The Minister for Industry (No. 2)* [1983] IR 88 had got lost as those cases were applied on a day to day basis, eventually in what O'Donnell J. (as he then was) suggested was a '*calcified'* way. The judgment in *Merck* reasserts as the primary feature of the remedy by way of interlocutory injunction, its flexibility, and the fact that it should not be rigidly governed by fixed or mechanical rules. The overall effect of the judgment in *Merck* was, I believe, well summarised by Collins J. in *Betty Martin Financial Services v. EBS DAC* [2019] IECA 327, at para. 85 as:

> '*mandating a less rigid approach, both generally and with particular reference to the issue of the adequacy of damages and emphasising that the essential concern of the court is to regulate matters pending trial pragmatically and in a manner calculated to minimise injustice'*.

52. Of relevance here are four points that emerge from the detailed analysis of the law conducted in the judgment in *Merck.* First, in cases involving trade disputes, the correct principles required an assessment of the strength or weakness of the parties' respective cases in situations in which it was unlikely that there would ever be a trial on the merits (applying *NWL v. Woods* [1979] 1 WLR 1294). Second, that in commercial cases in which damages for breach of contract was claimed, the Courts should be '*robustly sceptical'* of a claim that damages will not be an adequate remedy. That I think must mean cases in contract (such as this one) in which the loss is commercial (rather than cases

involving only commercial parties). Third, that in cases in which the balance of convenience '*may be finely balanced'* it may be appropriate to have regard – even on a preliminary basis – to the strength of the rival arguments as they may appear to the Court (at para. 62).

53. Fourth, it is I think clear from para. 54 of the judgment and the approval there of the dissenting judgment of Hogan J. in the Court of Appeal in that case ([2018] IECA 177), that (as one might expect) the engagement of the constitutional rights of the parties (in that case, of the plaintiff but logically also of a defendant) inevitably both required at least some assessment of the merits of the case, and necessarily required that the impact on those rights be factored into the balance of convenience (and see also in this regard the judgment of Hogan J. in *Herrera v. Garda Commissioner* [2013] IEHC 311, and my own judgment in *Ryan v. Dengrove* [2021] IECA 38 at para. 54 and following).

54. I see each of these factors as relevant in this case. The trial judge took care to ensure that she was satisfied – insofar as a judge in dealing with an application of this kind can be – that the action would in fact proceed to trial (and full pleadings were exchanged, the State joined as a party for the purposes of challenging the *vires* of the SEO to the extent that but for this appeal it appears the case would have so proceeded). The trial judge did not, of course, have the benefit of the careful analysis of this aspect of the labour injunction that now appears in the judgment of the Chief Justice. Following his judgment, the default position in applications for injunctions of this kind, is that it should be assumed that the case will not go to trial unless there are particular features of

the claim which make it probable that it will so proceed in relatively early course. To that extent some assessment of the merits of the parties' positions should usually be undertaken by the judge considering the application for such an injunction. That said, and in fairness to the trial judge, it is to be acknowledged that this case – because the defendants intended to (and did) challenge the validity of the SEO by way of counterclaim in the action – it was more likely than in many similar cases that the case would, indeed, proceed to a full hearing.

55. However, the question of whether the case would or would not come to trial was not the only factor that should prompt the Court to form a preliminary view on the merits of the underlying case. As I have explained it, those merits reduced themselves to a claim that the actions of the defendants in proceeding with the dispute were in breach of contract and unprotected by the immunities. But the basis for that claim was far from straightforward. As against Unite, it was *always* going to be immune from suit under s. 13 because the only cause of action that could be pursued against it was in tort: the argument to the contrary depended on a claim that there was some type of inferred contract between it and the employer, the basis for which continues to elude me. As against the individual employees, the case ultimately depended on the contention that the immunity for picketing provided for by s. 11 was inapplicable because the employees could not invoke those protections and/or because there was no trade dispute. Even if one gives effect to the presumption of validity and thus assumes that the SEO could lawfully impose obligations that prevented workers from striking, even if one assumes that the SEO applies to the dispute and has not, in

substance, been complied with, and on top of all of that if one applies the necessarily preliminary assessment urged in *Merck*, these arguments are based on so many contingencies that at this point they do not collectively appear overwhelmingly strong. I have outlined earlier the very significant difficulties they faced. And, as the judgment of the Chief Justice explains, even if there was an arguable case, the basis upon which it was contended that the balance of convenience favoured the grant of the injunctive relief was, in my view, far from compelling.

56. All of these features of the plaintiff's application highlight an important, if self-evident, issue of principle. As is made abundantly clear in the judgement in *Clare County Council v. McDonagh* [2022] IESC 2, [2022] 2 IR 122 (judgment of Hogan J. with whom all members of the Court agreed) there are cases in which interlocutory injunctions are sought which will impact upon the constitutionally protected interests of the defendant in such a way as to require the Court, in deciding whether to grant that relief, to factor into its decision some assessment of the proportionality of the relief claimed having regard to those interests. I have, as it happens, explained in my judgment in *Ryan v. Dengrove* how when constitutional property rights are engaged, this can in a purely commercial case often be a zero-sum game as between plaintiff and defendant. In this case, however, the balance lay between the plaintiff's economic interest in its business, and the defendants' rights to assemble, to express their opinions, to protest and to engage in the collective industrial action necessarily acknowledged by their constitutional right to form trades unions. It might be stressed that while Walsh J. in the course of his judgment in *Becton,*

Dickinson may have used the term '*right to strike'* loosely, and while he did not elevate it to an entitlement of constitutional status, he did take care to highlight it (at p. 38 – '*the long-established right to strike'*).

57. The fact is that the power of organised labour to engage in collective industrial action is closely connected to the right of persons to form associations *and unions* secured by Article 40.6.1(iii) of the Constitution. In the specific context of the activities characteristically undertaken in the course of a labour dispute, these guarantees are inextricably linked to broader entitlements of assembly and of expression, the centrality of which to our constitutional order is self-evident. As Hogan J. put it in his dissenting judgment in *O'Doherty and Waters v. Minister for Health* [2022] IESC 32, [2022] 1 ILRM 421 at para. 78, experience has shown that peaceable protests are amongst the most effective means of communicating grievances, and in many situations it is not a valid response to substantial restrictions on the exercise of these rights to say that they can be exercised in other places, at other times and by other means.

58. When factored into the task of a judge when considering the grant of an interlocutory injunction of the kind sought in this case, these considerations demand a preliminary assessment of the strength of the claims on foot of which that relief is claimed. This need not be exhaustive or closely analysed. But it does require more than a passing glance at whether the case is '*stateable*'. Were the position otherwise, as all of the decisions in this area show, a plaintiff employer who establishes a claim in law that is neither '*frivolous'* nor

‘*vexatious’* is far along the road to obtaining an order that constrains the exercise by trade unions and workers of significant constitutional entitlements.

59. In these circumstances I too would allow this appeal for the reasons identified both here, and by the Chief Justice and Hogan J. (with whose judgments I fully agree).