

KENNEDY v. MANGAN

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THE HIGH COURT

1986 No. 3153P

PAUL KENNEDY, PETER KENNEDY AND JOHN KENNEDY  
t/a KENNEDY TAVERNS

v

TERENCE MANGAN AND DELTVALE TRADERS LIMITED

J U D G M E N T

DELIVERED BY THE HONOURABLE MR JUSTICE DECLAN COSTELLO  
ON 15 MAY 1986

*Mary P. Donoghue*  
*Rep.*

The first preliminary point I want to make by way of introduction to this judgment is that the Plaintiffs and the Defendants have very wisely found an expeditious way of bringing this dispute before the Court, and I hope that it can be used as a precedent in other cases.

The Plaintiffs instituted proceedings by way of interlocutory motion and by consent the parties agreed to treat the motion as the trial of the action. An early date was fixed for the hearing and the parties agreed to give oral evidence. They dispensed with pleadings and instead agreed on a series of issues to be determined by the Court.

As I understand the position, the parties have in fact agreed that all the matters in controversy be determined by me today as if the matters had been put down in formal pleadings. The result has been that this case got on much more quickly than would otherwise have occurred and it is now possible to determine the rights of the parties within a short period of the proceedings being instituted. It was necessary that this be done because of the very undesirable situation which would exist if uncertainty existed as to the Defendant's position in the premises.

So after the hearing yesterday and today I now have to determine the issues between the parties. That determination is very largely - in fact, almost completely - to be made by a determination of fact which I have to make arising from the evidence which I have heard. As other trial judges have to do every day of the week, I make my determination of fact to a very considerable extent on the view that I arrive at as to the reliability of the witnesses' testimony where controversy arises. In this connection I have little difficulty in accepting the evidence of Mr Mangan where it conflicts with the Plaintiffs' evidence. However, I have further assistance in this case to support me in the view that Mr Mangan's evidence is to be preferred to the Plaintiffs' evidence.

There is undoubtedly a serious conflict between the evidence of the Plaintiffs and the Defendants in regard to vital meetings which were held between the parties, originally in September 1984 and later

throughout 1985, particularly in October 1985 and January 1986. Now, the principal person dealing with these negotiations was Mr Paul Kennedy, who gave evidence in this case. However, it is clear from the affidavits filed and from his own evidence that he was accompanied at a number of these meetings by his two brothers, Mr Peter Kennedy and Mr John Kennedy. Neither Peter Kennedy nor John Kennedy gave evidence although both filed affidavits on the interlocutory stage, and no explanation has been given as to why they did not come forward to be cross-examined to support the account given of these meetings by their brother Paul Kennedy.

The other factor which I think is of considerable significance in this case is the discrepancy in the evidence of Paul Kennedy as to the date of an important meeting at the end of January. Normally such a discrepancy might not be significant but it is of considerable significance in this case for reasons which I will explain in a moment. The letter of 5th March from Mr Kennedy stated that the meeting took place on the 20th January. His Solicitor's letter of 18th March stated that the meeting took place on the 27th January. In Mr Kennedy's affidavit sworn in this matter he stated that the meeting took place on the 20th January, and in Court he stated, and he said he was positive about it, that the meeting took place on the 24th January. The importance of the date is this: on the 23rd January a meeting was held between Mr Kennedy and Mr Murphy about which there is no doubt because Mr Murphy recalls the matter very well. He has it written in his diary and recalls it from a bereavement in his family. At the meeting on the 23rd January Mr Murphy was informed that Mr Mangan had resigned, and that was obviously not correct. It seems to me that the fact that Mr Murphy was told that the Defendant had resigned before the vital meeting and that Mr Murphy's services were sought to obtain a new franchisee for the premises lends support to the suggestion that Mr Kennedy and his brothers were endeavouring to bring about a situation in which they would be able to get rid of Mr Mangan from his position and from the premises. This is borne out by the independent evidence of Mr Turner who had a meeting on the 23rd January with the Kennedy brothers. I accept his evidence that at

that meeting whilst the percentage of the overheads to be borne by the franchisee was discussed, an invoice was handed over. This invoice was completely unjustified. As Mr Turner pointed out, it had no scientific basis. I think it was presented to the Defendant as part of an arrangement by which it was hoped that the Defendant would leave the Plaintiffs' premises.

It is unnecessary for me in this judgment to go through all the different interviews which occurred. As I said, I accept the Defendant's version of them. I propose to give my judgment by reference to the issues that I have been asked to determine.

The first question asked was whether or not the Plaintiffs in or about the month of September 1984 licensed the Defendants or either of them to use any part of the Spawell Centre. The answer to that question is 'yes'. I accept that the terms of the agreement were as given by Mr Mangan. I think it was an indefinite term in that there was no question of a trial period, that rent was agreed for a three-month period and that thereafter it was to be reviewed.

It is a nice legal point as to what the rights of the parties would be if there was not agreement at the end of three months, but for reasons which I will explain later it is unnecessary to go into that now.

In addition it was agreed that Mr Mangan pay to the Plaintiffs £1 per head per function to cover overheads, and this very important financial aspect of the matter was played down considerably in Mr Kennedy's evidence. In fact, it appears that the revenue from this part of the agreement is running at well over £20,000 per annum in addition to the agreed rental of £1,300 per month.

The second question relates to the termination of that licence. I will answer that question 'No', that the licence was not validly determined on 18th March 1986 because the parties entered into a new agreement in October 1985 which superseded the September 1984 agreement.

The third question relates to the discharge of the 1984 agreement on or about 20th January 1986. The answer to that question is that the September 1984 agreement was not discharged either on 20th January 1986, as stated in the question, or on 27th January, which was, as I find, the date on which the meeting referred to took place. The agreement was substituted by a new agreement in October 1985.

The question of estoppel is also raised in this question and I think I should deal briefly with the point here. It is alleged that an estoppel arose because of the conduct of the Defendant, first of all, in relation to acquiescence in the advertisement and, secondly, in relation to his negotiations with Mr Murphy. Mr Murphy's evidence contradicts that of Paul Kennedy on this point and supports the evidence of the Defendant. The Defendant did not know of the advertisement and was appalled when he got a telephone call from somebody applying for his own job, which affronted him greatly. He was very reluctant to meet Mr Murphy, and Mr Murphy confirms that he made the 'phone call to the Defendant at the request of the Kennedy brothers, so no question of an estoppel on either of those points arises.

The next question relates to the agreement in October 1985, and I accept Mr Mangan's evidence that prior to this there had been a request by the Plaintiffs for a flat rental of £75,000 per annum, that he brought this matter to the attention of his accountants for advice, that they wrote him the letter of 1st October, which has been produced and which gave various projections, that based upon this Mr Mangan met the Plaintiffs in October and produced these documents at the meeting with the Plaintiffs. At that meeting the Plaintiffs came up with the suggestion of a sliding scale, and I accept that at that meeting there was a firm concluded agreement that the Defendant would obtain a five-year contract by which he would be franchised to provide the catering services in the premises and that he would pay on a sliding scale £55,000 in the first year, £75,000 in the second year, £85,000 in the third year, £95,000 in the fourth year and £110,000 in the final year, making £420,000 in total over the five years. I also accept that the rental was not to come into operation until Mr Mangan obtained occupation of the new function room which it was then anticipated would be in May 1986. I reject the submission that this was in any way a condition of agreement.

I accept that Mr Mangan went to the extent of obtaining a new assistant manager-cum-head waiter at a substantial salary, and that that is inconsistent with the suggestion that the parties had entered into a conditional agreement and is inconsistent with the suggestion that he was told that the matter was subject to the approval of the Plaintiffs' bankers and accountants.

I will deal in a moment with the legal effects of the contract which the parties entered into. At this point I wish to make clear that the rental was on the basis that there would be a new function room, and the Plaintiffs were made aware that the Defendant was making bookings for the new function room, that as late as 23rd January 1986 a booking was made for the new room and a copy of this booking was given to the Plaintiffs, which is wholly inconsistent with the suggestion that a meeting had been held on 20th January which had terminated the arrangement between the parties and at which the Defendant had resigned.

Whilst it is speculation to say so, I think I am justified in saying that it could not have been the production of this booking on 23rd January, which was exhibited in the affidavit filed by the Defendant, that produced the suggestion that the crucial meeting took place on 24th rather than on the 20th, as suggested.

The fifth question refers to the rights of the Plaintiffs to relief, and for the reasons I have given I will answer that question 'No'.

The sixth question again refers to the question of estoppel. For the reasons I have given I will answer this by stating that the Defendants are not estopped <sup>from</sup> the suggestion that the licence has continued and they are not estopped from claiming that the licence was validly determined, and the Plaintiffs are not entitled to damages by way of trespass from the 28th March 1986. I will answer this question by stating that the agreement to occupy the premises was not terminated by the notice of 28th March to which reference was made in this question.

The seventh question relates to the claim now made by the Plaintiffs against the Defendants for £34,913. This relates to the invoice presented at the meeting of 27th January. In my judgment the Plaintiffs are not entitled to any sum in relation to the invoice or under this question. The quantum meruit, if it is allowed, or claim for payment on foot of an implied contract, if it exists, does not arise in this case because there was express agreement between the parties as to what the Plaintiffs were to be paid. There was express agreement in September 1984 in relation to the rental and the contribution to overheads and there was a further agreement in May 1985 as to the contribution for gas.

The claim which was being put forward on 27th January was, in my view, completely unjustified as a matter of law. As a matter of fact it seems to be a rough and ready attribution of overheads to the Defendant and was not a reasonable document. It supports the view suggested that the document was put forward in an endeavour to break the relationship between the parties.

In paragraph 8 the question again arises as to the right of the Plaintiff to the money referred to in the invoice, and I answer that question in the negative.

Question 9 relates to the same matter and I answer that question in the negative.

Question 10 relates to costs and I answer that question in the negative.

It does occur to me in the course of what I have been saying that I have not dealt with the suggestion that at the meeting of 27th January the Defendant resigned. I am quite satisfied that he was very disappointed, very upset by what he was told at the meeting of 27th January. It would not surprise me if he was also extremely annoyed at the invoice which was presented. I think he may well have expressed these sentiments to the Plaintiffs. However, I am quite satisfied that Mr Mangan did not say or do anything which would terminate the agreement he had entered into in the previous October. I am sure he expressed his disappointment at the prospect

of their future relationship but that is a different matter to deciding to discharge the contract entered into. Similarly, the later letter which he wrote was not one which indicated that the Plaintiffs' version of these events is the correct one. I accept the Defendant's explanation for the letter, which was given in evidence and which he wrote early in March, that it was written with a view to seeing how the situation could be negotiated in light of the fact that the new function room was not going to be available

Question 11 raises the question of whether there was any neglect or misrepresentation by the Plaintiffs in relation to any licensing agreement. I think I should answer this question by giving my view of the legal situation that arises as a result of the facts which I have found.

It has been submitted on the Plaintiffs' behalf by Mr Shanley that even if the Defendant is correct and I were to accept the Defendant's version of the agreement in October 1985, that this agreement was conditional on there being a new function room. I do not think that that is the correct way to approach the agreement. The correct way to approach the agreement is on the basis that this amounts in effect to a claim that would be specifically performed. I understood from what was said at the outset that if I were to decide in favour of the Defendant the Plaintiffs were prepared to allow the Defendant into possession of the premises under the franchise.

On the analogy of the specific performance order, the order that would be made would be a diminution in the agreed consideration arising from the failure to perform the contract as agreed. In this case I am quite satisfied that from very early on the Defendant was trying to formalise his arrangement with the Plaintiffs. I am quite satisfied that he was anxious to have something in writing. But he is a businessman, not a lawyer, and he let the time pass as the parties were in negotiation and no formal agreement was ever drawn up. However, he wished to get it drawn up and in October an agreement was entered into which had been contemplated from the beginning, an agreement of a formal sort, namely, that he was to have a term of

five years in the Plaintiffs' premises. There was agreement as to what the rental would be for the premises and I have already indicated what that is. That agreement was made on the basis that the franchise would extend to a much greater area of the premises than is now the situation.

If pleadings had been done in the normal way the Plaintiff would, in my view, be entitled to an order for specific performance with compensation.

In this case I propose to order that the rent that should be paid for the premises to which the Defendant can now obtain access be reduced below the agreed rent because of the Plaintiffs' failure to give the Defendant occupation of the premises which it was agreed would be given to him in October 1985.

I think that the evidence of Mr Kenny, who gave evidence on behalf of the Defendant, is persuasive. He is an accountant with considerable experience of this trade and I accept his evidence that the proper rent should be 15 per cent of nett turnover, and I will so order as a means of giving effect to the agreement of the parties as affected by the inability of the Plaintiffs to carry out its terms.

The question arises as to the date on which this is to come into operation. It seems to be reasonable that the new rental should operate on 1st July this year because of the changes contemplated in the VAT legislation as from that date.

So on the basis of giving specific performance with compensation I will order that the rental payable by the Defendant over the period of five years from 1st July be 15 per cent of nett turnover, that is to say gross turnover less VAT. The Plaintiffs are entitled to rent on the basis of the agreed figure, namely £1,300 per month plus £1 per head per function, plus the contribution for gas up to that date. It is not necessary for me to make any order in that connection because there is no suggestion that this would not be paid by the Defendant.

I can express the hope that the relationship will be good between the parties in what has been a successful business with the prospect of more success in the future. I cannot make people like one another. I can only do what is just in the circumstances. If the Defendant wins the case it is just that he should be entitled to the costs which he has incurred.. I will award the costs plus the costs of the interlocutory motion.

E N D

I certify the foregoing to be a true and accurate transcript of the shorthand note taken by me.

*A. Kerry*  
*Official Stenographer*

*Approved*

*JL*

*9-8-86*