

## THE HIGH COURT

2008 1683 P

BETWEEN

O'BRIEN'S IRISH SANDWICH BARS LIMITED

PLAINTIFF

AND

ANN MARIE BYRNE

DEFENDANT

**Judgment of Miss Justice Laffoy delivered on the 17th day of December, 2008.****Introduction**

1. When this action was initiated by plenary summons, which issued on 28th February, 2008, it was founded on alleged breaches by the defendant of two Franchise Agreements, both of which were dated 17th October, 2003 (the Agreements) and were expressed to be made between the plaintiff, as franchisor, and the defendant, as franchisee. In its statement of claim, which was delivered on 31st March, 2008, the plaintiff claimed:-

- (1) declaratory relief,
- (2) injunctive relief, both prohibitory and mandatory, which was framed in such a way as to control a wide range of activity on the part of the defendant, which was sub-divided into no less than eighteen sub-paragraphs,
- (3) damages, and
- (4) further and other relief.

2. At the hearing of the action the plaintiff, under the heading of further and other relief, claimed three mandatory orders against the defendant, one of which had been signposted in reply to a notice for particulars delivered by the plaintiff on 21st May, 2008.

3. The defendant, in her amended defence and counterclaim which was delivered in June, 2008, denied the breaches of contract alleged by the plaintiff. She alleged wrongdoing on the part of the plaintiff in its treatment of her and in the conduct of these proceedings, in particular, in relation to an application made by the plaintiff on 29th February, 2008 for an interim injunction and publicization of the outcome of the application. In her counterclaim the defendant sought:-

- (1) declaratory relief,
- (2) an order striking out the plaintiff's action on a number of grounds, including the ground that they constituted an abuse of the process of the Court, and
- (3) damages for negligence, breach of duty, breach of the defendant's constitutional rights, breach of contract, oppressive conduct and damage to the defendant's good name and her rights to her livelihood.

4. When this action came on for hearing there was pending in this Court another plenary action in which the defendant was plaintiff and the plaintiff was defendant (Record No. 2008/2230P) (the specific performance proceedings) which was initiated after these proceedings commenced – on 18th March, 2008. The specific performance proceedings are still pending, although at the hearing of this action, in circumstances which I will explain later, I made an order by consent vacating a *lis pendens* which had been registered by the plaintiff in relation to those proceedings.

5. In this judgment, it is necessary to focus to an unusual degree on the reliefs claimed and counterclaimed for the purposes of identifying the issues which remain in the action, because of what transpired on the plaintiff's application for an interlocutory injunction and at the hearing.

**The Agreements**

6. The plaintiff is involved in business format franchising in relation to sandwich bars, cafes and the provision of outside catering services. Both Agreements were in identical terms, although they related to different premises. The provisions of the Agreements which are material for present purposes are:-

- (a) Clause 3, under which the plaintiff granted to the defendant the right to use the "O'Brien's Irish Sandwich Bar" Trade Marks, as defined, and other Intellectual Property, as defined, in connection with a sandwich bar business to be carried on by the defendant in the relevant premises, to provide that business and to have the benefit of the plaintiff's accounting and merchandising knowledge and experience and all other rights and benefits accruing under the Agreement. One of the Agreements related to the premises 63, Dame Street, Dublin, 2 (the Dame Street premises) and the other related to the Dublin Tourist Office, Suffolk Street, Dublin, 2 (the Suffolk Street premises). The term of each Agreement was to be ten years from the date on which the relevant premises were acquired by the defendant, which I assume was 17th October, 2003. There is no controversy on this point, nor is there any controversy as to the fact that the defendant held the Dame Street premises under a lease for a term of thirty five years of which two years remained unexpired in October 2007 and held the Suffolk Street premises under an occupational licence agreement.
- (b) Clause 8, under which the defendant was liable to pay fees to the plaintiff: a Management Services Fee, representing 6% of Gross Sales Value, as defined; and a Marketing Services Fee, representing 3% of Gross Sales Value, as defined.

(c) Clause 17, which dealt with restrictions against competition with the plaintiff's business. The provisions of this clause in respect of which the plaintiff has sought specific relief are obligations on the part of the defendant –

(i) not during the Agreement or for a period of one year after its termination to be directly or indirectly engaged, concerned, or interested in a business which would compete with the business of the plaintiff within a radius of one mile from the relevant premises (Clause 17.02),

(ii) for a period of one year after the termination of the Agreement not to be directly or indirectly engaged, concerned or interested in any business at the relevant premises which would compete with the business of the plaintiff, nor to damage the surviving goodwill of the said business in any other way (Clause 17.03),

(iii) for the period of one year from the termination of the Agreement not without the prior consent of the plaintiff to solicit or tout, directly or indirectly, formally or informally, or as a servant, agent or in any other capacity whatsoever, any person who might currently or during the period of two years preceding such determination have been a customer regularly dealing with the said business at the relevant premises (Clause 17.04), and

(iv) not for the period of one year after the termination of the Agreement at any time to seek to employ any person then employed in any other business the subject of a franchise by the Plaintiff and not directly or indirectly to induce such person to leave his employment without the previous consent in writing of the plaintiff (Clause 17.05).

The plaintiff claims prohibitory injunctions to enforce those restrictions in paragraphs (c)(xv) to (xviii) of the prayer in the statement of claim.

(d) Clause 21, which dealt with termination but provided for termination by the plaintiff only. The Agreements contained no provision for termination during the term by the defendant as franchisee.

(e) Clause 23, which dealt with the consequences of expiry or termination, that is to say, termination by the plaintiff. It is convenient to refer to the provisions of Clause 23 which have been invoked by the plaintiff as restricting or imposing an obligation on the defendant by reference to the injunctive relief sought in paragraph (c) of the prayer in the plaintiff's statement of claim. They are restrictions or obligations –

(i) from continuing to use the plaintiff's Trade Marks, as defined (Clause 23.01 and paragraph (c)(i)),

(ii) from continuing to use any other Intellectual Property, as defined, and other display or advertising material indicative of the plaintiff (Clause 23.01 and paragraph (c)(ii)),

(iii) to forthwith remove any signs, cards, notices and other display or advertising matters indicative of the plaintiff (Clause 23.01 and paragraph (c)(iii)),

(iv) if so required by the plaintiff, to forthwith make or cause to be made such changes in buildings and structures as the plaintiff should reasonably direct so as to effectively distinguish the defendant's business from its former public and marketing image (Clause 23.01 and paragraph (c)(iv)),

(v) if the defendant should within thirty days of such direction fail or omit or make or cause to be made such changes as the plaintiff should reasonably direct under (iv) above, thereafter to forthwith permit the plaintiff (without incurring any liability to the defendant) and without prejudice to any other remedy open to it in respect of such default, to enter upon the defendant's premises and to make or cause to be made any such change at the expense of the defendant, such expense to be paid and to be repaid to the plaintiff on demand by the defendant (Clause 23.01 and paragraph (c)(v)),

(vi) to forthwith deliver up to the plaintiff all stationery, literature, signs, cards, notices, other displays or advertising matter and any other article bearing the name of the plaintiff or Trade Marks, as defined, or the other Intellectual Property, as defined, which might be the property of the defendant (Clause 23.01 and paragraph (c)(vi)),

(vii) to forthwith return all items which might have been loaned to the defendant by the plaintiff including the Operating Manuals to the plaintiff (Clause 23.01 and paragraph (c)(vii)),

(viii) to pay to the plaintiff all sums of money which might be due or owing from the defendant to the plaintiff (Clause 23.01 and paragraph (c)(viii)),

(ix) to forthwith provide the plaintiff with a list of all corporate customers and (insofar as she is aware) of prospective corporate customers (Clause 23.02(a) and paragraph (c)(ix)),

(x) to forthwith assign to the plaintiff in such form as the plaintiff should reasonably require the benefit of such contracts with customers as the plaintiff might specify and to pay over to the plaintiff any sums received on account of such contracts (Clause 23.02(b) and paragraph (c)(x)),

(xi) to forthwith procure the transfer of the telephone, facsimile and electronic mail numbers of the business to such person as the plaintiff might direct (Clause 23.02(d) and paragraph (c)(xi)),

(xii) to forthwith cease the use of all materials of whatever nature of which the copyright is vested in the plaintiff or where the continued use thereof would in any way infringe the plaintiff's copyright (Clause 23.02(e) and paragraph (c)(xii)),

(xiii) to arrange the preparation of a certificate from her auditors confirming the aggregate Gross Sales Value, as defined, of all work carried out, goods supplied and services rendered by the defendant in connection with the business in the relevant premises during the financial year up to the termination of the relevant Agreement (Clause

23.02(f) and paragraph (c)(xiii)), and,

(xiv) to immediately cease to operate the sandwich bar business and not thereafter to hold herself out in any way as a franchisee of the plaintiff and to refrain from any action which might indicate any relationship between her and the plaintiff (Clause 23.02(h) and paragraph (c)(xiv)).

### **The factual background to the dispute**

7. The defendant traded as an O'Brien's Sandwich Bar in the Dame Street premises and in the Suffolk Street premises under the Agreements until 1st October, 2007. I am satisfied on the evidence that the parties had a good business relationship up to that time.

8. By letter dated 1st October, 2007, the defendant informed the plaintiff that she had sold the Dame Street premises and that she would cease trading as an O'Brien's Sandwich Bar on 12th October following. The defendant acknowledged in cross-examination that the statement that she had sold the premises was not, in fact, true. She had been in negotiations with a third party for the sale of the premises since May 2007 but the negotiations came to nought and it was clear by 1st October, 2007 that the sale was not going to proceed. The notice of 1st October, 2007 had been implicitly accepted by the plaintiff, in that the plaintiff had arranged for its sign to be removed from the Dame Street premises around 12th October, 2007. By a circular letter of 12th October, 2007, the defendant notified her suppliers that she had ceased trading as O'Brien's Sandwich Bar in the Dame Street premises as of 12th October.

9. Within a week of 12th October, 2007, the defendant started trading in the Dame Street premises under the name of "Finn MacCools Café". The defendant acknowledged during cross-examination that when she commenced trading as Finn MacCools Café, the service she was providing to her customers in the Dame Street premises was similar to the service she had provided when she was trading there as O'Brien's Sandwich Bar. She also acknowledged that when she wrote the letter of 1st October, 2007, it was her intention to start trading as Finn MacCools Café. In fact, she had registered the business name, Finn MacCool, in the Register of Business Names in December, 2006. She also acknowledged that through November and into December 2007 she was trading in a similar manner as an O'Brien's franchisee, using all the knowledge and all the operational skills, all "the tricks of the trade", which she had learned as a franchisee of the plaintiff.

10. The plaintiff's response to the defendant's notice of 1st October, 2007 and the consequences which flowed from it have been canvassed in detail by the defendant. By letter dated 2nd October, 2007, the plaintiff's Chief Executive Officer, Mr. Fiacra Nagle, wrote to the defendant noting her intention to sell the Dame Street premises, referring her to various clauses of the relevant Agreement, including clause 23, and asking for details of the purchaser, the intended business and the offer to purchase price. Up to that stage there was, in my view, implicit acceptance of the termination of the Agreement in relation to the Dame Street premises. The plaintiff did not alter that position after taking legal advice, because by letter dated 25th October, 2007, the plaintiff's solicitors advised the defendant that the letter of 1st October, 2007 was taken as a notice of termination of the Agreement. The defendant was informed that the plaintiff intended to invoke clause 23.04 of the Agreement, which was a clause which provided that upon the termination of the Agreement for any cause there should arise in favour of the plaintiff an option to purchase the interest of the defendant in the Dame Street premises. By notice dated 26th October, 2007, the plaintiff exercised the option. However, just over a month later the plaintiff did something of a volte-face when, by letter dated 29th November, 2007, its solicitors informed the defendant that the plaintiff was reserving its position in respect of the option.

11. The change of attitude on the part of the plaintiff seems to have been provoked in part by a letter of 19th November, 2007 from the defendant to the plaintiff, in which the defendant formally tendered her notice of termination of the franchise in relation to the Suffolk Street premises with effect from 30th November, 2007. She stated that all of the plaintiff's property, including manuals, signage, etc., would be returned or available for collection from 30th November. In response, in their letter of 29th November, 2007, the plaintiff's solicitors contended that, in purporting to unilaterally repudiate both Agreements in respect of both premises and to cease to trade as an O'Brien's Sandwich Bar, the defendant was in breach of her contractual obligations under the Agreements. The letter enclosed notice of termination under clause 23 of each of the Agreements terminating each Agreement. Each notice pointed out that the restrictions against competition contained in clause 17 had come into operation. In the letter of 29th November, 2007, the plaintiff's solicitors made certain demands on behalf of the plaintiff seeking documentation which set out the legal interest the defendant held in each of the premises. They also sought an undertaking from her not to dispose of either interest within the option period of two months from the termination of the Agreements and an undertaking in writing that she would abide by the restrictions contained in clause 17 of each of the Agreements. She was threatened with High Court proceedings, without further notice, if the undertakings were not forthcoming by 5th December, 2007.

12. The defendant started trading in the Suffolk Street premises as Finn MacCools Café around 3rd December, 2007. This provoked a further letter from the plaintiff's solicitors, which was dated 4th December, 2007, once again seeking the undertakings sought in the letter of 29th November, 2007 and threatening legal proceedings.

13. A meeting was held on 14th December, 2007 between the defendant and Mr. Nagle, who was accompanied by his solicitor. The defendant acknowledged in cross-examination that she was trading in breach of the Agreement at that time. She also admitted that she did not tell the plaintiff's representatives that the sale of the Dame Street premises was not going to happen until the meeting of 14th December, 2007. Further, she would not disclose to Mr. Nagle who was behind the continued trading from the Dame Street premises.

14. However a firm of private investigators, Protocol Security Services (Protocol) had been retained by the plaintiff and had carried out an investigation. In their report of 12th December, 2007, they had concluded that the owner of the Finn MacCools chain of sandwich bars was the defendant. Following the meeting on 14th December, 2007, the plaintiff's solicitors wrote to the defendant on 19th December, 2007 stating that the plaintiff was going to carry out a valuation on the Dame Street premises with a view to determining whether it should exercise its option to purchase the defendant's interest. It was noted that the defendant did not have a difficulty with this.

15. Clause 24 of the Agreement in relation to the Dame Street premises provided that, immediately upon the exercise of the option, a binding agreement to sell and purchase the defendant's interest would arise. It was further provided that, in default of agreement between the parties as to the purchase price within four weeks of the service of the option exercise notice, the purchase price would be referred to the decision of a single independent valuer to be nominated, in the absence of agreement between the parties, by the Chairman for the time being of the Society of Chartered Surveyors in Ireland. A valuer did visit the premises, on the instructions of the plaintiff.

16. Subsequently, on the 18th January, 2008, the defendant wrote to Mr. Nagle intimating that she wanted to deal directly with him, not through the plaintiff's solicitors. She pointed out the effect of the exercise of the option – that a binding contract had come into being and indicated that she was happy to proceed with the sale. The next communication between the parties was a letter of 18th

February, 2008 from the plaintiff's solicitors to the defendant. In that letter, it was stated that, as the Agreement in relation to the Dame Street premises was terminated by the plaintiff on 29th November, 2007, the plaintiff had a period of two months from that date within which to exercise the option to purchase the defendant's interest in the Dame Street premises, but on receipt of its valuation had decided not to do so. There then followed a convoluted exposition of the plaintiff's position, which I would not attempt to paraphrase. It was in the following terms:-

"Whilst your earlier conduct has been treated by you as a *de facto* termination of the agreement, our Client is of the view that that was conduct which would entitle our Client to terminate the agreement rather than be an actual termination and that is why our Client then chose to terminate the agreement on 29th November, 2007".

17. What provoked the initiation of these proceedings was a further investigation carried out by Protocol for the plaintiff. What provoked that investigation was that by happenstance a corporate customer made a complaint to the plaintiff about the lack of vegetarian sandwiches in a selection of sandwiches which it was believed had been ordered, and had come, from the plaintiff. When the matter was investigated by the plaintiff, it transpired that the selection had come from the Suffolk Street premises. Protocol's report was dated 27th February, 2008. The investigator's "terms of reference" were set out. He was to pose as a corporate client ordering a platter of sandwiches for a business meeting. The object of the exercise was to ascertain what type of sandwiches the defendant was selling, whether she was using the names used by the plaintiff to describe them, for example, "Shambo" and whether she was using the plaintiff's materials, for example, disposable trays, to present them. The investigator recorded a number of telephone conversations with the defendant on 25th February, 2008 and he also recorded what transpired on his visit to the Suffolk Street premises on the following day to collect the order. In the course of the first telephone conversation the investigator ordered two of the plaintiff's specialties: a "Classic Aranmore" platter; and a "Shambo". The defendant explained to the investigator that she was not operating an O'Brien's Sandwich Bar any more. However, she did sell him the "Classic Aranmore" for ten, which was an assortment of sandwiches and canapés, and her replacement for the "Shambo" called "The Hero". When the investigator collected the order on the following day, in four of the boxes containing the "Classic Aranmore" the sandwiches were covered with O'Brien's cellophane wrapping. The report also revealed that the defendant had faxed her outside catering menu to the investigator and the transmission details recorded that the sender was "O'Brien's Sandwich Bar – Suffolk Street".

18. The application for the interim injunction, which was moved on 29th February, 2008, was grounded on the affidavit of the investigator, Ken Vero, sworn on 28th February, 2008. The cellophane wrapping bearing the O'Brien's Sandwich Bar logo and the fax showing "O'Brien's Sandwich Bar – Suffolk Street" as sender were exhibited. The deponent did not aver that the defendant told him that "we're actually not an O'Brien's Sandwich Bar anymore". The defendant contends that this omission constituted a material non-disclosure. The application was also grounded on the affidavit of Mark O'Neill, the Finance Director of the plaintiff, who averred that the "Aranmore Classic Platter, which Mr. Vero deposed to having ordered, is a type of sandwich which is part of the plaintiff's Trade Mark". The application was successful.

19. The defendant was contacted by an apprentice solicitor in the plaintiff's solicitors' firm shortly after 1pm on 29th February, 2008 on her mobile phone and was notified of the making of the interim order. The defendant would not confirm her whereabouts for the purposes of being served with the notice of motion and the grounding affidavits. She was told that the documents would be left with a member of her staff at the Suffolk Street premises. This was done a short time later.

20. In her counterclaim, the defendant alleges that an article which appeared in the edition of the Sunday Business Post newspaper on 2nd March, 2008 was published as a result of a press release issued by the plaintiff with the intention of inflicting massive and irreparable damage on the defendant's reputation as a businesswoman and upon her personal reputation. The article appeared under the headline "Sandwich chain carried out undercover sting". The article stated that the plaintiff had obtained an injunction preventing a franchisee from using any of the plaintiff's intellectual property, including its menus, sandwich wrappers and signage. The subject of the injunction was named as "Ann Marie Walsh" but the premises affected, which were referred to, erroneously the defendant contends, as "O'Brien's outlets", were correctly identified as the Dame Street premises and the Suffolk Street premises. It also stated that the subject had "renamed her outlets under the Finn MacCool brand".

21. On the basis of the evidence, it is not possible to make any finding as to the circumstances in which the making of the interim injunction first came to the attention of the journalist in the Sunday Business Post who wrote the article. On the evidence it would appear that it occurred some hours before a press release was issued by the plaintiff's public relations advisor, Elevate P.R., to nineteen media organisations after 5.30pm that day. The press release incorrectly stated that the plaintiff had "won" an interlocutory injunction against the defendant, a fact that the defendant and her advisors were unaware of until discovery in these proceedings. The press release would appear not to have been acted on by any of the broadcast or print media organisations to which it was circulated.

22. The article in the Sunday Business Post was correct in the important material respect, in that the interim order, which had been made by this Court (Murphy J.) on the 29th February, 2008, ordered as follows:-

"... that the Defendant be restrained until after 4th March, 2008 or until further order in the meantime from continuing the use of the trademarks and the other Intellectual Property and other displays or advertising matter indicative of the plaintiff or any association with the plaintiff or of the service or products of the plaintiff".

23. That order was, of course, pronounced in open Court.

24. The plaintiff's application for an interlocutory injunction was adjourned at least once. When the matter was in the Court list of 13th March, 2008, certain undertakings were given on behalf of the defendant. I will return to this aspect of the matter later.

### **Issues remaining in the proceedings**

25. It is necessary to identify with clarity what issues remain in the proceedings. I propose to do so by reference to the reliefs claimed. I think it appropriate to contextualize the process by reference to the defendant's position in relation to trading in both premises.

26. The defendant ceased to trade in the Dame Street premises some time at the end of March 2008. The focus thereafter, in relation to the Dame Street premises, it seems, was her separate specific performance proceedings against the plaintiff. After the lunch adjournment on the second day of the hearing of this action, counsel for the plaintiff informed the Court that his instructions were that his client was willing to "release the option", conditional on the defendant releasing the plaintiff, presumably from liability to complete a sale. Eventually, after what I can only describe as obfuscation, it was confirmed that the plaintiff's position was that the defendant was free to sell her interest in the Dame Street premises to a third party. There had been yet another *volte-face* by the plaintiff after 18th February, 2008. By letter of 28th March, 2008, the plaintiff's solicitors confirmed that the plaintiff accepted the

validity of the option exercise notice as served, apparently meaning the notice served on 26th October, 2007, and stated that there was no need to take the specific performance proceedings any further. In the course of the defendant's examination-in-chief on the following day, the third day of the hearing, it was further clarified that each side was releasing the other from any obligation to complete a contract for the sale of the property. At that stage it was agreed that an order could be made by consent vacating the *lis pendens* which had been registered by the plaintiff in the specific performance proceedings. The specific performance proceedings were not before the Court, but later it was agreed that the proceedings would be listed with these proceedings when these proceedings have been concluded, presumably for the purposes of making an order disposing of them.

27. On the fourth day of the hearing, which was two weeks after the evidence was closed, when this action was listed for legal submissions, counsel for the defendant informed the Court that the defendant had ceased trading in the Suffolk Street premises in the interim and that she had "sold out in Suffolk Street". The position, accordingly, was that, as of then, the defendant was not trading in competition to the plaintiff and the Court was informed that she did not intend to do so. The Court was also told that the catalyst for the cessation of trading in the Suffolk Street premises was the fact that, as a result of what transpired on the second day of the hearing, she was in a position to sell her interest in the Dame Street premises.

28. Against that background, the position in relation to the reliefs claimed by the plaintiff against the defendant is as follows:-

(1) The Court was informed on the fourth day of the hearing that the parties were agreed that the reliefs claimed in paragraphs (a) (a declaration that the plaintiff has lawfully terminated the Agreements) and (b) (a declaration that the defendant by her actions repudiated the Agreements) of the prayer in the statement of claim were no longer in issue.

(2) When the application for an interlocutory injunction was before the Court on 10th March, 2008, the defendant gave permanent undertakings in the terms of sub-paragraphs (i) (not to use registered Trade Marks), (ii) (not to use other Intellectual Property), and (iii) (to forthwith remove signs etc.) of paragraph (c) of the prayer, which arose out of clause 23.01 of the Agreements and which I have spelt out in greater detail earlier. Accordingly, the reliefs claimed in paragraph (c)(i)(ii) and (iii) are no longer in issue.

(3) Of the remainder of the reliefs claimed in paragraph (c), I think it appropriate to distinguish between the reliefs claimed on foot of clause 23 of the Agreements and the reliefs claimed on foot of clause 17 of the Agreements. It was made clear that apart from the relief claimed in sub-paragraph (vii), which was no longer being pursued, the plaintiff was seeking the reliefs based on clause 23 set out in sub-paragraphs (iv), (v), (vi), (viii), (ix), (x), (xi), (xii), (xiii) and (xiv) in paragraph (c). In relation to the reliefs based on clause 17, the plaintiff was continuing to seek the reliefs claimed in sub-paragraphs (xv), (xvi), (xvii) and (xviii) of paragraph (c).

(4) In relation to the relief claimed in paragraph (d) (an order directing the defendant to do what was necessary to facilitate the purchase by the plaintiff of the defendant's interest in the Dame Street premises), that became defunct as a result of the release by the parties of their respective contractual claims in relation to the completion of the sale of the Dame Street premises. This was recognised by the parties on the fourth day of the hearing.

(5) In relation to the claim for damages, the plaintiff reduced its claim for loss of franchise fees from €52,050 (*per* replies dated 21st May, 2008 to the defendant's notice for particulars) to €35,516.87. The Court was apprised of the reduction on the fourth day of the hearing.

(6) Under the claim for further and other relief, the Court was informed that the plaintiff was pursuing orders that the defendant furnish an account of the profits she earned through her unlawful trade, that she pay to the plaintiff such profits as was found on the account, that she pay such further franchising fees as might be found due on foot of the auditor's certificate referred to in paragraph (c) (xiii). The plaintiff also sought liberty to apply in relation to those reliefs.

29. In relation to the defendant's counterclaim, the position of the plaintiff was that it should be dismissed.

30. The defendant's position in relation to her counterclaim, as expressly stated or as arises by implication from what I have already outlined, was as follows:-

(1) The declaration claimed in paragraph (a) of the prayer for relief in relation to the termination of the Agreement was no longer in issue.

(2) The declaration claimed in paragraph (b) in relation to the Dame Street premises is defunct having regard to the reciprocal releases of their claims by the parties in relation to the Dame Street premises.

(3) The defendant defended the proceedings and sought a declaration that the Agreements are invalid, null and void, of no effect and unenforceable as an unlawful restraint on trade and as a contravention of the Competition Acts. As I understand the defendant's final position it was that, notwithstanding that she was willing to give any undertakings which were required by the plaintiff, she did so "without prejudice to her defence", which I take to mean that she was pursuing the claim in paragraph (c) for a declaration

(4) As I understand the position the defendant was also pursuing her claim for an order striking out the proceedings on the grounds of abuse of process and material non-disclosure.

(5) Finally, the defendant's position in relation to her counterclaim for damages was that any damages awarded against her on the plaintiff's claim should be set off against any damages to which she was entitled on the counterclaim.

31. Arising out of the foregoing analysis it seems logical to deal with the outstanding issues in the following order:-

(a) The defendant's defence that the Agreements are void and unenforceable;

(b) The defendant's claim for a strike out on the grounds of abuse of process or non-disclosure;

(c) The plaintiff's claim for injunctive relief arising out of clause 23 of the Agreements;

(d) The plaintiff's claim for injunctive relief arising out of clause 17 of the Agreement;

(e) The plaintiff's claim for damages coupled with the claim for further and other relief; and

(f) The defendant's counterclaim for damages.

#### **Agreements void?**

32. It was submitted on behalf of the defendant that the restrictions contained in clause 17.02, which prohibited her from being engaged in a sandwich bar business within a radius of one mile of the Dame Street premises or the Suffolk Street premises, as the case may be, for a period of one year post termination, and in clause 17.03, which prohibited her from being engaged in any business at the Dame Street premises or the Suffolk Street premises, as the case may be, which would compete with a franchise of the plaintiff for a period of one year post termination, constituted unreasonable restraints of trade and are void.

33. There was no dispute as to the applicable legal principles in assessing the validity of the restrictions at common law. Both parties referred to the following passage from the judgment of Costello J. in *John Orr Limited & Vescom B.V. v. John Orr* [1987] I.L.R.M. 702 as a correct statement of the applicable law:-

"The principles of law to be applied in the issue are not in controversy and can be briefly stated. All restraints of trade in the absence of special justifying circumstances are contrary to public policy and are therefore void. A restraint may be justified if it is reasonable in the interests of the contracting parties and in the interests of the public. The onus of showing that a restraint is reasonable between the parties rests on the person alleging that it is so. Greater freedom of contract is allowable in a covenant entered into between a seller and the buyer of a business than in the case of one entered into between an employer and an employee. A covenant against competition entered into by the seller of a business which is reasonably necessary to protect the business sold is valid and enforceable. A covenant by an employee not to compete may also be valid and enforceable if it is reasonably necessary to protect some proprietary interest of the covenantor such as may exist in a trade connection or trade secrets. The courts may in certain circumstances enforce a covenant in restraint of trade even though taken as a whole the covenant exceeds what is reasonable, by severance of the void parts from the valid parts."

34. The temporal limitation in both limbs of clause 17 in issue is one year and the geographical limitation is a radius of one mile. It was submitted on behalf of the defendant that in this case a temporal limitation in excess of six months and a geographical limitation in excess of half a mile was an unlawful restraint. That submission was not backed by any evidence or authority and was advanced solely in reliance on the basis of two passages from *Butterworths Competition Law* (Volume II, 2008), which were quoted in the plaintiff's written submissions. The first passage is to be found at (para. 1622) and states:-

"The reality is that the situation between the franchisor and the franchisee is *sui generis*, involving considerations which are involved both in relation to the restraints between employer and employee and between vendor and purchaser on the sale of a business. So far as the latter is concerned, it is the protection of the franchisor's goodwill which is the relevant consideration. Protection of this is central to the effective operation of the whole system and clearly it would defeat the intention of both parties when the agreement is entered into that an individual franchisee would be able to carry on activities calculated to damage that goodwill. It is clear that goodwill survives a defunct business and that, under the normal terms of the franchise agreement, it will have accrued to the franchisor. In the case of many franchises, however, the period of survival will be fairly short and the practical advice must be to confine the period of restraint to a time sufficient to re-franchise from the same, or a convenient adjacent, site. Although circumstances can be conceived where a longer restraint might be justified, having regard to Council Regulation (EEC) 4087/88, the period of restraint should from the point of view of the common law not usually exceed one year."

35. The second passage quoted is to be found in the next paragraph (para. 1623) and deals with the permitted extent of a geographical limitation, stating:-

"Similarly, the geographical area of restraint, preventing the former franchisee from carrying on a competing business near the location of the former business, should be based on a reasonable assessment of the territorial extent of the goodwill of the former franchise business. For example, in the case of a high street fast food restaurant, this would be fairly small, probably half a mile at most, but in the case of a similar restaurant situated in an out of town shopping mall it may be much greater."

36. The only evidence which the Court has from which an inference can be drawn as to the point at which temporal or territorial restraints on a franchisee of the type in issue here (the restrictions provided for in clause 17 in relation to the conduct of the type of business conducted by the defendant at the two locations in Dublin city centre) would become unreasonable and unlawful is the evidence of Mr. Nagle and a report of Patrick Massey, a competition law expert obtained by the plaintiff, which was admitted in evidence. It is not possible to infer from that evidence that clause 17 in either of the Agreements exceeds that point. The evidence indicates the opposite; that the restraints in clause 17 are lawful.

37. Accordingly, on the evidence, I must conclude that the provisions of clause 17 do not constitute an unlawful restraint of trade.

38. In any event, if, as the Court was invited to do by counsel for the defendant, the Court severed the provisions of clause 17 as suggested, that would not avail the plaintiff. The fact is that on her own admission she was trading in competition with the plaintiff in the Dame Street premises until March 2007 and in the Suffolk Street premises until July 2007 and even on the severed non-compete clauses she would have been in breach of the Agreements.

39. In her defence, the defendant asserted that it would be in breach of competition law, presumably referring to the Competition Act 2002 (the Act of 2002), were to be given effect to the plaintiff's claims. This aspect of the matter has not been addressed by the defendants in their written submissions and they have not sought to controvert the plaintiff's entitlement to rely on the report of Mr. Massey, in which he concludes as follows:-

(a) The Agreements come within the provisions of the Competition Authority Declaration in respect of Vertical Agreements and Concerted Practices (Decision No. D/03/001 dated 5th December, 2003) and, therefore, are not contrary to the provisions of the Act of 2002, pursuant to the provisions of s. 4(2) thereof.

(b) The Agreements are not anti-competitive or prohibited by s. 4(1) of the Act of 2002.

(c) Even if the Agreements were anti-competitive, they meet the requirements of s. 4(5) of the Act of 2002.

40. Further, the defendant did not controvert the plaintiff's contention that the Court is entitled to have regard to Mr. Massey's report pursuant to the provisions of s. 9 of the Act of 2002, nor did the defendant adduce any evidence from a competition law expert.

41. Therefore, on the evidence, I must conclude that the provisions of clause 17 are not contrary to competition law.

#### **Strike out proceedings?**

42. In my view, the defendant's contention that the plaintiff's proceedings constitute an abuse of the process of the Court is unsustainable. The plaintiff undoubtedly had a good cause of action. On her own admission, the defendant was in breach of her contractual obligations to the plaintiff. The Court expedited the plenary hearing. There were some deficiencies on the part of the plaintiff in compliance with the time limits imposed by the Court or agreed between the parties. In particular, there were deficiencies on the part of the plaintiff in complying with its undertaking or agreement to make discovery. However, I am satisfied that the plaintiff rectified the situation in sufficient time to ensure that the defendant was not prejudiced.

43. It was also contended on behalf of the defendant that it was inappropriate for the plaintiff to have applied for an interim injunction and that there was a lack of candour and a breach of the duty of full disclosure on the part of the plaintiff in making the application.

44. In view of what transpired in the course of Mr. Vero's dealings with the defendant on 25th and 26th February, 2008, in my view, the plaintiff was wholly justified in seeking interim relief. Moreover, the defendant was given sufficient advance warning that the plaintiff intended enforcing the provisions of clause 17 by litigation if necessary.

45. I am also satisfied that there was no material non-disclosure on the part of the plaintiff in making the application for interim relief such as would preclude the plaintiff from being afforded equitable relief. That the Protocol report, which was disclosed on discovery, revealed that the defendant told the investigator that she was not trading as an O'Brien's Sandwich Bar but was trading under the style Finn MacCools Café, in my view, was not material to the relief sought and granted on the interim application, namely, an order restraining the defendant from using the plaintiff's "Trade Marks" and other "Intellectual Property", as defined in the Agreements. The plaintiff put the material evidence before the Court on that issue. Even if, as the defendant contended at the hearing of the action, the use of the cellophane wrapping with the O'Brien's logo on it was due to a mistake on the part of an employee and the failure to change the transmitted details on the fax machine was inadvertent, the fact is that there was evidence, in my view, compelling evidence, to support the application for the interim relief which was granted, which the defendant's excuses would not have set at naught.

46. Aside from that, I have to say that I consider it quite bizarre that the defendant is making the case that the interim injunction should not have been applied for and that the proceedings should be struck out for failure to make full disclosure to the Court on the interim application, given that two weeks after the interim order was made the defendant gave to the Court permanent undertakings in the terms of the order made on the interim application and the wider reliefs sought on the interlocutory application.

47. I see no basis for striking out the proceedings on the ground of abuse of process or on any other ground.

#### **Injunctive relief in reliance on clause 23**

48. An injunction is an equitable remedy and, as such, it is discretionary in nature. For the reasons which I will outline, I do not propose making any of the orders sought in reliance on clause 23.

49. It is well settled that an injunction will not be granted where a wrong can be properly compensated in monetary terms. One of the mandatory orders which the plaintiff has sought is an order for payment of all sums due by the defendant to the plaintiff (para. (c) (viii)). Insofar as there is money due by the defendant to the plaintiff under the Agreements, it should have been claimed by way of damages. An injunction in the terms sought will not be granted.

50. The matters dealt with in para. (c)(iv) and (v) in relation to changes in the defendant's premises were overtaken by the events which occurred before the final submissions were made. The plaintiff, in my view, should have abandoned those claims and they will not be acceded to. In relation to sub-paragraph (vi) (delivery of stationery etc.), paragraph (ix) (provide a list of corporate customers), paragraph (x) (assign the benefit of contracts), paragraph (xi) (transfer telephone lines) of paragraph (c), I am not satisfied on the evidence that there is any necessity to make orders in the terms sought. The plaintiff's solicitors in their letter of 19th December, 2007 called on the defendant to address most of those points. Her reply in her letter of 18th January, 2008, was that she had no corporate customers and that there were no contracts to be transferred. If it were necessary on the termination of a franchise agreement to make an order of the type in question to protect the franchisor, in my view, having regard to the fact that the Court might be faced with the prospect of enforcing the order by way of attachment and committal, what the person to whom the order was directed was required to do and when he was required to do it, would have to be set out with absolute clarity. I am not satisfied that that has been done in this case. For that reason also, I do not propose making orders in the terms sought.

51. An order in the terms of paragraph (c) (xii) (to desist from infringing the plaintiff's copyright) is not necessary. All issues in relation to Intellectual Property are adequately covered by the permanent undertakings given by the defendant at the interlocutory stage. The same applies to paragraph (c) (xiv) (to cease to operate the sandwich bar business). Additionally, the Court was told on the fourth day of the hearing that the defendant had ceased trading in both premises and the plaintiff did not demur. An injunction in the terms sought is unnecessary.

52. I do not propose making an order in the terms of paragraph (c) (xiii) for the reasons I will outline when dealing with the question of further and other relief and damages.

#### **Injunctive relief claimed pursuant to clause 17**

53. The injunctive relief claimed in paragraph (c) (xv) to (xviii) inclusive, being prohibitory in nature and framed with precision, unlike the relief arising from clause 23, is of a type which would normally be granted. For two reasons I do not propose to grant the injunctions. The most obvious reason is that the period of one year from the termination of the Agreements has expired, whether termination was on foot of the plaintiff's notices of 29th November, 2007 in respect of both premises, or the defendant's notice of 1st October, 2007 in respect of the Dame Street premises. Apart from that, the defendant proffered to give any undertakings required by the plaintiff.

54. In the interests of clarity, I should say that I am satisfied that the plaintiff was entitled to injunctions in the terms sought but I am of the view that the defendant's undertakings would have been acceptable in lieu of orders.

### **Damages/further and other relief claimed by the plaintiff**

55. The figure of €35,516.87 claimed by the plaintiff represents loss to the plaintiff of Management Services Fees and Marketing Services Fees from October 2007 to July 2008, which the plaintiff contends it was at the loss of by reason of the defendant trading as Finn MacCools Café and thus depriving franchisees of the plaintiff of the business. The sum is calculated by reference to information in the plaintiff's possession as to Gross Sales Value, as defined, of the defendant's business in the year October 2006 to October 2007. Even though the defendant ceased trading in the Dame Street premises in March 2008, overall this claim seems to me to be reasonable. I propose allowing it.

56. What the plaintiff is striving for, as I understand it, in pursuing the three items of further and other relief is, first, to have the sum due in respect of fees updated by reference to the defendant's Gross Sales Value in the year preceding termination, on the assumption that the Gross Sales Value was higher than in the year from October 2006 to October 2007. This claim is linked to paragraph (c) (xiii), which I have already indicated I do not propose granting. The position is that the plaintiff's remedy for breach of the Agreements is an entitlement to damages for breach of contract. The answer to the plaintiff's claim for a mandatory order is that it is one that can be properly compensated in monetary terms. The only purpose of the order sought in paragraph (c) (xiii) is with a view to the quantification of such, if any, additional fees as would be due by reference to the year prior to termination with the view to getting an order for payment of the said sum. These are matters which should have been dealt with under the heading of the claim for damages.

57. Secondly, the objective of the other two items in the claim for further and other relief is to secure for the plaintiff such, if any, profits over and above the licence fees as accrued to the defendant out of her trading in the Dame Street premises and the Suffolk Street premises after the termination of the Agreements, through the mechanism of a mandatory order directing the defendant to furnish an account and a further mandatory order directing the defendant to pay the sum due on the account. While I am satisfied that, after termination, the defendant was trading in breach of clause 17 of the Agreements, the plaintiff's remedy is for damages for breach of contract measured in the ordinary way to compensate the plaintiff for loss and damage it can prove. I do not propose to grant such mandatory orders.

58. Accordingly, the plaintiff is not entitled to any relief under the heading of further and other relief.

### **The defendant's claim for damages**

59. The defendant was a candid and truthful witness. She acknowledged that she had entered into an agreement with the plaintiff in relation to operating a sandwich bar in Glasnevin Industrial Estate in terms similar to the Agreements about six months before she executed the Agreements. On that occasion, she had the benefit of legal advice. Although she did not get independent legal advice in relation to the execution of the Agreements, it is absolutely clear on the evidence that she entered into the Agreements freely and with a proper understanding of her contractual liability. Indeed, when it was put to her in cross-examination that, despite what was pleaded in her defence and counterclaim, she was not contending that the Agreements were unfair, her response was that she had never said that to anybody.

60. The Agreements are undoubtedly weighted in favour of protecting the rights of the franchisor. While they contain no provision for termination by the franchisee, each contains a clause which gives the right to the franchisee to sell the business with the prior written consent of the franchisor, such consent not to be unreasonably withheld, and subject to the conditions stipulated in clause 16.

61. The issues in relation to termination, by whom and when the Agreements were validly terminated, is no longer in the case. However, it is accepted by both sides that the Agreements were terminated from December 2007 onwards. The defendant continued to trade in the Dame Street premises until March 2008 and she continued to trade in the Suffolk Street premises until mid-July 2008. By continuing to trade as a sandwich bar in the manner in which she traded, in my view, she was contravening the non-compete provisions of clause 17 of the Agreements. In doing so she was in breach of the Agreements. The defendant acknowledged that she commenced trading as Finn MacCools Café in the clear knowledge that she was breaching the Agreements.

62. That is the background against which the plaintiff's counterclaim must be assessed. There are two alleged wrongs on the part of the plaintiff, which the defendant claims give rise to an entitlement to damages, on which I consider it necessary to comment, namely:-

(1) that the plaintiff stymied the sale of the Dame Street premises for nine months thereby causing the defendant to incur loss; and

(2) that, in courting publicity in relation to the interim injunction, the plaintiff inflicted massive and irreparable damage on the defendant's reputation as a businesswoman and on her personal reputation.

63. In relation to the sale of the Dame Street premises, the issues as to what if any contractual obligations came into existence and whether any party is in breach of any such obligations is the subject of the specific performance proceedings. The issues in the specific performance proceedings were not before the Court. Indeed, I have not had sight of the pleadings, which it would seem did not go as far as the delivery of a statement of claim, although there is a motion for judgment in default pending. My understanding from the hearing of this action is that the defendant was seeking specific performance of an agreement which she alleged came into existence on the service of the notice to exercise the option on 26th October, 2007. As is clear from the commentary earlier on the background to these proceedings, I consider that the plaintiff's attitude to the sale of the Dame Street premises was, to put it mildly, erratic. The respective positions of the parties when the hearing of this action commenced was that the defendant was suing for specific performance of an agreement for the sale of the Dame Street premises to the plaintiff, and the plaintiff was not resisting and, apparently without notice to the defendant, had registered the proceedings as a *lis pendens* against the Dame Street premises, presumably on the basis that it did not want anybody else to acquire them. In the course of the hearing the parties reached the agreement which I have already outlined and the *lis pendens* was vacated by consent. The Court could never have adjudicated on the issues in relation to the sale of the Dame Street premises in this action or determined who was at fault. The claim for damages grounded on the plaintiff's behaviour in relation to the sale is wholly misconceived, as is its defence to the plaintiff's claim grounded on it.

64. It is by no means clear what established cause of action in tort the defendant is invoking in relation to the press release and the article in the Sunday Business Post. With regard to the article in the Sunday Business Post, there is no evidence that any officer or agent of the plaintiff was its instigator and, in any event, it was accurate in the material respects, save that it misnamed the defendant. The press release was instigated by the plaintiff and it was inaccurate in describing the order which the plaintiff had obtained as an interlocutory injunction.



65. As I have recorded in the introduction, the defendant's counterclaim for damages is wide ranging but it contains references to negligence and "damage to the defendant's good name and rights to her livelihood". Those references reflect paragraphs 26 of the counterclaim, in which it is alleged that the press release, by its inaccuracies and omissions, demonstrated, *inter alia*, negligence as regards the defendant's right to her good name and reputation and that of her business, and a malicious propensity to injure and defame the defendant and her business. In response, it was submitted on behalf of the plaintiff that it did no more than exercise the freedom of expression granted to all citizens of the State and the provisions of the Constitution and the European Convention on Human Rights were invoked. It was also asserted that the defendant had no reputation to protect in the circumstances, the decision of the Supreme Court in *Cooper-Flynn v. R.T.E. and Anor.* [2004] 2 I.R. 72 being cited.

66. The degree of righteousness evinced by both sides in those assertions sits uneasily with the facts. The defendant was in breach of the Agreements and the plaintiff had properly applied for and obtained an interim injunction. Notwithstanding that the plaintiff had properly obtained an interim injunction and was subsequently vindicated, in the sense that the defendant gave an undertaking in the terms of the interim injunction at the interlocutory stage, nonetheless, one has to question the motivation and the ethical standards of the plaintiff in having the press release issued and its timing.

67. The crucial question in relation to the claim for damages, however, is whether the defendant has shown that, as a matter of law, she has a claim for damages against the plaintiff as the instigator of the press release. In my view, she has not. A scattergun approach was adopted in pleading her case and no effort was made to demonstrate an entitlement to damages under any established tort.

### **Orders**

68. The only order on the plaintiff's claim will be an order awarding the plaintiff damages against the defendant in the sum of €35,516.87. There will be an order dismissing the counterclaim.

69. While conscious that the Court is not always privy to all the dealings between the parties to litigation, nonetheless I feel constrained to comment that, in their conduct of this action, each side displayed an astonishing disregard for a businesslike and common sense approach to their differences. More significantly from the Court's perspective, neither side showed sufficient regard for how the jurisdiction of the Court may be properly, usefully and economically invoked to resolve, and provide a remedy for, disputes arising from such differences.