

THE HIGH COURT

2009 11281 P

BETWEEN

TESCO IRELAND LIMITED

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 23rd day of December, 2009.**The plaintiff's claim**

The plaintiff and the defendant are two of the major supermarket and retail operators in the State. In these proceedings the plaintiff seeks to restrain by injunction a certain type of advertising by the defendant. In essence, the plaintiff's complaint is that the defendant's advertisements, by comparing the defendant's promotional prices with the plaintiff's standard prices and, therefore, failing to compare like with like, are misleading for customers and in breach of the Consumer Protection Act 2007 (the Act of 2007) and the European Community (Misleading and Comparative Marketing Communications) Regulations 2007 (S.I. No. 774 of 2007) (the 2007 Regulations). In broad terms, the defendant's response is that the information contained in its advertisements is accurate as of the date of publication and not capable of misleading consumers in the context of a daily changing advertising environment where pricing approaches are far more complex than the plaintiff claims. Furthermore, the defendant contends that the plaintiff has engaged in the form of advertising complained of and other forms of advertising which are inaccurate or inappropriate and, accordingly, does not come to Court with clean hands.

The specific advertisements placed by the defendant in the period of just over a week prior to the initiation of these proceedings which the plaintiff contends are in breach of the law in comparing the defendant's prices (Dunnes prices) with the plaintiff's prices (Tesco prices) are the following:

1. 3rd December 2009: the Irish Independent and Metro newspapers

The products in question are 24-packs of Guinness, Carlsberg and Budweiser 50cl cans. Beside the product image, the Dunnes price is indicated in a bright red circle as €26.99, while the Tesco price is indicated in a slightly smaller, grey circle as €39.99. The small print below on the opposite side of the 2-page advertisement indicates that "all offers are subject to availability and valid until 05.12.09". It also states: "TESCO PRICES CHECKED ON 01.12.09 and 02.12.09".

According to the plaintiff, the Tesco price indicated is its everyday or standard price. Because the small print indicates that the Dunnes price is promotional, the plaintiff complains that the advertisement does not compare like with like and could be considered to imply that both prices are promotional when this is not the case.

According to the defendant, the advertisement image and the small print both contain accurate information regarding the price of the product as of the date of the advertisement and that the Dunnes price is promotional. It contends that consumers would be aware that the prices reflect Christmas promotional prices.

2. 6th December 2009: Sunday Independent and Sunday World newspapers

The products in question are Wolf Blass Red Label Shiraz Cabernet and Carte Noire coffee.

Beside the Wolf Blass image, the Dunnes price is indicated in a bright red circle as €9.99, while the Tesco price is indicated in a slightly smaller, grey circle as €11.49.

Beside the Carte Noire image, the Dunnes price is indicated in a bright red circle as €4.00, while the Tesco price is indicated in a slightly smaller, grey circle as €6.95. The small print below the images on the opposite side of the 2-page advertisement indicates: "all offers subject to availability and valid until 12.12.09 unless otherwise stated". On the bottom of the near side of the 2-page advertisement, it is stated: "TESCO PRICES CHECKED ON 3rd December and 4th December 2009".

According to the plaintiff, in relation to Wolf Blass, on the basis of an instore display exhibited, the Dunnes price reflected a promotional price to 5th January 2010, whereas the Tesco price was the standard price. In relation to Carte Noire, the instore display referred to the Dunnes price in its promotional format (although it did not specify an end-date for the promotion), whereas the Tesco price was the standard price.

The defendant's position is that these prices are correct and that the small print clearly indicates that, unless otherwise stated, the prices would be valid until 12th December 2009. As the instore displays indicated, the defendant's prices were promotional and for limited periods.

3. 10th December 2009: the Irish Independent newspaper

The products in question are Blossom Hill Shiraz 75cl, Domestos bleach and Charmin Toilet Tissue. Beside the

Blossom Hill image, the Dunnes price is indicated in a bright red circle as €6.99, while the Tesco price is indicated in a slightly smaller, grey circle as €7.99. Beside the Domestos image, the Dunnes price is indicated in a bright red circle as €2.00, while the Tesco price is indicated in a slightly smaller, grey circle as €3.05. Beside the Charmin image, the Dunnes price is indicated in a bright red circle as €4.00 while the Tesco price is indicated in a slightly smaller, grey circle as €5.79. The small print at the bottom of the advertisement states: "Subject to availability....All these lines are promotional prices except Avonmore Soup, Domestos, Viennetta... TESCO PRICES CHECKED ON 09.12.09".

According to the plaintiff, referring to the instore display of the defendant on 10th December 2009, the Blossom Hill promotion was available until 12th December 2009, whereas the Tesco price was its standard price. In respect of Domestos, the instore display indicated that this promotion was available until 12th December 2009, whereas the Tesco price was again its standard price. In respect of Charmin, the instore display indicated that the Dunnes price, which was on promotion until 29th December 2009, whereas the Tesco price was once again its standard price.

The defendant's position is again that this advertisement is accurate. All Dunnes prices are promotional except those specified. It says that the wording used – "all these lines are promotional prices" – is identical to that used by the plaintiff in its advertisement of 6th December 2009. In respect of the Domestos specifically, it says that its price is in fact a long-term price (which refers to a price for 28 successive days within the previous 3-month period) because that product was priced at €2 for all but 8 days in the last 3.5 months. It denies that anything in the advertisement is misleading and states that its meaning would be understood by the consumer, which is more important than the perception of a competitor.

A further complaint has been made in a supplemental affidavit filed on behalf of the plaintiff since these proceedings were initiated in relation to an advertisement in The Star on 12th December, 2009 and in the Sunday Independent on 13th December, 2009 in relation to which the plaintiff takes issue with another aspect of the defendant's advertising. In addition to the general complaint that it compares standard Tesco prices with promotional Dunnes prices, it is claimed that it compares the price of clementines and pineapples of different weights or sizes in the plaintiff's and defendant's stores. The defendant has refuted this.

In addition to disputing the plaintiff's contention that it is in breach of the law as alleged, the defendant defended the application on the basis that the proceedings have been improperly constituted, not having been commenced in accordance with the requirements of O. 84B of the Rules of the Superior Courts (the Rules), invoking, as they do, the provisions of s. 71 of the Act of 2007 and Regulation 5 of the 2007 Regulations. Further, the defendant contends that neither s. 71 nor Regulation 5 confers on the Court jurisdiction to grant interlocutory relief to the plaintiff.

At the hearing of the application, counsel for the plaintiff properly drew the Court's attention to a decision of the Supreme Court which appears to support the defendant's contention that it is not open to the plaintiff to grant interlocutory relief: *Dunnes Stores v. Mandate* [1996] 1 I.R. 55. However, counsel for the plaintiff submitted that, having regard to legislative changes since that case, the Court has jurisdiction to grant interlocutory relief. Alternatively, it was submitted on behalf of the plaintiff that the Court can make a final order on this application.

Because of the significance of the jurisdictional point raised, it is necessary to consider the course of this application in some detail.

The history of the application

By plenary summons of 11th December, 2009, the plaintiff seeks various orders restraining and prohibiting the defendant from engaging in what it alleges are prohibited and misleading comparative marketing communications and commercial practices. On 11th December 2009, this Court gave the plaintiff leave to issue and serve notice of motion returnable on Monday 14th December. In this notice of motion, the plaintiff seeks the following reliefs:

- (a) an interlocutory order pursuant to the the 2007 Regulations restraining the defendant from engaging in or continuing to engage in prohibited comparative marketing communication;
- (b) an interlocutory order pursuant to the 2007 Regulations restraining the defendant from engaging in or continuing to engage in misleading marketing communication;
- (c) an interlocutory order pursuant to Section 71 of the Act of 2007 prohibiting the defendant from engaging in or continuing to engage in misleading commercial practices;
- (d) an order pursuant to either or both the Act of 2007 and the 2007 Regulations restraining the defendant from engaging in comparative advertising whereby the defendant compares the price of some of its own products to those of the plaintiff without stating or stating clearly that the prices identified by the defendant are promotional prices available for a limited period only;
- (e) an order pursuant to either or both the Act of 2007 or the 2007 Regulations prohibiting the defendant from advertising or continuing to advertise in terms identical to the advertisements which are identified in the schedule to the notice of motion;
- (f) an interlocutory order pursuant to either or both the Act of 2007 or the 2007 Regulations prohibiting the defendant from engaging in any advertising whatsoever whether in printed matter or broadcast whereby the defendant compares prices of both the plaintiff and the defendant for identical products without clearly disclosing that the defendant's prices are promotional and for a limited period only.

The evidence before the Court on the plaintiff's application, which was heard on 17th and 18th December, 2009, is affidavit evidence. The plaintiff's application is grounded upon the affidavit of Kenneth Jacobs, marketing director in the plaintiff company, sworn on 11th December 2009. Mark Ody, a marketing consultant, has also sworn an affidavit on the plaintiff's behalf on 11th December 2009. The defendant's initial short replying affidavit was sworn by Vincent Hutton, head of food finance with the defendant, on 14th December 2009, followed by a comprehensive affidavit sworn by Richard

Reeves, director of food with the defendant, on 16th December 2009. Mr. Jacobs has sworn a further affidavit in reply to this on 17th December 2009, to which Mr. Reeves in turn replied on the same date. The defendant has also filed an affidavit by Ursula Carlin, an advertising and brand strategist, sworn on 16th December 2009. The timeframe within which the defendant had to respond to the plaintiff's affidavits was very tight, because the plaintiff contended that it was crucial that the Court address the issue as early as possible in order to minimise the effect of the defendant's advertising on the plaintiff in the lead up to Christmas.

At the hearing of the application counsel for the plaintiff contended that, under para. (d) of the relief claimed on the notice of motion, the plaintiff had sought a final order and that it was open to the Court to make such an order. However, counsel submitted that an order in the following terms would address the key issue on the plaintiff's claim – that the defendant's advertising is misleading – with greater clarity and sought an order in these terms:

"An order directing the defendant –

(a) when making a written comparative marketing communication (including without prejudice to the generality of the foregoing, advertisements in the print media, circulars, brochures, flyers, and similar forms of advertising), which communication compares the prices of specific products sold by the plaintiff and the defendant respectively, and where the availability of the defendant's price expires by a certain date, to state that fact in words which are clearly legible and immediately adjacent to the price of the specific product in question; and

(b) when making a comparative marketing communication on radio or television comparing the prices of specific products sold by the plaintiff and the defendant respectively, and where the availability of the defendant's price expires by a certain date, to include in the advertisement a statement that the defendant's prices quoted are promotional prices which expire on the date on which they expire.

Counsel for the defendant understandably complained that the defendant had been "wrong-footed" in being faced with a claim for a final order when his understanding and that of his client was that the defendant was in Court to meet a case for an interlocutory order, which required the plaintiff to show no more than that there was a fair issue to be tried, that damages would not be an adequate remedy for the plaintiff and that the balance of convenience lay in favour of granting the injunction. The understanding on the defendant's side was that the matter would go to a plenary hearing where the defendant would have an opportunity to cross-examine the plaintiff's witnesses and to fully argue its defence. In my view, the defendant is justified in its complaint that it is not fair that the plaintiff should have to face a case seeking a final order having regard to the history of the application as outlined.

It is necessary to consider the statutory framework in order to determine what jurisdiction the Court has.

The statutory framework

The Act of 2007

Counsel for the plaintiff identified three sections of the Act of 2007 which it was alleged the defendant is in breach of: s. 43, s. 44 and s. 46, all of which are in Chapter 2 of Part 3 of the Act of 2007, which deals with misleading commercial practices. Section 42 contains a general prohibition on misleading commercial practices.

Section 43(1) provides that a commercial practice is misleading if it includes the provision of false information in relation to any matter set out in subs. (3) and that information would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make. The matter set out in subs. (3) which counsel for the plaintiff submitted is relevant is to be found in para. (c) which refers to "the price of the product, the manner in which the price is calculated or the existence or nature of a specific price advantage". Sub-section (4) provides that it is not a defence in any proceeding to show that the information is factually correct. Sub-section (5) provides that, in determining whether a commercial practice is misleading, the commercial practice shall be considered in its factual context, taking account of all its features and circumstances. Counsel for the plaintiff stressed that in making such determination the Court must have regard to the everyday realities of the situation.

Section 44(1) provides that a commercial practice involving marketing or advertising is misleading if it would be likely to cause the average consumer, *inter alia*, to make a transactional decision that the average consumer would not otherwise make.

Counsel for the plaintiff submitted that s. 46(1) is the most directly relevant prohibition. Sub-section (1) provides as follows:

"A commercial practice is misleading if the trader omits or conceals material information that the average consumer would need, in the context, to make an informed transactional decision ("material information") and such practice would be likely to cause the average consumer to make a transactional decision that the average consumer would not otherwise make."

Particular emphasis was laid on subs. (2) of s. 46, which provides that a commercial practice is misleading if the trader provides material information "in a manner that is unclear, unintelligible, ambiguous or untimely". Sub-section (5) provides that, in determining whether a commercial practice is misleading under the section, the commercial practice shall be considered in the factual context, taking into account all of its features and circumstances.

Section 71 is contained in Chapter 2 of Part 5, which deals with civil proceedings. The expression "prohibited act or practice" in s. 71 is defined in s. 67 as including "any unfair, misleading or aggressive commercial practice under Part III". Sub-section (2) of s. 71 provides:

"Any person, including the Agency or other public body that is prescribed for the purposes of this sub-section, may

apply to the ... High Court for an order prohibiting a trader from committing or engaging in a prohibited act or practice."

The Agency means the National Consumer Agency (the Agency). Sub-section (3) provides that an application under subs. (2) shall be on notice to (a) the trader or person against whom the order is sought, and (b) the Agency, if the applicant is not the Agency. By virtue of subs. (5), where the applicant is not the Agency, the Court may not make an order unless the Agency has been afforded an opportunity to be heard and adduce evidence. In this case, in compliance with that provision, notice was served on the Agency. Counsel appeared on behalf of the Agency at the hearing of the application and informed the Court that the Agency was not participating in the application but would maintain a watching brief.

The other provisions of s. 71 which are relevant are:

(a) Sub-section (4) of s. 71 which provides:

"In determining an application under this section, the court shall consider all interests involved and, in particular, the public interest."

(b) Sub-section (7) which gives the Court a discretion to direct that a corrective statement be published.

(c) Sub-section (6) which provides:

"If the court considers it necessary or appropriate in the circumstances, taking into account all interests involved and, in particular, the public interest, the court may make an order under this section without proof of any actual loss or damage or any intention or negligence on the part of the trader."

On this application, counsel for the plaintiff made it clear that its only objective was to restrain the alleged offending conduct and that it was not claiming damages in the proceedings.

The 2007 Regulations

The purpose of the 2007 Regulations was to transpose Directive 2006/114 EC (the Directive) into Irish law. The substantive provision of the 2007 Regulations on which the plaintiff relies is Regulation 3 which provides that a trader shall not engage in misleading marketing communication and goes on to provide that a marketing communication is misleading if

(a) in any way (including its presentation), it deceives or is likely to deceive in relation to any matter set out in paragraph (4) the trader (sic) to whom it is addressed or whom it reaches, and

(b) (i) by reason of its deceptive nature it is likely to affect the trader's (sic) economic behaviour, or

(ii) for any reasons specified in this paragraph, it is injured or is likely to injure a competitor.

It was suggested by counsel for the plaintiff that there may be an error in paragraphs (a) and (b) and that the reference to trader should be a reference to consumer. That suggestion would appear to be correct. The matter set out in paragraph (4) which counsel for the plaintiff pointed to as being relevant on this application is to be found in sub-paragraph (c) – the price of the product, the manner in which the price is calculated "or the existence or nature of a specific price advantage".

Counsel for the plaintiff also invoked Regulation 4 which prohibits a trader engaging in a prohibitive "comparative marketing communication", which is defined in Regulation 2 as meaning "any form of representation made by a trader that explicitly or by implication identifies a competitor of the trader or a product offered by such a competitor". Paragraph (2) of Regulation 4 provides that a comparative marketing communication is prohibited if, as regards the comparison, *inter alia*, it is misleading under Regulation 3, or is a misleading commercial practice under any of s. 43 to s. 46 of the Act of 2007 or, as provided in sub-paragraph (d), on which counsel for the plaintiff laid particular emphasis, "it does not objectively compare one or more material, relevant, verifiable, and representative features of those products, which may include price".

The provision in the 2007 Regulations dealing with Court applications is Regulation 5, which, in paragraph (1) provides as follows:

"A trader or other person may, upon giving notice of the application to the trader against whom the order is sought, apply to ... the High Court for an order prohibiting that trader from –

(a) engaging in, or

(b) continuing to engage in,

a misleading marketing communication or a prohibited comparative marketing communication."

That is the provision on which the plaintiff relies and, as counsel for the plaintiff pointed out, it contains no prohibition on seeking interlocutory relief.

The other provisions of Regulation 5 of general application are:

(a) paragraph (2) which reverses the burden of proof to the extent that it provides that, if the truth of a factual claim in a representation is an issue, and the trader against whom the order is sought does not establish on the balance of probabilities that the representation is true, then the representation shall be presumed to be untrue;

(b) paragraph (3) which provides that, in determining an application under Regulation 5, the Court shall

consider all interests involved and, in particular, the public interest;

(c) paragraph (4) which provides that, where necessary or appropriate in the circumstances, taking into account all the interests involved and, in particular, the public interest the Court may make an order under Regulation 5(1)(b) without proof of any actual loss or damage on the part of the applicant, or any intention or negligence on the part of the respondent; and

(d) paragraph (5) under which the Court is given a broad discretion to impose terms or conditions in the order that the Court considers appropriate, including a requirement that the respondent publish a corrective statement at its own expense and in any manner the Court considers appropriate in respect of the matters the subject of the order.

The Directive

Counsel for the plaintiff referred the Court to a number of provisions of the Directive, but the provision of most relevance to the argument advanced is sub-article 3 of Article 5. Sub-article 1 of Article 5 provides that Member States shall ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors. Sub-article 3 provides:

" ... Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary taking into account all the interests involved and, in particular, the public interest:

(a) to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading advertising or unlawful comparative advertising; or

(b) if the misleading advertising or unlawful comparative advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication.

...

Member States shall make provision for the measures referred to in the first sub-paragraph to be taken under an accelerated procedure either with interim effect or with definitive effect, at the Member States' discretion."

Dunnes Stores Ltd. v. Mandate

The regulation at issue in *Dunnes Stores Ltd. v. Mandate* was contained in predecessor regulations to the 2007 Regulations – European Communities (Misleading Advertising) Regulations 1988 (S.I. No. 134 of 1988), which were revoked by the 2007 Regulations. The regulation in question, Regulation 4, had features which are now reflected, if not entirely replicated, in s. 71 of the Act of 2007 and Regulation 5 of the 2007 Regulations.

The Court order provided for in Regulation 4 was an order prohibiting the publication, or further publication, of advertising the publication of which was misleading advertising. The application was to be made on notice and it could be made by any person, including the Director of Consumer Affairs and Fair Trade. Where the application was made by the Director following non-compliance with a request by the Director to discontinue or refrain from advertising, there was no requirement to prove actual loss or damage or recklessness or negligence on the part of the advertiser. The Court had a discretion to require publication of its decision in full or in part and to require publication of a corrective statement. In relation to the evidential burden, the Court had a discretion to order the advertiser to furnish evidence as to the accuracy of any factual claims made and to deem any factual claim to be inaccurate if the evidence demanded was not furnished or was deemed to be insufficient. It was provided that, in the exercise of its discretion, the Court should take into account all interests involved, and, in particular, the public interest.

The Supreme Court found that the provisions of the 1988 Regulations must be construed as providing that an order made by the High Court under Regulation 4(1) prohibiting the publication of misleading advertising is a final order. Delivering the decision of the Supreme Court, Blayney J. explained the basis of that decision (at p. 63) as follows (as set out in the unreported judgment):

"A number of considerations lead to this conclusion:

(1) There is nothing in the manner in which the order which may be made by the High Court under Regulation 4(1) is described which would be consistent with its being a temporary order only. It is described as an order: 'prohibiting the publication, or further publication, of advertising the publication of which is misleading advertising'.

(2) Under paragraph 4 of Regulation 4 the court may require publication of its decision in full and require publication of a corrective statement. This would be consistent only with a final decision having been made that the advertisement was misleading, a finding which would not be made on an interlocutory application.

(3) Paragraph 5 of Regulation 4 envisages an advertiser being required to furnish evidence of the accuracy of any factual claims made in any advertisement and gives the Court the right to deem any factual claim to be inaccurate if the evidence is not furnished or is deemed insufficient. There is a clear implication here that the Court, on the application for the order, must make a finding as to whether the advertising is or is not misleading. As already stated, such a finding would not be made on an application for an interlocutory injunction.

(4) Under paragraph 6 of Regulation 4, the Court, in deciding, in the exercise of its discretion, whether

to make an order prohibiting the publication of misleading advertising, is required to take account 'of all the interests involved and in particular the public interest'. This requirement would be inappropriate if all that the Court was considering was the right of an individual plaintiff to an interlocutory injunction, an issue which would affect solely the parties to the proceedings."

It seems to me that each and every one of those considerations applies in the case of an application under s. 71 of the Act of 2007 or under Regulation 5(1) of the 2007 Regulations. I discern no difference or distinction of substance between Regulation 4(1) of the 1988 Regulations, on the one hand, and the provisions of s. 71 and Regulation 5 of the current regulations, on the other hand, which would preclude a finding that such considerations apply to the current statutory and regulatory provisions.

Conclusion on interlocutory/final order issue

I have come to the conclusion that, following the decision of the Supreme Court in *Dunnes Stores Ltd. v. Mandate*, the Court's jurisdiction under s. 71 and under Regulation 5(1) is to make a final order and that the Court does not have jurisdiction to grant an interim or interlocutory order.

It is true, as counsel for the plaintiff submitted, that there are two regimes which the plaintiff may invoke and has invoked in seeking a remedy for its complaints: the procedure under the Act of 2007 and the procedure under the 2007 Regulations which transpose the Directive. However, even though, under the Directive, the State is obliged to make provision for an accelerated procedure for obtaining a remedy, the State is given the option of providing such a procedure for a remedy with either interim effect or with definitive effect. It seems to me that in reflecting in the 2007 Regulations the features of the 1988 Regulations which led the Supreme Court to conclude that the jurisdiction of the Court under the 1988 Regulations was to make a final order rather than an interlocutory order, the State, as it was entitled to do, has opted for a procedure with definitive effect. Therefore, in my view, it is not open to the Court, in reliance on the Directive, to grant interim or interlocutory relief on an application under Regulation 5.

The procedural issue

Order 84B of the Rules contains the procedure for seeking certain relief in the High Court where the relief is statutory in nature, for example, relief being sought by a relevant authority, which, broadly speaking, means a public body, seeking to prohibit or restrain any person from taking any step or doing any thing. While I am not satisfied that an application under s. 71 of the Act of 2007 or under Regulation 5 of the 2007 Regulations by an applicant other than the Agency comes strictly within the letter of the definition of "relevant application" in Order 84B, it certainly comes within its spirit. Moreover, rule 1(2)(b) provides that in the case of an application which is statute based, other than a "relevant application", the Court has a discretion to direct that Order 84B shall apply, where it determines that it is just and convenient to do so. It seems to me that to adopt the procedure under O. 84B, rather than the plenary procedure of the High Court, would be fairer and more convenient in the case of an application under s. 71 or under Regulation 5.

However, as was pointed out by counsel for the plaintiff in reliance on O. 124, r. 1 of the Rules, non-compliance with the Rules is not necessarily fatal and, even if this application should have been brought under O. 84B, the fact that it was initiated by plenary summons, in my view, is not necessarily fatal.

Whether a final order should be made

As I have already indicated, I consider that the defendant was justifiably aggrieved at being faced at the hearing of the action with an application for a final order when it was its understanding that what it was facing was an application for interlocutory relief in a plenary action. That was also the Court's understanding, when leave for short service was given on 11th December, 2009. I am of the view that it would be grossly unfair to the defendant to make a final order in the circumstances, even if it were possible to do so.

However, I am of the view that, given the level of conflict of fact disclosed on the affidavit evidence, it is not possible to reach a conclusion that the defendant has been in breach of the Act of 2007 or the 2007 Regulations, even taking account of the evidential provisions included in s. 71 of the Act of 2007 and Regulation 5 of the 2007 Regulations. The factual dispute in relation to the advertisements in respect of which the plaintiff complains, which I have outlined in some detail earlier, is compounded by the defendant's assertion of the plaintiff's involvement in similar advertising practices. Nineteen examples are given in the affidavits filed on behalf of the defendant. Although the assertions of the defendant are addressed in a subsequent affidavit by the plaintiff's deponent, in my view, it would be dangerous on the evidence before the Court, without more, to make a judgment on whether the defendant was in breach of the Act of 2007 or the 2007 Regulations in procuring the publication of the advertisements complained of. Moreover, the totality of the evidence before the Court suggests a degree of subtlety in retail pricing, marketing and advertising which, it seems to me it is difficult, if not impossible, to grasp on an application on affidavit evidence without the possibility of cross-examining witnesses.

For the foregoing reasons I am not prepared to accede to the plaintiff's application. However, this is not necessarily the end of the matter. I will hear further submissions in relation to the reconstitution of the proceedings so that they can continue in accordance with O. 84B, if the plaintiff so wishes.

Material non-disclosure

For completeness, I reject a submission made by the defendant that there was material non-disclosure on the ex parte application on the part of the plaintiff which would justify refusing the application. In this case, the ex parte application was merely for short service and it was always understood that the defendant would be given an opportunity to respond to the application.

