Neutral Citation Number [2006 IEHC 171]

THE HIGH COURT

[2006 No. 342 P]

BETWEEN

WHELAN FROZEN FOODS LIMITED

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 17th day of February 2006.

1. The plaintiff in these proceedings was incorporated some 25 years ago and then operated from rented premises in Cabra. For the duration of its period in operation the plaintiff has engaged in the business of supplying the defendant with a variety of stock. The arrangement entered into was that the defendant agreed to open an account on the basis that the plaintiff would buy the stock and sell it to the defendant at a mutually agreeable margin on credit terms. Until recently there have been agreed terms and margins with the defendant's buyer and these have been adhered to, although on occasion reviewed in a manner later described. The defendant is the only customer of the plaintiff. The advantage of the arrangements from the Defendants point of view is that it dealt with one rather than a multiplicity of suppliers with a substantial reduction in staff overheads and paperwork. The Plaintiff derived its profit from the margin between purchase price from suppliers and resale to the Defendant.

2. It is now necessary to refer in greater detail to the two elements of the arrangement between the parties.

Textile Products

3. The case advanced is that in or about May, 2003 the parties entered into a contract for the warehousing and distribution of textile products. The essential term of this agreement was, that the plaintiff would provide warehousing and distribution of a sizeable portion of the defendant's textile business and that, in consideration thereof, a rate of €1.45 per cubic foot would be paid to the plaintiff by the defendant. The relevant credit terms for the payment were to be two weeks after the week of delivery. It is asserted that there was an implied term of this contract, through common understanding between the parties and by reason of the previous dealings between them, that these rates would continue for an indefinite period subject to variation only on mutual agreement between the parties and terminable only on reasonable notice. It is submitted that a reasonable notice period to give the plaintiff, given that the defendant is its only customer, that it has 477 employees, and has invested upwards of €15m in its business, should be a period of twelve months.

Frozen and chilled foods

4. Turning to the second element of the arrangement, the plaintiffs say that in or about October, 2005 the parties entered a contract for the warehousing and distribution of all frozen and chilled foods. The essential term of this contract, was that the plaintiff would provide transportation and warehousing for a substantial proportion of the defendant's chilled and frozen foods. The consideration for this service was that a rate of €1.69 per case for frozen food and €1.12 per case for chilled foods would be paid by the defendant. The relevant credit terms were for payment within two weeks of the month end. Similar contentions are made as to this aspect of the agreement regarding duration, review and notice.

Further background

5. Although no longer in issue for these interlocutory proceedings, a director, Mr. Padraig Whelan Snr. has deposed on behalf of the plaintiff that, for the latter half of 2005, the defendant engaged in an effort either to put the plaintiff out of business, or sought as an illegitimate tool to drive down the plaintiff's rates by unilaterally breaking agreements and withholding substantial sums of money owing under the two agreements. At one stage he says the sums in question reached a total of €14.1 m. This matter is no longer part of the matrix of facts relevant in this application for an interlocutory injunction because, on 31st January last, the plaintiff accepts that it received cheques from the defendant totalling a sum of €14.1 m. in respect of monies withheld.

Variation of the agreements

6. It is the plaintiff's case that the defendant has sought to make a unilateral variation of the two contracts entered into between the plaintiff and defendant.

7. The issue crystallised on 18th November, 2005, when the plaintiff received an email from a Mr. Eoin McGettigan of the defendant, advising of reductions whereby the defendant proposed to implement, with effect from 1st November, 2005, reductions to the "textile rate" from €1.45 to €1.30; and to the overall Food Rate by some 7%, based on an average of a mix of the frozen and chilled rates. Such deductions, were sought to be backdated to 1st November, 2005. The plaintiff says that Mr. McGettigan advised that he intended "to deduct these new rates from the account rather than complicate the invoicing costing arrangements at this stage". After receiving this email the plaintiff and defendant continued to negotiate. Mr. Whelan Snr. says that he told the defendants representatives on a number of occasions that the rates which they were unilaterally imposing on the plaintiff were not sustainable and would eventually put the plaintiff out of business. He says that, despite their protests and despite an ongoing process of negotiations between the parties, the defendant proceeded to implement the above variations from in or about 20th December, 2005. It is submitted now that this constitutes a unilateral variation of the contract entered into with the plaintiff which variation, is thereby null and void.

8. The plaintiffs also say that the defendant has unlawfully withheld substantial sums due to the plaintiff pursuant to the two contracts aforesaid, and that the total sum deducted, as of 3rd February, 2006, is €656,777.34.

9. Additionally, there is a claim for incurred losses in the sum of approximately €1 m. as a result of instructions conveyed to the plaintiff by the defendant under a number of headings since the year 2000.

10. These claims include:

> (a) Inducing the plaintiff to enter into a sub-lease which it contends was commercially illegal and on foot of which it has incurred losses in the sum of €447,319.00;
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> (b) obtaining and providing extra warehousing on the instruction of the defendant which was not ultimately justified on the basis of the volumes which they were assured they would obtain, giving rise to a loss of €218,107.00; and
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> (c) a direction that the plaintiff pay a third party warehouse provider a 35% rate increase. As a result of what is

contended to be an "enforced arrangement" the plaintiff contends that it has lost the sum of €290,079.00 under this heading.

11. The plaintiff further complains that, between October, 2005 and January, 2006, the defendant has wrongfully interfered with the internal business affairs of the plaintiff by using "economic duress" as a negotiating tool to obtain information about the plaintiff's accounts in order to direct the plaintiff how to manage its business and how to account therefor. By reason of this conduct the defendant has wrongfully undermined the independence of the plaintiff. An instance of this conduct is alleged to have occurred on Monday, 16th January, 2006, when Mr. Frank Dunne, a substantial shareholder of the defendant, telephoned the plaintiff and said that he had spent the weekend looking at the plaintiff's forecasts and that he needed to take action on the basis that the plaintiff was too inefficient. Mr. Whelan says that Mr. Dunne said that it was not acceptable to have massive amounts of overtime and that this should be dealt with through shift work. As a result, Mr. Whelan contends that Mr. Dunne stated that he was going to "halve" the plaintiffs business and thus it would have to reduce its costs.

12. A number of other issues are canvassed in the course of Mr. Whelan's affidavit, some going back as far as 1992. While these issues (whether explained or unexplained) may form part of the background, I am satisfied that for the purposes of this application they form no part of the issues to be considered. Similar considerations arise in relation to an issue of undercharging which, it is alleged occurred in January, 2003.

Other alleged variations

13. The plaintiff says that the events of November 2005 were not the first time that unilateral action has been taken by the defendant. It is contended that the withholding of a cheque in the year 2003 lengthened the plaintiff's credit terms by one week.

14. It is also said that in March 2003 the defendant released a tender document to distribution companies in the areas of textile and grocery warehousing and distribution. The plaintiff replied to the tender with reduced rates as the plaintiff was conscious of various commercial commitments entered into relating to a warehouse. Mr. Whelan says that on 2nd May, 2003 a fax was sent to the plaintiff from the defendant reducing the textile rate by 15% and dramatically changing payment terms. This is stated to have been a unilateral decision and to have ignored the response made by his company to the tender. A number of other areas of similar complaint in the year 2003 are outlined.

15. By January, 2004 it appears, the plaintiff was the largest distributor of the defendant's textile distribution service and was making a significant profit. In January, of that year the plaintiff says that the defendant notified it that a new milk distribution margin payable was to be introduced. This was to be the second of two reductions made in the space of six months and represented when annualised, a contribution to loss of a substantial sum of money. It is contended that, because the plaintiff company did not receive the volumes which had been assured to it, it sustained losses.

Meetings and contacts

16. It is common case that a series of contacts and meetings on this issue of variation have taken place over the last year. It is unnecessary to outline in detail all those which took place between Mr. Whelan and his son Patrick Whelan Jnr. on behalf of the plaintiff, and Mr. Andrew Street and Mr. Eoin McGettigan and others representing the defendant. Suffice it to say that a number of such contacts took place between these particularly parties between October and November 2005 in relation to the profitability and margins of the plaintiff company. Telephone calls took place between Mr. Whelan and Mr. Noel Fox, a director of the defendant. From 11th October, 2005 to November of that year, a series of meetings took place. This culminated in Mr. McGettigan suggesting a number of actions to be taken by the plaintiff company to improve its financial position. The Defendants say that the negotiation process can be dated back to much earlier, in the same year, regarding a new basis for the trading relationship between the parties.

17. On 10th November, 2005 a meeting took place between Messrs. Whelan Jnr. and Snr. and Andrew Street and Eoin McGettigan. At that meeting Mr. Whelan Snr. said that the plaintiff was in a perilous position due to the effects of the withholding of credit and the imposition of reduced rates. He says that the new Food Rate arose from a tender document dating back to February, 2005. Mr. McGettigan disagrees and maintains that the new rates agreed during the course of the year for implementation on 1st November arose from the necessity to change the pricing methodology from margins to case rates. Mr. Whelan says that Mr. McGettigan asserted that the plaintiff's balance sheet was too strong and that it arose solely from the business generated by the defendant. The Defendant believed the plaintiff was generating excessive profits and that it defendant was therefore overpaying for the service. During the course of this meeting it is said Mr. McGettigan, on behalf of the defendant, stated that he felt that if there were difficulties, these were of the plaintiff's own making, and that the plaintiff had €15 m. worth of assets on its balance sheet and had previously made very substantial profits. Mr. Whelan says that he made the case that the plaintiff company was now close to trading recklessly. He did not accept that the company should borrow money in order to finance the situation. At the conclusion of the meeting, the plaintiff agreed to provide a substantial amount of financial information by Friday, 13th January, 2006 and requested that the defendant release the credit due to them as a goodwill gesture.

18. On 18th November last, the plaintiff company received a call, confirmed by email, from Mr. Eoin McGettigan advising of reductions which the defendant proposed to implement with effect from 1st November, and to reduce the textile rate in a manner which has been outlined earlier in the course of this judgment. During December, 2005 a further series of negotiations took place between the plaintiff company and the defendant. But no consensus was established.

19. It was on 16th January, 2006, that Mr. Whelan says that the conversation previously described between himself and Mr. Frank Dunne took place. In addition to the remarks made earlier, Mr. Whelan imputes to Mr. Dunne the view that "It was no wonder that the plaintiff was losing so much money and that he knew it would be bankrupt if he did not take action". Mr. Whelan says that he said that the new rates caused the losses, and that as far as he was concerned the plaintiff had one of the cheapest cost bases available. During the course of the conversation Mr. Whelan contends that Mr. Dunne stated that (a) the plaintiff was "too big a part of the defendant" for him not to take action; (b) that there were others "out there" who could do the job cheaper; (c) that he was going to tender out part of the plaintiff's business. No replying affidavit from Mr. Dunne has been filed, either on these issues or his intentions allegedly halve the volumes of tenders available to the plaintiff.

20. The plaintiff contends that the effect of the alterations will be to reduce an operating profit to an annual loss of approximately €1,250,000. In the circumstances it claims that the defendant is well aware that the plaintiff could not continue to trade in a position where its directors might be potentially in breach of the Companies Acts, 1963 to 2001.

21. At paragraph 81 of the Mr. Whelan's Snr. grounding affidavit, he says that if the contracts are varied, the consequences will be as follows:

(1) the plaintiff will be insolvent;

(2) 477 direct redundancies will arise from the closure of the company. It is deposed that approximately 300 of these employees are non-national and non-English speaking people who work as general operatives and drivers.

The Defendants evidence
22. On behalf of the defendant, affidavits have been sworn by a number, but not all, of the participants in the negotiations. Mr. Vincent Hutton, described as head of Food Finance, describes a highly fluid negotiation process wherein a series of quotations based on varying criteria and counter-quotations were exchanged from as far back as February, 2005. He describes one suggested alteration which arose during the course of negotiations, whereby the defendant would move to a "stock ownership" system, that is that the plaintiff would effectively act as a logistics conduit rather than, as now, purchasing the goods and thereafter selling them on to the defendant. Instead it was proposed that the Defendant itself would purchase the goods. The proposal for this "stock ownership" system was postponed on 28th September, 2005. However, it was subsequently proposed that the defendant would nonetheless apply the rates devised by analogy with those which had been envisaged for the stock ownership project had it proceeded, but strictly on an interim basis only. Mr. Hutton points out and emphasises the usage of the word 'interim' in an email of the 28th September, 2005 and states that by reason thereof, he does not consider that the plaintiff could have reasonably thought that he was purporting to enter into any long term contractual agreement regarding rates, binding on the defendant in the future. It is clear from the remainder of Mr. Hutton's affidavit that, in the defendant's contention, no final agreement was reached as to any new long term defined rate applicable to the plaintiff.

23. In an affidavit sworn on 16th February, 2006, Mr. Dick Reeves, Director of Food in the defendant, makes a number of points. First that the plaintiff has not sufficiently identified the terms of the agreement(s). Second, that the plaintiff has not indicated upon what basis it, (the defendant) is not entitled to review the agreements at this time. Third, that there is no contractual provision which allows the plaintiff to insist that Dunnes Stores must accept a particular level of rates indefinitely. A core feature of the relationship that has pertained between the parties, is that the rates payable to the plaintiff in respect of the services which it provides to Dunnes Stores are subject to review and, if appropriate, revision. Mr. Reeves points to a number of prior occasions, where without objection, Dunnes Stores have varied the contracts. He particularly refers to tenders which were issued by the defendant company without objection from the plaintiff. Fourth, he says the essence of the stance taken by the defendant in 2005 was that it sought to adopt a "stock ownership system" whereby it would acquire title to goods supplied directly, and pay the plaintiff for logistic services only. This would avoid what were contended to be the undesirable aspects of the margin system, that is that the profit element could be disproportionate to the cost of obtaining the goods from the supplier to the defendant and that the defendant itself had no real means of determining whether the margin was disproportionately tilted in favour of profit. Attempts to move the stock ownership project forward proved abortive and, while Dunnes Stores allowed the plaintiff to apply an average or "blended" rate of €1.26 per carton (comprising €1.69 for frozen food, €1.12 for chilled food and €1.05 for ambient goods) over and above the price of the goods, it was made clear in the email from Mr. Hutton to the plaintiff on 28th September, 2005 (to which reference has been made earlier) that this was an interim measure only with the rate being based by an analogy with what had been envisaged would apply if the stock ownership project had proceeded.

24. At a meeting in October 2005 with Mr. Whelan Snr. and his son Padraig Whelan Jnr., representatives of Dunnes Stores stated that the plaintiff was deriving an unmerited level of profit from its dealings with the defendants. The plaintiffs directors in turn had not offered any insight into the operation of the affairs of their company to suggest that matters were otherwise. On the contrary, such information as was to hand suggested to the defendant that there was overspending on directors' fees which could easily be brought down to sensible levels if the plaintiffs' management chose to do so.

The rate fixed on 20th December 2005
25. In those circumstances, on 20th December, 2005, the defendant reduced the amount which it would pay to the plaintiff to a blended rate of €1.17 for grocery and €1.30 per cu.ft. for textiles. These figures were drawn from calculations which were carried out on behalf of the defendant.

26. The defendant specifically contests the items of loss, some of them historical, which the plaintiff contends it has sustained. It is stated that they represent once-off costs incurred by the plaintiff in servicing the business of the defendant and from which no liability lies on the defendant.

27. While maintaining that the defendant was entitled to take an extra week of credit, Mr. Reeves states that this has been restored to the plaintiff by letter from the defendant's solicitors dated 30th January, 2006.

Adequacy of damages
28. It is now necessary to deal with one aspect of the case in a little more detail. That is the material which has been put before the court in relation to the issue of the adequacy of damages. On behalf of the defendant, Mr. Michael Cush S.C. submits that the evidence on this issue is unspecific, or at least remained so until affidavits (which the Defendants contest) were sworn by Mr. Des Peelo, accountant, retained on behalf of the plaintiff. The defendant retained Mr. Liam Dowdall Accountant of BDO Simpson Xavier to review such financial information as it had to hand. It is the defendant's case based on extrapolation from certain figures available to them that the "blended rate" of €1.17 per carton for groceries and €1.30 per cu. ft. for textiles would not leave the plaintiff with dangerously reduced cash flow or threaten the continuation of its business. Mr. Dowdall, says in evidence that the Plaintiff company was solvent at 31st January, 2006, having projected profits of €358,000 and trading cash flows of over €3.32 m. As at 31st January, 2006, the company's capital and reserves were in excess of €7 m. It is pointed out that the plaintiff company in 2005 made €1.7 m. gross profit and generated €4 m. in trading cash flows.

29. Mr. Dowdall identifies what he contends are a number of exceptional items included in the 2005 statutory accounts. These are, he states, one-off or excessive charges which distort the overall trading results of the plaintiff. These include sums allocated as exceptional provisions; pension top-up for the directors of the plaintiff; and what are contended to be excessive directors' salaries and fees. He also points to an insurance write-back relating to 2004. Taking these factors together, he calculates in total, these items a total sum of €1.498 m.

30. In the course of submissions, Mr. Cush S.C. has also identified headings of depreciation in the next management forecast of the plaintiff company in relation to plant and equipment, motor and administrative costs which together, he contends, come to €1.768 m. and which need not be applied in the manner the plaintiffs contend for the assessment of solvency.

31. Mr. Dowdall states that, having discussed the impact of the rate reduction with the defendant and based on his discussions with them, the amount resulting from a rate reduction based on 2005 volumes would be in the order of €2,145,633.00. His estimate, based on 2005 volumes, would be that the plaintiff company might expect a loss, (if no adjustments were made to costs/overheads) of

€334,000.00 and trading cash flows (after add-back depreciation) of €1,400,000.00.

32. On behalf of the plaintiff Mr. Des Peelo states that, while the turnover of the company in the year 2005 was €188,874,917.00, the pre-tax profits as a percentage of turnover amounts to 0.59% in that year and that, on an anticipated increased turnover in 2006, the pre-tax profits as percentage of turnover would amount to 0.55%. These figures are based on extracts from management accounts up to 31st December, 2005 and an estimate in respect of the month ended 31st January, 2006. Mr. Peelo states that the trading record of the company shows that the pre-tax profit margin has been well below 1% of turnover in the last three financial years. He states that any significant adverse change in the pre-tax profit margin or in the debtor/creditor relationship would quickly impact on the company's cash flows and thereby on its ability to continue trading. In particular, Mr. Peelo points to the company's borrowings of approximately €12.6 m. vis-à-vis the shareholder's funds of circa €7 m., a debt/equity ratio of approximately 180%. Mr. Peelo says that in his experience a ratio of this type indicates that the company is at, or close to, its borrowing capacity, having regard to the nature and circumstances of its business. Mr. Peelo says that the introduction of the "imposed rates" i.e. grocery at €1.17 and drapery at €1.30, compared to the previous rates of €1.26 and €1.45 respectively, would have resulted in the following changes in the trading profit and loss accounts as follows:

12 months ended 31st January, 2005:

Actual: €1,110,481.00

Revised: (€1,035,152.00)

12 months ended 31st January, 2006:

Actual: €1,105,125.00

Revised: (€1,048,122.00)

33. Mr. Paul Gallagher S.C., on behalf of the plaintiff, points to losses on the part of his client on an ongoing basis as of 3rd February, 2006 of €656,000 allegedly attributable to the price variations made by the defendants, to be seen in the context of the claim for €1 m. for earlier losses to which reference has been made.

34. On behalf of the defendant, Mr. Cush S.C., contends that the real issue which arises in this application is in relation to the adequacy of damages as a remedy, although he submits that there is no written agreement between the parties, that the terms alleged are uncertain and that there is no stipulation in relation to when reviews might take place. He also says that the rates which were agreed were part of a proposal to move on to a different agreement with regard to frozen products, although this was never actually implemented. However, he accepts, correctly, that the court will find that there is a fair issue to be tried in accordance with the accepted legal principles, as outlined in *Company Oil Ltd. v. Minister for Energy (No. 2)* [1983] I.R. 88.

35. However, as to the adequacy of damages as a remedy, Mr. Cush submits that the changes which have taken place are in the rate of payment only. Thus, he submits that the damages which might arise therefrom (if a breach of contract be established) can be calculated with exactitude. It is not contended by the plaintiffs that the defendant is not a good mark for damages. On any reading the agreement is determinable on what would be accepted by the plaintiff as being a reasonable period, i.e. a period between nine or twelve months. In particular, relying on the evidence to which reference has been made earlier, Mr. Cush says that, with proper financial management, the case which was made by the plaintiff regarding the real risk of insolvency is ill-founded.

36. On behalf of the plaintiff, Mr. Gallagher, S.C., submits that the test which must be applied on this issue is whether, on the evidence there is a real risk of financial collapse. The application for an interlocutory injunction, and the realities of the issues must be seen against a backdrop where there has been a trading relationship of some 25 years between the plaintiff and the defendant company. Thus, he contends, it is now "a do or die issue" so far as the plaintiff is concerned. The opinion of the plaintiff regarding the effect of these changes is supported by an independent accountant in consultation with the directors and that there are already quantifiable losses.

37. With regard to the balance of convenience, guidelines in *Campus Oil*, Mr. Gallagher submits that this issue was not referred to in the course of the defendant's arguments in any detail. He asks rhetorically how can the defendant be damnified if an injunction is granted at this stage, especially in the context of the withholding of sums? He further submits that the defendant has not dealt with the issue of the readjustment in the textile rates. If the rates were not agreed then the status quo ante should apply.

The law

38. If any proposed variation in an agreement makes substantial or fundamental changes to the contract, it is tantamount to a declaration by the proposing party that it does not intend to continue to perform the contract in the unvaried form. Therefore, the proposed variation may amount to anticipatory repudiatory breach of the contract or, if insisted upon, will amount to a repudiation of the contract. It therefore follows that the party choosing not to accept the proposed variation will be put to its election to accept the repudiation or to call expressly for the performance of the contract prior to variation in its unaltered form. Accepting the existence of the contract in this case, this is the position which the plaintiff has sought to advance.

39. Turning then to the authorities which relate to the general issues or at stake, the judgment of McCracken J. in the case of *Private Research Limited v. Paul Brosnan and Network Financial Services Limited*: [1996] I.L.R.M. at p. 32, is illustrative of the approach taken where assessment of damages presents difficulties. But it also illustrates the interplay of the three guidelines normally applicable and the manner and sequence in which the guidelines in Campus Oil may be applied; further that in the assessment of balance of convenience, the Court should strive to preserve the status quo, though that is by no means an immutable principle. I now will refer to a number of other authorities cited and thereafter deal with the principles to be adduced therefrom and applied herein on the evidence.

40. The issue as to adequacy of damages was considered in detail in *Curust Financial Services Limited v. LOEWE-LACK-WERK* [1994] 1 I.R.

41. In the course of that decision the Supreme Court (Finlay C.J.) held that *difficulty*, as distinct from complete impossibility, of assessment was not a ground for characterising the awarding of damages as an inadequate remedy. The plaintiffs' loss in that case, were they to be denied the relief sought, was exclusively a commercial loss in what had been a stable and well-established market. No insuperable difficulties of quantification arose with regard to the assessment of future damages in respect of any period after the

trial of the action whilst the plaintiffs were recovering their share of the market; it was reasonable to suppose that evidence could be adduced which would enable the trial judge to assess such future losses.

42. At p. 471 of his judgment, Finlay C.J. stated:

> "… it is necessary that I should reach a conclusion on the affidavit as to whether it has, as a matter of probability, been established at this stage for the purpose of the interlocutory injunction that damages would not be an adequate remedy by reason of the *real risk* (emphasis added) of the financial collapse of the Curust Companies. In my view, having regard to all the factors which I have outlined, there has not been established such a case as a matter of probability. No information is forthcoming about the general position of the companies with regard to their indebtedness or net asset situation. No attempt has been made to assess the probable result of competition between Curust and Sales Ltd. in relation to this market for rust primer except on averment on affidavit that Sales Ltd. is underselling Curust with regard to the cost of the rust primer being offered for sale. In these circumstances, where damages can be quantified, the loss is quite clearly a commercial loss, there is no doubt about the capacity of the defendants to pay any damages awarded against the and there is no element of new or expanding business which may make quantification particularly difficult as a matter of principle. I conclude that damages must be deemed to be an adequate remedy in this case …"

43. In the course of his judgment in the same case, O'Flaherty J., having held that the crucial matter was whether the plaintiff would or would not be deprived of access to the market, stated:

> "Were it not for that factor I would hold that the matter was so finely balanced as to require a further inquiry as to where the balance of convenience lay. I would not, except for that circumstance regard damages as an adequate remedy. Then I would look to the status quo ante which I would regard as comprising the longstanding relationship that existed between the parties, the equilibrium of which was affected not by any default by Curust in relation to the 1986 agreement (on which agreement Curust relies) but on alleged tardiness in making payments in relation to a subsidiary agreement or agreements…"

44. Additional factors are identified in the case of *Hart v. Kelly*, (High Court) the decision of Laffoy J. on 16th July, 1997. Having discussed the series of employment injunction cases, prior to her decision Laffoy J. stated:

> "It was submitted that the common thread which runs through all of those cases is that the plaintiff was totally dependent on his income as an employee of the defendant and would be destitute without such income pending the hearing of the action."

45. Having discussed the issue of the plaintiff's means that judge went on to state:

> "In my view the entitlement to the type of order granted in the *Fennelly* case is not limited to a situation in which the plaintiff can establish that he will face penury if such an order is not made. The rationale of the decision is that it is unjust to leave a person who alleges that his dismissal has been wrongful without his salary pending the trial of the action and merely with his prospect of an award of damages at the trial of the action. The prospect of the destitution of the plaintiff pending the trial of his action was certainly a factual consideration in the *Fennelly* case…"

46. Thus two additional issues arise clearly: the justice of the case and the financial position of the parties *inter se*.

47. It will then be recollected that in the course of the judgment in *American Cyanamid Company, Appellants and Ethicon Limited, Respondents* [1975], A.C. the House of Lords held that in all cases, including patent cases, the court must determine the matter on the balance of convenience, there being no rule that it could not do so unless first satisfied that, if the case went to trial on no other evidence than that available at the hearing of the application, the plaintiff would be entitled to a permanent injunction in the terms of the interlocutory injunction sought; where there was a doubt as to the parties' respective remedies and damages being adequate to compensate them for loss occasioned by any restraint imposed on them, it would prudent to preserve the status quo. In the course of his speech Lord Diplock stated:

> "The governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage. If on the other hand damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them there would be no reason upon this ground to refuse an interlocutory injunction."

48. He continued:

> "It is where there is a doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of balance of convenience arises. It would be unwise to attempt even to list all of the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial, is to postpone the date at which he is able to embark upon a course of action which he had not previously found it necessary to undertake: whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

49. In his judgment in the case of *Cayne v. Global Natural Resources* [1984] 1 All E.R. at p. 237, having dealt with citation quoted on

guidelines in Lord Diplock's speech in American Cyanamid, May L.J. stated at (page 237):

> "It is only thereafter, if damages after a trial are thought to be inadequate, that one is then enjoined to look at what is described as the 'balance of convenience', that is the phrase which, of course, is always used in this type of application. It is, if I may say so, a useful shorthand but in truth, and as Lord Diplock himself made clear in the *N.W.L.* case, the balance that one is seeking to make is more fundamental, more weighty than mere 'convenience'. I think it is quite clear from both cases that although the phrase may be substantially less elegant, the 'balance of the risk of doing an injustice' better describes the process involved..."

50. I have been also referred to the case of *Noel O'Murchu t/a Talknology, appellant and Eircell Limited, respondent*, a judgment of the Supreme Court delivered on 21st February, 2001. Speaking for the court, Geoghegan J. stated in the context of an injunction sought to compel the respondent until further order to continue supplying or permitting a supply of telephones to the appellant and to treat the appellant as an authorised agent for that purpose, as follows:

> "I move on to the question of whether damages would be an adequate remedy. The learned High Court judge clearly thought it was and I would have to agree with him. In every case in which there is a breach of an agency or distribution agreement the task of assessing damages will be difficult, this does not mean that it cannot be done. The respondent is a viable company and is financially in a position to meet any award in damages that may be made against it."

51. But it is clear there that the appellant's loss was essentially financial and quantifiable. A feature of that case was that much of the argument put forward on behalf of the appellant in the High Court was that the Christmas trade was absolutely vital and that without it he would go out of business. The plaintiff was still in business. But even if were to go out of business as a result of losing the agency, his losses could be assessed in money terms.

52. That judge continued:

> "There is a further reason why I think that damages are an adequate remedy. If there is an implied or oral agency agreement, that agreement would be terminable upon reasonable notice and I doubt very much that the appellant would be able successfully to argue that the length of that notice could be more than six months. Depending on the evidence of the trade it might be less. Any damages to be assessed therefore would be confined within a limited period. I am not, of course, expressing any view as to how damages are to be assessed in the event of a finding of infringement of the Competition Act as that is not before the court. But insofar as the appellant is complaining of breach of contract the damages would be limited in the manner which I have suggested. That should not make them too difficult to assess."

53. It is important, however, to have regard to the next paragraph of Geoghegan J.'s judgment because he added:

> "… But even if I had doubts as to whether damages were an adequate remedy I am satisfied that the balance of convenience favours refusing the injunction. First of all there is the well known principle that in general the courts will not grant an injunction which would involve ongoing supervision. A court, therefore, is very slow to grant injunctions in either service contracts or trading contracts because it is very difficult to assess at any given time thereafter as to whether such injunctions are being obeyed or not. It is also usually impractical and undesirable that two parties be compelled to trade with one another when one, for reasons which are perfectly rational does not want to carry on such trading. The appellant's bad debt situation and the unsatisfactory nature of his relationship with the respondent make it *prima facie* reasonable that the respondent would not want to continue trading with him and I doubt that it would be practicable for a court to force such continued trading."

54. One can therefore observe that the evidence on financial viability and quantification of loss was in both Curust and O'Murchu very different from that which arises here. Here there is even now an ongoing relationship between the parties which while imperfect does not, I am satisfied raise the spectre of the need for any supervision by a Court of its order on an ongoing basis pending trial.

55. But the distinctions between those two authorities and the instant case are far more fundamental. This is an issue which can be illustrated in conjunction with the further principles applicable.

56. First as a principle, therefore, in the balance of convenience it is clear that as a *general* rule a court should where possible strive to maintain the status quo. However, this is but one element in weighing the balance of convenience. Second, the court must always have regard to the fact that as illustrated in Curust the onus lies upon the plaintiff to establish as a matter of probability that damages will not be an adequate remedy. There should be evidence which establishes this proposition, both as to the general position of the company, its indebtedness and net asset situation and whether a real risk exists to solvency. In the instant case I consider there is such evidence, albeit disputed, and weight can be given thereto by reason of the fact that Mr. Peelo has had access to a far broader range of relevant information than Mr. Dowdall. It can by no means be criticised therefore as mere assertion. The balance is affected further because of the probable results of the acts of the defendant in the context of its effect upon the plaintiff. The plaintiff and his advisors say the company will become insolvent, and the jobs of many people will be put at risk. But here there is also the added and uncontroverted evidence as to the intentions of Mr. Frank Dunne, to halve the plaintiffs volumes at some point undefined.

57. The issue of the balance of convenience involves as an inquiry, whether damages would be an adequate remedy. On the basis of the plaintiffs evidence even when balanced against that of the defendant, the issue is as to a risk of insolvency as contrasted to the maintenance of the status quo which in this case *inter alia* involves the long trading relationship which existed between the parties. I accept that one factor which must be borne in mind is the nature of notice which might be necessary to terminate an agreement of this type. In this connection it would appear common case that such reasonable period would be either nine or twelve months. But this must be seen in the light of potential consequences to the parties if no order is made.

58. A further issue to be borne in mind is the financial standing of each of the parties. The plaintiff is solely and entirely dependent on the defendant for its business. The court should have regard to the effect of the absence of an injunction on the respective positions of the plaintiff and the undoubtedly financially secure defendant, and on the evidence on these points referred to, then look to the justice of the case.

59. Where there is doubt as to the adequacy of damages, then the court should look at the question of balance of convenience. It will be a matter for the court to determine the relative weight in establishing or deciding where the balance lies. Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo. One of the tests which the court must apply is "the balance of the risk of doing an injustice"

60. Having regard to these principles, it is common case that a fair issue has been established. If, as here, there must on the evidence be a real doubt as to the adequacy of damages, the question of balance of convenience arises. I do not think that this is a matter which is dealt with in detail in the defendant's affidavits at all. The evidence in the application points only one way, that is in favour of an injunction, even having regard to any point which might be made as to the duration of any notice period. The adequacy of damages as a remedy must been seen as predicated on the continued existence of the parties as going concerning to the trial of the full action. If there is credible evidence of a real risk to solvency as against mere reversion to status quo ante pending trial, the arguments of the defendant become unsustainable.

61. In essence, taking each and all of the evidential factors into account and weighing them in the balance of convenience, the detrimental effect on the plaintiff of the absence of an injunction, on balance, significantly outweighs the effect of the failure to grant such an injunction. The granting of an injunction will, on the other hand, so far as concerns the defendant merely maintain a position which is effectively the status quo ante, until the hearing. A further issue to which the court may also have regard is a degree of uncertainty as to when the hearing of the plenary action will take place, even having regard to the desire of both parties to achieve an early hearing. The court cannot ignore the difficulties which may arise in the preparation of discovery or the assignment of a date when the court calendar will be free.

62. Having regard to all the factors therefor as outlined, the court will grant an interlocutory injunction in the terms of paras. (a) and (b) of the notice of motion of 6th February, 2006.

63. There will be an interlocutory injunction restraining the defendant from proceeding with the unilateral variation of:

> (a) the contract entered into between the plaintiff and the defendant in or about October, 2005 for warehousing and distribution of all frozen and chilled foods together with
>
> (b) the contract entered into between the plaintiff and the defendant in or about May, 2003 for warehousing and distribution of all textile products.

64. On final matter requires determination, that is the precise status quo to be maintained pending hearing. With regard to the relief claimed at (a) above I consider that this should be the rate whether "agreed" or "interim" set for the month of October 2005 of:

> Total case costs Frozen rate: €1.69
>
> Chilled rate: €1.12

65. With regard to (b), the textile rate to be maintained is that of €1.45 per cubic foot and based on carton size, as pertained from 2nd May, 2003.

66. The credit terms in each instance will be payment within two weeks of months end.