THE HIGH COURT

[2017 No. 6131P]

BETWEEN:

UNILIFT LTD T/A SUIRWAY FARM MACHINERY

PLAINTIFF

-AND-

PÖETTINGER IRELAND LTD AND PÖETTINGER LANDTECHNIK GMBH

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 26th day of July, 2017.

1. In this case interlocutory injunctions are being sought by the plaintiff pending a full trial of the dispute between the parties. The plaintiff is a seller of machinery to farmers in Ireland under the name 'Suirway Farm Machinery'. The second named defendant, Pöettinger GmbH is an Austrian company which manufactures farm machinery and the first named defendant, Poettinger Ireland Limited, is its Irish subsidiary.

2. The dispute concerns the alleged wrongful termination by Poettinger Ireland of its alleged Franchise Agreement with the plaintiff on the 30th June, 2017, with immediate effect, following a meeting between the parties on the 22nd June, 2017, in which it was indicated that it was the intention of the defendants to end the trading relationship between the parties as the relationship had broken down.

3. The alleged Franchise Agreement dated 14th August, 2013, contains a clause requiring 3 years' notice for the termination of the agreement, but the defendants claim that the Franchise Agreement was signed without the authority of Poettinger Ireland, that the Franchise Agreement is not authentic and so is not legally binding.

4. The alleged Franchise Agreement was signed on behalf of the plaintiff by Mr. James Coleman, the managing director of that company and on behalf of Pöettinger Ireland by Mr. John Fitzgerald, the Area Sales Manager. It is relevant that Mr. Fitzgerald left Poettinger Ireland in September of 2016 to join the plaintiff company and the Court was advised that he remains an employee of the plaintiff.

5. The relief being sought is in essence a mandatory injunction since it requires a direction from this Court that the defendants continue to supply grassland and tillage farm machinery pursuant to the alleged Franchise Agreement.

6. In addition to this mandatory relief, prohibitory relief is also being sought. However, this is in essence the specific performance of the alleged Franchise Agreement, since it seeks an order restraining its termination and an order prohibiting the defendants from appointing any dealer in respect of counties Waterford, Tipperary and/or Kilkenny in light of the terms of the alleged Franchise Agreement granting the plaintiff exclusive rights in certain counties.

7. In these circumstances where the order being sought is in essence a mandatory order, or specific performance of an agreement, it is clear that the test to be applied, in determining whether this Court should grant an interlocutory injunction pending the full trial of an action, is that set out in the Supreme Court case of *Maha Lingham v. HSE*, (unreported, Supreme Court, 4th October, 2005), namely that the plaintiff must satisfy this Court that it has a strong case that is likely to succeed at the hearing of the action.

8. In considering whether the plaintiff has satisfied this test in the context of its reliance on the legally binding nature of the alleged Franchise Agreement, this Court has regard to the judgment of Clarke J. in *AIB v. Diamond* [2012] 3 IR 549 at para. 5 where he states in the context of interlocutory injunctions:-

> "The court can, of course, conclude that even on the facts asserted by the plaintiff, the case would be weak and might fail to reach the strong case test where that test applies. The court can also, for reasons such as clear internal inconsistency in the evidence presented, come to the view that the facts asserted as forming the basis of the issue to be tried lack any credibility. So far as the factual elements of the plaintiff's case is concerned the court should assess whether, on the basis of the asserted facts for which credible evidence is presented, the plaintiff has a strong arguable case."

9. Against this background, it is this Court's view that based on the facts asserted by the parties, the plaintiff's claim that there is a legally binding Franchise Agreement dated 14th August, 2013, between the parties is inconsistent and is not sufficiently credible for this Court to find that the plaintiff has a strong arguable case that such a binding agreement exists.

10. It is important to state that this Court is not deciding whether or not the alleged Franchise Agreement is authentic or binding on Poettinger Ireland, as claimed by the defendants, since this is the function of the court which hears this case.

11. This Court's function is limited to determining whether the plaintiff has established that it has a strong case that is likely to succeed that the Franchise Agreement is a legally binding agreement. This Court concludes that it has failed to do so. Since counsel for the plaintiff has accepted that the relief which the plaintiff seeks is fairly and squarely based on the legally binding nature of the Franchise Agreement, this Court therefore refuses to grant the interlocutory injunction sought.

12. This Court finds that the plaintiff's case, that the alleged Franchise Agreement is binding, is inconsistent and is not sufficiently strong or credible to merit an interlocutory injunction, for the following reasons:-

> i. Sworn evidence was provided Mr. Sven Niels, a director of Poettinger GmbH, that it is not the defendants' practice to enter into contracts with their trading partners, such as the plaintiff. Instead, it was their practice to permit their trading partners to make offers to purchase their products and under Clause 3 of their Standard Terms and Conditions of Sale, all orders of goods by a trading partner are deemed to be an offer to Poettinger Ireland to purchase the goods from it and no order is binding on that company until accepted in writing or otherwise by it.
>
> ii. Mr. Diarmuid Claridge, the general manager of Poettinger Ireland, gave sworn evidence that he had been in the

agricultural product business for 20 years and he had never seen a notice period of 3 years in supply contracts and that it went against all industry standards. Mr. Niels also gave sworn evidence that it would be an absurdly long period of notice to give the plaintiff in August 2013, at the start of its trading relationship with that company.

iii. Mr. James Coleman, the managing director of the plaintiff, mentioned to Mr. Claridge the existence of the alleged Franchise Agreement for the first time in March of 2017, while at the same time saying that he was uncertain as to the whereabouts of the agreement. It is relevant that the first time it was produced by the plaintiff to someone in the defendant companies, other than Mr. Fitzgerald, was after the plaintiff was notified of the termination of the relationship by the defendants in June of 2017.

iv. The alleged Franchise Agreement between the plaintiff and Poettinger Ireland is a curious document to say the least. Although it purports to govern the purchase of expensive machinery (which the Court was advised would be in excess of €1 million euro per annum), it is a one page document that misspells the name of the defendant company on the nine occasions in the document that it is listed and because it contains 10 paragraphs in total with almost half of them being meaningless since they contain the term 'TBA' or 'to be announced'.

v. The key clause from the plaintiff's perspective is the final clause which is not subject to a 'TBA' but contains a notice period of 3 years and thus is sufficiently clear to be legally binding. This is a considerable period of notice (particularly when one considers the six month notice period contained in the Non-Binding Franchise Agreement which is referred to below). In this regard, the defendants have provided sworn evidence that not only was it not their practice to enter into binding franchise agreements, but that this period of notice was absurdly long for a new relationship with a trading partner.

vi. The alleged Franchise Agreement is signed on behalf of the defendant by Mr. Sean Fitzgerald. At the date which is stated on the Agreement to be the date of the Agreement, Mr. Fitzgerald was an employee of Poettinger Ireland. However, by the date when the Agreement was first produced to the defendants, he was an employee of the plaintiff, having left Poettinger Ireland to join the plaintiff in September of 2016. Mr. Fitzgerald's solicitors wrote to the defendants' solicitors confirming that the alleged Agreement was executed by Mr. Fitzgerald as Area Sales Manager for Poettinger Ireland in August 2013. However, it is relevant to note that Mr. Fitzgerald has not sworn an affidavit regarding the circumstances and date of his execution of this Agreement, which is the centrepiece of his employer's claim for an injunction and the validity of which has been challenged on affidavit by the defendants.

vii. The first draft of this alleged Agreement was prepared by an employee of the plaintiff company and sent by that employee to Mr. Coleman, who sent it on the 8th August, 2013, to Mr. Fitzgerald, who was then of course an employee of the Poettinger Ireland. This draft differs from the signed Agreement because certain terms were left blank and while there is a reference to a notice period it is left blank. It is relevant to note that sworn evidence has been provided on behalf of the defendant that no version of the alleged Agreement was found on Poettinger Ireland's computer system. No further draft was sent by email between the date of this first draft and the date of the alleged execution of the Franchise Agreement on the 14th August, 2013. It is also relevant that the amended version of the Franchise Agreement that was signed was not transmitted by the plaintiff to the defendants before the 14th August, 2013

viii. Of particular significance is the fact that there is an email from Mr. Fitzgerald to Mr. Niels on the 9th August, 2013, that states, *inter alia*, that:-

> "Suirway requested a signed Agreement of the term and conditions of their appointment, Nothing out of the ordinary but something to protect both our interests, I can draft something with James for your approval if you wish?"

Mr. Niels replied by email dated 9th August, 2013 to Mr. Fitzgerald in which he stated:

> "one problem, I really do not like contracts!!!
>
> and really not before we are starting….exclusivity or written approvals is something you have to earn and we do not give it away to end up legal after three years!
>
> what you think? is it really necessary!?
>
> or it has to be really open, like a letter of intent!?"

There are no further emails or correspondence after this email between Mr. Fitzgerald and Mr Niels, who is patently against the idea of a binding Franchise Agreement being signed with Suirway. Despite this, the next thing that occurs is that only four days after this explicit email, the Franchise Agreement is signed by Mr. Fitzgerald, on behalf of Poettinger Ireland and by Mr. Coleman on behalf of the plaintiff.

ix. Of crucial significance is the fact that just two months later on the 30th October, 2013, there is an exchange of emails which is inconsistent with, and completely undermines, the claim that the Franchise Agreement was signed on the 14th August, 2013. This is because on the 30th October, 2013, Mr. Fitzgerald wrote to Mr. Coleman sending him a draft Franchise Agreement which is in similar terms to the alleged Franchise Agreement, save that it is headed a 'Non-Legally Binding Franchise Agreement'. This draft is therefore consistent with Mr. Niels's expressed desire in his email of 9th August, 2013, that there be no contractual relationship with Suirway. This draft also provides for a termination period of six months. By email of the same date, Mr. Coleman replies to Mr. Fitzgerald that:-

> "Not bad Sean, il print it in the morning and have a better look!"

Mr. Fitzgerald replies by email to Mr. Coleman on the same date:-

> "Ok we have to offer poettinger something as you will see. Make any amendments you think necessary before I sent it to Sven, most dealer have problems with DLL. The few that have stocking are complaining the limits are two low, its good they are arranging a meeting something might happen as rodger see to be behind it".

This Court is of the view that the existence of a binding Franchise Agreement between the plaintiff and Poettinger Ireland since 14th August, 2013, as alleged, is completely inconsistent with this exchange of emails and the exchange of the draft Non-Legally Binding Franchise Agreement.

13. For all of these reasons this Court does not believe that the plaintiff has satisfied this Court that it has a strong case that is likely to succeed at the hearing of the action that the alleged Franchise Agreement is legally binding, and so the relief is refused.

14. This Court would add that even if the plaintiff had satisfied the Court that it had a strong case, it is this Court's view that based on the Supreme Court decision in *Curust Financial Service Ltd & Anor v. Loewe-Lack-Werk* [1994] 1 IR 450, this is a case where damages are an adequate remedy for the plaintiff since the loss arising from the alleged wrongful termination of the Franchise Agreement would be easily quantifiable based on what the plaintiff would have earned over the 3 year period if 3 years' notice had been given, as is alleged by the plaintiff. Indeed, even if the plaintiff were to go out of business, as a result of the actions of the defendants, which is not alleged by the plaintiff to be a consequence of the termination of the alleged Franchise Agreement, the Supreme Court case of *Ó'Murchú t/a Talknology v. Eircell Ltd* [2001] IESC 15 is authority for the proposition that such a scenario is a commercial loss which is easily quantifiable and so damages would be an adequate remedy in such a scenario.