Neutral Citation Number: [2009] IEHC 181

THE HIGH COURT

2009 1435 P

BETWEEN

RELAX FOOD CORPORATION LIMITED

PLAINTIFF

AND

BROWN THOMAS & COMPANY LIMITED

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 3rd day of April, 2009.

The application

On this application the plaintiff seeks an interlocutory injunction restraining the defendant from terminating the agreement pursuant to which the plaintiff operates a restaurant in the defendant's Grafton Street in Dublin store other than in accordance with the terms of the agreement. The plaintiff also seeks to restrain the defendant from appointing any other person or entity to operate the restaurant in the defendant's Grafton Street store or to carry on the services or some of them provided by the plaintiff to the defendant pursuant to that agreement. The orders sought are intended to continue until the hearing of the action.

The defendant contests the plaintiff's entitlement to the order sought and contends that the Court should give negative answers to each of the three questions which arise on an application for an interlocutory injunction, namely:

(1) Is there a fair and bona fide issue to be tried between the parties?

(2) Are damages an adequate remedy?

(3) Does the balance of convenience lie with granting the injunction?

I will deal with each of the foregoing questions in turn, having considered the factual basis of the dispute between the parties.

Factual background

The plaintiff, in its own right and through its subsidiary, Angleford Services Limited (Angleford), has had a long contractual relationship with the defendant under which it has operated cafes and restaurants in the defendant's department stores, a relationship which, on the evidence, was satisfactory and, presumably, mutually beneficial, for almost nine years.

From March 2000 to May 2004 Angleford operated Browns Bar and Browns Café in the defendant's main store in Grafton Street in Dublin, the restaurant in the defendant's store in Cork and for most of that time the restaurant in the defendant's store in Limerick. For periods during that time, Angleford also operated the café in the defendant's premises in Grafton Street known as BT2. The contractual arrangement between Angleford and the defendant was governed by a written agreement, a so called "Shop in Shop Concession Agreement", which was dated 31st May, 2000 (the 2000 Agreement), by virtue of which the defendant agreed to grant and Angleford agreed to take "a concession to operate a shop within Brown Thomas' in the locations detailed in schedule II on the following terms and conditions". Of the terms which followed, Clause 1, which set out the period of the concession is the most significant for present purposes. Clause 1 provided as follows:

> "This agreement shall commence on 6th March, 2000 and shall continue thereafter until terminated by either party giving to the other not less than three months notice in writing to expire at any time but subject always to the rights of termination specified in Clause 12. In any event this agreement will expire at the end of five years commencing on the date hereof."

Clause 12 provided for termination by either party on giving written notice in the event of a serious breach by the other of the obligations imposed by the agreement not being rectified following fourteen days' notice, or the other going into liquidation, or the other ceasing or threatening to cease to carry on the business. Essentially, the consideration which the defendant received for the grant of the concession was a commission of 18% of the retail sales value (as defined) excluding VAT. Schedule II referred to Browns Bar and Browns Café in the Grafton Street premises and the Browns Cafes in the Cork and Limerick stores.

The plaintiff was incorporated on the 10th December, 2002, to operate a restaurant in the Habitat franchise, which was then located at St. Stephen's Green in Dublin. In May 2004, the plaintiff acquired Angleford. Subsequently, in a reorganisation of the companies, the plaintiff took over the staff which had been employed, and café unit concessions which up to then had been operated, by Angleford in the defendant's Grafton Street, Cork and Limerick stores.

Around the same time, May 2004, the concession which had been operated on the second floor of the Grafton Street premises was moved to the third floor, upgraded and re-branded as the "Kitchen Café". Although the 2000 Agreement was still in place and, as I understand the evidence, was perceived by both the plaintiff and the defendant as continuing for

the residue of the five year period to March, 2005, new terms were negotiated between the plaintiff and the defendant in relation to the concession in the Kitchen Café. The rate of commission payable in respect of the Kitchen Café concession was agreed at 23%, instead of 18%, the rate under the existing agreement, which remained in place in relation to the other concession units. The plaintiff commenced trading in the Kitchen Café on 3rd May, 2004 and the commission rate of 23% was in operation from 10th May, 2004.

The area of disagreement between the plaintiff and the defendant, which is the core issue of fact on this application, is what was agreed in relation to the duration of the concession in the Kitchen Café and the basis on which the concession might be terminated by the defendant.

It is the plaintiff's case that what was agreed was that the term was to be five years from the expiry of the 2000 Agreement. In other words, it is the plaintiff's position that the concession agreement in the Kitchen Café will not expire until the 5th March, 2010, and has just over eleven months to run. Further, it is the plaintiff's position that the concession in the Kitchen Café was to be terminable only for cause shown, which I understand to mean, in accordance with terms similar to Clause 12 of the 2000 Agreement. It was not to be terminable on three months' notice. That such variation was agreed to by the parties is deposed to in the grounding affidavit of Alan O'Reilly, a director of the plaintiff, who was involved in the negotiations in 2004, sworn on 16th February, 2009.

The defendant's position is that no such variation was agreed. The factual position as to the negotiations between the plaintiff and the defendant in 2004 is deposed to in an affidavit of Declan Delanty, who, at the time, was the Chief Financial Officer of the defendant, which was sworn on 3rd March, 2009. Mr. Delanty has averred that in 2004 there were discussions between the parties that it would be best to operate each of the cafes under a separate agreement. It is clear from his affidavit that it was intended to put in place a separate agreement, that is to say, an agreement in writing, in relation to the operation of the Kitchen Café by the plaintiff and it is clear that this was the understanding of Mr. O'Reilly and the plaintiff's personnel. The new agreement in writing was not put in place. No draft of the new agreement was ever submitted by the defendant's representatives to the plaintiff for whatever reason, Mr. Delanty suggesting that it was due to questions arising in relation to the alcohol licensing structure to be used. Mr. Delanty has averred that it was always the case that the new agreement for the Kitchen Café would be a five-year agreement, but on the same terms as the 2000 Agreement and that there is no doubt that it was to have a three month termination clause. The understanding between the plaintiff and himself was that the terms of the new agreement would be the same as the 2000 Agreement, save the commission rate. He has further averred that the plaintiff never sought to re-negotiate the notice period.

On the basis of the evidence, I am taking the defendant's position to be that what was agreed in relation to the Kitchen Café in 2004 was that the plaintiff would be entitled to a concession agreement from the expiry of the 2000 Agreement for a period of five years on the same terms as the 2000 Agreement, save the variation of the commission rate. It is necessary to emphasise that, because the defendant's position is unnecessarily clouded by the averments contained in an affidavit of Lucinda Roche, the defendant's in-house legal counsel, sworn on 4th March, 2009, which contains more comment, argument and advocacy than fact. Ms. Roche has averred that following the expiry of the 2000 Agreement in March 2005, the parties continued to operate in all respects as they had done previously, but on the basis of an implied agreement that the terms of the 2000 Agreement would continue to govern the relationship between the parties. The evidence of Mr. Delanty, who was involved in the negotiations in 2004, was that there was an express agreement for a further term of five years from 6th March, 2005.

The events which led to the termination or purported termination, depending on whether the defendant's or the plaintiff's version of what was agreed in 2004 is the true version, of the plaintiff's concession agreement in the Kitchen Café would appear to flow from a decision of the defendant to extend the restaurant business on the third floor of the Grafton Street store. The plaintiff was requested to submit a business proposal in relation to this proposed venture and did so. There were discussions between the representatives of the parties in the latter half of 2008. By that stage, the Kitchen Café concession was the only concession which the plaintiff held from the defendant, the contractual relationship between the plaintiff and the defendant in relation to the cafes in the Cork and Limerick stores having been terminated some time previously, and Browns Bar in the Grafton Street premises having been closed in February 2008.

The defendant's position is that the concession agreement was terminated by an e-mail dated 9th January, 2009 from Nigel Blow, the Chief Executive Officer of the defendant. In that e-mail, Mr. Blow informed the plaintiff that the defendant had decided "not to move forward" with the plaintiff's proposal for the third floor and had opted for an alternative proposal submitted by the person who currently operates the restaurant concession in the Cork store. It was stated that, given that the defendant was retaining the restaurant operation, it would be its duty and its intent to ensure that the plaintiff's current staff are looked after and the defendant was prepared to have "the relevant TUPE discussions" as soon as possible, meaning, as I understand it, discussions to give effect to the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003). Mr. Blow informed the plaintiff that the defendant planned to commence works on the third floor in February but would "of course honour 3 months notice", if the plaintiff wished to continue until early April 2009. Mr. Blow suggested that the parties discuss the matter the following Monday.

The plaintiff's response was contained in an e-mail of 13th January, 2009 to Mr. Blow. In that e-mail, it was stated that the 2000 Agreement had expired, that the three months notice provision was no longer operative and that the circumstances necessitated that a notice period of at least two years must be given. That suggestion in relation to notice is at variance with the position adopted by the plaintiff on this application and that may be of relevance at the trial of the action. For present purposes its significance is that it provoked further e-mails between Mr. Blow and the plaintiff, the intervention of the plaintiff's solicitors, Arthur McLean, who put forward the case that the plaintiff had a concession agreement for a five year period terminating in 2010, which might be contractually terminated for "just cause" only, and a response dated 30th January, 2009 from Ms. Roche on behalf of the defendant who contended that the defendant's "Termination Notice", which I understand to mean the polite statement in Mr. Blow's e-mail of 9th January 2009 that the plaintiff could continue until early April 2009, was valid but, for the avoidance of any doubt, a further notice of termination was attached. That notice stated that it was confirmation that the plaintiff was given three months' notice to terminate its concession on 9th January, 2009 and the agreement would, therefore, terminate on 9th April, 2009. It would seem that the confirmation was considered necessary because of some confusion which occurred that Mr. Blow's reference to a three month notice period in his e-mail of 9th January, 2009 might have been based on a concession agreement which was executed by the parties in 2002 at a time when it was proposed to grant a bakery concession in the Grafton Street store to the plaintiff. That proposed concession never came into operation. As I understand it, the defendant has eventually conceded that the agreement signed in 2002 is of no relevance to the issues on this application.

In any event, if the defendant's position that the plaintiff's concession is terminable on three months notice is correct, then the plaintiff has got three months notice, either from 9th January, 2009 or 30th January, 2009.

Fair issue to be tried?

The primary reliefs claimed by the plaintiff in the plenary summons, which was issued on 16th February, 2009, are declarations that the plaintiff's concession agreement in the Kitchen Café has not been validly terminated and continues to subsist and that the plaintiff has unlawfully sought to terminate that agreement by the e-mail of 9th January, 2009. The case made by the plaintiff on this interlocutory application is that the concession agreement subsists and will continue to subsist until 5th March, 2010.

As the foregoing outline of the factual situation illustrates, the issue between the parties as regards the duration and entitlement to terminate the plaintiff's concession agreement in the Kitchen Café is reduced to a single question of fact, namely, whether it was expressly agreed between the parties in 2004 that the agreement governing the plaintiff's concession in the Kitchen Café would be terminable by either party giving to the other not less than three months' notice in writing to expire at any time, as the defendant contends, or was not to be subject to such a provision, as the plaintiff contends. That is an issue of fact.

In my view, for the purposes of this application, the plaintiff has demonstrated that there is a fair issue to be tried at the trial of the action between the parties as to the terms on which the concession agreement in the Kitchen Café was terminable in January 2009.

In the plenary summons, the plaintiff also claims damages under various headings, including damages for breach of contract. The affidavits filed on this application address allegations by the plaintiff of past breaches of contract on the part of the defendant, for example, alleged failure to reimburse the plaintiff for the cost of capital expenditure. The issues to which the plaintiff's claim for damages give rise have no relevance to this application and are matters for the substantive action. Accordingly, I express no view on those issues.

Damages an adequate remedy?

The seminal authority on how the Court should address the issue as to whether damages would be an adequate remedy for a plaintiff, if the Court were to refuse an application for an interlocutory injunction and the plaintiff were to be successful at the trial of the action, is the decision of the Supreme Court in Curust Financial Services v. Loewe-Lack-Werk [1994] 1 I.R. 451. While the legal issues in that case were much more complex than the legal issues on this application, for the purpose of putting the decision of the Supreme Court in context, I think it is not an over-simplication to say that the plaintiff, Curust, was seeking an interlocutory injunction to prevent a rust primer paint being manufactured, distributed and sold in Ireland and the United Kingdom by the defendants in competition with the plaintiff, which had been in the same business since 1986, and was continuing in that business. In dealing with the question whether damages were an adequate remedy for the plaintiff in that case, Finlay C.J. addressed three issues (at p.468 et seq.).

First, he recorded that there had been no suggestion that, if Curust was to obtain a decree for damages arising out of the first defendant's breach of contract, the first defendant would not be in a position to pay the amount of damages. The position is the same in this case; there has been no suggestion that the defendant would not be a mark for any award of damages ultimately made in favour of the plaintiff.

Secondly, Finlay C.J. addressed the argument that there would be considerable difficulty in quantification of the loss likely to be sustained by Curust in the event of an injunction not being granted. On the basis that there would be a commercial loss arising from a diminution in trade, the assertion of Curust was that there was a real risk that damages assessed would not be adequate.

Finlay C.J. set out the general principles which apply in relation to determining whether damages are an adequate remedy in the following passage (at p.468):

> "The loss to be incurred by Curust, if it succeeds in the action, and no interlocutory injunction is granted to them, is clearly and exclusively a commercial loss, in what has been, apparently, a stable and well established market. In those circumstances, prima facie, it is a loss which would be capable of being assessed in damages, both under the heading of loss actually suffered up to the date when such damages would fall to be assessed and also under the heading of probable future losses. Difficulty, as distinct from complete impossibility, in the assessment of such damages, should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy."

As regards what was advanced as a potential problem in that case, assessment of damages in respect of any period after the granting of a permanent injunction to Curust while its share of the market was being recovered, Finlay C.J. was of the view that insuperable difficulties of quantification would not arise. The extent of the market to which Curust was accustomed before an interruption of its exclusive rights of sale and distribution was ascertainable, and the quantity sold by the competitor, from the time it entered the market until the conclusion of the action, would also be ascertainable, as would its value.

Putting the assertion of the plaintiff that, in this case, damages would not be an adequate remedy into the context of the plaintiff's claim as to its contractual entitlement, the loss which the plaintiff would incur would be in respect of the period commencing on the date the plaintiff vacates the Kitchen Café, pursuant to the notice of termination, and ending on 5th March, 2010, a period of approximately eleven months. I have no doubt that such loss would be readily quantifiable by reference to the plaintiff's trading and financial history and its trading profit, as shown in financial statements for the year ended February 2008 and February 2009, and, if appropriate, by reference to the trade of the new concessionaire up to 5th March, 2010. I can see no basis for concluding that there would be a difficulty in assessing the plaintiff's losses and there would certainly be no question of such assessment being a complete impossibility. The important factor in this regard is that the plaintiff does not assert any entitlement to the concession, or any breach on the part of the defendant in relation to its duration, which extends beyond 5th March, 2010.

Mr. O'Reilly, in his grounding affidavit, raised two specific issues in the context of his assertion that damages would not be an adequate remedy.

The first related to what would happen to the plaintiff's staff on the termination of the concession. That is a sensitive issue, because it involves third parties who are not involved in these proceedings. The evidence indicates that the employees of the plaintiff are represented by their trade union, Mandate, and that a firm of solicitors, Connolly Sullivan, is in correspondence with the defendant on their behalf. All that it is necessary to say on this point is that, if the employees were to be made redundant and if liability for 40% of the statutory redundancy payments, which would not be recoverable from the State, fell on the plaintiff, as the employer, the plaintiff would be entitled to recover that sum from the defendant by way of damages, if the plaintiff were successful in this substantive action.

The second point relates to the plaintiff's liability on foot of leases of catering equipment for which it will have no use after the determination of the concession. Again, that is something that would be compensatable by an award of damages, if the plaintiff succeeded.

Thirdly, Finlay C.J. dealt with an assertion on behalf of Curust, that, if it were to lose the substantial market it had in the product in question and continued to suffer the loss up to the determination of the action, it might not survive as a solvent, trading unit. On that point, Finlay C.J. stated (at p.471):

> ". . . it is necessary that I should reach a conclusion on the affidavit evidence 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 of financial collapse of the Curust companies."

Finlay C.J. found that the plaintiff had not established such a case as a matter of probability.

In the second last of the eleven affidavits filed on this application, which was sworn on 25th March, 2008, Caragh Beggy, a chartered accountant in the accountancy firm which acts as auditors to the plaintiff, has averred that the plaintiff's only source of income is the income from the Kitchen Café. It has monthly financial commitments payable to a number of financial institutions in respect of leased equipment and loans in the aggregate amount of almost €9,000 per month. Ms. Beggy has averred that, should the plaintiff's only source of income come to an end in April, it will be unable to pay its debts as they fall due and the directors of the plaintiff will have no alternative but to immediately call a creditors' meeting and put the plaintiff into liquidation.

Unlike other cases in which the risk of insolvency and liquidation has been taken into account in determining whether damages would be an adequate remedy, the plaintiff has no broad trading base which will be jeopardised if an injunction is not granted (as was the case in O'Sullivans Pharmacies and Beauticians (Sarsfield Street) Ltd. & Ors. v. Health Service Executive [2008] I.E.H.C. 106), and does not assert an ongoing trading relationship of indefinite duration (as was the case in Whelan Frozen Foods Ltd. v. Dunne Stores [2006] I.E.H.C. 171). Those cases are also distinguishable on the basis that what was in issue was the alleged unilateral variation of a term in an ongoing contractual relationship, not the termination of such relationship.

It is clear, on the evidence, that, currently, the plaintiff's sole trading vehicle is its concession in the Kitchen Café, which, on the plaintiff's case, will terminate eleven months hence. Therefore, in my view, while Ms. Beggy's affidavit does establish, as a matter of probability, that, if the injunction is not granted, a situation will exist shortly in which the directors will have to put the company into creditors' voluntary liquidation, if they can find no alternative solution, there is no evidence that they have considered any alternative solution. Even if the directors are constrained to seek to wind up the plaintiff, if the plaintiff has a good cause of action against the defendant, the liquidator will be obliged to pursue it. Therefore, in the unusual circumstances which pertain here, that the plaintiff has only one trading vehicle, and the life of that trading vehicle, on the plaintiff's own case, has only another eleven months, in my view, it is not the case that damages are not an adequate remedy, even though there is a probability that the plaintiff will be wound up.

On the basis of the application of the principles set out in the Curust case, in my view, it is impossible to conclude that damages would not be an adequate remedy for the plaintiff, if it transpires that the plaintiff is found to be correct in its contention as to the terms of the contractual relationship between the parties.

The plaintiff has given the usual undertaking as to damages in this case. The defendant has cast doubt on the value of the undertaking, given the current trading and financial state of the plaintiff. It does seem to be doubtful that, if an interlocutory injunction were granted and it subsequently transpired that it should not have been granted, the defendant would recover any loss found due to it on an inquiry as to damages from the plaintiff, because of the parlous financial state of the plaintiff as represented by the deponents on its behalf.

Balance of convenience?

As I have found that, in the event of the plaintiff being successful in the action, damages will be an adequate remedy, strictly speaking, it is not necessary to consider the issue whether the balance of convenience favours the grant or the refusal of an interlocutory injunction. However, I think it appropriate to make the following observations on that issue.

Counsel for the defendant relied on the decision of the Supreme Court in Ó Murchú v. Eircell Ltd. [2001] I.E.S.C. 15. In that case, the plaintiff was seeking an order compelling the defendant to continue supplying, or permitting the supply of, "Ready to Go" mobile phones to him and to treat him as an authorised agent for that purpose. In the Supreme Court, Geoghegan J., with whom the other members of the Court agreed, held that, while there was a serious issue to be tried, damages would be an adequate remedy for the plaintiff. Although it was not necessary to do so, he addressed the question of the balance of convenience and concluded that the balance of convenience favoured refusing the injunction for the following reasons:

> "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 impracticable 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."

In setting out his reasons for refusing an interlocutory injunction in Sheridan v.The Louis Fitzgerald Group Ltd. & Anor. [2006] I.E.H.C. 125, Clarke J., having quoted most of the passage from the Ó Murchú case, which I have quoted above, stated as follows:

> "On the evidence currently before me, the operations of the two businesses are very closely linked. It would appear that Fitzgerald, on the basis of the established trading practice, was entitled to make important decisions as to the use of the restaurant portion of the premises for, for example, special events. It seems to me that the grant of an injunction which would require the parties to 'live together' in the sense of making day to day business decisions as to how the premises as a whole should operate, would be fraught with the type of difficulties identified by Geoghegan J. in Ó Murchú. While it is true to state, as was pointed out by counsel for Mr. Sheridan, that no difficulties appear to have occurred in the past, it must be remembered that 'that was then and this is now'. The parties are now in significant dispute. The fact that they were able to operate an entirely appropriate modus operandi when business relations were good, does not mean that the continuance of those arrangements would not be fraught with difficulty now that the parties are in significant dispute. I would, therefore, have come to the view, on that ground also, that it would not have been appropriate to grant an interlocutory injunction."

In that case, the plaintiff was seeking an injunction which would enable him to continue to provide catering and restaurant services in a restaurant known as "The Quays Kitchen" in a public house known as "The Quays Bar" in the Temple Bar area of Dublin on the basis that there was an agreement by the defendant to grant him a lease for a term of five years. It would appear that the plaintiff, through a company, had been running the business from June 2005 until December 2005, when the company went into liquidation, and thereafter until 26th February, 2006, when the plaintiff was locked out. Therefore, the factual basis of the claim in that case differs significantly from this case, where the trading relationship of the parties had lasted for nine years.

It is instructive to resort to the genesis of the principles which are applied in our courts in determining whether an interlocutory injunction should be granted or refused – the principles set out in the speech of Lord Diplock in American Cyanamid v. Ethicon Limited [1975] A.C. 396, which were adopted by the Supreme Court in Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 89.

Having stated that it is where there is 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 and that the various matters which need to be taken into consideration in deciding where the balance lies, and the relative weight to be attached to them, will vary from case to case, Lord Diplock stated (at p. 408):

> "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 on a course of action which he has 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."

Obviously, if, on the evidence, it is clear that, for reasons based on facts which, if true, would justify the defendant not wanting to trade with the plaintiff, that is a factor which must be given particular weight in determining whether to grant an injunction. However, the Court must be cautious lest the asserted breakdown of the relationship is a situation contrived by the defendant.

The affidavits filed on this application are long and replete with conflicts of fact. If it were necessary to decide where the balance of convenience lies in this case, I would attach little weight to what I believe I am justified in calling the raking over of old coals – matters that go as far back as 2005 – which were not pursued by the defendant at the time. I would also attach little weight to what can only be described as the vituperative allegations made in some of the affidavits filed on behalf of the defendant against the plaintiff's personnel, given that the matters complained of were, apparently, only raised informally by Mr. Blow in September 2008 and there is no hint in Mr. Blow's e-mail of 9th January, 2009 of any dissatisfaction with the plaintiff's operation of the concession. However, I would attach weight to the fact that, because of the defendant's move to terminate the concession, which the Court may find in due course it was entitled to do, and what has subsequently transpired, it would be difficult for the parties to trade satisfactorily together on the third floor of the Grafton Street store. I would conclude that, given that the plaintiff's case is that its concession will, in any event, terminate in eleven months' time, the greater inconvenience would be incurred by the defendant if the injunction were granted. Therefore, I would conclude that the balance of convenience lies in favour of refusing the injunction.

Order

There will be an order dismissing the plaintiff's application.