Neutral Citation Number: [2008] IEHC 185

THE HIGH COURT

Record Number: 2008 No. 4365P

BETWEEN

WESUMAT (IRELAND) LIMITED

PLAINTIFF

AND

TOPAZ ENERGY LIMITED

DEFENDANT

Judgment of Mr Justice Michael Peart delivered on the 17th day of June 2008

1. This is an application for an interlocutory injunction pending the hearing of these proceedings which were commenced by way of Plenary Summons issued on the 29th May 2008.

2. In the General Endorsement on the Plenary Summons issued herein on the 29th May 2008, the plaintiff seeks three declarations as follows:

> 1. A declaration that the maintenance and service agreement entered into on or about the 12th of February 2007 between the plaintiff and the defendant ("the Agreement") has not been validly terminated and that same continues to subsist.
>
> 2. A declaration that the defendant is estopped from purporting to terminate the Agreement by its letter dated the 6th day of March 2008
>
> 3. A declaration that the defendant has wrongfully sought to terminate the Agreement.

3. In addition, certain injunctive reliefs are sought to restrain the termination of the Agreement, and the appointment of any other person or entity to carry on the services provided by the plaintiff under the Agreement.

4. More recently the defendant has been put on notice that the plaintiff seeks leave to amend the General Endorsement of Claim by the addition of the following claim, in the alternative, for rectification of the Agreement in question as follows:

> *"(g) In the alternative an Order rectifying clause 16 of the Agreement by deleting the first paragraph thereof and by including the following in lieu thereof:*
>
> > *'The Service Provider or Customer may terminate this contract upon giving 2 months notice to the other at the last known address for any non-performance of its obligations or non-payment under the contract and all monies due shall remain owing under the contract'."*

Background events

5. Since November 1999, the plaintiff has been in the business of selling car and truck washes to operators of retail petrol/diesel stations throughout Ireland, having been appointed as sole distributor of such products here by a German multi-national company, Washtec AG. ("Washtec") described by the plaintiff in its grounding affidavit as a world leader in the manufacture of such washers.

6. In addition to selling such products throughout this country, it appears that the purchaser will generally enter into a renewable contract with the plaintiff for the maintenance and repair of that product.

7. Relevant to this application is that the plaintiff avers that while the percentage of its business represented by car wash sales and that represented by its maintenance contracts differs from year to year, the former represents approximately 48% of its business, and 52% by the latter.

8. In 2005 the defendant company acquired the retail and commercial business of Shell in Ireland and Northern Ireland, and in November 2006 acquired the retail and commercial business of Statoil in Ireland, and currently operates 55 Shell service stations and 69 Statoil service stations throughout the country.

9. The plaintiff company had traded with Statoil since 1999, and on the 15th March 2004 entered into a two year maintenance contract with Statoil which came to an end in March 2006 ("the 2004 Agreement). It is averred that since that date the agreement with Statoil continued to operate on the same terms.

10. In July 2006, (and therefore before the acquisition by the defendant of the Statoil business here), discussions had taken place between the plaintiff and Statoil in relation to a new maintenance contract for the washes supplied by the plaintiff to Statoil service stations in this country. The plaintiff says that the person with whom they were negotiating in Statoil at this time was Mr Ken Kearney.

11. Ultimately by October 2006, Statoil decided that it would put the contract out for tender to the plaintiff and other operators, and by letter dated 3rd October 2006 the plaintiff was given the details and specification for such tender, including "*Proposed service agreement outlining service requirements for all equipment*". Tenders were required to be submitted by close of business on the 5th November 2006.

12. The plaintiff has averred that during the course of the negotiations with Mr Kearney on behalf of Statoil they became aware that the Statoil business had been taken over by the defendant company herein, who were already operating Shell stations. As it happens, Mr Kearney then became an employee of the defendant company following its takeover of Statoil, and it appears that the plaintiff company was anxious at that time to know if the defendant would continue these negotiations or would discontinue same. In fact they continued, and furthermore were extended to include negotiation in relation to washes at some thirteen Shell stations being run by the defendant company.

13. The plaintiff was successful in that tender, and according to the plaintiff an agreement ("the Topaz Agreement") was entered into with the defendant in February 2007, even though the earlier drafts of the agreement had recited the parties as being the plaintiff and Statoil. I refer later to the fact that as late as 27th April 2007 the draft agreement was still undergoing revision, and does not

appear to have been finalised and executed by that date.

14. The precise terms of that agreement which related to how and in what circumstances it could be terminated are in controversy now since the plaintiff was informed through an e-mail dated 20th June 2007 from its newly appointed procurement manager, Ms. Ita Murray, that she intended re-tendering all significant supply agreements, which included the maintenance agreement with the plaintiff company. Such tenders were sought only from multi-national companies, which therefore excluded the plaintiff company. However, Washtec AG, the company already referred to, which has appointed the plaintiff as its distributor of washes in this country, tendered on its own behalf. That tender was unsuccessful, and on the 26th November 2007 the plaintiff received a telephone call from Ms. Murray that Washtec had been unsuccessful and that she intended terminating the plaintiff's existing agreement as and from the 31st march 2008. The plaintiff company requested that she put that in writing, but it appears that through an oversight on her part, Ms. Murray failed to do so. However, on the 6th March 2008 a telefax massage was sent by *Topaz Energy Group Limited* (not Topaz Energy Limited, the defendant) giving three months' notice of termination. Nothing in particular turns on the name of the company from which this communication emanated, but in her affidavit Ms. Murray states that it was Topaz Energy Group Limited which acquired Irish Shell Limited in 2005 and Statoil (Ireland) in 2006.

15. At the heart of this case are differing views on the part of the plaintiff and the defendant as to the basis on which the Topaz Agreement could be terminated by the defendant. The plaintiff states that it could be terminated only if there was fault on the part of the plaintiff, whereas the defendant states that it could be terminated at will. Relevant to that issue is the fact that even after February 2007 when the plaintiff states it commenced working this Agreement ahead of any execution thereof, the draft went through several revisions. Of relevance to the plaintiff's argument is that Mr Ken Kearney, the person in Statoil with whom the plaintiff was negotiating from July 2006, has since left the employment of the defendant company, and he has sworn an affidavit on behalf of the plaintiff confirming that "*it was at all times the intention of the parties, and of me, this deponent, that the Agreement on behalf of Statoil and later the defendant, that the Agreement remain in existence for a period of three years subject only to either party terminating same on notice to the other, if the other party did not perform its obligations or as regards the defendant did not pay the sums due to the plaintiff*" (sic).

16. The version of the 2004 Agreement which the plaintiff has exhibited contained a Termination clause at para.16 thereof which provided that either party could terminate the agreement on giving two months' notice to the other party "*for any non-performance of its obligations or non-payment under the contract… Under certain circumstances either party may terminate the contract with less than 2 months' notice. These are set out below*" (my emphasis).

17. Beneath that clause are a number of particular circumstances where less than two months' notice was required to be given, and it states also that where that provision is being availed of for the purpose of giving less than two months notice of termination, notice must be given in writing stating the reason for terminating. In the plaintiff's grounding affidavit by Denis Bergin he states that the background to this particular clause is to be found in a number of e-mails between Mr Kearney (then of Statoil) and the plaintiff company where the plaintiff's side suggested a one month warning period before any notice of termination would be issued so that it would afford an opportunity to each party to try and iron out the particular difficulty. That apparently is the provenance of the non-performance/non-payment clause. However, it is difficulty to see how the wording which Mr Bergin states reflected this notion of a warning period in fact does so. But Ms. Ita Murray in her replying affidavit has exhibited what purports to be a copy of the Agreement actually executed by Statoil and the plaintiff company on 1st April 2004, and that document contains a Termination Clause at clause 16 which provides:

> "16.0 Termination
>
> *The Service Provider or Customer may terminate this contract prematurely. Where termination of the contract is sought, the following protocol applies;*
>
> 16.1 Letter of Warning
>
> *A letter of warning must be sent by the terminating party 4 weeks prior to termination notice. Letter should explicitly state issues and corrective actions sought. A letter of termination may or may not be sent at the end of this period pending actions from this warning period.*
>
> 16.2 Notice of termination
>
> *Termination of the contract must start with a notice given in writing 2 months prior to termination date to the other party at the last known address. All monies due shall remain owing under the contract."*

18. This phraseology would seem to accord precisely with the intention to be gleaned from the e-mails of February 2004, and would appear to be the basis of termination which was agreed between the parties at that time for the purpose of that 2004 Agreement.

19. The draft Agreement furnished to the plaintiff by Statoil's letter dated 3rd October 2006 for the purpose of the tender for the contract proposed a three year contract period, and, at para.16, provided that either party could terminate the contract upon giving written 3 months notice to the other party, and again contained a list of circumstances (slightly different from that contained in the version of the 2004 Agreement which was exhibited by Mr Bergin) where less than 3 months notice of termination could be given, and stating, as did that draft version of the 2004 Agreement to which I have just referred, that where this clause was being invoked for the purpose of giving less than 3 months notice, it must do so in writing and stating which of the listed reasons was being relied upon. Noticeably absent from this 2006 draft is any reference to termination being possible only "*for any non-performance of its obligations or non-payment under the contract*" as was the case under the draft 2004 Agreement exhibited by Mr Bergin, or to the terminology of what was included as clause 16 of the executed 2004 Agreement exhibited by Ms. Murray, as regards a one month letter of warning prior to service of notice of termination.

20. It is on the basis of this particular termination clause as contained in clause 16 of what became the February 2007 "Agreement" that the defendant company makes the case that it was entitled to terminate its Agreement with the plaintiff when it gave the plaintiff company 3 months notice of termination verbally in November 2007, but in writing in March 2008, and that it is clearly permitted to do so under this clause without cause upon giving three months' notice.

21. It would appear to me that the final wording of the Agreement to be executed by the parties following the meeting on the 12th February 2007 when Mr Bergin believes that he signed two copies of that Agreement, had not in fact been agreed by February 12th. The reason I say that is that Ms. Murray has exhibited copies of further drafts which show by virtue of the 'Track Changes' facility available on PCs nowadays that amendments were being made at least up to the 27th April 2007.

22. By February 2007 the parties were ready to sign the Agreement following the plaintiff's successful tender, and a meeting took place on the 12th February 2007 when, according to Mr Bergin, an Agreement ("the February 2007") was produced by the defendant's representative, Mr Kearney, for signature. This Agreement was in the same terms as the draft provided for tendering purposes to which I have just referred, except that the defendant and not Statoil is the Contracting Party with the plaintiff.

23. Mr Bergin states that he believes that he signed two copies of that document on that date, and that Mr Kearney stated that he would then forward these documents to his legal department, but that it might take some time for the document to be returned to the plaintiff company duly signed as the legal department was apparently very busy at that time. Be that as it may, it appears that after the plaintiff had executed this document some discussion took place as to the date on which the contract would commence. The defendant was anxious that it commence immediately, whereas the plaintiff preferred that it would not commence until the Agreement had been executed by the defendant. Eventually, according to Mr Bergin's affidavit, it was agreed that it would commence immediately but that the defendant would confirm this in writing. Accordingly, Mr Kearney sent an e-mail to the plaintiff on the 26th February 2007. This e-mail states as far as is relevant to this application:

> *"Contract came into operation on Mon 19th February.*
>
> *Actual document under review by Topaz legal department.*
>
> *On review it will be circulated for signing.*
>
> *Details of charges to apply and cut-in times for specific items as below."* (my emphasis)

24. The defendant refers to the two lines which I have emphasised in this paragraph and suggests that Mr Bergin may be incorrect when he states that he signed two copies of this document at the meeting which he says took place on the 12th February 2007. At any rate it is averred by Mr Bergin that while the termination clause in the February 2007 Agreement is as it is, he states that the reason the clause is worded as it is was to "provide a mechanism to terminate the contract in the event that one or other party had failed to comply with its obligations and where that failure had continued", and he refers to some e-mails which passed between Statoil and the plaintiff company in February 2004 when the 2004 Agreement was on the point of being signed which in his view supports this view.

25. He states also that in spite of the way that clause is worded in the February 2007 Agreement "it was always the intention of the parties to the agreement between the plaintiff and the defendant that the Topaz Agreement would continue for a three year period unless one party was obliged to terminate the agreement due to non-performance of the other's obligations". A relevant averment at this point by Mr Bergin in his affidavit is that he has been advised by Senior Counsel "*that it may be necessary to seek an amendment or rectification of the agreement which will be sought during the course of these proceedings*."

26. At any rate the plaintiff commenced operating what it believed to be the Agreement which had been reached by February 2007, even though as I have stated there appears to have been some revisions of the draft being undertaken in the weeks following that, albeit that none of these revisions interfered with or altered what was proposed in relation to termination arrangements. It would appear to me that no final Agreement was ever executed after February 2007. Ms. Murray has exhibited a copy of an internal e-mail from Mr Kearney dated 9th May 2007 to her in which there are a number of bulleted paragraphs but the last of which states:

> *"Agreement redrafted a number of times, approved by HSE, now with legal department for approval. Once legal has approved and yourself as purchasing, it can go back to supplier and signed off."*

27. As I have said already, in June 2007 Ms. Murray contacted Mr Bergin to tell him that it was the defendant's intention at that point to put this maintenance contract out to tender. She has exhibited an e-mail sent by her to Mr Bergin on the 20th June 2007 confirming this and stating that their plan was to appoint a single vendor to supply and maintain their entire network. She stated that she would anticipate the tender process taking between three and five months and that "*we very much appreciate your support in continuing to provide the same maintenance and support arrangements to Topaz as Washtec have done since February. We would expect to have the new comprehensive supply, maintenance, support arrangement in place towards the end of Q3 of this year."*

28. One could say, and the defendant does so, that from this point in June 2007 onwards, the plaintiff must have known that in the event that it was not awarded the new contract for maintenance which Ms. Murray had stated she was seeking tenders for, whatever contractual relations which the plaintiff was then working under would necessarily have to be terminated by the defendant. But on 26th November 2007, as I have already set forth, Ms. Murray in a telephone conversation with Mr Bergin told him that Washtec had been unsuccessful in the tender process and that the Agreement with the plaintiff was being terminated with effect from the end of March 2008. The successful tender was from a company referred to in these proceedings as 'Istobal'. She did not in fact follow that conversation up with a written notice of termination, and as I have stated already, that was done by faxed message dated 6th March 2008 effective from the 5th June 2008.

29. Nevertheless it appears to be the case from any evidence before me at this stage that there was no communication between the plaintiff and the defendant concerning the entitlement of the defendant to unilaterally terminate the Agreement being operated by the parties since February 2007 in the absence of fault on the part of the plaintiff until a letter was written by the plaintiff's solicitors dated 4th March 2008. This is in spite of the fact that there was for example an e-mail dated 4th December 2007 from Mr Bergin to another lady in the defendant company, namely Noelle McLaughlin, which referred to the fact that Ms. Murray had told him on the 29th November 2007 that the defendant would be terminating the "existing service arrangements".

30. It will be recalled that following the 26th November 2007 no written notice of termination was sent by the defendant until 6th March 2008.

31. Mr Bergin states in his affidavit that he was prompted to seek advice from the company's solicitors because he had received a report from one of the plaintiff's engineers that personnel from another company had attempted to repair some of the defendant's car washes which were under contract to the plaintiff. It was only after he sought advice from these solicitors that he instructed them to write to the defendant advising them of their contractual obligations to the plaintiff and requesting the defendant to confirm that it intended to strictly abide by and adhere to the agreement, and that if that was not confirmed proceedings would be instituted. This letter also referred to the fact that though promised by Ms. Murray, no written notice of termination had followed up her conversation with Mr Bergin at the end of November 2007.

32. Clearly it was that letter to the defendant which provoked the service of the written notice of termination sent on the 6th March 2008. Accompanying that notice was a longer letter of the same date from the defendant's legal department which referred to the

meeting they had with Mr Bergin on 29th November 2007 and that he was advised that the contract was terminating at the end of March 2008, and that he could be under no doubt about that, and in support of that contention this letter referred to the said e-mail from Mr Bergin to Ms. McLaughlin dated 4th December 2007. The portion of that e-mail relevant for present purposes is as follows:

> *"Noelle*
>
> *As you are aware Topaz has decided to move its supply and service requirements for Car Wash Equipment from Washtec Ireland to Istobal.*
>
> *As regards service I met Ita Murray (on Thursday 29th November 2007 last) and she indicated that Topaz would be terminating the existing service arrangements with Washtec Ireland on 31st March 2008.*
>
> *Ita Murray conformed that she would be writing formally to my company to confirm that decision.*
>
> *I told Ita Murray that my company would discharge our responsibilities in a professional manner and that we intended to leave on sufficiently good terms that Topaz would consider giving work to us again in the future…".*

33. Ms. Murray has exhibited a further e-mail dated 23rd January 2008 from Mr Bergin to Mr Frank Gleeson of Topaz which seeks to address the question of replacement of Air/Water and Vacuum units at the defendant's stations. The subject-matter is not relevant but the opening sentence of the e-mail is referred to by the defendant to support its contention that at all times the plaintiff accepted that the contract was terminating at the end of March 2008, and therefore that the plaintiff accepted that legally the defendant was entitled to so terminate it on three months' notice. That opening sentence reads:

> "*Before Washtec disappear from view in Topaz I want to revisit the replacement of your Air/water Units and Vacs.*"(my emphasis)

34. Mr Bergin thereafter in that e-mail put forward a proposal for dealing with these units in the future, and the defendant submits that this too is indicative of an acceptance on the plaintiff's part that the contract was terminating at the end of March 2008.

35. Mr Bergin on the other hand in his second affidavit denies that at the meeting which he had with Ms. Murray on 29th November 2008 she mentioned anything about a three month notice of termination, though he accepts that she stated that the contract would be terminating on the 31st March 2008.He also makes the point that if she had stated at that meeting that she was invoking a three month notice clause, the contract would have terminated on the 28th February 2008 and not at the end of March 2008.

36. In relation to the e-mails to which I have referred dated 4th December 2007 and 23rd January 2008, Mr Bergin says that these were written by him before he had taken any legal advice in relation to the termination of the Agreement, and also against a background where the defendant owed the plaintiff a very considerable sum of money under the Agreement (in excess of €700,000).

37. There are other matters dealt with in Mr Bergin's second affidavit, but it is unnecessary for the purpose of the present application to set them out in any further detail.

Fair Issue to be tried

38. Lyndon McCann SC for the plaintiff accepts that there are factual issues about which there is disagreement between the parties, but submits that those areas of dispute do not have to be decided at this stage of the proceedings for the purpose of the Court being satisfied that there is a fair issue to be tried. He points to the fact that not only has Mr Bergin stated in his grounding affidavit that at all times it was the intention of the parties in February 2007 that not only would the contract run for a period of three years but also that it could be terminated only for cause shown, but also Mr Kearney has stated this to be the case. Mr McCann submits that while the statement of Mr Bergin could possibly be seen as self-serving, there has been no evidence to even suggest that Mr Kearney, who is no longer working for the defendant company, left it in circumstances where he might be motivated against them now. He points also to the fact that there has been no affidavit filed by the defendant in which issue is taken with what has been stated by Mr Kearney in that regard. Accordingly, Mr McCann submits that the issue as to what were the terms agreed between the parties as to the circumstances and manner in which the February 2007 Agreement could be terminated by the defendant has been established on this application to have passed the threshold of a 'fair issue' in the sense of that phrase as appearing in *Campus Oil Limited v. Minister for Industry and Energy* [1983] IR 88. He submits also that in the event that the plaintiff is successful in relation to the terms agreed in relation to termination there is a fair issue also in relation to the claim for rectification of the February 2007 Agreement.

39. In relation to the e-mails sent by Mr Bergin on 4th December 2007 and 23rd January 2008, Mr McCann accepts that this may cause some difficulties for the plaintiff at the hearing of this case, but that it must be borne in mind that at the time these mails were sent Mr Bergin had not had the benefit of legal advice as to the plaintiff's rights in relation to the termination of the Agreement.

40. Rory Brady SC for the defendant submits to the contrary. He places much emphasis on the discretionary nature of the Court's power to grant an interlocutory injunction, and in that regard points to delay on the part of the plaintiff in pursuing its claim since June 2007 when Mr Bergin was first told by the defendant that the maintenance contract was being put out to tender. He points to delay even after 29th November 2007 when the plaintiff was told that it had been unsuccessful in the tender process and that its existing Agreement would terminate at the end of March 2008. He points also to the fact that even after the plaintiff's solicitors had written to the defendant on the 4th March 2008 and had received a reply from the defendant some days later, it was still not until the 29th May 2008 that the plaintiff instituted its proceedings and then by Notice of Motion dated 3rd June 2008 sought this interlocutory injunctive relief. Mr Brady characterises this delay as being acquiescence, and he submits that the e-mails of December 2007 and January 2008 clearly demonstrate that at that time the plaintiff was in no doubt about the entitlement of the defendant to terminate the Agreement on a no fault basis. He cannot accept that some allowance should be made for the fact that these e-mails were sent prior to Mr Bergin consulting with the plaintiff's solicitors, and submits that they clearly show the plaintiff's state of mind in relation to the entitlement of the defendant to terminate on three months' notice without cause shown/no fault basis. He points to the fact also that since June 2007 the plaintiff went along with the tendering process embarked upon by the defendant company, in the full knowledge that if Washtec AG was unsuccessful in that process then the existing Agreement would have to be terminated to enable the successful tenderer to commence its own Agreement with the defendant company. Mr Brady submits that there is no evidence whatsoever to indicate that the plaintiff regarded the events following June 2007 to be in any way contrary to its own existing entitlements under the February 2007 Agreement.

41. Mr Brady has referred also to the fact that it was the defendant which has exhibited the two e-mails which were sent by Mr Bergin to the defendant company on 4th December 2007 and 23rd January 2008, and not the plaintiff. He attaches some significance

to that from the point of view of the plaintiff's candour.

42. Mr Brady submits that there is no fair issue in this case, and that it is clear from the materials which have been exhibited that the plaintiff accepted from June 2007 onwards that the intention from that time to put the contract out to tender was not something that ran contrary to the defendant's contract with the plaintiff, and that the termination of that contract announced verbally on 29th November 2007 was similarly in accordance with the terms of the Agreement, and that the plaintiff can be seen as having at least accepted that this was the case, and that it was only at the beginning of March 2006 that it decided that it would adopt a different stance. He submits that there is no evidence adduced which supports that stance, given the terms of the executed 2004 Agreement which Ms. Murray has exhibited, and given the terms of clause 16 of what appears to be the February 2007 Agreement, albeit that this was not signed.

43. In relation to the claim for rectification, Mr Brady submits that there can be no possibility that a Court would order rectification of the February 2007 Agreement if it is accepted that the principles set forth in *Irish Life Assurance Company Limited v. Dublin Land Securities Limited* [1989] IR 253 are the appropriate principles which would guide the Court in deciding whether or not to order rectification. In fact Mr McCann takes no issue in relation to that case being the correct and binding statement of the law in that regard, and submits that if the evidence of Mr Kearney is accepted by the Court, and remains uncontroverted, then there is ample justification for the Court to order rectification of the February Agreement in order to reflect the common intention of the parties to that Agreement.

44. In relation to the plaintiff's delay, Mr McCann urges the Court to consider that period of apparent inactivity in the light of the fact that the defendant has pleaded no adverse prejudice arising from any such delay, other than by means of hearsay evidence as to what adverse consequences to Istobal, which Mr McCann characterises as amounting to at most some inconvenience, might flow from the granting of an interlocutory injunction on this application. Mr McCann also refers to the fact that Ms. Murray did not, as she said she would, follow up her conversation with Mr Bergin on the 29th November 2007 with a written notice of termination of the Agreement. He submits that this also must be taken into account when considering what consequences should flow against the plaintiff in relation to inaction up to March 2008. He refers also in that regard to the averment by Mr Bergin that from the time he consulted the company's solicitors in March 2008 he and his colleagues spent a long time trying to locate a copy of the draft Agreement which had accompanied the tender documents in October 2006, and that it was not until 29th May 2008 that he realised that the copy which he held was in fact that document, even thought it contained a different reference number.

Decision on '*fair issue to be tried*'

45. The plaintiff undoubtedly has hurdles to negotiate successfully if it is ultimately to be successful in these proceedings. Difficulties standing in the way of that success are for example the fact that especially at the end of November 2007, nobody on the plaintiff's side, at least on the information presently disclosed, reacted in any way consistent with the termination of the February 2007 constituting a breach of the plaintiff's understanding of what its agreement with the defendant was in relation to termination. While lawyers later on may have suggested another position was open on the documents as known, the actual state of mind of the plaintiff company as of certainly November 2007, if not earlier, will be a matter of relevance to explore. Combine that question with the existence of the two e-mails of 4th December 2007 and 23rd January 2008 and this issue becomes even more problematical for the plaintiff. Another factor which may cause some difficulty is that if the understanding of the parties was that the position was to continue in relation to termination as it had been up to the end of the 2004 Agreement, how is it that the termination provisions in that Agreement were not simply carried over into the document appended to the tendering application in October 2006 and which later became the Agreement that everybody operated from the 19th February 2007, and which was on the table, so to speak, on the 12th February 2007 at the meeting on that date, when Mr Bergin, at least, recalls signing two copies of that document. The termination clause in the 2004 Agreement, which contained the warning mechanism, and which he states was intended to be the basis for termination going forward, and as conformed by Mr Kearney, is what Mr Bergin must be found to consider as the clause which entitles the defendant to terminate the February 2007 Agreement only on the basis of a breach of obligations by the plaintiff, since that is the wording contained in the executed 2004 Agreement. These are some of the challenges which the plaintiff faces in these proceedings. They feed into the question of whether there will at the end of the day be necessary facts established to meet the requirements for rectification.

46. While Mr Brady has asked the Court to bar a remedy to the plaintiff on the basis of laches/acquiescence, I prefer not to reach any such conclusion on this application.

47. I feel however that these difficulties are the sort of difficulties which may be assisted for either or both parties by discovery of documents and by cross-examination of witnesses called to give evidence. At the present moment there are on this issue before this Court, just the affidavits of Mr Bergin and Mr Kearney for the plaintiff, and that of Ms. Murray for the defendant. One presumes that these deponents will be giving evidence when this case comes on for hearing. There may or may not be other witnesses who were party to discussions at relevant times when the full hearing of this case takes place. On the evidence thus far, I am of the view that a fair issue is raised by the plaintiff in spite of the difficulties ahead for the plaintiff which have been highlighted by the defendant, and which are plain for all to see. There is at least an arguable case made out that the Agreement operated by the parties from 19th February 2007 does not, for whatever reason, contain in the version of the Agreement being operated (and as yet in fact not executed) the provisions as to termination in Clause 16 which were agreed between the parties. The plaintiff has to discharge the onus of proof in relation to the case it puts forward, and I believe that it has, as I have stated, passed the threshold of putting forward at this stage a 'fair issue to be tried'.

Adequacy of damages

48. *The plaintiff sells car and truck washes to companies other than the defendant. Of that 52%* of revenues generated from maintenance contracts, the portion generated by contracts with the defendant represents about half thereof. In other words, it represents 26% of all the annual maintenance revenues. In monetary terms, the maintenance contracts with the defendant currently amounts to about €150,000.

49. Mr Bergin has stated that if the plaintiff is unsuccessful in these proceedings, and its maintenance contract with the defendant is terminated, he and his fellow directors will have no alternative but to put the plaintiff into liquidation. He is hopeful that the plaintiff company may be appointed by Esso to maintain and service about 30 washes at Esso stations, but that it would take about five years for this to occur and that even then it may not be sufficient to provide a sufficient income stream. He believes that damages would not be an adequate remedy for the plaintiff in the event that this interlocutory injunction is not granted, and the plaintiff company's auditor, Liam Farrell, has sworn an affidavit which supports that belief. In his second affidavit Mr Bergin has averred that if the February 2007 Agreement is not enforced and allowed to run its course he will be obliged to close the business with the loss of jobs for ten direct employees and contracts with eight subcontractors. He states that total annual revenue from all sources was €2.8 million and in the year 2007 was €3.2 million. Of the latter figure, €2.3 million was generated from the defendant company. He states that even though the plaintiff company has cash reserves of some €435,00 at the end of 2006, and could use these in order to

continue trading for a short time, this would be commercially foolish and could lead to an allegation that the company was "trading fraudulently". I take this to be a reference to perhaps "trading recklessly". Mr Farrell in his affidavit concludes that should the plaintiff's contract with the defendant company be terminated, the plaintiff will suffer annual losses in the region of €500,000, and that in such circumstances the company would have to give immediate consideration to ceasing to trade and it is his advice that the company would have to be wound up.

50. In submitting that damages would not be an adequate remedy for the plaintiff if an interlocutory injunction is not granted and the plaintiff was to be successful in these proceedings, Mr McCann has referred to the judgment of Finlay CJ in *Curust Financial Services Ltd v. Loewe-Lack-Werk* [1994] 1 IR. 450 at p.468 et seq. He accepts that the defendant company would be a mark for any award of damages, and he accepts that the losses are purely commercial losses, but nevertheless submits that in a situation where, as averred by both the plaintiff company and its auditor the likelihood is that the plaintiff company would have to cease trading altogether, it would be impossible, and not simply be difficult to quantify, and that damages could not therefore be an adequate remedy. Mr McCann refers to the fact that the defendant has not sought to dispute on affidavit that the likelihood is that the plaintiff company will go out of business, though Mr Brady has emphasised that the portion of revenues generated by the maintenance of the defendant's washes is only about 26% of total revenues. Mr McCann has also referred to the fact that it has not been shown by the defendants that any losses which it may suffer of an injunction is granted cannot be compensated for under the plaintiff's undertaking as to damages, particularly given the cash reserves referred to.

51. Mr Brady submits that it has not been shown as a matter of probability that the plaintiff company would be insolvent if this contract is terminated. But he submits also that even if that were to be the consequence of an interlocutory injunction being refused on this application, the plaintiff's losses are already quantified by the plaintiff's own auditor, namely about €500,000 per annum, and that the defendant company is clearly a mark for such damages if necessary. He submits also that the plaintiff has not made any reference in its affidavits to the possibility that the plaintiff company could obtain appropriate banking facilities to cover any loss of revenue in the short-term while these proceedings are concluded. He submits also that it is relevant that the Agreement in question was in any event for a fixed three year period only, and that the plaintiff's losses which have already been established by the plaintiff's auditor, are readily ascertained purely commercial losses readily capable of being compensated for by an award of damages.

52. In my view, the question to be decided as a matter of probability is not whether or not the plaintiff company may have to be wound up if an interlocutory injunction is not granted, but rather whether, if that is to occur, it has been established that damages would not be an adequate remedy. I am of the view that since the losses are clearly quantifiable, and are purely commercial in nature, and the defendant is a mark for those damages, an award of damages is an adequate remedy, even if, as forecast by Mr Farrell and the plaintiff company itself, a winding up of the company is inevitable. This conclusion is consistent with the judgment of Finlay CJ. in *Curust* where at page 471- 472 of the judgment where he stated:

> *"… 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 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……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 them 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…"*

53. I further note that in the present case both parties have indicated that the case can be made ready very quickly for hearing, and this Court has indicated that an early date can be given to the case before the end of the present term. In that regard I refer to the fact that in *Curust* a similar situation was envisaged, and that was a factor which was taken into account. While I have reached my conclusions on the present application on the basis that damages are an adequate remedy for the plaintiff, I would, if I had been required to consider the balance of convenience between the parties, taken account of, inter alia, the possibility of an early hearing, and have reached the conclusion that the balance of convenience favoured refusing interlocutory relief. Another matter which Mr Brady adverted to is that the relationship between the parties is a commercial one where the plaintiff's employees have to attend upon the defendants' premises, and that in circumstances where the relationship has broken down, it would be inappropriate to force the defendant to continue in those relations pending the determination of the proceedings. I do not have to reach a conclusion on that facet of the balance of convenience, in view of my other conclusions, but it could be said perhaps that in view of the nature of the particular commercial relationship this factor may not have been determinative.

54. For the reasons appearing, I refuse the relief sought in the plaintiff's Notice of Motion.