Neutral Citation [2012] IEHC 557

THE HIGH COURT

[2012 No. 9498 P.]

BETWEEN

B.P.I. TELECOM LIMITED

PLAINTIFF

AND

NOKIA (IRELAND) LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Cooke delivered the 20th day of December 2012

1. In this action commenced by plenary summons on the 21st September, 2012, the plaintiff claims general damages for breach of a distribution agreement made between the plaintiff and the defendant on the 61h August, 2002, together with damages for breach of a collateral agreement alleged to have been made between the same parties in April 2011. Under that distribution agreement a commercial relationship had existed between the plaintiff and the defendant since 2002 under which the plaintiff was the non exclusive distributor of telecommunications devices (mainly mobile phone hand sets,) manufactured by the defendant. The commercial relationship was a substantial one with a turnover in purchases by the plaintiff from the defendant amounting to several million euros per annum. The plaintiff alleges that between the commencement of the relationship and the year 2010, the total value of the purchased goods was in excess of €451 million.

2. The motion now before the Court is an application by the defendant for summary judgment upon its counterclaim in the sum of €2,498,291.13 claimed to be due and owing by the plaintiff to the defendant as the outstanding balance on the trading account between them up the point when the relationship broke down and the plaintiff ceased to place orders and the defendant ceased to make deliveries.

3. The background to the litigation can be briefly described as follows. As indicated, the commercial relationship between the defendant and the plaintiff was based upon what appears to have been a standard form distribution agreement for the defendant's products containing many provisions typical of a distribution agreement between a major manufacturer of such products and its distributors. The agreement was signed on behalf of the plaintiff (then called Brightpoint (Ireland) Limited,) on 10th July, 2002, and later accepted on the part of the defendant on 6th August, 2002.

4. It is not disputed that in or about the beginning of the year 2010, the defendant complained to the plaintiff about balances outstanding upon its account in excess of the permissable credit limits and began to press for their reduction. This led to the account being "put on hold" on at least two occasions that is it say, that the defendant refused to make further deliveries or accept further orders until the outstanding credit balance was reduced to within an acceptable limit.

5. Because this is a motion for summary judgment upon the counterclaim for a liquidated sum, it is neither necessary nor appropriate for the Court to express any view on the issues of credibility of evidence or proof of fact which have been raised in the course of the arguments before the Court in relation to the substantive issues which will eventually be tried both on the claim and the counterclaim. It is sufficient for present purposes to record that during the course of meetings, correspondence and email exchanges throughout 2010 and 2011 complaints were made on the part of the plaintiff about the prices at which products were being offered to it by the defendant. In particular it was complained that the plaintiffs ability to reduce the outstanding balances upon its account was being thwarted by the prices at which the defendant's products were coming on to the Irish market from competing sources including, in particular, the prices at which the defendant was supplying other non-exclusive distributors of its products in the Irish market. In that regard the plaintiff proposes to rely upon specific information as to the prices upon which particular products were agreed by the defendant to be supplied to its main competitor and rival distributor Fonua Limited.

6. The plaintiffs claim in this action asserts that the defendant was in breach of contract in selling products to the co-distributor Fonuna Limited at unit prices which were considerably lower than the cost at which the same units were being sold to the plaintiff. This is based upon the proposition that the defendant was contractually obliged either (a) under the terms of the distribution agreement; or (b) by virtue of an implied term in that agreement; or (c) by virtue of a collateral agreement alleged to have been made date in April 2011, to accept orders from the plaintiff for products at prices which were no less favourable than those which the defendant was offering or making available to the rival distributors within the market.

7. Following further demands for substantial reductions in the outstanding balance on the account, on the 22nd July, 2011, the plaintiffs Barry Higginbotham sent the defendant's Gareth Holton a "Settlement Schedule" which set out a series of weekly payments to be made between the 15th July and 30th September, 2011, which would have the effect of reducing the balance of €2,848,109 outstanding at the end of June 2011, to the sum of €1,873,109 by the latter date. This involved two payments of €100,000 each in the week of the 15th July; two payments of€50,000 in the following fortnight and nine further payments of €75,000 each in the weeks to the 30th September, 2011. It is not in dispute that the only amount paid between the 22nd July and the 30th September 2011, was the sum of €150,000.

8. On the 21st September, 2011, the defendant's solicitors, Messrs McCann Fitzgerald wrote to the plaintiff demanding payment of the balance outstanding on the account in the sum of €2,498,291.13. By letter of the7tih October, 2011, the plaintiffs solicitors Messrs Arthur Cox, replied denying that the amount in question was due and asserting that it was not in any event an accurate reflection of the correct state of the account. In particular, it claimed that the figure in question failed to take into account certain credit notes which ought to have been posted to the account. Having set out the details claimed in that regard, the letter stated:-

> "Based on the above, our client estimates that the sum of €770,924 plus VAT at 21% (equalising €932,818) is owed to it by Nokia Ireland and as a result the amount claimed by Nokia Ireland is incorrect and Nokia Ireland's claim cannot exceed €1,565,473."

9. In addition, the letter asserted that the plaintiff had a sustainable counterclaim against the defendant for anti-competitive conduct which had caused loss to the plaintiff. More particularly it alleged an abuse of dominant position on the part of the defendant contrary to s. 5(2)(c) of the Competition Act 2002.

10. Extensive correspondence and some meetings then took place during the latter half of 2011 and the period up to September 2012. In particular, on the 3rd November, 2011, Arthur Cox wrote denying that the plaintiff had admitted that a definitive agreed amount was due and owing to the defendant. The letter said:-

> "The payment of one particular retrospective credit (in the amount of €770,924 plus VAT at 21%) ("H2 2010 credit") has been a key issue between our respective clients for a particular time. As this is an important issue of BPI it was raised by it at practically every appropriate opportunity with Nokia Ireland. In particular you might ask Alan O'Hara if he recollects a meeting on the 18th May, 2010, at Nokia Ireland offices, where Mr. O'Hara assured BPI that H2 2010 credit would be paid?"

11. The letter elsewhere said:-

> "BPI admits it owes Nokia Ireland a debt. However, for the avoidance of doubt, it has not admitted the amount of the debt as you state. One of the reasons it has not made any payments to Nokia Ireland since August 2010, is because Nokia Ireland has refused to post the H2 2010 credit which is, without question, due and owing to BPI."

12. Ultimately, by letter of the 11th September, 2012, McCann Fitzgerald wrote to Arthur Cox demanding payment of the sum of€1,565,473.09. This figure was arrived at by leaving aside, as it were, the disputed "retrospective credit" referred to above of €770,924 plus VAT (total including VAT of€932,818.04). The letter warned that High Court proceedings would issue if that sum was not paid within fourteen days.

13. This was responded to on the 21st September, 2012, by Arthur Cox denying that the claimed sum or any sum was owing to Nokia. The letter then broached for the first time a new claim to the effect that Nokia "clearly and deliberately breached the Nokia 'standard distribution agreement' dated the 8th August, 2002, by knowingly selling stock to a competitor of BPI at a significantly lower price than sold to our client". The letter further stated that:-

> "Our client entered into a collateral agreement with your client to clear the amount showing due on the trading account it held with your client at that time. It was agreed as part of that agreement that your client would ensure that our client would, from that point onwards, be allowed to avail of the most advantageous Nokia prices, in particular those offered to other Nokia distributors in Ireland. In fact your client breached this collateral agreement and continued to supply our client's competitors at significantly lower price making it effectively impossible for our client to trade profitably in Nokia products (its main business)."

The letter attached a copy of the High Court summons in the present action which had been issued that day.

14. It is in those circumstances, accordingly, that the case is now before the Court and the pleadings have been closed. Subject to such directions as may be required by way of case management and, no doubt, subject to the inevitable applications for discovery of documents, the case should shortly be ready to have a date fixed for hearing.

15. In the action as it stands at the close of pleadings, the plaintiffs claim is for general damages for breach of contract. The case as pleaded relies both on specific provisions of the distribution agreement and notably on Clause 9, relating to prices and purchase orders; and on a series of further terms which are claimed to be implied in the contract between the parties. In particular, it is pleaded that there was an implied term to the effect that the defendant would not offer to sell or sell phones to any of the other distributors at prices which were below those offered to the plaintiff or on terms which were commercially more beneficial to another distributor. It is pleaded that in 2010 and 2011, the defendant was found to be selling phones to one particular competing distributor at prices alleged to be considerably lower than those at which the same units were being sold to the plaintiff. As a result of this alleged breach, it is claimed that the plaintiff sustained losses. Insofar as those losses have been quantified they are based upon the "expected profit" on specific quantities of various products and the actual loss or reduced product said to have been sustained. The total loss claimed is given as €3,920,611.

16. In its defence, the defendant too, relies upon particular terms of the distribution agreement and especially those relating to pricing, payments, limitation of liability and the exclusion of deductions by way of set-off. The implied terms asserted by the plaintiff are denied, as is the making of any second or collateral agreement. The defendant also denies that it sold phones to the plaintiffs competitors at lower prices in the manner alleged, but also pleads that if it did so, there was no breach of contract. The defendant further pleads that by virtue of Clause 20 of the distribution agreement the plaintiffs claim for loss of profits cannot be maintained. The defendant then counterclaims for the sum of €2,498,291.13, being the total amount claimed to be due and owing to the defendant for the goods supplied to the plaintiff and in respect of which it is asserted that the plaintiff has no *bona fide* defence. It is that counterclaim which is the subject of the present application for judgment.

17. The Court has had opened to it many of the leading cases on the test to be applied when determining an application for summary judgment. They include particularly the following:-

> *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75
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> *Aer Rianta v. Ryanair Limited* [2001] 4 I.R. 607
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> *Moohan v. S. & R. Motors (Donegal) Limited* [2008] 3 I.R. 650
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> *Irish Life Assurance pic v. Quinn* [2009] I.E.H.C. 153 and *Westpark Investments Limited and Another v. Leisureworld Limited and Another* [2012] I.E.H.C. 343 (Unreported).
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> *GE Capital Woodchester Ltd. and Anor. v. Aktiv Kapital Asset Investment Ltd & Anor* [2009] IEHC 512

(Because these cases involve applications for summary judgment both by plaintiffs against defendants and as in the present case, by defendants on foot of counterclaims against plaintiffs, the Court will refer for the moment to the party applying for judgment as the "applicant" and the party seeking to resist summary judgment as the "respondent".)

18. In assessing the case put forward by a respondent to an application for summary judgment it is clear that there are two primary considerations each of which requires the application of a distinct test or of different criteria. It is first relevant for the Court to consider whether the respondent claims that it has a direct defence to the claim as made or, as it is referred to in some of the authorities, "a defence as such". The second situation is that which arises when the respondent relies upon a cross claim which sounds in general damages and which it claims it would be entitled to set off against the applicant's liquidated debt. There, as Clarke J. said in the Moohan case, "slightly different considerations may apply".

19. In the present case the plaintiff as respondent to the motion seeks to rely on both of these means of resistance. It says that it has a "defence as such" to at least part of the claim for the liquidated sum. It says that it will first seek to prove at the hearing that the claimed amount does not represent the correct balance outstanding upon the account because it omits two particular sums in respect of which it is entitled to credit.

20. It is not in dispute, however, that even if the plaintiff succeeds in proving both parts of that entitlement, there would remain a substantial balance outstanding in favour of the defendant. It accordingly seeks secondly to resist summary judgment in respect of the remainder of the claim upon the basis that it will establish its claim for damages for breach of contract and will be entitled to recover an amount in excess of that balance which will be set off against it and thus extinguish any liability.

The two sums claimed to be missing from the balance on the account are represented by two credits to which the plaintiff claims it had an agreed entitlement. These are the credit in the sum of €800,000 said to have been agreed for the third quarter of 2010 as a retrospective credit for that quarter similar to the credits that had been given in the two preceding quarters in the same amounts. The second credit note is claimed to be one in the amount of €500,000 said to have been agreed by Mr. Alan O'Hara in May 2011.

21. Insofar as this dispute as to the correct balance due upon the account is put forward as a defence to the claim, the test in law which the plaintiff must meet in order to resist summary judgment, at least in respect of the disputed amount, is clear. The law was stated in the judgment of Murphy J. in the Supreme Court in the *First National Commercial Bank* case in these terms:

> "For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the *bona fides* of the defendant or to doubt whether the defendant has a genuine cause of action (see *Irish Dunlop Co. Ltd. v. Ralph* (1958) 95 I.L.T.R. 70).
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> In my view the test to be applied is that laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in *National Westminster Bank Plc v. Daniel* [1993] 1 W.L.R. 1453. The principle laid down in the *Banque de Paris* case is summarised in the headnote thereto in the following terms:-
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> "The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or *bona fide* defence.'

In the *National Westminster Bank* case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-

> "I think it right to ask, using the words of Ackner L.J. in the *Banque de Paris* case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or *bona fide* defence?' The test posed by Lloyd L.J. in the Standard *Chartered Bank* case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?' amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"

22. That statement of the law was reaffirmed by the Supreme Court in its judgments in *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 and has been followed in subsequent judgments of the High Court including for example, the judgment of Clarke J. of 19th November 2009 in the *GE Capital* case. The essential approach to be taken to the issue can therefore be summarised as follows. A respondent's hurdle in resisting summary judgment is a low one and the jurisdiction to grant summary judgment is one which must be used with great care. The Court must decide whether the defence set out in the affidavits together with the documents exhibited is credible or, in other words, whether there is a fair or reasonable probability of the defendant having a real or *bona fide* defence. A fair and reasonable probability of the defendant having a real or *bona fide* defence is not the same thing as a defence which would probably succeed or even a defence whose success is not improbable. The fundamental questions to be posed on an application for summary judgment are: is it very clear that the defendant has no case? Is there either no issue to be tried or only issues which were simple and easily determined? Do the defendants' affidavits fail to disclose even an arguable defence?

23. This does not mean however that the Court is precluded from examining the basis upon which the defence is put forward: it is not obliged to accept a respondent's mere assertion that there is a bona fide and arguable defence. Where the asserted defence is based upon disputed facts deposed to on affidavit by the respondent, leave to defend will be granted if it is apparent that the issues raised are plausible and require to be defined by pleadings and resolved by a trial on oral evidence. Where on the other hand, the proposed defence relies only upon questions of law or on the interpretation of documents, a determination of the issues in the summary procedure may be appropriate if the Court is satisfied that it will not involve any inequitable curtailment of the time required for full argument and adequately prepared consideration. In her judgment in *Danske Bank v. Durkan New Homes* [2010] IESC 2010 Denham J. (as she then was,) pointed out that while the court is entitled to resolve issues of law on the hearing of a summary judgment application, it is not obliged to do so. As Murphy J. had pointed out in the passage from *Bank of Ireland v. Educational Building Society* [1999] 1 IR 220,cited by Denham J. it is appropriate to remit the application to plenary hearing to determine an issue which is primarily one of law where a defendant has identified issues of fact which require to be explored before the issue of law can be properly dealt with. It does not follow however that a plenary hearing in the sense of a full trial on oral evidence following an exchange of pleadings and the inevitable discovery of documents is the only alternative and necessary result of a determination that the respondent to the motion has raised an arguable defence.

24. If the issue of law or of interpretation of documents is adequately defined by the affidavits and is capable of being determined without recourse to witness testimony, there is no reason why, in the view of the Court, such issues cannot be determined fairly within the summary procedure (with or without directions for discovery or inspection as appropriate,) by adjourning the motion for exchange of submissions only followed by a hearing which gives the issue full and considered attention.

25. Such an approach would seem consistent with economy in the administration of justice and with avoiding of unnecessary costs being incurred by all parties. It might also be added that the fact that the respondent's hurdle may be low does not relieve the Court

of an obligation to ensure that the summary procedure is not misused. If caution is to be exercised before shutting a respondent out of an arguable defence, it must also be exercised to avoid injustice to an applicant by entertaining contrived or opportunistic defences or cross-claims which are designed to gain the time and the possible bargaining leverage which remittal to a plenary hearing might be thought to afford.

26. In applying that approach to the case made by the plaintiff in this motion, the Court is satisfied that the low hurdle is met at least as concerns the reliance placed on the entitlement to the first of the two credits mentioned above. The claim made here is that the plaintiff received a €800,000 "sell out support" in the first quarter of 2010 and again in the second quarter of that year for the sale of E Series devices in and agreement made with Mr. O'Hara in January 2010. It is claimed that this agreement required the defendant to continue the same sell out support figure for the third quarter. On this issue of fact as to the making of that agreement there is complete disagreement between the two sides. For the defendant, Mr. Holton swears: "Such credit was never agreed at any time by the parties and it is noteworthy that in the extensive contemporaneous, email traffic between the parties, including notes of meetings by BPI, there is no record of such an agreement". Mr. Higginbotham on behalf of the plaintiff says that Mr. Holtan's stance in this regard "is utterly and fundamentally incorrect". Mr. Napier in his affidavit maintains that:

> "The plaintiff had ordered the relevant amount of product with regard to the E Series devices on the basis that it would receive the same support as given in both previous quarters. On the 18th May, 2010, at the defendant's office in Dublin, Mr. O'Hara assured Barry Higginbotham ... that he would secure the agreed credits for Q3 and Q4 of2010. Without question, the plaintiff would not have taken in the Q3 product for the E Series devices if it had known that the agreed sell out support of €800,000 would no be forthcoming (as this would mean the price had increased substantially above what was agreed)."

While the plaintiff's assertions may well be open to criticism in due course by reference to the delay in asserting the entitlement to the credit note and the absence of any mention of it in the "Settlement Schedule" (see paragraph 7 above,) it is nevertheless clear that this dispute requires to be resolved by remittal to plenary hearing. If the evidence given at a trial confirms the claims made by Mr. Higginbotham and Mr. Napier in the affidavits and is not displaced by contrary testimony from the representatives of Nokia such as Mr. O'Hara who are claimed to have made those agreements, it cannot now be said that the partial defence is not credible or that the defendant clearly has no case at least in respect of the alleged agreement on this "sell-out support".

27. The second credit claimed relates to an agreement said to have been made on the 2ih April, 2011, with Mr. O'Hara according to which the plaintiff was to receive an additional €500,000 "sell out support" for the first quarter of 2011. The defendant does not appear to dispute that such a possibility was discussed but it is pointed out that the agreement was reflected in an email of the 5th May, 2011, sent by Mr. O'Hara to Mr. Napier which was in the following terms:-

> "As per previous conversations this week between Nokia and BPI can you please confirm by return email acceptance of the following terms regarding overdue balances due to Nokia. BPI commit to clear outstanding balance on account by close of business 31st May. Nokia will provide sell out support of €500k to assist you with this by posting a credit note on the 31st May. Regarding Q1 sell out support of €250k. Originally Nokia and BPI agreed a target date of the 31st March to have account overdue at zero. This was then extended to the 8th April. This targeted payment date was not achieved therefore Nokia are not in a position to release the credit note of €250k today. However, subject to getting account balance to €750k by the 31st May, Nokia will raise two credit notes. One for €500k mentioned above and we will also post the €250k credit note re. Q1."

28. It is not disputed that this condition as to the reduction of the account by the 31st May 2011 was never met. Accordingly, insofar a Mr. O'Hara can be taken as having made an offer of sell out support in the amount in question, the condition upon which he made it was never met. It is also noteworthy that although Arthur Cox responded to the demand for payment made by McCann Fitzgerald in a letter of 21 September 2011 in a lengthy and detailed letter of 7th October 2011 which made the claim in respect of the H2 2010 credit and set out the allegations of abuse of dominance, no mention was made of an entitlement to the second credit based on an alleged agreement on 27 April 2011. It is also clear that in April 2011 the account had again been "put on hold" and no further orders were being accepted from the plaintiff. No deliveries had apparently been made since the first half of the month. Mr O'Hara's offer was clearly conditional on the account being reduced to €750,000 by 31st May and this did not happen. The plaintiff may well complain that it was unable to effect the reduction because of the defendant's refusal to give it "fair and equal terms" (see the letter of 3rd November 2011,) but that is something that goes to the proposed cross-claim and not something that creates a right to the credit in question. It is not, in the view of the Court, therefore credible that the plaintiff can maintain a partial defence by reference to this alleged agreement.

29. It follows accordingly that so far as concerns a direct defence as such, the Court is satisfied that the plaintiff has made out a reasonable probability of a partial defence based upon an arguable entitlement to a reduction in the account balance in the amount of the H2 2010 credit namely the sum of €751,000 plus VAT at 21%, a total amount of €908,710. Leave to defend to that extent will therefore be allowed.

30. If there were no more to the present case than a dispute as to the entitlement to credit for those two amounts, the defendant would be in a strong position to insist upon entering summary judgment for the remaining balance. The second basis upon which the plaintiff seeks to resist summary judgment, however, is that of its cross claim for general damages for breach of the distribution agreement (with the alleged implied term,) or of the alleged collateral agreement.

31. Following the approach to the assessment of the claim to a *bona fide* defence, in the *Aer Rianta* case, Clarke J. in *Moohan v. S. and R. Motors* [2008] 3 I.R. 650 at 655 pointed out that:-

> "Where the nature of the defence put forward amounts to a form of cross claim slightly different considerations may apply. In those circumstances the court has a wider discretion. Where the defendant does not establish a *bono fide* defence to the claim as such, but maintains that he has a cross claim against the plaintiff, then the first question which needs to be determined is as to whether that cross claim would give rise to a defence in equity to the proceedings. It is clear from the judgments in *Prendergast v. Biddle* (Unreported, Supreme Court, 31st July 1957) that the test as to whether a cross claim gives rise to a defence in equity depends on whether the cross claim stems from the same set of facts (such as the same contract) as gives rise to the primary claim. If it does, then an equitable set off is available so that the debt arising on the claim will be disallowed to the extent that the cross claim may be made out."

32. In the judgment of the Court, it is clear that the present claim and counterclaim do satisfy this requirement. The counterclaim is for a sum of money due and owing for particular goods sold and delivered to the plaintiff. Those transactions were carried out by the parties under the distribution agreement. The plaintiffs cross claim is for damages for breach of the distribution agreement and

alternatively for breach of an alleged collateral agreement said to have been made between the same parties in dealings that took place in respect of products ordered and delivered under that agreement. The necessary nexus between claim and counter or cross claim clearly exists.

33. The issue does not, however, end there. As Clarke J. observed in his judgment in the *Moohan* case,:-

> "... a court in determining whether a set off in equity may be available, so as to provide a defence to the claim itself, also has to have regard to the fact that the set off is equitable in nature and, it follows, that a defendant seeking to assert such a set off must himself do equity".

34. In other words, where the cross claim is not an independent claim, but one arising out of the same facts so that an equitable set off will be available if the cross claim succeeds, the Court is not bound to refrain from entering summary judgment but has a discretion. The basis upon which that discretion may be exercised was described by Kingsmill Moore J. in his judgment in *Prendergast v. Biddle* and followed by Clarke in the *Moohan* case:-

> "It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties. If, for instance, the defendant could show that the plaintiff was in embarrassed circumstances it might be considered a reason why the plaintiff should not be allowed to get judgment, or execute judgment on his claim until after the counterclaim had been heard, for the plaintiff having received payment might use the money to pay his debts or otherwise dissipate it so that judgment on the counterclaim would be fruitless. I mention only some of the factors which a judge before whom the application comes may have to take into consideration in the exercise of this discretion."

35. In the present case, the defendant relies on a number of factors in urging the Court to exercise that discretion against the plaintiff. In particular, strong emphasis is placed upon question marks which are said to arise over the current financial position of the plaintiff. The defendant has exhibited abridged accounts of the plaintiff for the year ended the 31st December, 2010, being the last available published accounts of the company. It is pointed out that these accounts show the company having made a very substantial loss in the year in question and while they appear to indicate the existence of substantial shareholder funds, a closer examination of the relationship between the company and its shareholders and of the inter-company debts, raises serious questions as to the financial viability of the plaintiff. It is emphasised that it is therefore ominous that the plaintiffs on this motion have chosen not to place before the Court any information as to the finances of the company which would enable the Court to discount that assessment and to decide whether the plaintiff will be in a position to pay the defendant's claim should the cross claim not succeed. As between the two parties, accordingly, it is urged that it is the defendant alone who is at risk should the discretion be exercised in the plaintiff's favour.

36. The Court is also urged to take into consideration the conduct of the plaintiff as evident from the correspondence conducted on its behalf throughout 2011 and into 2012. In particular, it is pointed out that the plaintiff first purported to assert a claim for damages based upon anticompetitive activity. This was then completely dropped and an entirely new claim based on an alleged collateral agreement was introduced for the first time in September 2012. Furthermore, reliance is placed upon the absence of any attempt on the part of the plaintiff to quantify its claim for damages. On the one hand it purports to assert a cross claim for general damages which is unquantified while on the other maintaining that the quantum must exceed the amount of the defendants debt.

37. The defendant relies on one further factor to be taken into account in determining whether it is appropriate to disallow summary judgment in order to enable the plaintiff proceed with a cross claim for damages with a view to relying upon an equitable set off. There can clearly be no equitable set off if it has been excluded by contract and in this case the defendant points to Clause 10.4 of the distribution agreement which provides:-

> "Neither party will deduct any amounts due and payable to the other by set off or otherwise."

38. In exercising its discretion in this situation, the Court must obviously ask itself where the balance of justice lies having regard to the respective positions of the parties as between allowing the defendant to enter summary judgment for the amount of the debt in respect of which no defence as such has been made out and, on the other hand, requiring the defendant to forego such a judgment to enable the plaintiff to pursue the proposed cross claim. Clearly, the Court's decision would be rendered relatively straightforward if it was beyond argument that a set off was excluded by Clause 10.4 of the distribution agreement. While the point may not be beyond argument, there is clearly a stateable case that the clause falls to be interpreted as applying only to the legal set off of cross debts which are due and payable between the parties in the same right. What is at issue here, on the other hand, is the equitable set off a prospective award of general damages arising out of a breach of contract. The amount of such an award is not yet "due and payable", (or so it might be argued,) in the sense of the clause.

39. The Court is therefore satisfied that clause 10.4 does not relieve it of its discretion and it is, accordingly, necessary for the Court to decide where the equity of this issue lies. In the view of the Court, there is one important consideration to be taken into account as a starting point. The defendants claim is for the price of goods which were purchased by and delivered to the plaintiff in the course of the latter's commercial operations. Whatever grievance the plaintiff may have as to the fairness or otherwise of the prices at which the goods were invoiced, the company has had possession of those products since April 2011, and, no doubt, the benefit of their since being realised in the course to its trade. No suggestion has been made that the goods were unsaleable nor was there ever any offer to return them to the defendant. It would appear from the statement of claim (see paragraph 43 below,) that at least some of the goods in question were sold at a profit even if at one less than the plaintiffs expectation.

40. Next it is, as indicated in the *Prendergast* case, appropriate to take into consideration the nature and apparent strength of the plaintiffs claim and of its conduct in bringing the claim. As the claim is essentially based upon alleged verbal agreements made between the representatives of the two sides, it is clearly one which the plaintiff is entitled to pursue and it cannot be said to be one which will necessarily fail. It is, however, a claim which might be considered open to the criticism that it harbours a contradiction. On the one hand, the provisions of the distribution agreement contain specific terms governing the placing of orders by reference to periodic price lists notified by the defendant and the terms upon which different prices for ranges of models might be altered by the defendant. On the other hand, it is clear that as a matter of dealing between the parties in practice, the placing of orders from time to time was accompanied by negotiations giving rise to the forms of discount or rebate already referred to above as "sell out support". The defendant's position is that these amounts were made available to the plaintiff to use as it wished and they might be put to advertising campaigns or particular promotions. The plaintiffs on the other hand treated the availability of such credits as a mechanism to reduce the prices at which the products in question were sold on.

41. The plaintiffs cross claim, however, is based upon the proposition that either under the terms of that distribution agreement, or under an implied term or, in the further alternative, by virtue of a collateral agreement, the defendant was obliged to sell such products at prices equivalent to those at which the same products were made available to other distributors. The contradiction, obviously, lies in the assertion that the plaintiff was free to negotiate individual terms and prices for individual orders placed, but that the defendant was obliged to deal on the same or equivalent terms with all of its distributors. This restriction would, on the face of it, seem at odds with the clear interest of the defendant to promote competition between its non-exclusive distributors.

42. It is also relevant to consider the circumstances in which this claim came to be made. It will be recalled that the cross claim initially proposed as a basis upon which the liquidated debt might be extinguished was that of abuse of a dominant position set out at length in the letter of the 7th October, 2011. Although further correspondence was exchanged between the two firms during the months of January and February 2012, it was not until after the 11th September, 2012, when the defendant threatened to sue for what was assumed to be the undisputed part of the outstanding account, that for the first time the alleged existence of the collateral agreement was raised by letter from Arthur Cox of the 21st September, 2012. The allegation of abuse of a dominant position had apparently been dropped. In these circumstances, it is very difficult to ignore the possibility that the primary purpose of formulating these two threats of cross claim was the need to postpone or forestall the defendant's steps to recover the monies due to it.

43. Finally, it is also relevant to have regard to the basis upon which the plaintiff asserts that an award of damages will necessarily or probably exceed the amount of any debt due to the defendant. Two claims are made. In the statement of claim the "total losses" which form the basis of the first claim is given as €3,920,611. This appears to be based upon the difference between the "expected profit" and actual profit or loss attributable to seven particular consignments of products in the first quarter of 2011. In respect of two of those consignments, substantial figures for

> "expected profit" are given, but no figure is given for "actual loss/profit". Instead, the consignments are marked: "Not supplied as per forecast" although it is by no means clear what that means. In addition a more general claim for other unspecified loss of profit in 2011 and 2012 is claimed but when particulars of those losses were requested, the defendant was told that they would be "the subject of expert accountancy evidence" and would be "substantially in excess of €1 million".

44. In the judgment of the Court, the cumulative effect of all of these factors must be that the balance of justice between the parties in this situation lies with the defendant. However arguable may be the plaintiffs case that the "collateral agreement" was made in April 2011, the lack of a verifiable basis for the quantification of the cross claims, the fortuitous circumstances in which the claims were first broached and the fact that the plaintiff was apparently already in substantial financial difficulties in the operation of its account by the end of 2009 and before any claims in relation to the pricing of products were raised, are compelling reasons for declining to exercise the Court's discretion in favour of the plaintiff.

45. Accordingly, the defendant will be granted summary judgment for the amount of its counterclaim less the amount of the disputed H2 2010 credit and the plaintiff will be given leave to defend the counterclaim in respect of the latter amount in conjunction with the pursuit of its claim for damages.