

## THE HIGH COURT

2010 5368 P

BETWEEN

OSMOND IRELAND ON FARM BUSINESS LIMITED

PLAINTIFF

AND

FERGAL MCFARLAND

DEFENDANT

Judgment of Miss Justice Laffoy delivered on the 30th day of June, 2010.

## 1. Factual background

1.1 The issues which arise on the two motions now before the Court turn primarily on the construction and application of two clauses in an agency agreement entered into by the defendant with Cross Vetpharm Group Limited (Cross) on 26th February, 2001 (the 2001 Agreement). The format of the 2001 Agreement was that in a letter dated 26th February, 2001 addressed to the secretary of Cross, which was described as "Trading as Osmonds", which was signed by the defendant, the defendant accepted an appointment "to obtain business for Osmonds, a division of Cross ... ("Osmonds")" and acknowledged that the conditions attached to the letter formed part of his appointment. The conditions, insofar as they are relevant for present purposes, provided as follows:

- (a) Osmonds appointed the defendant to be its agent for the purpose of obtaining on behalf of Osmonds business upon the terms therein set out and in the letter. During the appointment the defendant would observe and perform the terms and conditions and would use his best endeavours to promote and extend the business of Osmonds in the area of Cavan/Monaghan, which was referred to as "the Area".
- (b) The sole legal relationship created between Osmonds and the defendant was that of principal and agent.
- (c) There was provision for termination of the appointment in clause 4.
- (d) Clause 18(a), which is the provision invoked by the plaintiff in these proceedings, provided:

"For a period of one year after the termination of this Agreement for any cause whatsoever, the [defendant] shall not canvass, solicit or endeavour to take away from Osmonds in the Area business or any customers or clients of Osmonds in the Area who have been customers or clients of Osmonds in the Area prior to the termination of this Appointment. This restriction relates to the categories of products sold by the Representative on behalf of Osmonds."

The meaning of "categories of products" in that clause is a matter of controversy between the parties. Counsel for the defendant pointed to clause 6, which imposed certain constraints on the defendant during the continuance of the agreement and used different terminology, in that it provided that the defendant should not engage or be interested or concerned in any other business or trade "concerning goods or goods and services of the kind sold by Osmonds".

- (e) Clause 21, which is the clause invoked by the defendant, dealt with arbitration and provided as follows:

"In the event of any dispute arising out of or in relation to this Appointment and this Agreement same shall be decided by arbitration in accordance with the provision (sic) of the Arbitration Acts or any statutory modification or re-enactment thereof for the time being [in] force."

1.2 There is a lack of clarity on the affidavit evidence as to how the plaintiff stepped into the shoes of Cross as the principal under the 2001 Agreement. On the basis of the evidence put before the Court by the plaintiff it would appear that the plaintiff was incorporated in 2009. It has been averred in an affidavit sworn on 21st June, 2010 by Paul Brady, the principal deponent on behalf of the plaintiff, that "Osmond" is a registered business name and not a registered corporate entity. It has been further averred by Mr. Brady that on or about 1st January, 2010 Cross assigned the business name of Osmond to the plaintiff. Counsel for the defendant, adopting a reasonable approach, consented to a letter from Cross to the defendant dated 21st December, 2009, on which there was endorsed an "Acknowledgement/Acceptance" signed by the defendant on 21st January, 2010, to be put in evidence notwithstanding that it was not exhibited on affidavit. In that letter the defendant was informed by Cross that the 2001 Agreement was to be "assigned by Osmond's (sic), a division of Cross ... to [the plaintiff] (100% subsidiary of Cross ...)" with effect from 1st January, 2010. The purpose of the letter was to inform the defendant that from 1st January, 2010 he would be operating as an agent of the plaintiff in accordance with what is known as a "Solicit orders" ("S.O.") licence from the Department of Agricultural, Fisheries and Food (the Department) dated 11th December, 2009, in which he was named as a representative of the plaintiff and that he would be required to observe all of its obligations, provisions, terms and conditions. In the endorsement of 20th January, 2010 the defendant agreed to be bound. I find it hard to believe that what transpired between Cross and the plaintiff with effect from 1st January, 2010 merely involved an assignment of a registered business name.

1.3 It is convenient at this juncture to refer briefly to the significance of a "S.O." licence. The licence dated 11th December, 2009

has not been exhibited but a later licence granted to the plaintiff and dated 15th April, 2010 has been exhibited. That discloses that the "S. O." licence is granted by the Minister for Agriculture, Fisheries and Food under Regulation 36(3)(b) of the European Communities (Animal Remedies) (No. 2) Regulations 2007 (the 2007 Regulations). The licence authorises the named representatives of the licensee "to make visits from house to house for the sole purpose of soliciting, collecting or obtaining orders on behalf of the licensee". It is stipulated that orders "shall only be solicited for animal remedies with a designated route of supply 'licensed merchant' and 'companion animal medicine'", whatever that means. The licence is subject to conditions which stipulate the manner in which the representative or agent of the licensee may operate. What emerges from the conditions is that the agent's function is to solicit, collect or obtain an order, not to enter into a contract or to distribute the product. It is a very limited function.

1.4 The grounding affidavit of Mr. Brady sworn on 4th June, 2010 suggests that the unhappy differences between Cross and the defendant date back to August 2009. Things did not come to a head until February 2010, after the plaintiff had assumed the position of principal. By letter dated 2nd February, 2010 the plaintiff requested the defendant to collect all outstanding cash as per a debtor's list annexed to the letter in the sum of €127,374.62 not later than close of business of 9th February, 2010. The defendant was warned that, if there was no significant improvement in his performance and behaviour, the plaintiff would have no alternative but to terminate the 2001 Agreement. There was no response from the defendant and by letter dated 11th February, 2010 the plaintiff terminated the agreement with immediate effect. Contemporaneously, the plaintiff informed the Department that the defendant should be deleted from the "S.O." licence with effect from 11th February, 2010. On 26th February, 2010 the plaintiff's solicitors wrote to the defendant expressing concern that he had been canvassing or soliciting customers of the plaintiff contrary to the provisions of clause 18(a) of the 2001 Agreement and seeking an undertaking to adhere to the terms of the 2001 Agreement. There was a comprehensive response from the solicitors on record for the defendant in these proceedings to the plaintiff's solicitors in a letter dated 18th March, 2010, in which it was alleged on behalf of the defendant that the plaintiff had wrongfully repudiated the 2001 Agreement and the defendant made claims against the plaintiff for compensation, commission and damages. On the issue with which the Court is now concerned, the application of clause 18(a), it was stated that there was "no basis" for the plaintiff to instruct its solicitors to correspond in the terms of the letter of 26th February, 2010, but that, in any event, the defendant's acceptance of the repudiation by the plaintiff of the agreement meant that the provisions of clause 18(a) did not survive.

1.5 Nothing further appears to have happened until 26th May, 2010 when the plaintiff's solicitors wrote to the defendant directly stating that the plaintiff was aware that the defendant had been canvassing or soliciting its customers. Once again the plaintiff's solicitors sought an undertaking from the defendant not to "compete with" the plaintiff or canvass or solicit its customers and injunction proceedings were threatened if the undertaking was not forthcoming. The defendant's solicitors responded by letter dated 27th May, 2010, stating that there was "no basis" for the plaintiff's solicitors to write in the terms of the letter of 26th May, 2010 and seeking a substantive response to their letter of 18th March, 2010. These proceedings were initiated by plenary summons which issued on 4th June, 2010.

## **2. The proceedings and the applications**

2.1 The plaintiff seeks various reliefs, declaratory, injunctive and by way of compensation or damages for alleged breaches of the 2001 Agreement including:

- (a) breach by the defendant of clause 18(a);
- (b) failure of the defendant to return product to the value of €752;
- (c) failure of the defendant to return other products belonging to the plaintiff;
- (d) failure of the defendant to return documents and records belonging to the plaintiff; and
- (e) failure to pay the sum of €52,547.82, which is described as monies due which the defendant was obliged to collect on behalf of the plaintiff under the 2001 Agreement.

This judgment relates to two interlocutory applications which were heard on 22nd and 23rd June, 2010.

2.2 Chronologically the earliest is the plaintiff's application brought by notice of motion dated 4th June, 2010 seeking an interim or interlocutory injunction restraining the defendant from acting in breach of clause 18(a) of the 2001 Agreement "by either directly or indirectly canvassing, soliciting or endeavouring to take away from the plaintiff any customers or clients of the plaintiff who have been customers or clients of the plaintiff in Cavan and Monaghan prior to the termination of [the Agreement], in relation to the categories of products sold by the defendant on behalf of the plaintiff prior to the termination of [the 2001 Agreement] at any time in the period of one year preceding the date of termination of employment."

2.3 There are a number of observations to be made in relation to the formulation of the reliefs claimed. First, the defendant was never in the employment of the plaintiff or Cross; the 2001 Agreement was an agency agreement. Secondly, the relief as formulated does not follow the wording of clause 18(a) precisely. Therefore, I am treating the plaintiff's application as an application to restrain a breach of clause 18(a) on its express terms.

2.4 The second is the defendant's motion initiated by a notice of motion dated 10th June, 2010 in which the defendant seeks an order pursuant to the Arbitration Act 2010 (the Act of 2010) and, in particular, Article 8(1) of Schedule I, referring the parties to arbitration, or an order under the Court's inherent jurisdiction staying these proceedings pending the determination by final award of all matters the subject matter of the proceedings, or an order for a stay pursuant to s. 5(1) of the Arbitration Act 1980 (the Act of 1980) further to the provisions of s. 4(2) of the Act of 2010.

## **3. The Act of 2010**

3.1 The Act of 2010 came into operation three months after its passing, that is to say, on 8th June, 2010 (section 1(2)). The position, accordingly, is that these proceedings and the plaintiff's motion preceded the coming into operation of the Act of 2010, but the defendant's motion post-dated it.

3.2 Section 3 of the Act of 2010 deals with its application and provides that it shall not apply "to an arbitration under an arbitration agreement concerning an arbitration which has commenced before the operative date" but that it shall apply "to an arbitration commenced on or after the operative date". The "operative date" means 8th June, 2010.

3.3 Section 4 deals with repeals and the effect of repeals. Subsection (1), which is expressed to be subject to subsection (2), repeals the Arbitration Acts 1954 to 1998. Subsection (2), which is referred to in the defendant's notice of motion, provides:

"Subject to section 3, the repeal of the Acts referred to in subsection (1) shall not prejudice or affect any proceedings, whether or not pending at the time of the repeal, in respect of any right, privilege, obligation or liability and any proceedings taken under those Acts in respect of any such right, privilege, obligation or liability acquired, accrued or incurred under the Acts may be instituted, continued or enforced as if the Acts concerned had not been repealed."

Sub-section (3) of s. 4 provides that in s. 4 "proceedings" includes arbitral proceedings and civil or criminal proceedings.

3.4 Section 6 provides that, subject to the Act of 2010, the Model Law shall have force of law in the State and shall apply to arbitrations under arbitration agreements. The Model Law means the UNCITRAL Model Law, the text of which is set out in Schedule I to the Act of 2010.

3.5 After these proceedings were initiated and after the Act of 2010 had come into operation, by letter dated 9th June, 2010, the defendant's solicitors wrote to the plaintiff informing the plaintiff that the defendant was invoking the dispute resolution mechanism provided for by the 2001 Agreement and calling upon the plaintiff to adhere to the provisions of the 2001 Agreement requiring that the matters in issue between the parties, all claims and counterclaims, be decided by arbitration. By further letter dated 10th June, 2010 to the plaintiff's solicitors, the defendant's solicitor requested that a proposed nomination or nominations in relation to a suitable arbitrator to be appointed to adjudicate on the issues between the parties be made by the plaintiff's solicitors. By letter dated 14th June, 2010 the plaintiff's solicitors suggested three members of the Inner Bar as appropriate arbitrators, but did so on a without prejudice basis to the plaintiff's contention that the arbitration clause has been waived or is not enforceable and to the plaintiff's entitlement to interim and interlocutory relief. Prior to the hearing of the motions, the defendant's solicitors had not responded to the plaintiff's solicitors' proposal.

3.6 Arising out of the foregoing facts, in my view, in accordance with s. 7 of the Act of 2010, the arbitral proceedings between the defendant and the plaintiff are deemed to have commenced on 9th June, 2010, that is to say, after the coming into operation of the Act of 2010. Therefore, by virtue of s. 3 of the Act of 2010, the provisions of that Act apply to the arbitration and the issues which arise on the two applications before the Court fall to be determined in accordance with the provisions of the Act of 2010 rather than the provisions of the repealed statutes.

3.7 Article 8 of the Model Law provides:

(1) "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued and an award may be made, while the issue is pending before the court."

Paragraph 1 of Article 8 has the same objective as s. 5 of the Arbitration Act 1980, namely, to make it mandatory for a court to compel the parties to an arbitration agreement to engage in the arbitral process as a means to resolving their dispute or disputes when one party makes an application seeking an order to do so in time. Indeed, it is interesting to note that the terminology used in s. 11 of the Act of 2010, where it is provided that there shall be no appeal from "any court determination of a stay application, pursuant to Article 8(1) of the Model Law ...".

3.8 While it is the position of the plaintiff that the defendant is not entitled to rely on the arbitration clause (clause 21) of the 2001 Agreement, and I will return to that argument later, it is also the position of the plaintiff that, in any event, it is entitled to injunctive relief under Article 9 of the Model Law. Article 9 provides:

"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

Interim measures are dealt with in Article 17 of the Model Law. Article 17J provides:

"A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."

3.9 Section 9(1) of the Act of 2010 provides that the High Court is the relevant Court for the purposes of Article 9 and the Court of competent jurisdiction for the purposes of, *inter alia*, Article 17J. Sub-section (2) of s. 9 provides that the functions of the High Court under an article referred to subs. (1) shall be performed by the President or such other Judge of the High Court as may be nominated by the President, subject to any rules of court made in that behalf. Although no rules of court or practice direction are yet in being, the parties accepted that this Court has jurisdiction to deal with the plaintiff's application for interim relief.

3.10 Section 10 of the Act of 2010 provides that the High Court shall have the same powers in relation to, *inter alia*, Article 9 as it has in any other action or matter before the Court subject to subs. (2) which, as it deals with security for costs of the arbitration and discovery of documents, is not relevant to the issues now before the Court.

3.11 The logical approach to the determination of the two pending applications, it seems to me, is to consider the defendant's application first.

#### **4. The defendant's application**

4.1 It was submitted on behalf of the plaintiff that the defendant is not entitled to rely on the arbitration clause (clause 21) in the 2001 Agreement because he had waived his right to do so by not indicating before these proceedings were commenced that he wished to have the matter referred to arbitration. In particular, it was pointed out that in the letter of 18th March, 2010 the defendant's solicitors threatened to "issue proceedings" against the plaintiff on behalf of the defendant. It was submitted that the reference to issuing proceedings could only reasonably refer to court proceedings and that the defendant by his conduct has waived his entitlement to arbitrate. I can see no good reason for interpreting the reference to "proceedings" in that letter as meaning court

proceedings rather than arbitral proceedings. In any event, under the law in operation before 8th June, 2010, the defendant had an entitlement under s. 5 of the Act of 1980 to apply to court for a stay after entering an appearance but before taking any other steps in the proceedings. After 8th June, 2010, under Article 8, the defendant was entitled to request the Court to refer the parties to arbitration "not later than when submitting his first statement on the substance of the dispute". The application for the stay or reference to arbitration has been brought by the defendant in time and that is what matters.

4.2 It was also submitted on behalf of the plaintiff that, as the defendant is alleging that the plaintiff is not entitled to rely upon clause 18(a) because of the alleged wrongful repudiation by the plaintiff, which was accepted by the defendant, applying the same principle, clause 21 is not enforceable. That submission does not stand up to scrutiny. Clause 21 provides for the reference of every dispute arising out of, or in relation to, the 2001 Agreement to arbitration. That includes a dispute as to the consequences of the plaintiff's actions. Whether clause 18(a) is enforceable may turn on a finding as to the legal consequences of the plaintiff's actions. However, the forum chosen by the parties for the making of such determination is arbitration.

4.3 I am satisfied that clause 21 of the 2001 Agreement is operative and is capable of being performed. Therefore, I am satisfied that the defendant is entitled to an order referring the parties to arbitration in accordance with Article 8(1) of the Model Law in pursuance of s. 6 of the Act of 2010.

## 5. The plaintiff's application

5.1 Given that the Act of 2010 came into operation after the plaintiff's application was initiated and that I have held that the arbitration which the defendant proposes to commence is governed by the provisions of the Act of 2010, the plaintiff's application falls to be considered as an application for an interim measure of protection in accordance with Article 9 and Article 17J of the Model Law. The order which the plaintiff seeks is an order restraining the defendant from acting in breach of clause 18(a) which at most, in the events which have happened, is an order to endure for one year from 11th February, 2010 or pending the making of an award in the arbitral proceedings, whichever shall occur first. Such an order would be an interlocutory order. On the basis of the jurisprudence of this Court on the corresponding provision of the Act of 1954, I am satisfied that the Court has jurisdiction to make an interlocutory order.

5.2 Section 22(1) of the Act of 1954 provided:

"The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of —

...

(h) interim injunctions ...,

as it has for the purpose of and in relation to an action or matter in the Court."

5.3 The effect of s. 22(1) was considered by O'Sullivan J. in *Telenor Invest A.S. v. I.I.U. Nominees Ltd.* O'Sullivan J. stated:

"... I consider that while it may well be appropriate to grant the first defendant a stay on part of the plaintiff's proceedings that this in no way trammels the courts' jurisdiction to afford interim relief (which clearly includes what is usually termed interlocutory relief) to the Plaintiff pending the determination of the dispute."

A similar view was expressed by Kelly J. in *Shelbourne Hotel Holdings Ltd. v. Torriam Hotel Operating Company Ltd.* [2008] IEHC 376, in which that passage was quoted with approval after the following statement:

"I should make it clear that whilst both [an article of the relevant arbitration agreement] and s. 22 of the Act speak of 'interim injunctions' that term must be interpreted to include interlocutory injunctive relief. If it did not do so and was confined only to relief granted *ex parte* (i.e. interim relief in the strict sense) the section would be unworkable."

5.4 On the same reasoning, the reference to "an interim measure" in Article 9 and Article 17J of the Model Law must include an interlocutory injunction. In fact, another provision of the Model Law establishes this beyond doubt. In Article 17, which deals with the power of an arbitral tribunal to order interim measures, the expression "interim measure" is defined in paragraph (2) as "any temporary measure" by which the arbitral tribunal orders a party to, *inter alia*, maintain or restore the status quo pending determination of the dispute.

5.5 Having regard to the provisions of the Model Law to which I have referred earlier and, in particular, Article 9 and Article 17J, the plaintiff's application for an interlocutory injunction falls to be determined by reference to the principles set out by the Supreme Court in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. In summary, in order to establish an entitlement to an interlocutory injunction the plaintiff must show that —

(a) there is a fair *bona fide* or serious question to be tried;

(b) damages would not be an adequate remedy for the plaintiff if it was refused interlocutory relief but was successful at the trial of the action; and

(c) the balance of convenience favours the granting of the injunction.

I will consider whether the plaintiff has satisfied each of those tests in turn.

## 6. Fair *bona fide* question?

6.1 As frequently happens, I think it is opportune to quote from the speech of Lord Diplock in *American Cyanamid v. Ethicon Ltd.* [1975] A.C. 396 (at p. 407) as to the constraints to which a court determining an application for an interlocutory injunction should have regard to. Lord Diplock stated:

"It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

In relation to the plaintiff's application, both sides made comprehensive submissions, both on the facts and in relation to applicable law, which would be more suitable for the trial of the action. I have found it necessary to filter the submissions to identify issues on which it is appropriate to express a view on an application for an interlocutory injunction on affidavit evidence.

6.2 As regards the plaintiff's application, the core issue which arises on the evidence before the Court is whether the defendant is in breach of clause 18(a) of the 2001 Agreement. The arguments made on behalf of the defendant that there is no fair question to be tried turned primarily on the application and construction of clause 18(a). It was argued that the *contra proferentem* rule should be applied in the construction of clause 18. It was argued that clause 18(a) does not protect the plaintiff, as distinct from Cross, on the basis of an analysis of the word "Osmonds" in the 2001 Agreement and of the evidence. While, as I have stated earlier, there is a lack of clarity as to the manner in which the plaintiff became the successor of Cross as the principal in the 2001 Agreement, nonetheless I am satisfied that there is a fair question to be tried as to whether the plaintiff is entitled to enforce clause 18(a) as successor of Cross.

6.3 In relation to the restraint on the defendant's activity post-termination stipulated in Clause 18(a), counsel for the defendant acknowledged that neither the temporal limitation (one year after termination) nor the territorial limitation (the Cavan/Monaghan Area) nor the combination of those limitations was unreasonable. However, it was submitted that the product limitation (the categories of products sold by the defendant on behalf of Osmonds) was unreasonable because that limitation is so unclear and so lacking in definition that the defendant cannot know whether the restriction relates to a particular product. In order to address that argument, it is necessary to consider the evidence as to the products which the plaintiff contends are the subject of that limitation in some depth.

6.4 In his grounding affidavit sworn on 4th June, 2010, Mr. Brady exhibited a list of products sold by the plaintiff as being the products which would have been "sold by" the defendant when he was engaged as a representative of the plaintiff. The list was in fact "Osmonds' Price List" for 2009. It was a list of products, rather than categories of products, running to three pages, ranging from "Aquadyne Iodine" to "Vetalis Sheep Bolus Gun". In response, the defendant averred that he took issue "with the unsubstantiated assertion" that he had sold the products listed and he identified two products which he averred were never items included in the product list while he worked for the plaintiff. In his second affidavit sworn on 14th June, 2010, Mr. Brady acknowledged that clause 18(a) of the 2001 Agreement relates "not to products manufactured or sold" by the plaintiff but to "categories" of products manufactured or sold by the plaintiff. He then listed 25 categories of products. Counsel for the defendant pointed to the broad scope of some of the categories, for instance the following:

- Disinfectant
- Sheep Dips/Products
- Minerals and Vitamins
- Calf and Lamb Help
- Dosing
- Farm Hygiene
- Nutritional

Mr. Brady exhibited "Osmonds Price List" for 2009 with the product category to which each item belongs indicated in the last column. For example, in the case of Aquadyne Iodine, the relevant product category was shown as "vitamin and mineral supplements" and, in the case of Vetalis Sheep Bolus Gun, the product category was given as "applicators". In response to the argument made on behalf of the defendant that the product limitation is unreasonably broad in scope, counsel for the plaintiff pointed, by reference to product catalogues and price lists of other manufacturers, wholesalers and distributors in the veterinary pharmaceutical sector exhibited, to categories of products not on the list exhibited by Mr. Brady, for example, vaccines, lubricants, rodenticides, sedatives, pet care products and small animals specialities.

6.5 There is undoubtedly a question of construction as to the meaning of "categories of products" in clause 18(a) in the context of the 2001 Agreement as a whole, including clause 6 thereof referred to earlier. That is not a matter which can be determined on this application. There is also a question as to whether, on the proper construction of the expression, the product limitation is so broad in scope as to render the restraint intended to be imposed by clause 18(a) unreasonable. That question cannot be determined on this application either.

6.6 On the basis of the submissions made on behalf of the defendant, it is clear that a number of difficult questions of law and fact will arise in the determination as to whether the defendant is in breach of clause 18(a). However, I am satisfied that the plaintiff has met the low threshold applicable and has satisfied the first test of demonstrating that there is a fair *bona fide* question to be tried that the defendant has been acting and intends to continue to act in breach of clause 18(a), as the plaintiff contends is the case. For the purposes of the grant of an interlocutory injunction, the product limitation in clause 18(a) would have to be identified by reference to the list set out in paragraph 17 of Mr. Brady's affidavit sworn on 14th June, 2010, in order to ensure the precision necessary to enable the order of the Court to be enforced, if an interlocutory injunction were to be granted.

## **7. Damages an adequate remedy?**

7.1 Whether the plaintiff has demonstrated that damages would be an inadequate remedy if the interlocutory relief is refused and it succeeds in establishing a breach of clause 18(a) on the part of the defendant is the most important and the most difficult issue to be determined in this matter. Counsel for the plaintiff cited two decisions of the High Court in support of his contention that damages would not be an adequate remedy for the plaintiff.

7.2 In *Murgitroyd & Co. Ltd. v. Purdy* [2005] IEHC 110, in the context of considering whether, on an application for an interlocutory injunction, damages would be an adequate remedy for breach of a "non-compete" clause in a service agreement, Clarke J. said:

"Thus if the plaintiff fails to obtain an injunction in respect of non-competition at this stage but ultimately succeeded at the trial it will have suffered the potential loss of clients (who may or may not return) and an intervening financial loss which may, in practice, not be capable of recovery."

Clarke J. held that damages would not be an adequate remedy for the plaintiff. In relation to reliance on a "non-soliciting" clause in the same service agreement, Clarke J. stated that he was not satisfied that there was evidence available at that stage of solicitation but, if such evidence were to become available, he would take the view that damages would not be an adequate remedy for the plaintiffs and the balance of convenience would favour the grant of an injunction.

7.3 In *European Paint Importers Ltd. v. O'Callaghan & Ors.* [2005] IEHC 280, which concerned the breach of a "non-soliciting" clause in an employment contract, where it was admitted "that the solicitation has already occurred and to all the plaintiff's customer base", Peart J. held that damages would be incapable of assessment, not simply difficult. It would be impossible to determine which orders had come to the defendants as a result of solicitation, and which had not, he held.

On that basis, he stated that the defendant could not avail of the principles set out in the judgment of Finlay C.J. in *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] 1 I.R. 450.

7.4 There is a factual dispute in this case as to whether the defendant has been in breach of clause 18(a) and, in particular, whether, as alleged by the plaintiff, he has canvassed and solicited at least ten customers who were customers of the plaintiff prior to the termination of the 2001 Agreement in relation to the categories of product to which clause 18(a) applies within the Cavan/Monaghan Area. That dispute cannot be resolved on this application. However, the plaintiff's case is that the consequence of a breach of clause 18(a), if it has occurred and if it continues, is that it has caused, and will continue to cause, potential loss of customers to the plaintiff, who may or may not return, resulting in damage to the plaintiff and will also cause damage to the representatives of the plaintiff who are now operating in the Cavan/Monaghan Area. In fact, two representatives have sworn affidavits in support of the plaintiff's application. One has averred that, as a result of the conduct of the defendant, the amount of orders for the sale of products of the plaintiffs which he has taken in Monaghan and North Cavan has decreased and, consequently, his earning capacity as a representative in that area has been damaged. The other deponent has made a similar averment in relation to his area, South Cavan and Longford.

7.5 Counsel for the defendant submitted that the critical point in relation to whether the plaintiff had demonstrated that damages would not be an adequate remedy was that the plaintiff had not shown any loss. There was a paucity of evidence on that point, it was submitted, and the plaintiff had not, as it could have done, put turnover figures before the Court, lists of customers and so forth to demonstrate a diminution in the orders it was receiving. It was also submitted that there was a lesser remedy available to the plaintiff, in that the defendant would have no difficulty in giving accounts of the orders he takes.

7.6 In the *Curust* case, the plaintiffs, which since March 1992 were marketing a rust primer manufactured by a third party in Ireland in tins which were marked "Loewe Rust Primer", were seeking interlocutory injunctions –

(a) restraining the first defendant from granting to the second defendant the right to manufacture, sell or distribute its products, including the rust primer paint, within Ireland or the United Kingdom and

(b) restraining the second defendant, which had entered the Irish market with rust primer in tins labelled "Loewe Rust Primer" in May 1992, from manufacturing, distributing or selling or offering for sale in Ireland or the United Kingdom all or any of the products of the first defendant,

on the basis that the first defendant was bound by the terms of an agreement entered into between the first defendant and the plaintiffs in 1986, under which, the plaintiffs contended, they were given the sole and exclusive licence to manufacture, market, sell and distribute the products of the first defendant in Ireland and the United Kingdom. In dealing with the question whether damages were an adequate remedy for the plaintiffs, referred to in the judgment as "*Curust*", Finlay C.J. identified the basis on which it was alleged that damages would not be an adequate remedy as follows (at p. 468):

"Whilst the loss likely to be sustained by *Curust* in the event of an injunction not being granted is purely and simply a commercial loss arising from a diminution in trade and, therefore, ostensibly capable of quantification and assessment, it asserts that there would be considerable difficulty in such quantification and a real risk that damages assessed in accordance with the evidence would not be adequate. This assertion largely consists of an assertion that whilst it might be possible to calculate, between the time of the advent into the market of [the second defendant] up to the time of the successful conclusion by *Curust* of their action and the obtaining of a permanent injunction, the loss of trade and, therefore, the loss of profits sustained by *Curust*, that it would be extremely difficult, if not impossible, to quantify into the future the loss of profits which would continue to be sustained until such time as *Curust* recovered its pre-1992 share of the market."

Finlay C.J. went on to state that the following principles apply to, *inter alia*, the issue just identified:

"The loss to be incurred by *Curust* if they succeed in the action and no interlocutory injunction is granted to them, is clearly and exclusively a commercial loss, in what had been, apparently, a stable and well-established market. In those circumstances, *prima facie*, it is a loss which should 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 loss. 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."

7.7 In one sense there is a similarity between the plaintiff's position and the position of the plaintiffs in the *Curust* case, in that the plaintiff's fundamental concern is that it will lose business and, consequently, profit to a competitor for whom the defendant solicits business. At the same time, there are distinguishing features between the two situations. One obvious distinction is that, in this case, the plaintiff is suing its former representative, not the competitor which it fears will take business from it in contravention of the "non-solicit" clause in the 2001 Agreement. However, as counsel for the defendant submitted, there is no evidence before the Court that the defendant would not be in a position to meet an award of damages. A more significant distinction is that the complaint against the defendant is that he has actively solicited and is continuing soliciting contrary to clause 18(a), not merely doing business in competition with the plaintiff contrary to a contractual arrangement not to compete for a certain period. From the authorities on which the plaintiff relies, it is to be inferred that quantifying the adverse consequences to the wronged party as a result of the breach of a "non-solicit" clause is more difficult than for breach of a "non-compete" clause.

7.8 Notwithstanding those distinguishing factors, having regard to the particular circumstances of this case, the principles set out in the *Curust* case support the conclusion that damages would not be an inadequate remedy for the plaintiff. Assuming it is operative, the restraints contained in clause 18(a) will endure until 10th February, 2011 only, that is to say, for just over eight months hence. It is to be hoped that the arbitral process will be completed much earlier. More importantly, both parties are operating in the highly regulated animal remedies sector, as is any competitor of the plaintiff for whom the defendant may act as representative. The defendant may only lawfully solicit orders in competition to the plaintiff if he is a representative authorised to solicit orders on behalf of the holder a licence issued under the 2007 Regulations and he may do so only in accordance with the conditions of the licence. The plaintiff's solicitors have ascertained from the Department that the defendant is a representative authorised to solicit orders on behalf of Coolchem Pharmacy Limited under a licence issued on 16th June, 2010 under the 2007 Regulations. While it is part of the plaintiff's case that the defendant was not only acting in breach of clause 18(a) of the 2001 Agreement after its termination, but also acting in breach of the 2007 Regulations between 11th February, 2010 and 16th June, 2010, the current position is that the defendant has the authority conferred by the "S.O." licence in question and compliance with the conditions of that order must render it reasonably easy to identify in the arbitral proceedings such orders as the defendant may wrongfully solicit between now and 10th February, 2011, or the arbitration hearing, if earlier, in breach of clause 18(a). Moreover, in my view, it should not be difficult to assess the impact of the loss of those orders on the business and the profit of the plaintiff and quantify such loss as damages, applying the civil standard of proof, proof on the balance of probabilities.

7.9 Accordingly, having regard to the limited function of a representative operating under a "S.O." licence, in the light of the principles enunciated by the Supreme Court in the *Curust* case, in my view, the plaintiff has not demonstrated that damages would be an inadequate remedy for it, if it is refused interlocutory relief but it subsequently transpires that the defendant has been, and is, acting in breach of Article 8 (1).

## **8. Balance of convenience**

8.1 Having regard to the factors considered in the context of the issue of the adequacy of damages as a remedy for the plaintiff – the limited duration of clause 18(a), the degree of regulation, and the limited nature, of the activity of a representative within the animal remedy sector, and the fact that the dispute is to be referred to arbitration, which should be concluded expeditiously – the balance of convenience does not favour the grant of an injunction.

## **9. Laches**

9.1 While, in relation to the plaintiff's entitlement to injunctive relief, the defendant raised the issue of the time lapse between his solicitors' letter of 18th March, 2010 and the plaintiff's letter of 26th May, 2010, that delay has been explained by Mr. Brady on the basis that the plaintiff was not in possession of sufficient evidence to support an application for an interlocutory injunction until late May 2010. I am satisfied that the plaintiff has not been guilty of laches such as to defeat an application for equitable relief.

## **10. Orders**

10.1 There will be an order on the defendant's motion referring the parties to arbitration pursuant to Article 8(1) of Schedule I of the Act of 2010.

10.2 There will be an order dismissing the plaintiff's application for an interlocutory injunction.