Neutral Citation Number: [2012] IEHC 523

**THE HIGH COURT**

**[2012 No. 10116P]**

**BETWEEN**

**JOHN FRASER AND LIAM FRASER TRADING AS**

**FRASER OIL**

**PLAINTIFFS**

**AND**

**GREAT GAS PETROLEUM (IRELAND) LIMITED**

**DEFENDANT**

**Judgment of Ms. Justice Laffoy delivered on 7th day of December, 2012.**

**The proceedings and the application**

1. These proceedings were initiated by a plenary summons which was issued on 10th October, 2012. The defendant's solicitors accepted service of the proceedings on 23rd October, 2012. The primary relief claimed on the general endorsement of claim on the plenary summons is damages for breach of contract and/or negligence and/or breach of duty and/or misrepresentation. There is also a claim for a declaration that the plaintiffs were entitled "to terminate contract and/or relationship with" the defendant.

2. The application before the Court is an application for interlocutory injunctive relief in the following terms:

> (a) an order restraining the defendant its servants or agents howsoever acting from acting on foot of or enforcing the terms of the Guarantee from Allied Irish Bank Plc dated 3rd August, 2010 (the Bank Guarantee) pending the determination of the proceedings;
>
> (b) an order restraining the defendant its servants or agents howsoever acting from acting on foot of or enforcing the demand for payment on foot of the Bank Guarantee (in the amount of €130,000) made on or about 15th October, 2012 pending the determination of the proceedings;
>
> (c) an order directing the defendant its servants or agents howsoever acting to countermand the demand for payment on foot of the Bank Guarantee (in the amount of €130,000) made on or about 15th October, 2012 pending the determination of the proceedings; and
>
> (d) if necessary, an order restraining Allied Irish Bank Plc its servants or agents howsoever acting from making payment and/or releasing any of the monies to the defendant its servants or agents on foot of or in accordance with the demand for payment on foot of the Bank Guarantee (in the amount of €130,000) made on or about 15th October, 2012, or at all, pending the determination of the proceedings.

3. On 1st November, 2012 an application was made on behalf of the plaintiffs to the Court for interim injunctive relief. By order of the Court (Gilligan J.) made on that day orders in the terms of paragraphs (1) and (4) of the notice of motion were made until 5th November, 2012 or until further order. The plaintiffs were given liberty to serve short notice of motion for an interlocutory injunction returnable for Monday, 5th November, 2012.

4. The interim orders have continued in force, as I understand it, with the consent of the defendant.

5. On the hearing of the application for an interlocutory injunction, counsel for the plaintiffs indicated that an order in the terms of paragraph (3) of the notice of motion would satisfy the plaintiffs' needs.

**The Contract and the Bank Guarantee**

6. The plaintiffs operate a number of fuel stations under the style and title of "Fraser Oil". They commenced trading at Tullow, County Carlow in early 2007 and expanded the business to Graiguecullen, County Kildare (September 2007), Kilcullen, County Kildare (December 2007) and Newbridge, County Kildare (May 2009).

7. The defendant is a supplier of fuel products.

8. The contract referred to in the endorsement of claim in the plenary summons is a contract which bears the date 1st May, 2009 (the Contract), although the plaintiffs contend that it was entered into on or about July 2009. In any event, the Contract was expressed to be made between the defendant and the plaintiffs, as customers. In the Contract, the plaintiffs agreed to purchase all fuel for its sites exclusively from the defendant for a term of five years or until 50m litres of product had been purchased from the defendant. The issue which arose between the parties prior to the initiation of these proceedings relates to the price for the product. That was to be determined in accordance with Schedule 1, which was headed "Pricing Formula for Motor Fuels". It provided:

> "The [defendant's] fuel prices to the [plaintiffs] will be based on a wholesale margin per tonne of fuel plus delivery costs to the Site/s. This will be based on Platts plus 2.25 cent (sic) (this excludes Government Duty, NORA and applicable rack charges). Prices will change twice weekly only in line with movements in the previous two – three days, of the international oil price as published by Platts European Marketscan, and the Euro/Dollar exchange rate, as published by the European Central Bank.
>
> Each Wednesday morning we will issue the [plaintiffs] with a price that will be valid for Thursday and Friday which will be based on Platts and exchange rate movements from the previous Friday, Monday and Tuesday. Each Friday morning we

> will issue the customer with a price valid for Saturday, Sunday, Monday, Tuesday and Wednesday which will be based on Platts and exchange rate movements for the previous Wednesday and Thursday."

Schedule 1 contained two further paragraphs dealing with the eventuality of a different pricing formula existing in the Irish market and the possibility of alterations to the formula.

9. The provisions of the Contract dealing with payment by the plaintiffs for the product supplied by the defendant contained a provision in the following terms:

> "The [plaintiffs] agree that they will furnish the [defendant] with a continuous rolling Bankers' Guarantee Document. The value of this Guarantee is agreed at €130,000."

10. The Contract also provided for termination by either party for breach of any of the terms of the Contract on notice. It was provided that upon early termination of the Contract for whatever reason any monies owed by the plaintiffs to the defendant thereunder would become immediately due and payable by the plaintiffs.

11. The Bank Guarantee which the plaintiffs contracted to give the defendant was given by AIB Bank to the defendant and it was dated 3rd August, 2010. The Bank Guarantee was expressly made in consideration of the defendant supplying from time to time consignments of petroleum products to the plaintiffs. It was given to the defendant in the following terms:

> "We, AIB Bank . . . at the request of the [plaintiffs] hereby guarantee payment to you on your first written demand of all sums now due of (sic) which may hereafter become due to you by the [plaintiffs] on foot of such consignments PROVIDED ALWAYS that our maximum aggregate liability hereunder shall not exceed the sum of €130,000 . . .."

There is obviously a typographical error in that provision, in that obviously the word "or" should appear instead of "of". It was further provided that demand for payment by the defendant should be in writing, addressed to the Manager of the Branch of AIB Bank at Naas and that the demand would be conclusive evidence, for the purpose of the Bank Guarantee, that the sums so demanded by the defendant are due by the plaintiffs.

12. The giving of the Bank Guarantee to the defendant in August 2010, which was more than a year after the Contract was entered into, was explained in the grounding affidavit of the first plaintiff sworn on 1st November, 2012. During 2010 the plaintiffs' business was encountering financial difficulty and the defendant sought the guarantee and it was furnished.

**The factual basis of the dispute between the parties**

13. The factual basis of the dispute between the plaintiffs and the defendant in respect of which the plaintiffs seek redress in these proceedings, in broad terms, is a continuation of the financial difficulties being encountered by the plaintiffs' business from 2010 onwards. However, for present purposes, it is only necessary to refer to the interaction between the parties since August 2012. In summarising the position, I propose setting out chronologically the interaction between the parties and their solicitors and AIB Bank up to 1st November, 2012, when the interim order was granted. The defendant has raised an issue that full disclosure was not made to the Court at the time the interim order was granted of what had transpired between the parties.

14. On 10th August, 2012 the plaintiffs' solicitors, Coughlan White and Partners, wrote to the defendant alleging that, after extensive investigations by the plaintiffs and their "Forensic Accountants and Engaged Experts", it had become apparent that over a significantly protracted period of time the defendant had been in breach of the Contract in consistently overcharging the plaintiffs, resulting in significant loss and damage and consequential loss to the plaintiffs' business. The defendant was called upon to admit liability and to undertake to compensate the plaintiffs within seven days under threat of legal proceedings. The response to that letter was from the defendant's solicitors, William Fry, and it was dated 16th August, 2012. In that letter it was stated that the defendant had no knowledge of any breach of contract and was "taken aback" by the claim that it was under some liability to the plaintiffs. Details of the aggregate amount of the alleged liability and the manner of its calculation were sought.

15. The next item of correspondence was a letter dated 3rd October, 2012 from the plaintiffs' solicitors to the defendant's solicitors, which was marked "Extremely Urgent". It referred to the plaintiffs' solicitors' letter of 10th August, 2012 to which there had been "no substantive reply", but did not refer to the letter of 16th August, 2012 from the defendant's solicitors. In that letter it was alleged that the defendant's breach of the provisions of the Contract had left the plaintiffs "in a precarious financial position". It was alleged that the "precarious financial position" had been caused solely by sustained and protracted overcharging by the defendant in respect of the fuel supplied, as a result of which the plaintiffs were continuing to sustain ongoing losses of approximately €40,000 per month. At the end of the letter it was stated that its purpose was to notify the defendant of the plaintiffs' losses and of termination of the Contract with effect from midnight on 8th October, 2012. The letter also contained details of the alleged loses incurred by the plaintiffs. Figures were included for alleged overcharging for 2009, 2010 and 2011. Those figures, rounded to the nearest thousand, aggregated €244,000. There was also an allegation of overcharging and loss of margin from January 2012 to 31st July, 2012 in the amount of €298,000 and it was alleged that those losses were continuing. There were two further elements of loss itemised: truck repayments incurred in the sum of €37,000 and loss of volume of sales in the sum of €31,000. All of those figures aggregate €610,000. There was a further allegation of damage caused to the plaintiffs' shop income, which I understand is the income from the shops on the garage forecourts, which it was alleged was affected by the increase of the retail price at the pumps.

16. In their response to that letter, which was dated 4th October, 2012, understandably, the defendant's solicitors complained about a lack of response to their letter of 16th August, 2012. It was contended that the course of conduct which the plaintiffs intended embarking on would be in flagrant breach of the Contract. Breach of contract on the part of the defendant was denied. It was stated that the defendant had reviewed all transactions over the period covered by the Contract and was satisfied that the total amounts charged did not exceed the total payable by the plaintiffs under the terms thereof. Other issues were addressed, but for present purposes it is sufficient to record that it was pointed out that the plaintiffs were indebted to the defendant in the sum of €378,882.45, being the trading balance as at 30th September, 2012.

17. By 9th October, 2012 there had been no response from the plaintiffs' solicitors to the request contained in that letter to provide the detailed analysis which the plaintiffs contended indicated overcharging. The implications of the termination of the Contract by the plaintiffs as notified in the letter of 3rd October, 2012 did give rise to further correspondence, but I consider that it is not necessary to outline it here.

18. The next matter of significance is that the plenary summons was issued on 10th October, 2012. By letter of 12th October, 2012, which has not been exhibited, the defendant's solicitors were asked to accept service of the proceedings. Once again, by letter of 12th October, 2012 the defendant's solicitors complained that they had not been given details of the basis of the plaintiffs' claim and

how it is quantified, notwithstanding their previous requests. By letter of the same date, 12th October, 2012, directly from the defendant to the plaintiffs, the defendant formally demanded immediate payment of the sum of €375,553.93 "in respect of past consignments of petroleum products".

19. By letter dated 15th October, 2012 to the Manager of the Branch of AIB Bank at Naas, the defendant demanded payment of €130,000 on foot of the Bank Guarantee in part satisfaction of the balance of €375,553.93 which it was stated remained owing by the plaintiffs to the defendant. By letter dated 18th October, 2012 the plaintiffs' solicitors wrote directly to the Manager of the Naas Branch of AIB Bank informing him that the plaintiffs had issued these proceedings, that the debt was disputed and, in fact, the debt was denied. Confirmation was sought that AIB Bank did not intend remitting any funds to the defendant on foot of the Bank Guarantee. It was stated that it was the plaintiffs' intention to seek injunctive relief preventing payment. The response of the Manager, which was dated 19th October, 2012 was to the plaintiffs directly. In that letter it was pointed out that AIB had no discretion in the matter and was obliged and mandated to pay the sum demanded. Apparently, there was another letter dated 26th October, 2012 from the plaintiffs' solicitors to the Manager of the Naas Branch of AIB Bank, which has not been exhibited. That letter was responded to by the Manager by a letter of the same date in which he stated that he was looking forward to receipt of written confirmation on 30th October, 2012 that the defendant had countermanded its request for payment under the Bank Guarantee or, alternatively, that the plaintiffs had obtained injunctive relief preventing payment on foot of the Bank Guarantee.

20. As I have recorded earlier, the defendant's solicitors accepted service of the proceedings on 23rd October, 2012. By letter dated 26th October, 2012 the plaintiffs' solicitors, having referred to the demand by the defendant for payment on foot of the Bank Guarantee, advised the defendant's solicitors that, unless that demand was countermanded by 5pm on 26th October, 2012, the plaintiffs intended to apply to the High Court on 30th October, 2012 for injunctive relief preventing payment on foot of the Bank Guarantee. That letter referred to the fact that "assessment reports for the relevant periods for 2009, 2010, 2011 and 2012" were enclosed. In fact, they were not enclosed. On 30th October, 2012 certain documentation represented as the "assessment reports", which merely comprised spreadsheets, was e-mailed from the plaintiffs' solicitors to the defendant's solicitors.

21. The defendant's solicitors responded to the plaintiffs' solicitors' letter of 26th October, 2012 by letter of 26th October, 2012, which was not exhibited in the grounding affidavit of the first plaintiff and which was not put before the Court prior to the making of the interim order on 1st November, 2012. In that letter it was contended that the defendant was entitled to make the demand on foot of the Bank Guarantee. An assertion which had been made by the plaintiffs' solicitors that the defendant was trying to circumvent the real dispute between the parties was rejected. Once again the defendant's solicitors complained about not having received the assessment reports, which were supposed to be included in the letter of 26th October, 2012. It was made clear that the defendant had no intention of withdrawing its request for payment on foot of the Bank Guarantee. Finally, it was stated that the defendant would vigorously defend any application for injunctive relief. There was a further letter of 30th October, 2012 (29th October, 2012 being a Bank Holiday) from the defendant's solicitors to the plaintiffs' solicitors. This letter was sent by fax following receipt of the assessment reports and it was stated in it that, from the initial analysis carried out of those documents, it appeared that there were material errors in the plaintiffs' calculations and a failure to take account of the terms of the Contract between the parties. Confirmation was sought that the plaintiffs would not seek an injunction. That letter was not exhibited in the grounding affidavit and it was not before the Court when the interim order was made. It was not responded to by the plaintiffs' solicitors before the application for the interim order was made.

22. By letter dated 30th October, 2012 from the Manager of the Naas Branch of AIB Bank to the plaintiffs' solicitors, disappointment was expressed that AIB Bank had not had any confirmation that the defendant had countermanded its claim or that injunctive relief had been sought. It was indicated that, accordingly, the AIB Bank was making the payment of €130,000 to the defendant and was debiting that amount to the account of the plaintiffs. By letter dated 31st October, 2012 to the Manager of the Naas Branch, the defendant's solicitors sought confirmation by return that payment pursuant to the Bank Guarantee would be made to the defendant.

23. There was direct contact between the defendant and its solicitors, on the one hand, and AIB Bank, on the other hand, on the day prior to and on the day the interim injunction was granted. In his replying affidavit sworn on 5th November, 2012, Mr. Ray O'Sullivan, the Managing Director of the defendant, deposed to the fact that he called AIB Bank on 31st October, 2012 seeking confirmation that payment pursuant to the Bank Guarantee would be made that day and that the defendant's solicitors wrote to AIB Bank on 31st October, 2012 seeking similar confirmation. Further, Mr. O'Sullivan called AIB Bank at 2pm on 1st November, 2012, and was informed that AIB Bank had been told by the plaintiffs' solicitors that an injunction was being sought by the plaintiffs and "would be provided to AIB Bank shortly and that payment to the defendant should not be made". As counsel for the plaintiffs submitted, those averments are relevant to the non-disclosure argument which is dealt with later, because they illustrate what the defendant knew about the proposed application.

24. That was the state of play on the communications between the parties and between the parties and the Bank when the application for the interim order was made.

**Issues**

25. The defendant resisted the grant of an interlocutory injunction on various grounds. In reliance on a number of English authorities, counsel for the defendant submitted that a court will not intervene to restrain payment on foot of a contract such as a guarantee save in exceptional circumstances and no such exceptional circumstances arise in this case. It was also contended that the Court should refuse to grant an injunction at the interlocutory stage because the plaintiff had not made full disclosure in seeking the interim relief *ex parte.* I propose to consider each of those issues in turn.

**No basis for injunction**

26. The Court has not been referred to any Irish authority on this argument. However, it is worth observing that helpful commentary on the topic is to be found in Kirwan on *Injunctions – Law and Practice* (2008, Thomson Round Hall) at p. 438 et seq. and in Breslin on *Banking Law* (2nd Ed., 2007, Thomson Round Hall) at para. 12 – 09 et seq.

27. In giving judgment in the Court of Appeal in *Bolivinter Oil SA v. Chase Manhattan Bank & Ors.* [1984] 1 All ER 351, Sir John Donalson M.R. specifically addressed the circumstances in which an *ex parte* injunction should be issued which prohibits a bank from paying under an irrevocable letter of credit or a performance bond or guarantee. He stated (at p. 352):

> "The unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from

> honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity. Furthermore, if this happens at all frequently, the value of all irrevocable letters of credit and performance bonds and guarantees will be undermined."

Donaldson M.R. then addressed the position of a judge who is asked, at short notice and *ex parte*, to issue an injunction restraining a payment by a bank under, say, a guarantee. He stated that the judge should ask whether there is any challenge to the validity of the guarantee itself. He continued:

> "If there is not or if the challenge is not substantial, *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligation, although restrictions may well be imposed on the freedom of the beneficiary to deal with the money after he has received it. The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged."

28. In Hapgood *Paget's Law of Banking* (13th Ed., 2007) (at para. 34.11) the observations of Donaldson M.R. are commented on as follows:

> "Although these observations were directed to *ex parte* injunctions, they apply with equal force where the application is *inter partes*.
>
> There are two major hurdles to be cleared by the applicant for an injunction restraining payment:
>
> (1) to establish a serious issue to be tried that the fraud exception applies; and
>
> (2) to establish that the balance of convenience is in favour of the grant of an injunction.

The circumstances in which both propositions can be established will be exceedingly rare."

29. More recently in *Deutsche Ruckversicherung v. Walbrook* [1996] 1 All ER 791, the Court of Appeal considered what level of proof is required for the grant of an interim injunction in a letter of credit case. Staughton L. J. stated (at p. 799) that the answer is to be found in the judgment of Ackner L.J. in *United Trading Corp. SA v. Allied Arab Bank* [1985] 2 Lloyd's Rep. 554 at 561 in the following passage:

> "Have the plaintiffs established that it is seriously arguable that, on the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the [letter of credit]."

Later, Staughton L.J., on the basis of the reasoning of the House of Lords in a case which did not involve an interlocutory injunction *(United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1983] 1 AC 168), set out the position when that reasoning is applied to an application for an interlocutory injunction to restrain a bank from making a payment as follows (at p. 800):

> "The bank is entitled and bound to pay on presentation of apparently conforming documents, unless the demand of the beneficiary is clearly fraudulent. . . . Here again, the justification for this favoured treatment of the beneficiary of a letter of credit, and of the bank that has issued it, is said to be the lifeblood of commerce."

Staughton L. J. later observed that the test he had outlined was a departure from the general rules applicable to interlocutory injunctions as stated in *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504, but he was inclined to regard the letter of credit cases as special cases within the American Cyanamid guidelines.

30. Whether stated in the terms formulated by Donaldson M.R. in the *Bolivinter Oil* case, or as laid down by Ackner L.J. in the United Trading case, the test is also outside the general principles adopted by the Supreme Court in this jurisdiction, following the *American Cyanamid* case, in *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. However, in recent years there have been many departures from those principles in private law areas. Two examples suffice to illustrate that point: applications for mandatory injunctions, particularly in the employment sphere (*Maha Lingam v. Heath Service Executive* [2006] ELR 137); and applications for springboard injunctions (*Allied Irish Banks v. Diamond & Ors*. [2011] IEHC 505). In any event, on the hearing of this application, counsel for the plaintiffs, in my view, was correct in acknowledging that the test laid down in the English authorities represents the law in this jurisdiction, although he submitted that the question posed by Ackner L.J. should be answered in the affirmative on the facts here.

31. Although no Irish authorities were opened to the Court on this application, Kirwan (op. cit.) refers to the decision of the High Court (Keane J.) in *G.P.A. Group Plc v. Bank of Ireland* [1992] 2 I.R. 408, a case in which an application to restrain payment on foot of a letter of credit, in the context of very complicated facts, was refused. Keane J. stated (at p. 423):

> "But it is perfectly clear, in my view, that the Bank was not entitled to withhold payment of the letter of credit because of a dispute between the parties as to whether or not it was intended to operate, where the documents furnished were on their face in conformity with the terms of the letter itself. It was somewhat faintly urged that the Bank's credit was not impugned since they were restrained by court order from meeting the demand but such an approach rests on the fallacious assumption that the courts in insisting on the honouring of such documents are concerned solely with the reputation of individual banks. The policy of the courts in such cases of requiring immediate compliance with a demand for payment, save in the case of obvious or established fraud, also reflects the importance of such documents in international commercial transactions and the extent to which they are relied on as the equivalent of cash by the business community."

32. In this case, as the Bank Guarantee states on its face, it was the plaintiffs who requested the Bank to give the guarantee to the defendant. The plaintiffs do not challenge the validity of the Bank Guarantee. Under it, AIB Bank has undertaken on written demand from the defendant to pay the sums due by the plaintiffs on foot of consignments up to a maximum of €130,000. In its letter of 15th October, 2012, which was properly addressed to the Manager of the Naas Branch of AIB Bank, as I have recorded, the defendant stated that there was €375,533.93 due to it by the plaintiffs in respect of consignments of petrol products supplied by it, which amount remained outstanding. The defendant demanded payment of €130,000 in part satisfaction of that sum. In accordance with

the terms of the Bank Guarantee, AIB Bank was entitled to treat that letter as conclusive evidence that the sum demanded was due by the plaintiffs to the defendant. Although they have alleged overcharging, the plaintiffs have not made the case that the demand by the Bank was fraudulent and there is no evidence whatsoever on the basis of which one could impute knowledge of fraudulence to the Bank. Therefore, on the basis of the test adumbrated by Donaldson M.R. the application for an interlocutory injunction should be refused. Similarly, in answering the question posed by Ackner L. J., it would not be appropriate to infer that, as of 1st November, 2012, the defendant could not honestly have believed in the validity of its demand on AIB Bank under the Bank Guarantee. On the basis of the affidavits filed since 1st November, 2012, in which there is a very complicated controversy as to whether the defendant overcharged the plaintiffs for the products supplied under the Contract thereby breaching the underlying contract, it is not possible to infer that the defendant could not honestly believe at this point in time in the validity of its demand. Accordingly, it seems to me that in the exceptional circumstances of this case, the Court should not restrain AIB Bank from making payment to the defendant, nor should the Court direct the defendant to countermand the demand for payment.

33. In order to illustrate why it is not possible to conclude that the plaintiffs have established that it is "seriously arguable" that, when the application for the interlocutory injunction came on for hearing, the only reasonable inference which could be drawn is that the defendant could not honestly have believed that it was entitled to make a demand on foot of the Bank Guarantee on the basis that it was owed in excess of €130,000 by the plaintiffs, I propose summarising the affidavit evidence which is now before the Court. The position evolved as follows:

(a) In his grounding affidavit sworn on 1st November, 2012, the first plaintiff averred that there had been overcharging by the defendant. He referred to an analysis of the invoices from May 2009 to December 2011 which had been carried out with the assistance of Ian Gillespie of RE-AN International Technology Services Ltd. (RE-AN) and he averred that the findings of the analysis revealed a significant and consistent overcharging for fuel prices to the plaintiffs by the defendant. He exhibited what was referred to as a copy of the Report of RE-AN. He quantified the overcharging for the years 2009, 2010 and 2011 on the same basis as had been set out in the letter of 3rd October, 2012 and he also alleged that the overcharges had led to the defendant taking over three of the plaintiffs' fuel station forecourt premises, which resulted in the plaintiffs suffering loss of profits and loss of margin/income, but that loss was not quantified. The Report of RE-AN exhibited was merely a series of spreadsheets, with no narrative.

(b) In his replying affidavit sworn on 5th November, 2012, Mr. O'Sullivan referred to the spreadsheets having been received by the defendant's solicitors on 30th October, 2012 but stated that it was impossible to understand the significance of what was contained in the spreadsheets without some form of narrative explanation, which had not been provided. It was averred that there was no explanation as to why the author of the document believed overcharging had taken place, or what the basis of the overcharging might be. However, Mr. O'Sullivan averred that, notwithstanding that the documents were unclear and inconclusive, he had reviewed them and it seemed to him that it might be the case that the author of the Report had failed to take account of the rack charges in calculating the prices charged.

(c) Mr. Gillespie swore an affidavit on 7th November, 2012 in response to those averments in Mr. O'Sullivan's affidavit, with which he took issue. He confirmed the findings of the Report of RE-AN and that the analysis was carried out on the basis of the "Method Statement". He rejected Mr. O'Sullivan's interpretation of the difference between the price charged and the price which Mr. Gillespie assessed should have been charged. He advanced certain arguments, rather than strict facts, to answer the defendant's contention that the prices payable by the plaintiffs for fuel were subject to "rack charges".

(d) On 7th November, 2012 the first plaintiff swore his second affidavit. He also disputed Mr. O'Sullivan's contention that "rack charges" were included in the calculation of the price. He referred to provisions of the Contract and he also referred to invoices which had been issued by the defendant to the plaintiffs. He contended that the response of the defendant was grossly inadequate and accused the defendant of being intent upon responding in a vague and general way to the plaintiffs' claim, although it had been furnished with the necessary documentation.

(e) In fact, the Method Statement referred to by Mr. Gillespie was not furnished to the defendant's solicitors until 8th November, 2012. This led to Mr. O'Sullivan's second affidavit which was sworn on 9th November, 2012. In that affidavit Mr. O'Sullivan averred that the Method Statement provided precisely the information which was required to understand the RE-AN Report in full. He averred that, having reviewed the Method Statement, he was in a position to confirm his "suspicion" that the conclusions in the RE-AN Report were wrong, because the author had failed to take into account that the defendant included (as it was entitled to pursuant to the terms of the Contract) rack charges in the price of fuel. On that basis, there had been no overcharging by the defendant. Later in his affidavit Mr. O'Sullivan elaborated on some of Mr. Gillespie's comments in relation to the implications of imposing rack charges. He gave an explanation of the basis on which rack charges charged to the plaintiffs were calculated, referring to the fact that from August 2010 fuel was sourced by the defendant on behalf of the plaintiffs from the Joint Fuel Terminal at Dublin Port, with resultant increase in rack charges. He also averred that from July 2010 the Bio-Fuel Obligation Scheme imposed a requirement on fuel importers to ensure that road fuel products have a minimum of four per cent bio-fuel content, which also increased importer rack charges. The last two averments are recorded here with a view to illustrating the complexity of the factual dispute between the plaintiffs and the defendant on the issue of alleged overcharging.

(f) The first plaintiff swore a further affidavit on 13th November, 2012. In that affidavit the first plaintiff averred that he had always accepted that the concept of "applicable Rack charges" was included in the definition of the price in Schedule 1 to the Contract, which seems to be at variance with what he had averred in his affidavit of 7th November, 2012, but such rack charges were not applied at the commencement of the Contract (which I assume means under the plaintiffs' previous relationship with the defendant) and the Contract proceeded on that basis. The first plaintiff further averred that no notice or notification had been given to the plaintiffs that rack charges were being applied. In particular, the first plaintiff took issue with an averment in Mr. O'Sullivan's second affidavit, which exhibited an e-mail sent by Mr. O'Sullivan to the plaintiffs on 27th October, 2010 and the thrust of what the first plaintiff had to say was that the plaintiffs did not receive the e-mail. Nonetheless, the first plaintiff embarked on an analysis of it with a view to illustrating that the additional rack charge "does not tally with the overcharging we have discovered".

(g) Mr. Gillespie swore a second affidavit on 13th November, 2012, in which he criticised the content of Mr. O'Sullivan's second affidavit. He averred that, if the level of rack charge referred to in the controversial e-mail was applied for the years 2010 and 2011, it would not "match" the level of variation between the calculated price and the invoice price, which he had ascertained and had set out in his Report. His conclusion was that, even if the rack charge referred to in the e-mail was built in, there remained an unexplained discrepancy. Mr. Gillespie's affidavit is very technical and, quite frankly, in order to understand it, its contents would have to be explained to a person with no expertise in the subject.

(h) Finally, Mr. O'Sullivan swore his third affidavit on 14th November, 2008 and reiterated that the controversial e-mail had been sent to the first plaintiff. He also contradicted an averment in the previous affidavit of the first plaintiff that the defendant had charged the plaintiff different prices for the same fuel at different fuel station locations, exhibiting invoices dating from August 2010 to corroborate his assertion that the first plaintiff was simply wrong.

34. As the foregoing summary illustrates, it is wholly impossible, and it would clearly be inappropriate, for the Court to form any view on the factual dispute between the plaintiffs and the defendant in relation to overcharging having regard to the conflicted nature of the affidavit evidence. It is for that reason that the Court cannot form the view that it is seriously arguable that the defendant could not honestly believe that it is entitled to the sum it claims is due by the plaintiffs to it, which is almost €250,000 in excess of the maximum amount which AIB Bank is committed to pay under the Bank Guarantee.

**Balance of convenience**

35. Having regard to the observations of Keane J. in the penultimate paragraph in *G.P.A. Group Plc. v. Bank of Ireland,* I consider that it is not necessary to address the issue of the balance of convenience. Keane J. stated (at p. 424):

> "I bear in mind that this is an application for an interlocutory injunction and that, generally speaking, the court, if satisfied that the plaintiff had raised a serious question as to the violation of its rights, would go on to consider whether the balance of convenience was in favour of granting or withholding the injunction. However, in a case of this nature, where the question as to whether the Bank is obliged to make payment depends solely on the construction of the letter of credit and the documents furnished by the party seeking payment, it would defeat the policy considerations already mentioned if the court were to enjoin the Bank from payment until the final disposal of the action."

**Lack of candour on the application for interim injunction**

36. As I have outlined earlier, the interim order has remained in place. The defendant did not apply to have it discharged. However, the defendant invites the Court to decline to make an interlocutory order on the basis that the plaintiffs did not make full disclosure to the Court of all matters relevant to the exercise of the Court's discretion on the *ex parte* application for an interim injunction. In this connection, the defendant relied, *inter alia*, on the decision of the High Court (Clarke J.) in *Bambrick v. Cobley* [2006] 1 ILRM 81. In his judgment (at p. 89) Clarke J. listed the factors which he considered to be the ones most likely to weigh heavily with the Court where the Court is asked to exercise its discretion to refuse to grant an interlocutory injunction, where a failure to disclose has been established, listing:

> "1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place."

37. There were undoubtedly errors, inaccuracies and omissions in the grounding affidavit sworn by the first plaintiff on 1st November, 2012. There was an incorrect averment that no demand had been made by the defendant for the sum of €375,553.93 which was alleged to be outstanding. There was an unfair comment that the defendant had "acted with impunity", which the deponent sought to justify on the basis of an erroneous statement that the plaintiffs' claims of overcharging had been ignored by the defendant, which was not the case. It was incorrectly averred that the defendant's solicitors had not responded to the plaintiffs' solicitors' letter of 26th October, 2012. However, that was clearly not a deliberate error because the first plaintiff swore an affidavit on 2nd November, 2012 exhibiting the letters of 26th October, 2012 and 30th October, 2012 which the plaintiffs' solicitors had received from the defendant's solicitors and he acknowledged that they should have been brought to the attention of the Court. Further, he stated that the failure to do so arose through inadvertence, which I accept was the case. I would also be inclined to attribute the failure to furnish the narrative, which eventually rendered the so-called "assessment reports" meaningful, until 8th November, 2012 to inadvertence. In short, if the determinative factor which I have addressed earlier did not exist in this case, I do not think it would be proper for the Court to exercise its discretion by refusing interlocutory relief merely because of the errors and omissions in the grounding affidavit, when one takes into account the overall circumstances.

**Any other form of relief available to the plaintiffs?**

38. The statement in the judgment of Donaldson M.R. in the *Bolivinter Oil* case that "restrictions may well be imposed on the freedom of the beneficiary to deal with the money after he has received it" raises the question whether there is any other form of relief available to the plaintiffs. The reality of the situation is that a freezing order of the type considered in Paget (*op. cit*.) at para. 34.14 would not resolve the plaintiffs' problem.

39. The nub of the plaintiffs' problem is that the sum of €130,000 to be paid by AIB Bank to the defendant on foot of the Bank Guarantee will be debited to the plaintiffs' account with AIB Bank, in consequence of which the plaintiffs' overdraft availability, which is already at its maximum, will be effectively wiped out. The consequence of that, the first plaintiff has averred, will be that direct debits on the account will not be met, which will mean, in reality, withdrawal of banking facilities from the plaintiffs, which will result in their business failing, leaving fifty five employees jobless. The only mechanism by which that unfortunate eventuality could be avoided would be if the sum of €130,000 was lodged back to the plaintiffs' account pending the trial of the action. I can see no basis in equity on which the Court could make an order which would have that effect.

40. While counsel for the plaintiffs did not ask the Court to provide such relief, which, in effect, would be akin to temporary attachment of the sum of €130,000 in advance of judgment, and not merely a freezing of that sum in a manner akin to a mareva injunction, consideration of the availability of such relief has been prompted by the statement of Donaldson M.R. I am satisfied, however, that there is no equitable principle on the basis of which such an order could be made pending the hearing of the substantive action.

**Order**

41. There will be an order dismissing the application for an interlocutory injunction. The interim injunction will lapse.