Neutral Citation: [2013] IEHC 318

THE HIGH COURT

[2013 No. 4143 P.]

BETWEEN

PAT O'LEARY

PLAINTIFF

AND

VOLKSWAGEN GROUP IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Moriarty delivered on the 4th day of July, 2013

1. In this strenuously contested interlocutory injunction application, heard last week, the Plaintiff primarily seeks an Order restraining the Defendant from terminating, or taking any steps to terminate, some three Volkswagen Dealer Contracts held by him, until the determination of the substantive proceedings. He sought further like injunctive relief, restraining the Defendant from contacting customers of the Plaintiff without his prior consent, but this aspect formed only a limited part of what was agitated at the hearing. The importance of the interlocutory hearing to the parties was shown by the swearing of approximately 65 pages of Affidavits, two from each of the Plaintiff and Mr. Simon Elliott, the Defendant's Managing Director, together with volumunious Exhibits appended.

2. Both written and oral submissions were also furnished, and whilst some relatively limited conflicts of fact arose on the respective Affidavits, the area of controversy primarily related to the legal consequences arising from extensive dealings had been the parties. Two matters in particular arose, firstly, the repercussions of European Commission Regulations on what had hitherto been the largely uncontroversial content of the relevant Dealership Agreements and secondly, the nature and scope of national measures taken by the Defendants to its dealers, in response to plummeting Volkswagen car sales in the wake of the financial crisis besetting this country from in or around late 2007. It will suffice at this juncture to set forth only a very abbreviated summary of the principal events involved in and preceding the controversies that have arisen.

3. The Plaintiff, as sole proprietor of O'Leary's Garage at Lissarda, Co. Cork, had succeeded his parents in the early 1980s in running the business, selling farm machinery and various makes of cars, in addition to maintaining the repairs and servicing that had always been provided. The premises were conveniently situated on the main road from Cork to Killarney and were within five minutes of Macroon and twenty of Cork City by car. About 1989, the Plaintiff was approached with a view to undertaking the local franchise for Audi cars, and for both Volkswagen cars and commercial vehicles, and following negotiations was in September, 1989, appointed as an authorised dealer for Audi and Volkswagen in Ireland. Matters prospered in the dealership, with the focus shifting from farm machinery to promotion, sale and service of Audi and Volkswagen cars and it is not in issue that, as sales nationally of both makes grew dramatically, so also did the Plaintiff's, whose sales performance and other endeavours seen at all times to have been held in high esteem. Construction of an improved and expanded showroom, sufficient to accommodate twelve cars of either make, was completed in 2002, although the Plaintiff later that year evinced some disappointment that, after complying with that capacity for both makes as instructed, he was then informed that dealers of stand-alone Audi showrooms were being given contracts of indefinite duration, whereas he was only then accorded five more years with the Audi brand.

4. At para. 3 of his first Affidavit, the Plaintiff stated that, prior to the introduction of EC Regulation 1400 of 2002, he and other dealers had concerns that the expected provisions in this could enable manufacturers to terminate dealership contracts more easily. In any event, what his existing 1996 contract provided for by way of termination was for:-

(a) two year's notice on either side, described as ordinary termination;

(b) one year's notice in the event of a need to reorganise the whole or a significant portion of the dealer network; or

(c) Immediate or summary termination for ten specifically listed causes.

In this context, dealers experienced considerable relief when it was learned that the 2002 Regulation required suppliers wishing to terminate a dealership contract to give notice of termination in writing, and that such notice must include "detailed, objective and transparent reasons for the termination". That same article provided at 3(b)(g) that either party could refer the issue of whether termination was justified by the reasons given in the notice to an independent expert or arbitrator; this in addition was stated to be without prejudice to the right of either party to make an application "to the competent national court".

5. In September, 2003, all dealers were called to a meeting for the purpose of signing new agreements reflecting the EC Regulation. At that meeting, the Plaintiff averred that he was expressly advised that under the new contracts, dealers were now significantly more secure, as now they could only be terminated for cause shown. In the light of that reassurance, the Plaintiff signed three Volkswagen Dealer Contracts, respectively for sales of different Volkswagen products. As his business continued to grow, albeit with more stringent controls from Volkswagen, the Plaintiff moved his farm machinery for sale to an adjoining site, and then, following repeated advice from Volkswagen personnel to focus exclusively on sales of their cars, did so and exited from farm machinery sales.

6. In June, 2007, by reason of transfer of Volkswagen distribution rights from MDL to the Defendant, the Plaintiff was advised that his contracts had been assigned to the Defendant, with effect from 2nd July, 2007. Later that year, the Plaintiff met with the Chief Executive of MDL, Mr. Bob O'Callaghan, and on foot of the Plaintiff's concerns about losing Audi sales, was reassured by him that Volkswagen sales would continue to grow, and that remaining exclusively with Volkswagen was the correct business decision for him, especially as his Volkswagen contract, being of indefinite duration, gave him security of tenure. In similar but perhaps more significant vein, the Plaintiff recalled a subsequent visit from Mr. Tom O'Connor, National Volkswagen Sales Manager. Mr. O'Connor indicated that his visit was due to the imminent termination of the Plaintiff's Audi contract, and to discourage him from seeking a new brand. In further conversation, in response to the Plaintiff's further enquiries, relating to a possible nationwide network review by Volkswagen, and resultant dealership terminations, the Plaintiff recalled Mr. O'Connor responding that there was no possibility of this happening,

that his contractual relationship with Volkswagen was stronger than ever, and that it could only be terminated for cause shown. In consequence, the Plaintiff resolved not to multi-franchise, but to concentrate exclusively on selling Volkswagen products. This conversation was specifically referred to at para. 51 of Mr. Simon Elliott's first replying Affidavit: he there deposed that no such "assurance" could alter the contract, under Article 22 of which all amendments or alterations had to be in writing, and that any such representation in 2007, when Volkswagen sales had peaked to their highest level, could not have foreseen the national economic crisis that was about to unfold. It was not sought to dispute the content of the conversation, either by reason of any contact had by Mr. Elliott with Mr. O'Connor, or otherwise.

7. The motor industry did indeed recede dramatically, although the Plaintiff stated that he managed to avoid dispensing with any of his 29 staff. He stated that, at National Dealership meetings held in 2009, both Mr. Chamberlain, Irish Sales Manager of the Defendant, and latterly, Mr. Willis, predecessor to Mr. Elliott as Managing Director, exhorted dealers to secure their positions by investing in their premises. In response, the Plaintiff did so to such effect that in 2010, he had one of the largest volume increases in the Irish market, and by April, 2011, he was completing a new Volkswagen display area, at a cost of €200,000, and capable of giving Lissarda a capacity to display 200 vehicles on site.

8. Storm clouds soon followed. At a National Dealer's meeting in Dunboyne on 15th April, 2011, Mr. Willis stated that all Dealership Contracts were being terminated, and, following an "Ideal Network Plan", carried out by a UK Company, GMAP, dealers were being reduced from 40 to 35 nationwide. Part of this plan provided that dealers in Cork were being reduced from five to four, with a facility for a 20 plus showroom in Cork City. To the Plaintiff's particular chagrin, being among all his fellow dealers, it was further then announced that Lissarda was not "an ideal network point". Apart from his shock in the context of prior reassurances, the Plaintiff was in no doubt as to the resultant damage that would accrue to the goodwill of his business, both sales and servicing. He recalled that it was then announced by Mr. Chamberlain that it was open to any dealer who was not in "an ideal network point" to present "an exceptional business case" which would be favourably reviewed. Likewise, any dealers could apply for an area, and in the event of more than one applicant for such an area, a tender competition would be held.

9. On 18th April, 2011, the Plaintiff received a letter from the Defendant, purporting to give written notice of termination of his three contracts. The reasons given were that it was necessary for the Defendant to reorganise its dealer network in light of recent structural changes to the market, and due to the significant downturn in the Irish Economy. Meeting with Mr. Willis the following month, the Plaintiff requested to be provided with further information and background to the "ideal network plan". This was refused by Mr. Willis, who also refused to elaborate on the reason for Lissarda's exclusion, other than to rely on the GMAP report, which he refused to share or discuss. What he did do was to suggest that the Plaintiff tender for the new Cork City Contract, stating that if successful the Plaintiff could retain Lissarda as a hub of the Cork City dealership. It was following a further meeting, at which the Plaintiff was advised as to the necessity that the successful tenderer should be seen to have appropriately impressive showroom facilities, that the Plaintiff completed the €200,000 expansion, already referred to, and entered the competition but was informed in late June, 2011, that his tender had been unsuccessful.

10. In August, 2011, Mr. Elliott replaced Mr. Willis as Managing Director, and the Plaintiff set about a vigorous strategy of seeking to persuade him of the commercial value to the Defendant of retaining Lissarda, and revising what he viewed as his unwarranted termination. Despite a visit to Lissarda by Mr. Elliott, at which he complimented the Plaintiff on the excellent site and sales performance, and expressed frustration at lack of progress by the successful tenderer in Cork City in constructing a new showroom, the most comfort he offered the Plaintiff was that he would "look again" at the termination of the Lissarda contracts. Although the meeting ended cordially, the Plaintiff was contacted by Mr. Elliott the following month, and told there would no change in the decision to exclude Lissarda and that had the decision been reversed, it would have threatened the new Cork City incumbent. Correspondence with Mr. Elliott ensued on similar lines, and the two met incidentally at a Dealers' Conference, but no change of heart was induced. On 5th April, 2013, the Plaintiff received a letter from the Defendant's Mr. Richard Blunden, advising the termination of the contracts was to proceed on 30th April following, and stating that thereafter the Defendant would write to all customers, advising them of authorised sellers of Volkswagen products. This, the Plaintiff took additional exception to, being advised that such letters would clearly infringe the Data Protection Acts, 1988 to 2003, and this matter forms the second, albeit lesser, of the grounds of interlocutory relief urged. The Plaintiff then instituted his proceedings by Plenary Summons, dated 25th April, 2013, five days prior to the specified date of termination of the three contracts, on 30th April, a time-scale repeatedly castigated by the Defendant, both in written and oral submissions, and in Mr. Elliott's Affidavits. Those Affidavits contain quite little by way of disputing factual matters comprised in the Plaintiff's Affidavits, which is why this résumé of events predominantly refers to what Mr. O'Leary has sworn.

11. Cogent and forceful written submissions were furnished by each side in the days prior to last week's hearing. For the Defendant, it was urged primarily that the Plaintiff's application was in essence moot, as the Dealership Contracts had been duly determined in accordance with their terms, furnishing the more favourable two year period of the notice options available, whereupon the Plaintiff had evinced acceptance by only seeking to persuade a change of heart on commercial grounds, and had only contended that termination was ineffectual on the basis of the EC Regulation some five days before notice expired. Apart from such delays and laches being of an extreme nature, the exceptional downturn in car sales had necessitated revised measures with dealerships. In any event, applying the accepted tests for interlocutory relief, it was argued that the Plaintiff fell far short on all grounds, especially as the substantively mandatory nature of the relief sought necessarily carried with it the significantly higher threshold on the essential first test. Likewise, the court should be extremely hesitant in imposing an ongoing contractual relationship on parties who were clearly at loggerheads.

12. For the Plaintiff, it was submitted that their client fulfilled each of the criteria for the relief sought, even if the higher level on the first hurdle consequent on relief sought being mandatory was applied, which it was suggested was not the case. On the inadequacy of damages as a remedy, and the balance of convenience, it was contended that the facts clearly favoured the Plaintiff, and in any event, given the preparedness evinced by both sides to have the matter ready for plenary hearing by the start of the Legal Year in October next, the period of continuance of the relationship contemplated was for only a modest and manageable duration. Further, the subsisting and unquestioned after-sales servicing and repairs contracts between the parties provided a nexus which would offset any awkwardness in maintaining the dealership arrangements for a limited period. The Plaintiff had not acquiesced in termination of his contracts, but had merely sought resolution through dialogue in relation to the commercial merits of maintaining Lissarda, while reserving his legal options under the EU Regulation, if those endeavours proved unavailing.

13. I have considered these and the other arguments advanced both orally and in writing by both sides. It is not in dispute that, even after the recent meticulous review of existing law undertaken by Clarke J. in *Okunade & Anor v. Minister for Justice, Equality and Law Reform* [2013] ILRM 1, in the sole Judgment delivered on behalf of a full Supreme Court (although in a case of itself primarily concerning principles applicable to asylum seekers), the relevant law remains as helpfully set forth by Laffoy J. in *Kinsella & Kinsella v. Wallace & Ors* [2013] IEHC 112, cited in the Plaintiff's written submissions, as summarising the tests set forth by the Supreme Court in *Campus Oil Limited v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88. These are as follows:-

(a) whether a fair *bona fide* question to be tried has been raised by the Plaintiffs;

(b) whether, if the Plaintiffs were to succeed at the trial, they would be adequately compensated by an award for damages;

(c) whether, if the Defendants were successful at the trial, they could be adequately compensated under the Plaintiff's undertaking as to damages for any loss which they would have sustained by reason of the grant of the interlocutory relief; and

(d) if there is a question as to whether damages would be an adequate remedy for either party, whether the balance of convenience lies in favour of the award or the refusal of an interlocutory injunction.

14. While it is submitted for the Plaintiff that the substantive relief sought is actually prohibitory rather than mandatory, what is sought is in essence a mandatory order, requiring the Defendant to hold to and observe a relationship it contends has lawfully ended. Indeed, the relief sought by the Defendant against the Plaintiff in its cross-proceedings is likewise primarily mandatory, a factor which may have contributed to the Defendant's preparedness to have those proceedings stand in the wings, and let the Plaintiff make the running. Some reliance is placed on behalf of the Plaintiff on the Supreme Court decision of Geoghegan J. in *O'Murchú v. Eircell Limited*, of 21st February, 2001, upholding a High Court decision of the then Kearns J. to refuse interlocutory relief to the Plaintiff, who sought orders to compel the Defendant to continue supplying him with mobile phones after it had ceased dealing with him. It is true that Geoghegan J. made some observations in the context of different types of mandatory relief, contrasting the then facts with an application requiring a wall to be knocked down. However, the ratio of his decision, upholding the High Court refusal of interlocutory relief, was based on his agreement with the High Court that damages were a sufficient remedy. Accordingly, it may reasonably be said that the initial remarks were primarily obiter, but in any event, it seems to me in the present instance that what the Plaintiff seeks by way of principal relief cannot be viewed as other than mandatory. That being so, he faces the higher criterion of being required to show "a strong case…likely to succeed at the hearing of the action".

15. This may have to some degree accounted for the primary trust of the trenchant closing submission of Mr. O'Callaghan, S.C., for the Plaintiff, being upon the inadequacy of damages and balance of convenience, as factors favouring his client. I share the view that, notwithstanding dicta of Finlay C.J. that the mere difficulty of assessing damages in a case does not of itself preclude their being assessed at full hearing, the combination of all the factors brought to notice in the Plaintiff's Affidavits, including the antiquity of the Dealerships, the consequences on his employees and the likely extensive future losses in this instance combine to render damages inadequate if the Plaintiff succeeds at full trial. I am also am of the view at this juncture, given all the matters to hand and the relative consequences for both sides, that the balance of convenience stands somewhat in the Plaintiff's favour.

16. But I have to return to the thornier question of whether the Plaintiff has surmounted the primary and more arduous hurdle of showing a strong case likely to succeed at full hearing. I may well feel considerable sympathy for the Plaintiff, and there is little doubt, depending on how matters run at full hearing, that he may establish that aspects of the Defendant's dealings with him were unfair, damaging and such as to entitle him to significant damages, not least in the refusal to provide specific and reasoned grounds for his future exclusion such as may have been comprised in the GMAP Report, rather than what the Plaintiff contends were little more than platitudinous generalisations. However, it is clear that I am bound by the Supreme Court decisions in both *Maha Lingham v. Health Safety Executive* [2005] IESC 1, and *Okunade*, as already referred to. Nor can I lose sight of the fact that, in response to a query from myself during the argument, it was agreed on behalf of the Plaintiff that in the ultimate it is for the Defendant to decide where it pitches its principal place of Cork retail business, even if it is in so improbable a location as Sherkin Island. I have not set forth in the course of this Judgment all the matters urged on both sides in relation to the EC Directive and connected case law, but I have considered the relevant arguments and materials, including the Plaintiff's averments in his initial Affidavit that he appeared to be aware of the significance of the Regulation at the time in question. While dicta of McCracken J., cited in submissions, in addition to some of Clarke J. in *Okunade*, referred to a disposition to retain the status quo in finely balanced contests, I am mindful, even if that facility were open to me, of the difficulties inherent in maintaining and supervising an uneasy and on one side unwanted regime pending finality and likewise, have some concerns that a three month period as envisaged on behalf of the Plaintiff may transpire to exceed this considerably. However, after considering all that is to hand, I have come to the conclusion that on the initial criterion, the Plaintiff has shown a *bona fide* question to be tried on the central matters in controversy, but has not satisfied the further test for mandatory relief of showing a strong case likely to succeed at the hearing of the action, when all matters on both sides are balanced. Consequently, I refuse the injunctive relief sought in mandatory terms.

17. I, however, am inclined to a different view in regard to the, admittedly lesser, prohibitory relief sought in relation to contacting the Plaintiff's customers, and was inclined to grant an interlocutory order in the terms sought until I noted a preparedness to furnish an undertaking in that regard at the conclusion of Mr. Elliott's first Affidavit. I will hear Counsel in this regard.