Neutral Citation Number: [2011] IEHC 15

THE HIGH COURT

COMPETITION

2010 10685 P

BETWEEN

GOODE CONCRETE

PLAINTIFF

AND

CEMENT ROADSTONE HOLDINGS PLC, ROADSTONE WOOD LIMITED AND KILSARAN CONCRETE

DEFENDANTS

JUDGMENT of Mr. Justice Cooke delivered the 20th day of January 2011

1. On the 26th November, 2010, the plaintiff applied by notice of motion to this Court for a series of interlocutory injunctions, the essential purpose of which is to prevent the defendants, pending the trial of this action, from selling or offering to sell certain products in the concrete and cement sector at allegedly below-cost prices in breach of ss. 4 or 5 of the Competition Act 2002, and Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU).

2. The plaintiff is an unlimited company engaged in the manufacture and supply of materials to the construction industry, particularly ready-mixed concrete and related products.

3. The first named defendant (more correctly designated, the Court believes, as "CRH plc",) is the holding company of a major commercial group and one of Ireland's largest publicly quoted enterprises. Many of its numerous subsidiaries are also engaged in this sector in the State or internationally. The second named defendant is one of those subsidiaries and is engaged in the manufacture and supply of cement, concrete and related products and is thus a competitor of the plaintiff. (The first and second named defendants are referred to jointly as "CRH".) The third named defendant ("Kilsaran",) which is an unlimited company is also engaged in this trade and is also a competitor of the plaintiff.

4. Although the issues raised in this application involve a number of related products, the case is primarily concerned with the production and supply of ready-mixed concrete which is used in building construction and is supplied in various grades, particularly in the grade described as "35 Newton" (35N). Most of the figures for price and market shares canvassed in this application are based mainly on that product and on that grade in particular.

5. It is an acknowledged characteristic of that product market that its geographic market can be defined with reasonable precision. It does not appear to be disputed that ready mixed concrete must be produced, delivered and used in place within about two hours of manufacture. Thus the geographic market is defined by a transportation radius by lorry delivery from the point of production. In effect, for these parties the geographic market is the greater Dublin area, based upon the 2 hour radius of delivery distances from the production plants of the operators in that market.

6. The claim made by the plaintiff as the basis for the interlocutory relief sought is that it is at imminent risk of being put out of business as a competitor in that market by the anti competitive and therefore illegal conduct of the defendants. The allegation is that they, as the main operators in that geographic market for those products, have combined to eliminate the plaintiff by means of secret ownership of Kilsaran by CRH, or by their collusive bidding for contracts; or by dint of the "collective dominance" of the three defendants in tendering for contracts at product prices which are anti competitive because they are well below cost and particularly below "average variable cost" of production to the defendants.

7. It appears also to be an accepted characteristic of this market that the major part of the turnover of the undertakings concerned is made up of sales of product to development projects and construction sites on the basis of supply contracts concluded through tender procedures. This part accounts, according to the plaintiff, for approximately 80% of sales in this market.

8. In the main grounding affidavit of Peter Goode, managing director of the plaintiff, detailed information and statistics are furnished in relation to the structure, volumes and other characteristics of the related markets in cement, aggregates and concrete. It seems likely, (although no finding on this point is called for in the present application), that CRH plc is an undertaking with the dominant position in the cement market in the State, through its wholly owned subsidiary Irish Cement Limited (which is not a party to this proceeding,) because it enjoys a market share of at least 70% and possibly as much as 90% while the only other producers of cement have market shares in single figures. The position of CRH in the aggregates market appears to be similar. The present application is not directly concerned with either of those markets, but such a position of dominance in the cement market may well be of relevance to the evaluation of dominance in the concrete market given that cement is an indispensable ingredient of concrete products.

9. The market in respect of which the injunctive relief is claimed is that of ready-mixed concrete and in his grounding affidavit, Mr. Goode suggests that the market shares of the main undertakings in the greater Dublin area are as follows:

COMPANY	2008	2009	2010
CRH/Roadstone	23%	29%	36.5%
Kilsaran	30%	30%	37%
Cemex	17%	16%	15%
Goode	15%	14%	5.5%
Keegan	8%	7%	3%

CPI	3%	2%	1.5%
Others	4%	2%	1.5%
Total	100%	100%	100%

10. It is not obvious or inevitable therefore that either CRH or Kilsaran individually occupies a dominant position in the relevant market on the basis of those market shares only. The plaintiff nevertheless alleges that CRH and Kilsaran together occupy a position of dominance. This is based first on the claim that Kilsaran is in fact secretly owned or controlled by CRH and secondly on the proposition that a position of joint dominance between them exists based on some unspecified form of financial interdependence or assistance between them. Alternatively, it is suggested that by their positions and conduct in the market they fall to be construed as having a "collective dominance".

11. It must immediately be said that these claims and assertions as to the existence of any such relationship between the defendants is categorically denied by the defendants. In the various affidavits filed on behalf of the defendants, the deponents are at pains to insist that there exists no relationship of ownership, financial interdependence or of day to day cooperation between them and that, at all relevant times, they have operated only as either independent competitors or as supplier and customer. Mr. Ken McKnight on behalf of the first named defendant avers as regards the allegation of this secret relationship that it is :

> "Completely untrue (and) without substance and is unsupported by any evidence. The first named defendant has no such relationship with the third named defendant and the only relationship between the second and third named defendants is as competitors. Neither the first nor second named defendant has ever acted in concert with the third named defendant, as suggested nor is the third named defendant controlled by CRH plc or any other company within its Group".

12. The plaintiff's claim, however, is said to be substantiated by extensive details of tenders made for and contracts awarded to the parties and other operators in the relevant market in the years 2007 – 2010. Details of the prices offered by the plaintiff are given and contrasted with what are said to be the prices which were successfully tendered by the defendants. On the basis of these figures it is alleged that the defendants have won contracts by offering to supply concrete at prices which are significantly below the claimed "average variable cost" of production of those products to the defendants.

13. According to the plaintiff, the effect of this strategy on the part of the defendants has been that the plaintiff has been unable to tender successfully for any contracts throughout the year 2010. On one occasion when it considered it had been successful in a tender, it was subsequently deprived of the contract by the second named defendant, which induced the contractor "with prices significantly below average variable cost".

14. The plaintiff further alleges that the defendants' intention to force the plaintiff from the market is corroborated by things said at various meetings and in various telephone conversations. Reliance is placed in particular upon the transcript of one conversation which Mr Barry Goode says he had on 27 April 2010 with a director of Kilsaran which, while rich in expletives is said to corroborate the proposition that Kilsaran intended to eliminate the plaintiff from the market by reducing prices to uneconomic levels. The Kilsaran director is claimed to have been recorded as threatening to "up the ante" and "to have 35N at €52 per m3 within three months….. and if it has to come to €50, here we go."

15. There is, accordingly, a widespread dispute between the plaintiff and the defendants on many of the main issues which will arise to be determined in this case. The defendants deny the existence of the alleged dominant positions either individually or as a form of "collective dominance". They categorically deny that Kilsaran is either owned or controlled, secretly or otherwise by any entity in the CRH group or that it has received any form of financial assistance from the group including the alleged payment of discounts or rebates by the group into foreign bank accounts. The figures put forward by the plaintiff for their respective market shares in the concrete market are not accepted nor is the accuracy of at least some of the 80 or more contract tenders identified in the grounding affidavit of the plaintiff's managing director. They question the accuracy of some of the prices quoted and point out that at least in some instances where a defendant is identified as having won the contract in question, this was not the case. Each defendant furthermore denies having engaged in any form of collusive tendering for contracts and any strategy of anti competitive behaviour designed to eliminate the plaintiff from the market. CRH also seeks to convey a different picture of the various discussions and meetings which the plaintiff refers to as having taken place in the latter half of 2010 by suggesting that some of these discussions were concerned with approaches made by the plaintiff to CRH inviting it to consider purchasing the plaintiff's quarry in Galway and to either purchase or enter into a joint venture in relation to its quarry at Naul in Dublin. It was in this context, according to Mr. McKnight, a Regional Director of CRH that the suggestion arose of Kilsaran having a possible interest in the Naul quarry because the latter's own production plant was located beside it.

16. It is obvious, therefore, that there are a large number of issues including disputes of fact which will fall to be determined at the trial of this action and which cannot be addressed much less resolved upon this application. In these circumstances the approach of the Court is not in dispute and involves applying the well established principles of *Campus Oil Limited v. Minister for Energy (No. 2)* [1983] I.R. 88. In considering whether to grant the interlocutory relief sought, the Court must consider:

> (a) Whether the plaintiff has established the existence of a "fair issue" or "serious question" for determination by the Court at the trial;
>
> (b) Whether, in the circumstances of the claim, the nature of the acts or conduct sought to be restrained and the losses which have been or will be incurred depending upon whether the injunction is granted or refused, damages will be an adequate remedy; and
>
> (c) Depending on the assessment made in relation to (b) whether the balance of convenience lies in favour of granting or refusing the injunction.

17. In the particular circumstances of the present case and for the reasons which the Court is about to give, the Court does not consider that it is either necessary or appropriate to make a detailed determination in relation to the first question as to the existence of a fair issue to be tried. Having regard to the widespread controversy between the parties and to complexity and perhaps novelty in law of the basis upon which the impugned conduct is sought to be brought within ss. 4 and/or 5 of the Act, it would, in the view of the Court, be difficult to set out a considered analysis of the factors involved in order to express a view on that issue without risk of influencing the further presentation of the case (no statement of claim has yet been filed,) or the substantive adjudication of those issues at a trial. The Court is satisfied that it is not necessary to do so when this is not an instance in which it would be possible, in any event, to grant any interlocutory injunction along the lines sought. It is sufficient in the view of the Court to indicate that if, following the inevitable discovery of documents and the cross examination of the plaintiff's witnesses, the essential case is

established as to the existence, on the balance of probabilities, of some causal link between the drop in tender prices quoted by the defendants throughout the years 2008 to 2010 and some form of concerted approach between them to that market, a serious issue will fall to be tried as to an infringement of the prohibitions in s. 4 and 5 or one of them.

18. The Court finds, however, that the evidential basis does not exist in this case for concluding that damages would not be an adequate remedy for the plaintiff if the injunction is refused. As is well settled, this second criterion of the *Campus Oil* test has two limbs or aspects to it. If the plaintiff succeeds in the action will it be adequately compensated for any loss it will sustain in the interim from the continuance of the defendants' alleged wrongful conduct and will the defendants be able to pay those damages? Secondly, if an injunction is granted and the plaintiff fails in the action, will the defendants be adequately compensated for any losses they incur through the restraint of the injunction on their trade and will the plaintiff be able to make good its undertaking as to damages for that purpose?

19. The plaintiff's case in this regard is straightforward. It says that as a result of the anti-competitive pricing activities of the defendants, its market share since 2007 has been greatly reduced - down to 5.5% in 2010 from 15% in 2008. The relevant market is comprised as to 80% of sales under supply contracts awarded in response to contracts put out to tender and in 2010 the plaintiff was unable to win a single such contract because of the deliberate below-cost pricing and exclusionary strategies of the defendants. Unless this strategy is halted by an interlocutory injunction so that the defendants are constrained to tender for any new business at prices which are at least not below "average variable cost"' the plaintiff claims that it will be put out of business.

20. At para. 78 of the grounding affidavit, Mr. Goode says:

> "I say and believe that the collusive tendering, below-cost pricing and anti competitive behaviour on the part of the second and third named defendants has intensified in the course of 2010 to the point where the plaintiff is now in serious danger of being forced to exit the market and therefore urgently needs injunctive relief."

Later (para. 134) he says:

> "I say and believe that matters have now come to the point where the plaintiff will be driven out of the market, with detrimental effects not only to the plaintiff but to the future prospects for competition in the Dublin area concrete market, if an interlocutory injunction is not urgently granted to stop the anti competitive actions of the defendants."

21. The difficulty for the Court is that this claim to urgency in the need for interlocutory relief is put forward as an assertion without any evidential basis being laid in the affidavit evidence by way of substantiation of the current financial position of the plaintiff or the nature or extent of the financial difficulties it claims to face.

22. On the face of it, the relations between all of these companies are commercial in character. The losses which are alleged to be caused are losses in the course of trade. The damage alleged is primarily if not exclusively pecuniary. The cause of the losses which the plaintiff claims to have sustained and which it alleges it will continue to sustain lies in the difference between the price at which it must necessarily bid for tenders and what it says are the deliberately uneconomic prices at which the defendants contrive to win such contracts. While the calculation of damages in cases involving lost profits or business sales may often present experts and courts with difficulties, the exercise is by no means necessarily impossible. Although the issue is one which will remain to be debated and explored when this case comes to trial, the fact that the plaintiff has been able to identify in some detail specific contracts and winning tender prices over a period of years in the relevant geographic market, suggests that it may not be an unduly difficult exercise. In the event that this claim is successful following a trial in six or twelve months time, it does not for example appear unrealistic to expect to be able to calculate what profit the plaintiff might have made if it had not been deprived of a reasonable or historically average return on contracts awarded in the interim based on a market share which it might reasonably be expected to have retained had it not been excluded by the defendants' allegedly anti-competitive conduct.

23. It is useful to recall the applicable principles as enunciated in this regard by Finlay C.J. in *Curust Financial Services Limited v. Loewe-Lack-Werk* [1994] I.R. 450:-

> *"The loss to be incurred by Curust if it succeeds 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."*

24. In the judgment of the Court it has not been established on this application that the particular circumstances of these markets are such as would render it impossible to arrive at a reasonable assessment of damages should the plaintiff succeed and no injunction has been granted. On the contrary, because the relevant product market is characterised as to 80% by contracts of the kind described above and because the geographic market is readily identifiable and limited in scope, the difficulties of calculation may well be less than may arise in other cases. Furthermore, it may be relevant to point out that, having regard to the nature and covert character of the conduct alleged against the defendants, if the substantive claim is upheld as currently articulated, the plaintiff may well be entitled to an award of exemplary damages under s.14 (5) of the Act of 2002.

25. As mentioned, the claim that any such final damages would be inadequate is made upon the basis that the plaintiff will by then have been put out of business. The Court finds itself in the surprising position that it has no evidence before it which substantiates this proposition. Apart from the references to the failure to win any contracts in 2010 and the important drop in market share, no information has been given to the Court as to the resulting drop in turnover; to particular losses incurred; to the overall results of the company in any of the recent years. It is not said the plaintiff company is insolvent or about to become insolvent. No accounts of the company have been exhibited and no information has been put before the Court as to the company's financial position at the end of the year 2010. No affidavit has been sworn by or on behalf of the company's own accountants and auditors. Instead a very short affidavit containing a single paragraph of evidence has been sworn by Mr. Feely of Grant Thornton, Chartered Accountants, which is said to have acted as adviser to the plaintiff for many years and "has recently been assisting the company in relation to its ongoing deliberations with its bankers". He does not say what the subject matter of those deliberations has been and states merely that as a result of the failure to win contracts in 2010 "the company is suffering financially and is in a very precarious cash flow position. I further say and believe that unless this trend is reversed, the company will have to cease trading and my well go out of business. It cannot compete and tender for projects where concrete is being sold at €52/m^3".

26. It is perhaps not unrealistic to suggest that many companies in the construction sector or dependent upon it are "suffering

financially" and have been since the dramatic collapse of the property and construction sectors came about. What Mr Feely says is equally open to the interpretation that a decision could be made to discontinue trading because there was not enough business rather than that the company had not the resources to continue without risk of trading while insolvent. The Court notes in this regard that the plaintiff is an unlimited company but nothing is said as to the implication of this status for the financial difficulties it faces. Is it an unlimited company with or without share capital? How many members does it have and who are they? What are their resources? Would they be in a position to secure its continued presence in the market even on a reduced basis pending an early trial?

27. If the Court is to conclude that damages will not be an adequate remedy on the basis that the plaintiff will, in probability, be driven out of business as a result of the defendants' activities before the action is concluded, there must be some evidential basis which enables the Court to do so. The Court is struck by the fact that no attempt appears to have been made to flesh out this assertion. No figures, even in general terms, are given to illustrate the plaintiff's inability to continue trading or for how long. In response to a number of questions in this regard at the hearing, counsel for the plaintiff stated he had instructions that the plaintiff had been obliged to close down parts of its operations, to lay off staff and dispose of assets. These matters have not, however, been put on affidavit and the Court has no basis upon which it can relate such matters to the plaintiff's operations within the relevant geographic market as opposed to its operations in Galway or elsewhere. Nor have the defendants been placed in position to say whether the steps in question are or are not typical of what has been forced on many other enterprises in this market in the current economic downturn and collapse of the construction sector.

28. The plaintiff also faces the difficulty of the second limb of this criterion. If it is to obtain an injunction pending the hearing it will be required to give an undertaking as to damages. Having regard to its own evidence as to its precarious financial position and assertion that it may soon go out of business, the Court cannot conclude that it will be in a position to make good its undertaking as to damages should the injunction be granted in the absence of any indication as to how the undertaking would be secured.

29. For all of these reasons the Court is satisfied that the application for injunctive relief must fail for lack of adequate proof that the commercial loss which may be caused by the impugned conduct of the defendants pending the trial cannot adequately be compensated by an award of damages at the trial.

30. Although that finding is sufficient to dispose of the application, the Court would point out, for the sake of completeness, that there are also a number of other aspects of the case which tend to tip the balance of convenience against the grant of the injunction. In the first place, as both parties readily admit, and as was illustrated by the debate recorded in the case of *Leanort Limited v. Southern Chemicals Limited*, (High Court, 18 August 1988,) it is by no means easy to formulate the terms of an injunction designed to restrain predatory pricing in a way which will allow a defendant to know precisely what is being restrained while enabling the Court to police adherence to the injunction should it be necessary. While such difficulty is no reason for refusing an injunction in a case where it is clearly required, there is the added complication in the circumstances of this market that the intervention of the Court on the basis of prices identified by reference to "average variable cost" involves possible encroachment upon contractual negotiations and conditions between defendants and their third party customers, where quoted prices may be dependent upon or influenced by a wide range of other factors which vary from one customer or contract to the next. In this regard the product market conditions are materially different from those obtaining in the *Leanort* case where the court was dealing with published price lists for uniform products sold in standard units rather than supplied under individually negotiated contracts comprising various other negotiable terms and conditions.

31. In addition, an injunction of the kind suggested in the present case would not be purely prohibitory in its effect and serve merely to preserve a status quo but would have a partly mandatory character to the extent that it would necessarily intervene to dictate one of the terms upon which the defendants would be required to trade and deal with third parties.

32. Furthermore, it is by no means clear to the Court on the evidence before it that the grant of an injunction even in the broader terms suggested on behalf of the plaintiff namely, without identifying a specific price or cost below which sales ought not to be offered, would have the effect of re-establishing the plaintiff's position in the market or enabling it to win a sufficient number of the contracts which may be put out to tender between the grant of an injunction and the conclusion of the action. Here again, no evidential basis to substantiate the claim has been put before the Court. What is known, if anything, as to the likely level of contract activity in the relevant geographic market in the next six to twelve months? What minimum sales does the company need to achieve to remain in trade at a viable level over such a period? Will there be enough contract activity for that purpose and what market share of that activity would the plaintiff need to win to achieve that level? Could it realistically expect to do so? At the heart of the case made by the plaintiff against the defendants is the proposition that their costs of production and supply of ready mixed concrete must be similar to those of the plaintiff. In 2010 the plaintiff's average variable cost was €64.86/m^3. Thus, by tendering at prices considerably below that and threatening to bring the prices down to the equivalent of €50/m^3 for 35N concrete, the defendants would be selling at a price level that is far below their average variable cost. These calculations are, of course, strongly contested by the defendants and CRH points out that it has its own directly owned sources of raw materials including quarries for aggregate and its cement subsidiary and that it organises its distribution through sub contracts with independent hauliers on an "as needs basis"; unlike the plaintiff which maintains its own transport fleet for distribution of product. These differences, it is argued, could account for a cost differential of up to €10 per m^3 such that, if correct, an injunction in general terms restraining the defendants (or at least the second named defendant) pricing at below amounts based on CRH's average variable cost would still not place the plaintiff in a position to meet prices offered by the defendants within the terms the injunction.

33. Finally, as the Court will refuse the application for interlocutory relief, it is unnecessary to consider or rule upon the interesting preliminary issue raised on behalf of the defendants as to whether the particular terms of s. 14(5) (a) of the Competition Act 2002, fall to be interpreted in a way which precludes the Court granting interlocutory relief in claims based on the right of action created by that section.