Neutral Citation: [2014] IEHC 482

THE HIGH COURT

[2014 No. 7691 P]

BETWEEN:

BAÍNNE ALÁINN LIMITED AND SHAY HAYDEN

PLAINTIFFS

AND

GLANBIA PLC

DEFENDANT

JUDGMENT of Mr. Justice Max Barrett delivered on the 24th day of October, 2014

1. This is an application for an interlocutory injunction restraining Glanbia plc and its servants or agents from taking certain actions in respect of either or both of the plaintiffs. There is also a related application to discharge an interim injunction that was granted on 1st September last in terms similar to the proposed interlocutory injunction. The discharge is sought on the basis of an alleged failure by the plaintiffs and their advisors to disclose material information when making the *ex parte* application for the interim injunction. Any views expressed in this judgment are tentative in terms of the strength or weakness of any case that might be made by either side at plenary hearing.

Plaintiffs

2. The application is brought by Mr. Shay Hayden and Baínne Aláinn Limited. The latter is a company that Mr. Hayden has incorporated in the furtherance of his dairy distribution business and is the company to which, for example, Glanbia issues the regular statements of account arising from its dealings with what is, in effect, Mr. Hayden's dairy distribution business. There is some suggestion from Glanbia that it ought properly to be construed as having dealt at all times with Mr. Hayden and not with Baínne Aláinn Limited. Any confusion arising in this regard, at least on the part of Glanbia staff, is perhaps understandable. Mr. Hayden established his dairy distribution business, later incorporated a company to operate some or all of that business, left in his own name at least one significant agreement under which that business is operated, and remains the principal actor in the dairy distribution business. So it may be that in their everyday dealings Glanbia staff consider themselves always to be treating with Mr. Hayden in a personal capacity. However, it is clear from the statements of account that issue from Glanbia that it, as a company, recognises itself to be dealing directly, at least sometimes, with Baínne Aláinn Limited. Any such dealings as there are between Glanbia and Baínne Aláinn Limited appear to proceed on exactly the same basis as dealings between Glanbia and Mr. Hayden and thus it would seem appropriate that any injunction that issues pursuant to the instant proceedings ought to affect Glanbia, its servants and agents in respect of their dealings with both Mr. Hayden and Baínne Aláinn Limited.

Background

3. Sometime around 1991, Mr. Hayden started delivering 'Snowcream' dairy products in Wexford, the Snowcream milk plant then being owned by Waterford Foods plc, the ownership of which subsequently devolved to Glanbia. In order to commence in business, Mr. Hayden bought his own van and built up a dairy-round through dint of his own efforts. In the years since, he has built up business partly by acquiring new clients and partly by buying up the dairy-rounds of other individuals as they come up for sale. He has worked hard and he has done reasonably well.

4. In terms of buying up other dairy-rounds, Mr. Hayden's first foray in this regard came in 1993. At the time he made this first acquisition, Mr. Hayden did so with the comfort that the relevant dairy products supplier, then Premier Dairies, knew what was being done and made no objection to same. The distribution arrangements between Mr. Hayden and Premier Dairies were subsequently documented in a distribution agreement of 20th September, 1995, which agreement is returned to later below. Following the 1993 acquisition, a flurry of later acquisitions further swelled Mr. Hayden's burgeoning dairy distribution business. All of these acquisitions, it is claimed, were done with the knowledge of, and without any objection from, Premier Dairies or indeed by Glanbia, after the latter came ultimately to own the Premier business. In affidavit evidence provided on behalf of Glanbia, reference is made to "*approval*" being given to an acquisition that took place in 2010.

5. There is some controversy in the affidavit evidence as to whether certain persons named by Mr. Hayden could in fact have indicated any lack of objection or granted any approval to all of Mr. Hayden's dairy-round acquisitions over the years. The court accepts that the individuals so named could not have been involved in all of the alleged pre-purchase discussions for the simple reason that all of them were not employed by Premier and/or Glanbia at the relevant times. The court notes that some of the named individuals are acknowledged in the affidavit evidence supplied by Glanbia as having interacted with Mr. Hayden prior to his acquisition of the Gorey round in 2010, *i.e.* the round that is at the core of the present dispute, and as having given their prior approval to same.

6. In late-2010, Mr. Hayden was approached by an individual who was seeking to sell his dairy-round in Gorey. This round was three times the size of Mr. Hayden's existing total rounds. Buying it involved considerable commercial risk for Mr. Hayden, yet its ownership held out the promise of a certain economic security for him and his young family. Before making any final decision as to the acquisition, Mr. Hayden met with representatives of Glanbia at a hotel venue in Dublin. Mr. Hayden maintains that at this meeting he was encouraged by Glanbia to proceed with the acquisition. At the least, it would seem that Mr. Hayden was not discouraged. In the absence of objection from Glanbia, he subsequently acquired the Gorey round. Following this acquisition Mr. Hayden was now a distributor of Glanbia produce in Gorey, Tara Hill, Ballymoney, Craanford, Inch, Coolgreany, Kilanerin and Hollyfort; all places in County Wexford. He had to take on another worker and was continuously busy expanding his business, and that of Glanbia, throughout the county.

7. Relations between Mr. Hayden and Glanbia somewhat soured in 2012 when Glanbia discovered that Mr. Hayden had been sourcing certain butter supplies from another supplier, yet claiming a credit and delivery allowance from Glanbia in respect of same. This resulted in Glanbia demanding repayment of certain monies in July, 2012, and warning that a further instance of such behaviour would likely result in a termination of the distribution arrangements between Mr. Hayden and Glanbia. It would appear that the monies were repaid, certainly business continued between the parties, though Glanbia staff could be forgiven if the episode left something of a

taste in their mouths for a time, and not the taste of fresh creamery butter.

8. Referring to this last episode in his grounding affidavit, Mr. Hayden states that "*The only issue between this Deponent and the Defendant over the years was one involving commission on butter delivery which was resolved amicably*." Glanbia contends that this last averment is misleading as to the seriousness of what occurred in 2012. Mr. Hayden contends that as the issue was resolved, no like issues have arisen, and the course of dealings between the parties has continued regardless, it is correct to describe matters as having been resolved "*amicably*", though his counsel indicated at the hearings that perhaps it was not the most felicitous choice of wording. To the court it seems merely to be another instance, so often encountered in life, where two rational parties honestly describe the same event in entirely different terms. The court does not consider that Mr. Hayden's use of the word "*amicably*" in a context in which Glanbia would not apply the same description must have as its explanation that Mr. Hayden sought to mislead the court or yields the consequence that he did in fact do so. Neither does it consider that Mr. Hayden's actions in this regard have the effect that he is in breach of the longstanding equitable principle that 'he who comes to equity must come with clean hands'. Nor does the court consider that the underlying episode, what might be described as the 'butter battle' of 2012, has that immediate and necessary relation to the present application as would justify the refusal of injunctive relief by reference to the said principle. It is perhaps in the nature of court proceedings that both sides will make much ado about every aspect of their opponent's case to which objection might conceivably be made. However, insofar as the foregoing criticism of Mr. Hayden's grounding affidavit is concerned, the court considers it to be much ado about little.

9. In February, 2014, came the first rumblings of the storm that has latterly unfolded between the parties. A complaint was made to Glanbia by a sizeable customer in Gorey as to the operation by Mr. Hayden of his dairy-round in that town. Though matters were swiftly resolved, mention was made to Mr. Hayden for the first time by Glanbia that, given its pending takeover of Wexford Creamery, there would be change ahead in how the Gorey route was operated. Specifically it was mentioned that another agent operating in the Gorey area would need somehow to be accommodated. Mr. Hayden made no comment when this prospect was first raised. Matters progressed, however, in August, 2014, when Mr. Hayden met with Glanbia and was advised that as a consequence of the acquisition of Wexford Creamery by Glanbia and the need to accommodate the Wexford Creamery agent, Mr. Hayden's Gorey round was to be cut, with a substantial portion going instead to the Wexford Creamery agent. Further details of the proposed arrangements and increased supply volumes on other routes that were to be put in place by Glanbia were supplied by the latter at a meeting between the parties on 21st August. There was also a meeting on 27th August at which, Glanbia maintains, an offer of financial compensation to Mr. Hayden was made. This last meeting has acquired a special significance in these proceedings because Glanbia claims that the failure to detail this meeting in the affidavit that grounded Mr. Hayden's *ex parte* application for an interim injunction was a material non-disclosure. For his part, Mr. Hayden disputes that any financial compensation was offered at the meeting on 27th August, he notes that there is a reference in one of the attachments to his grounding affidavit to contact between the parties on that date, and he has indicated that so far as he was concerned no special significance attached to the meeting of the 27th because it did not feature an offer of compensation and merely replicated the previous discussions between the parties. The dispute between the parties as to the substance of the meeting of 27th August and the absence of any detailed reference to same in the affidavit that grounded Mr. Hayden's *ex parte* application for an interim injunction is considered further below. Suffice it for now to note that the court does not consider that such non-disclosure as arose in this context justifies the discharge of the interim injunction or the refusal of the interlocutory injunction that is now being sought.

10. Continuing with the sequence of facts arising, Mr. Hayden was advised by Glanbia that, notwithstanding his objections, the proposed revised distribution arrangements were to occur on 1st September last. However, Mr. Hayden secured on that day an *ex parte* injunction whereby it was ordered by the court that:

> *"[Glanbia] its servants or agents be restrained from taking any action to remove [Baínne Aláinn Limited and Mr. Hayden] …each or either of them their respective servants or agents from their current duties of distributing [Glanbia's]…dairy products in the County of Wexford or in any other manner breaching the terms of the said distribution agreement until further order."*

11. Mr. Hayden's objections to the proposed revised distribution arrangements can perhaps be summarised as follows. First, he claims that the proposed arrangements are in breach of his existing contractual arrangements with Glanbia. Second, he claims that if the Gorey round is reduced as proposed he will suffer an immediate and ongoing financial loss, placing his home and personal finances in jeopardy. Third, he claims that as a consequence of Glanbia's proposed changes it would no longer be financially viable for him to continue in the only business that he has ever known. Fourth, he maintains that it was he who through dint of his own efforts procured or acquired at least part of the distribution business which is now proposed to be moved to the Wexford Creamery agent. In this regard Mr. Hayden distinguishes between 'contract business' whereby he distributes Glanbia produce to Glanbia customers and gets paid commission for that work, and 'private business' whereby Mr. Hayden himself buys and sells Glanbia produce to third parties with whom he has established dealings. Mr. Hayden appears to accept that the contract customers are Glanbia customers but maintains that the private customers comprise a business that he alone has established and which belongs to him alone. Fifth, Mr. Hayden contends that once any business is lost to the Wexford Creamery agent, it will be impossible to recover that business because once the shops involved are serviced by or for Glanbia they will have no further need of Mr. Hayden. Sixth, Mr. Hayden claims that a natural consequence of the proposed distribution arrangements will be a loss of commercial reputation and also of the value of the goodwill in his existing business.

12. Insofar as the contractual arrangements between Mr. Hayden and Glanbia are concerned, Mr. Hayden, as mentioned above, entered into a distribution agreement with Premier in 1995. When Glanbia later came to own Premier Dairies, its dealings with Mr. Hayden were governed, at least in part, by the 1995 agreement. By 2010, Glanbia had standard agreements that it issued as a matter of form with persons distributing its products. However, Glanbia did not execute such a standard-form agreement with Mr. Hayden. As for the vendor of the Gorey dairy-round, there is an averment in affidavit evidence provided to the court by Glanbia's Distribution Manager that there was no contract between Glanbia and this individual. It is averred that:

> *"[The vendor] was an independent contractor providing milk distribution and agency services to Glanbia…[T]here is no evidence that Glanbia was in any way bound to provide a certain volume of product to [this individual]…nor is there any evidence of exclusivity."*

13. Glanbia contends that the Gorey route, because it was acquired in 2010, must have been governed by the standard-form distribution agreements that it issued around that time, though it appears to accept that the 1995 agreement has some applicability to its dealings with Mr. Hayden. He, for his part, contends that the 1995 agreement applies to the entirety of his dealings with Glanbia and that Glanbia by its actions or proposed actions in relation to the Gorey route is acting in breach of same.

14. What are the ill-consequences for Glanbia if the interlocutory injunction that is now being sought is in fact granted? Glanbia's contentions in this regard can perhaps be summarised as follows. First, its attempts to integrate the Wexford Creamery business into

its existing business will be partly frustrated, albeit it seems as regards Mr. Hayden and the Creamery distributor only. Second, it would result in Mr. Hayden being treated in a different manner to any other distributor whom Glanbia has previously encountered, all of whom have apparently been amenable to proceeding as Glanbia has wished. Third, it would have the effect of rendering it impossible for Glanbia to alter the volumes of product supplied to Mr. Hayden unless this was to be agreed between them. Fourth, it will yield a situation in which for the duration of the injunction, Glanbia will be presented with a cumbersome and, it contends, unsustainable situation in which two distributors will be providing Glanbia products to the same stores. Fifth, Glanbia contends that compliance with the injunction may result in legal difficulties for it with the Wexford Creamery distributor whom Glanbia has thus far sought to facilitate if that distributor considers that his contractual arrangements with Glanbia are not being honoured, with the result that Glanbia may lose the services of the Creamery distributor.

15. One last matter needs to be mentioned in this consideration of the facts presenting in this case. It is suggested in the affidavit evidence that a Glanbia employee, in the course of a business call placed on 3rd September, 2014, two days after the issuance of the interim injunction, sought somehow to intimidate Mr. Hayden. The allegation arises because in the course of this business call the Glanbia employee volunteered his privately held opinion that the approach being adopted by Mr. Hayden towards Glanbia was too adversarial and might antagonise certain senior Glanbia staff, that Mr. Hayden ought to accept the financial assistance which Glanbia claims to have offered, and that Mr. Hayden had received poor legal advice. The court accepts that these elements of the telephone conversation had nothing to do with the business purpose of the call, did not comprise an authorised Glanbia communication and, while perhaps best left unsaid, were not intended to intimidate Mr. Hayden, though the court accepts that Mr. Hayden's alarm at what was communicated to him during the call was genuinely felt.

Application for discharge of interim injunction

16. The court proposes to consider first the alleged failure by the plaintiffs and their advisors to disclose material information at the *ex parte* application for an interim injunction and the consequent application for discharge of that interim junction. As mentioned in the above account of the facts arising in this case, Glanbia claims that there were two instances of material non-disclosure in the affidavit grounding Mr. Hayden's *ex parte* application, viz. his statement that the 2012 'butter battle' had been resolved "*amicably*", and the failure to mention the meeting of 27th August last, at which, Glanbia claims, financial compensation was offered by it to Mr. Hayden.

17. The decision of Clarke J. in *Bambrick v. Cobley* [2005] IEHC 43 outlines in some detail the principles to be applied by the court in an application for discharge such as that now before it. That case involved an application for an order freezing part of the proceeds of a land sale in circumstances where the plaintiff was seeking damages from the defendant consequent upon an alleged delay in closing the transaction. At the interlocutory stage it was claimed by Ms. Cobley that, *inter alia*, Mr. Bambrick had failed to disclose in the affidavit grounding the *ex parte* application that there had been detailed discussions concerning the terms upon which monies might be retained to meet the possible claim. In his judgment, Clarke J. commences his consideration of the issue of lack of candour with a reference to *Tate Access Floors Inc. v. Boswell* [1990] 3 All E.R. 303 in which Browne-Wilkinson V-C observes, at p. 316, that:

> *"No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for ex parte relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the ex parte order and may, to mark its displeasure, refuse the plaintiff further inter partes relief even though the circumstances would otherwise justify the grant of such relief."*

18. Clarke J. then proceeds, at p.8 of his judgment, to reduce this so-called 'golden rule' to two questions: (1) did the plaintiff fail to make appropriate disclosure; and (2) if he did so fail, what consequences should follow? To the extent that there is a breach of the 'golden rule', and perhaps by way of tacit acknowledgement that the rule does not demand the impossible – it demands absolute candour of a plaintiff, not absolute perfection – the courts are prepared to countenance lapses in the information furnished by a plaintiff, provided they are not material. Having considered a number of relevant authorities, Clarke J. concludes in this regard, at p. 9, that:

> *"Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner."*

19. Moving on, Clarke J. considers what the consequences of material non-disclosure should be. He notes that typically a defendant in respect of whom an adverse *ex parte* order is made absent full disclosure will seek discharge of that order. He notes too that in the ordinary course of events, as is the case in the instant proceedings, an application for discharge will come on for hearing at the same time as the application for an interlocutory injunction. Following a consideration of relevant case-law, Clarke J. concludes that the court to which application is made in such circumstances has a discretion to refuse to grant the interlocutory injunction, and to discharge the already granted interim injunction, but is not obliged to do so.

20. What criteria ought a court to apply when it comes to the exercise of this last-mentioned discretion? The answer, per Clarke J., at p. 11 of his judgment, is that:

> *"Clearly the court should have regard to all the circumstances of the case. However the following factors appear to me to be the ones most likely to weigh heavily with the court in such circumstances:-*
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> *1. The materiality of the facts not disclosed.*
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> *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.*
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> *3. The overall circumstances of the case which lead to the application in the first place."*

21. To summarise the foregoing, it appears that the following are the questions to be considered and resolved by a court when it is presented, as in the present case, with a claim that an *ex parte* injunction has been obtained in breach of the 'golden rule' and is seeking to determine what consequences ought to follow. First, at the *ex parte* stage of proceedings did the plaintiff fail to disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief? Second, objectively speaking could the facts that were not disclosed reasonably be regarded as material, with materiality to be construed in a reasonable and not

excessive manner? Third, if the answer to each of the previous questions is 'yes', what is the appropriate course of action for the court to adopt having regard to (i) all the circumstances of the case, and in particular (ii) the materiality of the facts not disclosed, (iii) the extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose, and (iv) the overall circumstances of the case which led to the application in the first place?

22. As to the first of these three questions, it is not at all clear that there was any failure on the part of Mr. Hayden as regards disclosure of relevant facts. He maintains that he sought to present the complete facts of this matter to the court at the *ex parte* stage. He did not, it is true, expressly mention the meeting of 27th August in his grounding affidavit; however, Mr. Hayden maintains that this is because he attached no especial significance to that meeting and that there is no deficiency in the facts as presented by him in his grounding affidavit, with the meeting of 27th August, he claims, merely replicating what had previously been discussed between the parties. The special significance of the meeting of the 27th, according to Glanbia, was that at that meeting it made an offer of financial compensation to Mr. Hayden such as would ease him through any difficulties presented by Glanbia's intended changes to the existing distribution arrangements. Mr. Hayden "*strongly disputes*" that any offer of financial compensation was made to him at this meeting and claims that his affidavit evidence encapsulates correctly what transpired between the parties. Thus, so far as Mr. Hayden is concerned, there is no omission in what he stated. Even if Mr. Hayden is mistaken as to what transpired at the meeting of 27th August, it would appear that he is honestly mistaken, and thus any, if any, failure to address in detail the substance of that meeting seems to the court to be entirely unworthy of censure. As to the second question, the facts that were not disclosed could reasonably be regarded as material, not least because any, if any, offer of compensation, was clearly of relevance to the court's consideration of the situation in which Mr. Hayden professed to find himself. As to the third question, the court has already indicated that it does not consider an innocent misrepresentation, if misrepresentation there was, of relevant facts, to be worthy of censure and thus does not consider that the discharge of the interim injunction would be justified by reference to same.

Law applicable to granting of interlocutory injunctions

23. The court has been referred to a wealth of precedent on interlocutory injunctions, starting unsurprisingly with the judgment of Lord Diplock in *American Cyanamid v. Ethicon Limited* [1975] A.C. 396, and the consideration therein of various principles that might usefully inform a court's consideration of whether or not to grant an interlocutory injunction. However, before moving on to consider American Cyanamid and other cases to which the court has been referred, it is worth noting that pursuant to Order 50, r.6 of the Rules of the Superior Courts (1986), the court at all times retains the jurisdiction to grant an interlocutory injunction "*in all cases in which it appears to the court to be just or convenient so to do…[and] either unconditionally or upon such terms and conditions as the Court thinks just."* Moreover, while there are obvious advantages to the court complying with such recognised guidelines as may be drawn from case-law in this area, not least in terms of ensuring certainty and avoiding arbitrariness, that case-law has long been informed by the common-sense recognition, evident in the just-quoted extract from the Rules of the Superior Courts, that the question as to whether or not to grant an interlocutory injunction is one in respect of which the court ultimately retains a degree of flexibility and discretion that is unconstrained by strict criteria, though subject of course to the rules of precedent. This necessary flexibility and discretion is reflective, at least in part, of the fact that the life of the law is not logic, it is experience, and experience teaches that even ostensibly similar facts can sometimes require entirely dissimilar treatment when viewed through the prism of context.

24. In *American Cyanamid*, the appellant before the House of Lords, American Cyanamid Co., held a patent which it alleged would be breached by a product that Ethicon was about to release on the British market. Ethicon disputed this and counterclaimed for revocation of the patent in issue. American Cyanamid sought an interlocutory injunction that was granted in the High Court, successfully appealed before the Court of Appeal, and eventually restored by the House of Lords. The House considered that provided a claim is not frivolous or vexatious, in other words that there is a serious question to be tried, a court before which an application for an interlocutory injunction is made should go on to consider whether the "*balance of convenience*" lies in favour of granting or refusing the interlocutory relief sought. In case-law this last-quoted phrase is often employed and seldom explained. In short, it bears the following meaning: the object of an interlocutory injunction is to protect a plaintiff from violation of a right in circumstances where the plaintiff could not, if he succeeded at trial, be adequately compensated in damages for such violation; however, the plaintiff's need for protection in this regard must be weighed against a defendant's corresponding need to be protected against any injury that would result from preventing the defendant from exercising legal rights for which the defendant, if successful at trial, could not be adequately compensated by way of damages payable pursuant to that undertaking for damages which is typically required by a court of a plaintiff in return for ordering an injunction; the court before which application for injunctive relief is made must weigh one need against the other and decide where the "*balance of convenience*" lies between the two.

25. Insofar as the undertaking as to damages just referred to is concerned, there are at least two good reasons why such an undertaking is typically sought of a person seeking an interlocutory injunction. The first is referred to by Lord Diplock in *American Cyanamid*, at p.408, where he quotes nineteenth-century precedent to the effect that requiring an undertaking as to damages upon the grant of an interlocutory injunction aids a court in doing that which is its great object, *viz*. "*abstaining from expressing any opinion upon the merits of the case until the hearing*." The second reason, evident from *American Cyanamid* and later case-law, is that requiring such an undertaking diminishes the obvious risk of unfairness to a respondent against whom an interlocutory injunction is ordered at a time when the issues have not been fully determined and when usually all the facts have not been ascertained.

26. It might perhaps be contended that the usual requirement whereby a successful applicant for an interlocutory injunction must provide an undertaking for damages in return for the granting of the injunction is a requirement that the wealthy are always more likely to be able to satisfy, and thus a requirement that has the potential to close, or at least make less readily attainable, to those whom life has not endowed with riches sufficient to sustain potentially protracted and invariably expensive litigation, a form of relief or mode of justice that may be made available to a wealthier person who presents with exactly the same case. In other words it might perhaps be contended that the availability of interlocutory injunctive relief tends presently to be rationed on the basis of financial circumstance. In truth, however, there are a number of bases on which, if presented with the right set of conditions, a court could, by reference to, and in conformity with, existing law and precedent, grant injunctive relief to an applicant of limited or middling means without imposing a requirement as to an undertaking for damages. It appears to the court that there are at least three bases on which a court might do so:

> - first, as mentioned above, under O.50, r.6 of the Rules of the Superior Courts (1986), the court always retains the jurisdiction to grant an interlocutory injunction in all cases in which it appears "*just or convenient so to do*", *i.e.* not just those cases where an applicant has the resources to back up any undertaking as to damages.
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> - second, it is clear from the unqualified endorsement that O'Higgins C.J. gives in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88 at p.107 to "*the views expressed by Lord Diplock*" that this includes Lord Diplock's reiteration, at p.409 of his judgment, that in addition to the general principles identified in *American Cyanamid* as relevant to the decision as to whether or not to grant an interlocutory injunction "*there may be many other special factors to be taken into consideration in the particular circumstances of individual cases*". Presumably this would extend to the injustice that

could result through undue insistence on the requirement as to an undertaking in damages in a case where an applicant has substantial cause but not especially substantial means.

- third, in the relatively recent decision of the court in *Whelan Frozen Foods Limited v. Dunnes Stores* [2006] IEHC 171, a case which the court considers in greater detail hereafter, McMenamin J. mentions a number of criteria relevant to the issue of whether or not to grant an interlocutory injunction but which could also be relied upon to justify not requiring an undertaking as to damages in appropriate cases, *viz*: (1) the "*general rule*" that a court should where possible strive to maintain the *status quo ante* between the parties; (2) the relative financial standing of the parties; and (3) the balance of the risk of doing an injustice.

27. The court does not mean to suggest in the foregoing that an undertaking as to damages should never be required where an interlocutory injunction is to be granted; the consensus in the case-law to date has been that such an undertaking ought typically to be required. However, just because something is typically done does not mean that it must always be done. It is almost impossible, if indeed it is possible at all, to make any general rule of law but that it shall fail in some case. Just as the general may yield to the particular, so the law must be applied in context. In the right circumstances there is adequate basis afforded by existing law and precedent whereby, in conformity with that law and precedent, an interlocutory injunction could be granted without an undertaking as to damages being required. In this way the courts can ensure that the levelling influence of the law invariably pertains and that equitable relief is not unfairly denied to those whom the Fates have perhaps treated inequitably.

28. Turning to a more general consideration of *American Cyanamid*, in that case Lord Diplock identified a number of principles that arise when determining where the balance of convenience may lie in any one case, writing, at p.408 *et seq*., that:

> *"[U]nless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*
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> *As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiffs' undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.*
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> *It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.*
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> *Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.*
>
> *Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of the uncompensatable damage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence on the hearing of the application. This, however, should only be done where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."*

29. The various principles espoused by the House of Lords in *American Cyanamid* were adopted in this jurisdiction by the Supreme Court in *Campus Oil v. Minister for Energy (No. 2),* and have been referred to as "*well settled*" by Clarke J. in the recent Supreme Court decision in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at 180. These principles are sometimes reduced to a three-point rule of thumb, *viz*. (1) Is there a serious issue to be tried? (2) Are damages an adequate remedy? (3) Does the balance of convenience favour the granting rather than refusing of an injunction? However, while this is a useful check-list, it does not capture the rich substance of the guidance provided by the House of Lords, as later embellished upon by the Irish courts in various cases of interest that are considered hereafter. By way of more fulsome summary, it appears to the court that the *American Cyanamid* principles ought to prompt the following queries on the part of the court when it is presented with an application for an interlocutory injunction:

- first, does the material available to the court at the hearing of the application fail to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial? Unless the material available does so fail, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

- second, if a plaintiff were to succeed at the trial in establishing his right to a permanent injunction, (a) would he be adequately compensated by an award of damages in the measure recoverable at common law for any loss arising to the time of trial from the non-issuance of the interlocutory injunction and (b) would the defendant be in a financial position to pay them? If the answers to each limb of this question are 'yes', then no interlocutory injunction should normally be granted. If the answer to either limb is 'no', then the court needs to proceed further with its enquiry.

- third, if such damages aforesaid would not provide an adequate remedy for the plaintiff in the event of his succeeding at trial, and the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, (a) would the defendant be adequately compensated under an undertaking by the plaintiff as to damages for such loss as the defendant would sustain by virtue of the issuance of the interlocutory injunction against the defendant, and (b) would the plaintiff be in a financial position to pay them? If the answers to each limb of this third question is 'yes', there would be no reason upon this ground to refuse an interlocutory injunction.

- fourth, is there any doubt as to the adequacy of the respective remedies in damages available to either party or to both? If the answer to this fourth question is 'yes', the question of balance of convenience arises and the relevant factors and the weight to be attached to them in determining where the balance lies will vary from case to case. However, the extent to which the disadvantages to each party would be incapable of being compensated in damages is a significant factor in assessing where the balance of convenience lies.

- fifth, do the various factors that present in a case appear to be evenly balanced? If the answer to this fifth question is 'yes', then it would generally be prudent to take such measures as are calculated to preserve the *status quo ante*.

- sixth, is it the case that (a) the extent of the uncompensatable disadvantage to each party would not differ widely, and (b) upon the facts disclosed by evidence there is no credible dispute that the strength of one party's case is disproportionate to that of the other party? If the answer to each limb of this sixth question is 'yes', Lord Diplock suggested that it may not be improper to take into account, in tipping the balance in favour of one or other party, the relative strength of that party's case as revealed by the affidavit evidence that is adduced. However, notwithstanding the apparent wholesale incorporation of the *American Cyanamid* principles into Irish law by way of *Campus Oil*, it appears from the Supreme Court decision in *Westman Holdings Limited v. McCormack* [1992] 1 I.R. 151 that once an Irish court concludes that a party seeking an interlocutory injunction has raised a fair question to be tried it is inappropriate to make any further reference to the relative strength of the case presented by each of the parties, at least, per Clarke J. in Okunade at p.183, "*in the commercial context*". Thus, notwithstanding the broad similarity between the principles which apply to the granting or withholding of interlocutory injunctions here and in England and Wales, it seems safe to conclude that at least that part (b) which is referred to above has been excised from Irish law insofar as commercial cases such as the present proceedings are concerned.

30. Various elaborations upon the *American Cyanamid* principles occur in post-*Campus Oil* case-law. Some of the leading cases of relevance are considered hereafter.

31. In *Curust Financial Services Limited v. Loewe-Lack-Werk* [1994] 1 I.R. 450, the High Court and, on appeal, the Supreme Court, were presented with a case in which the facts arising were not entirely dissimilar in their essence to those which arise in the instant proceedings. Curust and Loewe were longstanding business partners between whom there was an exclusive manufacture and distribution agreement whereby Loewe granted Curust the sole and exclusive licence to manufacture, market, sell and distribute 'Loewe Rust Primer' in Ireland. In the early-1990s a dispute arose between the parties concerning the agreement and, as part of the subsequent litigation, Curust sought a series of injunctions restraining Loewe, its servants and agents from what Curust claimed were breaches of the agreement. Further injunctions were sought against the second defendant, referred to in the Supreme Court judgments as Sales Limited, from carrying out activities that would in effect constitute a breach of the agreement and an infringement of what was alleged to be the sole right of Curust to manufacture, sell and distribute the products covered by the agreement. The High Court granted the relief sought; its decision was reversed on appeal. It is on the issue of adequacy of damages that the Supreme Court made various pronouncements that are of particular relevance in the instant proceedings. Finlay C.J., having posed the question whether damages were an adequate remedy for Curust, made the following observations, at p.468 *et seq*:

> *"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.*
>
> *With regard to the particular question of the agreement of damages in respect of any period after the granting of a permanent injunction to Curust while its share of the market is being recovered, it does not seem to me that insuperable difficulties of quantification could arise. The extent of the market to which Curust was accustomed before an interruption in its exclusive rights of sale and distribution is ascertainable…Evidence in such a situation could surely be adduced which would permit a judge to make a reasonable forecast of the period during which Curust may suffer a continued diminution of trade and the approximate extent of that. In those circumstances, I do not see, by reason of difficulties in quantification, any ground for holding that damages are not an adequate remedy…*
>
> *There remains the question as to whether, on the evidence which was before the learned trial judge, it was open to him to conclude that damages would not constitute an adequate remedy by reason of a real risk that the postponement of their payment necessarily involved until after the determination of the action, would lead to the collapse, from a financial point of view, of Curust…[The Chief Justice then considers the factual information contained in the affidavit evidence that is relevant to this last issue]…If the injunction were now set aside, Curust would not be deprived of access to the market in rust primer, but rather would be obliged to share it in competition with Sales Ltd…[I]t is necessary that I should reach a conclusion on the affidavit evidence as to whether it has, as a matter of probability, been established at this stage for the purpose of the interlocutory injunction that damages would not be an adequate remedy, by reason of the real risk of the financial collapse of the Curust companies. In my view, having regard to all the factors which I have outlined, there has not been established such a case as a matter of probability. No information is forthcoming about the general position of the companies with regard to their indebtedness or net assets situation. No attempt has been made to assess the probable result of competition between Curust and Sales Ltd. in relation to this market for rust primer, except an averment on affidavit that Sales Ltd. is underselling Curust with regard to the cost of the rust primer being offered for sale. In these circumstances, where damages can be quantified, the loss is quite*

clearly a commercial loss, there is no doubt about the capacity of the defendants to pay any damages awarded against them and there is no element of new or expanding business which may make quantification particularly difficult, as a matter of principle, I conclude that damages must be deemed to be an adequate remedy in this case".

32. Echoing the Chief Justice's judgment, O'Flaherty J. writes, at p.472:

> *"I then turn to the question of the balance of convenience. That involves as a first inquiry whether damages would be an adequate remedy for Curust should Curust ultimately succeed at the plenary hearing. I agree with the Chief Justice's reasoning that it would be in the circumstances of this case. The crucial matter, in my judgment, is that Curust is not to be deprived of access to the market in rust primer, but rather would be obliged to share it in competition with Sales Ltd.*
>
> *Were it not for that factor I would hold that the matter was so finely balanced as to require a further inquiry as to where the balance of convenience lay."*

33. The court suggests hereafter that the above-quoted observations of Finlay C.J. and O'Flaherty J. can helpfully be reduced to a number of queries that might usefully be answered by the court when it is presented with an application for an interlocutory injunction and is seeking to act in compliance with the decision in Curust. Before moving on to do so, however, the court pauses to consider Finlay C.J.'s observation, at p.469 of his judgment, that "*Difficulty, as distinct from complete impossibility, in the assessment of… damages should not, in my view, be a ground for characterising the awarding of damages as an inadequate remedy*" and his later observation, at p.472 of his judgment, that "*[W]here damages can be quantified, the loss is quite clearly a commercial loss*" and so, *prima facie*, a loss that should be capable of being assessed in damages. Taking the first of these two observations, there are perhaps three categories of application for interlocutory injunction that will typically present before the court. The first is where damages are clearly the appropriate form of relief; in such cases the application for injunctive relief will be denied. The second is where the alleged loss of the plaintiff is not quantifiable or capable of being compensated by an award of damages; in such cases the application for injunctive relief will likely be granted, subject to such conditions as the court considers ought to be imposed. The third is where the alleged loss can conceivably be reduced to damages but where the quantification of these damages is not capable of reasonably precise estimate. In this last regard, nothing is impossible to an accountant or an actuary: if asked to quantify a loss he or she will do so but such estimates may and sometimes will be little more than informed guesswork. In other words one will reach a point where it is possible still to quantify the amount of damages but impossible to do so with any meaningful accuracy. It is this type of impossibility that the court understands Finlay C.J. to refer to when he speaks of "*[d]ifficulty, as distinct from complete impossibility, in the assessment of…damages*", *i.e*. damages that are completely impossible to calculate with such a degree of accuracy as to represent the probable loss that a person will suffer absent injunctive relief.

34. To put matters in context, in the present case a significant loss that appears potentially to arise for Mr. Hayden is the loss of growth opportunities of a failed business that suffers a pre-wind-down diminution in its commercial goodwill and/or whose principal operator suffers a like diminution of his commercial reputation, in circumstances where that business might have survived and, indeed, expanded had such diminution/s not occurred. There is no doubt that a skilled accounting professional could seek to put some sort of estimated figure on this potential loss, and equally there is no doubt that such attempt would almost certainly be accompanied by significant caveats as to the accuracy of the figure arrived at or the degree of reliance to be placed on same. In the present context, can one say that because some form of quantification, however flimsy, may be arrived at, Mr. Hayden has failed to show the complete impossibility of assessing damages? Or should one conclude that it is completely impossible to arrive at an assessment of damages that evinces as a matter of probability the level of loss that Mr. Hayden may ultimately suffer and thus injunctive relief is appropriate? The court considers that the correct reading of Finlay C.J.'s observations in *Curust* suggests that the latter type of impossibility is the type of impossibility to which the Chief Justice intended to refer, and thus that in the present proceedings Mr. Hayden has shown that he will suffer damages which are completely impossible to quantify with the necessary degree of probability.

35. As to the second of Finlay C.J.'s observations referred to above, viz. that "*[W]here damages can be quantified, the loss is quite clearly a commercial loss*", the court considers much the same issues to arise as have been considered immediately above. In one sense all damages can be quantified but there will come a point when the quantification of some damages is such a matter of estimate, perhaps 'guesstimate', even if done by a skilled accounting professional, that they can no longer be said to be damages that the plaintiff would be likely to suffer as a matter of probability were the actions or events that it is sought to injunct allowed to transpire. In such instances the court considers that the damages, though capable of being given some form of quantification, are not capable of quantification to a degree that would suggest they were likely to arise as a matter of probability and so are not commercial losses of the type to which Finlay C.J. intended to refer.

36. Moving on, it appears to the court that the above-quoted observations of Finlay C.J. and O'Flaherty J. ought to prompt a number of queries on the part of the court when presented with an application for an interlocutory injunction:

- first, is the loss arising clearly and exclusively a commercial loss and so typically capable of being assessed in damages under the heading of loss actually suffered up to the point when damages fall to be assessed and also under the heading of probable future loss?

- second, does such challenge as may arise in the assessment of damages reflect a difficulty, as distinct from a complete impossibility, in the assessment of same; a mere difficulty not being a ground for characterising the award of damages as an inadequate remedy?

- third, is it contended that damages would not constitute an adequate remedy by reason of a real risk that the postponement of their payment until after the determination of the action would lead to the collapse, from a financial point of view, of the party so contending?

- fourth, if the injunction were refused, is it the case that the party seeking same would (a) be shut out from a market in which it has previously participated or (b) merely be obliged to share that market with another, with situation (a) justifying further enquiry as to the balance of convenience and situation (b) pointing to the possible adequacy of damages?

- fifth, if it is contended that damages would not constitute an adequate remedy by reason of a real risk that the postponement of their payment until after the determination of the action would lead to the collapse, from a financial point of view, of the party so contending, is there evidence before the court, such as evidence regarding the general position of the parties with regard to their indebtedness or net assets or the probable result of increased competition, whereby the case so advanced has been established as a matter of probability?

- sixth, is there any doubt as to the capacity of the party against whom an injunction is sought to pay any damages awarded against such party?

- seventh, is there a new/expanding business dimension to the facts presented before the court that would make the quantification of damages particularly difficult?

37. In *Fitzpatrick v. The Commissioner of An Garda Síochána* (Unreported, Kelly J., High Court, 16th October, 1996), Kelly J. was presented with an application by Mr. Fitzpatrick, a member of An Garda Síochána then serving with the UN Civilian Police, seeking an interlocutory junction restraining his transfer or repatriation by the Garda Commissioner from Cyprus to Ireland. The case is of interest in the context of the present proceedings insofar as it is alleged that Mr. Hayden would suffer damage to his business reputation if Glanbia is allowed to proceed with its proposed course of action. As to the issue of reputation and damages, Kelly J. states that:

> *"[I]t seems to me that any embarrassment or loss of character or good name has already been sustained by all that has occurred…In any event, I am satisfied that if the Applicant is correct and his repatriation is unlawful, a determination by the court to that effect will completely vindicate him. Insofar as his constitutional entitlement to his good name and reputation is concerned, I see no reason why they cannot be adequately compensated by an award for damages. Damage to reputation as a result of libel or slander is regularly compensated in these courts by an award of damages."*

38. At first glance the decision in *Fitzpatrick* would appear to support the contention that, insofar as Mr. Hayden claims that he may suffer damage to his business reputation, any such damage is remediable by way of damages. Certainly, if one was to reduce the above-quoted text from *Fitzpatrick* to a single-line principle, it would appear that Kelly J. did not see a claim as to reputational damage to be one that would typically, if at all, justify injunctive relief. Notably, however, the form of reputation that arose to be considered by Kelly J. was personal reputation and not that business reputation which may attach to a trader or enterprise and comprise part of the commercial goodwill enjoyed by same. A rational distinction can be drawn between the two, and while there can of course be an inter-relationship between them, this need not always be so. It is, for example, entirely possible that an individual could have a bad personal reputation, yet enjoy a good business reputation. Given this distinction between personal reputation and business reputation, the relevance of the *Fitzpatrick* decision to a case such as that now before the court, which is focused entirely on business reputation, seems open to question. Moreover, it does not seem to the court that the loss caused by damage to business reputation will invariably be measurable in cash terms. In the present case, for example, it is not clear to the court that one could identify as a matter of probability the scale of damages that would compensate Mr. Hayden, in the event of his dairy distribution business failing, for the potential loss of growth that his business might have enjoyed if it had survived and if he and/or the company had not suffered a stinging loss of business reputation in the period prior to such failure.

39. In *Noel Ó'Murchú t/a Talknology v. Eircell Limited* (Unreported, Supreme Court, 21st February, 2001), the Supreme Court considered what proved ultimately to be an unsuccessful appeal from a decision of the High Court refusing a number of interlocutory injunctions, the effect of which injunctions, if granted, would have been to compel Eircell, until further order, to continue supplying or permitting the supply of 'Ready to Go' mobile phones to Talknology and to treat Talknology as an authorised agent for this purpose. Insofar as the adequacy of damages was concerned, Geoghegan J. made certain observations the relevance of which to the instant proceedings will be immediately apparent. Thus, per Geoghegan J., at p.8 *et seq*:

> *"I move now to the question of whether damages would be an adequate remedy. The learned High Court judge clearly thought it was and I would have to agree with him. In every case in which there is a breach of an agency or distribution agreement the task of assessing damages will be difficult, but that does not mean that it cannot be done. The respondent is a viable company and is financially in a position to meet any award in damages that may be made against it. The appellant's loss is essentially financial. An interesting feature of the case is that much of the argument put forward on behalf of the appellant in the High Court was that the Christmas trade was absolutely vital and that without it, he would go out of business. The plaintiff is still in business. But even if he does go out of business, as a result of losing the agency, his losses can be assessed in money terms."*

40. There are perhaps two key points to be derived from this text. The first is that breach of an agency or distribution agreement will invariably present a difficulty as regards the calculation of damages. However, this does not mean that it cannot be done, and of course Finlay C.J. indicated in *Curust* that a mere difficulty in the calculation of damages, as opposed to an "*impossibility*" (the term has been considered above), is not a ground for characterising the award of damages as an inadequate remedy. The second is that even the losses arising from a complete failure of a business could, at least in the case before the Supreme Court in *Talknology*, be assessed in money terms. Notably, however, Geoghegan J. does not suggest that there will never be instances in which the complete failure of a business would have consequences that render the calculation of damages impossible and thus merit the invocation and application of injunctive relief.

41. The judgment of McMenamin J. in *Whelan Frozen Foods* considers a number of authorities and makes various observations that are of interest in the context of the present proceedings. Whelan Frozen Foods had supplied Dunnes Stores with stock over a quarter-century long period. In the proceedings before McMenamin J., Whelan made various claims against Dunnes Stores, including that the latter had sought to make unilateral variations of contracts entered into between the two parties, had unlawfully withheld certain sums due to Whelan, and had caused Whelan to incur certain losses. A consequence of the alleged transgressions was that Whelan came to the High Court seeking injunctive relief. It is when it comes to the question of the adequacy of damages that the case is of the greatest interest in the context of the present proceedings. In the course of his judgment, McMenamin J. considers a number of relevant precedents, including the decisions in the American Cyanamid, *Curust* and *Talknology* cases, before reaching the following conclusions:

> *"First, as a principle…in the balance of convenience it is clear that as a general rule a court should where possible strive to maintain the status quo. However, this is but one element in weighing the balance of convenience. Second, the court must always have regard to the fact that as illustrated in Curust the onus lies upon the plaintiff to establish as a matter of probability that damages will not be an adequate remedy. There should be evidence which establishes this proposition, both as to the general position of the company, its indebtedness and net asset situation and whether a real risk exists to solvency…*
>
> *The issue of the balance of convenience involves as an inquiry, whether damages would be an adequate remedy. On the basis of the plaintiffs evidence even when balanced against that of the defendant, the issue is as to the risk of insolvency as contrasted to the maintenance of the status quo which in this case inter alia involves the long trading relationship which existed between the parties….*

A further issue to be borne in mind is the financial standing of each of the parties. The plaintiff is solely and entirely dependent on the defendant for its business. The court should have regard to the effect of the absence of an injunction on the respective positions of the plaintiff and the undoubtedly financially secure defendant, and on the evidence on those points referred to, then look to the justice of the case.

Where there is doubt as to the adequacy of damages, then the court should look at the question of the balance of convenience. It will be a matter for the court to determine the relative weight in establishing or deciding where the balance lies. Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo. One of the tests which the court must apply is the 'balance of the risk of doing an injustice'...The adequacy of damages as a remedy must been seen as predicated on the continued existence of the parties as going concerning to the trial of the full action….A further issue to which the court may also have regard is a degree of uncertainty as to when the hearing of the plenary action will take place, even having regard to the desire of both parties to achieve an early hearing. The court cannot ignore the difficulties which may arise in the preparation of discovery or the assignment of a date when the court calendar will be free." [Underline in original].

42. Briefly put, McMenamin J. reiterates the principle identified by the Supreme Court in *Curust* that the onus lies upon the plaintiff to establish as a matter of probability that damages will not be an adequate remedy, then raises various points that can be reformulated into queries which can usefully be considered by the court when presented with an application for an interlocutory injunction:

- first, is the court's assessment of damages predicated, as it must be, on the continued existence of the parties as going concerns to the trial of the full action?

- second, in its determination as to where the balance of convenience lies, is the court attaining insofar as possible the maintenance of the *status quo ante*?

- third, in its determination as to where the balance of convenience lies has the court had regard to (a) the financial standing of each of the parties and (b) the effect of the absence of an injunction on the respective positions of the plaintiff and the defendant, and (c) the justice of the case, bearing in mind the evidence as to points (a) and (b)?

- fourth, in its determination as to where the balance of convenience lies has the court had regard to the balance of the risk of doing an injustice?

- fifth, in its determination as to where the balance of convenience lies has the court had regard to the degree of uncertainty as to when the hearing of the plenary action will take place, even having regard to the desire of both parties to achieve an early hearing, it not being open to the court to ignore the difficulties which may arise in the preparation of discovery or the assignment of a date when the court calendar will be free?

Summary of principles arising

43. The court considers that the following are the queries that the judgments in *American Cyanamid*, *Curust* and Whelan indicate to arise in an application for an interlocutory injunction. It is not intended as a list of all the queries that can arise for consideration in an application for an interlocutory injunction. Such a list would be impossible to assemble. This is because, as Lord Diplock noted in *American Cyanamid*, at p.409, individual cases may present special factors that require to be taken into consideration. Moreover, as mentioned above, Order 50, r.6 of the Rules of the Superior Courts and the broad thrust of applicable case-law point to the court ultimately retaining a degree of flexibility and discretion as regards the granting or refusal of injunctive relief that is untrammelled by strict criteria, though its exercise of this discretion is of course subject to the rules of precedent. All that said, it appears to the court that the queries identified below provide a useful checklist by which to assess whether an interlocutory injunction ought to issue in a case such as that now before it:

(1) Does the material available to the court at the hearing of the application fail to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial? (*American Cyanamid*)

(2) If the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, (a) would he be adequately compensated by an award of damages in the measure recoverable at common law for any loss arising to the time of trial from the non-issuance of the interlocutory injunction and (b) would the defendant be in a financial position to pay them? (*American Cyanamid*)

(3) If such damages aforesaid would not provide an adequate remedy for the plaintiff in the event of his succeeding at trial, and the defendant were to succeed at the trial in establishing his right to that which was sought to be enjoined, (a) would the defendant be adequately compensated under an undertaking by the plaintiff as to damages for such loss as the defendant would sustain by virtue of the issuance of the interlocutory injunction against the defendant, and (b) would the plaintiff be in a financial position to pay them? (*American Cyanamid*)

(4) Is there any doubt as to the adequacy of the respective remedies in damages available to either party or to both? (*American Cyanamid*)

(5) Do the various factors that present in a case appear to be evenly balanced? (*American Cyanamid*)

(6) Is it the case that the extent of the uncompensatable disadvantage to each party would not differ widely? (*American Cyanamid*)

(7) Is the loss arising clearly and exclusively a commercial loss and so typically capable of being assessed in damages under the heading of loss actually suffered up to the point when damages fall to be assessed and also under the heading of probable future loss? (*Curust*)

(8) Does such challenge as may arise in the assessment of damages reflect a difficulty, as distinct from a complete impossibility, in the assessment of same; a mere difficulty not being a ground for characterising the award of damages as an inadequate remedy? (*Curust*)

(9) Is it contended that damages would not constitute an adequate remedy by reason of a real risk that the

postponement of their payment until after the determination of the action would lead to the collapse, from a financial point of view, of the party so contending? (*Curust*)

(10) If the injunction were refused, is it the case that the party seeking same would (a) be shut out from a market in which it has previously participated or (b) merely be obliged to share that market with another, with situation (a) justifying further enquiry as to the balance of convenience and situation (b) pointing to the possible adequacy of damages? (*Curust*)

(11) If it is contended that damages would not constitute an adequate remedy by reason of a real risk that the postponement of their payment until after the determination of the action would lead to the collapse, from a financial point of view, of the party so contending, is there evidence before the court, such as evidence regarding the general position of the parties with regard to their indebtedness or net assets or the probable result of increased competition, whereby the case so advanced has been established as a matter of probability? (*Curust*)

(12) Is there any doubt as to the capacity of the party against whom an injunction is sought to pay any damages awarded against them? (*Curust*)

(13) Is there a new/expanding business dimension to the facts presented before the court that would make the quantification of damages particularly difficult? (*Curust*)

(14) Is the court's assessment of damages predicated, as it must be, on the continued existence of the parties as going concerns to the trial of the full action? (*Whelan*)

(15) In its determination as to where the balance of convenience lies is the court attaining insofar as possible the maintenance of the *status quo ante*? (*Whelan*)

(16) In its determination as to where the balance of convenience lies has the court had regard to (a) the financial standing of each of the parties and (b) the effect of the absence of an injunction on the respective positions of the plaintiff and the defendant, and (c) the justice of the case, bearing in mind the evidence as to points (a) and (b)? (*Whelan*)

(17) In its determination as to where the balance of convenience lies has the court had regard to the balance of the risk of doing an injustice? (*Whelan*)

(18) In its determination as to where the balance of convenience lies has the court had regard to the degree of uncertainty as to when the hearing of the plenary action will take place, even having regard to the desire of both parties to achieve an early hearing, it not being open to the court to ignore the difficulties which may arise in the preparation of discovery or the assignment of a date when the court calendar will be free? (*Whelan*)

44. As the above queries and the cases from which they derive are all variations on a theme it is inevitable that some of them will overlap.

Should an interlocutory injunction be granted in this case?
45. The court turns now to apply the various legal principles and related queries identified above to the facts arising in the instant proceedings.

46. (1) *Does the material available to the court at the hearing of the application fail to disclose that Mr. Hayden has any real prospect of succeeding in his claim for a permanent injunction at the trial*? Mr. Hayden has raised various substantive issues, not least concerning the interpretation and operation of the distribution agreement of 20th September, 1995, that will require to be determined at the trial of the full action. The material available to the court does not fail to disclose that Mr. Hayden has any real prospect of succeeding in a claim for a permanent injunction at the trial of the action.

47. (2) *If Mr. Hayden were to succeed at the trial in establishing his right to a permanent injunction, (a) would he be adequately compensated by an award of damages in the measure recoverable at common law for any loss arising to the time of trial from the non-issuance of the interlocutory injunction and (b) would Glanbia be in a financial position to pay them*? For the reasons stated in its answer to Question (7) below, the court does not consider that if Mr. Hayden succeeds at the plenary hearings, damages would be adequate compensation for the non-issuance of an interlocutory injunction at this time. This is because the court considers that it is and would be impossible to calculate as a matter of probability the full extent of the damages that Mr. Hayden would suffer. As to the ability of Glanbia to pay such damages as might be awarded against it, no evidence has been adduced before the court in this regard. However, given that Glanbia is a large public company of considerable prominence in its sector, it seems likely that this is so.

48. (3) *If damages would not provide an adequate remedy for Mr. Hayden in the event of his succeeding at trial, and Glanbia were to succeed at the trial in establishing its right to do that which Mr. Hayden has sought to enjoin, (a) would Glanbia be adequately compensated under an undertaking by Mr. Hayden as to damages for such loss as Glanbia would sustain by virtue of the issuance of the interlocutory injunction against Glanbia, and (b) would Mr. Hayden be in a financial position to pay them*? It will be recalled that in Whelan, McMenamin J. indicates that any decision as to the adequacy of damages must be predicated on the continuing existence to the plenary hearings of the respective parties. The court concludes in its answer to Question (14) below that, as a matter of probability, if the injunction sought by Mr. Hayden is not granted, his business will not survive to the full trial of the action. Thus Question (3) seems moot in the present proceedings. That said, it appears to the court that any damages arising for Glanbia by virtue of the issuance of the injunction now sought would be relatively small. After all, Glanbia's products would continue to be supplied. Moreover, if the volumes of produce to be supplied either increased or decreased, the relevant adjustments could be agreed between Mr. Hayden and Glanbia. Insofar as any operational difficulties may present, it seems from the affidavit evidence that these not insurmountable difficulties pertain to the injunction possibly making the supply process more cumbersome, rather than it making them significantly more costly. As to whether the injunction now sought would give rise to difficulty between Glanbia and the Wexford Creamery distributor, it might, but it seems to the court that any such difficulty is attributable ultimately not to any injunction being granted but due to the integration process arising from Glanbia's decision to acquire Wexford Creamery on the assumption, correct or otherwise, that it could proceed as it has sought to do vis-à-vis Mr. Hayden and that other distributor. Given the relatively minor damages that would appear to arise for Glanbia in the event of the injunction that is now sought being issued, it does not appear from the financial evidence before the court that payment of damages to Glanbia would necessarily present an issue, though again it appears that Question (3) is redundant in light of the court's answer to Question (14).

49. (4) *Is there any doubt as to the adequacy of the respective remedies in damages available to either party or to both*? For the reasons stated in answer to Question (7) below, the court does not consider that if Mr. Hayden succeeds at the plenary hearings, damages would be adequate compensation for the non-issuance of an interlocutory injunction at this time. Conversely, there is nothing in the evidence adduced or the argument made before the court that would lead it to conclude that damages would not be adequate compensation for Glanbia in the event that it were ultimately to succeed at the main trial of action following the issuance of the injunction now sought. It is worth recalling in this regard, and the court notes, the observation of Lord Diplock in *American Cyanamid*, at p.409, that:

> *"The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies."*

50. (5) *Do the various factors that present in a case appear to be evenly balanced*? It will be apparent from the court's answers to the other questions considered in this section of its judgment that the court considers the answer to this question to be 'no'. Thus, for example, it appears to the court that: any damages arising for Glanbia by virtue of the issuance of the injunction now sought would be relatively small whereas the potential losses arising for Mr. Hayden are potentially catastrophic, both as regards the continued existence of his business and his personal income; there is a significant imbalance in the financial standing of the parties; and in terms of balancing the risk of injustice it seems to the court that the potential injustice to be suffered by Mr. Hayden were the injunction refused would be greater than that to be suffered by Glanbia were it granted. All of these factors, it appears to the court, are further exacerbated, in terms of the potential serious adverse consequences they present or entail for Mr. Hayden, by the fact that the trial of the full action may not come on for some time.

51. (6) *Is it the case that the extent of the uncompensatable disadvantage to each party would not differ widely*? It is not clear to the court that the issue of uncompensatable damage arises for Glanbia at all, whereas it does appear to arise for Mr. Hayden.

52. (7) *Is the loss arising clearly and exclusively a commercial loss and so typically capable of being assessed in damages under the heading of loss actually suffered up to the point when damages fall to be assessed and also under the heading of probable future loss*? This query arises from the decision of the Supreme Court in *Curust* and the court has explained above why it considers that, when Finlay C.J. referred in *Curust* to the complete impossibility of assessing damages as a pre-requsite to injunctive relief, he meant to refer to the impossibility of calculating damages with a sufficient degree of accuracy as would identify the probable damages that would arise for an applicant in the event of certain behaviour on the part of a respondent not being enjoined by injunction. It appears to the court that, in the event of Glanbia proceeding as it has proposed, the loss that would arise for Mr. Hayden consequent upon the reduction of goodwill that he contends would arise for him, and/or Baínne Aláinn, would be impossible to calculate in the sense to which Finlay C.J. refers. That loss would have to be calculated in part by reference to a decreased ability to expand a now failed business thanks to a pre-failure diminution of goodwill and it is not at all clear how the relevant losses could be calculated with the necessary probability. There is also the fact that Mr. Hayden alleges, and the court concludes at Question (14) below, that the refusal of the injunction now being sought would on the balance of probabilities bring about the collapse of Mr. Hayden's business, which is largely a 'one-man show', although he does have at least one employee. This collapse would have many consequences, including that Mr. Hayden, who has spent most of his adult life in the dairy supply business, would likely have to re-train for alternative employment and, at his age, might face limited employment opportunities, giving rise to various related difficulties, including an inability to service his home-loan, a particular concern to which Mr. Hayden makes specific reference in his affidavit evidence. Of course even were this disastrous series of events to unfold, most of the losses arising, were they in fact to occur, might conceivably be capable of some form of quantification at some future time. However, it is difficult to see how they could be assessed with the necessary degree of probability, and it would seem to fly in the face of reason and common-sense to describe these potentially significant and possibly irremediable losses of unknown extent as examples of those quantifiable 'commercial losses' for which damages would be an adequate remedy and to which Finlay C.J. intended to refer in Curust as offering a basis for the refusal of injunctive relief.

53. (8) *Does such challenge as may arise in the assessment of damages reflect a difficulty, as distinct from a complete impossibility, in the assessment of same; a mere difficulty not being a ground for characterising the award of damages as an inadequate remedy*? The court has considered above what Finlay C.J. means when he refers in Curust, at p.469, to *"[d]ifficulty, as distinct from complete impossibility, in the assessment of…damages",* and has concluded that it considers that the impossibility to which Finlay C.J. refers does arise in relation to some of the damages that Mr. Hayden contends that he will suffer if Glanbia is allowed to proceed as it intends.

54. (9), (10) *Is it contended that damages would not constitute an adequate remedy by reason of a real risk that the postponement of their payment until after the determination of the action would lead to the financial collapse of the party so contending*? *Is it the case that, if the injunction were refused, the party seeking same would (a) be shut out from a market in which it has previously participated or (b) merely obliged to share that market with another, with situation (a) justifying further enquiry as to the balance of convenience and situation (b) pointing to the possible adequacy of damages*? Mr. Hayden alleges, and the court concludes in its answer to Question (14), that the refusal of the injunction now being sought would on the balance of probabilities bring about the imminent collapse of Mr. Hayden's business. Thus it would have the effect that he would be required to leave the market. Even were such a collapse not to come about, Mr. Hayden would nonetheless be excluded from that part of the market which he had once supplied but which now came under the ambit of a different distributor. There are two reasons why this is so. First, as Glanbia contends, it seems unsustainable commercially to have two distributors delivering the same supplier's produce to a single store. Second, once that store is getting its dairy produce from an entity such as Glanbia which produces a wide array of dairy products, it would likely have no need to procure alternative dairy supplies from Mr. Hayden. One or both of these factors would have the end-result that, on the balance of probabilities, Mr. Hayden would find himself shut out from that part of the market which fell to be apportioned to the Creamery agent.

55. (11) *If it is contended that damages would not constitute an adequate remedy by reason of a real risk that the postponement of their payment until after the determination of the action would lead to the collapse, from a financial point of view, of the party so contending, is there evidence before the court, such as evidence regarding the general position of the parties with regard to their indebtedness or net assets or the probable result of increased competition, whereby the case so advanced has been established as a matter of probability*? The adequacy of the financial information provided by Mr. Hayden is considered in Question (14) below. Suffice it to note here that, having regard to such evidence as has been presented before it and to which reference is made in the answer to Question (14), the court concludes as a matter of probability that if the injunction sought is not granted, Mr. Hayden's business will not survive to the full trial of the action.

56. (12) *Is there any doubt as to the capacity of the party against whom an injunction is sought to pay any damages awarded against them*? This has been answered in the court's consideration of Question (2) above.

57. (13) *Is there a new/expanding business dimension to the facts presented before the court that would make the quantification of damages particularly difficult*? The court has broached this issue in its answer to Question (7) and considers that the answer to the query posed must be 'yes'. Thus it appears to the court that the loss that would arise to Mr. Hayden consequent upon the diminution of goodwill that he contends, and the court accepts, would arise for him and/or Baínne Aláinn, in the event of Glanbia proceeding as proposed, would not be possible to calculate as a matter of probability, not least because the loss would have to be calculated in part by reference to Mr. Hayden's life-long reduced ability to expand his onetime business on the strength of such goodwill as he and/or Baínne Aláinn had once enjoyed but which, as a result of the actions of Glanbia, would have suffered a diminution in value prior to the collapse of that business.

58. (14) *Is the court's assessment of damages predicated, as it must be, on the continued existence of the parties as going concerns to the trial of the full action*? Mr. Hayden has over 20 years' experience in the dairy distribution business and knows his own business intimately. He has averred in his affidavit evidence that the proposed revised arrangements would necessitate a costly upgrade of his existing transportation stock at a time of reduced trade. He has also, in his averments, provided concrete examples of the increased labour and running costs and associated inefficiencies that will arise for him if the proposed revised distribution arrangements are effected. He anticipates that he will suffer damage to his business reputation as well as a significant loss of goodwill in the business that he has built over the years. Having regard to all of the foregoing, Mr. Hayden has formed the view that the proposed revised distribution arrangements will have the effect that his business will no longer be commercially viable. He is so concerned in this regard that he has gone to the not inconsiderable expense of commencing the present proceedings. His concerns are partly grounded in certain financial analyses that he has commissioned from a named firm of accountants and exhibited with his affidavit evidence. For its part, Glanbia acknowledges that some financial difficulty may arise for Mr. Hayden and it has offered increased volumes on another route (though Mr. Hayden disputes the commercial viability of such an arrangement) and claims to have offered certain financial assistance (which Mr. Hayden claims was never offered). However, Glanbia does not accept that the Gorey route would render Mr. Hayden's business unprofitable. Moreover, counsel for Glanbia has urged on the court that it should not have any regard to the financial analyses supplied by Mr. Hayden, these being hearsay evidence. But as Mr. McGrath notes in his learned text, "*Evidence*" (2005), at p.295, "*It is well established that the application of the hearsay rule is relaxed in interlocutory proceedings*". This is echoed in Mr. Kirwan's learned text, "Injunctions" (2008), at pp. 220 and 256. Indeed, Order 40, r.4 of the Rules of the Superior Courts expressly allows for the inclusion of hearsay in affidavits on interlocutory motions, even if the courts have typically, and rightly, been cautious as to placing undue reliance on such hearsay. Thus, albeit tempered with appropriate caution, the court has had regard to such financial analyses by a named firm of accountants as have been referred to by Mr. Hayden, and exhibited with his affidavit evidence, in support of his case that Glanbia's proposed changes pose a real threat to the continuation of his business. To the extent that the facts or decisions in *Curust* or *Whelan* might be advanced to support the notion that more comprehensive financial analyses ought to have been supplied by Mr. Hayden, it appears to the court that those cases can be distinguished on the basis that they involved plaintiffs of some substance, in *Curust* a plaintiff engaged in the manufacture and distribution of the largest-selling rust primer in Ireland, and in *Whelan*, a plaintiff supplier that, if not quite a household name, was not far removed from that status. By contrast, Mr. Hayden operates a relatively small undertaking and has come to the court at a time when he perceives that his 'back is against the wall' and his relatively modest business, the only business he has ever known and which he has built up from nothing, is confronted with imminent collapse. In a 'David and Goliath'-style battle, a 'David' may have little choice but to come to the fray armed less than perfectly, but that need not yield the conclusion that he has come ill-equipped or produce the result that he fails. The court considers that the evidence of an experienced and sober-minded businessman who has operated a business for over 20 years and has real and substantive concerns as to its continuing viability and who has furnished to the court some supporting evidence, albeit hearsay evidence, from a named source, is considerably more persuasive than the rather terse, and entirely unsupported, dismissal by Glanbia in its affidavit evidence of Mr. Hayden's contention that the restructuring of the Gorey route would render his business unprofitable. Given the evidence adduced before it, the court concludes as a matter of probability that if the injunction sought is not granted, Mr. Hayden's business will not survive to the full trial of the action.

59. (15) In its determination as to where the balance of convenience lies is the court attaining insofar as possible the maintenance of the *status quo ante*? It appears to the court that the only way of preserving the *status quo ante* between the parties is to grant the injunctive relief sought. Glanbia has made clear to Mr. Hayden its intention to proceed with its proposed amendments to the distribution régime, which he alleges are in breach of contract, and it appears that it is only the interim injunction which has stopped Glanbia from so proceeding. Glanbia continues to maintain that its view as to the contractual obligations arising between the parties is correct and so, absent injunctive relief, will likely proceed as it originally intended (certainly it has given no indication that it will not), thus upsetting the status quo ante and potentially causing significant damage to Mr. Hayden.

60. (16) *In its determination as to where the balance of convenience lies has the court had regard to (a) the financial standing of each of the parties and (b) the effect of the absence of an injunction on the respective positions of the plaintiff and the defendant, and (c) the justice of the case, bearing in mind the evidence as to points (a) and (b)?* The court has referred to the financial standing of the parties elsewhere above and would note again that Mr. Hayden is a small or medium-sized trader operating what is in effect a family business with a limited number of employees. Glanbia is a large public company that, at least by reputation – no evidence has been adduced before the court in this regard – has the appearance of being possessed of considerable financial resources or, at least, resources that are considerably greater than those of Mr. Hayden. The court has concluded above that the absence of the injunction would likely lead to the collapse of Mr. Hayden's business and would free Glanbia to proceed as it has intended all along. Having regard to the foregoing, the relative financial strength of the parties and the potentially devastating effect that the absence of the injunction would have for Mr. Hayden and the related advantage that it would give to Glanbia to advance matters as it wishes and to a stage where Mr. Hayden might quickly lose the financial wherewithal to continue these proceedings, the court considers that the justice of the case requires that it grant the injunctive relief sought by Mr. Hayden.

61. (17) *In its determination as to where the balance of convenience lies has the court had regard to the balance of the risk of doing an injustice*? If the court grants the injunction it risks doing an injustice to Glanbia in that Glanbia could not proceed in a manner that it contends is in accordance with the contractual obligations between the parties. If the court refuses the injunction it risks exposing Mr. Hayden to the collapse of his business and the related personal difficulties that this would entail. It seems to the court that, having regard to the risk of injustice, the potential injustice to be suffered by Mr. Hayden were the injunction refused would be greater than that to be suffered by Glanbia were it granted. Consequently the balance of convenience favours Mr. Hayden in this regard.

62. (18) *In its determination as to where the balance of convenience lies has the court had regard to the degree of uncertainty as to when the hearing of the plenary action will take place, even having regard to the desire of both parties to achieve an early hearing, it not being open to the court to ignore the difficulties which may arise in the preparation of discovery or the assignment of a date when the court calendar will be free*? Even allowing for the possibility of an early hearing, the court has concluded that the likely consequence of refusing the injunction would be the imminent collapse of Mr. Hayden's business. It is possible that his business could 'limp on' to the trial of the full action; however, it would likely have been irremediably damaged by that time. Thus it seems to the court that, whether prompt or protracted, the timing of the coming on of the main proceedings makes little difference to Mr.

Hayden given the likely imminence of the collapse in his business, and thereafter his personal finances, that would be engendered by the implementation of Glanbia's proposed revised distribution arrangements.

Conclusion

63. For the reasons provided in its answers to the various questions posed above, the court considers that it is appropriate to grant relief to Mr. Hayden by way of interlocutory injunction. The court notes that Mr Hayden has indicated that he is willing to give the usual undertaking as to damages. As it happens, the court considers that this case comes within that category of cases in which it would have been appropriate to grant the interlocutory relief sought even if such an undertaking was not forthcoming from Mr. Hayden. That an interlocutory injunction might be granted without any order as to damages is clear from the consideration of the relevant principles and precedents above. That such an approach would be merited in the present context seems clear from a consideration of the facts, not least among which is that, on the one hand, the court is presented with circumstances that threaten the imminent collapse of a family business and the consequent collapse of an individual's personal finances, and, on the other, the court is presented with an apparently successful public company for which a delay in the implementation of its proposed revised distribution arrangements would appear to involve little financial loss, a certain loss of face, and some practical inconveniences that have been referred to above. The balance of convenience and the scales of justice in this case are weighted heavily in Mr. Hayden's favour and, however one looks at matters, "*it appears to the court to be just or convenient*", to quote the words of O.50, r.6 of the Rules of the Superior Courts, that the injunctive relief being sought in this application should issue in any event. That said, the court notes that Mr. Hayden has expressed a willingness to give the usual undertaking in damages, it appears that there is substance to his undertaking in the context arising, and the court is satisfied to accept his offer that such undertaking be given.

64. As indicated at the hearing of the application, the court does not consider that the exact terms of the injunction sought are appropriate in that, as was conceded by Mr. Hayden's counsel at hearing, the proposed terms would capture actions the lawfulness and legitimacy of which is not in dispute. The court will consider with counsel the appropriate wording of the interlocutory injunction that is to issue pursuant to this judgment.