THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 327

[2019 No. 99]

Whelan J
McGovern J
Collins J

BETWEEN

BETTY MARTIN FINANCIAL SERVICES LIMITED

RESPONDENT

AND

EBS DAC

APPELLANT

JUDGMENT of Mr Justice Maurice Collins delivered on 18 December 2019

PRELIMINARY

1. EBS DAC ("*EBS*") appeals against the Judgment and Order of the High Court (Jordan J) of 13 February 2019 (as varied by Order of 21 February 2019) whereby, for the reasons set out in its reserved judgment, the Court made various orders the effect of which was to restrain the termination by the EBS of a number of Tied Agency Agreements with the Plaintiff ("*the Agent*") and to restrain the taking of any steps on foot of a notice of termination that had been served by the EBS, pending the trial of this action. Those Agreements related to agencies operated by the Agent in Lucan, Athlone and Longford, all of which operate from premises owned by the EBS.

2. On 19 February 2018 the EBS gave 12 months' notice of termination of those Agreements (in terms said to be ineffective because of alleged non-compliance with the mandatory requirements of the Tied Agency Agreements), in reliance on an express power to terminate on the giving of such notice contained, in identical terms, in each of the Tied Agency Agreements.

3. The High Court Judge concluded that there was a serious question to be tried that the termination was unlawful, both on the basis flagged above – the Agent's argument that the form of the notice did not comply with the mandatory requirements of the Tied Agency Agreements and a further argument that the notice had not been served in accordance with the Agreements – and by reference to a number of arguments made by the Agent to the effect that the termination was substantively unlawful. The Judge considered that damages would not be an adequate remedy for the Agent because damages would not adequately compensate the damages to its reputation, and that of its principals, that had been established over a lengthy period. In the Judge's view, the balance of convenience lay decisively in favour of granting the injunctions. The Judge also considered and rejected the EBS's argument that the relief sought should be refused on grounds of delay. Having heard the parties on his Judgment, the Judge made an order for costs in favour of the Agent. That order is also the subject of appeal by the EBS.

4. The proceedings were commenced some 12 months ago. At the start of the hearing of the appeal, this Court was informed that the proceedings had been entered into the Commercial list but were nonetheless "*a long long way from trial*" due, the Court was told, to ongoing dispute as to the proper scope of discovery and in particular the extent to which the Agent is entitled to EBS documents relating to agencies it has, or had, with third parties. That discovery dispute has yet to be determined by the High Court. The Court was also told that the EBS is seeking security for the costs of discovery.

5. It follows that, in event that the High Court injunctions are upheld, they are likely to remain in place for some considerable time, a fact to which I will return below.

THE TIED AGENCY AGREEMENTS

6. The three Tied Agency Agreements at issue were executed in April 2011. Each relates to a particular branch agency carried on by the Agent but they are otherwise in identical terms. The evidence before the Court discloses that the agencies were all operated by the Agent prior to 2011 and that the agency businesses had been established by the late Betty Martin. Betty Martin took over the EBS agency in Athlone in the 1990s and the agency in Longford some time after that. Mr Declan Martin (a director of the Agent and son of Mrs Martin) avers, without contradiction, that Betty Martin was the first woman to operate an EBS tied agency in Ireland. Betty Martin Financial Services Limited was established in 2004. In 2008, the Agent took over the Lucan branch of EBS. As mentioned, the Tied Agency Agreements at issue in these proceedings were entered into in April 2011, by which time Mrs Martin was less involved in the business due to illness. Sheila Martin, a daughter of Betty Martin, has been involved in the business since 2012.

7. Although operated through a corporate entity, it is argued on behalf of the Agent that its business was and is a family business and in his submissions to this Court, Declan McGrath SC for the Agents submits that Declan and Sheila Martin have a "*huge emotional investment*" in the business such as cannot properly or adequately be compensated by an award of damages in the event that the termination is permitted to proceed and that investment is lost (as it is argued would inevitably be the case).

8. The Tied Agency Agreements are detailed documents which, it appears, are in a standard form adopted by the EBS from time to time. For the purposes of this Judgment, only certain of the Agreements' provisions require to be noticed, as follows:

- Clause 3 appoints the Agent, on a non-exclusive basis, to carry on the Agency Business (as defined)

- Clause 4.1 provides for the commencement of the Agreement and for its continuation "*for the duration of the Term*." Clause 4.2 provides that the Agreement "*may be terminated at any time in accordance with the provisions of Clause 15*." The effect of these provisions, along with the terms in which *Term* is defined, is that the Agreement effectively operates as a contract of indefinite duration, but subject to termination in accordance with Clause 15.

- There are a number of clauses that impose particular obligations, both positive and negative, on the Agent. Clause 6.1 provides that the Agent is to act as such "*subject to and in accordance with the provisions of this Agreement and the Procedures*." Procedures is defined as the procedure notices issued by EBS from time to time. No such notices were before us but it seems reasonable to infer from the reference to Procedures in clause 6.49 (see below) that these procedures cover (*inter alia*) appropriate selling of financial products. Clause 6.13 requires the Agent to submit a Compliance Statement annually, in the form set out in Schedule which provides for the Agent's confirmation that it has "*complied with all applicable laws and regulations" save to the extent disclosed on the form*. Clause 6.49 (which is in a section of the Agreement head "*Regulatory Compliance*") requires the Agent to comply "*with Procedures regarding the sale of investment, saving and insurance related products to ensure such products are not mis-sold*." Clause 6.55 requires the Agent to notify the EBS of anything which has resulted or which may result in a material breach of any Laws (a term defined expansively to include codes of conduct, guidelines etc whether or not having the force of law) and which may result in proceedings against the EBS or investigations involving it. Finally, Clause 13.1 requires the Agent to comply with all Laws relating to the operation of the Agency and clause 13.2 - then identifies a number of legal instruments which the Agent "*shall, in particular, comply with..*", including the Investment Intermediaries Act 1995 (as amended), the Consumer Protection Code and other Laws intended to protect users of financial services. At the hearing of this appeal, there appeared to be no dispute that the effect of these provisions was that the Agent was contractually obliged not to engage in any mis-selling of financial products and, in the event that it did so, it would be under an obligation to report that to the EBS.

- Termination of the Agreement is addressed in Clause 15. Clause 15.1 and in particular Clause 15.1(b) is central to the EBS's defence to the injunction application and so I shall set it out in full:

  "Without prejudice to any other rights which the parties may have to terminate this Agreement, this Agreement shall terminate, whereupon its Term shall expire:

  (a) three months from the date on which the Tied Branch Agent gives notice to the Society of its intention to terminate this Agreement;

  (b) twelve months from the date on which the Society gives notice to the Tied Branch Agent of its intention to terminate this Agreement;

  (c) on the first Business Day after the Society gives notice to the Tied Branch Agent pursuant to Clause 15.3."

  Clause 15.3 provides that the Society may give notice of immediate termination in any of the "*events*" listed in that sub-clause. The long list of events includes breach of the Agreement by the Agent ((a) & (b)); breach of any law considered to be detrimental to the Agency Business (i), insolvency ((d) & (e)) and many others.

Clause 17 is also relevant in the context of termination. In essence, it gives the EBS the option of terminating the Tied Agency Agreement without cause, but with immediate effect, on the basis of paying a termination payment calculated in the manner provided for in clause 17.2 i.e. a payment in lieu of notice.

- There are a number of other provisions on which the EBS relies. One is Clause 18.1 which provides that nothing in the Agreement shall create or be deemed to create a partnership between the parties. This, EBS says, means that the Agreement cannot be considered to be a "relational contract" such as might give rise to mutual obligations of good faith. I return to this point below. The EBS also places significant reliance on Clause 24, an entire agreement clause in the following terms:

  "24.1 This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior agreements and understandings oral or written relating to the subject matter of this Agreement.

  24.2 The Tied Branch Agent acknowledges that it has not relied upon any oral or written representations made to it by the Society or its employees or agents and has made its own independent investigations into all matters relevant to the Agency Business."

The effect of this clause (according to the EBS) is to preclude the Agent from advancing an argument to the effect that the operation of Clause 15.1 of the Agreement is affected by the terms of a collateral contract alleged to have been entered into at or around the time that the Tied Agency Agreements were entered into in April 2011.

- Finally, Clause 28 should be noticed as it is an important element of the Agent's argument that notice of termination was ineffective. It provides:

  "28.1 All notices and other communications required to be given or made under this Agreement will be in writing and will be sent to the respective addresses specified at the head of this Agreement or to such other addresses of which notice in writing has been given by the Society or the Tied Branch Agent to the other.

  28.2 Any such notice or other communication shall be deemed to have been duly given or made as follows:

  (a) if sent by prepaid first class post, two Business Days after the date of posting; and
  (b) if sent by fax, when dispatched.

  [proviso omitted]"

To anticipate the argument discussed in more detail below, the Agent makes two points about the form of the notice of termination. Firstly, it is said that the notice is invalid because it proceeds on the basis that there was one umbrella Tied Agency Agreement, covering all three agencies operated by the Agent, when in fact each agency is the subject of a separate Agency Agreement. Secondly, although the notice is addressed to the Agent at the address specified in each of the Tied Agency Agreements (the branch premises in Athlone), it was not in fact posted to that address but was rather handed to the Agent at the Lucan premises.

THE DISPUTE BETWEEN THE PARTIES: THE EVIDENCE

9. I will summarise the issues in dispute between the parties, and the evidence that is before the Court directed to those issues, as succinctly as possible. This is an application for an interlocutory injunction, heard on affidavit, and the Court cannot determine any factual disputes at this stage or seek to make any prediction how those disputes may be resolved at trial.

10. Mr Martin has sworn a number of affidavits on behalf of the Agent. In addition, the Court has the pleadings, including the Agent's Statement of Claim and Amended Statement of Claim, Replies to Particulars and Reply which set out the case being made by the Agent.

11. Mr Martin says that, from 2010 onwards, he began to have issues with an ESB Regional Manager, Mr Tim Gleeson. Mr Gleeson initially had managerial responsibility for the Lucan branch but as a result of restructuring within the EBS ultimately was responsible for (*inter alia*) all three branches operated by the Agent. According to Mr Martin, the underlying reason for these issues was the fact that Mr Gleeson sought to pressure the Agent to sell unsuitable investment products to its customers, specifically to sell higher-risk investment products to customers whose assessments indicated that they ought to be sold low-risk products, such as deposits. The appropriate assessment of a potential investor's capacity/appetite for risk is, of course, a central element of financial services regulation in the State and elsewhere and in this context the Court's attention was brought to Chapter 5 of the Consumer Protection Code which sets out in detail the steps to be taken by regulated entities in terms of knowing the consumer and assessing the suitability of financial products prior to offering, recommending, arranging or providing them.

12. I should record immediately that Mr Gleeson has sworn an affidavit in this application in which he categorically denies these allegations. The allegations are also denied on the EBS's behalf by Mr Des Fitzgerald, its Managing Director, in affidavits sworn by him.

13. Mr Martin says that he resisted Mr Gleeson's efforts and refused to sell high risk investment products to unsuitable customers. He says that things came to a head in 2017. He was (he says) concerned that if continued to resist Mr Gleeson's pressure, he would lose the EBS business. Having discussed the issue with his sister, he decided to surreptitiously record a meeting with Mr Gleeson on 18 January 2017. A purported "*transcript*" of that meeting was put before the High Court. The EBS makes the point that this document has not been prepared by a professional stenographer but by a relative of Mr Martin and also observes that it has never been provided with a copy of the audio

recording so as to verify the document. In his affidavit, Mr Gleeson complains that the document contains select excerpts taken out of context and that it does not convey the "*mutual understanding of the position*." He also takes issue with the covert nature of the recording.

14. In any event, by letter of 18 May 2017, signed by Mr Gleeson, the EBS gave 12 months' notice of termination of the three Tied Agency Agreements pursuant to Clause 15.1(b). It may be noted that this notice refers in clear terms to the three Agreements. In other words, the notice did not suffer from the alleged frailty said to vitiate the notice served in February 2018. The letter did not give any indication of the EBS's reason(s) for terminating the Agreements. The letter concluded by thanking the Agent "*for [its] contribution to EBS over the years*."

15. In response, Mr Martin arranged a meeting with Mr Des Fitzgerald, the EBS' Managing Director, which took place on 29 May 2017. According to Mr Martin, at "t*hat meeting, I disclosed the mis-selling and misconduct of Mr Gleeson, Mr Fitzgerald confirmed that he was withdrawing the Notice and that there would be an investigation into the matters raised.*" (Affidavit of 18 December 2018; para 28). Mr Fitzgerald says that the notice was suspended rather than withdrawn but it does not appear necessary or useful to consider that distinction further: the fact is that a further notice of termination issued in February 2019 and the EBS subsequently confirmed that it was not relying on the earlier notice.

16. It is also a fact that there was an investigation, undertaken by personnel from AIB Group Internal Audit (AIB having taken over EBS in 2011). Mr Fitzgerald explains that he considered it appropriate to suspend the termination decision pending that investigation even though he was "*satisfied the reason for the decision [to terminate] was in no way linked to any alleged failure on the part of the Plaintiff to engage in the mis-selling of products."* (Affidavit of 4 January 2019 at para. 20). Mr Fitzgerald and EBS are silent on what was the reason for the decision to terminate the Agreements in May 2017.

17. As part of that investigation, Mr Martin was interviewed by the investigators and a transcript of that interview was put before the High Court. Following that interview, the investigators followed up with a request for various information/material touched on in the course of the interview, including all recordings held by Mr Martin (it having been suggested in a draft affidavit of Mr Martin which had been provided to the investigators that he had recordings of more than one conversation with Mr Gleeson). It appears, however, that Mr Martin did not provide any of this material to the investigators, for reasons which are unexplained. That is the subject of criticism by Mr Fitzgerald.

18. In December 2017 AIB Group Internal Audit issued its Investigation Report. However, only a short Executive Summary was provided to Mr Martin and it was this document only that was before the High Court and this Court[1]. As Mr McGrath observed in his submissions to this Court, there is a caveat at the start of the Executive Summary to the effect that the section is just a summary which did not incorporate the full details of the

[1] Exhibit "DM 6"

investigation and was intended only to provide an overview. It went on: "*Decisions relating to this case should be based on the summary.*" In any event, the document identified the two main headings of complaint as being pressure to mis-sell and pressure to cold-call customers (such cold-calling is not permitted by the Regulator). The findings of the Group Internal Audit, as summarised in the document, warrant notice. As regards the issue of cold-calling, the document noted that it was not possible to determine whether there had been cold-calling and that the investigation had instead sought to determine whether Mr Gleeson had given any "*explicit instruction*" to the Agent, or to any other agents in his region, to cold-call customers. There was no evidence of any such explicit instruction, though it seems from the document that the investigation considered that certain training material prepared by Mr Gleeson might be capable of being understood as advocating cold-calling though it noted (without comment) Mr Gleeson's explanation that that was not what he intended to convey.

19. As regards mis-selling, the investigation noted that, because customer financial reviews were not recorded, it was impossible to say whether customer's responses were being influenced. As regards the suggestion that low-risk customers were being sold investment products when they should not be, the document noted what it referred to as a "*disparity between EBS's and Irish Life's views on how conversations with customers emerging from the financial review questions with a risk score of 1 or 2 should be progressed. The default option for such customers is deposits. Mr Gleeson is clear that it is appropriate for the Financial Advisor to ask a customer with this risk score if they wished to be informed about investment options. Mr Gleeson encourages his Agents to have this conversation with customers and provides coaching to the Agents on how to conduct such conversations. Irish Life contends that a conversation about investment options must only be progressed by the Advisor, if the customer themselves initiates that discussion.*" The appropriateness or otherwise of an Agent initiating such a conversation with a customer with a risk profile of 1 or 2 was "*a question for EBS Management/Compliance to resolve and not a matter for the investigation to conclude*."

20. I should explain that, at the relevant time, EBS did not have investment products of its own and instead sold Irish Life products to its customers through its branches, as agents for Irish Life. The "*disparity*" identified by AIB Group Internal Audit therefore involved what, on its face, appears to have been a material difference of view on the part of EBS (who were selling the products) and Irish Life (whose products were being sold) as to the appropriateness of the approach being advocated by EBS/Mr Gleeson. It is therefore somewhat surprising that this identified "*disparity*", and the compliance issues potentially arising from it, are not addressed by Mr Fitzgerald in his affidavits. The Court is therefore unaware how EBS Management/Compliance may have resolved the issue identified by the investigation.

21. I should also explain that the AIB Group Internal Audit document refers to, and relies to a significant extent on, a separate report published by Irish Life in August 2017 which, it appears, had concluded that there was no evidence to support the allegations made against Mr Gleeson regarding the sale of Irish Life products. That report was never

furnished to the Agent and was not put before the High Court or before this Court on appeal. Mr Martin complains about the non-production of this report and also makes the point that Irish Life did not seek to speak to him in the course of preparing that report.

22. In his judgment, the High Court Judge observed that the AIB Internal Audit Report was relied on heavily by EBS and questioned how it could be afforded the status the EBS wished to give it when all that had been produced was an Executive Summary (Judgment, at para 5a.). He also questioned why the "*disparity*" identified in the Executive Summary was dispatched in such a "*cavalier fashion*" in the summary when the issue lay at the core of Mr Martin's assertions (5c.) and how it could be stated that Irish Life had concluded that there was no evidence to support the mis-selling allegations given the disparity of views referred to in the summary (5d.)

23. These are, it appears to me, fair questions, albeit it might be said that any criticism of any failure to address the "*disparity*" ought more properly to be directed to the EBS than to AIB Group Internal Audit. In fact, both Mr Fitzgerald and Mr Gleeson assert that the AIB and Irish Life investigations exonerated the EBS/Mr Gleeson. Thus, at para. 26 of his affidavit of 4 January 2019, Mr Fitzgerald says that the AIB investigation "*found that there was no substance to the complaints made by the Plaintiff*" and Mr Gleeson in his affidavit (para 11) states that he had been "*exonerated by both investigations undertaken by Allied Irish Banks plc and by Irish Life*." Absent sight of the full AIB Report and the Irish Life Report, these averments are difficult to assess but what can be said is that the Executive Summary leaves a number of unanswered questions that the EBS's evidence does not really engage with.

24. In any event, the AIB executive summary appears to have been furnished on 15 February 2018, followed very shortly afterwards by the second letter of termination of 19 February 2018. In common with the earlier notice of termination, it did not identify any reason for termination and no reason has been identified by the EBS in its affidavits or submissions. This second notice also concluded with an expression of EBS's gratitude for the Agent's contribution "*over the years*."

25. Mr Martin makes other allegations of inappropriate conduct by the EBS/Mr Gleeson in the affidavits sworn by him and in particular his affidavit of 11 January 2019. These allegations are, it should be noted, disputed by Mr Fitzgerald and by Mr Gleeson. In addition to Mr Martin's affidavits, the Agent has put before the Court a number of affidavits from former tied agents of the EBS which canvass complaints about the manner they were treated by the EBS and suggest – in varying terms and tone – that they had felt pressured to achieve sales even at the cost of breaching applicable regulations/guidelines.

26. A further issue canvassed in the affidavits concerns the representations alleged to have been made to the Agent at or around the time it entered into the Tied Agency Agreements in 2011 which are relied on as giving rise to a collateral contract. I will track what has been said by the Agent in the affidavits and in its pleadings.

- At para 14 of his affidavit of 18 December 2018, Mr Martin avers that "*at the time that BMFS entered into the Tied Agency Agreements, I was expressly assured by Mr Gerry Middleton that EBS would never terminate it save for exceptional reasons being misconduct or gross misconduct."*

- Mr Middleton had died in 2013 so obviously there was no direct response to this assertion though Mr Fitzgerald made observations to the effect that it was plausible in his first affidavit.

- Para 7 of the Agent's Statement of Claim – delivered on 11 January 2019 – contains a plea in the same terms as in Mr Martin's affidavit, with the additional plea that the parties thereby entered into a collateral contract.

- In Mr Martin's second affidavit – also dated 11 January 2019 - he gives what appears to be a quite different account, stating that "*firstly such assurances were given to my mother, Betty Martin, who raised this point specifically with Mr Gerry Middleton and Mr Tony Moroney when the plaintiff entered into the agreements*" before going on to say that such assurances were repeated to him by Mr Middleton at a meeting on 28 January 2013 and a follow up call the following day.

- On 4 March 2019 an Amended Statement of Claim was delivered which included an amendment to para 7 by which it was pleaded that the EBS has represented to/assured the Agent that the Agreements would not be terminated "*save for good cause such as insolvency or gross misconduct*"

- In Replies to Particulars dated 18 April 2019, further particulars of the alleged representations/assurances were given, in substantially the same terms as Mr Martin's second affidavit i.e. to the effect that representations were made to Mrs Martin prior to the Agent entering into the Tied Agency Agreements (in April 2011) and repeated to Mr Martin in January 2013.

27. The final factual matter that it is necessary to note relates to events occurring since the service of notice of termination in February 2018. Curiously, the Agent appears to have taken no step to question or challenge the termination until 7 December 2018 when these proceedings were commenced by the issue of a summons (which was not served immediately). On 11 December 2018, a letter was sent by its solicitors which referred to the firm's instructions "*that the purported terminations are proceeding and that staff have [been] informed of same*" and sought the withdrawal of the "*purported terminations*" or, in the alternative, an undertaking not to take any steps on foot of them, failing which proceedings would issue and injunctive relief would be sought. No grounds for impugning the validity and/or lawfulness of the terminations (and the letter consistently refers to terminations in the plural) were identified in that letter. This letter received a quick response confirming that EBS would not be withdrawing the notice of termination or giving the undertaking sought. The proceedings were then served and this application followed.

28. Mr Martin seeks to explain the Agent's failure to take steps to challenge the termination in the period between February and December 2018 by saying that he understood from speaking to persons in the business (by which, presumably, he means EBS) that "*matters would calm down*", "*the personal animosity would dissipate*" and "*common sense would prevail*" (affidavit of 1 January 2019, paras 34 and 35). In all the circumstances, this is difficult to understand, unless of course there was engagement between the parties that has not been disclosed in the evidence.

29. However, there are curious features to the position of EBS also. While Mr Fitzgerald refers to the "*extensive preparation for the termination (which has been in train since February 2018)*", the available evidence suggests that no concrete step was taken by EBS until November 2018, when (according to Mr Fitzgerald) notification of the termination was given to the Central Bank. Customers were not notified of the change in agent until 18 December 2018, i.e. after the letter before action of 11 December 2018 and while the notices to customers identified the new agent as Woods Financial Services Limited, the agreements between that entity and EBS were only entered into on 7 January 2019, [2]after the commencement of these proceedings and the bringing of this injunction application. Whatever about the date of execution of the formal agreements, it is not at all clear from the evidence, such as it is, that, as of February 2018 (when the notice of termination was served), Woods Financial Services Limited had been chosen to replace the Agent or had agreed to act as such, even in principle. Mr Woods, the principal of the company, has sworn an affidavit but that simply says that had discussions with the EBS about taking over the agencies going back to 2017, that these discussions "*revived in 2018*" and culminated in the agreements of January 2019. I think it is a reasonable inference from this evidence that, as of February 2018, no definite arrangements were in place in respect of the succession which, it seems to me, throws into sharp relief the issue of why the Agency was being terminated.

30. There is also some evidence – in the form of a further "*transcript*" of another conversation surreptitiously recorded by Mr Martin, this one with Mr Woods [3]– that, if accepted at trial, might be thought to cast doubt on the reality of the arrangements between EBS and Woods Financial Services Limited. That is, however, a matter for trial.

DISCUSSION

31. The power to grant an interlocutory injunction in an appropriate case is, of course, a critical part of the effective administration of justice. The absence of such a power would significantly impair the capacity of the Courts to vindicate rights and prevent injustice. However, the grant of an interlocutory injunction also has the capacity to give rise to injustice in that it may restrain a party from taking action which, it transpires, they were fully entitled to take or (in the case of mandatory injunctions) require them to undertake some course of action they do not wish to undertake and which, it transpires, they were under no obligation to undertake.

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[2] Exhibit "BW1"
[3] Exhibit "4DM1"

32. As the Supreme Court (per Clarke J, as he then was) observed in *Okunade v Minister for Justice v Minister for Finance* [2012] IESC 49; [2012] 3 IR 152, the problem that a court faces in determining an application for an interlocutory injunction "*stems from the fact that the court is being asked, on the basis of limited information and limited argument, to put a place a temporary regime pending trial in the full knowledge that the court does not know what the result of the trial will be*" (at [67]). In these circumstances, Clarke J went on, the "*underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice*". As the Supreme Court (again per Clarke J) observed in *Dowling v Minister for Finance* [2013] IESC 37; [2013] 4 IR 576, that problem presents itself to any court deciding, in advance of a final determination on the merits, whether to make any form of interim intervention. Thus, albeit not identical to the criteria applicable in this jurisdiction for the granting of interlocutory measures (which in turn closely reflect the position in England and Wales), the criteria applied by the Courts of the European Union for deciding whether to grant interim measures are functionally similar, as indeed is evident from the detailed discussion in *Dowling*. As Clarke J points out (at [92] it is hardly surprising that there is such a similarity: the problem is the same in all cases.

33. The recent decision of the Supreme Court in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited* [2019] IESC 65, where the sole judgment was given by O' Donnell J (Clarke CJ and McKechnie, Dunne and O' Malley JJ agreeing with that judgment) is also relevant.[4] It will be necessary to refer in more detail below to O' Donnell J's discussion of the interaction of the adequacy of damages (for applicant and respondent) and the balance of convenience. That discussion takes place in a context where O' Donnell J. emphasises the "*essential flexibility*" of the injunction remedy (para 27) and cautions against a tick-the-box approach to the grant or refusal of an interlocutory injunction (para 47). Elsewhere in his judgment, O' Donnell J reminds us that the decision of the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396 – the *fons et origo* of the modern law of injunctions both in England and Wales and, given its adoption by the Supreme Court in *Campus Oil v Minister for Industry (No 2)* [1983] IR 88, in this jurisdiction also - should not be seen be approached "*as though it were the laying down of strict mechanical rules for the control of future cases*" (at para 33) or "*as akin to statutory rules*" (at para 34).

34. Allowing that establishing a serious issue to be tried is a necessary (but not sufficient) condition to the grant of an injunction (at least where that issue, if established at trial, would provide a basis for a permanent injunction), the decision to grant or refuse thereafter becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment. That is not to imply that the outcome is or ought to be a matter of impression or intuition. As the decision in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited* concretely illustrates, a decision to grant or

[4] The Court brought *Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited* to the attention of the parties at the hearing of the appeal and also gave them an opportunity to provide supplementary submissions addressing the decision. Both parties did so and their submissions were helpful and to the point.

refuse an interlocutory injunction is a judicial decision, deriving from a structured and careful assessment of the relevant considerations that is (or at least ought to be) reasoned and capable of review. However, there are likely to be multiple considerations to be weighed in the balance, pointing in different directions, none of which are likely to be decisive in itself.

The Proper Approach of this Court on Appeal

35. What is before this Court is, of course, an appeal from the decision of the High Court and, citing *Lawless v Aer Lingus* [2016] IECA 235 and *Ganley v RTE* [2019] IECA 18, the Agent contends that that decision was made in the exercise of the Judge's discretion, based on a correct application of the applicable principles and that the decision was one that was clearly open to him on the evidence and, accordingly, a significant margin of appreciation should be afforded to that decision (para 11 of the Agent's written submissions to this Court). In his oral submissions, Mr McGrath SC refined that position somewhat, accepting (correctly, in my view) that a distinction is to be drawn in this context between the analysis of whether a fair question/serious issue had been established on the one hand and, on the other, the Judge's consideration of adequacy of damages, balance of convenience and delay. In respect of the former, Mr McGrath accepted that if this Court identified an error of principle in the analysis of the Judge, it could properly intervene but as regards the latter, intervention was appropriate only if this Court was satisfied that there is an injustice.

36. Mr Gardiner SC did not seriously dispute the proposition that the hearing of an appeal from an interlocutory injunction application did not involve a re-hearing. His primary submission in this context was that the High Court Judge had failed to deal with the issues and arguments and had provided no reasons for his determinations in respect of the crucial questions presented for decision. In these circumstances, Mr Gardiner submitted, this Court had to conduct a rehearing of the application and, given that it had the same material before it as the High Court had, it was entitled to determine the application effectively *de novo*.

37. In *Lawless v Aer Lingus* (a discovery appeal), Irvine J (with whose judgment Hogan and Keane JJ agreed), referred to her judgment (for the Court) in *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 (an appeal to this Court against the High Court's refusal to dismiss the proceedings on grounds of delay) which comprehensively analysed the authorities before expressing its conclusion in the following terms:

> *"79. For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in Lismore Homes, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed."*

38. In Lawless, Irvine J added the following qualification to that statement:

> *"23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application de novo in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion."*

39. Accordingly, while as a matter of principle, "*great weight*" is to be given to the views of the High Court Judge, the ultimate decision on this appeal is for this Court. It is also clear that the EBS is not required to establish any error of principle as a pre-requisite to this Court coming to a different conclusion to the Judge.

40. The particular point made by Mr Gardiner remains to be considered. As a matter of principle, it appears to me that Mr Gardiner is correct. Where the High Court does not explain its basis for taking a particular view on a contested issue and/or fails to engage appropriately with the arguments made to the Court by one or other party on that issue, that will necessarily affect the weight to be attached to the Court's view on appeal. An obvious parallel is provided by the appropriate approach to findings of fact made by the High Court. In general, such findings will bind an appeal court: *Hay v O' Grady* [1992] 1 IR 210. That will not be the case, however, where the Judge fails to engage with the evidence of both sides and explain why one side or the other has been preferred: *Doyle v Banville* [2012] IESC 25; [2018] 1 IR 505.

41. Separately, it is clear that a judge must give sufficient reasons for his or her decision such that the parties can understand the basis for that decision: see, for example, the decision of this Court in *Law Society v Callanan* [2017] IECA 217; [2018] 2 IR 195, at paras 80-8- (per Hogan J).

Fair Question / Serious Issue

42. Neither party takes issue with the Judge's view that the requirement to show a fair question/serious issue does not mean that the Agent must establish a very strong case and that the threshold to be surmounted is generally recognised as low (para 11 of the Judgment under appeal). It may be useful to regard this threshold as akin to the threshold that applies where a party seeks to dismiss a claim against it pursuant to the inherent jurisdiction and that was the approach taken by the High Court in a number of decisions cited to us including *Wingview Limited v Ennis Property Finance DAC* [2017] IEHC 674 (per Haughton J, at para 14) and *O' Gara v Ulster Bank DAC* [2019] IEHC 213 (per Barniville J at para 42).

43. In the jurisprudence "*fair question*", "*bona fide issue*" and "*serious issue*" (and other variants of these phrases) have been used interchangeably. As a matter of language, I

prefer the expression "*serious issue*" (in the sense of serious issue to be tried) but in using it I do not mean to suggest that the threshold is higher than it is.

44. Notwithstanding its acceptance that the threshold is a low one, the EBS contends that no serious issue has been established by the Agent. That is not a merely formal position: it was in fact the primary focus of the EBS's appeal before this Court.

45. In deference to the forceful submissions that have been made by Mr Gardiner, and having regard also to the EBS's complaints regarding the adequacy of the Judge's analysis, I consider it appropriate to analyse and discuss the question whether the Agent has established a serious issue to be tried in more detail than might normally be warranted.

(i) The Form of the Notice of Termination and its Service

46. The Judge concluded that there was a serious issue to be tried that the notice was defective because it did not refer specifically to the three Tied Agency Agreements, that it referred in fact to an agreement which did not exist and was not in any event served as required by the Agreements: para 13. He went to indicate that he would have expected "*three tailor made Notices to be served*" in circumstances where the EBS sought to avail of a condition which it asserted was a "*strict condition*" allowing the termination of a long-standing business relationship without having to give a reason (or have) a reason and even if the reason is capricious. (ibid).

47. It may be noted, firstly, that the Agent does not in fact contend that three separate notices of termination were required, as Mr McGrath made clear in the course of his submissions to this Court. Its complaint is, rather, that the notice as served in February 2018 (in contrast to the earlier notice given in 2017) refers to a Tied Agency Agreement (rather than Agreements in the plural, though in fact there are a number of references in the notice to "*Agreements*"). It is not suggested that the form of the notice gave rise to any lack of clarity, confusion or prejudice; the Agent's argument is a net legal one, namely that, in order for there to be a valid termination, there has to be precise observance of all applicable contractual conditions. Given the argument being made by the Agent, it appears to me that the decision in A*llam & Co Ltd v Europa Poster Services Ltd* [1968] 1 WLR 638, on which Mr Gardiner relied significantly, is of limited assistance.

48. In support of its position, the Agent relies on a passage from *Chitty on Contracts* (32nd ed) in which following a discussion about requirements as to notice the editors state that "*prima facie the validity of the notice depends on the precise observation of the specified conditions*". (para 22-05`). However, the text goes on to note that a consideration of the relationship of the notice requirements to the contract as a whole and regard to general considerations of law may show that a contractual stipulation was intended to be an intermediate term, breach of which was intended to give rise to a claim in damages only and not invalidating the notice. More pertinently, perhaps, the very statement relied on to support the Agent's argument is further qualified by a footnote to it, which suggests that "*the prima facie rule may have to give way on the facts of the case when regard is had to*

the underlying commercial purpose of the termination clause and the modern approach would appear to place less emphasis on the need for precise compliance."

49. The underlying "*commercial purpose*" of Clause 15.1(b) was to enable the EBS to terminate the Tied Agency Agreements by giving twelve months' notice of its intention to terminate. As Mr Gardiner emphasised, it is not a unilateral power: the Agent is also entitled to terminate the Agreement on giving notice, though in that situation only three months' notice is required: clause 15.1(a). Notably, Clause 15.1(b) does not stipulate any particular form of notice. In fact, it does not in terms even require such notice to be in writing. While the effect of clause 28.1 is to require written notice, it is perhaps significant that the requirements of clause 28.1 apply generally to all "*notices and other communications*" under the Agreement and its requirements are not specific to clause 15.1(b) termination notices.

50. It seems to me, therefore, that the position here is remote from the oft-cited example given by Lord Hoffman in *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 where the use of pink paper for a notice exercising an option would (according to Lord Hoffman) render the notice invalid if the relevant contractual clause had stipulated the use of blue paper. That fact is implicitly acknowledged by the fact that Mannai was not cited or relied on before this Court.

51. In the absence of any stipulated form of notice, and absent any suggestion that the notice here was ambiguous or confusing or that it otherwise caused any prejudice to the Agent, I am not persuaded that a serious issue has been shown that the form of the notice, and in particular its reference to Tied Agency Agreement rather than Agreements, renders it ineffective or invalid.

52. I have come to same view on the service point. Again, there is no suggestion that the notice was not duly received by the Agent. In fact, the mode of delivery used ensured that it came to the attention of the Agent immediately, rather than a day or two later as would have been the case if the notice had been posted. The commercial purpose of clause 28, insofar as it relates to the giving of notice, is clearly to ensure that notices etc can be effectively delivered and that, where delivery is effected in accordance with its terms, notices etc will be deemed to have been given at a particular time. There is nothing in clause 28 which suggests that it was intended to exclude other means of delivery or that a notice served otherwise than in accordance with clause 28.1 should be regarded as ineffective where, as a matter of fact, that notice has been delivered and received.

53. It follows that I respectfully differ from the conclusion of the Judge on this issue. For completeness, I would add that, even if I had been persuaded that a fair issue had been established under this heading, I would nevertheless have been of the view that such a finding could not sustain the injunctions granted by the High Court in any event. At the conclusion of his judgment in *Merck Sharp and Dohme v Clonmel Healthcare Limited*, O' Donnell J sets out a useful series of steps which might be followed in injunction applications such as this (at para 64). The first is these is that the court should consider

whether, if the plaintiff succeeded at the trial, a permanent injunction would be granted. If not (he continues) then it is "*extremely unlikely*" that an interlocutory injunction could be granted. In my opinion, even if at trial the Agent were to succeed in establishing any deficiency in the form of the termination notice and/or in its service, that would not be such as to lead to the conclusion that the termination should be permanently enjoined. Rather, any such deficiency would, in my view, be addressed by way of damages (though indeed it is difficult at this point in time to see how anything other than nominal damages could arise).

(ii) The Alleged Collateral Agreement

54. The High Court Judge considered the collateral agreement argument along with the Agent's implied terms arguments. He noted that authorities had been opened by both parties. Having noted that there was no authority on all fours with the case before him, he stated that it "*would be easy to dismiss the arguments by reference to Clause 15 and the express wording of the commercial contracts entered into*" but to do so would be find that there was no fair or serious issue to be tried, which was not his view having considered the evidence and authorities. He concluded by stating that, in light of the submissions made and having regard to the authorities, there was a fair and serious issue to be tried on each of the grounds.

55. Mr Gardiner criticises the Judgment for not giving any explanation for this conclusion and for failing to engage with the arguments that had been made on the EBS's behalf about the meaning and effect of the Tied Agency Agreements, and in particular clause 15.1(b). In my opinion, these criticisms have considerable force. It appears from the Judgment that the Judge may have been of the view that, having formed the view that a serious issue (or series of such issues) had been established, it was not appropriate to say anything further and, as Mr McGrath observed in his submissions, it may be that the Judge had in mind the approach taken in summary judgment applications where, if an arguable defence is found to be established, courts conventionally refrain from further comment because the merits or otherwise of any such defence will then a matter for final adjudication at trial.

56. This is not an application for summary judgment and an order such as that made by the High Court cannot be equated with an order adjourning such an application for plenary hearing. The order made by the High Court had immediate and significant effects for the EBS in that it suspended the termination of the Tied Agency Agreements in circumstances where the EBS argued that the terms of those Agreements gave them an unambiguous and unqualified entitlement to terminate, excluded any reliance on any collateral contract and precluded the implication of any terms of the kind argued for by the Agent. Those arguments were not of course necessarily determinative of the application before the High Court but the EBS was entitled to some explanation as to the basis on which the Court had concluded that a serious issue had nonetheless been established. I do not mean to suggest that any form of elaborate analysis is necessary. In many injunction applications there will be little or no dispute that a serious issue has been raised and, even where

there is a dispute, the position may be relatively straightforward. Here, however, the question was vigorously disputed in the High Court (as it was in this Court) and in those circumstances, something more than a conclusionary statement was required.

57. It follows that, even if as a matter of principle any degree of deference ought to be given by this Court to the High Court's views on the serious issue question – and as already noted Mr McGrath appeared to accept that that was not the case - no question of any deference arises in the circumstances here.

58. For my part, I am not persuaded that the Agent has established a serious issue to be tried to the effect that there is a collateral contract in existence which modifies (and on the Agent's argument, radically alters) the EBS's contractual entitlements under clause 15.1(b). Quite apart from the evident (and significant) inconsistencies in the Agent's evidence as to what is alleged to have been said, to whom and when (see para 26 above), I agree with Mr Gardiner that this argument fails in the face of clause 24 of the Agreements.

59. Mr McGrath places significant reliance on the decision of the Queen Bench Division (Gray J) in *Ryanair Limited v SR Technics Ireland* [2007] EWHC 3089 (QB). It appears to me that that decision (which is not, of course binding on this Court in any event) is clearly distinguishable, legally and factually. The entire agreement clause was in different terms, with no provision equivalent to clause 24.2 of the Tied Agency Agreements. Factually, the collateral contract relied on by Ryanair (which was recorded in a formal and detailed side letters executed by the parties and other written communications) addressed an issue – the need for DAA consent to any lease or licence which SRT might grant to Ryanair – which was not addressed in the main contract.

60. Here the collateral contract argument relies on representations/assurances purportedly made before the execution of the Agency Agreements. However, the whole purpose of clause 24.2 (which, again, had no equivalent in the Ryanair/SRT contract) is to preclude any such reliance. Furthermore, unlike the position in Ryanair, the collateral contract relied on by the Agent cannot properly be characterised as supplemental to the Tied Agency Agreements; rather it would radically alter Clause 15 (not just clause 15.1 but clause 15.3 also). Clause 24 excludes that argument in my view.

(iii) The Alleged Implied Terms

61. The Agent next relies on certain contractual terms which, it argues, ought to be implied into the Tied Agency Agreements. The first such implied term is that the EBS would not terminate the agreement capriciously or for an improper motive. The second – and narrower – implied term is to the effect that the EBS would not terminate the Tied Agency Agreements on the ground that the Agent refused to mis-sell financial products or, as it was also put, on the basis that the Agent complied with its contractual obligations not to mis-sell financial products.

62. Before addressing the arguments of the EBS as to why no such terms can or should be implied, I should note that the EBS accepts that the implied term issue is not affected by

clause 28 of the Tied Agency Agreements. In other words, the EBS does not contend that the entire agreement clause precludes the implication of terms such as those contended for by the Agent here.

63. What the EBS says forcefully is that these terms do not satisfy the requirements for the implication of a term set out in the jurisprudence, with particular reference to the decision of the Supreme Court in *Sweeney v Duggan* [1997] 2 IR 531. According to the EBS, neither of these implied terms can be said to be "*not merely reasonable but necessary*" (per Murphy J in *Sweeney v Duggan* at 539). They also argue that such terms cannot be implied because they would be inconsistent with the express terms of clause 15 and that they are not capable of being formulated with reasonable precision (criteria also articulated in *Sweeney v Duggan*).

64. According to the EBS, clause 15.1(b) of the Agreements gives an unqualified power to the EBS to terminate for any or no reason and the Court has no function to inquire into the reason(s) for termination in any given case. In answer to a question that I put to him in the course of oral argument, Mr Gardiner did not shrink from the position that, even if there was irrefutable proof that the Tied Agency Agreements had indeed been terminated because the Agent refused to succumb to pressure to mis-sell investment products, it would no difference to the validity of the termination. Consistently with that position, Mr Gardiner also resisted any suggestion that evidence of discriminatory motives, such as racial or religious animus, could be relied upon to impugn a termination on notice pursuant to clause 15.1(b). The right to terminate on giving twelve months' notice was, he submitted, "*an unfettered, untrammelled absolute right*."

65. In support of this submission, Mr Gardiner brought the Court to a decision of the Privy Council, *Reda v Flag Ltd* [2002] UKPC; [2002] IRLR 747 and a recent decision of the (EW) Court of Appeal, *Ilkerler Otomotiv Sanayai v Perkins Engines Co Ltd* [2017] EWCA Civ 183; [2017] 3 WLR 144. In response, Mr McGrath relied on another decision of the (EW) Court of Appeal, *Paragon Finance plc v Nash* [2001] EWCA Civ 1466; [2002] 1 WLR 685.

66. I do not consider that it either necessary or appropriate to examine these authorities in detail. This Court is adjudicating on an interlocutory appeal, not an appeal from the final determination of these proceedings. It would not be appropriate to determine complex legal issues at this stage. I will limit myself to observing that, in my opinion, neither the Privy Council's decision in *Reda* nor that of the Court of Appeal in *Ilkerler* necessarily forecloses the arguments advanced by the Agent on the implied terms issue.

67. As a general observation, it appears to me that the question of whether or not it is appropriate to imply a term into a contract depends on an assessment of the nature of the implied term suggested, consideration of the express terms of the contract and – at least arguably – the (objective) context in which the contract was entered into and its (objective) purpose. It follows that I am not convinced that it is possible or appropriate to read across from the rejection of the implied terms contended for in *Reda* to conclude that the implied terms contended for here must necessarily be rejected also. The contract in *Reda* was a different form of contract, it appears that the termination clause was in

different terms to the termination clause here, the implied terms contended for were not the same and the overall context was, it seems to me, quite different also. The same points may be made regarding *Irkerler*. In addition, I would observe that the Court of Appeal in *Irkerler* did not appear to exclude in principle the possibility of implying a term (though it agreed with the judge below that the particular terms contended for should be given "*short shrift*") and, further, that the judge below clearly contemplated the possibility of implying a general good faith term, in reliance on the observations of *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 1321.

68. It would, in my view, be to go too far to conclude in this interlocutory appeal that termination of the Tied Agency Agreements cannot in any circumstance be impugned by reference to what is said to be an improper reason for termination or that the Court cannot in *any* circumstance seek to look behind a notice of termination given pursuant to clause 15.3(b). That may be the conclusion reached at trial but, in my opinion, it is not so clear that such a conclusion is inevitable that the Court could on this appeal properly conclude that no serious issue arises.

69. I would add that I am not at all convinced that the decision of the Court of Appeal in *Paragon Finance* has the import contended for by Mr McGrath. It related to – and subsequent case law suggests is limited to – the exercise of a unilateral contractual discretion by one contracting party (there the power vested in the mortgagee to vary the interest rate payable by the mortgagor). No authority has been opened to the Court that suggests that a term such as was implied in *Paragon Finance* can or should be implied into a contractual provision such as clause 15.1(b) of the Tied Agency Agreements.

70. Yam Seng was considered by the High Court and by this Court in *Flynn v Breccia* [2015] IEHC 547 (H Ct); [2017] IECA 74 (CoA). While reversing the High Court's judgment, this Court left open the issue of whether it should be followed here. Furthermore, while endorsing the proposition that there is no general principle of fair dealing and good faith in Irish contract law and holding that the shareholder agreement was not an agreement of a type to which any general duty of good faith applied, this Court sensibly did not seek to identify *a priori* those categories of contract to which such a duty might apply. There may be further developments in this area of the law. However, in the course of his submissions, Mr McGrath made it clear that the Agent was not contending that a duty of good faith should be implied here. The terms for which he was contending were, he emphasised narrower than a term of good faith.

71. In any event, looking at these issues through the prism of the Supreme Court's decision in *Sweeney v Duggan*, I consider that it is at least arguable that the second (and narrower) term contended for by the Agent ought to be implied into clause 15.1. of the Tied Agency Agreements. In other words, I consider that it is arguable that the clause 15.1(b) termination power cannot properly be exercised where the basis for its exercise is the performance by the Agent of its express contractual obligations under the Agreements

not to engage in mis-selling and its refusal to succumb to pressure to do so exerted on it by the EBS. That is, of course, sufficient to establish a serious issue to be tried.

72. I will briefly explain why I have come to that conclusion, emphasising the provisional and qualified nature of what follows. As for the need for such an implied term to be *necessary* (and not merely *reasonable*), it is I think important to avoid any exaggerated understanding of what this requires. Rarely can a party demonstrate that, absent a particular implied term, a contract simply cannot operate. That point is made by Lord Neuberger in his judgment in *Marks & Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72; [2016] AC 742 in which, in a passage cited by Haughton J in *Wingview*, he suggested that it may be more helpful to express that aspect of the test in terms of a term being implied only if, without that term, "*the contract would lack commercial or practical coherence*."[5]

73. Here, given the nature of the contracts at issue, including the express obligations placed on the Agent, and having regard to the the regulatory context in which they were entered into and in which they fall to be performed, (which in my opinion is a very significant consideration), it is arguable that such an implied term is necessary to give business efficacy to the Tied Agency Agreements or (in the words of Lord Neuberger) to give it a "*commercial or practical coherence*". The tests of necessity and obviousness are often used interchangeably (as indeed Murphy J in *Sweeney v Duggan* used them: see at page 540) and, applying the test of obviousness, it is in my opinion arguable that if the fabled officious bystander had asked the parties in 2011 whether the Agreements could be terminated (albeit on notice) because the Agent was *performing* its express contractual obligations (which of course reflect general obligations imposed by the general law, in the interests of consumer protection) and resisting pressure to breach those obligations by mis-selling investment products, the answer would have been a testy "*of course not*".

74. As regards the other considerations identified in *Sweeney v Duggan,* it seems to me arguable that such an implied term is not inconsistent with or contradictory of clause 15.1(b) but would rather operate as a very limited qualification to it. Lastly, I consider that it is arguable that such a term can be formulated with sufficient precision.

75. It follows that, in my opinion, the Agent has established a serious issue to be tried that, as a matter of law, the Tied Agency Agreements could not be terminated on the grounds that the Agent declined to be pressurised into mis-selling financial products to its customers.

76. Is there an arguable issue that such was the basis for the termination here? In the absence of any contrary basis having been advanced by the EBS and having regard to the evidence of Mr Martin, as well as the contents of the Executive Summary considered above and the EBS's silence on the "*disparity*" identified by AIB Group Internal Audit, I am satisfied that there is. It is only proper to emphasise that this is a low threshold and is remote from any form of finding that EBS and/or Mr Gleeson actually engaged in the

[5] At para. 25, cited at para. 25 of *Wingview*

conduct alleged by the Agent. Any findings on that issue can only be made after a full hearing.

77. As regards the wider form of implied term argued for by the Agent (namely a term to the effect that the EBS would not terminate the Tied Agency Agreements capriciously or for an improper motive) in light of the conclusion I have just reached on the narrower term, it is not strictly necessary to address this argument further. I would, however, observe that the arguments made by the EBS as to why the narrower term ought not be implied appear to apply with greater force to this wider term. This wider term would not operate as a limited qualification of clause 15.1(b) but would rather recast it significantly. Further, though Mr McGrath was careful to disavow any such argument, the implication of any such term would arguably carry with it a corollary obligation on the EBS to give reasons for termination (at least if asked) which would involve a further recasting of clause 15.1(b). Any argument that such a term was necessary would also appear to be considerably more difficult. Nevertheless, if it was necessary to reach a conclusion on this point, I would have been very reluctant to conclude that this argument did not raise a serious issue.

Adequacy of Damages and Balance of Convenience

78. The Judge considered the issue of the adequacy of damages and the balance of convenience sequentially. As to the former issue (discussed at para 15 of his Judgment) he considered that damages would not be an adequate remedy for the Agent. It had established its business over a period of 17 years and its reputation, and the reputation of its principals, would be dealt a severe blow if the Agreements were to be permitted to be terminated pending trial. Lost confidence, the Judge observed, is not easily restored. Furthermore, the business of the Agent would be "*gone*" if it was ousted. The case was not of the kind identified in *Curust Financial Services Limited v Loew-Lack-Werk* [1994] 1 IR 450 and, similarly, the Judge considered that the decision of the High Court (Laffoy J) in *Relax Food Corporation Limited v Brown Thomas* [2009] IEHC 181 was readily distinguishable.

79. As to the balance of convenience, the Judge considered that it clearly favoured granting the relief sought: paragraph 16 of his Judgment. The Agent was operating the three branches and there was no suggestion that it was not doing so as before and successfully. The Judge also noted that the notice of termination mandated the Agent to continue to operate the branches throughout the notice period (which I take to be a reference to the fact that the EBS could have, but did not, terminate the Agreements with immediate effect pursuant to clause 17). The Judge addressed the issue of loss/prejudice to the EBS under the rubric of the balance of the convenience. In his view, the potential loss averred to by the EBS was "*difficult to fathom*" and any postal costs (associated with notices required to be sent to customers) could be ascertained and compensated in damages. The Judge expressed puzzlement at the fact that the Agreements between the EBS and the new agent had been entered into after these proceedings had commenced but in any event he was of the view that the provisions of those Agreements, and in particular,

clause 16.3, would protect the EBS vis a vis the new Agent in the event that the injunctions sought were granted.

80. Before addressing the submissions of the parties on these issues (and I will address separately the arguments made by the EBS on the issue of delay), it is appropriate to refer again to the decision of the Supreme Court in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited*. The plaintiff sought an injunction restraining the sale by the defendant of a generic equivalent of an anti-cholesterol drug manufactured by the plaintiff which was protected by a Supplementary Protection Certificate (SPC). The defendant alleged that the SPC was invalid. An interim injunction was not continued by the High Court on an interlocutory basis and the Court of Appeal dismissed the plaintiff's appeal (Hogan J dissenting). The Supreme Court heard and determined a further appeal by the plaintiff despite the fact that it was likely (as in fact was the case) that the SPC would expire before the Court was in a position to give its decision. It was agreed that the Court would determine the appeal by reference to the position as at the date of the initial application for an interlocutory injunction in the High Court in April 2018, effectively *de novo*, untrammelled by any constraints that might be argued to apply when an appellate court is invited to review the decision of a trial court on an interlocutory application: para 5.

81. One of the important questions discussed in Merck Sharp & Dohme is whether the issue of the adequacy of damages is antecedent to or part of the balance of convenience. In O' Donnell J's view:

> *"the preferable approach is to consider adequacy of damages as part of the balance of convenience, or the balance of justice, as it is sometimes called. That approach tends to reinforce the essential flexibility of the remedy. It is not simply a question of asking whether damages are an adequate remedy. As observed by Lord Diplock, in other than the simplest cases, it may always be the case that there is some element of unquantifiable damage. It is not an absolute matter: it is relative. There may be cases where both parties can be said to be likely to suffer some irreparable harm, but in one case it may be much more significant than the other. On the other hand, it is conceivable that while it can be said that one party may suffer some irreparable harm if an injunction is granted or refused, as the case may be, there are nevertheless a number of other factors to apply that may tip the balance in favour of the opposing party. This, in my view, reflects the reality of the approach taken by most judges when weighing up all the factors involved." (at para 35)*

82. The reference to Lord Diplock is, of course, a reference to his speech in *American Cyanamid* and O' Donnell J went on to observe that a noteworthy feature of that speech was his acknowledgement that, save in the simplest cases, both parties will be able to show some damage that cannot be adequately compensated for in damages. Even if (O' Donnell J observed) "*a very structured and sequential approach is taken, therefore, it is important to keep in mind that, while the end point of most civil cases is the award of damages, the interests that the law exists to protect often extend beyond the purely*

financial." (para 36) This is, in my view, a critically important observation, particularly in light of the Judge's discussion of *Curust*.

83. As to *Curust*, for many years reliance had been placed on the judgment of Finlay CJ as authority for the position that damages were to be taken as an adequate remedy for an applicant for an injunction unless it was shown – as a matter of *probability*[6] – that it was strictly impossible to quantify such damages. As every practitioner will be aware, very many injunction applications have fallen at that daunting hurdle. According to O' Donnell J., however, the relevant passages from the judgment of Finlay CJ should be understood in context and should not be understood as establishing a rule of general application that if damages may be awarded, an injunction must be refused.[7] The fact that is possible to award damages does not preclude the grant of a permanent injunction – even in the context of a purely commercial transaction, a court may grant damages for a prior breach of contract and an injunction restraining future breach – and should not be understood as an absolute bar to the grant of an interlocutory order.[8] Damages "a*re not a perfect remedy, and cannot be a complete answer to an application for an injunction whether permanent or interlocutory*.[9]" The key question at interlocutory stage, according to O' Donnell J, is whether "*the remedy in damages can be said to be necessarily commensurate with any possible injury so as to preclude the possibility of the grant of an injunction*." [10] O' Donnell J went on to explain that, where the balance of convenience was finely balanced, it may be appropriate to have some limited regard to the merits.[11]

84. At the conclusion of his judgment O' Donnell J helpfully sets out "*the steps which might be followed in a case such as this*":

> *"(1) First, the court should consider whether, if the plaintiff succeeded at the trial, a permanent injunction might be granted. If not, then it is extremely unlikely that an interlocutory injunction seeking the same relief upon ending the trial could be granted;*
>
> *(2) The court should then consider if it has been established that there is a fair question to be tried, which may also involve a consideration of whether the case will probably go to trial. In many cases, the straightforward application of the American Cyanimid and Campus Oil approach will yield the correct outcome. However, the qualification of that approach should be kept in mind. Even then, if the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;*

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[6] I confess that I have always been puzzled as to how it could be said that *any* element of the test for granting an interlocutory injunction – where, of course, only affidavit evidence will be before the Court and where, accordingly, the court is not in a position to make any form of factual finding – could require to be established as a matter of *probability*.
[7] At para 40
[8] Paras 42 and 43
[9] Para 44
[10] Para 46
[11] Para 62

(3) *If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice;*

(4) *The most important element in that balance is, in most cases, the question of adequacy of damages;*

(5) *In commercial cases where breach of contract is claimed, courts should be robustly sceptical of a claim that damages are not an adequate remedy;*

(6) *Nevertheless, difficulty in assessing damages may be a factor which can be taken account of and lead to the grant of an interlocutory injunction, particularly where the difficulty in calculation and assessment makes it more likely that any damages awarded will not be a precise and perfect remedy. In such cases, it may be just and convenient to grant an interlocutory injunction, even though damages are an available remedy at trial.*

(7) *While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial;*

(8) *While a structured approach facilitates analysis and, if necessary, review, any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."*

85. In my view, *Merck Sharp & Dohme* effects a significant (and, if I may say so, welcome) restatement of the appropriate approach to applications for interlocutory injunctions, mandating a less rigid approach, both generally and with particular reference to the issue of the adequacy of damages and emphasising that the essential concern of the court is to regulate matters pending trial pragmatically and in a manner calculated to minimise injustice.

86. The Judge here applied the conventional approach of considering adequacy of damages (at least from the Agent's point of view) prior to and separate from the balance of convenience. Rightly, no criticism is made of that approach, according as it did with general understanding pre-*Merck Sharp & Dohme*. The Judge is, however, criticised by the EBS for concluding that damages would not be an adequate remedy for the Agent in the event that interlocutory injunctive relief was denied and the Agent was successful at trial. According to Mr Gardiner, damages would be easy to calculate by reference to the commission that the Agent would have earned in the period between 19 February 2019 and the ultimate High Court decision and, in the event that the Agent succeeded in its claim, it would be restored to the three agencies, restored to the premises from which

those agencies operated and its reputation (and, so far as relevant, the reputations of its principals) would *ipso facto* be restored also.

87. Countering the argument that implementation of the termination of the Tied Agency Agreements would result in the collapse of the Agent, Mr Gardiner pointed to the paucity of evidence before the Court as to the financial position of the Agents. In his submission, there is nothing to stop the Agent from setting up business as financial advisors.

88. It is correct that no financial information regarding the Agent is before the Court. The Court is therefore unaware of its profitability, financial reserves and so on (though we were told that the EBS is seeking security for costs in respect of discovery which seems to imply that it may have an adverse view of the solvency of the Agent). That is rather unsatisfactory. However, what is clear is that, in the event that the injunctions granted by the High Court are discharged, the Agent will lose its EBS tied agency business (at least *pro tem*) which, the evidence clearly establishes, is in fact its only business. As to its capacity to develop an alternative business, far from being "ideally placed" to do so (as is stated at para 54 of the EBS's submissions to this Court), the reality would appear to be that the Agent would be left trying to establish such a business without premises (the premises from which it has traded being the property of the EBS) or staff (because, the Court is told, it is anticipated that all staff will transfer to the new Agent under the Transfer of Undertakings legislation).

89. The argument that, if successful at trial, the Agent will simply be restored to the three agencies also strikes me as simplistic. In the first place – and Mr McGrath made this point in argument – it is very difficult to reconcile that argument with the contention simultaneously advanced by the EBS to the effect that relationship between the parties has broken down to such an extent that the EBS should not be compelled to deal further with the Agent, even on an interlocutory basis. Secondly, I do not consider that the Court can or should ignore the fact that, in the event that the injunctions are discharged, that will immediately lead to a significant change in the status quo. The new Agent takes over the branches. In the period between now and trial, there may be changes in the nature and/or level of business being done by those branches. Customers may move their business elsewhere. There would, in principle, be nothing to prevent the EBS from closing any of the branches and/or disposing of the premises from which they trade. Even in the absence of any such step, it will be open to the EBS to argue at trial that, even if some breach of contract is established, by reason of the circumstances existing at that stage – such as the fact that the new Agent may by then have been in place for a considerable time, the impact on staff of another TUPE transfer and so on – the Court should not grant injunctive relief, but should instead confine the Agent to a remedy in damages.

90. Even if a permanent injunction(s) were to be granted at trial, it would not necessarily follow that damages assessed on the basis suggested by the EBS (the lost commission accruing in respect of the period to trial) would adequately compensate the Agent given that the profile of the agency businesses could alter significantly, and irreversibly, in that period.

91. Therefore discharging the injunctions would, in my view, give rise to a position where the *status quo* is significantly altered and that alteration may significantly prejudice the position of the Agent in this litigation, not just in the period between now and trial but beyond.

92. In this context, it is also relevant that there is, in my opinion, *prima facie* plausible evidence before the Court that the Agent's business is, in substance, a family business in which Mr Martin and his sister have a particular emotional/familial investment given the circumstances in which the business was first developed by their mother and her apparent pioneering role as the first woman to be appointed as a branch agent by the EBS in Ireland. The position disclosed by the evidence here is, it seems to me, materially different to the position *in O' Gara v Ulster Bank Ireland DAC* where, on the evidence before him, Barniville J concluded that the assets at issue were effectively purely commercial assets without any special feature or emotional attachment for the plaintiffs. I do not think the evidence before this Court leads to that conclusion here. The Judge attached considerable weight to this factor and in my opinion he was entitled to do so.

93. In these circumstances, I am not satisfied that it can confidently be said the remedy in damages would, for the Agent, "*be necessarily commensurate with any possible injury as to preclude the possibility of the grant of an injunction.*" That is not to say that damages would not be an available remedy at trial – clearly they would – but rather that the interests that the Agent is seeking to vindicate in these proceedings extend beyond the purely financial and, in my view, there is a very real risk that, if the injunctions granted by the High Court were to be discharged, and if the Agent is successful at trial, an award of damages at trial in respect of the intervening period will not adequately vindicate those interests.

94. As for the EBS, I am accept that it will suffer uncompensatable damage if the injunctions are continued and it ultimately succeeds at trial, in that it will in such a scenario have been restrained, without justification, from exercising its contractual entitlement to terminate the Tied Agency Agreements and appoint a replacement agent(s) in its stead.

95. It is not suggested that the EBS will suffer any other form of loss or damage if the injunctions are continued. No case is made that the EBS will be at any commercial/financial loss if the Agent, rather than Woods Financial Services Limited, continue to operate the branches between now and a trial. This is perhaps unsurprising as there has never been any complaint by the EBS of any inadequate performance by the Agent.

96. As for wider considerations of the balance of convenience (or balance of justice) the Judge was firmly of the view that these weighed decisively in favour of granting the injunctions sought. The Judge is criticised for failing to address the submission made by the EBS to the effect that it would be wrong to require the EBS to continue to deal with the Agent, in circumstances where serious (and, on the EBS' case, unfounded) allegations had been made by the Agent. The decision of the High Court (Laffoy J) in *Relax Food Corporation*

Limited v Brown Thomas & Company [2009] IEHC 181 was relied on in support of this argument.

97. I do not think that the Judge overlooked this argument. It is addressed, in substance, in para 16 of his judgment where he observed that there was no evidence or suggestion that the Agent was not operating (and/or would not continue to operate) the branches as successfully as before and where he also observed that the termination notice had mandated the Agent to continue to operate the businesses during the termination period. In making that latter observation, the Judge clearly had in mind the fact that clause 17 of the Tied Agency Agreements gave the EBS the option of terminating under clause 15.2(b) with immediate effect (subject to the payment of compensation). That option had not been exercised, thus indicating, in a very concrete way, that the EBS was content to continue to deal with the Agent during the 12 months' notice period.

98. *Relax Food Corporation* must be understood by reference to its particular facts, which (so far as relevant) were that the plaintiff's concession traded from the department store operated by the defendant and operated check-by-jowl with the defendant's own trading operations on the third floor of that store. (The fact that the concession agreement had only 11 months to run was also a significant factor in the decision to refuse the injunction.)

99. While the EBS was entitled to have this argument considered, as I read his judgment it was in fact considered by the Judge and rejected by him. I see no basis for taking a different view. The evidence was that, in the period while the Agent's complaints were being investigated by AIB Group Internal Audit, the relationship between the EBS and the Agent was managed professionally, and no issues arose. That was the position during the termination period (and, as already noted, the EBS could have elected to pay compensation in lieu of notice but did not) and, as Mr Gardiner fairly acknowledged before this Court, in the period of approximately 9 months between the High Court Judgment and the hearing before this Court no issue had arisen either.

100. It is, of course, an imposition on the EBS to be compelled to deal with the Agent as their agent pending trial, in circumstances where, on their case, the Tied Agency Agreements terminated last February. I do not mean to underestimate that imposition when I express the view that the Judge's conclusion that the balance of convenience favours the granting of the injunctions sought (and their continuance by this Court) appears to me to be plainly correct. Albeit that the EBS has to continue to deal with the Agent, the Agent is an entity whose competence, diligence and/or integrity has never been impugned by the EBS. There is no reason to believe that the three branches will not continue to operate successfully pending trial in the event that the injunctions remain in place. On the other hand, were the injunctions to be discharged, that would have a significant and immediate adverse impact on the Agent. Its business would be lost, until trial at least. Its capacity to pursue these proceedings effectively could be undermined. Its relationship with existing staff would be ruptured. The status quo that has been in place since 2011 (and earlier) would be profoundly altered.

101. The question of delay remains to be considered, however.

Delay

102. It is clear that, as a general principle, a party seeking interlocutory relief is bound to move with reasonable expedition: *Nolan Transport (Oaklands) Limited v Halligan* (Unreported, High Court, Keane J, 22 March 1994), followed in *Futac Services Limited v Dublin City Council* (Unreported, High Court, Smyth J, 24 June 2003).

103. The EBS complains that no plausible explanation is offered by the Agent for its delay in seeking interlocutory relief. It will be recalled that the notice of termination was served on or around 19 February 2018, following which no step appears to have been taken by the Agent to dispute the termination until December 2018, with a summons being issued (but not then served) on 7 December 2018 and a pre-action letter being sent on 11 December 2018.

104. The Judge expressly addressed the issue of delay in his Judgment, concluding that it would be unfair and inequitable to refuse the Agent relief on grounds of delay: para 17. That conclusion is one to which this Court is required to give weight and, notwithstanding the forceful arguments of Mr Gardiner on this issue, I am not persuaded that that conclusion was wrong, still less that it was not reasonably open to the Judge.

105. The following considerations appear to me to be relevant in this context:

- The Agent had challenged the earlier termination notice.
- There was some – albeit limited – evidence from Mr Martin to the effect that he had been led to understand that the EBS might not act on the second notice.
- That might be said to be consistent with the fact that, as I have already observed, little or nothing appears to have been done by the EBS in the immediate aftermath of serving the second notice.
- Notably, the EBS gave notice to its customers of the termination of the Agent *after* the pre-action letter was sent.
- The Agreements with the new agent were entered into *after* the commencement of these proceedings and after the Agent had brought the injunction application.

106. It is also relevant that, despite the timing of the injunction application, it was possible for the High Court and hear and determine it before the expiry of the notice period.

107. Having regard to all of these considerations, and allowing that there was delay on the part of the Agent and also allowing that the Agent has not convincingly explained that delay, I agree with the Judge that it would not be just or equitable to refuse the injunctive relief sought on grounds of delay.

The Costs of the High Court

108. At the commencement of the hearing of the appeal, the Court indicated that it was minded to defer consideration of the EBS's appeal against the order for costs made by the Judge. The parties will have an opportunity to address the Court further on that appeal with the benefit of this Court's decision on the substantive appeal.

DISPOSITION

109. For the reasons set out above (at, I fear, excessive length) I would dismiss the EBS's appeal against the injunctive relief granted by the Judge (in the terms as varied by him on 21 February 2019).

110. I am very conscious that the effect of the orders made by the Judge, and now upheld by this Court, is to continue the involuntary relationship between the EBS and the Agent for, potentially, a significant further period of time. The Court was informed at the hearing of the appeal that the proceedings are being managed in the Commercial list of the High Court and accordingly it is reasonable to assume that the proceedings will get on for hearing with all due dispatch. However, in the event that the EBS considers that the Agent is guilty of any undue delay, then it will be open to it to apply to discharge the injunctions. In making that observation, I do not intend to appear to encourage the bringing of such an application or imply that the Agent will deal with the proceedings in a way which will give grounds for such an application. It simply reflects the well-established principle that, where a party has sought and obtained an injunction pending trial, that party is under a particular duty to take all reasonable steps to ensure a timely trial.

111. Equally, in the event that there is any material change in circumstance which appears to impact on the continuing operation of the injunctions, it will be open to either party to bring whatever application appears appropriate arising from that.

112. The EBS's appeal is accordingly dismissed.