



THE HIGH COURT

Record No.: 2022/6238P

Between:

BENSON FUELS LIMITED

Plaintiff

-AND-

FLOGAS IRELAND LIMITED

Defendant

**JUDGMENT of Mr Justice Rory Mulcahy delivered on the 28<sup>th</sup> day of April 2023**

**Introduction**

1. In this application, the Plaintiff seeks an interlocutory injunction restraining the Defendant from terminating an agreement pursuant to which the Plaintiff is exclusive distributor of the Defendant's products in the Wexford area.
2. The Plaintiff claims that it is a small family company and has been the exclusive distributor for the Defendant in the Wexford area for a period in excess of 40 years. It claims that the relationship has been regulated by a series of written agreements in broadly similar terms. The last of these written agreements, for a term of three years, expired in September 2021, but it is claimed that the parties continued to transact on the same terms as those contained in the written agreement and the Plaintiff thus claims that the contractual relationship continued thereafter.
3. After negotiations on the terms of a new written agreement broke down, the Defendant purported to terminate the relationship with the Plaintiff by letter dated 8 August 2022, advising the Plaintiff that the termination of the "authorised retail & filling distribution arrangement" between the parties would be effective from 30 April 2023.

4. The Plaintiff disputes the entitlement of the Defendant to terminate the arrangement in this way. It claims that as a consequence of the continuation of the contractual relationship after the expiry of the previous written agreement, a further three-year fixed term agreement came in to place which could not be terminated within that fixed-term period in the absence of a breach of the agreement. In the alternative, it claims that an agreement of indefinite duration exists between the parties which can only be terminated on the giving of reasonable notice and that the notice period given was unreasonably short. It contends that a period of 18 months would have constituted reasonable notice. At the hearing of the injunction application, the Plaintiff relied exclusively on this latter argument but reserved the entitlement to pursue the argument that there was a three-year fixed term agreement at the hearing of the action.
5. The Defendant claims that upon the expiry of the written agreement in September 2021, the contractual relationship between the parties ended and that they transacted thereafter on an “orders placed basis”, *i.e.* the only contractual relationship between the parties was in respect of each individual order. In the circumstances, it claims that there was no obligation on it to give any notice of termination at all. In the alternative, it claims that the notice period given was reasonable in all the circumstances.

### **Background Facts**

6. The business now operated by the Plaintiff was started by Alan Benson Senior in or around 1978, although the Plaintiff was only incorporated in 2005. The company has been the authorised distributor of certain of the Defendant’s products – propane and liquified petroleum gas (LPG) – in South Wexford and Wexford Town since about 1982.
7. The company has two full time employees, David Benson, the son of the founder of the company, and also his nephew, Alan Benson Junior. Mr Benson explains that he entered the business in the early 1980s when he was just 14 and has worked there ever since. He does not hold any formal qualifications. His nephew Alan began working with him in 2007, when he was 21.

8. The company is profitable and there is no suggestion that it has failed properly to perform its obligations as exclusive distributors. David Benson avers that the Defendant's share of the market in South Wexford is 10% higher than that nationally, and that the Defendant has never had reason to question the Plaintiff's "performance, reliability or probity". The arrangement with the Defendant accounts for approximately two-thirds of the Plaintiff's revenue, the balance being attributable to a solid fuel business operated by the company. Mr Benson avers that he believes that the company would have to enter liquidation if the distribution agreement with the Defendant were terminated. He says that it would be very difficult to find an alternative supplier as two suppliers, the Defendant and Calor Gas, hold 90% of the market.
9. The company operates three delivery trucks from a premises at Newbay, Coolree, County Wexford. The company has invested in gas filling and storage over the years, including an investment in 2020 of €62,754 on a new truck branded with the Flogas logo, and upgrading of its premises used for the supply of Flogas products.
10. As set out below, it has been David Benson's intention to retire next year and allow Alan Benson to take over the business.

### **The Written Agreements**

11. In his affidavit, Mr Benson refers to the relationship between the Defendant and the Plaintiff as having been governed by periodic fixed-term agreements in writing. He avers that the terms of "each successive agreement have been substantially similar". He says that the agreements were prepared by the Defendant and presented to the Plaintiff for signature. He avers that the following were the key features of the relationship:
  - (i) Flogas supplied LPG to Benson Fuels at agreed rates.
  - (ii) Benson Fuels supplied those products to customers in Wexford Town and South Wexford regions.
  - (iii) Benson Fuels was required to comply with certain performance, service, and safety standards stipulated by Flogas.
  - (iv) Benson Fuels was not permitted to be involved in the sale or supply of LPG supplied to it by anybody other than Flogas.

- (v) Benson Fuels was required to use Flogas branding and to make clear in all of its dealings with customers that the products it was supplying were Flogas products.
  - (vi) Benson Fuels was required to use its best endeavours to promote and extend the Flogas brand and sale of Flogas products throughout Wexford Town and South Wexford regions.
12. Mr Benson also avers that where one agreement expired without having been renewed, “as a matter of custom and practice” between the parties, they continued to do business upon precisely the same terms as had previously applied and that, once a new agreement was finalised, it would be backdated to the date of expiry of the previous agreement.
13. Mr Peter Brogan, for the Defendant, does not seriously dispute the key features of the relationship as set out above and describes the Plaintiff as having been “*an exclusive distributor of LPG for Flogas in South County Wexford for almost 40 years, pursuant to a series of written Distribution Agreements*”. He does, however, dispute what Mr Benson says about the movement from one written agreement to the next and avers that there were important differences between the written agreements. He says that Mr Benson used the occasion of the expiry of a fixed-term agreement to negotiate better terms for the next fixed-term contract. Each of the parties makes points about the history of the relationship and the terms of the different written agreements. In the circumstances, it is necessary briefly to review those written agreements.
14. The Plaintiff exhibited some of the written agreements completed between the parties, but all written agreements since 1993 are exhibited in the affidavit of Peter Brogan, cylinder sales manager of Flogas, sworn in response to the injunction application. The earliest of the written agreements provided to the Court was an agreement dated 26 March 1993 (“the 1993 Agreement”) between Flogas and Alan Benson Senior by which Mr Benson was appointed as distributor for Flogas. The agreement was for a five-year period. The term of the agreement was set out at Article 2(1):

*“This Agreement shall commence on the 26<sup>th</sup> day of March 1993 and shall terminate not later than the fifth anniversary of the date of its commencement without prejudice to the right of the parties if they mutually so wish to enter into a new agreement to take effect following such termination.”*

15. Article 2(2) sets out four circumstances which would lead to termination, including breach of the terms of the agreement. Article 3 sets out the distributor's obligations under the Agreement. The schedule to the agreements purports to define the rates to be charged and the territory over which Mr Benson was appointed but, in fact, these have been left blank in the executed agreement exhibited in Mr Brogan's affidavit.
16. The next agreement exhibited is dated 7 August 1998 ("the 1998 Agreement"), a little over 4 months after the date upon which the earlier agreement was due to terminate. It was also made between Flogas and Mr Benson as distributor. The 1998 Agreement contained the following clause regarding the term of the agreement at Clause 2(b):

*"This agreement shall come into effect on the date hereof and, subject as provided in this Clause 2, shall continue in force for a period of 5 years and thereafter unless or until terminated by either party giving to the other not less than 30 days written notice in the case of [Flogas] and not less than 60 days written notice in the case of the Distributor in each case expiring on or at any time after the end of that period."*
17. The 1998 Agreement thus expressly provided that the agreement would remain in force after the expiry of the term of the Agreement unless written notice of termination was provided. This contrasts with the 1993 Agreement which expressly provided that it would terminate upon the expiry of the term of that agreement.
18. The 1998 Agreement contained a more extensive list of the circumstances in which Flogas was entitled to terminate the agreement than were contained in the 1993 Agreement, with 11 different circumstances specified. There is no provision for termination of the agreement within the term on the giving of written notice. The agreement defined the territory over which Mr Benson had been appointed as Wexford Town and District. Applicable rates are set out in an appendix (which was not exhibited).
19. The next agreement available is dated 3 January 2005 ("the 2005 Agreement") made between Flogas and David Benson t/a Benson Fuels Limited. All subsequent agreements were expressed to be between those parties. The 2005 agreement was also for a five-year term and contains an identical Clause 2(b) to that set out above from the

1998 Agreement and the same list of ‘termination events’. It sets out the rates to be paid and states that the territory over which Benson Fuels has been appointed is “as per existing”. The 2005 Agreement also contains an Addendum at Clause 28:

*“In return for Benson Fuels Ltd. Entering into an exclusive 5 year Distributor Agreement, Flogas will pay an advance Rebate of €10,000 plus VAT (€12,100 incl. VAT) payable on date of signing of Agreement.”*

20. The next executed agreement was dated 7 October 2014 (“the 2014 Agreement”) and was for a term of 2 years. Notably, it does not contain a clause similar to that contained at Clause 2(b) of the 1998 and 2005 Agreements. Rather, Clause 2.2. provides that:

*“The Agreement shall come into effect on the date hereof and, subject as provided in this Clause 2, shall continue in force for a period of 2 years (the “Term”).”*

21. Thus the 2014 Agreement does not contain any clause expressly continuing the agreement after the expiry of its term. Nor, however, does it contain a clause similar to that contained in the 1993 Agreement expressly terminating the agreement upon expiry of its term.

22. The 2014 Agreement contains an addendum in similar terms to that included in the 2005 Agreement and a new set of applicable rates.

23. The following year, the parties executed an agreement dated 24 September 2015 (“the 2015 Agreement”) which was in similar terms to the 2014 Agreement (including Clause 2.2) save that it contained a more detailed addendum, Addendum 27. It provided, *inter alia*, for the payment of a “support contribution” to help facilitate the buyout of Mr Ben Benson from the business. The term of the 2015 Agreement was three years.

24. When concluding the 2015 Agreement, David Benson, on behalf of Benson Fuels was also required to provide a written undertaking in the following terms:

*“I agree that I will operate an exclusive agreement with Flogas as per attached Distributor Agreement.  
I undertake not to invest in any competitor LP Gas Cylinder operation or distribute their products in any manner.”*

25. In an affidavit of Tom Kavanagh, sworn on behalf of Flogas, it was explained that this undertaking was a very unusual requirement and arose in circumstances where Benson Fuels had, in order to re-negotiate better terms with Flogas, threatened to switch to a competitor, Tervas Gas. He avers that Benson Fuels obtained very favourable terms in the 2015 Agreement in circumstances where Flogas was concerned that Benson Fuels might otherwise change suppliers. In Mr Benson's replying affidavit, he accepts that he negotiated with Tervas in 2015, but states that it was Tervas who approached him rather than the reverse.
26. The final agreement executed by the parties was dated 16 September 2019 ("the 2018 Agreement"). Unlike previous agreements which were executed following the expiration of prior agreements and which commenced from the date of those agreements, this agreement was expressly backdated to 1 September 2018, hence its description as the 2018 Agreement.
27. The term of the 2018 Agreement was three years from the date of the agreement, which the parties appear to have agreed means from the backdated date, *i.e.* 1 September 2018. The Agreement contains the same Clause 2.2 as the 2014 and 2015 Agreements and the same 11 grounds for termination as set out in every agreement since the 1998 Agreement.
28. The 2018 Agreement also contains a new Addendum 27 which provides for a support contribution of, in total, €30,000. It also contained the following provisions:
- “3.                    **Direct Delivery Model**  
*Bensons to move to Direct Delivery Model on 1<sup>st</sup> April 2021 with cylinder filling continuing on a consignment basis.*
4.                    **Marketing Support**  
*A marketing support payment of €4000 to be paid on date of Bensons moving to the Direct Delivery Model.*
5.                    **Filling Plant Closure**  
*The Filling Plant at Benson's would come up for review and discussion in (or before) September 2021. It is agreed that no change will be made without a discussion in advance with Bensons.”*
29. I note that the parties did not move to a direct delivery model on 1 April 2021 as provided for in the Addendum.

## **The Expiry of the 2018 Agreement**

30. As set out above, the Plaintiff claims that the parties continued in a contractual relationship on the same terms as the 2018 Agreement after the expiry of that Agreement. The Defendant, however, contends that the Plaintiff continued to distribute Flogas products “on an orders placed basis”.
31. Neither party has identified any steps taken as a result of the expiry of the 2018 Agreement before 2022. It appears, therefore, that the parties continued to operate for a number of months without addressing the basis upon which they were so doing. Neither party has identified any significant difficulties which arose over that period.
32. As described in Mr Brogan’s affidavit, the Defendant is in the process of phasing out cylinder filling distribution and moving to a direct distribution model. In the past, some distributors, including the Plaintiff, purchased bulk LPG from Flogas and used this to fill Flogas cylinders on their own premises. Under the direct distribution model, Flogas will fill the cylinders at a central location which it will provide to its distributors for onward distribution.
33. The parties thus entered negotiations on a new distribution agreement which would operate on the basis of the direct distribution model. Mr Benson states that these negotiations commenced in early 2022, Mr Brogan says the summer of that year. In any event, it appears that by the end of July 2022 most of the terms had been agreed and the Defendant emailed a draft agreement to the Plaintiff, called a “Cylinder Transport Agreement” on 26 July 2022. However, at the beginning of August 2022, Mr Benson asked that the Defendant make an additional ‘goodwill’ payment to him of €250,000 as a retirement payment. Mr Benson claims that such payments had been made to other distributors. Mr Brogan avers that the issue of a retirement payment had been raised previously by Mr Benson, but that it had been made clear that this would not be facilitated. He also states that insofar as goodwill payments had been made to other distributors, this was done to reflect a “*material change in the operations and business model of a distributor’s region*”. I pause to note that that seems to be precisely what was proposed here.



34. The parties met on 4 August 2022. There is a dispute regarding the characterisation of that meeting, but no dispute that the parties did not finalise an agreement, with the issue of the goodwill or retirement payment remaining as the only issue between the parties. Mr Brogan says that he made clear at that meeting that the Plaintiff only had until close of business on 5 August to agree to the offer contained in the draft agreement emailed on 26 July 2022. Mr Brogan explains that the offer included an expansion of the Plaintiff's territory and that this aspect of the offer was only possible due to the imminent retirement of another distributor and that the Defendant needed to know that there would be an alternative distributor in place upon that distributor's retirement, hence the urgency to conclude the agreement.
35. The benefits or otherwise of the proposed alternative arrangements for the Plaintiff and the customers provided with LPG by Benson Fuels are debated in some detail in the affidavits. However, it does not seem to me that the relative merits of the arrangements under the 2018 Agreement and the proposed new arrangements are relevant to the issues to be decided on this application. The Defendant states that it made a "commercial decision" to move to the direct distribution model. It can be assumed, therefore, that the Defendant saw some benefit to Flogas in changing the business model.
36. On 8 August 2022, the Defendant, having not heard further from the Plaintiff, issued the notice at the heart of this application, the so-called Notice of Termination.

### **The Notice of Termination**

37. Chris Bermingham, on behalf of the Defendant, wrote to the Plaintiff on 8 August 2022. At the hearing of the injunction application, both parties placed significant emphasis on different parts of this letter. I propose, therefore, setting out the letter in full:

*"I write to you in relation to our business relationship and in particular the role of your company as our distributors in the South Wexford area. As you are aware your most recent commercial agreement with Flogas Ireland expired on 1st September 2021. Over the last couple of months, we have been negotiating a new agreement.*

*Up to the 3rd of August we had agreed all the commercial aspects of the new agreement which would have included the following changes to your last agreement:*

- i) *Benson Fuels would become the authorised distributor for Flogas products in all of County Wexford and not just south Wexford (additional 388mt).*
- ii) *Your annual rebate would no longer be paid on any tonnes.*
- iii) *You had agreed minimal savings on handling rate which in total amounted to approximately €2,500 per year.*
- iv) *At the end of the two year deal Benson Fuels would close the filling plant operation.*
- v) *Any new deal after the proposed deal would be exclusive of the filling plant closing and Benson Fuels would operate of the direct model from 2024 onwards.*

*All other terms and conditions remain unchanged. Flogas are of the opinion that this was a very attractive deal on offer to Benson Fuels which allowed for over doubling of your current volume even though your rates are substantially higher than the old distributor rates in north Wexford. It must be noted that Flogas had agreed to the additional volume to reflect your excellent track record of service in the region and our partnership type approach which we endeavour to have with all main distributors.*

*On Tuesday 3<sup>rd</sup> August at 3pm you informed me by phone that you wanted one other clause inserted into the agreement as follows:*

- i) *That the entire agreement hinged on the condition that you David Benson received a one-off payment of €250,000 from Flogas as a retirement payment and that you could retire from the business at the end of the agreement in 2024. This payment would not alter the fact that your nephew Alan Benson would take over the running and ownership of Benson Fuels from the first day after the expiry of the new agreement - pending a new agreement being signed.*

*Flogas categorically reject such a clause or payment and have on numerous occasions outline to you that you are not an employee of Flogas, instead you are an authorised distributor. If you want to exit or retire from your own business that is entirely the business of Benson fuels. We highlighted and notified this to you and Alan at our meeting on the 4<sup>th</sup> August 2022 in the Maldron hotel in Wexford town. We also informed you that you had until 5pm on the 5<sup>th</sup> August to reconsider the offer which was emailed to you on 26<sup>th</sup> July 2022. You were also informed that if you did not want to accept this offer then Flogas would have no other option but to issue this letter of termination and plan to make alternative arrangements at the end of the notice.*

*Since we have not been contacted by you or Alan to accept the original offer from the 26<sup>th</sup> July we therefore write to inform you that we are terminating our business relation with you as our authorised filling & retail distributor. Whilst we have been advised that nine months' notice is a very generous notice period we are nonetheless agreeable to providing such a lengthy period so as to make sure that you have sufficient time to make any interim arrangements necessary to accommodate the change.*

*Therefore we are putting you on notice that the termination of the authorised retail & filling distribution agreement between Flogas Ireland limited and your company, Benson Fuels Limited would be effective from close of business on 30<sup>th</sup> April 2023.*

*We are deeply saddened to lose Benson Fuels as an authorised Flogas distributor but we cannot be held to ransom by such requests. We really value the relationship we have enjoyed over the past 4 decades. Whilst we appreciate that your business is comprised of various constituent parts we accept that the news of the termination is a disappointment for you. Please be assured however that we are agreeable to meeting with you to consider how best to give effect to this decision whilst, in as far as possible, serving all our commercial interests. I have no doubt you will want to discuss with us items such as stock in hand, credits/debits due, uplift of all LPG infrastructure, notice to dealers etc and how these could be addressed. We will therefore be in contact with you to agree a meeting between us wherein we can work through all these issues.”*

38. Although it is clear that the parties never concluded a new agreement, it is worth noting that the terms offered by the Defendant referred to in the above letter included an acceptance that the Plaintiff would not switch to the direct distribution model until 30 August 2024, when the filling plant would be closed (see Schedule 1 to the draft Cylinder Transport Agreement).
39. The Plaintiff replied by letter dated 10 August 2022. The letter continued to dispute the Defendant’s refusal to make a goodwill payment. Importantly, the letter stated that:

*“Bensons have been advised that the notice of termination issued by Flogas is unreasonable in terms of notice period particularly against the indisputable background of honest and loyal trading in all our affairs with Flogas for over 40 years where almost single-handedly we helped to build the dealer and customer network and we maintained it with high service levels way beyond our contractual responsibilities.*

*Therefore we reject the entire basis of this unlawful termination notice.”*

40. Mr Bermingham replied by letter dated 16 August 2022. The letter concluded by stating:

*“In summary David,*

- i) The deal that was offered to you by e-mail on 26<sup>th</sup> July 2022 is gone and not on the table anymore.*
- ii) You are currently on notice as per our letter 8<sup>th</sup> August 2022.*

iii) *There may be a possibility of Benson retaining their current region of South Wexford through a new contract under different terms & conditions from your current ones.*”

41. The letter included an offer to meet with David Benson to discuss matters further and by email dated 18 August 2022, Mr Benson agreed to travel to Drogheda to meet Mr Bermingham. It doesn't appear that this meeting took place. Rather correspondence was exchanged between the parties' solicitors in September 2022.

42. The Plaintiff's solicitor wrote to Mr Bermingham on 5 September 2022. The letter disputed the Defendant's entitlement to serve the notice of termination and asserted that its client *“is, by reason of the long course of business custom and practice that has existed between the parties, entitled to a continuing term of the distribution model for a term of three years from Sept 1 2021.”* The letter called on the Defendant to withdraw its letter of 8 August 2022 and threatened to seek an injunction restraining termination if the Defendant persisted with its threat to terminate the agreement.

43. The Defendant's solicitor replied by letter dated 26 September 2022 in which it was stated that:

*“We note what you say about a notice period. Strictly speaking no notice period was in fact required after the expiration of the last written agreement. However, Flogas did provide notice of termination to your client of 9 months. Even taking the observations you make about a notice period at its height the following is worth noting. Regardless of whether there is or isn't a specific clause in the Distribution Agreement dealing with termination on notice, it is common course in business relationships that a commercial agreement can be terminated by either party to that agreement upon the provision of reasonable notice. Therefore, any notice that is required even on your approach has been given.”*

44. Similar points are reiterated at the conclusion of the letter.

45. Further correspondence was exchanged in October 2022 where the possibility of further negotiations was raised.

46. On 15 December 2022, the Plaintiff issued the within proceedings and the Defendant entered an appearance on 16 January 2023. By letter dated 18 January 2023, the Plaintiff sought an undertaking that the Defendant would not terminate the Distribution Agreement on notice without cause prior to the determination of these proceedings or

1 September 2024, whichever is the earlier. The Plaintiff indicated a willingness to facilitate an early hearing of the action.

47. The Defendant declined to provide the undertaking and the Plaintiff issued a motion seeking interlocutory relief on 10 February 2023.
48. The application for an injunction was heard on 19 April 2023. At the hearing of the application, the Court made clear to the parties that an early hearing of the substantive proceedings could be facilitated and that a hearing in October could be accommodated. In this regard, the parties have exchanged pleadings, the Defendant having delivered its defence on 14 April 2023.
49. In circumstances where the Notice of Termination will take effect on 1 May 2023, and in the absence of any undertaking from the Defendant, the parties required a decision on the application prior to that date.

### **Issues**

50. Unsurprisingly, there was no dispute between the parties regarding the principles which should apply on an application for an interlocutory injunction, and both parties referred to and relied on the recent refinement of relevant principles by the Supreme Court in **Merck, Sharp & Dohme Corporation v Clonmel Healthcare Limited [2019] IESC 65, [2020] 2 IR 1** and, in particular, the suggested steps which might be followed by a Court in considering an injunction application set out at paragraph 65 of the Court's judgment in that case.
51. At the hearing of this application, counsel for the Defendant very helpfully identified six issues which he wanted to address as relevant to the question of whether the Court should grant the injunction sought. These seem to me to be a convenient way of addressing the Plaintiff's application and can be summarised as follows:
  1. What is the appropriate threshold for the grant of an injunction in this case, *i.e.* should this be regarded as an application for a mandatory injunction?
  2. Has the relevant threshold been met in relation to the case that there is a continuing contract between the parties?

3. Has the relevant threshold been met in relation to the argument that insufficient notice has been given and, in particular, to the contention that if inadequate notice has been given, the Notice of Termination should simply be disregarded?
  4. Are damages an adequate remedy for the plaintiff?
  5. Are damages an adequate remedy for the defendant?
  6. Where does the balance of convenience lie?
52. I propose to consider the parties' arguments and address them under each of the headings set out above.

### **Appropriate Threshold**

53. The Plaintiff claims that it has identified a serious issue to be tried and therefore has met the "necessary condition" (see **Betty Martin Financial Services Limited v EBS DAC [2019] IECA 327** at paragraph 34) for the grant of an injunction. The Defendant, however, states that what is being sought is, in substance, a mandatory injunction and therefore the Plaintiff is required to meet the higher threshold of a strong case likely to succeed at trial (see **Maha Lingam v HSE [2005] IESC 89**).
54. For completeness, I note that the Plaintiff contends that it has made out a strong case likely to succeed at trial, and conversely, the Defendant contends that the Plaintiff has identified no serious issue to be tried, but in their submissions to the Court, the main focus of the Plaintiff's argument was that it had met the lower threshold, the Defendant's that the higher threshold had not been met.
55. As counsel for the Defendant correctly contends, it is the substance rather than the form of injunction sought which informs the decision as to the correct threshold to apply. As stated by Clarke CJ in **Charleton v Scriven [2019] IESC 28**:

*4.6 However, there is also clear authority for the proposition that the assessment of whether an injunction can properly be said to be mandatory for those purposes is a matter of substance rather than one of form. Indeed, this is clear from the judgment of Fennelly J. in Maha Lingam, where he stated:-*

*“...[T]he implication of an application of the present sort is that in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well established that the ordinary test of a fair case to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory.” (Emphasis added)*

*4.7 This substance over form approach can also be seen in, for example, my judgment in Bergin v. Galway Clinic Doughiska Ltd. [2007] IEHC 386, [2008] 2 I.R. 205 and the judgment of Irvine J. in Stoskus v. Goode Concrete Limited [2007] IEHC 432.*

56. In this regard, the Plaintiff claims that the Orders sought merely seek to maintain the *status quo* pending the determination of the proceedings and seek only to prohibit the Defendant from changing the existing position.
57. By contrast, the Defendant says that the Orders, if granted, would oblige it to continue to supply its products to the Plaintiff and to hold to and observe a relationship which it says has lawfully come to an end. It also contends that, if granted, the Plaintiff will have the benefit of almost all the notice period to which it contends it is entitled.
58. The parties referred to a number of cases in which injunctions to restrain the termination of agreements analogous to the agreement which the Plaintiff contends exists here were in issue.
59. In **Ó’Murchú t/a Talknology v Eircell Limited** [2001] IESC 15, the Supreme Court considered whether the injunctions sought, to compel the Defendant to continue supplying mobile phones to the Plaintiff and to treat the Plaintiff as the authorised agent of the Defendant, was a mandatory injunction. In rejecting the argument that what was being sought was a mandatory injunction as having “no real force”, Geoghegan J stated:

*“There are different kinds of mandatory injunctions. Undoubtedly, if a plaintiff is looking for a mandatory injunction requiring a wall to be knocked down he may in fact be attempting to obtain at an interlocutory stage what effectively is his final relief. Once the wall is gone it may not be practicable to rebuild it. That is the classic form of mandatory injunction which a court will rarely grant. Although the injunctions sought in this case may arguably be classified as “mandatory” they are not of that type. They are directed simply towards retaining the status quo pending the outcome of the action, which is the normal purpose of a prohibitive injunction. I see no reason therefore why the traditional principles would not be relevant to this case.”*

60. **Relax Food Corporation Limited v Brown Thomas [2009] IEHC 181** and **Wesumat (Ireland) Limited v Topaz Energy Limited [2008] IEHC 185** also provide examples of the Courts applying the lower threshold to applications for injunctions to restrain termination of agreements analogous to the alleged agreement here.
61. However, in **O’Leary v Volkswagen Group Ireland Limited [2013] IEHC 318**, Moriarty J in the context of an application to restrain the termination of three Volkswagen dealer contracts, concluded that insofar as **Ó’Murchú** suggested that the relevant threshold for that type of injunction was a fair issue to be tried, the decision was *obiter* and concluded that what was sought in that case was “*in essence a mandatory order, requiring the Defendant to hold to and observe a relationship it contends has lawfully ended.*” In that case, the plenary summons had issued five days prior to the date on which the dealership agreements were to be terminated, being 30 April 2013. The injunction application was heard and determined in late June and early July 2013, some two months after the termination.
62. In this regard, counsel for the Defendant contends that whether an injunction can be described as prohibitory or mandatory cannot depend on the happenstance of when the injunction application is heard and therefore the fact that the notice period afforded by his client still had some months to run when these proceedings were instituted and still has not expired (albeit its expiry is fast approaching) is immaterial.
63. In **Betty Martin**, both the High Court and the Court of Appeal applied the serious issue to be tried criterion to an application for an injunction to restrain the termination of tied agency agreements on the basis that the notices terminating those agreements were defective. It seems clear that the parties in that case agreed that that was the applicable threshold and therefore the issue cannot be taken to have been decided in those proceedings. It is instructive, however, that in a detailed consideration of the question of whether there was, in fact, a serious issue to be tried, the Court of Appeal at no time adverted to the possibility that a higher threshold might have been appropriate, even when noting (at paragraph 42) that “*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*”. Moreover, the Court of Appeal expressly concluded (at paragraph



91) that the discharge of the injunction would “*give rise to a position where the status quo was significantly altered*”.

64. Set against the background of a 40-year relationship pursuant to which the Plaintiff has distributed the Defendant’s products without any difficulty arising, as is apparent even from the Defendant’s letter purporting to terminate the relationship, it seems to me that the injunction sought here is an injunction directed towards maintaining the *status quo* and is not one which should be assessed against the higher threshold of a strong case likely to succeed. In substance, the Defendant is being asked to keep doing that which it has been doing for many years and only for, if an early trial is facilitated, a relatively short period of time. The Defendant has clearly evinced an intention to change its business model in the area but has put scant evidence before the Court of having taken steps to achieve that change, such as the appointment of, or even identification of, an alternative distributor. Mr Brogan avers that a distributor has already been appointed for North County Wexford, a territory which the Plaintiff had been offered but does not state that steps have been taken to appoint that or any other distributor over the territory currently served by the Plaintiff, though it notes that it won’t achieve the “*efficiencies inherent in having a single distributor for the whole territory of Wexford.*” It also seems that had it concluded an agreement with the Plaintiff, it would have been prepared to permit the Plaintiff to continue under the existing business model, where the Plaintiff bought LPG in bulk and filled cylinders on its own premises, until the end of August 2024.
65. Although the Defendant argues that the injunction sought here is akin to an injunction sought in employment cases and that the grant of an injunction may require ongoing supervision by the Court, it seems to me that this overstates the case. There is little or no evidence to support the contention that any ongoing supervision by the Court would be required. The commercial relationship between the parties has operated successfully for over 40 years. The relationship continued to operate after the expiry of the 2018 Agreement without any issue arising.
66. Even after the Defendant purported to terminate the agreement, the only evidence of any difficulty arising in relation to the ongoing role of the Plaintiff as distributor for the Defendant is a reference to a dispute over a €10,000 payment which the Plaintiff says

is due but which the Defendant disputes. It is hard to see this as something which would require ongoing supervision or which could not be addressed at the trial of the action.

67. The Defendant's concern that, were an injunction granted, the Plaintiff would continue to deal with the Defendant's customers while potentially acting as a distributor for a competing brand, does not alter the threshold applicable in circumstances where the Defendant has made clear that, insofar as it afforded a notice period to the Plaintiff, it was for the express purpose of enabling it to put in place alternative arrangements for the continuation of the Plaintiff's business.
68. Nor is it the case that the grant of an injunction in this case would effectively determine the issues between the parties. On the Plaintiff's case, it is entitled to a valid Notice of Termination providing adequate notice and, if successful at the trial of the action, the Defendant will be required to serve a fresh Notice of Termination. If the Plaintiff can establish that there is a serious issue to be tried that it is entitled to a fresh Notice of Termination, then there will very much remain a live issue between the parties even if an injunction is granted.
69. In the particular circumstances of this case, therefore, I have concluded that the threshold for the grant of an injunction which the Plaintiff has to overcome is the threshold applicable to the grant of a prohibitory injunction, *i.e.* the Plaintiff must establish that there is a serious issue to be tried.

#### **Serious Issue to be Tried**

70. In light of the foregoing conclusion, the next question to address is whether the Plaintiff has established a serious issue to be tried. I am satisfied that it has and that, by reference to **Merck, Sharp & Dohme**, there is a serious issue to be tried that at the hearing of the action, the Plaintiff would be entitled to an injunction preventing any reliance by the Defendant on the Notice of Termination.
71. Against the extensive historical relationship between the parties, the numerous agreements executed on a similar basis, a history of the parties continuing to deal without interruption on the same terms following the expiry of written agreements and the evidence that they continued to do so following the expiry of the 2018 Agreement,

I cannot but conclude that the Plaintiff has established that there is a serious issue to be tried regarding whether there is an ongoing contractual relationship between the parties.

72. In addition to the foregoing is the fact that the Defendant did purport to terminate an existing relationship and gave a period of notice for so doing. I am mindful that the Defendant also made clear in correspondence that its position was that there was no requirement to provide notice of termination at all (see, for instance, its solicitor's letter of 26 September 2022 referred to at paragraph 43 above). It is not to say, therefore, that the Defendant might not succeed at the trial of the action in establishing that the purported notice of termination and notice period went beyond any obligations it may have had following the expiry of the 2018 Agreement. However, it cannot be said at this stage that the Plaintiff's argument that the relationship between the parties was based on more than a "per orders placed" basis is not a serious issue, or put another way, is bound to fail (see **O'Gara v Ulster Bank DAC [2019] IEHC 213**).
73. The Defendant makes cogent arguments that the Plaintiff's proposition, for the purpose of the injunction application, that it has an indefinite agreement with the Defendant terminable on reasonable notice, may be undermined by Mr Benson's averments to the effect that the agreement that came into existence between the parties was a fixed-term agreement which could not be terminated, but those are issues to be determined at the hearing of the action, as are the Defendant's detailed arguments regarding the terms of the various executed agreements. It is worth noting that the Plaintiff's immediate response to the Notice of Termination, as set out in its letter of 10 August 2022, was to assert that the Notice was "*unreasonable in terms of notice period*".
74. In this regard, although the Defendant contended that the injunction sought was, in addition to being inconsistent with the averments in Mr Benson's affidavit, inconsistent with the Plaintiff's pleaded case, I am satisfied that the injunction sought and the basis for it pursued at the hearing is consistent with the reliefs sought at paragraphs G and H of the Plenary Summons, in which the Plaintiff seeks a declaration, in effect, that the Defendant could not terminate the agreement between the parties without reasonable notice and that the notice period given was not reasonable.
75. Of course, the Plaintiff needs to establish more than a continuing relationship in order to establish that there is a serious issue to be tried such as to warrant the grant of an

injunction. It must also establish that it has a basis to contend that it was entitled to reasonable notice and, moreover, that the notice period it was afforded was inadequate. I am satisfied that it has raised a serious issue in this regard.

76. Although both parties identified cases in which the adequacy of a notice period was in dispute, all of the cases make clear that what is adequate notice will turn on the facts of each particular case. What constituted adequate notice here – assuming a contractual relationship is established – will, again, be for the hearing of the action, but in light of the 40-year relationship between the parties, it cannot, in my view, be said that it is beyond argument that the notice period here was not adequate.
77. Finally, the parties dispute what the effect of an inadequate notice period might be. The Defendant contends that if the notice period was found to be inadequate, the Plaintiff would only be entitled to such additional notice as the Court considered to be reasonable, *i.e.* over and above the notice already given. The Plaintiff, however, contends that if the Notice of Termination afforded a lesser period than is determined by the Court at trial to have been required, then the Notice falls away and the Defendant will be required to serve a fresh Notice providing the full period of notice which the Court has determined to be reasonable.
78. The Plaintiff's proposition was at least identified in an English case (see **Decro-Wall International SA v Practitioners in Marketing Limited** [1971] 1 WLR 361) although clearly not decided there (see also **Burke v Independent Colleges Limited** [2010] IEHC 412). Absent any identification of a case in which the proposition has been rejected, it seems to me that there is a serious issue to be tried regarding the implications of a Notice to Terminate being found to have provided inadequate notice of termination.
79. In light of the foregoing, I am satisfied that the Plaintiff has established a serious issue to be tried.

### **Adequacy of Damages**

80. Per **Merck, Sharp & Dohme**, the question of adequacy of damages is an aspect of the balance of convenience, albeit a very important one. Insofar as I deal with it under a separate heading, I do so mindful of that refinement of the **Campus Oil** principles.

i. Are damages an adequate remedy for the Plaintiff?

81. The Plaintiff contends that, in this case, damages would not be an adequate remedy in the event that it ultimately succeeds at the trial of the action. In this regard, it relies on the fact that the Plaintiff is essentially a family company, with two family members the only employees, and the likelihood that the company will go into liquidation if the injunction is not granted having regard to the importance of the distribution agreement to its overall business. The Defendant criticises the lack of evidence to support the proposition that the company will go into liquidation, citing the fact that the company also has a solid fuel supply business but says that, in any event, damages will be an adequate remedy. The Defendant relies, in particular, on **Curust Financial Services Limited v Loewe-Lack-Werk & Anor** [1994] 1 IR 450 at pp. 471/472:

*“No information is forthcoming about the general position of the companies with regard to their indebtedness or net assets situation. No attempt has been made to assess the probable result of competition between Curust and Sales Ltd. in relation to this market for rust primer, except an averment on affidavit that Sales Ltd. is underselling Curust with regard to the cost of the rust primer being offered for sale. In these circumstances, where damages can be quantified, the loss is quite clearly a commercial loss, there is no doubt about the capacity of the defendants to pay any damages awarded against them and there is no element of new or expanding business which may make quantification particularly difficult, as a matter of principle, I conclude that damages must be deemed to be an adequate remedy in this case.”*

82. Given the difficulties which the Plaintiff has identified in securing an alternative supplier, insofar as the Plaintiff accepts for the purpose of this application that the arrangement with the Defendant could be terminated on reasonable notice, there is also some force to the contention that even taking the Plaintiff’s case at its height, it can only hope to delay the adverse consequences of termination. However, the Plaintiff argues that if it has an eighteen-month notice period, it will give it “*a fair shot at replacing the business.*”

83. In my view the position here is more analogous to that addressed by the Court of Appeal in **Betty Martin** than the purely commercial loss at issue in **Curust**. In **Betty Martin**, Collins J, having examined the relevant case law, including **Curust**, concluded as follows:

*“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.”*

84. Likewise, I do not think it can be said with confidence here that the availability of damages as a remedy for the Plaintiff if successful at the trial of the action is a sufficient basis to refuse the injunction sought. The potential impact on a small family company of the loss of a supplier who accounts for two thirds of its business, the possibility that it will lead to the liquidation of the company and the adverse impact that such liquidation might have on David and Alan Benson may not be capable of being adequately compensated in damages.

ii. Are damages an adequate remedy for the Defendant?

85. Insofar as the Defendant criticises the Plaintiff for lack of information regarding the consequences of the injunction being refused, it seems to me that the information

provided by the Defendant to support its contention that damages would not be an adequate remedy for it is even more sparse. In substance, it claims that the difficulty for it is that it will not be able to appoint a distributor under the direct delivery model for the period that any injunction remains in force.

86. There may well be commercial advantages to the Defendant in switching to the direct distribution model, indeed the Defendant clearly believes that there will be. The fact that any such benefits, or the loss of them during the period of any injunction, are difficult to quantify based on the evidence before the Court does not equate to damages being an inadequate remedy in the event that it transpires that any injunction should not have been granted. The Defendant has not set out any detail regarding the commercial benefits to it of the direct distribution model and so any concern about loss of those benefits cannot, it seems to me, ground an argument that damages are an inadequate remedy. Against a background where the parties have successfully operated the existing arrangement for a considerable period, I am not persuaded that the Defendant will suffer any loss which could not be compensated in damages if it is ultimately successful in its defence of these proceedings.
87. Nor, absent any detail of significant financial loss, do I think that there is any basis to conclude that the undertaking as to damages provided by the Plaintiff is worthless. The Plaintiff trades at a modest profit and there is no reason to believe that it will not continue to do so during the period of any injunction. Moreover, it has some cash reserves and assets. Its undertaking as to damages must be considered to be of substance.

### **Balance of Convenience**

88. The consideration of the adequacy of damages is an aspect of the overall consideration of the balance of convenience or the balance of justice, albeit an important one. The conclusion that damages may not be an entirely adequate remedy for the Plaintiff but seem to be an adequate remedy for the Defendant is therefore an important indicator in favour of granting an injunction but is not determinative. As Collins J stated in **Betty Martin** (at paragraph 34), when carrying out an overall assessment of where the balance of justice lies “*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.”*

89. There are, in this case, factors weighing in the balance against the grant of an injunction. The Defendant has purported lawfully to determine its relationship with the Plaintiff in circumstances where the written agreement regulating their relationship has long since expired. Moreover, the Plaintiff has long been on notice of the Defendant’s intention to switch to a direct distribution model – it was expressly accepted in the 2018 Agreement, concluded in 2019 – and, but for the dispute regarding the payment of a goodwill payment, was clearly prepared to switch to that model. All things being equal, the Defendant should be free to organise its business as it sees fit.
90. It is also the case that, although the Plaintiff says that the Defendant could mend its hand by serving a new Notice of Termination affording reasonable notice, it has only belatedly identified that it considers that a period of 18 months would have been reasonable and continues to reserve the entitlement to argue that there was a new fixed-term agreement which was not terminable on notice at all.
91. On the other hand, the Defendant, having provided in the 2018 Agreement for a switch to the direct distribution model in April 2021 did not make that switch and continued trading with the Plaintiff on the same terms as those contained in the 2018 Agreement for some time after it expired before seeking to negotiate new terms. The negotiated terms provided for the continuation of the existing model with the Plaintiff until August 2024 before the switch to the direct distribution model was finally made. No evidence has been proffered of any steps taken by the Defendant to put in place alternative arrangements with a new distributor.
92. The arrangement between the Plaintiff and the Defendant has, historically, been a successful one. Even if the direct distribution model ultimately proves to be more successful, the balance of convenience supports the grant of an injunction for a short period restraining the Defendant from terminating the existing arrangements pending the trial of the action.
93. It is true that there is no written agreement to which the Plaintiff can point which expressly regulates the arrangements between the parties or which expressly provides



for a period of notice. However, I have already concluded that the Plaintiff has established serious issues to be tried on these questions and the strength or otherwise of the Plaintiff's case on these points is a matter for the trial of the action.

94. One final issue to weigh in the balance is the question of the Plaintiff's delay in bringing the injunction application. Parties seeking equitable relief cannot sit on their hands and the Defendant argues that the delay in issuing the proceedings and bringing the within application is, of itself, a basis to refuse the injunction application. In my view, however, any delay is merely a factor to be considered in assessing the overall balance of convenience. Here, the Plaintiff could undoubtedly have moved with greater expedition in making the application, but in circumstances where the parties have exchanged pleadings, it does not seem to me that any delay has significantly prejudiced the Defendant. The proceedings issued in December 2022, a little over four months after the Notice of Termination was served and well before it expired on the Defendant's case. It has (just) been possible to hear and determine the injunction application before the termination date set out in the Notice of Termination.
95. Moreover, the parties have continued to exchange pleadings and an early hearing date can be accommodated. Even had the injunction application been moved sooner, it seems unlikely that a significantly earlier hearing date for the action could have been achieved. Thus, any delay in bringing the application has not substantially lengthened the period during which the injunction sought would remain in effect.
96. I also note that the delay is significantly less than that at issue in **Betty Martin**, where proceedings issued five days before the Notice of Termination became effective and where there the effect of the injunction granted was to "*continue the involuntary relationship between the EBS and the Agent for, potentially, a significant further period of time.*"
97. In all the circumstances, I propose granting an Order restraining the Defendant from terminating the distribution arrangement in existence between the parties without cause pending the trial of the action or until further Order.
98. I will hear counsel as to the precise form of the Order.

99. In granting the Order sought, it should be clear that I have been influenced by the fact that an early trial of the action can be accommodated, and that the Plaintiff has made clear that it will facilitate such an early trial. Pleadings have been exchanged, although the Plaintiff has not yet delivered a Reply to the Defence. The issue of discovery has not yet been addressed, but it does not seem to me that discovery is likely to be a major undertaking in this case, nor should it be allowed to prevent an early trial of the action. If an early trial proves impossible or the Plaintiff delays in progressing the case, the Defendant can, of course, ask the Court to discharge the injunction.
100. I propose listing the matter before me at 10.30 am on Tuesday, 9 May 2023 for the purpose of fixing directions and finalising Orders including in relation to costs.