An Chúirt Uachtarach

The Supreme Court

O'Donnell J
Dunne J
Charleton J

Supreme Court appeal number: S:LE:IE:2012:000227
[2021] IESC 34
High Court Record Number: 2011 No. 15095 P

Between

Michael Hoey

Plaintiff

- and -

Waterways Ireland

Defendant

Judgment of Mr Justice Peter Charleton delivered on Friday 28 May 2021

1. The plaintiff Michael Hoey claims a wide range of both prohibitory and mandatory injunctive relief against the defendant, Waterways Ireland, arising out of the removal and storage of a canal barge. In the past, the plaintiff ran a business called Canalways Ireland which provided tours of Ireland's canals and linked rivers, including the Barrow navigation. Waterways Ireland has statutory responsibility for the management, maintenance, development and restoration of inland navigable waterways, principally for recreational purposes. This all began when Waterways Ireland removed barge 43M, belonging to the plaintiff, ostensibly on the basis that it had sunk and was obstructing a canal. Did it sink? Like everything in these proceedings, even a simple question like that is overlain with inventive legal constructions which, whether this is the purpose or not, divert the channel of fact away from what matters and into ultimately unnavigable side streams. Included in the pleadings of the plaintiff are assertions as to rights of navigation, riparian rights, statutory duties as to the maintenance of watercourses and aspects of foreign law on boats, barges, depths of navigation, rivers and canals. Waterways Ireland are clear that 43M had sunk and that they recovered it from the canal bed, where, by obstruction, it had halved the navigation width. Asked during the hearing as to whether the barge had sunk, the plaintiff, representing himself on this appeal, replied: "The barge couldn't sink because there is nowhere for it to sink. It was full of water."

Course of proceedings

2. In the High Court, Murphy J, judgment of 27 April 2012, rejected the plaintiff's claim for injunctive relief. The plaintiff then lodged an appeal to this Court but, as this coincided with the establishment of the Court of Appeal, the Chief Justice issued a general notice, including these parties, under Article 64.3.1 of the Constitution that this appeal would now be heard by the Court of Appeal. Some years later, Waterways Ireland applied for an order pursuant to Article 64.3.3 that would have the effect of cancelling the direction made by the Chief Justice. That was granted. Therefore, the appeal has come before this Court. That happened in 2018 but neither party has sought to bring the matter on before now.

3. A comment is appropriate as to this inaction. As all of the authorities make clear, an application for an interlocutory injunction is a plea to the courts holding equitable jurisdiction that justice should respond by the making of an order compelling a defendant to stop doing something, a prohibitory injunction, or should do something, a mandatory injunction, in the face of what is claimed to be an infringement of the plaintiff's rights that is so serious that such action is needed, even prior to a full trial, and where a judge will have only a limited knowledge of the facts, usually deposed to on affidavit, and in circumstances where a full review of the law may be difficult. For reasons set out below, every such order carries consequences for the parties and, mindful of that, the granting of an interlocutory injunction is a serious step, one potentially fraught with the danger of injustice, for a court to make. It may happen, for reasons related to the overall justice of the position in which the parties find themselves at interlocutory stage, or related to the weakness of the plaintiff's argument as to law, or where damages rather than a court order of compulsion emerge as adequate to meet the case, or where the balance of convenience does not favour such an order, that an application for an interlocutory injunction is refused. What the course of this case exemplifies, and what is in the nature of a plaintiff having applied for an injunction prior to trial, is that a plaintiff has asserted: this is urgent, this is an infringement of rights where unless a plaintiff responds speedily, serious harm will be done. That is what an interlocutory injunction is about. Yet, the case languished for nine years. There is an obligation on a plaintiff, having made such an assertion, through applying for an interlocutory injunction, to consistently pursue the path of urgency by seeking to bring forward the full trial. Consistent with the principle that delay can equate to acquiescence, failure to follow through on promptness may have consequences at the full trial. More importantly, having sought the urgent aid of the courts through an interlocutory application, a plaintiff is required to consistently seek the disposal of the case through application to preparation and in seeking an early hearing. The Rules of the Superior Courts enable defendants who are faced with a reluctant plaintiff to set a matter down for trial. Where State parties are involved, the especial duty of cooperation with the courts should prompt defendants in the face of a recalcitrant plaintiff to use the procedures of the court to have the full trial of a failed interlocutory injunction disposed of.

Core facts

4. The plaintiff claims illegality in the removal by Waterways Ireland of barge 43M, which happened on 11 October 2011. The course of proper attention for the High Court, and this Court on appeal, was and remains on a narrow range of issues and not on the very wide scatter of assertions that characterise the pleadings in this case. The key issues are: whether the barge had sunk; had the plaintiff previously been asked to remove it prior to Waterways Ireland removing it; was the barge obstructing the narrow canal where it was lying on the canal bed; did Waterways Ireland have the statutory power to take the barge away and to dispose of it or to store it pending the resolution of these proceedings? In contrast to focusing on these points, the plaintiff asserted before the High Court a range of issues related, not to the barge but, to the general management of waterways. Hence, he claimed that there were ten abstractions of water from the Barrow Navigation by Kildare Woodchip Limited, not a party to the proceedings, which allegedly

interfered with the draft of the waterway. Further, it is pleaded that in November 2001, Kildare County Council made a proposal to take surface water from the Barrow for domestic and industrial purposes. Also asserted is that Waterways Ireland propose to sell the Barrow navigation. To whom, when or for what is not detailed. What purported to be a statutory Interference Notice was issued by the plaintiff, in respect of both the surface water and groundwater from the catchment of the Barrow navigation. The plaintiff, however, is not one of the statutory bodies entitled to issue such a notice. Instead, he is a private person without authority to issue any such notice. The plaintiff, nonetheless, claims to have had navigation authority status under s 21 of the Water Supply Act 1942. S 21(1) of the Act gives definition whereupon an Interference Notice may be issued on coming within the legislative mandate, which otherwise does exist, being a statutory invention, the expression "navigation authority" meaning: "in relation to any navigable water, the person entitled to navigate thereon or to receive tolls or dues in respect of navigation thereon." The plaintiff as a private operator, does not receive tolls. Even supposing to the plaintiff status to issue such a notice, this case remains about the seizure of the barge. Consequently, this assertion is part of a range of assertions that have nothing to do with the case.

5. Pending a full trial, by motion the plaintiff sought interlocutory prohibitive and interlocutory mandatory injunctions before the High Court. In the pleadings and affidavits is the assertion that Waterways Ireland has an obligation to maintain water depth on the Barrow navigation at 1.2 metres. This can have nothing to do with the sunken barge 43M. Waterways Ireland denied that the plaintiff held navigation status in the High Court. In a finding of fact made by the High Court on the analysis of the interlocutory papers, there was an absence of proof of a valid permit in respect of barge 43M for the three years prior to the decision. Since the removal of barge 43M off the canal bed, the barge has been stored for nearly 10 years by Waterways Ireland at a cost of about €3,000 per annum. Furthermore, barge 43M is, on the evidence on affidavit, missing support hoops, leaks badly, is decayed, is not capable of being floated and hence is not asserted to be worth anything close to what has been spent on storage. Furthermore, it is a standard canal barge and nothing at all suggests that it may have a unique or special character whereby, in equity, it might attract the range of protections which enables courts of equity to apply special protection to unique items, or whereby real property may be the subject of specific performance; since each piece of land has traditionally been regarded as possessing an individual character. This consideration is central when considering the test of adequacy of damages as an alternative remedy to the injunctions sought.

The High Court

6. The reliefs claimed by the plaintiff are five in number. On the face of the motion seeking interlocutory orders pending a full trial, these are both prohibitory and mandatory in nature:

> 1. An injunction restraining the Defendant whether by itself or by its servants or agents from selling or disposing of my Barge called 43M
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> 2. An injunction to the Defendant to maintain the Grand Canal
>
> 3. An injunction to the Defendant to maintain the Barrow Navigation
>
> 4. An injunction restraining the Defendant from selling or disposing of any part of a disused canal or navigation
>
> 5. An injunction restraining the Defendant selling or disposing of water or a source of water required for navigation purposes
>
> 6. Further or other relief

7. In the High Court, the plaintiff also pleaded Article 4 of Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. He claimed that this obliged the Irish authorities to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by the 25th June, 2005. He referred to the objective of the Aarhus Convention. He said that he was awaiting an appeal from the Circuit Court in relation to one particular abstraction of water but remained concerned about the potential consequences of the continuous abstractions which he said were ongoing. Even still, none of that would either have sunk his barge or have rendered it less of an obstruction of the canal or have prohibited or permitted its removal.. In Waterways Ireland's submissions before the High Court, it was submitted that an interference notice dated 1 March 2003 had been served on Kildare County Council by the plaintiff, but the Council was not a party to the proceedings. Waterways Ireland submitted that neither the plaintiff nor Canalways Ireland were navigation authorities as asserted by the plaintiff. Canalways Ireland had challenged the decision of An Bord Pleanála in relation to a provisional order made on 4 December 2003 related to water abstraction. Canalways Ireland are not party to these proceedings: the parties are the plaintiff and Waterways Ireland as defendant. Simply as a matter of background, therefore, that planning matter was before the Circuit Court and, in turn appealed to the High Court, where the appeal was said to be still outstanding at the time of judgment in the High Court in this case. Waterways Ireland submitted that this brought to an end any further challenge by the plaintiff as to water abstraction and indicated that it was unclear whether the plaintiff or Canalways Ireland were the registered owners of the barge in question. If the plaintiff had no permit to navigate, then he did not come to court with clean hands, Waterways Ireland claimed, as in the maxim he who comes to equity must come with clean hands. The report on the High Court judgment, on this point of registration, indicates "this fact was uncontroverted."

8. As this was a routine Monday motion, no written judgment was delivered in the High Court though a report on the judgment of 27 April 2012 was prepared by Murphy J. At [5], the report on the High Court judgment concludes:

> The court decided that an interference notice had been served in Kildare County Council. Waterways Ireland was the wrong defendant. The water had been taken by Kildare and Offaly Local Authorities…
>
> The court noted the undertaking as to damages by the respondent. The issue of a navigational authority was a matter for the hearing…
>
> The order sought were mandatory orders which in any event were exceptional and required a high degree of proof. The court would be reluctant to make such orders as it would be difficult to supervise their implementation.
>
> The court was concerned with the locus standi of the plaintiff in the absence of proof of a valid permit [for barge 43M] for the last three years.
>
> The adequacy of damages and the balance of convenience justified the court in refusing the application for injunctive relief.

9. In the notice of appeal to this Court, to recap, the plaintiff seeks various reliefs including the following: a perpetual injunction to maintain the Grand Canal and Barrow Navigation to the certified draft; and an interim injunction against the respondent from selling or disposing of any of a certain class of craft.

10. At case management, McKechnie J made an order that the sole issue on the appeal is whether the High Court was correct as a matter of law in refusing Mr Hoey's application for an

interlocutory injunction moved by motion dated 5th December 2011. That is now the sole matter that is before this Court on the appeal.

Submissions of the plaintiff

11. The plaintiff submits that his application is governed by the *Campus Oil* guidelines and that, "in consequence, all he must establish is," in the words of O'Higgins CJ in *Campus Oil Ltd v. Minister for Industry and Energy (No 2)* [1983] IR 88 (at 107), "that he has raised a fair bona fide question." The plaintiff claims that an award of damages would be inadequate to compensate him for any loss he might suffer if an injunction is not granted and his barge 43M disposed of. He also claims that the balance of convenience favours granting an injunction; citing *Rogers v An Post* [2014] IEHC 412. Essentially, this series of orders sought could be regarded as an application by him to preserve his barge pending him obtaining a decision in the High Court at full trial that it was unlawfully seized and that it be returned to him. This covers ground 1 of the reliefs sought. But grounds 2 and 3, claiming an order against Waterways Ireland to maintain the navigability of or the depth of the Barrow and associated canals, claim mandatory injunctive relief at interlocutory stage. Ground 4, seeking the prohibition of the sale of any part of such waterways is a very wide relief, prohibitory in nature, certainly, but in respect of which there is not the slightest evidence that there is any prospect, immediate or remote, that any such lands containing waterways would be sold. If this is to be taken in reference to abstracting water, which ground 5 explicitly is, the order sought is a vague prohibition but not one based on any clear law and in respect of which the plaintiff has not demonstrated an interest, and certainly not an interest that he can claim will affect him personally.

12. Additional points were raised in the submissions that go beyond the issues on appeal. From the plaintiff's submissions, these include:

> That Waterways Ireland has failed in its statutory duty because it has allowed the river to become "starved of water and [it] is unable to provide the necessary uplift to support the larger barges on the navigation".
>
> The respondent had no powers to grant or allow Kildare County Council to take the water. In this case the injunction should have been granted because the defendant/respondent had no arguable case.
>
> That public interest justifications may not trump a constitutional right, presumably a right to navigate, which is not a recognised constitutional right, or to keep water courses exactly as they were.

13. The third part of the plaintiff's submissions are most relevant because these relate to the removal of barge 43M on the 19th October 2011.

> I refer to paragraphs 28 to 42 of my submission to the court dated 21 May 2018. I also refer to paragraph 39 of the Affidavit of Mr. Shane Anderson for the defendant/respondent where he confirms that 43 M was tied up at my own Jetty.
>
> In this case the barge had been at the same location since I purchased it on the 21st December 2007, no damage occurred or was complained of and there were no previous complaints about the barge being an obstruction.
>
> In relation to the adequacy of compensation for the removal of 43 M I refer to paragraph 31 of the respondent's legal submission on page 9. I submit that damages for the loss of the boat is not adequate.

> In his handwritten notes Judge Murphy highlights the excessive actions of the defendant/respondent and at page 4 of Judge Murphy's report on the judgment he confirms that the immediate loss of the Barge and cradle as being €25,000. This is not accurate the steel frames and plating on their own to support the cradle would cost in the region of €10,000 on its own. This investment in 43M was to be the first phase of my commercial barge trading activities which I had planned and I refer to Exhibit MH 20 drawings for a purpose built commercial Barge which I was planning to have built and operate.

14. The submissions of the plaintiff then reference the concerns of Murphy J that he may not have *locus standi* to seek injunctive relief, given the lack of a permit for barge 43M:

> There was a permit on the Barge when I purchased it in 2007 and when I travelled on the Grand Canal from Shannon Harbour to Rathangan. As stated at para 138 of my originating affidavit "that Mr Anderson's insistence that I get a permit is an attempt at indemnifying the defendant, against any claim for loss or damage to property or injury to persons arising out of the use of the facilities provided by the defendant on the canals and may have undone ten years of work trying to protect my navigation and property rights."
>
> In the case of *Hill v Cock* (1872), 36 J.P. 552 it was found that 'an obstruction which is a private nuisance may be abated in a reasonable manner provided that the least injurious means are employed.' In this case this did not occur and there was no need to remove the barge.

15. The plaintiff's final submission is as follows:

> With reference to relief no 5 of the Notice of Motion I submit that in addition to not participating in the water abstractions identified in Table 1(Table 1 at MH 10 c. Tab 17) there is no excuse or defence for the defendant/respondent setting out to give away the water supply for the Royal Canal and to try to use the Water Supplies Act procedure to compulsory purchase the water from Lough Ennell. I had no opportunity to inform the court in detail in at the hearing of the Motion in2011 and I raised this issue at the first opportunity at paragraph 30 on page 8 of my second affidavit filed on the 15th April 2018.

Defendant's submissions

16. Waterways Ireland contend that the central issue on this appeal is whether or not the High Court erred in the exercise of that court's discretion to refuse to grant the interlocutory injunctive reliefs sought by the plaintiff and, in particular, whether the High Court erred in finding that the difficulty in supervision of the mandatory reliefs, the adequacy of damages and the balance of convenience justified Murphy J in refusing the application for injunctive relief. Waterways Ireland submits that many of the issues raised are outside the scope of this appeal. As noted, the appeal is limited by order of McKechnie J to the injunctive reliefs sought. Further, Waterways Ireland claims that the plaintiff has raised a number of issues on the appeal that were not before the High Court. It is asserted that the plaintiff's legal submissions embrace scandalous and groundless allegations against members of the judiciary, servants or agents of Waterways Ireland, counsel for the defendant and third parties such as Kildare County Council, in particular on page 4 of the submissions under the heading "underlying points of fraud and undue influence."

17. Waterways Ireland submits that a perpetual injunction does not arise on this appeal because it is a remedy which can only ordinarily be granted at the final determination of a case and, accordingly, following the hearing of the plaintiff's plenary action. It is contended that the plaintiff

has failed to meet the first limb of the *Campus Oil* test that there is no serious issue to be tried and further that the appellant has failed to meet the other limbs of the *Campus Oil* test as to adequacy of damages and that the balance of convenience does not justify returning the barge pending trial. Waterways Ireland contend that the plaintiff has completely failed to address the question as to whether damages would be an adequate remedy and has also failed to identify the manner in which it is alleged that the High Court erred in finding that damages would be an adequate remedy in place of injunctive relief:

> The principal relief sought by the Appellant in the High Court, namely, an order restraining the Defendant from disposing of the barge salvaged by the Defendant from the bed of the Grand Canal, is one which is justly convertible into damages, should the Plaintiff succeed at trial. The Appellant's derelict barge, the 43M, has a monetary value capable of being ascertained. In the event that the Defendant, as it is entitled to do, disposes of the 43M, the Plaintiff will be capable of being compensated entirely by an award of damages should he succeed at the trial of the action.
>
> The Appellant has failed to point to any loss that would be occasioned to him in the event that other M boats, apart from the 43M, were sold or disposed of and/or if the Respondent sold any part of disused canal or navigation or any water or a source of water required for navigation purposes.
>
> In such circumstances, and based on the fact that, in practical terms, the consideration of the adequacy of damages is generally the single most important factor in the analysis of whether or not to grant an interlocutory injunction, it is submitted that on this basis alone the court should decline to grant the prohibitory interlocutory reliefs.
>
> In circumstances where the Appellant concedes that nothing urgent was about to occur, there is no necessity for interlocutory injunctive relief and the Plaintiff's case can be adequately dealt with at the hearing of the plenary action.

18. Thus, it is also contended that the plaintiff's delay in (i) first applying for an interlocutory injunction and (ii) prosecuting the within appeal is fatal to the application for interlocutory injunctive relief; as in the maxim, delay defeats equity. As is asserted in the affidavit of Shane Anderson, the plaintiff had delayed for eight years in instituting proceedings in circumstances where he was aware of the matters complained of since March 2003; in fairness, however, this relates to water abstraction. In all the circumstances, Waterways Ireland pleads that the High Court was correct in refusing the mandatory orders sought.

19. The submissions of Waterways Ireland then address the other errors alleged by the plaintiff to have been made in the judgment of Murphy J in the High Court. These, however, are not in issue on this appeal. The background facts are contended to be part of the necessary matrix because the clear statutory law on the subject is that a trial judge, on considering an application for an injunction, will have regard to, and should uphold, unless there is a basis for a reasonable and tenable contention that there is an overriding factor which makes such law inapplicable. This includes the Interference Notice, the assertions as to water abstraction, which is made by the plaintiff as against Kildare County Council, and which has statutory authority under the Water Supplies Act 1942 s 13 to abstract water, and is not a party, and so cannot be made subject to injunctive relief. Any contention by the plaintiff that this is already subject to an appeal in another case is said to be irrelevant. As a matter of fact, it is pleaded, the High Court dealt with the appeal from the Circuit Court as to the water abstraction issue on 26 May 2005 and there was no outstanding appeal as of the date of the judgment of Murphy J in the High Court on 27 April 2012. In addition, Waterways Ireland answer all procedural questions raised by the plaintiff such as his ability to cross-examine in the High Court. On that, as a matter of law, it is only on special summons and summary summons cases that, under the Rules of the Superior Courts, cross-

examination is an entitlement. Other than that, it is at the discretion of the trial judge and this is usually exercised only as to a direct conflict of relevant evidence on affidavit where the resolution of a fact is essential to the outcome of an application.

Interlocutory injunctions

20. Of the essence of any interlocutory injunction is that it is a plea seeking the aid of the High Court or Circuit Court, also holding equitable jurisdiction in this respect, so that an order preserving so much of the situation in contention may be made pending a full resolution at trial. In every application prior to trial, the danger emerges of a wrong decision since the court is then only dealing with affidavit evidence and has a limited view of the issues. As Lord Hoffman put the matter in *Films Rover Ltd v Connon Film Sales* [1987] 1 WLR 670, 680 this prompts the court towards the least risk of injustice; see also Clarke J in *Okunade v Minister for Justice and Equality* [2012] 3 IR 152 at [67]. Further, since delay defeats equity, the remedy of injunction is usually, in fact almost invariably, granted at a pre-trial level on the basis of an application with an air of urgency; one where the plaintiff asserts that rights are being interfered with by a defendant and that the erosion of the plaintiff's position must be halted, or exceptionally reversed, in order to preserve so much of the *status quo* as is possible pending the resolution of the issues at full trial. This essential characteristic is stated in Kirwan, *Injunctions: Law and Practice* (3rd edition, Dublin 2020) at 6-317, footnotes omitted:

> An interlocutory injunction is generally sought due to some measure of urgency which demands that a court intervene prior to the substantive hearing of an action. As such, and as has been seen in cases such as *Lennon v Ganly* delay in applying for such an injunction may be fatal to the application. Delay was also critical in *Futac Services Ltd v Dublin City Council*, in which Smyth J. held that the plaintiff had "in effect, awaited events as they unfolded and did not move with reasonable expedition." That being so, an application for an injunction on an interlocutory basis needs to be made promptly once an identified wrong has been committed or is apprehended. If there is no such urgency evident, this will militate against the court acceding to such an application.

21. There has been considerable delay by both parties in bringing this appeal to hearing. As such, since the need to move as against an infringement of rights is at the heart of any application to ask a court to intervene prior to trial, this speaks against any claim that such an intervention by the Court at interlocutory stage is either warranted by the circumstances or is necessary to prevent an avoidable injustice by preserving as much of the rights of the plaintiff as is fair and just pending a resolution at full trial.

Mandatory interlocutory orders

22. Turning first to the mandatory injunctions sought: these are grounds 2 and 3 claiming an order maintaining the navigability of, or the depth of, the Barrow waterway and associated canals. A difference in approach is demonstrated in the case law where, as a matter of reality and sensible analysis, a litigant seeks, on the one hand, to require by court order that a defendant carry out a positive action, and on the other hand, those applications where the relief is merely to stop something happening, or, in effect, to freeze what has already happened so that no further harm, or contended-for harm, may be done. As an equitable remedy, an injunction is at the discretion of the court in order to prevent injustice; but a discretion founded on identifiable principles. As noted, it is also a remedy with potentially serious consequences. The effect of an injunction is that once served with the penal endorsement inscribed on the court order, or through notice in court by participation in the hearing, or by giving an undertaking personally or through an advocate to the court, any breach by a defendant, or by those with notice, can enable civil contempt proceedings

to follow. Such a step may place the court in the position of being required to enforce its own order through processes that can include imprisonment. Any injunctive order thus engages the processes of the civil courts in their most serious aspect.

23. What is mandatory is different to a prohibition and is more onerous on a defendant than merely ordering that a defendant stop doing something. As Lord Upjohn said in *Redland Bricks Ltd v Morris* [1970] AC 652, 666, a court in compelling a defendant to do something "must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions." Clearly, for a court to order that something stop is different to an order that a defendant embark on works of a specified nature, which must necessarily require that an order be in precise terms. The supervision of the court on those works is impossible. Contentions as to what should have been done, whether same was done properly, may be predicted to result. A party with the benefit of a prohibitory interlocutory injunction is in a different and relatively straightforward position, being able to say the defendant: continued to build, to picket, to market patented medicines, to carry on a nuisance by noise or smells, after the injunction and the consequences may be attachment for contempt of court. Those with the benefit of a mandatory injunction are in possession of an order that specific works be done, or that property be returned; for instance that a drain be built to prevent flooding, that goods be returned completely intact or that a computer system for accessing patient records in a hospital should be entirely uploaded as against a contention of copyright by a defendant. These measures, especially at interlocutory stage, are onerous, need to be specific. Mandatory orders at interlocutory stage, of their nature, go beyond the usual instincts of a court that what needs to be done pending trial is to preserve the *status quo*: rather, such mandatory orders require precise and positive steps. Mandatory injunctions involve difficulties in judging what the exact form of the order ought to be, in enforcement, in evoking cross-contentions post decision by the parties, and in the inherently different nature of requiring that matters be done, or steps taken, rather than that matters simply cease.

24. While it may be vacuously argued that a prohibition does not inherently differ from a mandatory order, there is a sensible difference to which a court of equity will always address itself in a commonsense way. That difference is as set out by Keane in *Equity and the Law of Trusts in Ireland* (3rd edition, Dublin 2017) where the author states at 5.111: "A mandatory injunction is one that commands the defendant to do a specific act: it is to be distinguished from a prohibitory injunction, which simply restrains him from doing something." Of necessity, this is a working definition but it also has legal consequences, a prohibitory injunction being subject to a different test to a mandatory injunction. In that regard, while the citation of Fennelly J in the course of his judgment in *Maha Lingam v Health Services Executive* [2006] 17 ELR 137, is related to an employment matter, where, in the context of a claim which, in part, relied on the Protection of Employee's Fixed Term Work Act 2003, but sought the positive return and incorporation of a suspended employee 2003, the principle stated in that judgment is well supported by existing authority. To quote:

> However, having looked at that Act the Court cannot see that it significantly alters the matter. It is unnecessary to go into it except that the general policy of the Directive and the Act seems to be to protect employees who are employed on short term fixed term contracts and who have been employed on such basis for a certain minimum number of years, either three or four years, and, accepting for the sake of the purpose of the present case, that the plaintiff is employed under such a contract of employment, the question would be whether he could make out a case to justify the grant of an interlocutory injunction. There are two major obstacles in place of the plaintiff/appellant in this context; first that it that the implementing Act, the 2003 Act, contains, like the Unfair Dismissals

> Act, its own statutory scheme of enforcement and it does not appear to be envisaged by the Act that it was intended to confer independent rights at common law or to modify in general the terms of contracts of employment to be enforced by the common law courts; and the second is that in any event the general terms and provisions and policy of the Act and of the Directive seems to be to put persons who were in such short term contracts in the same position as if they were persons who were on fixed long term contracts but in neither event does it appear to interfere with the ordinary right and obligation of the employer to terminate the contract on the giving of reasonable notice and for that reason the matter comes back within the general ambit, therefore, of the sort of remedy that would be available to the plaintiff/appellant for the termination of the contract.

25. That standard, as to what was described in *Redland Bricks Ltd* as requiring a "very strong probability" by Lord Upjohn, at 665 was considered by Megarry J in *Shepherd Homes Ltd v Sandham (No. 1)* [1971] CH 340, 351, as being correct and requiring "a high degree of assurance". Megarry J describing an interlocutory order requiring a defendant to positively act, stated:

> On motion, as contrasted with trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

26. What is thus required for a mandatory inunction prior to trial is a level of proof from a plaintiff that at the ultimate trial that relief is likely to be granted. This engages the probability standard where an interlocutory mandatory injunction is sought by a plaintiff.

27. Here, there is no probable ground established by the plaintiff for any mandatory injunction. Sometimes this form of order is grounded on the clearest possible assertions of law and fact which of necessity, perhaps because of a grave injustice, need to be resolved straight away; but only there on the basis of probability being demonstrated. Without the need to further comment on that principle in the light of modern cases, there is no basis for making the kind of wide-ranging and positively vague and legally unsubstantiated orders here sought. This Court's ultimate power of enforcement through the attachment jurisdiction could not possibly be sought in aid of matters about which a court could know little, where a court could easily be led into contentious and unresolved waters, and where the orders sought do not practically aid the plaintiff in any real sense, even assuming he has sufficient interest to establish his standing.

Prohibitory interlocutory orders

28. Returning to the prohibitory injunctions sought at interlocutory stage: ground 1, to recap, seeks to stop the sale of barge 43M; ground 4, seeking the prohibition of the sale of any part of such waterways is a very wide relief, prohibitory in nature, certainly, but in respect of which there is not the slightest evidence that any such lands containing waterways would or might be sold. Since a decade has passed and there has been no sale or offer for sale, the entire foundation of the order sought is infirm. If this were taken as somehow a reference to abstracting water, which ground 5 specifically is, that is a vague prohibition that the plaintiff has sought but not one based on any clear law and in respect of which the plaintiff has not demonstrated an interest. All injunctions which proceed at interlocutory level, where there is only opportunity in the courts for a limited appraisal of the facts on affidavit evidence, mean that the court decides whether or not to make an order maintaining the *status quo* on the basis of what will cause the least risk of injustice to the parties; Clarke J in *Okunade* [2012] 3 IR 152, 181. On principle, if a reasonably arguable case is not

established by a plaintiff that interfering with the ostensibly lawful, or not demonstrated on a reasonably arguable basis to be unlawful, actions of a defendant is appropriate at interlocutory stage, for a court to order that a situation be preserved may "create a serious and disproportionate risk of injustice"; *Okunade* [71]. The alternative to injunctive relief, an aspect of equitable jurisdiction, is the ordinary award of damages for a civil wrong when the trial is heard. No ground for an injunction at interlocutory stage is demonstrated if an award of damages will be adequate to compensate a plaintiff for any contended for loss. That is a key principle when injunctive relief is sought at interlocutory stage.

29. Here, we are concerned with a barge, old, partly stripped, as contended for by Waterways Ireland by the plaintiff himself to construct a canal bank mooring, and not, in contrast, with any precious, unique, irreplaceable or heritage item. In terms of the discretion exercised by a court of equity, whether on an application for specific performance or for injunctive relief, personalty is contrasted to realty. Realty, the kind of dwelling people place their heart's desire on, or the farm with aspects suitable for a range of purposes and possessing specific amenities, and long regarded by courts of equity as having unique characteristics and qualities, is different to an object. An object may have such a status, for instance a steam barge or other heritage vessel. A canal barge, apart from that, is not realty and does not similarly engage the same degree of equitable protection. In *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 Finnegan J observed:

> The courts regard interests in land differently to interests in personality and, in general, damages are not considered to be an adequate remedy. It was for this reason that courts of equity developed the remedy of specific performance: Adderley v. Dixon (1824) 57 E.R. 239. Likewise a mortgagor can always obtain an injunction to restrain a mortgagee from wrongfully exercising his rights: Kerr, A Treatise on the Law and Practice of Injunctions (6th ed., 1927, Sweet & Maxwell) at pp. 523 to 532.

30. On an application for a prohibitory injunction, once a reasonably arguable case is established at interlocutory stage and damages are not demonstrated to adequately compensate for an apprehended loss, a consideration of the balance of convenience is directed to discovering where the least harm would be done. In that regard, maintaining what is there at the time of the injunction, the *status quo*, is generally the approach of the courts as the best way to avoid an apprehended injustice; *Okunade* 180-181 and see the restatement and clarification of these principles by O'Donnell J in *Merck Sharpe and Dohme Corp v Clonmel Healthcare Ltd* [2019] IESC 65 [64] placing the approach to interlocutory injunctions as facilitated by a structured approach but "with a recognition of the essential flexibility of the remedy and the fundamental objective in seek to minimise injustice, in circumstances where the legal rights of the parties have yet to be decided." This involves also a consideration "of how matters are to be held most fairly pending a trial, and recognising that there may be no trial." Of the principles enunciated, a key, and primary, consideration is that a court should not lose sight of whether, at full trial, what is sought on an interlocutory basis, may or may not be ever granted. Then, it must be established that the plaintiff has "a fair question to be tried, which may involve a consideration of whether a case will probably go to trial." As to holding the *status quo*, that consideration is one of "how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice", which should involve a range of factors, but where the most important factor is the adequacy of damages. Where a contract claim is involved as between commercial organisations, scepticism as to pleas of inadequacy are warranted, but difficulty in assessment and in making damages "a precise and perfect remedy" is an appropriate factor to be taken into account.

Balance of convenience

31. Some authorities look at the issue of balance of convenience as part and parcel of, and mixed with, a consideration of whether damages will be an adequate remedy. Since, an injunction is a remedy at the discretion of the court, perhaps it may be proper to look at such remedies together; but essentially what is being considered is whether the pre-trial grant of an injunction is appropriate in all of the circumstances then known to the court and this must include whether the ordinary remedy of damages would be adequate. To quote Keane, *Equity and the Law of Trusts in Ireland* at 15.74-15.78:

> If the court is satisfied that there is a fair, *bona fide*, question to be determined in the proceedings, it must then go on to consider whether the 'balance of convenience' lies in favour of granting rather than refusing the interlocutory injunction.
>
> The phrase 'balance of convenience' has been criticised with some force on the ground that the court should be concerned with justice rather than the convenience of either of the parties. However, provided that it is born in mind that it is simply a useful shorthand expression, no great harm is done by its use. The court will not grant an injunction where it would be *unjust* to do so no matter what the convenience of the parties may suggest. … Where there is a doubt as to the adequacy of the respective remedies in damages available to either party, the court will take other factors into account in assessing where the balance of convenience lies. In the first place, where other factors appear to be evenly balanced it will in general 'as a counsel of prudence' seek to preserve the *status quo* pending the trial. The *status quo* normally means the situation which existed at the time the proceedings were commenced; if, however, there has been unusual delay by the plaintiff in applying for the interlocutory injunction, it will be the *status quo* at the time of the application which will be relevant. In the second place, where he damage likely to be suffered by either side as a result of the granting or withholding of he relief is not determinative, the court may take into account the comparative strength of the parties' respective cases. … In all cases concerning interlocutory injunctions, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be the wrong course when the case is finally decided.

32. Part of that consideration by the court must certainly be the undertaking as to damages required from a plaintiff, whereby if the court falls into error in making an interlocutory order, a defendant will have some remedy for what will, necessarily, be a restriction of rights. Central must be the nature of the item, if not realty, and any inherent characteristic claimed. A court will also look at what the nature of the ongoing harm appears, on any fair view, to be, whether sleep is lost, whether people are inconvenienced by nuisance, whether trade secrets may be spread beyond those proper to be privy to same, whether patented medicines are to be undermined by substitutes in the marketplace. Where, in consequence, does a just order lie in the context of the position of the parties, what they are to be restrained from doing and how that may hold the position in a fair manner pending to trial?

This case

33. What kind of case has been demonstrated here? In terms of fact and in terms of law, the contentions of the plaintiff do not establish a sufficient basis for the intervention of a court of equity. Firstly, the legal basis for what the plaintiff seeks is not manifested to be reasonably arguable. While in *Okunade* Clarke J at [67] counselled against rushed decisions at interlocutory stage of complex questions of law, there are also questions of law which are genuinely uncertain,

there are cases where a recent case is authority for a specific proposition and there are black letter law cases where there is a clear statutory authority passed by the Oireachtas in exercise of its exclusive law making power under Article 15.2 of the Constitution, or where an instrument is passed within the limits of delegated legislation, that completely undermines the contentions of a plaintiff. This is a black letter law case pursuant to Bye-law 34 of the Canals Act, 1986 (Bye-Laws), 1988 [SI No 247 of 1988] as notified to the Appellant by letters dated 18 May 2011 and 2 November 2011. Bye-Law 27 provides:

> (1) The owner, master, or person in charge of any boat which has—
> (a) gone aground on any part of the canal property, or
>
> (b) sunk in any part of the canals
>
> shall, as soon as possible after the going aground or the sinking, inform the Commissioners thereof, and take all such steps as may be necessary to re-float the boat or remove it from the canal property.
>
> (2) The owner, master or person in charge of any boat which has sunk in any part of the canals shall mark the place with a marker or buoy where such boat sank and shall maintain the marker or buoy in that place until such boat has been raised.
>
> (3) Where a boat has gone aground or has sunk in any part of the canal property, the boat may be removed and stored by, or on the authority of, the Commissioners.

34. Bye-law 31 states: "Any boat, vehicle or object may be removed by, or on the authority of, the Commissioners where such boat, vehicle or object interferes with the use of the canals or canal property." So, there the only possible issue would be was there, on a reasonable basis, an interference with the navigation or associated facilities in having barge 34M full of water and not moving and taking up about half of the navigation space. That is not a substantial issue on which to claim a wrong. Especially as Bye-law 34 provides:

> (1) Where any article has been removed and stored in accordance with Bye-Laws 6, 25, 26, 27, 28, 29, 30, 31 or 32 of these Bye-laws there shall be payable to the Commissioners by the owner of such article compensation equal to the costs incurred by the Commissioners in the removal and storage of, and including the cost of making good any expense, loss or damage caused by, such article. The amount of the compensation shall be computed by the Commissioners and their certificate as to the amount thereof shall be final.
>
> (2) The Commissioners may dispose of any article which has been removed and stored in accordance with Bye-laws 6, 25, 26, 27, 28, 29, 30, 31 or 32 of these Bye-laws in any manner they think fit where the owner of the article has not claimed it and paid the compensation due within one month.
>
> (3) Where the Commissioners propose to dispose of an article in accordance with the provisions of this Bye-law, they shall, subject to paragraph (4) of this Bye-law, and provided the article is valued by the Commissioners at more than £200, serve on the owner of the article a notice of their intention to dispose of the article.
>
> (4) Where it has not been found possible on reasonable enquiry to ascertain the name and address of the owner of the article the Commissioners shall publish in at least one daily newspaper notice of their intention to dispose of the article.

> (5) Compensation under this Bye-law may, in default of being paid, be recovered as a simple contract debt in a court of competent jurisdiction.
>
> (6) The Commissioners shall not be liable for any loss or damage arising from the removal, storage or disposal in accordance with these Bye-laws of any article.

35. As to compensation Waterways Ireland might not be successful in ultimately recovering the costs of removal, storage and disposal from the plaintiff; but that is not because of a lack of legal authority. Waterways Ireland is entitled to dispose of pursuant to Bye-law 34(2). The barge in question had been moored for more than five days and so required a permit; Bye-Law 25 (1)(d). Waterways Ireland has the authority to remove the Barge under By-Law 27(3) if it interferes with the use of canals; Bye-Law 31.

36. Here, the balance of convenience is one whereby if Waterways Ireland is required to return the barge to the plaintiff, that defendant will lose any possible lien they may have over the property; thereby, the statutory authority of Waterways Ireland to remove, store and dispose of obstructions will be made subject to question and what is sought is effectively to reverse the authority over the Barrow navigation based on an argument contradicted by clear law. Having the barge, rather than it being stored, avails the plaintiff nothing if he is not in a position to assert some unique characteristic. What is to be done with it, other than him storing it? The storage cost is now huge but it is in consequence of the dispute that the storage is being maintained .

How strong a case?

37. How strong a case does a plaintiff have to present in seeking a prohibitory injunction pending trial? This question is answered by the extant authorities, but a perusal of Kirwan indicates a variability of approach which is, possibly, more than the discretionary nature of the equitable remedy might suggest, notwithstanding the flexibility emphasised in the *Merck Sharp and Dohme* judgment as to the overall assessment of where the justice of such an order might lie. While many authorities emphasise that what is a fair case to be tried, the *Campus Oil* test, establishes quite a low threshold, see Keane J in *Fanning v Public Appointments Service* [2015] IEHC 663, it is not a negligible test. Nor is that test a reason to ignore clear legal authority. Nor could the test be equated with cases where there is a motion to strike out on grounds of lack of substance, vexation or frivolity; where courts take every contention in a statement of claim at its height and are conscious of the constitutional duty to allow any arguable grounds to be adumbrated and adjudicated upon; see *O'Gara v Ulster Bank of Ireland DAC* [2019] IEHC 213. Keane, in *Equity and the Law of Trusts in Ireland* at 15.67-15.73, traces the wording of this primary consideration on an interlocutory basis as related in *Educational Co of Ireland v Fitzpatrick* [1961] IR 323 as being, as regards the majority of the Supreme Court, a demonstration by the plaintiff of probable success at full trial, but points out that all the judges agreed with Lavery J in characterising this as "a fair question raised to be decided at trial"; at 337. Llater, on the face of the judgment, this reverted to a requirement to prove a probability in *Esso Petroleum Co v Fogarty* [1965] IR 531, 541. This was the test adumbrated by O'Higgins CJ in *Campus Oil* at 107 as revolving around "whether a fair, *bona fide* question has been raised." No different view is taken here since, as Keane points out, the test adopted "is a more practical and workable one than that which requires the plaintiff to prove in the necessarily truncated and inconclusive interlocutory proceedings that he is more likely to win than lose." But, what should nonetheless be born in mind is the prospect of confusion arising from an analysis of what is fair, what is put up in good faith and that there is a quite extreme range in what is arguable, from what is barely stateable, but not at all potentially convincing, to what is beyond sensible contradiction. Securing compliance with the law is one of the objects of interlocutory relief; a point emphasised in the judgment of Clarke J in *Okunade.*

38. Courts should continue to be conscious that the law, if clearly established, ought to be applied: the invention or construction of law in argument is not the same as demonstrating to a court which may later be called upon to exercise powers for compulsion in the event of contempt that a contention of fact and law is reasonably capable of succeeding when fairly and objectively viewed. While many expressions have been used as to the nature of the test as to what kind of case the plaintiff is putting up at interlocutory stage, the principles in *Okunade* and in *Merck Sharpe and Dohme* are unchanged. Meeting the first part of the test should focus on what may reasonably be contended, what is a fair point, as the colloquial expression has it in encapsulating what ordinarily is regarded as reasonably arguable, as opposed to speculatively or distortedly argued, on whether there is clear statutory or case decision as authority which enables a clear view of the law to be taken to the contrary of any such argument.

39. It should also be remembered that literally anything may be argued. he courts in administrative law have developed the principle that decisions flying in the face of fundamental reason and common sense may be quashed; judicial review, while not of equitable origin, nonetheless being another discretionary remedy*; Meadows v Minister for Justice* [2010] 2 IR 701, *Barry & Others v Minister for Agriculture and Food* [2015] IESC 63, for example. Further administrative actions such as arrest are required to be taken only on reasonable grounds; see *Braney v Ireland* [2020] IESC 7 for a review of the authorities. Similarly, leave to commence judicial review requires some ground to be put forward that is not contradicted by existing law and which is reasonably arguable; *Esme v. Minister for Justice and Law Reform* [2015] IESC 26. No lesser test than what may reasonably be contended for, in a context where that argument is not met by black letter law or recent authority, especially in circumstances where there lurks behind every grant of the discretionary remedy of an injunction the prospect not only of potential injustice but also of the invocation of civil contempt against any party proven to be in disobedience of a court order. Hence, here the expression reasonably arguable is preferred as the correct way to construe the fair case to be tried aspect of the *Campus Oil* principles as restated and reviewed in *Okunade* and in *Merck Sharpe and Dohme.*

Result

40. There is nothing to be found that is reasonably arguable here. There is black letter law enabling the removal of an obstruction. There is clear law allowing the storage of a vessel in such circumstances. Waterways Ireland are empowered to dispose of the vessel. This is not realty, or a precious and irreplaceable item, nor is a noxious experience threatened such as the continued diminution in the amenities of a dwelling through nuisance by noise, smells, toxic fumes or disturbance in other ways. This is a barge. It may be sold since there is statutory authority to do so. It is easily valued. The value of a boat, which is not an irreplacable heritage boat like the Saint Brendan, the bar is put high in referencing the late Tim Severin's heroic voyage across the Atlantic in the wake of the saint, it is ordinary, not contended to be anything other than a barge and not demonstrable as being in the same category as realty which equity generally protects. A heritage, a unique, an antique or an item of major personal value may be in that category. A serious interference with personal convenience or the amenities of property may also evoke the principle that damages are not adequate as a remedy. But that is not demonstrated here.

41. Hence, there is no reasonably arguable case made by the plaintiff that Waterways Ireland acted illegally, damages are an adequate remedy and it is consequently unnecessary to proceed to consider the balance of convenience or maintaining any status quo.

42. Thus, the appeal is dismissed and the order of Murphy J in the High Court is upheld.

43. Finally, this is a case which if it ever goes to full trial in the High Court cannot be allowed to become a lengthy one. Case management should establish the essential parameters of the case and thus remove parts for which there is perhaps no standing to argue or no statutory authority to contend for or where the wrong party as defendant has been chosen. Bearing in mind the strictures

clearly established by *Talbot v Hermitage Golf Club* [2014] IESC 57, the case should be allocated such time as its importance demonstrates. Case management and ordinary and reasonable time limits become ever more central in clearing the backlogs that the current pandemic have tiered over the ordinary work of the courts.