

THE HIGH COURT

[2022] IEHC 130
[RECORD NO. 2021 5055 P]

BETWEEN

GARY KEVILLE TRANSPORT LTD

PLAINTIFF

AND

MSC (MEDITERRANEAN SHIPPING COMPAN)] LIMITED

AND

MSC (MEDITERRANEAN SHIPPING COMPANY) SA

DEFENDANTS

JUDGMENT of Mr. Justice Dignam delivered on the 8th day of March, 2022.

Introduction.

1. This matter comes before the Court by way of an application by the Plaintiff ("GKT") for an interlocutory injunction. An interim injunction in the following terms was granted on consent by Barr J on the 17th August 2021:

"that the Defendant be restrained until after the 11th day of October 2021 or until further Order in the meantime from exercising any embargo on the Plaintiff delivering and/or collecting the Defendants' containers from any depot within Ireland and in particular to revoke and/or cease any instruction or business practice which has the consequence of prohibiting the Plaintiff company from transporting collecting and/or carrying the Defendants containers".

2. The application comes before the Court in a somewhat unusual fashion in that a Notice of Motion was not issued following the granting of the interim injunction by Barr J. The matter simply proceeded by way of exchange of affidavits and was then given a hearing date of the 12th January 2022. It was clarified during the hearing that GKT was seeking an interlocutory Order in the same terms as the interim Order, suitably adapted for the interlocutory stage. The Defendants ("MSC") did not suffer any prejudice from the absence of a Notice of Motion as they had proceeded on the basis that GKT was asking the Court to continue the interim Order pending trial.
3. A further unusual feature of the case is that in fact the interim Order expired on the 11th October 2021, so while the parties proceeded on the basis that this hearing was concerned with an application to continue that interim Order that is not in fact the case. Again, given that both parties proceeded on the same basis, this does not appear to have caused any difficulty and I have treated it as an application for an interlocutory injunction. It must also be noted that MSC, notwithstanding the expiry of Barr J's Order, continued not to exercise any "embargo" (as described in the Order) on GKT delivering and/or collecting MSC's containers from any depot within Ireland.
4. Finally, it must be noted that there is a considerable dispute between the parties as to the circumstances of the making of the consent interim Order. There are a number of aspects to this dispute, one of which is whether the Order was properly made against the Second-named Defendant. I do not propose to address this at this stage. GKT's case is that the First-named Defendant was at all material times dealing as agent of the Second-named

Defendant. The First-named Defendant accepts that it presents itself to be the agent of the Second-named Defendant but says that all relevant operations in Ireland are conducted by the First-named Defendant and that the Second-named Defendant has not participated in any of the matters complained of by GKT. At the time of the making of the consent interim Order against both Defendants, the First-named Defendant's solicitor was not on record for the Second-named Defendant. In light of my conclusion below I do not need to address the legal consequences of this dispute and these averments. In the meantime, I will refer to the Defendants either separately or together as "MSC" save where it is necessary to distinguish between them. I will refer to the Plaintiff as "GKT".

5. The application is grounded on an affidavit of Mr Gary Keville, a director of GKT, sworn on the 17th August 2021. A replying affidavit on behalf of MSC was sworn by Mr. Seán Douglas on the 18th October 2021. As noted above, there was an issue in relation to the inclusion of the Second-named Defendant and therefore at the time of swearing Mr Douglas swore the affidavit on behalf of the First-named Defendant only. An affidavit was also sworn by Mr. Gearóid Carey on the 18th October 2021. Mr. Carey was the solicitor for the First-named Defendant at that time and later came on record for the Second-named Defendant. His affidavit deals with events surrounding the application for the interim Order, discussions between the parties on that occasion and the grant of same by Barr J.
6. As I understand it, the matter appeared in the Chancery list from time to time and when it appeared in that list on the 16th December 2021, the Court gave it a date for hearing on the 12th January 2021 and directed that a Statement of Claim be delivered. That was delivered on the 21st December 2021. The Court did not give liberty for the filing of any further affidavits. However, an affidavit was sworn by Ms Helen Noble, solicitor for GKT on the 4th January 2022 and by Mr Gary Keville on the 6th January 2022 and they were delivered to the solicitors for MSC shortly thereafter. On the first day of the hearing MSC objected to these affidavits being admitted in circumstances where they were filed and delivered (after the date for hearing had been set) without leave of the Court and, indeed, without the Court being informed that further affidavits would be delivered. I heard submissions from the parties as to whether these affidavits should be admitted. Counsel for MSC made it clear that they were not seeking to adjourn the matter in order to reply to these affidavits, despite the fact that they would have things to say in reply, because they were anxious that the matter should proceed in order to bring some finality to the situation which had prevailed since the making of the Order in August 2021. They were, therefore, objecting to the admission of the affidavits. I decided that these affidavits should be admitted with the caveat that their contents were disputed. I did so on the basis that the objective of the Court when dealing with the late delivery of affidavits is to ensure that justice and fairness is done between the parties; that there was a risk of unfairness if GKT was not permitted to address the affidavits of Mr Douglas and Mr Carey but there was a particular risk to MSC in the affidavits being delivered in the manner in which these affidavits were because, if MSC looked for time to reply, the hearing of the interlocutory injunction would have to be adjourned and MSC would remain constrained, or at least would feel constrained, by the terms of the interim Order for a further period

of time. I therefore admitted the affidavits on the express basis that GKT and the Court would not treat or consider MSC as having accepted any of the contents of those affidavits as being true or correct and GKT acknowledged this.

7. In those circumstances the evidence on the application was set out in the affidavits referred to above with the caveat that nothing contained in the affidavit of Ms Noble or the second affidavit of Mr Keville could be treated as having been accepted by MSC save where there was no dispute as to the facts.

Summary of the background

8. GKT is a haulage company which was established in 1993. MSC is a shipping company.
9. As part of the haulage services which GKT provides to its customers it transports containerised goods for those customers. This service includes collecting filled containers, delivering them to the customer and then returning the empty container on the instructions of its customers to various container depots in Dublin including depots known as Reefercare, Stateline, Dublin Ferry Terminal and Dublin Ferry Port Container Depot. Mr Keville in his affidavit describes GKT's customers for the service as various global and transport logistic operators and freight forwarders who have arranged the door-to-door transportation of containerised goods with container shipping companies such as MSC.
10. The business structure seems to be that the goods carried within the containers are owned by GKT's customers (or their customers) and the containers are the property of the shipping company - insofar as relevant to this dispute, MSC. GKT's customers book passage and GKT is then tasked by its customers with transporting the goods to and from port within the shipping company's containers.
11. It is common case that there is no contractual relationship between the haulier (in this instance GKT) and the shipping company (in this instance MSC). The haulier's customers are also customers of the shipping company but that is a separate relationship. Mr. Keville does refer to the fact that on occasion the directions as to which depot a container should be returned to are given directly by MSC and that some of MSC's customers have nominated GKT as their agent in conducting dealings with MSC. However, he makes clear that GKT has not pleaded that a contractual nexus exists between the parties.
12. The evidence of Mr. Keville, which was not disputed, was that GKT had been "*occasionally transporting our customers containerised goods without incident, apart from the incidents referred to above, since 1993 but have been growing this side of the business in recent years and have invested recently in recruiting two extra drivers to service these customers.*"
13. Mr. Douglas on behalf of MSC described the engagement between the parties as "*sporadic and occasional at best, as the Plaintiff does not frequently or regularly collect or deliver MSC containers.*"

14. Two incidents occurred (one in March 2020 and the other in July 2021) which caused difficulties between GKT and MSC and which ultimately led to the application the subject of this hearing.
15. In the first of these incidents (March 2020) GKT was required by a customer to transport an empty container belonging to MSC to the Reefercare depot in Dublin Port, Reefercare having been nominated as the return depot by MSC. The driver queued at that depot for a period of time before he was told that the depot was full. The evidence is that this is not an infrequent occurrence as there is serious congestion at the various container depots. These depots are not owned by GKT or MSC. There was contact between GKT and MSC and GKT was told to bring the container to another depot, Stateline in Ballymun, but GKT's driver had already brought the container to GKT's own depot.
16. GKT was of the view that the extra cost and charges arising should be paid by MSC. There followed what can only be described as a stand-off, with GKT insisting that those charges be paid before it would release MSC's container back to it. In addition, GKT also proposed to charge storage and trailer hire for the time while the MSC container was in GKT's depot. Ultimately, MSC paid the bills though under protest.
17. The second incident occurred on the 22nd July 2021. On that occasion GKT was instructed by its customer to return an MSC container to the Stateline depot. When the GKT driver attempted to do so, Stateline refused to accept the container. It transpired that in fact MSC had instructed GKT's customer the previous day that the container was to be returned to the Dublin Ferry Terminal depot rather than Stateline but GKT's customer had not advised GKT accordingly. When the GKT driver could not gain admission to the Stateline depot he brought the container back to GKT's own depot (apparently on Mr. Keville's instructions) and Mr. Keville informed MSC that it would invoice for the additional charges that had been incurred and once they were paid GKT would arrange delivery of the container to the Dublin Ferry Terminal.
18. This second incident led to MSC instructing the various container depots not to allow GKT to deliver or collect any MSC containers and GKT brought its application for an interim injunction in response.

The Evidence as to the Dispute

19. The disagreement which led directly to MSC's instruction to the depots and therefore to the application to Court by GKT was largely played out in correspondence between the parties. It is therefore necessary to set out in more detail the events of the 25th March 2020 and 22nd July 2021, the contents of the written communications between the parties and what they say about those in their affidavits.
20. The first incident occurred on the 25th March 2020. GKT's driver queued at the Reefercare depot for 40 minutes and was told the depot was full and the container should be brought to the Stateline depot in Ballymun. Mr Keville emailed MSC at 11:30 and stated that if MSC required the container to be brought to Stateline there would be a transport cost of €150 plus VAT which "*needs to be paid in advance*". Four minutes later an MSC

representative replied, copying his colleagues seeking advice, and 15 minutes later Mr Keville responded to say that they could not wait around any longer and that the container would be returned to GKT's own depot. He also stated that there would be three charges: transport cost to GKT's depot, trailer hire per day/all days count and transport cost from GKT's depot to Dublin Port. At 11.56 (7 minutes later) a representative of MSC replied, referring to how congested Dublin Port is and how as soon as they get information that a particular depot is full, they try to get space in an alternative depot. Four minutes later Mr. Keville replied to say that GKT had not been informed of any plan change, that the container would be returned to GKT's depot as stated in the email of 11:49 and that the charges in that email were justifiable and applicable. Later that evening, GKT sent an invoice for that day's truck/trailer hire and at approximately the same time the following evening, the 26th March 2020, sent an invoice for that day's trailer hire. By email of the 26th March at 18.54 MSC stated that they had informed Mr Keville the previous day that he could return the empty container to Stateline, that it was his decision to keep the MSC unit in the GKT yard and that MSC would not pay for that. MSC also stated that if GKT kept the container longer than allowed detention charges would be generated on the MSC system.

21. Mr Keville then replied stating:

"The instruction for the return of the container was clearly stated as Reefercare

My truck was refused at your nominated depot (Reefercare) after a long time spent queueing.

We were informed by your depot (Reefercare) to travel to Ballymun.

Your office was informed of the additional charges applicable to this detour - You (on behalf of MSC) refused to accept the charges.

We sent you an invoice by email yesterday evening - This invoice/email was ignored.

We send you another invoice by email this evening - now you are refusing our justifiable and applicable charges.

The additional charges applied to this issue are of no surprise to your office as I notified your office in advance of our departure from Reefercare.

It was your decision to ignore my advance notification.

Please be aware, the container will remain on my trailer until the justifiable and applicable charges are paid in full and in advance.

Daily trailer hire costs will continue to accumulate and will be invoiced on a daily basis."

22. MSC then offered to cover 50% of GKT's costs up to the previous day and advised that if the container was not returned as soon as possible there would be detention charges generated and the importer would be charged. This was rejected by GKT later that same day, Friday 27th March 2020, and Mr Keville stated that trailer hire for the day would be invoiced before close of business on that day
23. This then led to a reply from Mr. Paul Barton, managing director of MSC, in which he said:

"We will not accept any additional trailer hire based on your decision to hold onto our container. These strong arm tactics are not acceptable.

Will you accept the detention charges from MSC from tomorrow onwards?

In looking down through the emails you received a response from Margaret 26 minutes after your original email (which is exceptionally fast). You made no attempt to contact our office by phone for a quicker response.

You made the decision to return the empty to your depot, without approval from MSC. Am I missing something?

If you had contacted our office by phone we would have confirmed that the empty should be returned to Stateline instead.

I accept this was a miscommunication on MSC's part and we have no issue paying for the journey from Reefercare to Stateline, but outside of this we will not accept any other charges.

We are trying to be reasonable here, but there appears to be no compromise on your part."

24. Mr Keville replied shortly after that, joining issue with the contents of Mr. Barton's email, saying:

"You are certainly missing something? (Sic)

Following our 40 minute experience queueing only to be refused lift off, 26 minutes later I receive an email refusing to accept any charges. Is this reasonable?

I advised your office of the additional cost... This cost was refused. Is this compromising?

Refusing to pay for justifiable additional charges was the introduction of the strong arm tactics, by your office in the first instance.

As for being reasonable and compromising, this is failure on your behalf.

I will accept payment for the two outstanding invoices and I will return the container to the depot on Monday, after full payment is received.

No trailer hire costs will be invoiced from now to the return of the container on Monday."

25. Mr. Barton replied fourteen minutes later to say:

"Returning the container to your depot and charging trailer hire fee for a day and another charge for transporting the container to Stateline without consent from MSC is not justifiable.

If you insist on continuing with the stance of holding our container and that MSC pay the two invoices in full, detention charges will apply from tomorrow.

Alternatively in the interest of resolving this matter I can agree to paying €200 if you return the container on Monday and that is my final offer.

Trust this closes the matter."

26. Mr Keville then replied thirty-two minutes later quoting and responding to each of the paragraphs in Mr. Barton's email:

"With respect, I don't have the time nor the interest for this continuous issue.

"Returning the container to your depot and charging trailer hire fee for a day and another charge for transporting the container to Stateline without consent from MSC is not justifiable"

I don't require MSC consent when MSC created this issue.

If you insist on continuing with the stance of holding our container and that MSC pay the two invoices in full, detention charges will apply from tomorrow.

The reason I am holding the container until Monday is due to the unavailability of a truck to transport it to the depot plus awaiting payment

No trailer hire will be charged for today, tomorrow and Sunday - This is me being reasonable

If you want to apply detention charges, I will apply full trailer hire

Alternatively in the interests of resolving this matter I can agree to paying €200 if you return to the container on Monday and that is my final offer.

As clearly stated in my last mail, the two invoices outstanding require payment.

This is my final communication"

27. Mr Douglas in his replying affidavit on behalf of MSC avers "ultimately, in order to resolve the issue and secure the return of the container and avoid discord with the Plaintiff, I say that the First Named Defendant did pay the amounts sought by the Plaintiff in the sum of

€2084.85 and the container was duly returned. As identified above, this was a novel issue for the First-named Defendant which had not been experienced before with any haulier, but in order to secure the return of our property we were left with no choice but to submit to this unreasonable demand and the effective holding of our container to ransom."

28. The second incident occurred on the 23rd July 2021. On that occasion GKT was mistakenly instructed by their customer, a freight company, to return an empty MSC container to the Stateline depot. When the GKT driver sought to do so, Stateline refused to accept the container. As it transpired, MSC had instructed the freight company the previous day that the container should be returned to Dublin Ferry Terminal but that was not passed on by the freight company, GKT's customer, to GKT.

29. When GKT's driver was refused permission by Stateline to drop the container Mr Keville contacted MSC by email at 8.54 on the 23rd July informing it that Stateline was refusing to accept the container and asking MSC to "*sort this please*". By email of 9:03 (nine minutes later) MSC told GKT that the container had to go to Dublin Ferry Terminal not Stateline. That was repeated in a further email at 9:32. However at 9:55 Mr. Keville replied and said that:

"...This container is at my depot now.

We will send you an invoice shortly for the additional charges...

Once the invoice is paid, we will arrange delivery to DFT".

30. A representative of MSC replied at 10.22 to say that:

"... MSC will not accept any charges. My colleague advised you as below that 40' HCS should be returned to DFT.

From what I remember you kept MSC unit already last year as well.

We do not want to play your games but if you're going to keep our unit again, we will ask DFT to ban your drivers of entering the terminal "

31. Mr Keville then replied at 10.45 to say:

"You certainly know how to escalate a problem...Who do you think you are???"

I received an email yesterday informing empty units to Stateline (no further email received)

As for your comment about playing games..... I own and operate an extremely professional transport company and I take offence to your comment

The previous issue was caused by your company taking a bullying approach to an issue caused by yourselves, obviously no lesson was learnt.

You have just formally issued a threat against me/my business "we will ask DFT to ban your drivers of entering the terminal"

I strongly suggest you think about the contents of your emails.

If you attempt to create an issue between my company and DFT, I will issue legal proceedings against you and your employer."

32. The same representative of MSC replied shortly after that to take exception to the tone of Mr Keville's emails and to again ask for the return of the MSC container to DFT.

33. Mr Douglas, the deponent on behalf of MSC, then became involved and emailed Mr Keville at 11:56 to say:

"You are entitled to take whatever action you see fit, legal or otherwise, fact remains this equipment is the ownership of MSC and to protect our interests and the interest of our Principal we will instruct our container depots and if necessary DFT (for import) to refuse all further releases to GKT, you can deal with the situation as you see fit but GKT will not gain access to our equipment.

We are working in extremely challenging environment - depots, terminals are all heavily congested and on occasions we need to make changes to try assist, otherwise the operation would grind to a halt.

If you'd like to pass on my details to your legal representative feel free... Details below."

34. An email was also sent by Mr. Dave Quinn, Operations Manager of MSC, in which he said:

"As the shipping line MSC have total autonomy over our equipment and as such we who (sic) we will and will not release units to, as it is our equipment.

Obviously we cannot stop you entering the terminal.

What my colleague is saying is you will not be permitted to remove or laydown MSC containers in or out of DFT/MTL/Stateline/Reefercare whether they are full or not.

This should solve the problem of our containers delaying your trailers.

Trust this is clear."

35. MSC followed through on its warning that it would instruct the depots not to allow GKT to drop or collect any of MSC's containers. Mr. Keville explains on affidavit how this adversely affected the company by leading to them not being able to fulfil some contracts and through loss of business.

36. There followed some emails from Mr. Keville asking whether GKT was banned and then on the 28th July 2021 he wrote:

"In April of last year, an issue arose on foot of your company redirecting GKT to deliver a container to a second destination after GKT had arrived at the contracted, original destination. Whilst MSC procrastinated on payment of additional charges incurred as a result of this redirection, including extended trailer hire costs and indeed an unwarranted and unsuccessful attempt to pass these costs on to our customer, East European, the bill was eventually and rightly paid by MSC.

It seems clear that this episode left a sour taste in some mouths (see email attached of July 23rd).

Move forward to last week, wherein we had a similar load redirection when our driver, having arrived and queued for c.40 mins was instructed to take his load to a second destination. By email I contacted your office, explaining that we have queued only to be told by the Stateline forklift operator to take the container elsewhere. Several attempts by me throughout that day to resolve the issue were ignored.

It transpired that Champion Freight had been instructed the day before to redirect the delivery but had failed to pass this on to GKT. You are aware of this miscommunication as Champion Freight in turn accepted responsibility and agreed to cover GKT's justifiable charges. This was conveyed by Ed Champion, to you by email.

However, instead of this being the closure of the matter, we now understand that MSC have instructed Stateline and Reefercare (and possibly others) to ban GKT from delivering/collecting any MSC container. This is documented in their communications to us.

Under advice, I am writing to you to address this wrong and to immediately reverse your vindictive "ban" instruction and decess (sic) the obvious personal vendetta against me and my company. Failure to do so, I will escalate the matter through the appropriate channels to force redress and remedy in terms of compensation for loss of revenue and reputational damage. So far I have identified four loads that GKT had been forced to abandon, as a result of your "ban" and I will continue to document further losses as they come to pass..."

37. Mr Douglas replied by email of the 29th July 2021 saying:

"You are fully aware our policy, we are here to represent the interests of our company and will not permit any practices which put our well-being or that of MSC in jeopardy - the industry today is extremely challenging - we will not be held to ransom by contractors or third parties who improperly hold our equipment for recompense (for whatever reason) delays relating to restitution of equipment or related is a consequence of the industry, common user terminals are full, heavily congested - these problems are not the failing or deficiencies of MSC we not (sic) the responsible party but like all it is something that we as a Carrier and dare I say

our own contractors must contend with every day but we do so in a professional and respectful manner."

38. Mr Keville replied on the 30th July saying:

"I fully appreciate your prioritisation of the interests and well-being of MSC and rightly so. Also, you are correct that the industry is extremely challenging, especially these days and all stakeholders including both our companies need to compromise and work together, professionally and with respect for all.

The incident at the root of this issue was caused by an absence of communication from our mutual friends at Campion Freight, which to be fair was subsequently acknowledged and remedied by Ed Campion (i.e. covering the costs incurred). Ordinarily that should have been the end of it. What I can't see as fair is the resultant banning by your good selves of GKT from carrying MSC containers through the depots e.g. Stateline and Reefercare.

Can I ask you to revisit this decision and enable us all to get back to work... Focusing on looking after the needs of our mutual customers?"

39. It has been necessary to set out all of this correspondence in detail because the parties have fundamentally different perspectives on the underlying dispute and on the meaning of these exchanges which they each rely on to justify their respective positions.
40. GKT's perspective is that it incurred extra costs through no fault of its own and was therefore entitled to recover those costs from MSC and was entitled to do so in advance of returning MSC's containers; and that MSC's instructions to the depots was revenge for GKT having exercised its entitlement, was a personal vendetta and was unjustifiable and vindictive.
41. MSC's perspective is that GKT had no entitlement to pass on additional costs, or at least not those costs which were not caused by MSC, but that in any event GKT was not entitled to seize or hold onto MSC's containers pending payment and then to charge the cost of holding onto the containers to MSC. It therefore decided not to permit GKT to take possession of its containers so as to avoid a similar situation in the future.
42. GKT takes the position, at least in relation to the March 2020 incident, that it did not retain the containers to secure payment but that it could not wait around for instructions, had to bring the container to its own depot and had no trucks to return it to MSC. GKT also maintains that MSC's concern about the retention of containers is a manufactured concern to seek to ex post facto justify the instruction given by MSC to the depots.
43. These perspectives are set out in pre-litigation correspondence from GKT's solicitor and in the parties' affidavits.

44. There are two points of disagreement between the parties which it would be helpful to address at this stage, insofar as they can be addressed at the interlocutory stage of proceedings.
45. The first is the question of why GKT retained the containers. MSC maintains that this was a "strong-arm tactic" to force payment by MSC and was a case of GKT holding MSC to ransom whereas Mr Keville says in paragraph 13 of his second affidavit that *"I made it very clear to the first named defendant that the sole reason I was holding the container until the following Monday was because I had no truck spare to transport the container to the newly designated depot, having planned according to the original itinerary."* [emphasis added]
46. However, the assertion that the sole reason why GKT was holding the container was the non-availability of a truck is not supported by the contemporaneous evidence including Mr Keville's own emails. As set out above, in Mr Keville's first email on the 25th March, 2020 he made clear that if MSC required *"the unit to be returned to Stateline, there will be a transport cost of €150 and VAT at 23% which needs to be paid in advance"* [emphasis added]. At 11.49 he informed MSC that the container was now in GKT's yard and a number of different charges were applicable. By email of 19.32 on the 26th March he stated *"please be aware, the container will remain on my trailer until the justifiable and applicable charges are paid in full and in advance."* [emphasis added]. By further email of 16.01 on the 27th March he stated *"I will accept payment for the two outstanding invoices and I will return the container to the depot on Monday, after full payment is received."* [emphasis added]. Then by email at 16.47 he stated *"the reason I am holding the container until Monday is due to the unavailability of a truck to transport it to the depot plus awaiting payment."*[emphasis added]. In relation to the second incident, Mr Keville stated in an email of 9:55 (less than an hour after he was told to bring the container to Dublin Ferry Terminal after his customer had omitted to pass on an instruction to do so) that *"this container is at my depot now. We will send you an invoice shortly for the additional charges... Once the invoice is paid, we will arrange delivery to DFT."* [emphasis added]
47. A final finding will have to await a full hearing. However, based on those documents, I have no hesitation in concluding for the purpose of this discussion that at least one of the reasons why the containers were retained by GKT was to secure payment. Furthermore, it is of note that the possible existence of a lien has been referred to by GKT during submissions which seems to suggest that it will be argued that GKT was entitled to retain the containers to secure payment.
48. Thus, GKT views the imposition of an "embargo" as being a response to its exercise of an entitlement to be paid the extra charges by MSC and describes it as disproportionate and unreasonable whereas MSC views it as being a response to both that and the seizure and detention of its property by GKT.
49. The second issue is the assertion by GKT that MSC's concern over the retention of its containers was manufactured ex post facto to justify the "embargo". In paragraph 14(ii)

of his second affidavit Mr. Keville states *"In the ultimate sentence of paragraph 14 of his affidavit Mr. Douglas seeks to retrospectively justify the imposition of the embargo as a necessary protective measure. This justification was not however stated by the Defendants at the time they threatened the ban. The reason for imposing the ban was the threat of imposing charges which as stated by Mr. Douglas at paragraph 22 of his affidavit was taken most seriously. The justification that the issue arose due to the threat of retention of containers has been suggested after the event and has been described in terms such as misappropriation and holding to ransom the First-Named Defendant's containers."*

50. In paragraph 18 of the same affidavit Mr. Keville says *"Notably the focus of Mr. Douglas' affidavit has switched from a focus on charges being levied to the appropriation of containers. I have dealt above with how this argument has been conveniently developed after the imposition of the ban to somehow justify its imposition..."*. In paragraph 20 Mr. Keville states *"Mr. Douglas in developing his new ex facto justification for imposing a ban goes as far as to suggest that the Plaintiff does not have clean hands in seeking equitable relief in the form of an interlocutory injunction as it has not given a commitment to desist from withholding containers in the future..."*.
51. However, in the documents exhibited by Mr. Keville, as early as 10.22 on the 23rd July 2021 (the day of the second incident) MSC's representative referred to the retention by GKT of a container in 2020 and said *"We do not want to play your games but if you are going to keep our unit again, we will ask DFT to ban your drivers of entering the terminal."* Later that morning Mr. Douglas of MSC emailed Mr. Keville to say: *"You are entitled to take whatever action you see fit, legal or otherwise, fact remains this equipment is the ownership of MSC and to protect our interests and the interest of our Principal we will instruct our container depots and if necessary DFT (for import) to refuse all further releases to GKT, you can deal with the situation as you see fit but GKT will not gain accept (sic) to our equipment."* On the 29th July 2021 Mr. Douglas had written (albeit after the instruction had been given to the depots) *"...we will not be held to ransom by contractors or third parties who improperly hold our equipment for recompense (for whatever reason)..."*
52. Thus, the suggestion that a concern about the retention of the containers was sought to be used retrospectively to justify the imposition of the ban is simply not supported by the evidence to date. MSC raised it with GKT on the very day on which the dispute arose. I am satisfied for the purpose of this discussion that the concern in relation to the retention of the containers was not manufactured after the imposition of the ban.

Parties' Submissions

53. GKT contends that what is sought is a prohibitory interlocutory injunction which seeks to prohibit MSC from instructing depots not to allow GKT to drop off or collect MSC containers. This would have the effect of maintaining the status quo pending the trial of the action.

54. As it is a prohibitory injunction all that is required of GKT is to establish that there is a fair, bona fide or serious question to be tried; that the Plaintiff has pleaded a number of causes of action (referred to below) and that it has established a fair question in respect of each of them. Even if it has not established a fair question in respect of any of the individual causes of action provided it has established a fair question in relation to one that is sufficient.
55. Damages would not be an adequate remedy because containers are an essential part of GKT's business and denial of those containers may cause irreparable damage to the business and break GKT's entire chain of operation. It is also contended that as a small family business trading on its name and goodwill the reputational harm done by a "ban" would have extremely grave consequences.
56. The balance of convenience favours the granting of the injunction because it maintains the status quo that had been in place since the mid-1990s. The Defendant would suffer no prejudice if the Order was granted whereas the "re-instatement" of the "ban" could be catastrophic to GKT's business. In this latter regard, it is important to note that by the time the interlocutory application came on for hearing GKT indicated in written submissions and the second affidavit of Mr Keville that it was prepared to "*give an undertaking that no containers will be detained in said fashion, should the Order remain in place.*" This was first contained in the written submissions filed on behalf of GKT on the 6th January 2022.
57. GKT describes the dispute between the parties as a "*David and Goliath*" situation, an attempt by a "big player" to stamp out dissent and that the Defendant's attitude is that "it's our way or the highway".
58. MSC opposes the application on a number of different grounds. Firstly, it contends that GKT did not come to court with clean hands and that it must therefore be denied relief. The Defendant submitted that this has to be resolved first. Secondly, the onus of proof is on GKT in respect of all limbs of the test for an injunction – it is not up to MSC as defendant to justify its position. Thirdly, the injunction is in substance a mandatory injunction because its effect is not just to prohibit MSC from declining to allow GKT to carry its containers but also to compel MSC to allow GKT to do so. The appropriate test is therefore the higher test of a strong arguable case and that GKT has failed to satisfy that test in respect of any of the causes of action. Fourthly, the balance of convenience or justice favours the injunction being refused because (i) damages would be an adequate remedy and (ii) an injunction of the type sought would require supervision and this militates against the grant of an injunction.

Discussion

GKT did not come to Court with clean hands.

59. MSC submitted that if it were determined that GKT did not come to court with clean hands then it would not be entitled to an injunction and that the Court should resolve this first.

60. No authority was provided for the contention that this question should be considered first or separately from the other elements of the test for an interlocutory injunction rather than as part of the Court's overall discretion. However, in circumstances where I am not satisfied that the conduct which is contended to disentitle GKT to relief was sufficiently wrongful to amount to a bar on GKT securing such relief I do not need to resolve whether it should be considered first or as part of my overall consideration.
61. MSC points to four separate matters which it says amounts to GKT coming before the court with unclean hands.
62. First, GKT acted unlawfully in detaining MSC's containers – if GKT has a claim, whether on a quantum meruit basis (as stated by GKT) or any other basis, then that should be prosecuted in court if necessary but not by what MSC described as the 'strong arm tactics' of retaining MSC's property until the charges are paid. As noted above, Mr. Keville has sought to say that GKT was not retaining the container in March 2020 to secure payment but rather because GKT had no truck spare to transport the container. As noted above, to the extent that Mr. Keville says that the sole reason why the container was retained was the non-availability of a truck that is not supported by the evidence and I am satisfied for the purpose of this application that one of the reasons for the retention of the container was to secure payment.
63. In *Curust Financial Services Ltd & anor v Loewe-Lack-Werk Otto Loewe GmbH & anor* [1994] 1 IR 450 it was held that for wrongful conduct to disentitle a party to relief it must of necessity involve some element of "turpitude" and not just a breach of contract.
64. I am not satisfied that the retention of the containers reaches the level of turpitude required to debar GKT from relief if it is otherwise entitled to relief. For reasons discussed below and subject to argument at the full trial (GKT in its submissions refers to a lien and the law of bailment as being of relevance but this has not been developed yet) it seems to me that the retention of GKT's containers was unacceptable. However, the context of the exchange of emails between the parties and of GKT's decision has to inform any assessment of whether GKT's conduct was sufficiently wrongful to amount to the type of misconduct which would disentitle it to equitable relief.
65. There is undoubtedly high pressure in the haulage and shipping industry - this is clear from the affidavits of both parties - and delays can cause serious problems for all parties involved: a delay in being able to drop off a container can have a knock-on effect on GKT and a delay in the return of a container can have a knock-on effect on MSC. This is the context in which Mr. Keville acted. Furthermore, Mr. Keville undoubtedly feels strongly that he is entitled to pass on any additional costs which he has incurred through no fault of GKT. It seems to me that allowance has to be made for this context and the pressure in which Mr. Keville's decisions were made and his emails sent. They were written and sent with great immediacy in a pressurised industry. As Charleton J said in *Kelly v Simpson* [2008] IEHC] 374 "the court shall always remember that the parties are subject to human folly before dismissing a claim on the grounds of conscience."

66. Secondly, MSC relies on the circumstances in which the interim Order was secured, particularly, though not exclusively, against the Second-named Defendant. These matters were addressed in Mr. Carey's affidavit of the 18th October 2021. This affidavit was replied to by an affidavit of GKT's solicitor sworn on the 4th January 2022. This was one of the affidavits which was filed without leave of the court and which was objected to by MSC and which I admitted on the basis set out above. There are very serious factual disputes disclosed in those affidavits and I do not believe they can be resolved on affidavit. In those circumstances, I cannot make a finding at this stage that GKT was guilty of misconduct such as might disentitle him to equitable relief.
67. Thirdly, MSC relies on the terms of the email which GKT sent to the depots after the consent Order for an interim injunction was granted. The email quoted the terms of the Order. It did not refer to it having been made on consent, describing it as a "*ruling by the High Court*" and asked the depots to confirm that they had been instructed accordingly by MSC and that GKT would be accommodated when collecting/delivering MSC containers. Most important for this discussion is that the subject line of the email read "*MSC illegal embargo on GKT*" This, of course, suggested to the reader that the Court had ruled and found that the "embargo" was illegal. That is clearly incorrect. No such finding could have been made at an interim or interlocutory stage even if there had been a contested hearing but the Order was in fact made on consent.
68. MSC referred the Court to the judgment of Twomey J in *Ryanair v Skyscanner* [2020] IEHC 399. Twomey J was strongly critical of a press release which Ryanair released after securing an ex parte interim injunction against Skyscanner in Germany. The press release did not refer to the fact that the Order was secured ex parte and Twomey J referred to the possibility of this giving a misleading impression that the court had considered all the evidence, including Skyscanner's defence, and had found that Ryanair was in the right and Skyscanner was in the wrong. GKT's communication was equally capable of creating a similar misleading impression. However, there are also key differences between the two communications. First, Ryanair issued a press release which presumably was intended to be picked up by the media and which may have led to wide circulation whereas GKT's communication was only sent to the depots who were the very parties to whom MSC had given the impugned instruction. Second, as noted by Twomey J, Ryanair also relied on the fact that an injunction had been granted by the German court to call for the boycotting of Skyscanner. Twomey J placed very great significance on this aspect of the press release.
69. I am satisfied that Mr. Keville's communication was inappropriate and unacceptable in its terms. However, I do not think it was of the same order as Ryanair's conduct in Skyscanner or was sufficiently wrongful or reprehensible to disentitle GKT to relief given its limited circulation and purpose.
70. Finally, MSC relies on GKT's failure to progress the substantive proceedings or this application after securing the interim Order. There is an obligation on a party who secures an interim or interlocutory Order which curtails the actions of another pending the determination of the proceedings to prosecute those proceedings with all due expedition.

He cannot simply sit back with the benefit of the interim or interlocutory Order and adopt a laconic attitude to the substantive proceedings. He cannot be dilatory in the exchange of documents, such as affidavits, which are necessary to have the interlocutory application heard. There is no doubt that GKT could have moved with greater expedition in this case. The interim injunction was obtained on the 17th August 2021 and MSC's replying affidavits were filed on the 18th October 2021. Of course, MSC's affidavits could have been filed sooner but the same obligation is not on the party whose freedom to act is curtailed by the Order as is on the applicant, who has the benefit of that curtailment. Nothing further occurred until the 16th December 2022 on which date GKT applied for a hearing date and the Court directed that a Statement of Claim be filed. No application to file any further affidavits was made by GKT and two affidavits were then served in the few days prior to the hearing. Proceedings, in the context of injunctive relief, must be prosecuted with greater dispatch than this. MSC has been bound or felt itself bound since August 2021 not to take steps which it wishes to take and is entitled to have the matter determined at the earliest practicable opportunity consistent with fair procedures for both parties.

71. However, while GKT's prosecution of the matter was far from ideal – particularly in light of the fact that MSC's solicitors were seeking the delivery of the Statement of Claim through correspondence from October to December - I do not believe that it is such as to amount to GKT not coming to court with clean hands.
72. I have also considered whether the cumulative effect of each of these points brings the Plaintiff's conduct to a level of turpitude such as to disentitle it to relief and I am not satisfied that when taken individually or together they do so.
73. However, it does seem to me that some of these points are also relevant to a consideration of where the balance of convenience or justice lies and I return to them below.

Nature of the injunction and the test to be applied.

74. The test for an interlocutory injunction is well-established (see *Campus Oil v Minister for Industry and Energy (No. 2)* [1983] IR 88). The applicant must establish:

1. That there is a fair or bona fide or serious question to be tried.;
2. That damages would not be an adequate remedy;
3. That the balance of convenience favours the grant of the injunction.

75. Clarke J restated the test in *Okunade v Minister for Justice & Ors* [2012] 3 IR 152 in stating:

- the party seeking the injunction must show that there is a fair or bona fide or serious question to be tried.

- if that be established, the court must then consider two aspects of the adequacy of damages. First the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by the award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the Plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.
- If damages would not be an adequate remedy for the Plaintiff, then the court must consider whether, if it does grant an injunction at the interlocutory stage, the plaintiff's undertaking in damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated in damages, then the injunction will normally be granted. This last matter is also subject to the proviso that the Plaintiff would be in a position to meet the undertaking for damages in the event that this called on.
- If damages would not adequately compensate either party, then the court must consider where the balance of convenience lies.
- If all other matters are equally balanced the court should attempt to preserve the status quo.

The approach to an interlocutory injunction, particularly, though not exclusively, in relation to the consideration of the adequacy of damages and the balance of convenience, was recalibrated by the Supreme Court in *Merck Sharpe & Dohme v Clonmel Healthcare Limited* [2019] IESC 65 but the threshold test was not altered.

76. It is, of course, also long-established that the test to be applied to an application for a mandatory injunction is higher than for a prohibitory injunction and the applicant must establish a strong arguable case (*Maha Lingam v HSE* [2005] IESC 89 and Clarke CJ in *Charleton v Scriven* [2019] IESC 28).
77. It is clear that whether an injunction is a prohibitory or mandatory injunction is a matter of substance rather than form. Clarke CJ said 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...*
- 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 IR 205 and the judgment of Irvine J in Stoskus v Goode Concrete Limited [2007] IEHC 432.*

4.8 *The reason why a higher standard is applied is not because of some technicality but because of the greater risk of injustice which I have sought to identify. But that greater risk is a function of the substance of the order sought and the consequences which it might have for an individual who became bound to obey the interlocutory injunction but ultimately succeeded. It is clear that, at least in general terms, requiring someone to do something which, it may ultimately transpire, they were not required to do may give rise to a greater risk of injustice than simply requiring someone to refrain from doing something which they may ultimately be found to be entitled to do. But that question is dependent on an analysis of the substance of the effect of the injunction if granted, rather than the language used in terms...".*

78. Thus the nature of the injunction sought here must be assessed by reference to its substance, not its form.
79. Applying this approach I am satisfied that the substance of the injunction sought is a prohibitory injunction. MSC has allowed GKT to carry its containers since the early 1990s. While there is some uncertainty as to the frequency with which GKT did so (described by GKT as "*occasional*" and by MSC as "*sporadic and occasional at best*"), the fact is that it has been allowed to do so and has been doing so, to one extent or another, for a period of approximately thirty years. The effect of the injunction would be to prohibit MSC from refusing to do what it has been doing for a very long period of time, i.e. allowing GKT to carry MSC's containers. Thus, it seems to me that it is in its terms and substance prohibitory in nature.
80. There are some potential consequences of the injunction sought which are suggestive of it being a mandatory injunction. MSC will end up engaging with GKT if their mutual customers choose to engage GKT as their haulier. However, while in practical terms that is likely to follow from the Order sought, that does not seem to me to amount to a compulsion on MSC to engage with GKT. If, for example, MSC were to take the haulage business in-house as seems to be suggested in an email from Mr. Douglas to Champion Freight exhibited at "GK7" to Mr. Keville's first affidavit or even to change its terms and conditions in the future to expressly state that it will not be liable for any additional costs incurred by the customer or the haulier the Order would not compel MSC to engage with GKT in breach of its own new model or terms and conditions.
81. MSC also submits that the Order is mandatory because its effect is to "*foist a new business model*" on MSC and it relies on Twomey J's judgment in *Ryanair v Skyscanner*. It seems to me that the two cases are very different. Twomey J described the effect of the injunction in that case as involving:

"...Skyscanner itself in a completely new business model whereby it would be involved in a high degree of monitoring (whether directly by Skyscanner or indirectly by Ryanair) of the OTAs and then requiring the 'wrongdoer' OTAs to change their business model. If the OTA failed to do so, Skyscanner would have to

take further positive action by altering its business model by excluding that OTA from the Skyscanner website in respect of Ryanair flights.”

82. The consequences of the injunction in this case (particularly in light of the undertaking which is now forthcoming) goes no further than to expose MSC to a risk of a claim by GKT for additional costs incurred as a result of delays or changes of instructions if they occur. I do not accept that this amounts to a new business model in circumstances where MSC will be free to defend any such claim and is a far cry from what was sought as part of the application in the Skyscanner case.

83. I am therefore of the view that the substance of the Order sought is a prohibitory injunction.

84. In my view, those potential consequences of the Order fall to be considered under the balance of justice limb and I return to them below.

85. The test for a prohibitory injunction is that there is a fair or serious or bona fide question to be tried (those phrases being used interchangeably). It is a low hurdle. Barniville J in *O’Gara v Ulster Bank Ireland DAC* [2019] IEHC 213 described the test in the following terms:

“It may be helpful to view the threshold in terms of requiring a plaintiff who seeks an interlocutory injunction to demonstrate that there is a question or issue which would withstand an application to dismiss...as disclosing no reasonable cause of action or as being frivolous or vexatious. The threshold is of that order and so unless the case is un-stateable, it is generally not a difficult threshold to meet.”

86. Collins J in *Betty Martin Financial Services Ltd v EBS DAC* [2019] IECA 327 said:

*“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 (paragraph 11 of the judgement under appeal). It may be useful to regard this threshold as akin to the threshold that applies where a party seeks to dismiss a claim against it pursuant to the inherent jurisdiction and that was the approach taken by the High Court in a number of decisions cited to us including *Wingview Ltd v NS Property Finance DAC* (per Haughton J, paragraph 14) and *O’Gara v Ulster Bank DAC* (per Barniville J paragraph 42)”*

87. GKT has pleaded five causes of action:

- a) Unlawful interference with GKT’s commercial activities;
- b) Interference with Economic Interest
- c) Defamation

- d) Abuse of a dominant position
- e) Breach of GKT's property rights and right to a good name.

88. It seems to me that in the circumstances of this case (e) is not a separate cause of action but refers to the constitutional rights which underly the causes of action referred to in (a)-(d): for example, GKT's constitutional right to a good name is vindicated by the tort of defamation at (c); in relation to the breach of property rights GKT did not identify with any particularity what property rights were engaged or how they were engaged other than to refer generally to aspects of the law relating to liens and bailment. To the extent that it can be argued that GKT has property rights in its business dealings with its customers they are vindicated by the other causes of action such as the alleged unlawful interference with its commercial activities and economic interests at (a) and (b). I have therefore not considered (e) as a standalone cause of action.

Abuse of a Dominant Position

89. Counsel for GKT, while not making a formal concession, very fairly indicated that this aspect of the case would really be a matter for the trial. In GKT's written submissions it is stated "This cause of action will be advanced further by expert evidence at trial, in terms of the precise market and the relative share of same enjoyed by the Defendants."

90. Cooke J in *Island Ferries Teoranta v Minister for Communications & Ors* [2011] IEHC 388 said:

"70. *The prohibition in s.5 is directed at market distorting conduct made possible by the misuse of a position of influence over a market held by (usually) a single undertaking. The classic definition is that of the Court of Justice in the United Brands Case as:*

'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it a power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers. In general, it derives from combination of factors which taken separately are not determinative (Case 27/76 United Brands v Commission [1978] ECR 207.' "

" 72. *What is crucial to the concept of 'abuse', in the view of the Court, is that a dominant undertaking uses its position of market power in a way which, while otherwise possibly lawful, has as its purpose or effect the exacting of some additional gain or collateral advantage made possible for it only because of its ability to ignore the likely reaction of affected undertakings in that market.*"
[emphasis added]

91. At this stage, GKT has not defined the "relevant market" in which it alleges MSC holds a dominant position. In the absence of the relevant market being defined, it is impossible for the Court to be satisfied to the required standard of proof that there is a fair question

to be tried that MSC holds a dominant position within the market or indeed that it is abusing that position.

92. It was stated in Case T-169/08 *Dimosia Eticherisi Ilektrismouade v European Commission* that:

"60. Before it is possible to assess whether an undertaking such as the applicant has a dominant position within the meaning of article 82EC, it is necessary to define the relevant market, both from the point of view of the goods or services concerned and from the geographic point of view... The purpose of that market definition is to define the perimeter within which it must be assessed whether an undertaking is in a position to behave to an appreciable extent independently of its competitors, its customers and consumers..."

93. In relation to the market, the furthest the Statement of Claim goes is to plead in paragraph 31 and 32:

"31. This embargo was made in circumstances where the Defendant is a dominant player in the market. The precise market share fluctuates with market trends and business volumes but the Defendants are understood to be amongst the foremost operators within their sector and within the shipping industry globally and within Ireland.

32. According to publicly available information the Defendants are the world's second largest container shipping company operating some 465 container vessels worldwide. It operates direct container shipping services to and from Ireland connecting through European hubs and according to the Irish Maritime Transport Economist 2020 Volume 18 they are the third largest container operator in Ireland."

This is reflected in paragraph 19 of Mr. Keville's first affidavit.

94. Mr. Douglas joins issue with Mr. Keville but the point is that at this stage there is no definition of the relevant market within which it is alleged MSC holds a dominant position.
95. In relation to MSC having a dominant position, i.e. being able to ignore the likely reaction of affected undertakings in the relevant market, GKT points to the position taken by MSC in relation to potential loss of business. It is common case in the affidavits that MSC opted to potentially lose business from two customers, Forte Pespa and Campion Freight, and it is suggested by GKT that this shows that MSC is able to *"ignore the likely reaction of affected undertakings in that market"*. I am not satisfied that this in itself discharges the burden of proof of establishing a fair question that MSC holds a dominant position. It is equally consistent with a view being taken by MSC that it has more to lose by continuing to do business with GKT, who intends to charge extra costs to MSC and possibly retain its containers, than by losing some customers. Thus, that may be a commercial decision made by balancing two potential downsides as much as stemming from an ability to ignore the reaction of the other players.

96. There are two other difficulties in relation to GKT's case that MSC is guilty of an abuse of a dominant position. Firstly, it is not pleaded in the Statement of Claim or indeed explained in the affidavits how consumers, rather than GKT, will be adversely affected by the actions of MSC (see Sanfey J in *Ryanair DAC v SC Vola SRL* [2020] IEHC 308 paras 105-108 and *Attheraces Limited v The British Horse Racing Board Limited* [2007] UKCLR 309); secondly, GKT does not engage with the point made by MSC that a refusal to allow a party to use its containers will not be an abuse if the party will not abide by regular commercial practice. There is a dispute at this stage as to whether or not it is regular commercial practice for the haulier to impose or to seek to recover charges from the shipping company but the only evidence available is to the effect that it is not regular commercial practice for the haulier to retain the shipping company's containers. Neither of these points, nor the point in paragraph 95, could be determinative at this stage because they are classically matters which will be drawn out during the course of a trial but nonetheless they have to be taken into account when considering whether GKT has satisfied the test.
97. In light of these points, but particularly the absence of a definition of the relevant market at this stage, I am not satisfied that GKT has established to the required standard of proof that there is a fair question to be tried that MSC is guilty of an abuse of a dominant position.

Defamation

98. It is unnecessary to express a view as to the strengths or otherwise of the case in defamation. Even if GKT has a fair case to be tried that the actions of the Defendant were defamatory of GKT there is no nexus between that and the need for or entitlement to an injunction. If GKT has been defamed then the imposition of an interlocutory injunction does not address that wrong. So even if GKT established that it had a fair case that it had been defamed that would not give rise to an entitlement to an injunction absent any suggestion that the alleged defamation will be repeated.

Unlawful Interference with Commercial Activities and Economic Interest

99. GKT deals with the alleged unlawful interference with its commercial activities and interference with economic interest together and I therefore also do so.

100. GKT relies on the judgment of Lord Nicholls in *OBG Ltd v Allan* [2008] 1 AC 1 where he said:

"A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests."

101. The High Court said in *Camiveo Limited v Dunnes Stores* [2017] IEHC 147:

"The tortfeasor must have acted either with the intention of invading the victim's interests or, acted in the knowledge that such invasion was likely to occur, even if its occurrence was not sought."

102. The Court of Appeal in *Camiveo* [2019] IECA 138 said:

"...the common good is best served by protecting people from improper conduct intended to cause economic injury to them (regardless of whether that conduct occurs in two-party or three-party situations) and that a requirement as to breach of some law, whether civil or criminal (here contractual) may assist both in constraining the tort in scope and also in reducing the scale of the task involved in discerning hidden intention in manifest behaviour."

103. GKT's case is essentially that MSC set out to harm its business in revenge for GKT charging extra costs to GKT. In pre-litigation correspondence from GKT's solicitor and, indeed, in Mr. Keville's affidavit, MSC's action is described as "*vindictive*" and it is stated that there is a "*personal vendetta*" on the part of MSC. The dispute is described as a "*David and Goliath*" situation and reference was made during the hearing to the phrase "*fit of pique*" used by Barrett J in *Camiveo Ltd v Dunnes Stores* discussed below.
104. MSC denies this but rather asserts that it was entitled to protect its interests against a party who it says was acting in a manner which did not accord with normal industry practice and who felt entitled to seize the Defendant's containers.
105. In any event the tort of unlawful interference with economic interests is not made out simply by establishing that the alleged wrongdoer was motivated by a desire to harm the other party or that he did not care whether or not they were harmed. There must also be some improper/unlawful conduct. This is clear from the judgments in *Camiveo* and *OBG Ltd* referred to above. Of course, this would have to be the case or any action taken in the cut and thrust of trade could automatically become a tort. A shop which is next door to a coffee shop and opens its own coffee dock is clearly intending to sell coffee and will very likely have the effect of harming the coffee shop's business but it cannot be said that the action of the shop-owner amounts to a tort without something more.
106. The starting point of any assessment of whether there is a fair question that MSC's conduct was wrongful/unlawful must be that the containers are MSC's property and MSC is, as a matter of general principle, free to use them in such manner as they see fit or, indeed, to allow them to be used only by persons of their choosing or on such terms and conditions as they wish.
107. That freedom can, of course, be limited by civil, criminal or regulatory law such as contract, competition law, or planning law to give just some examples.
108. It is common case that there is no contract between the parties by which MSC is bound to continue to allow GKT to carry its containers. GKT expressly disavows pleading that there is any contractual nexus. I have already decided that a fair question has not been

established in relation to competition law. GKT has not contended for any elements of criminal or regulatory law which might render MSC's conduct unlawful. GKT has suggested that the law relating to liens and bailment might be relevant to an analysis of MSC's freedom to act in relation to its containers in certain circumstances (including, presumably, the circumstances that arose here) and therefore whether its actions were lawful. It was submitted that it is too simple to say that because MSC owns the containers it can decide who gets or doesn't get a container. In paragraph 14(ii) of Mr. Keville's second affidavit he says that GKT's actions have been "*described in terms such as misappropriation and holding to ransom the First Named Defendant's containers. Whilst I am advised issues such as bailment, quantum meruit and the exercise of a lien are matters of law, I say that it is industry practice for a haulier to exercise a lien over a container and/or contents of a container in its possession pending payment for its services.*" As noted above, this affidavit was admitted on the express basis that its contents were disputed by MSC. Indeed, Mr. Douglas says in this affidavit that "*...I am not aware of a single instance where a haulier has seen fit to withhold the return of the First Named Defendant's equipment (or any other shipping company's equipment) against the payment of charges unilaterally imposed and without any contractual basis.*" I can therefore not make a finding whether or not hauliers exercise such a lien as against shipping companies. Furthermore, even if GKT is correct that it was entitled to exercise a lien, that does not go to the general principle that MSC, as the owner of property, is entitled to decide what it will do with its property in the future.

109. That being the case, what then is the wrongful conduct which it is alleged grounds the cause of action for wrongful interference with economic relations? The question is not whether GKT is entitled to recover additional costs from MSC or even whether GKT is entitled in law to detain MSC's property until those charges are paid. It is whether MSC is entitled to decide in the future that it does not wish to permit its containers to be carried by a party who will pass on those extra charges and/or who will retain the containers pending payment (even if they are entitled to do so) and, if it decides not to permit a party to do so, to then communicate that decision to the other parties involved in the transaction – the freight companies and the depots. If this case was brought solely on the basis that as a matter of general principle MSC is not entitled to do this then I would have no hesitation in concluding that a fair question had not been established.
110. GKT referred to a number of cases in its written submissions and placed particular reliance on *North v Great Northern Railway* (1860) 66 ER 28 and *Camiveo Limited v Dunnes Stores* [2017] IEHC 147 and [2019] IECA 138.
111. In *Great Northern Railway* the Court held that:

"there can be no doubt that –... The plaintiff's trade being such as it is, the coal wagons were of special value to him, in order to carry on his business. The sudden

sale of these wagons, without which the trade could not be conducted, must necessarily have inflicted serious injury by the interruption of his trade.

It is no answer to say that it is possible to state a sum of money which would have been sufficient compensation for the injury. The court looks at the circumstances of the case with reference to the right to the specific thing. It cannot be pretended that the plaintiff could have got, on a sudden, fifty-four other coal wagons fit for his business as readily and promptly as he could have purchased fifty-four tons of coal or fifty-four bushels of wheat.

Where specific things, necessary for conducting a particular business, are in the possession of persons who claim a lien upon them, and threaten an immediate sale, this Court has undoubted jurisdiction to interfere by injunction, and prevent irreparable injury to the debtor, by giving him an opportunity of redeeming assets. The passage cited from Lord Redesdale attributes to the Court greater jurisdiction than merely to protect the property, but asserts the jurisdiction of the Court, where justice requires it, to order the delivery up of the specific thing will stop."

112. However, it seems to me that *Great Northern Railway* is of limited assistance involving, as it does, the reverse of the situation in this case. The railway company had entered an agreement with a third party for the delivery of a certain quantity of coal and it was a term of that agreement that if the third party failed to deliver the agreed quantity of coal it would make good the shortfall by a money payment to the railway company. The agreement further provided that should the third party fail to do so the railway company could retain as security the coal wagons used by the third party and ultimately could sell the wagons if payment was not made. The third party hired fifty-three wagons from the Plaintiff. The third party failed in its obligations to the railway company and the railway company seized the wagons and then proposed to sell them which led to the Plaintiff, the owner of the wagons, to seek an injunction restraining their sale. Thus, the case involved an action by the owner of the property and it was in that context that the court referred to the special value of the property and its importance to the Plaintiff's trade. It does not establish a general principle that a third party has a right to another party's property on the basis that the property is important or essential to the third party's business or that the owner is acting unlawfully in not making its property available.

113. In *Camiveo* the trial judge held at paragraph 145 that:

"The court finds that Dunnes has interfered with the economic interests of Camiveo, that it has intentionally caused loss to [the respondent] by unlawful means (the closure of the doors in breach of covenant) and as a retaliatory measure, that Camiveo has suffered loss and damage that includes loss of rent from other tenants (whom it had to sue for same), corruption of commercial relationships, loss of use of rent-roll, and legal costs, and thus that the tort of causing loss by unlawful means has been committed by Dunnes."

114. The reference by the trial judge to Dunnes Stores' "*unlawful means*" must, of course, be noted. In that case, the trial judge found that the closure of a particular set of doors by Dunnes was not just done as a retaliatory measure in response to the exercise of an entitlement by *Camiveo* but that its actions were in breach of planning permission and in breach of a covenant in the lease between the parties. *Camiveo* must be distinguished in circumstances where the trial judge found that the conduct complained of was "*unlawful*".
115. As stated above, I am not satisfied that GKT has established a fair question that as a general principle it would amount to unlawful or wrongful conduct for MSC to refuse to permit its containers to be carried by haulier who intended to pass on costs to MSC or who expressed an entitlement to retain containers until bills were paid. However, it seems to me that GKT's case is not limited to such a broad proposition: it is also addressed to the specific context in which MSC made and communicated its decision.
116. It is pleaded in paragraph 22 of the Statement of Claim and is contended in Mr. Keville's affidavits that the decision and instruction by MSC is "*disproportionate, irrational and excessive*". These are concepts which are applicable in public law and it remains to be argued in full whether they have any applicability to a private law situation, particularly where there is no contract between the parties. On the assumption that they do, at the core of these complaints is the contention that the abrupt or summary imposition of the "*embargo*" was unlawful (i) where the parties had been engaging (albeit occasionally) with each other over a long number of years (ii) where it was in response to what GKT perceives as a minor dispute in the context of it asserting a lawful entitlement in circumstances (iii) where GKT had business booked and which therefore had to be cancelled at very short notice and (iv) which was communicated to the depots by way of, it is alleged, a terse communication.
117. I am just about satisfied, given the very low bar for the test as described by Barniville J in *O'Gara*, that GKT has established a fair question on this point. I should say that it does seem to me that the unilateral retention of MSC's containers in July 2021 against the background of the tensions in March 2020 about the same conduct, has to raise serious doubts about describing MSC's decision as disproportionate. However, balanced against that in deciding whether a fair question has been established has to be (i) the fact that MSC was aware that GKT had bookings which would have to be cancelled at extremely short notice if an immediate ban was imposed, (ii) that MSC must have been aware that the effect of its decision and instruction to the depots may be significant for GKT, (iii) the fact that MSC did not give a meaningful warning of the possible imposition of an "*embargo*" either in March 2020 or July 2021 before the embargo was imposed and (iv) it seems that the decision was communicated by way of a communication, without any context or explanation, to the depots rather than simply to the mutual customers (it must be noted that the Court has not seen the communication).
118. Taking all those into account, and particularly the low threshold, GKT has established a fair question to be tried that MSC's action was wrongful/unlawful.

Balance of Convenience – Adequacy of Damages

119. It is clear from *Merck Sharpe & Dohme* that the adequacy of damages should be considered as part of the assessment of the balance of convenience or balance of justice. As it was put by Collins J in *Betty Martin Financial Services Ltd v EBS DAC* [2019] IECA 327 “...the decision to grant or refuse [an injunction after the establishment of a serious issue to be tried] thereafter becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment.”
120. I therefore propose to consider the different aspects of the balance of convenience starting with a consideration of the adequacy of damages.
121. It seems to me that damages would be an adequate remedy.
122. Mr. Keville has been able to set out in paragraph 20 of his second affidavit what he says the immediate financial effect of the instruction given by MSC has been. Mr. Keville gives the figures for the “levels of business in transactions which involved carrying containers of the Defendant on behalf of the Plaintiff who instructed them to carry goods” for the three months prior to the imposition of the ban. He also gives a figure of €4182 for cancellations from its customers for the month of August when the ban was imposed. He also gives the figures for the volumes of business written by GKT on behalf of customers who instructed GKT to carry goods within MSC containers in September, October and November 2021. Presumably GKT can give the figures for a longer period prior to the three months before the ban was imposed and will be able to give the figures for the months since November 2021. Obviously those figures and whether or not there is any link with the alleged wrongful act of MSC may be tested at trial but the point is that it appears to be a relatively simple exercise to calculate the direct financial loss arising from MSC’s instruction, though of course it may be claimed that GKT will have unknowingly lost other business, as is referred to by Mr. Keville in paragraph 21.
123. I am also conscious of the fact that there appears to be nothing to prevent MSC from introducing terms and conditions in the future which would expressly preclude the payment by MSC of any or any specific extra costs incurred by a haulier. On GKT’s stated position it will decline to accept those terms and conditions and it would follow that it will not carry or be permitted to carry MSC’s containers so there is probably a limit on the period of time for which GKT can say that it will have suffered direct financial loss.
124. However, GKT also relies on loss of reputation and damage to its relationships with its existing and prospective customers and the depots. These are always more difficult to deal with than direct financial loss. However, it is certainly not beyond relevant expertise to value these heads of loss. GKT also places emphasis on the fact that it is a family business and the importance of reputation in that context and relies on *Betty Martin* where it was held:

“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... 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.”

125. Some regard has to be had to the fact that Mr. Keville has stated on affidavit that GKT is a family business, notwithstanding that this is said in his second affidavit. However, I do not believe that anything like the same weight is warranted as was given to this aspect in Betty Martin.
126. Firstly, it appears that extensive evidence was given of the history and family nature of the business in *Betty Martin* and the consequent “*emotional/familial investment*”. This is touched on in the quote above. In this case much less weight is placed on the family nature of the business. Mr. Keville, in paragraph 30 of his second affidavit, simply says “*I say that we are a family business who trades very much upon our good name and in which circumstances we are absolutely reliant upon our good name and reputation to successfully trade, which we have built painstakingly since 1993...*” There is no evidence of the type of “*emotional/familial investment*” referred to in *Betty Martin*. The reference to dependency on reputation may apply to very many small and medium sized businesses.
127. Secondly, the action which was sought to be injuncted in *Betty Martin* was the termination of three Tied Agency Agreements which would have terminated the Plaintiff’s carrying on of its business as agents of the Defendant. The evidence in this case appears to be that the type of business which would be affected by the “*ban*” is just one element of GKT’s business. For example, in paragraph 14 of Mr. Keville’s first affidavit he acknowledges that there are different sides to the business where he says: “*We have been occasionally transporting our customer’s containerised goods without incident, apart from the incidents referred to above, since 1993 but have been growing this side of the business in recent years and have invested recently in recruiting two extra drivers to service these customers. There is a real risk we may have to make these drivers redundant if the ban is not lifted.*”[emphasis added]. In addition, it is clear that only some containers of the total carried by GKT are owned by MSC because in paragraph 4 of his first affidavit Mr. Keville explained GKT’s business and said “*Our customers for this service are various global and transport logistic operators and freight forwarders who have arranged the door to door transportation of containerised goods including the ocean shipment through container shipping companies such as the Defendant company.*” Thus, on GKT’s evidence it is clear that the ban will impact part of GKT’s business and not its whole business. No doubt evidence will be called by GKT at the trial as to the level of business affected but the evidence at this stage is to the effect that it would impact on part of the business but not the entirety of it. This is in contrast to the situation in *Betty Martin* where the termination of the three agencies would have meant the loss of the business of those agencies. Furthermore, it was held by Geoghegan J in *Ó Murchú t/a*

Talknology v Eircell (Supreme Court, 21st February 2001) that even if the Plaintiff in that case went out of business as a result of the alleged wrongful act, his losses could still be assessed in money terms.

128. Thus, it seems to me that GKT could be adequately compensated by an award of damages should it succeed in the substantive proceedings.
129. As part of the consideration of the adequacy of damages I am also required to consider whether MSC could satisfy an award of damages if GKT is ultimately successful. While GKT challenges the Defendants' ability to do so on the basis that there is no transparency as to the financial position of the Second Named Defendant and that the First Named Defendant is owned by a Swiss company, United Agencies Ltd, for which no financial data has been provided, I am satisfied on the basis of the averment in paragraph 48 of Mr Douglas's affidavit that the First Named Defendant would be in a position to discharge an award of damages.
130. I must also consider whether damages would be an adequate remedy for MSC should they be restrained from acting but ultimately succeed at trial. I am satisfied that damages would be an adequate remedy for MSC and that GKT would be in a position to pay such award in light of the averments at paragraph 31 of Mr Keville's second affidavit. It seems to me that in light of the belated undertaking that has been offered on behalf of GKT it is very unlikely that MSC will suffer any significant financial loss. It may have to face a claim for incurred costs but on the basis of the figures contained in the affidavits (particularly where there could be no question of additional trailer hire or storage costs) the exposure in respect of any such claim would be relatively small.
131. Traditionally, if damages would be an adequate remedy then the Court proceeded no further. However, there was a recalibration of this approach in *Merck Sharpe & Dohme* where it was held by O'Donnell J that the adequacy of damages is part of the assessment of the balance of convenience or balance of justice. For example O'Donnell J said in paragraph 42 that "...the fact that it is possible to award damages does not preclude the grant of a permanent injunction, and should not be understood as an absolute bar to the grant of an interlocutory injunction" and in paragraph 47 said "...An injunction should not be granted merely because an applicant can tick the relevant boxes of arguable case, inadequacy of damages, and ability to provide an undertaking as to damages, and by the same token should not be refused merely because damages may be awarded at trial."
132. Collins J, in addition to the statement in paragraph 118 above, stated in *Betty Martin*:

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

133. Thus, notwithstanding my conclusion that damages would be an adequate remedy I propose to go on to consider the other aspects of the balance of convenience or balance of justice.
134. There can be no doubt that it is likely that some prejudice will be suffered by GKT in the event that the injunction is not granted. In that event, MSC would be free to reactivate the instruction to the depots not to permit GKT to collect or drop MSC's containers. Of course, it is important not to conflate two things: the refusal of the injunction and the reactivation of the "ban". MSC would, of course, be free to decide not to reactivate the ban even if the injunction was refused. Any loss to GKT would arise from the reactivation of the ban rather than the refusal of the injunction but for the purpose of this discussion of potential prejudice it must be presumed that the instruction would be reactivated. This is very likely to lead to some loss of business as GKT will not be able to accept business from customers who want MSC containers to be used and that would cause direct financial loss to GKT. Mr. Keville has set out figures for the financial loss but it is difficult to assess the full significance of that loss as there is no evidence as to the overall extent of GKT's business or as to the percentage of GKT's business that those figures represent or indeed what percentage of these figures represent profit. There is certainly no evidential basis for concluding that the direct financial losses would be extremely significant or catastrophic. There was some reference during the hearing to cancellations "flooding in" in the days after the instruction was given by MSC but the evidence of cancellations contained in Mr. Keville's affidavits is more limited. It is therefore difficult to say anything other than that GKT will suffer some financial prejudice from the reactivation of the instruction.
135. I also have to have some regard to the possibility of GKT having to let go of two staff who were recruited in recent years (paragraph 14 of Mr. Keville's first affidavit). However, the weight to be attached to this must be limited in circumstances where Mr. Keville merely mentions this possibility but does not state how likely it is or indeed what percentage of the work that these employees do is represented by carrying MSC's containers. In this regard it is important to recall that GKT carries other shipping companies' containers and, indeed, is engaged in other haulage work.
136. There may also be some damage to GKT's reputation. However, it difficult to assess the level of such damage in circumstances where GKT maintains that its reputation was already damaged by the imposition of the ban in the first place and this forms the basis for its plea in defamation.
137. The prejudice to MSC of the injunction being granted is that it may end up engaging with a company which it does not want to be involved with and, more particularly, will be subject to a haulier who maintains an entitlement to pass on extra charges to MSC. That this is the intention of GKT is absolutely clear from Mr. Keville's second affidavit. He says in paragraph 3 " *...in the event a similar incident arises, the Plaintiff undertakes to indicate what charges it considers it is entitled to levy and reserves the right to recover these from the Defendants at the end of these proceedings should judgement be granted*

in their favour." MSC does not want to do business with a party who proposes to impose such extra charges. While MSC denies any liability for such charges the reality is that GKT's maintenance of an entitlement to pass them on to MSC means that MSC is liable to a claim in the future and does not want to do business on those terms. This is part of the basis for MSC's argument that what is sought is a mandatory injunction. While I am satisfied that it is not a mandatory injunction for the reasons set out above, nonetheless, regard must be had to the fact that the effect of the grant of the injunction is that MSC may be exposed to the risk of having to pay charges incurred in the future which it does not want to be exposed to.

138. As discussed above, I am of the view that the direct financial prejudice to MSC would not be at all significant so the actual prejudice is that MSC will, to a certain extent, lose the freedom to decide what to do with its own property and is likely to end up engaging with a party with whom it does not wish to be involved and may be exposed to a claim from that party.
139. The potential prejudice would be much more significant if GKT was continuing to maintain an entitlement to retain MSC's containers because that would involve the deprivation of MSC's property and would potentially mean that MSC could not discharge its own contractual obligations to other customers which in turn could expose MSC to significant prejudice. In my view this would be fatal to GKT's application. It would amount to GKT taking things into its own hands rather than prosecuting a claim in the proper manner but, more importantly to the present discussion, it would be a form of very significant prejudice to MSC because it would expose MSC to the risk of not being able to discharge its own contractual obligations to third parties.
140. An injunction which had the effect of permitting GKT to retain MSC's property or which even exposed MSC to the risk of that occurring could not be contemplated. Fortunately, GKT through Mr. Keville and through its written submissions has expressly stated that it will give an undertaking that no containers will be retained in the event that the injunction is granted. Mr. Keville stated in his second affidavit (paragraph 3) which was only delivered a few days before the hearing that *"It appears from paragraph 47 of Mr Douglas's affidavit that the First Named Defendant's main concern as to the consent order remaining in place pending the trial of the action is that the First Named Defendant will remain subjected to the misappropriation of its property and the levying of charges by the Plaintiff with impunity. I deal with this in paragraph 30 of this replying affidavit. I do not consider the consent order has this effect as put forward by Mr Douglas. However, in order to address this concern I confirm the Plaintiff undertakes not to retain, for any longer than absolutely necessary for their safe transit, any containers of the Defendants pending final determination of these proceedings provided the consent order remains in place and, in the event a similar incident arises, the Plaintiff undertakes to indicate what charges it considers it is entitled to levy and reserves the right to recover these from the Defendants at the end of these proceedings should judgement be granted in their favour."* In paragraph 30 he states *"Mr. Douglas suggests that by the consent order remaining in his place the First Named Defendant remains subject to the misappropriation of its*

property. This is not what the order provides for, as is clear from any straightforward reading of the order, but I confirm the Plaintiff is willing to address this manufactured concern by undertaking not to retain any containers of the Defendants pending final determination of these proceedings if this will prevent the Defendants imposing a ban preventing my business operating in the interim. The Plaintiff undertakes to indicate what charges it considers it is entitled to levy and reserves the right to recover these from the Defendants at the end of these proceedings should judgment be granted in their favour."

141. In light of this undertaking, the potential financial prejudice to MSC if the injunction is granted is significantly less than the potential financial prejudice to GKT of a refusal of the injunction.
142. The offering of this undertaking seems to me to have been a correct and appropriate step but it is noteworthy that it was expressed so late in the day, coinciding with the filing of written submissions. I do not believe that it is an answer to say that MSC did not ask for an undertaking. MSC's concern was manifest from the emails referred to above and nothing was said or done by GKT to address this concern. The undertaking must be considered in the context of it being offered so late and in the context of GKT's overall position because that is relevant to the ongoing relationship between the parties and the question of whether the Court would have to supervise any Order that is made, both of which are factors in the consideration of the balance of convenience. Mr. Keville is essentially dismissive of the stated concerns of MSC in relation to the retention of the containers and, as discussed above, explicitly states that concerns about the retention was not a basis for MSC's imposition of the ban – that the concerns were manufactured as an ex post facto justification for the ban. This is concerning in relation to the operation of any injunction even with an appropriate undertaking from GKT because Mr. Keville's position is not supported by the evidence which is before the Court at this stage.
143. Mr. Keville does not show any appreciation for this concern on the part of MSC and it is in that context that his willingness to give an undertaking must be viewed – indeed the view that MSC's concerns were simply an ex post facto justification for the embargo is reflected in Mr. Keville's very clear statement when giving the undertaking that MSC's concerns that the Order would expose MSC to the retention of containers by GKT was a manufactured concern.
144. Perhaps more important is Mr. Keville's portrayal of the dispute between the parties as a David and Goliath situation where MSC, the Goliath, has set out to punish GKT's David through vindictiveness and a personal vendetta.
145. In all of those circumstances there is a real question over whether there is and can be a working relationship between the parties. That this is a factor to be considered in relation to where the balance of convenience lies is clear from *Ó Murchú v Eircell Limited* [2001] IESC 15. Geoghegan J for the Supreme Court held:

"... It is also usually impracticable and undesirable that two parties be compelled to trade with one another when one, for reasons which are perfectly rational, does not want to carry on such trading..."

146. Earlier in that passage Geoghegan J had referred to the *"well known principle that in general the courts will not grant an injunction which would involve ongoing supervision. A court, therefore, is very slow to grant injunctions in either service contracts or trading contracts because it is very difficult to assess, at any given time thereafter, as to whether such injunctions are being obeyed or not."*
147. An Order which had the effect of compelling the parties to continue working together was made in *Betty Martin* but in that case, while the Plaintiff had made adverse comments about the Defendant, there was a strong emotional/familial investment in the company, the termination of the agreements (sought to be enjoined) would strike at the heart of the Plaintiff's business, the parties were already in a contractual relationship, and there was no evidence that the branches, the agency to which was held by the Plaintiff, were not being operated as successfully as before the alleged termination which gave rise to the injunction application.
148. However, the situation is very different in this case where there is a very real question whether there is or can be a working relationship between the parties in light of the parties' respective perspectives and, in particular, Mr. Keville's expressed view that MSC is motivated by vindictiveness and a personal vendetta. Also significant to this consideration is the fact that while there was engagement between the parties' solicitors on the morning of the 17th August 2021, as evident in the correspondence that was put before the Court, GKT nonetheless felt it was necessary to obtain an Order from Barr J on the 17th August rather than proceeding by way of an agreement or commitment from MSC because of concerns that the matter might escalate again over the court vacation. This concern may have been well-founded (or may not have been) but the existence of such a concern notwithstanding engagement between the solicitors is strongly suggestive of a fundamental breakdown between GKT and MSC and suggests that it is likely that the Court will end up having to supervise the injunction and undertaking. Such a breakdown is a reason why an injunction which might have the effect that the parties will end up engaging with each other against the wishes of one of the parties.
149. I have also taken into account that the proceedings were not prosecuted with appropriate expedition by GKT and that must be considered in any assessment of the balance of convenience because it raises a concern about how the proceedings would be prosecuted in the future were an interlocutory injunction to be granted. However, this could of course be addressed by appropriate directions being made by the court to have the case ready for hearing as soon as possible.
150. When all matters in the consideration of where the balance of convenience lies are equally balanced, the Court should attempt to preserve the status quo (O'Gara at para. 77 and Okunade at para. 9.8). However, even were I to conclude that all matters are equally balanced the impetus to maintain the status quo is of limited assistance in this case due

to the difficulty in identifying the status quo. On one view it is simply that MSC has permitted GKT to use its containers for their mutual customers. However, the evidence is that the engagement between the parties was occasional or sporadic and thus it is difficult to identify this as the status quo. Furthermore, arguably the introduction by GKT of an intention to charge additional costs to MSC in itself changed the status quo which had previously persisted. As against that, it can be said that GKT had introduced that intention in March 2020 and MSC continued to deal with GKT and it thereby became part of the status quo. In the absence of any clear status quo I find that this could not be determinative if all other matters were equally balanced.

151. However, I am not in any event satisfied that they are equally balanced. In my view when all aspects of the consideration of the balance of convenience or justice are taken into account the balance favours the refusal of the injunction sought.
152. There are undoubtedly aspects of the balance which favour the grant of the injunction: (i) the potential financial prejudice to GKT from a reinstatement of the ban, which it must be presumed for this discussion would follow a refusal of the grant of the injunction, is certainly greater than the potential financial prejudice to MSC if the injunction is granted, particularly in light of the undertaking offered by GKT, (ii) the possibility (though there is no sound evidential basis for this and it is therefore speculative at best) of the financial prejudice to GKT if the injunction is not granted undermining the entire business of GKT, (iii) the possibility (and the Court can not properly put it any higher than this) of GKT having to let go of two staff and (iv) the possibility of damage to GKT's reputation which may be of greater significance because GKT is a family business. But they must be set against (i) the fact that a consequence of the injunction may be that MSC's property will be used by a party whom MSC does not wish to have the use of its property and on terms and conditions with which it does not agree, and (ii) it may have to engage with a party with whom a normal working relationship has broken down and who has accused it of operating through vindictiveness, a personal vendetta and a desire to exact revenge which in turn makes it more likely that the Court would have to supervise the operation of the injunction and undertaking.
153. When regard is had to these different aspects the balance of convenience is reasonably balanced. However, regard must also be had to the adequacy of damages in determining where the balance ultimately lies. O'Donnell J stated in *Merck Sharpe and Dohme* when setting out the approach to an injunction application "...*(3) If there is a fair issue to be tried (and it probably will be tried), the court should consider how best the matter should be arranged pending the trial, which involves a consideration of the balance of convenience and the balance of justice; (4) The most important element in that balance is, in most cases, the question of adequacy of damages...*" and at (7) he said "*While the adequacy of damages is the most important component of any assessment of the balance of convenience or balance of justice, a number of other factors may come into play and may properly be considered and weighed in the balance in considering how matters are to be held most fairly pending a trial, and recognising the possibility that there may be no trial.*" Collins J said in *Betty Martin* "...*the decision to grant or refuse [an*

injunction]...becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment."

154. Thus, while it is clear that the adequacy of damages is no longer determinative in itself, it remains an important, if not in some cases the most important, element in the overall assessment of the balance of convenience or justice.
155. In light of this, when my finding that damages would be an adequate remedy is put into the balance along with the other matters discussed above it seems to me that GKT has not discharged the burden of proof that the balance of convenience, or balance of justice, favours the granting of the interlocutory injunction sought.
156. In those circumstances I must refuse the relief sought.