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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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MBCC FOODS (IRELAND) LIMITED

v

LESLEY BLOOMFIELD LIMITED

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Mr Gibson (instructed by CMG Cunningham Dickey, Solicitors) for the Plaintiff
Mr Dunlop KC with Mr Fletcher (instructed by DWF, Solicitors) for the Defendant

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McBRIDE J

Introduction

[1] The plaintiff applies for an interim injunction under section 91 of the Judicature (Northern Ireland) Act 1978 and Order 29 Rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980, seeking an injunction:

> "(a) preventing the defendant from granting, executing or otherwise entering into a lease with an entity known as Jamaica Blue Ltd trading as Jamaica Blue in the shopping centre known as Bloomfield Shopping Centre located in Bangor.
>
> (b) otherwise allowing or permitting the defendant to grant access to Jamaica Blue to said shopping centre for the purposes of carrying out any further fit-out works.
>
> (c) otherwise allowing or permitting the defendant to grant access to Jamaica Blue to said shopping centre for the purposes of trading as a specialist coffee shop."

[2] The application is grounded on the affidavit of Michael Conroy, a director of the plaintiff company, sworn on 23 May 2025.

[3] Pursuant to court directions, the defendant filed a replying affidavit by Mr Herbert, director of the defendant company, on 2 June 2025 and Mr Conroy filed a rejoinder on 3 June 2025.

Representation

[4] Mr Gibson of counsel appeared on behalf the plaintiff and Mr Dunlop KC and Mr Fletcher of counsel appeared on behalf the defendant. I am grateful to counsel for their detailed skeleton arguments and helpful oral submissions.

Background

[5] The plaintiff is a limited company incorporated in Ireland. It operates under the trading name Costa Coffee ("Costa").

[6] The defendant is the owner of the Lesley Bloomfield Shopping Centre ("shopping centre").

[7] On 31 March 2011 Donegal Place Investments Ltd of the one part and the plaintiff on the other part entered into a lease in respect of unit 19 at the shopping centre. The unit was leased for a term of 10 years from 11 November 2011. The lease contained a restrictive covenant at Clause 6.2 which provided:

> "During the term…the landlord shall not…enter into a lease…permitting any such unit…to be used for the **principal business of a specialist coffee shop**…other than in respect of any part of the premises comprised in the leases…deemed to be an anchor tenant provided always that the use of part of any premises within the centre as a coffee shop ancillary to its principal use shall not be subject to this clause." ("The restrictive covenant.")

[8] Costa's permitted use was set out at Clause 1.3:

> "As a good quality coffee shop including and ancillary thereto retail sale of all products usually sold in a coffee shop, all products being for consumption on and off the premises."

[9] By Clause 1.14(q) Costa was prohibited from using the unit for:

> "The sale of food or food products other than (ancillary to the permitted user) those items which may be usually

> sold ancillary to the normal operation of a good quality coffee shop…"

[10] Donegal Place Investments Ltd assigned its interest as landlord in the shopping centre to Episo 4 Flower SARL, who entered into a supplemental lease with Costa on 14 June 2021 renewing the lease for a further period of 10 years.

[11] More recently, the landlord's interest has been assigned to the defendant. The parties agree that their relationship is governed by Clause 6.2 of the original lease.

[12] In or around early 2025 due to the number of vacant units in the centre, the defendant entered into discussions for the lease of two units in the shopping centre to Jamaica Blue Ltd ("Jamaica Blue"). Fit-out works commenced in March.

[13] The plaintiff first became aware of the proposed letting, according to Mr Conroy, in or around 6 May 2025. On 7 May Mr Conroy spoke to Mr Herbert and later contacted his own solicitors. Thereafter, counsel was briefed and on 12 May the plaintiff's solicitors issued a letter before action threatening injunctive proceedings against the landlord for beach of the restrictive covenant.

[14] On Tuesday 13 May, the defendant's solicitors replied to the plaintiff's solicitors' letter denying any breach of the covenant and sought a pre-action protocol compliant letter.

[15] On 15 May 2025, the defendant executed a lease for units two and three of the shopping centre with Jamaica Blue and Foodco UK Franchising Ltd. Under the terms of the lease Jamaica Blue's permitted user was:

> "Subject to the prohibited users **a restaurant** selling hot and cold food and drinks ancillary items for consumption both in the premises and for takeaway..."

[16] One of the prohibited users set out at paragraph (q) was:

> "For the principal use as a specialist coffee shop."

[17] On the same date as the lease was executed the parties entered into a "side agreement." This provided for a break clause. Paras 1 and 2 of the side agreement provided as follows:

> "1. If during the term a court or tribunal declares that the lease, the permitted user or the manner in which the tenant is trading from the property is in breach of any now existing obligations imposed upon the landlord…or the tenant is required to cease any trade which offends such declaration…

> 2. If paragraph 1 of this letter applies and the tenant is not able to resume trading from the property for the permitted user by the suspension end date, either party may terminate the lease on the break date by serving the Break Notice on the other."

"Suspension end date" was defined as, "the date being six months from the date when the tenant is required to cease trading from the property for the permitted use pursuant to paragraph 1." Consequently, if the conditions for the operation of the break clause are satisfied Jamacia Blue could terminate its lease at the earliest on 5 December 2025.

[18] By summons dated 23 May the plaintiff applied for interim injunctive relief and on 28 May the plaintiff issued a writ seeking damages and injunctive relief.

Relevant legal principles

[19] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 is still regarded as the leading authority in respect of the grant of interim injunctions. This was a very factually and legally complex patent infringement case. The case proceeded to the House of Lords on the specific question of whether an applicant had to demonstrate a prima facie case on the merits before the court turned to consider the balance of convenience question.

[20] The House of Lords substituted the lower threshold of "a serious question to be tried" in place of the previous prima facie case and Lord Diplock stated at page 407 G and H:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations…"

[21] Lord Diplock outlined that after determining whether there was a serious question to be tried the court must then go on to consider whether the plaintiff would be adequately compensated in damages and whether the defendant is in a position to pay them. If so, no injunction is normally granted. If on the other hand damages are not an adequate remedy to compensate the plaintiff the court must then consider whether the defendant, in the event the plaintiff lost at the trial, would be adequately compensated by the plaintiff's undertaking as to damages. If damages

would be an adequate remedy and the plaintiff is in a position to pay them Lord Diplock opined, "there would be no reason…to refuse an interlocutory injunction."

[22] In cases of doubt as to the adequacy of the respective remedies in damages available to either party or to both, then the question of the balance of convenience arises. Lord Diplock stated at page 408 F:

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case."

At page 409 A and B the court set out some matters which can be considered and these included; the extent to which the disadvantages to each party would be incapable of being compensated in the event of his succeeding at trial is a significant factor in assessing where the balance of convenience lies; the relative strength of each party's case as revealed by the affidavit evidence adduced but:

> "this, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case."

In addition to these factors, Lord Diplock also reiterated that there may be other special factors to be taken into consideration in the particular circumstances of individual cases.

[23] The guidelines provided by Lord Diplock in *American Cyanamid* were generally applied by the courts through consideration of the following questions:

(i) Is there a serious question to be tried?

(ii) Are damages an adequate remedy for both parties?

(iii) Where does the balance of convenience lie?

(iv) Are there any special factors to be taken into consideration?

Serious question to be tried - revisited

[24] The interpretation held widely for 20 years after *American Cyanamid* was that once a party showed a serious question to be tried any further reference to the strength of the respective parties' cases was prohibited.

[25] In *Series 5 Software v Clarke* [1996] 1 All ER 853, Laddie J re-considered *American Cyanamid* and concluded that where on an application for an interim injunction the court is able from reading the evidence to form a clear view of the relative strengths of the parties' cases, it should take that view into account in deciding whether to grant or refuse the injunction. Similarly in *Guardian Group v Associated Newspapers* (Court of Appeal, unreported, 20 January 2000) Robert Walker LJ said at para [18] that in applying the *American Cyanamid* principles the court may give "proper weight to any clear view which the court can form at the time of the application for interim relief (and without the need for a mini-trial on copious affidavit evidence) of as to the likely outcome at trial." Laddie J and Walker LJ both noted the specific factual and legal context of *American Cyanamid* and noted it was a large and complex case involving complex disputes of law and fact where there was competing affidavit evidence, and the evidence was untested. At the interim stage, therefore, the court could not resolve the critical disputed facts of law and evidence and could do no more than consider whether there is a serious question to be tried.

[26] By revisiting the commonly held view among practitioners and academics that the ratio of *American Cyanamid* was that the court need only be satisfied that there is a serious question to be tried, Laddie J and Walker LJ avoided the concern noted by *Bean on Injunctions*, 15th Edition (Sweet and Maxwell) at para 3.20 that the commonly held interpretation of *American Cyanamid* placed, "a weapon for injustice" in the hands of applicants with weak but arguable cases.

[27] Accordingly, whether the court simply asks, "is there a serious question to be tried" or seeks to assess the strength of the parties' cases depends on the nature of the case. In cases where the facts are not in dispute or can be resolved without the need for copious affidavits or hearing the witnesses and where the issues of law are straightforward or do not require lengthy argument the court should give proper weight to the relative strength of each parties' case rather than just considering whether there is a serious issue to be tried. In contrast in cases where there are "critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend, particularly where the point of law turns on fine questions of fact which are in dispute or are presently obscure", the court should not attempt to resolve these at the interim injunction stage and all it can do is determine whether there is a serious issue to be tried – See *Sukhoruchkin v van Bekestein* [2014] EWCA 399, per Sir Terence Etherton C.

Discretionary remedy

[28] Secondly it is important to remember that Lord Diplock's speech in *American Cyanamid* is "neither a statute nor a biblical text." It only sets out guidelines and not tram lines. The statutory test for the grant of in injunction is whether it is "just and convenient" to do so. Accordingly, the proper approach is to recognise that the grant of an interim injunction as an equitable remedy is a matter of discretion. Whilst the discretion must be exercised in accordance with principle, judicial precedent and rules of court, there are no fixed rules when an injunction should or should not be granted. It is not a mechanistic exercise of slavishly following the guidelines in *American Cyanamid;* rather its grant will ultimately depend on all the particular facts and circumstances of the case.

Factors generally taken into account in exercise of discretion

[29] Nonetheless in the exercise of its discretion the court generally takes into account the matters set out in *American Cyanamid,* and it is, therefore, convenient to consider any application for an interim injunction under the headings:

(a) Is there a serious question to be tried?/Strength of the parties' cases?

(b) Are damages an adequate remedy for both parties and is each party able to pay damages?

(c) Where does the balance of convenience lie?

(d) What is the status quo?

(e) Are there any special factors to be considered?

The evidence

[30] Mr Conroy in his affidavit sets out that Costa coffee is a specialist blend of coffee which is served by trained baristas. Costa has an ancillary food offering but space and focus within the store is placed on the coffee and the business focus is to sell coffee with a food add on. Sales of coffee range from 30-40% with non-coffee drinks making total sales of 50%. Food is the other 50% of sales. The sales of coffee and food mix varies by a range of 20% depending on location but in enclosed shopping centres the coffee mixes at a higher percentage.

[31] Mr Conroy further averred that damages would not be an adequate remedy as they negotiated a property right with the landlord and, secondly, calculating their loss would be extremely difficult as it involves calculating future loss.

[32] There was no direct evidence from Jamaica Blue, but the court was provided with a promotional video, extracts from its website and photographs of the internal

and external layout of the store in the shopping centre and some franchise promotional material.

[33] These materials showed Jamaica Blue's branding is a coffee cup with steam arising out of it. Its website describes the journey of its coffee from "bean to cup" and in the section 'About Us', it talks about its belief in sourcing the very best coffee and using only fresh ingredients in respect of its food. It also references a "bean to cup" ethos of sourcing the finest beans, using roast masters and service by expert baristas. The promotional video is exclusively about coffee and does not refer to food. Jamacia Blue is a franchise and the franchise opportunity guide and advertising describes "coffee franchise opportunities" and "coffee shop business". Photographs of the fit-out of the shop shows that externally it has the brand logo of the coffee cup and on the wall there is the following statement: "passionate about great coffee, inspired by the best coffee growing regions in the world – Jamaica Blue." Internally, there is a very significant amount of space on the walls dedicated to posters about coffee, for example, "Coffee from a higher place." Another wall has the Jamaica Blue logo and pictures of coffee. Internally there is also a counter where there are some food items for sale, and coffee machines. Behind the counter there is a sign setting out details of various coffees and drinks and a board setting out "daily specials." At the tables there is a food menu and food is ordered at the counter and brought to the table. Food is prepared by a chef.

[34] In terms of sales Mr Herbert averred that he was informed Jamaica Blues' sales revenue for the Forestside Shop was split approximately 28% for coffee, 16% for other drinks and 56% for food.

Consideration

Question 1 – Does the grant of an interim injunction finally determine the action?

[35] The defendant submits that the granting of an interim injunction in this case will effectively determine the case because of the contents of the break clause in the side agreement. Mr Dunlop KC submits that in the event the court grants an injunction obliging the defendant to take any steps to prevent Jamacia Blue from trading from the shopping centre or requires Jamacia Blue to cease any trade which offends such declaration of the court, Jamacia Blue will exercise the break clause set out in the side agreement and will cease to trade, thus amounting to a final determination of the action.

[36] Mr Dunlop submitted that where granting an interim injunction would amount to a final determination at the interim stage, the defendant must show an overwhelming case. No authority was cited for this proposition but the well-established principle is that the court will take into account the strength and weaknesses of each parties' case and the likelihood of the plaintiff's eventual success at trial– see *Araci v Fallon* [2011] EWCA 668 and *AutoStore Technology AS v Ocado Group Plc* [2021] EWHC 1614 at [33].

[37] The plaintiff in reply submitted that the break clause does not come into operation until 5 December thereby leaving sufficient time for an expedited trial.

[38] I consider the grant of an interim injunction does not operate to determine this case finally because the break clause *may* not be exercisable as there is an argument it only comes into operation in the event the court makes a declaration or the court requires the landlord to take steps causing the tenant to cease trading. An interim injunction is not a declaration, and any interim injunction granted would not be requiring the tenant to cease trading in circumstances where Jamaica Blue has not yet started to trade. The court is not making any definitive ruling on the interpretation of the break clause as it has not heard full arguments. Even if the break clause is operative, however, under its terms Jamacia Blue would only cease to trade from 5 December and, accordingly, there is time for an expedited trial.

Serious question to be tried or relative strength of the parties' cases?

[39] The plaintiff's case is that the defendant breached Clause 6.2 of the lease as it has granted Jamaica Blue a lease to trade from units in the centre in a way which is in breach of the restrictive covenant in the plaintiff's lease.

[40] In determining whether there is a serious question to be tried or whether the plaintiff has a good case the court must decide what the restrictive covenant means and then consider whether it has been breached.

[41] Construction of the lease is a legal question which does not depend on the subjective views of the parties. Accordingly, the evidence of the parties is of limited importance. In determining whether there has been a breach the court must consider the evidence of the parties in respect of the activities to be undertaken by Jamaica Blue and Costa. The evidence in relation to the activities of Costa and Jamaica Blue largely consists of undisputed evidence about sales, shop layouts internally and externally, promotional materials and branding. The real dispute between the parties relates to how these facts are to be interpreted rather than the facts themselves. In circumstances where the construction of the lease is a pure legal question which can be resolved based on legal submissions and where there is no major dispute about the facts, I consider the court can and should in determining whether to grant interim injunction, consider the relative strengths of each parties' case.

Construction of the restrictive covenant

[42] The seminal case on the correct approach to be adopted to the interpretation or construction of a written contract was set out by Lord Neuberger at para [15] of *Arnold v Britton* [2015] UKSC 36 when he stated:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean' to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14… That meaning has to be assessed in light of:
>
> (i) the natural and ordinary meaning of the clause;
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> (ii) any other relevant provisions of the lease;
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> (iii) the overall purpose of the clause and lease;
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> (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and
>
> (v) commercial common sense; but
>
> (vi) disregarding subjective evidence of any party's intentions."

[43] The key words in Clause 6.2 is the prohibition on the grant of a lease for use for the *principal business of a specialist coffee shop*. This phrase is not defined in the lease and the parties spent pages in submissions and quite some time before me setting out very different definitions of what it meant. All of that indicates to me that it is a phrase which is clearly ambiguous and, accordingly, in deciding what was prohibited, I need to assess its meaning in light of the other factors set out by Lord Neuberger.

[44] Firstly, I note that Costa's use is described as "a good quality coffee shop" which is different wording to this phrase "specialist coffee shop." I also, however, take into account that in a shopping centre the purpose of such a clause is to stop direct competition.

[45] I consider this clause should, therefore, be interpreted as prohibiting a lease to enable any person to trade in direct competition with the plaintiff by providing a similar offering to the plaintiff. The defendant does not disagree with this interpretation as it states at para 26 of its skeleton argument as follows:

> "When interpreting "specialist coffee shop" it is important to cognisant that the purpose behind the covenant is to ensure that the centre does not include

> another shop that trades in the same manner as the plaintiff…hence it must be the case that the covenant is targeted at a specific sub set of shops that sell coffee, and that subset includes the plaintiff."

[46] All the parties agreed that the restrictive covenant does not prohibit a shop operating where the sale of coffee is ancillary to the main business and, therefore, the question is whether the evidence presently before the court indicates that Jamaica Blue is in direct competition with Costa as it provides a similar offering to the consumer.

[47] Costa submitted that Jamaica Blue was a direct competitor because they both had strong coffee credentials with a focus on the preparation, service and marketing of a barista service with ancillary food and other drinks. Secondly, Costa submitted there was a similarity in terms of sales; Costa's sales for coffee are about 30-40%, non-coffee drinks taking it up to 50% with the balance being 50% for food whilst Jamaica Blue food sales were 56%.

[48] In reply, Mr Dunlop submitted that Jamaica Blue did not breach the clause as it was not in direct competition with Costa and he emphasised that the nature of Jamaica Blue's business was very different. He highlighted that Jamaica Blue's main business was the sale of food as shown by the fact its sales were over 50% for food, they advertised their daily specials on a board, had paper menus at the table and customers could order fresh food prepared by a chef at the shop.

[49] In *Rexbay Limited v McCann & Others* [2023] IEHC 563 Stack J had to determine whether the landlord breached an exclusivity clause given to Starbucks when it granted a lease to another coffee company. The restrictive covenant provided:

> "The landlord shall not grant…a lease in respect of any part of the centre to…any other similar type of coffee chain store where coffee is their primary product."

[50] Although the wording of the clause in *Rexbay* is different to the restrictive clause in this case, nonetheless I consider *Rexbay* is of much assistance as determining whether a business is of a "similar type…where coffee is their primary product" is a similar exercise to deciding whether another business is in direct competition because it provides a similar service, namely one where coffee is its main or principal business.

[51] In determining the question whether it was a similar type of coffee chain, the court took into account a number of factors including the external appearance of the shop, the branding and how it marketed itself, the internal appearance and the layout of the shop. I also consider these are the factors which are relevant to assessing where two businesses are in direct competition as it views their offerings from the eyes of the average consumer. I, therefore, consider that these are factors I

should take into account in assessing whether Jamaica Blue is in direct competition with Costa.

[52] To assess the strength of the plaintiff's case it is necessary to look at the evidence before the court which consisted of the competing affidavit evidence, the documentary evidence which included website materials, a promotional video and photographs of the layout of the shop.

[53] I have carefully considered all the materials. I do not see any material difference between the offerings provided by Costa and Jamaica Blue. Jamaica Blue's literature states it is a coffee café. The focus and emphasis of all the materials is on coffee. There is, to a lesser extent, mention of fresh food but it very much secondary to the emphasis on coffee. Significantly, all coffee shops offer coffee and food, in most cases the split between food and drink is 50/50. Jamaica Blue's split is only marginally greater for food, but I do not consider that that means its principal business is not that of a specialist coffee shop. Notably, there was no evidence from Jamaica Blue to contradict the literature to say that it was a restaurant or that its main focus was on food. It was clearly open to the defendant to lodge such evidence but they failed to do so. The defendant has relied only on Mr Herbert's affidavit which provides his subjective evidence about his view of Jamica Blue's business.

[54] The photographs of the internal and external lay out demonstrate that space and focus is given to coffee rather than food as most of the wall space and notices reference coffee. To the average consumer, I consider, it presents as a coffee shop where coffee is the primary offering with add on of a food item.

[55] I am satisfied on the basis of the branding, the promotional literature, the internal and the external fit-out, the actual services provided, the products provided and its sales figures that Costa enjoys a strong case of demonstrating that Jamaica Blue provides a similar offering and could be viewed as a direct competitor and, accordingly, the lease permitting it to trade in its way is in breach of the restrictive covenant. At this stage the court does not have all the evidence before it and the available evidence has not been tested. Accordingly, this is my assessment of the relative strength of the case based on the materials available at this stage.

[56] Mr Dunlop further submitted that the landlord had not acted in breach of the restrictive covenant as the lease granted to Jamaica Blue prohibited Jamaica Blue trading as a specialist coffee shop and only permitted it to trade as a restaurant.

[57] I consider that the wording of this lease to Jamacia Blue is a thinly veiled attempt to get around the restrictive covenant. In assessing whether there is a breach, the court looks to substance and not form. Even though the landlord may describe Jamaica Blue's business as a restaurant, the reality is that the defendant knows the nature of Jamacia Blue's business and in granting a lease to Jamica Blue to carry on this business I consider the landlord was acting in breach of the restrictive covenant, and the use of the word "restaurant" in the lease and the prohibition on

trading as a "specialist coffee shop" could be considered a device or a sham to underline the efficacy of the restrictive covenant. I, therefore, consider the argument that the lease as worded does not breach the negative covenant in the lease as weak.

[58] Accordingly, I am satisfied based on the evidence before the court, that the plaintiff enjoys a relatively strong case.

Adequacy of damages for both parties

[59] The second factor the court must consider is whether damages are adequate to both sides and the ability of the respective parties to pay damages.

[60] Firstly, I consider the negative covenant is a property right. It is not a personal right but rather attaches to land. Since section 92 of the Judicature (NI) Act 1978 there is a general power to award damages in lieu of an injunction. In *Lawrence v Fen Tigers* [2014] UKSC 13, the court set out, albeit with some disagreement between the law lords, that the existence of a property right does not per se give rise to a right to injunctive relief and the decision whether or not to grant injunctive relief is a "classic exercise of discretion."

[61] In *Pride of Derby and Derbyshire Angling Association Ltd & Another v British Celanese Ltd & Others* [1953] Ch 149 where the defendant wrongly interfered with a property right and continued to interfere with it, the court held that the plaintiff was prima facie entitled to an injunction but, obviously, the court still exercised its discretion in deciding whether to grant an injunction.

[62] These seemly conflicting authorities were more recently considered in *D v P* [2016] ICR 688 by Sir Colin Rimer where he observed that an interim injunction is the ordinary remedy to enforce a negative covenant but noted that an injunction is a discretionary remedy and, therefore, the court also looks at other factors, being very alert to prevent a person trying to buy the privilege of infringing the plaintiff's rights.

[63] *Bean* at para 2.13 notes:

> "A submission that damages should be awarded in lieu of injunction on the ground that an injunction would not benefit the claimant comes ill from a defendant who has himself created that situation by acting in breach of obligations freely undertaken. In a valuable and extensive review of the authorities in *Priyanka Shipping Ltd v Glory Bulk Carriers* in [2019] EWHC 2804, David Edwards QC said that:
>
> > 'The principles to be derived from these authorities are, in my judgment, as follows:

> (i) Negative covenants will ordinarily, though not invariably, be enforced by injunction;
>
> (ii) It is not a precondition to enforcement by injunction that the parties seeking an injunction should prove that it would otherwise suffer damage.
>
> (iii) An injunction is nonetheless an equitable and, therefore, a discretionary remedy…
>
> (iv) So far as the exercise of discretion is concerned, there may be cases where the circumstances are such that the grant of an injunction would be unconscionable or oppressive and in such circumstances, an injunction should be refused. Whilst a mechanistic approach should not be followed, inconvenience or hardship to the defendant is, however, not enough. The burden lies on the party bound by the negative covenant to show why the ordinary rule should not apply, ie why the covenant should not be enforced by injunction.
>
> The test for granting an injunction is stricter where the injunction sought is mandatory, but the question is one of substance not form and does not depend on the use of positive or negative forms of expression."

[64] I consider damages are not an adequate remedy to the plaintiff. Firstly, to limit the plaintiff to damages would enable the defendant to buy the privilege of infringing a property right he freely granted to the plaintiff.

[65] Secondly, Professor Capper, "Injunctions in Private Law" at para 2.29 identifies areas where damages are not usually considered adequate. One of these is where there is a permanent loss of market share and another is where there is difficulty in quantifying loss. Whilst difficulty of calculating loss alone is not a bar to restricting the plaintiff to a remedy in damages it is a factor which can be taken into account in the exercise of the discretion.

[66] I consider damages are not an adequate remedy because the plaintiff's claim relates to a permanent loss of market share and calculation of loss is difficult, something the defendant accepts.

[67] I have also considered the defendant's evidence about whether its loss can be compensated in damages and I accept that in the event the court grants an injunction and the defendant is successful at trial it may be difficult to assess its loss.

Balance of convenience

[68] In these circumstances the court must consider the balance of convenience. In this exercise Lord Diplock said:

> "It is unwise to attempt to list all the various matters that need to be taken into consideration in deciding where the balance lies. But, the court should certainly take into account the prejudice to each party if the injunction is granted and if the injunction is not granted and that is by having regard to the very specific facts of each case. Ultimately, each case will turn on its own specific facts."

[69] I consider each side is going to suffer in the event of an injunction being granted or not being granted, although the landlord's potential loss arises out of a situation he created by entering into the lease at a time when he knew the plaintiff was threatening injunctive proceedings. I consider the balance is tipped in favour of the plaintiff due to the relative strength of the plaintiff's case, the defendant's conduct, the existence of the side agreement which illustrates that the landlord understood the trading activities of Jamaica Blue potentially breached the restrictive covenant, the expedition with which the plaintiff acted and the fact third party interests can be protected by the terms of the injunction.

[70] In terms of the status quo, Jamaica Blue has a lease but it is not yet trading and, therefore, the status quo would point to Jamaica Blue not being allowed to trade in a way which would breach the terms of the restrictive covenant.

Quia timet

[71] Mr Dunlop submitted that this was an application for a quia timet injunction and therefore a different test applied. I do not accept it is a quia timet application as the breach relates to the granting of the lease which has already occurred.

Injunction order

[72] I consider that the plaintiff is entitled to interim injunctive relief. The terms of the relief must reflect that the aim of the negative covenant is to limited only a subset of coffee shops namely those in direct competition. Accordingly, I consider the injunction should be granted in the following terms:

> "Restraining the defendant from allowing or permitting Jamaica Blue to trade in breach of Clause 6.2 of lease dated 31 March 2011 and specifically requiring Jamaica Blue to obscure all Jamaica Blue branding and signage from Units 2 and 3 Bloomfield Shopping Centre, Bangor before it commences trading, and requiring Jamaica Blue not to identify with any Jamaica Blue promotional materials."

[73] Costs reserved.