[2020] IEHC 503

THE HIGH COURT
CHANCERY

[2020 No. 6166P]

BETWEEN

FLOGAS IRELAND LIMITED
AND
DCC ENERGY LIMITED

PLAINTIFFS

AND

NORTH WEST GAS COMPANY LIMITED

DEFENDANT

JUDGMENT of Mr Justice David Keane delivered on the 9th October 2020

Introduction

1. This is an interlocutory injunction application in an action for breach of contract, breach of copyright, unlawful interference with contractual relations, breach of duty and defamation.

2. The first plaintiff, Flogas Ireland Limited (‘Flogas’) is an Irish company that has its registered office in Drogheda, County Louth. It is one of the State’s leading suppliers of liquefied (or liquid) petroleum gas (‘LPG’) in industrial, commercial and domestic markets.

3. Flogas forms part of the energy division of the second plaintiff, DCC Energy Limited (‘DCC’), a United Kingdom company that has its registered office in the Belfast suburb of Sydenham, County Down.

4. The defendant, North West Gas Company Limited (‘North West’) is an Irish company that has its registered office in Carndonagh, County Donegal. As its name suggests, it is engaged in the sale or distribution of LPG in the North West region of the island, primarily in Donegal.

Background

5. The precise nature of the pre-existing contractual relationship between the parties is in dispute. On 28 August 2019, Flogas wrote to North West giving 12 months’ notice of its intention to terminate that relationship with effect from 28 August 2020. When a dispute arose about whether the relevant contractual relationship was one between DCC and North West, DCC wrote to North West giving 12 months’ notice of its intention to terminate its relationship with North West with effect from 19 March 2021.

6. North West issued High Court proceedings against DCC and Flogas on 26 March 2020, alleging that what it described as the ‘exclusive distribution agreement’ between them for the ‘supply and re-sale’ of Flogas LPG could not be terminated on less than 42 months’ notice (‘the North West proceedings’).

7. After a process of mediation, the parties entered into a settlement agreement in the North West proceedings on 27 June 2020. That agreement contains the following recitals explaining the background to the underlying dispute between them:

'A. [North West] has been a distributor for [Flogas] for almost 30 years.

B. A dispute has arisen between the parties in relation to changes to the terms of their contractual relationship proposed by Flogas, including in relation to; (i) the relevant parties to the contractual relationship; (ii) the applicability of an agreement entered into between [Flogas] (then 'Ergas Limited') and Inishowen Oil Company Limited (an associated company of [North West]) dated 12 December 1989; (iii) the appropriate notice period for termination of the contractual relationship; and (iv) the ownership of customer relationships ('the dispute').

C. High Court proceedings were issued by [North West] against DCC and Flogas in relation to the dispute on 26 March 2020 bearing High Court record number [2020 No. 2390P] ('the proceedings').

D. The parties have now settled their differences and have agreed terms for the full and final settlement of the proceedings and the dispute and the parties now record those terms of settlement, on a binding basis, in this agreement.'

8. Among the terms of the settlement agreement in the North West proceedings are the following:

'1. The parties agree that all and any contractual agreements between the parties and/or any company associated with and/or connected with the parties, will terminate on 1 June 2021 ('the termination date').

2. As and from the termination date, the parties will be free to compete in all respects and in all markets.

...

9. The parties each individually agree not to make, or cause to be made, any statements or communications, whether verbally or in writing, which are derogatory or disparaging of the other, or either of them, to any third party, including customers.'

The present application

9. Flogas and DCC seek five separate interlocutory injunctions against North West, restraining it from: (a) soliciting any customer of Flogas or DCC; (b) interfering in the contractual relationship between Flogas or DCC and any customer of either of them; (c) infringing Flogas's copyright in its standard form customer supply agreement; (d) breaching any of the terms of the settlement agreement; and (e) suggesting to any person that Flogas or DCC intends to cease doing business in County Donegal.

10. North West opposes that application and joins issue with Flogas and DCC on all of their underlying claims. North West has given an undertaking to the court in terms of the fifth interlocutory injunction sought; that is to say, an undertaking pending the trial of the action that neither it, nor any of its servants or agents, will communicate or suggest to

any person, natural or legal, that either Flogas or DCC is ceasing in whole or in part its operations in Donegal. North West is at pains to emphasise that it has given that undertaking as a purely practical expedient to assist in the efficient conduct of the present litigation, entirely without prejudice to its contention that neither it, nor any of its servants or agents, has ever made any such communication or suggestion.

Procedural history

11. Flogas and DCC procured the issue of a plenary summons on 4 September 2020. They filed the present motion on the same day. North West entered an appearance on 10 September.

12. When the motion came on for hearing, Flogas and DCC had not yet delivered a statement of claim. In the absence of a properly particularised claim, it is necessary to attempt to identify the issues that they seek to have tried (and, thus, that form the basis of their injunction application) from the contents of the indorsement of claim on the plenary summons; the averments contained in the affidavits that have been exchanged; and the written and oral submissions of the parties.

13. The application is grounded on an affidavit of John Rooney, sworn on 4 September 2020. Mr Rooney is the managing director of Flogas and a director of DCC. It is supported by an affidavit of Shelley McCloskey, sworn on 3 September. Ms McCloskey is DCC's account manager for the Northwest region, including Donegal. The application is further supported by an affidavit of Martin Loughran, also sworn on 3 September. Mr Loughran is employed by DCC as the Flogas sales executive for County Donegal.

14. North West has responded with an affidavit of Conor Kelly, sworn on 11 September, and one of Jim Porter, sworn the previous day. Mr Kelly is a director of North West. Mr Porter is a sale representative for North West, covering County Donegal.

15. Mr Rooney, Ms McCloskey and Mr Loughran each swore a second affidavit on behalf of Flogas and DCC on 15 September, and Ms McCloskey swore a third affidavit on their behalf on 17 September.

16. Mr Kelly and Mr Porter each swore a second affidavit on behalf of North West on or about the 17 September – I cannot be specific because the copies produced in court were unsworn. And Mr Kelly swore a third affidavit, in response to Ms McCloskey's third affidavit, on 18 September.

17. I heard the application on 18 September 2020.

The underlying contractual relationship between the parties

18. On behalf of Flogas and DCC, Mr Rooney avers that the existing contractual relationship between the parties operates as follows. Customers contract with Flogas for the supply of LPG at a particular price. North West then purchases LPG from DCC and distributes it to those customers in exchange for payment. Where customer purchase prices fall below certain minimum price thresholds agreed between DCC and North West, DCC provides North West with a rebate in the form of a monthly credit on its purchase account. Sale

and supply of Flogas LPG to North West is managed through DCC for geographical and logistical reasons, although Flogas manages the overall contractual relationship with North West. Thus, Flogas and DCC characterise that contractual relationship as an 'exclusive distribution' agreement for Flogas LPG.

19. On behalf of North West, Mr Kelly avers that it is incorrect to characterise the customers concerned as 'exclusive customers' of Flogas or DCC, because – with the express consent of Flogas and DCC – those customers also have an entirely separate contractual relationship to purchase the same Flogas LPG from North West. In support of that assertion, Mr Kelly emphasises that North West trades with those customers on its own account, which entails accepting orders, making deliveries, furnishing invoices, collecting payment, and bearing the credit risk of customer non-payment in the course of that trade. The agreement that has operated between North West and Flogas/DCC for almost thirty years is one for the exclusive purchase by North West of Flogas LPG for the purpose of re-sale. Thus, North West characterises its contractual relationship with Flogas and DCC as an 'exclusive purchase' agreement.

20. In his second affidavit, Mr Rooney avers that North West had never previously sought to characterise its contractual relationship with Flogas/DCC as anything other than a distribution agreement. In support of that contention, Flogas/DCC rely on the following: first, North West's description of the contractual relationship between the parties in the North West proceedings as, variously, an 'exclusive distribution agreement' and a 'long-standing exclusive re-sale and distribution agreement', rather than an 'exclusive purchase agreement'; and second, North West's description of itself on its own headed notepaper as an 'authorised distributor' of Flogas.

21. Mr Rooney further avers that the guaranteed margin that North West receives through rebates from DCC where required is calculated at a level that takes account of the anticipated incidence of customer payment default. Mr Kelly denies that that is so, averring that the variation in price between customers is designed solely to take account of the differing cost of supply logistics.

22. Both sides appear to acknowledge four specific features of the contractual relationship between them. First, Flogas/DCC cannot distribute or sell Flogas LPG through any entity other than North West in County Donegal (without the consent of North West). Second, North West cannot distribute or sell any LPG product other than Flogas in County Donegal (without the consent of Flogas/DCC). Third, there is no suggestion – for the purpose of the present application at least – that the agreement between the parties is recorded in writing. And fourth, the mutual obligations of the parties will cease when the contractual relationship between them terminates on 1 June 2021.

23. In his second affidavit on behalf of North West, Mr Kelly denies that the terms 'exclusive distribution agreement' and 'exclusive distributor' have any special meaning in respect of the present dispute and asserts that the contractual relationship between the parties falls to be identified by reference to its substance, rather than the terminology used to describe it.

24. In her second affidavit on behalf of Flogas and DCC, Ms McCloskey avers that, in her experience, the contractual relationship between the parties has always been that North West has had sole responsibility for the distribution of Flogas LPG to customers in Donegal and the billing of those customers, whereas sales and marketing have been the exclusive preserve of Flogas and DCC. In his second affidavit for North West, Mr Kelly avers in response that, however the relevant Flogas LPG customers are categorised, the majority of them were introduced to Flogas and DCC by North West.

25. In his second affidavit Mr Rooney avers that, as Mr Kelly acknowledges, Flogas has a standard form LPG sale and purchase agreement in place with many of the customers that North West supplies with Flogas LPG ('the Flogas industrial LPG supply agreement'). Among other terms, the Flogas industrial LPG supply agreement stipulates that it covers a period of two years from its operational date and that it is to continue from year to year thereafter unless terminated in accordance with its terms.

26. In his second affidavit, Mr Kelly avers that the existence of these Flogas industrial LPG supply agreements does not displace the exclusive entitlement of North West to supply the customers concerned with the Flogas LPG that it purchases from DCC. Further, Mr Kelly questions whether Flogas has such supply contracts in place with all Flogas LPG customers in Donegal. Still further, Mr Kelly avers that, following intervention by the Competition Authority, all suppliers operating in the market now accept that supply contracts must be limited in duration to two years and that so-called evergreen contracts, which automatically roll over indefinitely without express renewal, are not permissible.

27. In appears to be common case that, where customers are supplied with Flogas LPG in bulk rather than in cylinders, the necessary storage tanks are provided, installed and maintained at customers' premises by Flogas. Indeed, this is reflected in the terms of the Flogas industrial LPG supply agreement whereby Flogas is to furnish the equipment necessary for the use and storage of LPG, which equipment is to remain its property, and the customer is to pay an agreed annual rental and maintenance charge for the use of that equipment.

28. In her third affidavit on behalf of Flogas and DCC, Ms McCloskey avers that, as part of the existing contractual relationship between the parties, North West is responsible for invoicing Flogas LPG customers for storage tank rental and maintenance fees, for collecting those fees, and for remitting them to Flogas. In his third affidavit on behalf of North West, Mr Kelly avers in response that the annual rental and maintenance fee for each customer is a very modest one, generally ranging between €62 and €75 a year; that only a minority of customers (approximately 35% of them) pay it; that those customers who fail to pay it get a write-off; that DCC then invoices North West in the aggregate amount of the fees it does receive, less 25% of that sum as its own fee; and that the aggregate amount concerned for the year 2017/2018 was a mere 0.22% of the turnover of North West and a mere 0.21% of the aggregate amount that North West paid to DCC for the supply of Flogas LPG during that period.

29. Against this backdrop, it is tolerably clear that the central dispute between the parties on the terms of the contractual relationship between them concerns the manner in which, and extent to which, those terms govern the relationship of each with the relevant Flogas LPG customers in County Donegal.

The issues that Flogas and DCC seek to have tried

i. breach of the underlying contractual relationship or the settlement agreement or both

30. On behalf of Flogas and DCC, Mr Rooney avers that North West has been unlawfully soliciting business from Flogas customers in the Donegal area in breach of the terms of the existing contractual relationship between the parties or the settlement agreement between them, or both. In essence, Flogas and DCC contend that North West cannot solicit any Flogas LPG customer in Donegal to contract with it instead of them for the supply of LPG until 1 June 2021.

31. On behalf of North West, Mr Kelly avers in response that the Flogas LPG customers in the Donegal area are North West customers and that it has been openly approaching them to invite them to continue to deal with North West as their LPG supplier when its contractual relationship with Flogas/DCC ends on 1 June 2021. According to Mr Kelly, North West has explained to those customers that, should they select it to supply their LPG after 1 June 2021, it will be necessary for North West to replace their existing Flogas equipment with equipment of its own but that this will be accomplished without significant disruption. Simply stated, North West contends that it is perfectly entitled to solicit those customers under the settlement agreement between the parties, as long as it does not supply any of them with LPG until after 1 June 2021, when the existing contractual relationship between the parties ends.

32. In brief summary then, Flogas and DCC contend that, under the existing contractual relationship and the settlement agreement between the parties, North West cannot compete with them to secure LPG customer supply contracts in Donegal until after 1 June 2021, whereas North West acknowledges only that it cannot compete with them in the supply of LPG to customers in Donegal until after that date.

33. More particularly, DCC and Flogas argue that in expressly stipulating that the parties are free to compete in all respects and in all markets 'as and from the termination date', clause 2 of the settlement agreement precludes North West from competing with them – presumably, in any respect in any market – until after that date, by application of the canon of construction '*expressio unius est exclusio alterius'* – a Latin tag, which means in effect that the explicit inclusion of one thing in a formal document should be taken to imply the exclusion of another.

34. In response, North West submits that clause 2 of the settlement agreement was not drafted to impose a blanket prohibition on competition of any sort between the parties until after 1 June 2021, as could have been done using plain words if that was what was intended. They go on to submit that, if that had indeed been the intention, then – as the clause expressly refers to 'the parties' and not solely North West - the implied prohibition

would be reciprocal, preventing Flogas and DCC, just as much as North West, from soliciting customers to enter into or renew LPG supply agreements during the relevant period (between 27 June 2020 and 1 June 2021), whereas it is common case that Flogas and DCC do not accept that they are constrained in that way.

35. Further, North West submits that, as Mr Kelly avers on its behalf, a disputed claim by Flogas and DCC that North West was subject to a restraint of trade clause, prohibiting it from selling or supplying LPG in Donegal for two years after the termination of the contractual relationship between them, formed a significant element of the matrix of fact surrounding the settlement agreement. Thus, North West contends that clause 2 of the settlement agreement must be interpreted in accordance with its plain words as establishing no more than that neither party is subject to any restraint of trade after 1 June 2021, and not as stipulating – as an unstated but implied corollary – that, prior to that date, North West is precluded from seeking to secure customer contracts for the supply of LPG after that date. North West urges the court to heed the warning of Lopes LJ for the England and Wales Court of Appeal in *Colquhoun v Brooks* (1888) 21 QBD 52 (at 65) concerning the 'expressio unius' maxim of construction that '[i]t is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents.'

ii. breach of fiduciary relationship

36. On the facts already described, Flogas and DCC submit that North West is in a fiduciary relationship with them. They contend that, in soliciting Flogas LPG customers, North West is in breach of the distinguishing obligation of loyalty that characterises the occupation of a fiduciary position, citing *Bristol and West Building Society v Matthew* [1998] Ch 1 at 18, approved in *Clements v Meagher* [2008] IEHC 258 (Unreported, High Court (Feeney J), 25 July 2008), *Fermoy Fish Limited v Canestar Ltd & Anor*. [2015] IESC 93, (Unreported, Supreme Court (Dunne J), 9 December 2015), and *Best v Ghose* [2018] IEHC 376 (Unreported, High Court (Baker J), 27 June 2018).

37. For its part, North West denies it is in a fiduciary relationship with Flogas or DCC. It invokes the dictum of Feeney J in *Clements* (at para. 3.1) that it is not the characterisation of someone as a fiduciary that imposes fiduciary obligations upon that person but rather the existence of fiduciary obligations owed by someone that makes that person a fiduciary, before submitting that it owes no fiduciary obligations to Flogas or DCC because the relationship between them is an arms-length contractual – and not a fiduciary - one. As for its acknowledged responsibility for collecting bulk tank rental and maintenance fees from Flogas LPG customers and remitting them to Flogas and DCC, North West denies that this gives rise to a fiduciary relationship and emphasises the relatively small sums involved. North West submits that no meaningful analogy can be drawn between that situation and the substantial payment obligations that gave rise to the fiduciary relationship that the Supreme Court found to exist between the parties in *Fermoy Fish.*

iii. unlawful interference with contractual relations

38. Flogas and DCC contend that North West's acknowledged endeavours to persuade existing Flogas LPG customers to sign – what Mr Rooney describes as 'competing and inconsistent' – LPG supply agreements with North West constitute unlawful interference with the private contractual relations between Flogas/DCC and those customers.

39. In response, Mr Kelly avers that the North West's customer agreement is not inconsistent with any subsisting agreement between any Flogas LPG customer and Flogas and DCC because it contains an express term that North West will not be in a position to sell or supply LPG to any customer with a subsisting third party LPG supply agreement. Thus, they submit, it cannot be suggested that they have done anything to induce any Flogas LPG customer to breach an existing agreement with Flogas or DCC, so that the tort of interference with economic relations, as recognised by Henchy J for the Supreme Court in *Talbot (Ireland) Ltd v ATGWU* (Unreported, Supreme Court, 30 April 1981), cannot arise. Further, through Mr Kelly, North West repeats the claim that Flogas and DCC have no valid agreement in place with many of the Flogas LPG customers in Donegal.

iv. infringement of the copyright in the Flogas 'Industrial LPG Agreement'

40. Flogas and DCC claim that the North West LPG supply agreement is substantially similar to Flogas's Industrial LPG supply agreement in all material respects, thereby infringing Flogas's copyright in that work, in the creation of which Flogas has expended considerable time, money and effort. In asserting that North West is in breach of copyright, Flogas and DCC submit that : (a) copyright can subsist in a standard form contract as a protected work, *USB Strategies Plc v London General Holdings Ltd* [2002] EWHC 2557 (Ch) (para. 32); (b) the whole of each work should be considered, *Designer's Guild v Russell Williams* [2001] FSR 11 (para. 69); and (c) the result depends much more on the quality, than the quantity, of the work taken, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (at 276).

41. On behalf of North West, Mr Kelly avers that the two standard form contracts are materially different in several respects, and that the similarities between them arise from the use of 'boiler plate' clauses, common in the industry. Further, Mr Kelly avers that North West wishes to put Flogas on strict proof of its ownership of the copyright in its own contract.

v. defamation and malicious falsehood

42. The affidavits exchanged between the parties evidence in some detail a number of claims by Flogas and DCC, each denied by North West, that, through Mr Porter, North West has falsely suggested to a number of Flogas LPG customers that Flogas and DCC are withdrawing from the market for LPG in Donegal. These claims give rise to issues concerning whether North West is in breach of the requirement under clause 9 of the settlement agreement not to make derogatory or disparaging statements or communications concerning Flogas and DCC and whether North West is separately liable to one or both of them for the torts of defamation and malicious falsehood.

43. However, the undertaking provided by North West – that pending the trial of the action neither it, nor any of its servants or agents, will communicate or suggest to any person, natural or legal, that either Flogas or DCC is ceasing in whole or in part its operations in Donegal – renders it unnecessary to consider further that aspect of the dispute between the parties for the purpose of the present application.

The test for an interlocutory injunction

44. The proper approach to an application for an interlocutory injunction was recently restated in *Merck Sharp & Dohme Corp v Clonmel Healthcare* Ltd [2019] IESC 65 (Unreported, Supreme Court (O'Donnell J; Clarke CJ, McKechnie, Dunne and O'Malley JJ concurring), 31 July 2019) ('Merck').

45. The general principles remain those identified by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) (at 407-9) and approved by the Supreme Court in *Campus Oil v Minister for Industry (No. 2)* [1983] 1 IR 88 (O'Higgins CJ and Griffin J, Hederman J concurring) ('the *Campus Oil principles'*).

46. In summary, those principles are that the applicant must establish that: (1) there is a serious issue to be tried on the applicant's entitlement to a permanent injunction; (2) the balance of convenience favours the grant of interlocutory relief, which requires, but is not limited to, a consideration of whether damages would be an adequate and effective remedy for an applicant who fails to obtain interlocutory relief but later succeeds in the action at trial and, if not, whether the applicant's undertaking to pay damages would be an adequate and effective remedy for a respondent against whom interlocutory injunctive relief is granted but whose defence to the action succeeds at trial. While Lord Diplock's speech in *American Cyanamid* was ambiguous on whether the adequacy of damages was a consideration antecedent to, or part of, that of the balance of convenience, the judgment of O'Donnell J in Merck (at para. 35) has now clarified that it is preferable to consider adequacy of damages as part of the balance of convenience, thus emphasising the flexibility of the remedy.

47. In *Merck*, O'Donnell J pointed out that it would be an error to treat the *Campus Oil* principles as akin to statutory rules (at para. 34), before later outlining the steps that might usefully be followed in considering an interlocutory injunction application (at para. 64):

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

the claim is of a nature that could be tried, the court, in considering the balance of convenience or balance of justice, should do so with an awareness that cases may not go to trial, and that the presence or absence of an injunction may be a significant tactical benefit;

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

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

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

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

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

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

48. Finally, in approaching the test I must apply to the evidence that I have attempted to summarise, I am conscious of Lord Diplock's admonition in *American Cyanamid* (at 407):

> '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. These are matters to be dealt with at trial.'

The threshold test

49. North West argues that the present application falls into that category of cases where the test for the grant of an interlocutory injunction includes a requirement that that the applicant or applicants, in this instance Flogas and DCC, establish a strong arguable case, rather than merely a serious question to be tried.

50. In advancing that argument, North West relies on the decision of Clarke J in *Allied Irish Banks plc v Diamond* [2012] 3 IR 549 ('*Diamond*'). That was an application for a so-called 'springboard' injunction, whereby certain employers sought to restrain certain of their former employees and certain of the employers' competitors with whom those former employees were now connected from soliciting the employers' customers; contracting with the employers' customers; soliciting the employers' other employees; or retaining the employers' confidential information, against the background of the employers' claims against those employees for breach of fiduciary duty, breach of the contractual obligation of fidelity to an employer, and breach of confidence.

51. Where granted, a 'springboard' injunction is designed to deprive a competitor of any head start gained through the exploitation of a former employee's breach of contract, breach of fiduciary duty or breach of confidence. It is quite distinct from an injunction to enforce a restraint of trade clause in a contract of employment, in that the former will be specifically calibrated to take away an illegally obtained advantage whereas the latter will only be granted where the clause concerned is not over wide and is designed solely to protect the legitimate legal interests of the employer. The manner in which a springboard injunction must be calibrated makes it unlikely in the extreme that most aspects of it will be open-ended. It is designed to make competition fair rather than to prevent competition – to properly handicap rather than wholly disqualify, to borrow the horse racing analogy offered to Clarke J in *Diamond* (at 560). Thus, whatever measures are deemed appropriate will be limited in time so as to amount to a proportionate response to the illegally obtained advantage.

52. North West acknowledges that this is not a springboard injunction application but argues that, nonetheless, it shares the fundamental characteristic that any injunction granted must necessarily be limited in time. That is because, as the settlement agreement expressly acknowledges, the contractual relationship between the parties in this case will terminate on 1 June 2021, so that any relief to which Flogas and DCC might be entitled could not, on any view, extend beyond that date.

53. As Clarke J explained in *Diamond* (at 560-1):

> 'That point draws attention to one of the difficulties with the springboard injunction. Given that such an injunction is likely to be limited in time, there is every chance that all, or a substantial part, of the time covered by a springboard injunction will occur before the trial of the action. There is a very real sense in which the interlocutory injunction will, in those circumstances, deal with a significant part of the action itself. In *N.W.L. Ltd. v. Woods* [1979] 1 W.L.R. 1294 Lord Diplock suggested that in cases where a decision at the interlocutory stage would put an end to the action the court may have to consider the strength of each party's case. The relevant passage is in the following terms at p. 1307:-
>
> > "Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action be-cause

> the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."

While it may not strictly be the case that the interlocutory decision brings the case to an end the grant of a springboard injunction at the interlocutory stage has some similarities to such cases. It will, of course, be the case that a plaintiff will be required, if obtaining a springboard injunction, to give the usual undertaking as to damages. If the interlocutory order is made and the plaintiff ultimately loses at trial, then the plaintiff will have to compensate the defendant or defendants for the consequences of the injunction being in place. However, in many cases it may be that most of the maximum period, for which it might reasonably be contemplated that the plaintiff might be entitled to a springboard injunction, will have elapsed before the trial is concluded and judgment given. In those circumstances the judgment may be more about whether, with the benefit of full evidence and argument, the interlocutory order was justified or not with the plaintiff being entitled perhaps to some damages and perhaps to some relatively short further injunctions in the event of succeeding, but being obliged to compensate the defendant on the plaintiff's undertaking as to damages, in the event of losing. It seems to me that that curious feature of the spring-board injunction is a matter that needs to be kept in mind in balancing the legitimate interests involved in relation to the grant or refusal of an interlocutory injunction.'

54. Returning to the issue later in his judgment, Clarke J went on (at 575-6):

> I have already noted the issue which arises as to whether, given that what is sought in these proceedings is a springboard injunction, there may be a case to be made that the court requires a higher level of assurance that the plaintiff will succeed by reason of the fact that the granting of an interlocutory injunction in favour of AIB might well amount to a resolution of all of the issues (with the exception of damages) in this case in AIB's favour. As noted earlier, there is an argument to be made to the effect that the court should require a higher level of likelihood that the proceedings will succeed in those circumstances. I have come to the view that there is an obligation on a plaintiff, seeking to obtain an interlocutory springboard injunction, to satisfy the court of a strong arguable case for those reasons.

55. North West argues that, in view of the fact that the grant of the injunctions sought by Flogas and DCC would, in effect, result in the resolution of all of the issues in the case (with the exception of that of liability for damages) in their favour, the same 'strong arguable case' test should apply here.

56. I accept that argument. Indeed, it seems to me that the decision of the High Court in *Diamond* is now, in relevant part, reflected in that of the Supreme Court in *Merck*. There, in discussing the decision of the House of Lords in *American* Cyanamid, O'Donnell J observed (at para. 36):

> 'In particular, the underlying assumption on which the decision proceeds is that the interlocutory injunction is to be considered pending trial, which it is assumed will take place and finally resolve the merits of the action. If, however, it is unlikely that the trial will take place (for example, if the injunction sought is the entire remedy, such as injunction restraining a strike or other industrial action, or restraining some form of public protest), then the grant of the injunction will almost always determine the case and the parties will have little practical incentive to proceed to trial and incur the time and expense necessary to do so.'

57. That appears to me to have been one of the considerations that informed the formulation by O'Donnell J, later in his judgment in *Merck* (at para. 64), of the second of the eight suggested steps that a court should take in determining an interlocutory injunction application, whereby the assessment of whether there is a fair (or serious) issue to be tried, may also involve a consideration of whether the case will probably go to trial.

Is there a serious issue to be tried?

58. In Betty Martin Financial Services Ltd v EBS DAC [2019] IECA 327, (Unreported, Court of Appeal, 18 December 2019), having noted that the threshold to be surmounted to show a fair question/serious issue to be tried is generally recognised as low, Collins J went on to observe (at para 42):

> 'It may be useful to regard this threshold as akin to the threshold that applies where a party seeks to dismiss a case against it pursuant to the inherent jurisdiction and that was the approach taken by the High Court in a number of decisions cited to us including *Wingview Limited v Ennis Property Finance DAC* [2017] IEHC 674 (per Haughton J, at para 14) and *O'Gara v Ulster Bank DAC* [2019] IEHC (per Barniville J, at para 42).'

59. With that test in mind, I have come to the following conclusions on the issues that Flogas and DCC seek to have tried in these proceedings.

i. breach of contract

60. I am satisfied that there is a serious issue to be tried on whether the underlying contractual relationship between the parties is the exclusive distribution agreement contended for by Flogas and DCC or the exclusive purchase and resale agreement contended for by North West. I am also satisfied that there is a serious issue to be tried on the proper interpretation and, hence, application of clauses 1 and 2 of the settlement agreement between the parties. Thus, I conclude that there is a serious issue to be tried on whether, under the existing contractual relationship and the settlement agreement between the parties, North West is prevented from competing with Flogas and DCC for

contracts to supply customers in Donegal with LPG until after 1 June 2021 or is only prevented from competing with them in the supply of LPG to those customers until after that date. However, given the conflicting evidence of the parties on the nature of their underlying contractual relationship and given also the relative strength of the competing arguments on the proper interpretation of clause 2 of the settlement agreement, I am not satisfied that Flogas and DCC have established a strong arguable case on the issue, likely to succeed at trial.

ii. breach of fiduciary duty

61. On the evidence before me, I am not satisfied that Flogas and DCC have established as a serious issue to be tried whether North West is in breach of a fiduciary duty that it owes to them in openly competing with them for contracts to supply customers in Donegal with LPG after 1 June 2021. I do not doubt that the obligation on North West to collect LPG tank rental and maintenance fees (however modest those fees may be in the context of its overall turnover from the sale of LPG) and to account to DCC for them does give rise to a relationship of trust and confidence between those parties that does amount to a fiduciary relationship in that regard. Hence, I am also in no doubt that DCC is entitled to the single-minded loyalty of North West in that context until the contractual relationship between those parties terminates on 1 June 2021. However, I do not see how the scope of that duty of loyalty as it applies to that aspect of the contractual relationship between the parties could be said to extend beyond it to prohibit North West from competing now for the contractual right to supply Flogas LPG customers in Donegal with LPG after the existing contractual relationship between the parties comes to an end on 1 June 2021. After all, in stark contrast to the position in *Fermoy Fish*, there is no suggestion in this case that North West has failed to properly account to DCC for any of those fees.

iii. unlawful interference with contractual relations

62. Flogas and DCC have failed to satisfy me, on the evidence so far presented, that there is a serious issue to be tried on unlawful interference by North West in their private contractual relations with their customers. That claim rests on the assertion that the North West LPG supply agreement imposes obligations upon existing Flogas and DCC customers that are inconsistent with their obligations under the Flogas Industrial LPG supply agreement, thereby inducing a breach of, or interfering with the contractual relations created by, the latter.

63. However, one of the few significant differences between those two standard form agreements is the recital contained in the North West agreement that the customer has been informed that North West 'will not be in a position to sell or supply [LPG] to the [customer] if, during the period of the Agreement, or any part thereof, the customer is subject to a subsisting agreement (either oral or in writing) between [the customer] and any third party in relation to the supply of LPG to [the customer]'. Each of the two standard form agreements contains an identical clause whereby each is to commence on 'either (a) the day immediately following the expiration of any written agreement entered into by [the customer] with any third party for the supply of LPG at [the customer's]

premises or (b) where no such prior agreement exists, on [the date the agreement is made]'.

64. Flogas and DCC have made no attempt, for the purpose of the present application at least, to explain how, containing as it does the relevant recital and clause, the North West LPG supply agreement nonetheless constitutes an interference with the economic relations created under the Flogas Industrial LPG supply agreement, such that a court could conclude that it amount to such an interference or an inducement to breach the terms of that agreement, wherever such an agreement is in place.

iv. breach of copyright

65. I am satisfied that the Flogas and DCC have made out a strong arguable case that North West has infringed the copyright that Flogas holds in its Industrial LPG agreement. The quantity and quality of the similarities between that document and the North West LPG Supply Agreement are very striking. For the purpose of the present application, I do not accept that it is necessary for Flogas to go any further in establishing that it holds the copyright in that work than the sworn averment of Mr Rooney to that effect at paragraph 30 of his first affidavit. Despite its assertion that it is entitled to what it considers satisfactory proof in that regard, North West adduces no evidence whatsoever concerning the authorship of its own supply agreement beyond the unsupported assertion that its clauses largely comprise standard boilerplate and that the particular order and layout of those clauses is common in the industry.

The balance of convenience or least risk of injustice

66. As Collins J explained in *Betty Martin Financial Services* (at para. 34):

> 'Allowing that establishing a serious issue to be tried is a necessary (but not sufficient) condition to the grant of an injunction (at least where that issue, if established at trial, would provide a basis for a permanent injunction), the decision to grant or refuse thereafter becomes a matter of overall assessment of where the balance of justice lies, though with particular (and, in many cases, decisive) weight being given to the adequacy of damages within that overall assessment. That is not to imply that the outcome is or ought to be a matter of impression or intuition. As the decision in *Merck Sharp & Dohme Corporation v Clonmel Healthcare Limited* concretely illustrates, a decision to grant or refuse an interlocutory injunction is a judicial decision, deriving from a structured and careful assessment of the relevant considerations that is (or at least ought to be) reasoned and capable of review. However, there are likely to be multiple considerations to be weighed in the balance, pointing in different directions, none of which are likely to be decisive in itself.'

67. With those strictures in mind, I now propose to follow the steps suggested by the Supreme Court in *Merck*.

68. First, it seems to me that, if Flogas and DCC succeed at trial, permanent injunctions might well be granted restraining North West from soliciting their customers prior to the agreed termination of the contractual relationship between the parties on the 1 June 2021 and permanently restraining North West from infringing Flogas's copyright in its Industrial LPG supply agreement.

69. Second, while I have already concluded that Flogas and DCC have established serious issues to be tried on whether North West is in breach of contract and breach of copyright, I must also consider whether the case will probably go to trial. I cannot be satisfied that that is a probability. Flogas and DCC acknowledge, as I think they must, that there can be no inhibition on fair competition between them and North West after 1 June 2021 in all respects in all markets. The reliefs that they seek in these proceedings are, thus, principally directed towards enforcing what they contend are various private law obligations on North West to refrain from competing with them for contracts for the supply of LPG to customers in Donegal until after 1 June 2021. The interlocutory orders for which they now apply are essentially directed towards the same end. Hence, it seems reasonable to conclude that, in the very real sense identified by Clarke J in *Diamond* (at 560), the interlocutory injunction sought would deal with a significant part of the action itself and may have to effect of going a long way to deciding the case. For that reason, it is appropriate to take into consideration whether Flogas and DCC have established a strong arguable case. For the reasons I have already given, I have concluded that, save in relation to the Flogas breach of copyright claim, they have not.

70. Third, insofar as there remains a fair issue to be tried that is likely to be tried, I must consider the balance of convenience and the balance of justice. And fourth, as the most important element in that balance is the question of the adequacy of damages, it is to that question that I next must turn as part of that consideration.

71. If injunctions are refused but Flogas and DCC succeed at trial would an award of damages be an adequate remedy for the loss caused to them during the intervening period? Similarly, if injunctions are granted against North West but Flogas and DCC fail at trial, would the payment of damages – on foot of the undertaking to do so that Mr Rooney avers Flogas and DCC are willing to provide - be an adequate remedy for the effects on North West of injunctions wrongly imposed upon it?

72. That brings me to the fifth consideration, which is the necessity for robust scepticism about the inadequacy of damages as a remedy where breach of contract is claimed in a commercial case. This is, of course, just such a case. Nonetheless, Flogas and DCC argue that damages would not be an adequate remedy for the unlawful conduct they allege for two reasons: first, because it will be difficult for them to undo the damage done to their market share in Donegal; and second, because the court should endeavour to preserve their property rights in the goodwill of their business, rather than hold out the prospect of compensation in the form of damages for any reduction in the value of those rights.

73. The first of those reasons is, in effect, an invocation the sixth consideration, which is the requirement to take into account the extent of any anticipated difficulty in the calculation and assessment of damages, rendering it unlikely that an award of damages could be a precise and perfect remedy.

74. The second reason raises an issue that was succinctly described in the following way by Clarke J in *Diamond* (at 589-590):

> 'The courts have always been anxious to guard property rights in the context of interlocutory injunctions; see for example *Metro International v Independent News* [2005] IEHC 309, [2006] 1 ILRM 414. The reason for that is clear. Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the part who has lost his property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that the person would be entitled, in substance, to compulsorily acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily and adequate remedy for the party concerned is entitled to its property rights instead of their value.'

75. In *Diamond* (at 590), Clarke J concluded that there would be an element of irremediable loss to the plaintiff's property rights in that case, should it be refused an interlocutory injunction but succeed at trial. The judgment then continued:

> '[97] Like considerations lead me to take the view that the same situation would apply in the case of the defendants. If the defendants are now injuncted but succeed at trial they will, of course, be entitled to damages on the basis of [the plaintiff's] undertaking as to damages. However, they will have been deprived of their opportunity of doing business in an open and fairly competitive way in the intervening period. While it may (although a difficult task) be possible to attempt to calculate any losses suffered and award damages accordingly, it can equally be said that [the plaintiff] should not, by paying damages, be entitled to secure an absence of competition to which it was not otherwise entitled.'

76. For those reasons, Clarke J was not satisfied that damages would be an adequate remedy for either party in that case. On the same basis, I have come to the same conclusion in this one. That requires that I should return to the broader question of the balance of convenience.

77. On that question, Flogas and DCC submit that a factor that tilts the balance of convenience decisively in favour of granting the injunctions that they seek is the preservation of the status quo. In doing so, they rely on the oft-quoted dictum of McCracken J in *B & S Ltd v Irish Auto Trader Ltd* [1995] 2 IR 142 (at 145):

> 'It is normally a counsel of prudence, though not a fixed rule, that if all other matters are equally balanced, the court should preserve the status quo.'

78. I perceive two difficulties with that submission. The first is the identification of the point in time at which the status quo should be preserved. After all, the status quo immediately preceding the issue of the plenary summons in this case at the beginning of last month was that North West was openly competing with Flogas and DCC for customer contracts to supply LPG after 1 June 2021. Obviously, by implication, Flogas and DCC are suggesting that I should have regard to the status quo before the commencement of that course of conduct or, as they would contend, before the commencement of those unlawful acts.

79. The second and more fundamental difficulty is that, in my judgment, all other matters are not equally balanced. I refer here to the conclusion I have already reached that the interlocutory injunctions sought would deal with a significant part of the action itself and may have to effect of going a long way to deciding the case, although – solely in the context of the present application - Flogas and DCC have failed to establish a strong case, save in relation to breach of copyright.

80. A further factor that Flogas and DCC cite as relevant to the balance of convenience is the public interest in the integrity and finality of settlement agreements, such as the one the parties entered into in this case, which public interest – they submit - also tilts the balance in favour of the grant of injunctive relief in this case. However, in stark contrast to the authorities upon which they rely on in support of that submission, this is not a challenge to the validity of a settlement agreement (unlike *Flynn v Desmond* [2015] IECA 34, (Unreported, Court of Appeal, 26 February 2015). Nor is it a dispute about whether a prior settlement agreement amounts to an accord and satisfaction of a subsequent claim (unlike *Cafolla v O'Reilly* [2014] IEHC 85, (Unreported, High Court (Kearns P), 28 February 2014)). Rather, it is a dispute about the proper interpretation of a settlement agreement that both sides agree is binding upon them and operative between them. The question here is not about the finality or applicability of the settlement agreement – it is about the proper interpretation of that agreement.

81. North West argues that a strong factor in the assessment of the balance of convenience is their contention that the underlying contractual relationship between the parties, as it applies until the agreed termination date of 1 June 2021 under the settlement agreement, is void under s. 4 of the Competition Act 2002, as amended, as an anti-competitive vertical agreement. As that argument may be pursued at greater length and in more detail at trial, I will observe only that I am not persuaded as matters stand that North West has so far raised a serious issue in that regard. Accordingly, I do not give that contention any weight in assessing the balance of convenience.

82. It should not be necessary to reiterate that, in dealing with the present interlocutory application, I am not purporting to finally decide any of the legal or factual issues in controversy between the parties in the action. As Hardiman J observed in *Dunne v Dun*

Laoghaire-Rathdown County Council [2003] 1 IR 567 (at 581), on a full hearing the evidence may be different and more ample and the law will be debated at greater length.

Conclusion

83. I conclude as follows.

(a) There is a very good chance that the whole, or a substantial part, of the period of time covered by the injunctions sought in this case will, if they are granted, occur before the trial of the action.

(b) Hence, there is a very real sense in which those injunctions would, in those circumstances, deal with a significant part of the action itself.

(c) It follows that there is an obligation on the applicants in seeking to obtain them to satisfy the court that they have a strong arguable case.

(d) On the evidence before me and in the submissions so far made, the applicants have failed to satisfy me that they have a strong arguable case on their claims of breach of contract, breach of fiduciary duty and unlawful interference with their contractual relations.

(e) On that evidence and based on those submissions, I am satisfied that the applicants have established a strong arguable case of copyright infringement.

(f) While acknowledging the need for robust scepticism, I am not satisfied that an award of damages would be an adequate remedy for the loss caused to the applicants if they are refused injunctions but later succeed at trial. However, nor am I satisfied that damages would be an adequate remedy for the loss caused to the respondent if injunctions are granted against it but the claims against it fail at trial.

(g) Overall, I find that the balance of convenience or balance of justice lies against the grant of the interlocutory injunctions sought, save in respect of the infringement of the first applicant's copyright in its standard industrial LPG supply agreement.

84. It follows that the injunctions sought as reliefs at paragraphs 1, 2 and 4 of the notice of motion must be refused. I will order an injunction in terms of paragraph 3 of the notice of motion, that is to say:

> 'An interlocutory injunction restraining the defendant, its directors, officers, servants or agents, from infringing the first plaintiff's copyright in its standard industrial LPG supply agreement pending the trial of these proceedings.'

85. In opening his submissions on behalf of North West, Mr McCullough SC indicated that it is willing to take every step necessary to have the trial of this action heard before 1 June 2021 when the contractual relationship between the parties is due to terminate under the settlement agreement between them. I will, of course, consider any application that the parties may wish to make for any appropriate directions in that regard.

Final matters

86. On 24 March 2020, the Chief Justice and Presidents of each court jurisdiction issued a joint statement recording their agreement that, in light of the COVID-19 pandemic and the need to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that written judgments are to be delivered electronically and posted as soon as possible on the Courts Service website. The statement continues:

> 'The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of deliver subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made where appropriate.'

87. Thus, I direct the parties to correspond with each other to strive for agreement on any issue arising from this judgment, including the issue of costs. In the event of any disagreement, short written submissions should be filed in the Central Office of the High Court within 14 days, to enable the court to adjudicate upon it.

Appearances

Michael Howard SC for the plaintiffs/applicants, with Joe Jeffers BL, instructed by Pinsent Masons, Solicitors.

Eoin McCullough SC for the defendant/respondent, with Stephen Dowling BL, instructed by Philip Lee, Solicitors.