THE HIGH COURT
CHANCERY

[2020] IEHC 563
[2020 No. 6166P]

BETWEEN

FLOGAS IRELAND LIMITED
AND
DCC ENERGY LIMITED

PLAINTIFFS

AND
NORTH WEST GAS COMPANY LIMITED

DEFENDANT

RULING of Mr Justice David Keane delivered on the 6th November 2020

Introduction

1. On Friday, 9 October 2020, I gave judgment on an application by Flogas Ireland Limited ('Flogas') and DCC Energy Limited ('DCC') for a number of interlocutory injunctions against North West Gas Company Limited ('North West'). This ruling should be read in conjunction with that judgment, which can be found under the neutral citation [2020] IEHC 503. In accordance with the joint statement made by the Chief Justice and the Presidents of each court jurisdiction on 24 March 2020 on the delivery of judgments during the Covid-19 pandemic, I invited the parties to seek agreement on any outstanding issues, including the costs of the application, failing which they were to file concise written submissions within 14 days of the delivery of my judgment, which would then be ruled upon remotely unless a further oral hearing was required in the interests of justice.

Failure to comply with the terms of the joint statement

2. For reasons that have not been explained, although judgment was given on Friday, 9 October, there was no engagement between the parties on the outstanding issues until Wednesday, 21 October, when – through its solicitors – North West emailed Flogas and DCC, inviting them to agree that, on the straightforward application of the usual rule ('that costs follow the event'), North West was entitled to its costs of the application against them. Although the 14 day period was close to expiry, North West invited a response to that proposal, reserving to itself a right of reply. Through their solicitors, Flogas and DCC replied by email the following day, inviting North West to agree instead to reserve the costs of the application to the trial of the action. Flogas and DCC delivered their statement of claim as an attachment to that email, in which they also set out a timetable of proposed directions on the steps necessary to prepare for trial. Flogas and DCC invited a response to those proposals by 11 a.m. on the following day, Friday, 23 October – the last day of the period allowed for providing written submissions on costs.

3. Thus, both sides were now setting demanding deadlines for each other, having unaccountably elected to refrain from engagement for the first twelve days of the fourteen day period allowed. To that extent, both sides were then equally remiss, though neither was yet in breach of the court's direction.

4. On 23 October, within the time permitted, Flogas and DCC filed written submissions on the issues of the costs of the application and the directions necessary to facilitate an expedited trial.

5. North West did not file any submissions within the period permitted. Instead, it emailed Flogas and DCC again on 23 October, asserting that the deadline they had fixed for a response to their proposal for agreed directions was unreasonable and that, instead, a response would be forthcoming by close on business on the following Tuesday, 27 October. The email went on to note that submissions on costs would be necessary, and that North West would await hearing from Flogas and DCC in that regard.

6. The email just described discloses a fundamental misunderstanding or misconstruction of the terms of the joint statement of 24 March 2020, whereby the parties are either to agree the precise form of order to be made or to file concise written submissions on the appropriate terms of that order within 14 days of the delivery of the judgment, subject to any other direction given in it. While I do not doubt that a court has a discretion to extend that deadline (if satisfied that, for good reason, it is appropriate to do so), the assertion that one or other party can unilaterally extend it is directly contrary to both the spirit and the letter of the joint statement.

7. Thus, the appropriate response to any eleventh hour proposal deemed unacceptable is to file written submissions to the court within the time permitted; it is not for a party to arrogate to itself the unilateral power to extend the deadline for reaching agreement or making those submissions. To hold otherwise would undermine the clear and obvious intent behind the joint statement. It would also introduce an element of administrative uncertainty into the finalisation of orders during the Covid-19 pandemic that the court registrars, who are already overburdened in that context, should not have to contend with.

8. As an exceptional measure and lest any submissions made by North West had been misdirected or overlooked, on 29 October I requested the registrar to enquire whether it intended to file submissions. That inquiry elicited a terse email stating that North West did intend to file submissions and would do so 'as quickly as possible.' In the interest of fairness to both sides, I requested the registrar to write again, requiring an explanation for North West's failure to comply with the deadline and inviting it to make whatever submissions it might wish on why it should be permitted to file submissions late.

9. North West emailed the following day, attaching its written submissions (then one week late) and a letter of explanation. In that letter, North West asserts that it did not receive the written submissions of Flogas and DCC until after close of business on 23 October and, hence, was unable to respond to them within time. That explanation implies that, rather than a reciprocal obligation on each of the opposing parties to make written submissions within 14 days on the appropriate form of final order in default of agreement, there was instead an obligation on Flogas and DCC to furnish North West with its written submissions on that issue within a period it was to agree with North West, after which North West was to be afforded a reasonable period within which to file written

submissions in response, subject to apprising the court of its intention to do so. Thus, in that correspondence, North West apologised to the court solely for its failure to apprise the court of that intention.

10. I can find no basis for any such interpretation of either the joint statement or the direction contained in my judgment of 9 October. For that reason, all other things being equal, I would not have granted North West leave to file those submissions, nor would I have had regard to them for the purpose of the present ruling. However, as an exceptional measure, I will grant that leave and take those submissions into consideration. I propose to do so for two reasons: first, because a period of adjustment to the requirements of the joint statement should perhaps be permitted; and second, because the arguments that North West makes are entirely conventional and were flagged in earlier correspondence between the parties, so that there is no obvious prejudice to Flogas and DCC in taking them into account. To further limit the risk of prejudice, I also propose to take into account what Flogas and DCC describe as their 'clarification' of 30 October, directed towards a specific misstatement of fact that they say those submissions contain.

Directions to facilitate an early trial

11. In their email to the registrar of 30 October, North West asserts that a trial preparation timetable has now been agreed between the parties so that no directions are required. Hence, I do not propose to make any order in that regard, although I will grant liberty to Flogas and DCC to apply to the court in the event that they wish to dispute that assertion.

The costs of the application

i. the positions of the parties

12. North West seeks its costs of the interlocutory application on the basis that it successfully resisted three of the five interlocutory injunctions sought against it by Flogas and DCC. That result, it says, is the event that costs should follow.

13. Flogas and DCC rely on their success both in obtaining one of the injunctions that they sought and in securing the provision by North West of an undertaking to the court equivalent to another as factors that would entitle them to the their costs of the application against North West, although they adopt the position that this case falls into the category of interlocutory applications the costs of which cannot be justly adjudicated upon at the interlocutory stage, so that the decision on those costs should be reserved to the trial judge.

ii. applicable rules and principles

14. Order 99, rule 2(3) of the Rules of the Superior Courts ('RSC'), as inserted by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019), reproduces the former O. 99, r. 1(4A), which had been introduced by the Rules of the Superior Courts (Costs) 2008 (S.I No. 12 of 2008). That rule states in material part:

'The High Court ... upon determining any interlocutory application, shall make an award of costs save where it is not possible justly to adjudicate upon liability for costs on the basis of the interlocutory application.'

15. Order 99, rule 3(1) of the RSC provides in material part:

'The High Court, in considering the awarding of the costs of any action or step in any proceedings ... in respect of a claim or counterclaim, shall have regard to the matters set out in section 169(1) of the [Legal Services Regulation Act 2015], where applicable.'

16. Section 169(1) of the Act of 2015 states:

'A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,
(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
(c) the manner in which the parties conducted all or any part of their cases,
(d) whether a successful party exaggerated his or her claim,
(e) whether a party made a payment into court and the date of that payment,
(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.'

17. Thus, the rule is that the costs of an interlocutory application (including an interlocutory injunction application) must be awarded to the party who is successful against the party who is not successful, unless having regard to the nature and circumstances of the case and the conduct of the parties it is just to order otherwise, and an award of costs must be made unless it is not possible to do so justly at the interlocutory stage.

18. As Murray J explained in *Heffernan v Hibernia College Unlimited Company* [2020] IECA 121 (Unreported, Court of Appeal, 29 April 2020) (at para. 29), in respect of the former O. 99, r. 1(4A):

'That provision reflected both the preference articulated in the case law pre-dating [its introduction] that those bringing and defending interlocutory applications should face a costs risk in the event that the Court determines that the stance they adopted was wrong (*Allied Irish Banks v Diamond* (Unreported, High Court, 7 November 2011) at p. 6 of the transcript of the *ex tempore* judgment of Clarke J.), and the fact that there will be cases in which it is not possible to determine where

the proper burden of the costs of an interlocutory application should lie without the benefit of discovery, a complete marshalling by the parties of relevant evidence and in some cases an oral hearing (*Dubcap Ltd v Microchip Ltd* (Ex tempore Unreported, Supreme Court, 9 December 1997 at p.4)).'

19. In the earlier Supreme Court decision in *ACC Bank plc v Hanrahan* [2014] 1 IR 1, Clarke J had elaborated on the basis for the introduction of O. 99, r. 1(4A) in the following terms (at 5-6):

'[8] The reason for the introduction of that rule seems to me to be clear. While, historically, there had been a tendency to reserve the costs of most motions to the trial judge, a view has been taken that this can lead to injustice for, at least in very many cases, a judge who has heard a motion is in a better position than the trial judge to consider the justice of where the costs of that motion should lie. This will especially be so in cases where the trial court will not have to revisit the merits or otherwise of the precise issue that was raised by motion. For example, if there is a dispute over discovery then that dispute will have been resolved before the case comes to trial. Of course, discovered documents may well be relied on at the trial and, indeed, in some cases may turn out to be decisive. But, at least in the vast majority of cases, the fact that the documents, with the benefit of hindsight, have turned out to be either very useful or of very little use, will not add very much, if anything, to an assessment of whether the positions adopted by the parties on a discovery motion were reasonable or appropriate. A judge hearing a discovery motion will, therefore, in almost all cases, be in a better position than the trial judge to decide where the costs of such a motion should lie. Like considerations apply to many other cases such as motions for further and better particulars.

[9] It is, of course, the case that such motions are very much 'events' in themselves. There are issues as to the appropriate scope of discovery or particulars. They are decided once and for all on the motion. The merits of the results of those motions are not, in the vast majority of cases, in any way revisited at the trial.

[10] Slightly different considerations seem to me to apply in cases where, at least to a material extent, some of the issues which are before the court at an interlocutory stage arise or are likely to arise again at the trial in at least some form. As I noted in *Allied Irish Banks v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549 and as approved by Laffoy J. in *Tekenable Limited v. Morrissey & ors* [2012] IEHC 391, (Unreported, High Court, Laffoy J., 1st October, 2012) somewhat different considerations may apply in cases where the interlocutory application will, to use language which I used in *Allied Irish Banks v. Diamond* [2011] IEHC 505 and which Laffoy J. cited in *Tekenable Limited v. Morrissey & ors* [2012] IEHC 391'turn on aspects of the merits of the case which are based on the facts'. It is true that both of those cases concerned the costs of an interlocutory injunction. One of the issues which, of course, arises on an application for an interlocutory injunction is as to whether the plaintiff has established a fair issue to be tried and, indeed, whether

the defendant has established an arguable defence. In many cases the argument for both plaintiff and defence on those questions is dependent on facts which will not be determined at the interlocutory stage save for the purposes of analysing whether the facts for which there is evidence give rise to an arguable case or an arguable defence.

[11] However, the point made in *Allied Irish Banks v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549 is that those facts may well be the subject of detailed analysis at trial resulting in a definitive ruling as to where the true facts lie. In substance a plaintiff may well secure an interlocutory injunction by putting forward evidence of facts which, if true, would give him an arguable case and by succeeding on the balance of convenience test thereafter. However, if the facts on which the plaintiff's claim is predicated are rejected at trial, then the justice of the case may well lead to the conclusion that the interlocutory injunction was wrongly sought. It may be that, on the basis of the evidence before the court at the interlocutory state, the injunction was properly granted. However, with the benefit of hindsight, and after the trial, it may transpire that the case for the granting of an interlocutory injunction was only sustained on the basis of an assertion that the facts were other than the true facts as finally determined by the court at trial. It follows that in such cases there may well be good grounds for not dealing with the costs at the interlocutory stage, for the trial court may be in a better position to assess the justice of the costs of an interlocutory hearing when it has been able to decide where the true facts lie. It is not necessarily just that a plaintiff who secures an interlocutory injunction on the basis of putting up false facts should get the costs of that interlocutory injunction even if it was fairly clear that an injunction would be granted on the basis of the facts as asserted.'

20. In *Glaxo Group Ltd v Rowex Ltd* [2015] 1 IR 185 (at 210), Barrett J neatly summarised the relevant distinction in the following terms (at 210):

> 'A distinction falls to be drawn between (a) cases where the decision on an interlocutory injunction application turns on issues in respect of which a different picture may emerge at trial and (b) cases where the application turns on matters such as adequacy of damages or balance of convenience which will not be addressed again at the trial. In the former category of cases, a risk of injustice may arise in determining costs at the stage of the interlocutory injunction application; in the latter the same risk may not arise (*Haughey v. Synnott* [2012] IEHC 403, (Unreported, High Court, Laffoy J., 8th October, 2012); *Allied Irish Banks v. Diamond* [2011] IEHC 505, [2012] 3 I.R. 549; *ACC Bank plc v. Hanrahan* [2014] IESC 40, [2014] 1 I.R. 1).'

iii. analysis

21. The injunction application raised five issues:

(1) Whether North West is in breach of the underlying contractual relationship between the parties, the settlement agreement between them, or both.

(2) Whether North West is in breach of any fiduciary duty that it owes to Flogas or DCC, or both.

(3) Whether North West is unlawfully interfering with the contractual relations between Flogas or DCC, or both, and the customers of either or both of those companies.

(4) Whether North West is unlawfully infringing the copyright of Flogas in its Industrial LPG supply agreement.

(5) Whether North West is defaming Flogas and DCC or publishing the malicious falsehood that they are withdrawing from the market for the sale and supply of LPG in County Donegal.

22. Flogas and DCC sought 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.

23. I found that, because there is a good chance that the period of the injunctions sought would expire before the trial of the action, the grant of those injunctions would deal with a significant part of the action in a real sense, so that Flogas and DCC would have to meet the higher threshold of establishing a strong arguable case, rather than the lower one of a serious issue to be tried, in order to obtain them

24. In short summary, I concluded that, on the present state of the evidence and arguments, Flogas and DCC:

(1) did establish that there is a serious issue to be tried, though not a strong arguable case, that North West is in breach of the underlying contractual relationship between the parties, the settlement agreement between them, or both;

(2) did not establish that there is a serious issue to be tried on breach of fiduciary duty;

(3) did not establish that there is a serious issue to be tried on unlawful interference with contractual relations; and

(4) did establish that there is a strong arguable case that North West is unlawfully infringing the copyright of Flogas in its Industrial LPG supply agreement.

25. It was unnecessary to consider the claim that North West is unlawfully defaming, or publishing a malicious falsehood about, Flogas and DCC by communicating or suggesting

to their customers that they are ceasing, in whole or in part, their operations in County Donegal. That is because, on the day of the hearing of the injunction application, North West provided 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 that county, although entirely without prejudice to its contention that it has not made any such suggestion.

26. While I gave due consideration to the balance of justice, including the adequacy of damages for Flogas and DCC should injunctions be wrongly refused and for North West should injunctions be wrongly granted, those considerations did not lead to any different result than that suggested by the application of the strong arguable case test. I applied that test (and, in a subordinate way, the lower 'serious issue to be tried' test) subject to the obvious caveat that I was not purporting to finally decide any of the legal or factual issues in controversy between the parties in the action, since on a full hearing the evidence may be different and more ample and the law will be debated at greater length.

27. The hearing of the interlocutory injunction application was called on for, and took, a single day. I commend both parties for the concision of their arguments and the deftness with which those arguments were presented.

28. In seeking its costs of the application, North West advances a number of propositions. First, it says that it was successful in its defence of the application, save in relation to the copyright infringement injunction that was granted against it, which – it says – only took up a small proportion of the court's time.

29. Second, North West says that no court time was taken up with the defamation/malicious falsehood issue because it provided an undertaking to the same effect as the relevant injunction sought on the first return date (without prejudice to its denial of the misconduct alleged against it). Flogas and DCC have submitted what they describe as a clarification, pointing out that the undertaking that North West provided on the first return date, 11 September 2020, was an interim one, pending the hearing of the application, and not one pending the trial of the action. Flogas and DCC rely on the transcript of the short hearing on the first return date, which (at page 16) does bear that out. Thus, they say, it was necessary for them to marshal evidence and prepare argument on that issue until, on the morning of the hearing of the injunction application on 18 September 2020, North West provided the relevant undertaking pending trial.

30. Nonetheless, North West argues that because it provided that undertaking, no court time was taken up in argument on the entitlement to an equivalent injunction and, because the court did not have to decide the matter, the issue did not give rise to any 'event' upon which an order for costs could be based. In advancing that argument, North West relies upon *Tekenable*, already cited. In that case, the plaintiff sought the costs of an interlocutory injunction application that did not proceed after the defendant provided an equivalent undertaking, whereas the defendant sought to have the costs of the application reserved to the trial judge. Laffoy J concluded (at para. 25) that, since the court had not been required to adjudicate on the merits of the application, it could not

form a view on whether there had been an 'event' for costs to follow. It is notable that Laffoy J went on to conclude that, had it proceeded, the injunction application would likely have turned on the fact-based merits of the case (just as the application did in *Diamond*, already cited), so that it would have been unsafe to deal with the question of the costs of the application, rather than reserving that question to the trial judge.

31. In response, Flogas and DCC rely on the more recent Court of Appeal decision in *Heffernan,* already cited. In that case (at para. 37), Murray J stated that a party who has invested significantly in bringing an interlocutory application and who as a consequence obtains a concession from his opponent that would not otherwise have been tendered is entitled in many circumstances to expect to recover the costs incurred in securing that concession, particularly if the offer is made at a very late stage in the process. Murray J identified the correct approach to the costs of an interlocutory injunction application as that described by Peart J in *Irish Bacon Slicers v Weidemark Fleischwaren GmBH & Co* [2014] IEHC 293, (Unreported, High Court, 30 May 2014) (at p. 7) in the following way:

> 'It is right that there should be costs consequences immediately visited upon a defendant who waits until the injunction hearing itself to proffer an undertaking, thereby removing the need for the plaintiff to proceed to a hearing of his application. The fact that there is no "event" in the sense of the court's determination of whether or not an injunction should be granted does not seem to me to be something of which such a defendant should be able to gain an advantage by having the question of costs kicked off into the long grass, to be retrieved perhaps a year later or more when the substantive action is finally determined.'

32. North West argues that it was successful in resisting three of the four interlocutory injunctions that were the subject of argument; that the evidence on the issues relevant to those three injunctions was more extensive than that on the more limited issues relevant to the other; and that the arguments on those three injunctions took up the greater part of the single-day hearing. Thus, North West submits, its success in resisting those three injunctions, on that evidence and on the basis of those arguments, constitutes the 'substantive event' on the interlocutory injunction application that costs should follow. In addition, it argues that the application turned, not on issues in respect of which a different picture may emerge at trial, but on the adequacy of damages or on the balance of convenience, so that there is no risk of injustice in determining the question of the costs of the application now, rather than at trial.

33. I do not accept those arguments for the following reasons. First, on the principles identified by Murray J in *Heffernan*, already cited, I cannot disregard the significance of the undertaking that North West offered on the morning of the application.

34. Second, in the proper identification of the 'event' that costs should follow, I must have regard to the broad distinction that Clarke J drew between two different approaches in *Veolia Water plc v Fingal County Council (No. 2)* [2007] 2 IR 81.

35. The first approach is where, in the ordinary way, the successful party was required to bring or defend an application concerning a disputed entitlement, which dispute could only have been resolved in that way. That party will be regarded as having succeeded, even if not successful on every point raised. The prosecution or defence of the application will have been justified by the result; the result will be the event; and the party concerned will be entitled to the costs of the application.

36. The second approach is where the successful party has not succeeded on all the issues that were argued before the court. In that case the court should consider whether it is reasonable to assume that the costs of the parties in pursuing the set of issues before the court were increased by the successful party having raised additional issues on which that party was not successful. Where the court is satisfied that the costs were increased in that way, it should attempt to reflect that fact in its order for costs whether by disallowing, setting off, or awarding the costs attributable to witnesses called to address any such issue or issues; disallowing, setting off, or awarding any discrete item of expenditure incurred in doing so; disallowing, setting off, or awarding the costs of the portion of the hearing directed to any such issue or issues; or by combining some or all of those measures.

37. Clarke J concluded (at 87) that the second approach is appropriate in more complex litigation involving a variety of issues even where, in the overall sense, one party may be said to have succeeded and the other party may be said to have failed, while acknowledging that, in more straightforward litigation, the first approach is appropriate, even where some elements of a successful party's claim or defence have not succeeded, unless those elements have affected the overall costs of the litigation to a material extent.

38. Flogas and North West argue that they did succeed in obtaining an injunction and in securing an eleventh-hour undertaking, even though there were three other injunctions that they sought but did not obtain. Thus, as I follow their argument, they contend they have succeeded, though not on every point raised, thereby justifying their injunction application and creating a result in their favour, which is the event that costs should follow – were they to seek their costs. Conversely, North West argues that it did succeed in resisting three of the five interlocutory injunctions sought in the notice of motion, even though an injunction was granted against it and it did furnish an undertaking on the day of the application in respect of another injunction sought. Thus, North West submits that its successes outweigh its failures, justifying its defence of the application and creating a result in its favour, amounting to the 'event' in this case, entitling it to an order for its costs of the application against Flogas and DCC.

39. Neither characterisation strikes me as entirely accurate.

40. I do not see this as a case of the kind that Clarke J had in mind in *M.D. v N.D.* [2016] 2 IR 438 (at 445-6); that is, as one where an essentially successful party can be identified, even if not successful on one or more of the points that it raised, so that the court must

decide whether the costs of the litigation as a whole have been materially increased by the raising of those unmeritorious points.

41. Rather, I view the result of this application in the same way that Clarke J viewed the result of the trial of the preliminary issues in *Veolia* (at 90), that is to say, not as a case in which one party was essentially successful (even if not on all issues), but as one in which there are two equally valid ways of looking at which party might be said to have been successful, so that the correct approach is to come to a global view as to the length of time taken in the preparation and presentation of issues upon which either party might be said to have succeeded.

42. In the particular circumstances of this case, I must have regard to the time that was taken up in the preparation, if not the presentation, of the evidence and argument on the defamation/malicious falsehood issue that was disposed of (for the purpose of the application) by the provision of an undertaking on the morning of the hearing. Once that is done then, even allowing for the fact that a significantly greater part of the one-day hearing was taken up with arguments on the breach of contract, breach of fiduciary duty and unlawful interference with contractual relations issues, as opposed to the breach of copyright one, it is not unreasonable to conclude that the allocation of time in the preparation and presentation of the issues on which each side prevailed (by securing a benefit or avoiding a detriment) was roughly the same. In those unusual (though not, as *Veolia* establishes, unprecedented) circumstances, it seems to me that – all other things being equal - the justice of this case would have been best met by making no order as to costs.

43. However, all other things are not equal. That is because this was an interlocutory injunction application that turned on issues in respect of which a different picture may emerge at trial. There is quite plainly conflicting evidence on: the nature of the underlying contractual relationship between the parties; the matrix of fact surrounding the conclusion of the settlement agreement; the nature and contents of the interaction of each of the parties with Flogas LPG customers in Donegal; the ownership of the copyright in the Flogas Industrial LPG agreement; and the extent to which the contents of the North West LPG supply agreement reflect the innocuous use of boiler-plate clauses common in the industry or the unauthorised use of the Flogas Industrial LPG agreement, as an original literary work in which Flogas holds the copyright.

44. It may be that the decision I have made on the evidence before me to grant one injunction and refuse others by applying a strong arguable case test will, with the benefit of hindsight at the end of the trial, turn out to have been based on an incomplete or incorrect understanding of the relevant facts or the applicable law, or both. This was not an application that turned as much on the wider balance of justice as on the strictly provisional view that I was required to form about the strength of the various claims advanced by Flogas and DCC. Thus, I judge it to be in the category of cases where a risk of injustice may arise in determining the costs of the interlocutory injunction application at this stage of the litigation.

45. It follows that the costs of the interlocutory injunction application should be reserved to the trial of the action.

Order accordingly.