

**THE HIGH COURT  
COMMERCIAL**

**[2011 No. 10238 P]**

**BETWEEN**

**FLOGAS IRELAND LIMITED**  
**AND**  
**TRU GAS LIMITED AND PATRICK MORGAN**  
**PLAINTIFF**  
**DEFENDANTS**

**THE HIGH COURT  
COMMERCIAL**

**[2011 No.10090 P]**

**BETWEEN**

**FLOGAS IRELAND LIMITED**  
**AND**  
**LANGAN FUELS LIMITED**  
**PLAINTIFF**  
**DEFENDANT**

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 28th day of June, 2012

1. These are two related cases in which the plaintiff claims injunctions, damages and other forms of relief against the defendants arising out of the alleged use by the defendants of the plaintiffs gas cylinders in circumstances which the plaintiff alleges amount to infringement of the plaintiffs registered trademarks and passing off. The plaintiff also claims damages under various headings and other relief.

2. This application concerns a motion for discovery brought by the defendant in each case in respect of certain categories of documents where no agreement could be reached between the parties on the issue. In proceedings bearing record number [2011 No. 242 COM], the defendants seek an order for discovery in respect of the following categories of documents:

*"Category 1: All documents concerning:*

*(a) Any assessment of market share of the total market for LPG in Ireland (including Northern Ireland) in the past six years.*

*(b) Any assessment of the turnover value of the entire Irish market in the past six years.*

*(c) Any assessment of the LPG usage as a percentage of Irish primary energy consumption in the past six years.*

*(d) Any assessment of the percentage of cylinder gas as a percentage of Irish primary energy consumption in the past six years.*

*(e) Any assessment of the Plaintiff's market share of the cylinder market in Ireland in the past six years.*

*(f) Any assessment of the aforesaid market share for LPG, turnover value, usage, consumption and market share as concerns Flogas NI and the Northern Irish Market.*

*(g) All returns made by the Plaintiff to the Competition Authority pursuant to Article 8 of Declaration (No. D/05/001).*

*Category 2: All documents concerning:*

*(a) Listing of all outlets currently within the Plaintiff's dealer network. (b) Listing of all distributors currently within the Plaintiff's Distributor network.*

*(c) Listing of all distributors currently engaged in the filling of cylinders from supplies of bulk gas.*

*Category 3: All documents concerning:*

*(a) The Plaintiff's procurement of butane cylinders since 1979. (b) The Plaintiff's procurement of propane cylinders since 1979.*

*(c) The Plaintiff's procurement of newly manufactured butane cylinders since 1979.*

*(d) The Plaintiff's procurement of newly manufactured propane cylinders since 1979.*

*(...)*

*Category 4: All documents concerning:*

*(...)*

*(e) All customer lists as provided for by paragraph 19 of the Authorised Dealer Agreement.*

*(f) All forms of agreement with 'Direct Customer Accounts'.*

*(g) All customer lists maintained by Authorised Distributors under clause 6.7(d) of the Authorised Distributor Agreement.*

*(h) Any similar agreements, price cards, forms and lists relating to cylinders placed on the market in Northern Ireland by the Plaintiff and/or Flogas Northern Ireland*

*Category 8: All documents concerning:*

*(a) The price charged by the Plaintiff for filled cylinders supplied to authorised distributors.*

*(b) The price charged by the Plaintiff for bulk gas delivered to authorised distributors.*

*(c) The price charged by the Plaintiff for filled cylinders supplied to direct accounts.*

*(h) The cylinder licence fees charged by the Plaintiff to Authorised Distributor under clause 7.1 of the Authorised Distributor Agreements. Category 12: All documents concerning any alleged breaches by any other supplier or retailer of LPG of property rights asserted by the Plaintiff and its associated company Flogas Northern Ireland in the past six years."*

3. In the case bearing record number [2011 No. 244 COM], the defendant seeks an order for discovery of the following categories of documents:

*"Category 1: All documents concerning:*

*(a) Any assessment of market share of the total market for LPG in Ireland (including Northern Ireland) in the past six years.*

*(b) Any assessment of the turnover value of the entire Irish market in the past six years.*

*(c) Any assessment of the LPG usage as a percentage of Irish primary energy consumption in the past six years.*

*(d) Any assessment of the percentage of cylinder gas as a percentage of Irish primary energy consumption in the past six years.*

*(e) Any assessment of the Plaintiff's market share of the cylinder market in Ireland in the past six years.*

*(f) Any assessment of the aforesaid market share for LPG, turnover value, usage, consumption and market share as concerns Flogas NI and the Northern Irish Market.*

*(g) All returns made by the Plaintiff to the Competition Authority pursuant to Article 8 of Declaration (No. D/05/001).*

*Category 2: All documents concerning:*

*(a) Listing of all outlets currently within the Plaintiff's dealer network.*

*(b) Listing of all distributors currently within the Plaintiff's Distributor network.*

*(c) Listing of all distributors currently engaged in the filling of cylinders from supplies of bulk gas.*

*Category 3: All documents concerning:*

*(a) The Plaintiff's procurement of butane cylinders since 1979.*

*(b) The Plaintiff's procurement of propane cylinders since 1979.*

*(c) The Plaintiff's procurement of newly manufactured butane cylinders since 1979.*

*(d) The Plaintiff's procurement of newly manufactured propane cylinders since 1979.*

*[...]*

*Category 4: All documents concerning:*

*[ . . ]*

(e) All customer lists as provided for by paragraph 19 of the Authorised Dealer Agreement.

(f) All forms of agreement with 'Direct Customer Accounts'.

(g) All customer lists maintained by Authorised Distributors under clause

6.7(d) of the Authorised Distributor Agreement.

(h) Any similar agreements, price cards, forms and lists relating to cylinders placed on the market in Northern Ireland by the Plaintiff and/or Flogas Northern Ireland

Category 8: All documents concerning:

(a) The price charged by the Plaintiff for filled cylinders supplied to authorised distributors.

(b) The price charged by the Plaintiff for bulk gas delivered to authorised distributors.

(c) The price charged by the Plaintiff for filled cylinders supplied to direct accounts.

(h) The cylinder licence fees charged by the Plaintiff to Authorised Distributor under clause 7.1 of the Authorised Distributor Agreements.

(k) The wholesale price charged for LPG and LPOG cylinders by the Plaintiff to distributors and by the Plaintiff or its distributors to its dealers in County Waterford.

(l) The wholesale price of LPG cylinders bearing the Norgas brand recently distributed by the Plaintiff in County Waterford."

4. **Category 1:** The defendant seeks discovery of these documents in view of the plaintiffs claim of loss of reputation and having regard to the reliance the plaintiff places on the nature and extent of its market share. The plaintiff agrees to make discovery except in respect of Northern Ireland on the grounds that it is not seeking any remedy in the proceedings relating to Northern Ireland and therefore does not meet the test of relevancy.

**Category 2:** The plaintiff contends that it has an extensive network of distributors and dealers and that through this network it exercises rights of ownership over Flogas-branded cylinders. The plaintiff also claims that its dealers and distributors have been engaged in cylinder exchange with the first named defendant and that the members of the network are suffering loss as a result of the alleged unlawful conduct of the defendant. The defendant maintains that details of the distributors and dealers are relevant to these claims and the defendants claim that through this network, the plaintiff is engaged in anticompetitive conduct. The plaintiff agrees to make discovery of a sample of documents required in para. (a) concerning its dealer network. It objects to providing more than this on the grounds that the defendant and the plaintiff are competitors and the issue of confidentiality has to be taken into account. Paragraphs (b) and (c) are agreed.

**Category 3:** Discovery is sought of these documents because the plaintiff claims ownership over all Flogas and its cylinders in circulation and further claims that the service charged to customers does not represent a sale price. The defendants contend that the age and cost profile of cylinders is material to whether the service charge is an artificial charge and truly represents a sale price as well as to the extent to which the cylinders acquired were new or used. The plaintiff, in support of its claim to cylinder ownership, seeks to place reliance on the cost of operating its "cylinder refurbishment programme" which the defendants contest. The plaintiff says that the pleadings do not correspond with the reasons offered for the need to make discovery of this category of documents and the discovery sought is not demonstrated on the pleadings. The plaintiff argues that there is a world of difference between the value of the cylinders and their cost and that the distinction is relevant to Category 3.

**Category 4:** Discovery of this category of documents is sought because the plaintiff places reliance on the documents which are referred to in support of its claim to ownership of cylinders, which claim is denied by the defendants. The defendant claims that the discovery arises from the agreements on which the plaintiff relies. The plaintiff set out in the statement of claim the custom and practice that exists, and it relies on the terms of its agreement with dealers. It argues that it has given discovery of the agreements and the defendant now wants other documents generated pursuant to such agreements. The plaintiff said it has not pleaded these documents nor does it rely on the lists referred to in Category 4. So far as Category 4(h) is concerned, the plaintiff does not seek any remedy concerning its business in Northern Ireland and such documents as relate to Northern Ireland are irrelevant to the case as pleaded.

**Category 8:** The defendant says that these documents are relevant in that the plaintiff has placed considerable reliance on the effect on the prices of the conduct of the first named defendant of which it complains. The defendants, for their part, complain that the plaintiff is involved in anticompetitive price maintenance. The plaintiff denies this claim. The plaintiff agrees to make discovery in respect of Categories 8(d), (e) and (f). So far as the remaining documents are concerned in that Category, the plaintiff says that they are neither relevant nor necessary to determine the matters in issue, having regard to the pleadings.

**Category 12:** Only applies to record number [2011 No. 242 COM]. The defendant claims that discovery of these documents is necessary as the plaintiff has alleged that it has had ongoing concerns about "pirate" related filling of its Flogas-branded cylinders. The first named defendant, for its part, claims that the plaintiff has been engaged in a course of threatening litigation in order to restrict competition on the cylinder LPG market.

5. Insofar as some of the documents sought relate to the plaintiffs associated company, Flogas Northern Ireland, the plaintiff alleges that these documents are irrelevant as there is no claim in respect of its Northern Ireland business. The plaintiff contends that there is no reference in the defence to any issues which would make such documents relevant. It does appear, however, that para. 54(e) contains an allegation that the plaintiff has brought the proceedings for the purpose of furthering and reinforcing unlawful anticompetitive conduct including "the pursuit of similar litigation with the object and/or effect of restricting the growth of effective competition, in particular, price competition, on the cylinder LPG market in the State." The plaintiff claims that this is a fishing exercise and does not arise out of the pleadings.

6. A general complaint is made by the plaintiff that the nature of the discovery sought is such as to require the plaintiff to furnish sensitive information in circumstances where the plaintiff and the defendants are competitors and that this is a factor to be taken into account. The plaintiff also complains that the discovery sought constitutes a fishing exercise which is not permitted by the courts and that the discovery sought is outside the terms of the pleadings and therefore irrelevant. The defendant claims that the applications are anchored in the pleadings. The defendants also claim that the identity of the plaintiff's dealer network is not a confidential matter.

### **The Law**

7. The plaintiff relies on the case of *Hartside Ltd. v. Heineken Ireland Ltd.* [2010] IEHC 3, as setting out the current law relating to discovery.

8. In the course of his judgment in that case, Clarke J. said at para. 5.1:

*"(a) It was common case that the principles which a court must have regard to in an application for discovery of documents are as set out by McCracken J in Hannon v. Commissioner for Public Works (Unreported, High Court, McCracken J, 4th April, 2001), in the following terms:-*

*'(1) The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.*

*(2) Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that O. 31, r. 12 of the Rules of the Superior Courts 1986 specifically relates to discovery of documents 'relating to any matter in question therein'.*

*(3) It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other party's documentation is not permitted under the Rules.*

*(4) The court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties'.*

*That test was approved and applied by the Supreme Court, speaking through Murray J., in Framus Ltd v. CRH plc [2004] 2 IR. 20."*

9. At para. 5.7 of his judgment, Clarke J. referred to the fact that there may be competing considerations which need to be taken into account on the facts of a particular case. This might include information which is highly confidential.

10. The way in which confidential documents should be dealt with in an application for discovery was considered by Clarke J. in *Independent Newspapers v. Murphy* [2006] IEHC 276, where he said as follows:

*"4.3 I am satisfied that the court should only order discovery of confidential documents (particularly where the documents involve the confidence of a person or body who is not a party to the proceedings) in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made.*

*4.4 It is clear that confidential information (which is not privileged) must be revealed if not to reveal same would produce a risk of an unfair result of proceedings. The requirements of the interests of justice would, in those circumstances, undoubtedly outweigh any duty of confidence. There is ample authority for that proposition which now may be taken to be well settled. Where, therefore, it is clear that the materials sought will be relevant, then discovery must be made notwithstanding any confidentiality.*

*4.5 However, it seems to me that the balancing of the rights involved also requires the application of the doctrine of proportionality. To that extent, it seems to me to be appropriate to interfere with the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing. .. "*

At para. 5.9 of his judgment, Clarke J. stated:

*"... the overall problem is one between balancing, on the one hand, the need to facilitate a party who may have a legitimate claim but who may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim, on the one hand, and the need to prevent, on the other hand, a party by making a mere allegation, from being able to have a wide range of access to its opponent's documentation, including what may well include highly confidential documentation."*

11. The authorities suggest that a party may be required to specify legitimate bases for seeking information which is of a confidential nature because of the undesirability of allowing a mere allegation to give rise to an entitlement to access to such information. Where contested documentation is confidential, then the courts should exercise special care to ensure that a party is not given free access to such information without having satisfied the court that there is some basis on which the documentation is likely to be relevant and necessary.

12. Applying the legal principles outlined above to the discovery sought in this case, I make the following orders:-

**Category 1:** I will allow (a) to (f) but without any reference to Northern Ireland.

**Category 2:** (a) The sample of documents offered by the plaintiff to the defendant by way of discovery is sufficient. I refuse further discovery in this category on the grounds of commercial sensitivity and I am not satisfied that it is necessary for the defendant to have this information in order to defend the claim.

**Category 3:** I will allow (a) to (d) for a period of three years prior to the making of this order and confined to the State.

**Category 4:** I refuse this category on the basis that these documents do not come within the cases pleaded and are not necessary.

**Category 8:** I refuse discovery of the documents in this category on the basis that they are neither relevant nor necessary. Furthermore, the information is commercially sensitive and sufficient reason has not been furnished to require that they be discovered.

**Category 12:** I refuse the discovery sought under this category for lack of relevance on the pleadings and because it is not necessary for the proper resolution of the issues in dispute.