Neutral Citation Number [2010] IEHC 3

THE HIGH COURT

COMMERCIAL

2009 6582 P

BETWEEN

HARTSIDE LIMITED

PLAINTIFF

AND

HEINEKEN IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered on the 15th January, 2010

1. Introduction

1.1 In these proceedings the plaintiff company ("Hartside") sues the defendant ("Heineken Ireland") arising out of what is said to have been a breach by Heineken Ireland of the terms of a joint venture agreement entered into in 1996. It is unnecessary, for the purposes of the issue which I now have to decide, to set out in detail either the terms of that joint venture agreement or the disputes which have arisen between the parties, save to say that amongst the allegations contained in the statement of claim filed on behalf of Hartside is a contention that Heineken Ireland is in breach of the joint venture agreement concerned insofar as that agreement relates to the terms on which certain products are to be supplied by Heineken Ireland to the joint venture. It will be necessary to refer to the relevant provisions of the pleadings and the joint venture agreement in due course.

1.2 In the context of seeking discovery, a range of categories of documents were sought by both parties. As a result of constructive correspondence in both directions, all bar one of the relevant categories of discovery have been agreed between the parties with or without appropriate modifications. One issue of discovery, however, remains in dispute and this judgment is directed towards that issue. In order to understand the issue which has arisen it is necessary to turn, briefly, to those aspects of the pleadings which deal with the claim in respect of which the opposed category of discovery is sought. I, therefore, turn to the pleadings.

2. The Pleadings

2.1 At para. 20 of the statement of claim Hartside makes a range of allegations as to breach of contract. In general terms it is asserted that Heineken Ireland has failed to fulfil its duties and obligations under the relevant joint venture agreement. In particular, it is asserted at subpara. (h) that Heineken Ireland "has been supplying its Heineken products to the company on less favourable terms than to other parties who are purchasing comparable volumes, in breach of the provisions of Clause 9.3.1 and Clause 2.1.1. of the JVA". In that context the "company" is the vehicle through which the joint venture agreement operates and the JVA is the joint venture agreement. Heineken Ireland sought particulars of the products referred to in para. 20(h) and details of the less favourable terms referred to, together with the identity of the other parties allegedly involved.

2.2 The reply to that item in the particulars sought was as follows:-

> *"This is a matter within the knowledge of the defendant. The plaintiff is aware that the defendant has been supplying its Heineken products on less favourable terms to the Company than to other parties. The products include without limitation Heineken beer products (33cl bottles and 50cl cans). The plaintiff reserves the right to provide further particulars following the completion of discovery."*

2.3 The relevant paragraphs of Heineken Ireland's defence and counterclaim traverse those allegations.

2.4 In order to properly understand the claim it is also necessary to refer to the relevant provisions of the joint venture agreement and in particular, Clause 9.3.1 which reads as follows:-

> *"MBIL covenants with the Company that, during the duration of this Agreement, MBIL shall supply MBIL Packaged Products to the Company on terms which are no less favourable than those terms given by MBIL to other wholesalers buying volumes of MBIL Packaged Products comparable with the volumes bought by the Company."*

In the context of the joint venture agreement "MBIL" is Murphy Brewery Ireland Limited, the then name of Heineken Ireland. The "company" is Nash Beverages Limited which is, in substance, the joint venture vehicle.

2.5 It will, therefore, be seen that the relevant allegation on the part of Hartside is that Heineken Ireland is in breach of its obligation under Clause 9.3.1. That allegation in turn would, for its establishment, require Hartside to demonstrate that Heineken Ireland had supplied "MBIL packaged products" to other wholesalers, who purchased comparable volumes of those products, on more favourable terms. It also needs to be noted that MBIL Packaged Products is defined in the joint venture agreement as meaning all bottled and canned drinks products produced or otherwise sold by any company within the MBIL Group. It should also be noted that the scope of the joint venture agreement is, on its terms, expressed to relate to the licenced trade which is defined as, in substance, referring to public houses (i.e. the holders of on-licences) and off-licence premises which operate exclusively as such, and is expressly defined so as not to include supermarkets, or

the like, which may include off-licence sales as part only of their business. Against the background of the pleadings it is next necessary to turn to the request for discovery.

3. The Request for Discovery

3.1 The relevant request in respect of discovery is category 10, which is in the followings terms:-

> *"All documents evidencing, recording, discussing, or otherwise relation to the terms and conditions on which the defendant sells its 33cl Heineken and Coors Light bottled beers to parties, other than the Company, including but not limited to, documents evidencing the defendants supply terms with Musgrave Group Cork, and Galvin (Listowel), Monaghan Bottlers, J. Kelly (Tipperary Town), J. Donohue (Enniscorthy) and United Wine Merchants Limited (Northern Ireland) and documents evidencing details of discounts, promotional allowances, promotional pricing, special prices, rebates, long term agreements, incentives, advertising and marketing allowances provided in respect of the sale of products by the Company."*

3.2 The reason given for seeking that category of discovery in the relevant letter of request was as follows:-

> *"The plaintiff pleads at paragraph 20(h) that the Company has been supplying its Heineken products to the Company on less favourable terms than it does with other parties who purchase comparable volumes. The defendant denies this at paragraph 15 of the Defence and Counterclaim. The category of documents sought will assist in determining what terms and conditions of sale the defendant offers to other parties who purchase similar or lower volumes as the Company. As such these documents are both relevant and necessary and ought to be discovered."*

3.3 In response, solicitors for Heineken Ireland agreed to make limited discovery answering as follows:-

> *"The defendant is not prepared to make discovery on the terms requested above. The defendant is prepared to discover documents relating to the terms and conditions on which the defendant sells its 33cl Heineken and Coors Light bottled beers to Galvin (Listowel), Monaghan Bottlers, J. Kelly (Tipperary Town), J. Donohue (Enniscorthy) and United Wine Merchants Limited (Northern Ireland) for the last six years. Musgrave Group Cork is not a wholesaler and therefore the provisions of Clause 9.3 of the JVA are not applicable and therefore the defendant is not prepared to discover records of sales to it."*

The dispute is confined, therefore, to documents relating to the supply of products to Musgrave Group Cork ("Musgraves").

3.4 In reply, solicitors for Hartside contested the contention that Musgraves are not a wholesaler as that term is used in the joint venture agreement. In further response the solicitors for Heineken Ireland stated the following:-

> "It remains the defendant's strong contention that Musgrave Group Cork is not a wholesaler and that Clause 9.3 of the JVA is not applicable to it. As your client is well aware, there is a very considerable difference in the market place between wholesalers and multiples (such as for example Tesco, Dunnes Stores) and cash and carry/retail operators such as Musgraves and Galvins, with the latter two groups being treated as retailers and thus with different buying power to wholesalers such as the Company and the other named entities in respect of whom the defendant has agreed to make discovery.
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> Musgrave Group is not a wholesaler despite the fact that it has a cash and carry operation. Cash and carry operations are different to wholesale operations with wholesalers typically delivering product to consumers and operating customer accounts other than on a purely cash basis. Musgraves also have a very significant distribution network to its franchisees with stores throughout Ireland and this makes them akin to multiples in the retail sector and not comparable with wholesalers such as the Company. You will further note, for example, that the Beverage Council of Ireland which represents the interests of the producers and distributors of non-alcoholic beverages and also the wholesale distributors of packaged beverages to the licensed retail sectors does not include cash and carry or multiple operators such as the Musgrave Group. The Company and the other named wholesalers in your original request for discovery are of course members as is indicative of their status in the trade as wholesalers."

3.5 So far as the correspondence between the parties is concerned, it seems clear that the principal, if not the only, case made on behalf of Heineken Ireland was to the effect that there were differences between wholesalers on the one hand and multiples and cash and carry retail operators on the other. There is some reference to the "different buying power" enjoyed by those parties in the second reply.

3.6 In that context it is necessary to turn to the issues which emerged in the course of the filing of affidavits in relation to the discovery application and the argument made by counsel at the hearing before me. I, therefore, turn to the issues.

4. The Issues

4.1 In substance three points were made, both in the affidavit evidence filed and in argument on behalf of Heineken Ireland, as to why discovery of the relevant category should not be made. It should also be noted that, as a fallback position, a suggestion was made that a narrower scope of discovery would, in any event, be appropriate should I rule against Heineken Ireland on its principal contention which was, of course, to the effect that no discovery under this category should be directed at all.

4.2 On behalf of Heineken Ireland it was said that:-

A. Musgraves were not a wholesaler within the meaning of Clause 9.3.1 and that, therefore, the terms and conditions on which Heineken Ireland sold to Musgraves were not relevant to the proceedings;

B. Even if Musgraves were a wholesaler for the purposes of the joint venture agreement, the volume of sales of what were said to be relevant products to Musgraves was much larger than those to the joint venture company so that it could not be said that same were comparable in the sense in which that term was used in Clause 9.3.1. On that alternative basis it was also said that the terms and conditions on which relevant product was sold by Heineken Ireland to the joint venture company was irrelevant.

C. In the light of the fact that the overriding purpose of the joint venture agreement was, by its terms, to facilitate sale to the licenced business (and thus not to supermarkets and grocery stores who had an off-licence part to their trade), it was contended that the proper construction of Clause 9.3.1 did not contemplate sale to a business such as Musgraves which operates principally as a franchisor and seller to general stores rather than public houses or special purpose off-licences.

4.3 Certain evidence was put before the court relevant to those issues. However, it seems to me that the appropriate starting point, before reviewing that evidence and the agreement, has to be a consideration of the proper approach to be taken by a court in circumstances where a dispute such as the one which I have identified arises in relation to discovery. I, therefore, turn to the relevant legal principles.

5. The Law

5.1 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.
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> (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".
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> (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.
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> (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 I.R. 20.

5.2 However, one of the most significant questions that arise on the facts of this case concerns the proper application of test 1. There can be little doubt but that, if Musgraves are a wholesaler purchasing a comparable volume of relevant product so as to come within (both on the facts and on the proper construction of same) the terms of Clause 9.3.1, then the terms and conditions on which Heineken Ireland supply Musgraves would manifestly be relevant to the proceedings and, thus, any documents evidencing those terms and conditions would, in turn, not only probably be relevant but almost certainly be relevant. The basis on which it is said that the documents concerned are not relevant in this case is because of the construction which is sought to be placed on Clause 9.3.1 by Heineken Ireland coupled with certain facts which are put before the court in affidavit evidence, and to which reference will need to be made in due course.

5.3 In substance, it seems to me that counsel for Hartside was correct when he said that, in truth, the reason why the contested documents are alleged not be relevant is because it is said that Hartside can not make out a case to the effect that Musgraves are captured by Clause 9.3.1. There is, in addition, it needs to be noted, a question raised on behalf of Heineken Ireland which concerns the way in which this aspect of the case has been pleaded, and as to whether the pleadings fairly put the Musgrave supply issue into dispute as defined by the pleadings. This is a point to which I will need to turn in due course.

5.4 However, the point of principle which arises is as to the approach which the court should take where the real reason why a set of documents is said not be relevant is that it is argued that there is no legitimate basis for suggesting that the issue to which those documents might be relevant can properly arise in the case.

5.5 It is, of course, clear that such questions could, in theory, arise in virtually any case. At its simplest almost all cases involve a series of sequential propositions which need to be established in order that the plaintiff concerned might succeed. Even the most basic case will involve questions of liability, causation, and loss. Questions of loss, for example, only arise when liability and causation has been established. Thus, there is a sense in which materials relevant only to the calculation of loss will only be relevant in the proceedings if the plaintiff establishes liability and a causal link between the alleged loss and the cause of action. It could not, of course, follow that it would be appropriate for the court to determine, in the words of McCracken J. in Hannon, "as a matter of probability" whether the document is relevant to the issue to be tried on the basis of considering whether, as a matter of probability, the plaintiff is going to get to the issue of loss by reason of surmounting the obstacle of liability and causation. Rather the proper approach to the application of the test identified by McCracken J. is that the issue of loss is an issue in the case, albeit one which may not need to be determined in the event that other issues go a particular way. Once it is probable that a document would be relevant to the calculation of loss, then its discovery must be directed (in the absence of any other good reason for not so doing) even though there might well be a risk that loss will never come to be assessed by the court at all. Loss is an issue because it is pleaded and denied. Whether it may be reached as a consequence of decisions on other issues is neither here nor there in the context of discovery. To take any other view, would be to invite the court to attempt to resolve potentially contested issues at the preliminary stage of a discovery application. The relevant general proposition must,

therefore, be that, provided that an allegation is properly made on the pleadings, then documents which are probably relevant to the resolution of that issue should be discovered even though that issue may only arise in the event that other matters are resolved in favour of the party concerned. There are, however, a number of points that need to be made about that general proposition.

5.6 First, as I have indicated, the issue must fairly arise on the pleadings. That is a question to which I will return.

5.7 Second, there may be competing considerations which need to be taken into account on the facts of an appropriate case. In this case it is said on behalf of Heineken Ireland that information concerning the terms and conditions on which it sells its product to Musgraves is highly confidential. I am prepared to accept that this is so. It was not, of course, contended on behalf of Heineken Ireland that the mere fact that information is confidential is a barrier to that information becoming available on discovery if it proves necessary for the proper resolution of the proceedings. However, it was said to be a factor to be taken into account. As I pointed out in Independent Newspapers v. Murphy [2006] IEHC 276 at paras. 4.3 – 4.5:-

> "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.
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> 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 in 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 he materials sought will be relevant, then discovery must be made notwithstanding any confidentiality.
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> 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. In the unusual circumstances of this case it is far from clear (for the reasons analysed above) as to whether any of the disputed documentation will become necessary. As pointed out relevance will depend on the case which Independent makes, the facts and evidence led in support of that case and the legal submissions of the parties. The balance is, therefore, between a possible relevance and a high probability of a breach of confidence."

5.8 On the particular facts of that case I directed that certain confidential information should be the subject of an order which required same to be recorded and preserved, so that it might be made available at the trial should the trial judge so direct.

5.9 Finally, I should refer to the difficulties which I had to address in both National Education Board v. Ryan & Ors [2007] IEHC 428 and Moorview Developments Limited v. First Active plc [2008] IEHC 211. Both of those cases involved allegations of fraud which are not, of course, of any relevance to this case. However, it does not seem to me that the issues raised are confined to fraud cases (indeed, I had occasion to indicate that similar principles applied in the competition field in Ryanair v. Bravofly [2009] IEHC 41). 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. The balance struck in both Moorview, National Education Board and Ryanair, leads to the conclusion that a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation. The need for such a restriction seems to me to stem from the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information.

5.10 Taking all of those factors into account, it seems to me that the court retains a discretion to disallow discovery of documentation which might, theoretically, be relevant to an issue in proceedings, but where that issue will only arise in the event that some logically previous issue is determined in favour of the party concerned and where no legitimate arguable basis has been put forward for suggesting that the requesting party will be able to succeed on that earlier issue, and thus, have the issue to which the contested documents are relevant reached at all. In a case where the contested documentation is confidential (or particularly highly confidential), then special care should be taken to ensure that a party is not, in substance, being given free access to highly confidential information without having satisfied the court that there is some basis on which the relevant documentation is likely to be relevant at the hearing.

5.11 Likewise, in the light of National Education Board, the court may be required to craft an individual order on the facts of a particular case designed, as best it can, to protect the legitimate interests of confidentiality, on the one hand, and the need to ensure that justice is fairly administered, on the other.

5.12 It is, next, necessary to apply those principles to the facts of this case.

6. Application to the Facts of this Case

6.1 As has been pointed out earlier, the real question between the parties is as to whether the terms and conditions on which Heineken Ireland supplies Musgraves are relevant. Those terms and conditions are only relevant if it can be established that supply to Musgraves comes within para. 9.3.1. No other basis is suggested for the terms of supply to Musgraves being relevant to these proceedings. In those circumstances it is clear that the question of the terms and conditions by which Heineken Ireland supplies Musgraves (and, therefore, by definition the relevance of any documents touching on that issue) only arise in the event that Hartside satisfies the court that supply to Musgraves does come within the terms of Clause 9.3.1. That matter is disputed.

6.2 However, as pointed out earlier, it is no function of the court at this stage to reach a concluded view as to whether, either as a matter of construction or as a matter of fact, the allegation of Hartside in that regard is correct. However, having regard to the fact, in particular, that the information which will be disclosed on discovery is likely to be

significantly confidential, it seems to me that it is appropriate to assess whether the relevant allegations of Hartside under this heading are clearly pleaded and, if so, are mere assertion or whether they possess a sufficient degree of credibility. Against that background it is necessary to turn briefly to the case as pleaded and the submissions of counsel relevant to that case.

6.3 As noted earlier, Hartside squarely alleges, at para. 20(h) of the statement of claim, that relevant product has been supplied on more favourable terms to entities which come within Clause 9.3.1. The question is as to whether supply to Musgraves comes within that allegation. There is no specific reference to Musgraves in the statement of claim or particulars subsequently delivered. However, the relevant reply to particulars indicates that more details will be supplied after discovery. In addition, it should be noted that the evidence put before the court on this motion contains an account by Mr. Nash, of Hartside, of a conversation which he says he had with a Mr. Liston (who at certain times had connection with both Heineken Ireland and Musgraves). The content of the relevant conversation is contested by Mr. Liston. However, on the basis of Mr. Nash's evidence it is suggested that it was accepted by Mr. Liston that a change occurred in the terms and conditions whereby relevant product was supplied by Heineken Ireland to Musgraves which brought those terms and conditions more into line with those available to large supermarket retailers, such as Tesco and Dunnes Stores. There is, therefore, a credible basis for the assertion that Heineken Ireland has supplied Musgrave on terms which are significantly more favourable than those available to the joint venture company. That is not, of course, the end of the matter. However, it seems clear that (subject to discovery) it would be the intention of Hartside to include a specific allegation referable to Musgraves in its updated particulars. I am satisfied that the allegations relating to the supply terms in respect of Musgraves arise on the pleadings even though it will be necessary to further particularise specific allegations before trial if same are to be persisted with. It is also clear that there is a credible basis for believing that discovery may provide information to substantiate the factual allegation that the terms available to Musgraves has been, at material times, more favourable than those on which supply to the joint venture company has operated.

6.4 It is also, however, necessary to look at the additional points made on behalf of Heineken Ireland. It is said that Clause 9.3.1 must be seen in the light of the overall ambit of the joint venture agreement which relates to on-licence and exclusive off-licence business. In that context it is said that a proper construction of Clause 9.3.1 must take that fact into account and may lead to a conclusion that Clause 9.3.1 has no application to a wholesaler of the type of Musgraves whom, it would seem, is primarily concerned with the supply of product, either on a cash and carry basis, or to retail franchisees who operate principally under the Supervalu or Centra logos (although the operators of those retail units would appear in general terms to be independent traders). That is, undoubtedly, a question of construction which will arise at the trial, but it cannot be said that Hartside's position on that issue (i.e. that Clause 9.3.1 refers to any wholesaler as opposed to wholesalers whose primary business is in the on-licence and exclusive off-licence business) is not arguable. Likewise, there is a dispute between the parties as to whether the business carried on by Musgraves is, properly speaking, a wholesale business in the sense in which that term is used in the joint venture agreement. It would again appear, on the evidence currently available, that Musgraves principal business involves supplying those with whom it has a franchise arrangement and also supplying other traders on a cash and carry basis. There is, again in my view, at least a credible basis for asserting that such a form of business is a wholesale business in the sense in which that term is used in Clause 9.3.1. It will be necessary to turn, in early course, to the question of whether Musgraves can be said to be operating at a comparable volume level to the joint venture company. However, in all other respects it seems to me to be clear that Hartside has established a credible basis for asserting that Musgraves are arguably a wholesale business in the sense in which that term is used in Clause 9.3.1, such that that Clause, properly interpreted, (and provided that comparable volume can be established) would require that Musgraves not be supplied on any more favourable terms than the joint venture company. In making that comment I should, of course, point out that nothing in this judgment should be taken as indicating any view on the disputed issues of fact and interpretation which underlie the matters which I have just addressed. Rather the conclusion which I have reached is that Hartside have satisfied me that their contentions under those headings amount to more than mere assertion and have a credible, arguable basis.

6.5 That leads to consideration of the comparable volume question. It is clear that, in order that Clause 9.3.1 govern the relations between Heineken Ireland and any particular wholesaler, that the wholesaler concerned have a comparable volume of sales (from Heineken Ireland) to those applicable to the joint venture company. Two issues of detail arose in the course of argument. It was asserted on behalf of Hartside (and I accept, again, that this matter is sufficiently arguable for the purposes of the application with which I am concerned) that the relevant time for considering volume in this context is the time when any material divergence in terms and conditions first appeared. If it were to be established that, at the level of principal, Clause 9.3.1 applied to Heineken Ireland's business with Musgraves, then it would follow that there should not have been any material difference in the terms applied to Musgraves on the one hand and the joint venture company on the other hand. To the extent that after such a divergence in terms and conditions might have emerged, a consequential differentiation arose in the volume of sales to respectively Musgraves and the joint venture company, then it is at least arguable that Heineken Ireland could not place reliance on any such subsequent divergence, for that divergence would in itself have arisen as a result of a breach of contract.

6.6 A second question arises as to the relevant products by reference to which the question of comparable volume should be assessed. It will be recalled that the discovery request related solely to bottled products. Complaint is made on behalf of Hartside that the figures presented in evidence by Heineken Ireland as to the comparison between volume sales by Heineken Ireland in favour of, respectively, Musgraves and the joint venture company, relate to all products which come within the relevant definition in the joint venture agreement. The competing arguments are the following. Hartside says that each product line should be separately assessed so that there should not be a difference in terms and conditions referable to a particular product line where the volume in respect of that product line is comparable. Heineken Ireland says that the assessment should be conducted at a global level for, it is argued, the basis upon which one might commercially expect to achieve better terms and conditions is dependent on the overall level of business done, rather than the business done in respect of any individual product line. No figures were produced in evidence as to the respective volume of business over any material period in respect of bottled beer as and between sales to Musgraves and sales to the joint venture company. The figures produced in respect of overall sales of qualifying products do suggest that, even before the time at which it is argued that a price differential may have arisen, sales to Musgraves were three to four times sales to the joint venture company. On that basis, Heineken Ireland suggests that there is no credible case made out on behalf of Hartside to the effect that Musgraves are comparable from a sales volume perspective to the joint venture company.

6.7 I should start by noting that it is correct, as was asserted on behalf of Hartside, to say that the sales volume question did not arise at all in the first reply to the request for discovery and arose, if at all, only in the most oblique way, in the second reply. It is clear, therefore, that the position of Hartside as of the bringing of the application with which I

am now concerned, was confined solely to the "wholesaler" issue which I have already discussed. However, the comparable volume question is now before the court and I must deal with it.

6.8 On the basis of the evidence and the argument currently before the court, it seems clear that Hartside will have to surmount significant hurdles before it would be possible for Hartside to satisfy the court that Clause 9.3.1 had application to sales by Heineken Ireland to Musgraves. Hartside would either have to persuade the court that a differentiation of the order of 300% nonetheless left the volumes as being properly described as comparable in the sense in which that term is used in Clause 9.3.1. or, alternatively, or in addition, Hartside would need to establish that the proper analysis of the relevant Clause requires volume sales to be analysed on an individual product basis, and also would need to establish that bottled beer, on that analysis, reflected a sufficiently comparable level of sales as and between Musgraves and the joint venture company so as to bring Musgraves within the ambit of Clause 9.3.1 (at least so far as bottled beer is concerned). It would not, in my view, be appropriate for me to rule at this stage that Hartside could not succeed under those headings. However, I do have to confess that my current view is that Hartside will have a significant task in getting over those hurdles.

6.9 In the light of that view, it seems to me that I must also bring into the balance the undoubted confidentiality of the material sought to be discovered. On that basis I have come to certain conclusions as to the proper course of action to adopt.

7. Conclusions

7.1 Balancing, on the one hand, the fact that sales to Musgrave may not turn out, in the view of the trial judge, to be relevant at all and the fact that giving information concerning the terms and conditions by which Heineken Ireland sells to Musgraves will undoubtedly disclose confidential information which is confidential, not only to Heineken Ireland but also to Musgraves, who are not a party to these proceedings, and which information may come into the public domain in the context of these proceedings, but on the other hand having regard to the fact that it remains possible, in my view, that Hartside may be able to persuade the trial judge that sales to Musgrave are material, I have come to the view that I should adopt a practice similar to that which I followed in International Newspapers v. Murphy..

7.2 It seems to me that, by requiring the relevant information to be placed in a ready form so that it can be produced at the trial in the event that, in the view of the trial judge, it should become relevant, I would be adopting a practice which does the least risk of injustice. The trial judge will be in a much better position (particularly having regard to the fact that witness statements will need to be filed prior to the hearing) to judge whether there is, in truth, likely to be any reality in the trial judge needing to hear evidence concerning the terms and conditions on which sales to Musgraves took place. To make that information now available would be to expose undoubtedly confidential information to being revealed in circumstances where it may not turn out to be necessary at all. On the other hand not to make some provision for the availability of that information in the event that it should transpire to be relevant, would run the risk of doing an injustice to Hartside or disrupting the trial unnecessarily.

7.3 In addition it seems to me that, having regard to the way in which the argument has developed, information, broken down on a product by product basis, of the volume of relevant sales to Musgraves by Heineken Ireland should be immediately provided, for it is not suggested that that information is of any greater degree of confidentiality than other information which will necessarily be made available in the course of the proceedings. It is also true that such information is likely to be relevant to the question of whether sales to Musgraves comes within the ambit of Clause 9.3.1 at all.

7.4 In summary, therefore, I will direct that discovery should be made of documents evidencing the volume of relevant sales, broken down on a product by product basis, to Musgraves where the product concerned comes within the definition of MBIL Packaged Products in the joint venture agreement.

7.5 Secondly, I will direct that an affidavit should be prepared and sworn making discovery of any documents relevant to the price at which qualifying product was sold to Musgrave during the relevant period, or relevant to any other terms and conditions of the supply of such product which are material to the price at which it was so sold. The documents so discovered should be collated and should, at the trial, be available to be produced when, and if, the trial judge directs.