

IRISH SHELL v RYAN

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THE HIGH COURT

1985 No. 5840P

BETWEEN:

IRISH SHELL LIMITED

PLAINTIFFS

AND

DAN RYAN LIMITED AND ESSO IRELAND plc

DEFENDANTS

Judgment of Mr. Justice Costello delivered the 22nd day
of April 1986

The commercial rivalry between the Plaintiff company ("Shell") and the second-named Defendant company ("Esso") is of long standing and has led to the dispute with which these proceedings are concerned. They relate to a valuable filling station at Punch's Cross on the outskirts of Limerick, owned by the first-named Defendant company ("Dan Ryan Ltd"). For many years Shell had exclusive rights in relation to this station arising under a series of agreements (including a "solus" trading agreement) which meant that Dan Ryan Ltd could only sell Shell motor fuels at the station. On 28th June of last year Dan Ryan Ltd entered into an agreement to sell the station to Esso in breach, Shell say, of their contractual undertakings. Proceedings against both Dan Ryan Ltd and Esso were instituted and in the course of these an order for discovery of documents was made on 31st July, 1985. Esso failed to comply with the order and as a result a motion was brought in January last to strike out their defence. This was adjourned and on the 7th February, 1986 Esso's affidavit of discovery was eventually sworn. Shell considered that this affidavit failed to comply with the Rules and brought this present motion for an order either striking out the defence or directing that a further affidavit be filed. Esso accept that their affidavit is inadequate in two respects. (a) Due to an error correspondence passing between Esso's solicitors and Dan Ryan Ltd's solicitors was included in Part II of the first Schedule, at paragraph 6 and as a result privilege for this correspondence was incorrectly claimed. It is also accepted (b) that a number of documents (exhibited as exhibit "A" in their solicitors' affidavit of the 10th March 1986) should have been discovered, and properly identified. The

dispute between the parties is thus now limited to a number of documents referred to compendiously in the discovery affidavit as "market reports, valuations and Board approvals" relating to the proposed purchase of the Punch's Cross station. Esso make two points; (i) that these documents are not relevant to any issue that arises in these proceedings and are therefore not discoverable, and alternatively (ii) that even if they are relevant they are privileged by reason of their confidential nature.

Before describing the documents (which were given to me and which I have examined) I should briefly refer to the issues between the parties.

The Plaintiffs plead five written agreements which they entered into with Dan Ryan Ltd and claim that they each have been breached by the agreement of 28th June 1985. Their claim against Esso is that Esso had full knowledge of their terms and have wrongfully interfered with them and conspired with Dan Ryan Ltd to put it out of the power of Dan Ryan Ltd to perform their terms. They claim an injunction and damages against both Dan Ryan Ltd and Esso. Esso do not deny that they knew the terms of the five contracts, nor that the agreement of the 28th June, 1985 amounts to a breach of them. They claim however, that the terms on which Shell rely and which admittedly were broken by their agreement with Dan Ryan Ltd. were as a matter of law unenforceable and that accordingly no tortious liability attaches to Esso.

By virtue of Order 31 rule 12 Esso are required to discover all documents in their possession "relating to any question" in these proceedings, a provision which has been

considered in a number of cases helpfully analysed by Mr. Justice Kenny in Sterling - Winthrop Group Ltd. .v. Farbenfabrikan Bayer AG (1967 I.R. 97). In that case Mr. Justice Kenny quoted with approval the judgment of Lord Justice Brett in Compagnie Financiere du Pacifique .v. Peruvian Guano Co. (II. Q.B.D.55) in which it was established that a discovery affidavit must not merely comprise those documents which would support or defeat any issue in the case but which could reasonably be said to contain information which might either directly or indirectly enable a Plaintiff who has sought discovery to advance his own case or damage the case of a Defendant.

It is of course obvious that Esso would have given very careful consideration to the commercial aspects of the proposed purchase of the station at Punch's Cross, and not surprisingly internal memoranda were prepared to enable the relevant decision-making authority to decide whether or not to purchase the station. The documents which have been given to me comprise (a) a memorandum headed "Executive Authorisation Request" (undated which sets out commercial considerations for the proposed purchase (b) calculations of sales of Esso's products in the Limerick area (undated) (c) a Valuation of 6th May 1985 of the site (d) a memorandum of the 27th May 1985 headed "Road Development Plans, Limerick and County" (e) a set of calculations dated the 17th June 1985 relating to the sales from the Punch's Cross filling station (f) handwritten worksheets of calculations of the output from the Punch's Cross filling station (g) three memoranda relating to road development in the area (h) an application for capital expenditure relating to the Punch's Cross site with a final date given of the 26th June 1985 (i) three internal memoranda of 17th, 25th, 28th June 1985 relating to the approval

of the purchase (j) two computer print-outs dated 2nd April 1985 and 14th June 1985 containing commercial calculations relating to the Punch's Cross station and other outlets in the Limerick Area

I fail to see how anything in these documents could assist either directly or indirectly in advancing the Plaintiffs' case on the question on the enforceability of the five agreements or damage the Defendants case on this issue. If a Defendant deliberately and with intent to injure set out to induce a breach of contract and conspired with others to do so and was unwise enough to put his intentions in writing the written document could, conceivably, relate to an issue on damages or the appropriateness of injunctive relief. But there is nothing in the documents which I have examined which could in anyway affect the nature of the relief to which Shell might be entitled or the quantum of damages. In my view, therefore, none of these documents relate to any matter in question in these proceedings and so they need not be discovered. I need express no view therefore as to whether, if discoverable, Esso could claim privilege in respect of them.

I will order Esso to file within 14 days a further affidavit of discovery in relation to those documents to which I have already referred. On failure to do so I will order that the defence be struck out.

Approved

J.L.

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