

THE HIGH COURT

[2021] IEHC 463
[2020/234 COS]

**IN THE MATTER OF BRANDON PLANT HIRE LIMITED
AND
THE COMPANIES ACTS
(DISCOVERY MOTION)**

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 6th day of July, 2021.

1. Brandon Plant Hire Limited (In Liquidation), which I will describe as 'Brandon', acted as a subcontractor to the Respondent ('Cairn') in a respect of a number of developments. The three developments of central relevance to this dispute are Mariavilla, Griffith Wood and Donnybrook. Brandon and Cairn entered into a settlement agreement on the 11th of March 2020 in respect of a dispute between them as to the amount to be paid by Cairn to Brandon. The liquidator of Brandon, Mr. Fitzpatrick, now seeks a range of orders including orders to the effect that the settlement agreement constitutes a fraudulent disposition and orders directing the payment of monies allegedly due to Brandon; these monies allegedly arise from variations to the original agreements, in large measure involving accelerated works by Brandon.
2. In this discovery motion, brought against Cairn, there are six categories in dispute. The balance have been agreed. Given that the relevant legal principles are well settled, there were no written legal submissions provided by either party. At the hearing, I was referred to no authorities. I will therefore decide the differences on the categories on the basis of the well-known case law on discovery.
 - A. Category 14**
3. As currently sought, this reads:-

"All private notes or telephonic or electronic documents made and/or taken by the Respondent's Seoirse Comerford, Paddy Hoare, Fergus McMahon, Michael Stanley, Donal Stenson, Stephen Bethel David Cloonan relating to dealings and meetings involving the Company and the Respondent concerning the Mariavilla contract between the Company and the Respondent."
4. There is only the most passing reference, in the reason given for this request, to the pleadings. No real effort is made to show how this particular category is either relevant or necessary. It is, as Cairn submit, an extremely broad category, even in its current format (which constitutes a refinement by the liquidator of the category as originally sought by him). It involves a very wide range of documents relating to all dealings and meetings involving Brandon and Cairn concerning Mariavilla, a development which was clearly a very significant one; for example, paragraph ten of the Points of Claim talks about the delivery of 150 houses in this development ahead of time. Even operating on the basis that this was the entire development, it is obviously a fairly large one. In fact, I am told by counsel for Cairn in her submission that the estate is made up of some 567 houses and apartments. As it is likely that Cairn and Brandon had dealings which did not relate to the matters at issue in these proceedings, the category as currently drawn will in all

probability involve discovery of completely irrelevant documents. For all these fundamental reasons, I find that the liquidator has not established either the relevance or the necessity which would enable me to order this discovery. While it might have been open to me to reformulate the category, particularly if invited to do so, I do not think that this is an appropriate occasion to act in this way given that (a) no such invitation is made by counsel for the liquidator (b) the liquidator, in reformulating the category, has already clarified the limit of what he feels is required, and this limit is nowhere what the court could properly considering ordering and (c) most importantly, two other categories (both agreed) appear to cover some of the documents sought under category fourteen that would actually be relevant to the issues in this action. These categories (six and ten) read:-

"6. All internal communications including notes, memoranda, documents between the Respondent's Paddy Hoare, Seoirse Comerford, Kevin Sweeney, Liam O'Brien, Fergus McMahon, Stephen Bethel, Donal Stenson and Michael Stanley or any of them regarding payments to the Company in respect of the Mariavilla site, the Griffith Wood site, and the Donnybrook Greenfield site for the period 31 December 2019 to 11 March 2020.

10. All documents and notes evidencing reliance upon the contractual provisions of the Mariavilla contract by the Respondent with regard to variation/acceleration instructions and/or requests to the Company by the Respondent."

5. Counsel for the liquidator has not provided any persuasive reason why category fourteen is required, given the discovery being made in respect of these other two categories.

6. I will therefore refuse category fourteen.

B. Category 16

7. This category is:-

"All correspondence, specifications and reports from Irish Water to the Respondent relating to the Mariavilla site including the Irish Water licence agreement."

8. This request is anchored in paragraph nine of the liquidator's Replies to Particulars dated the 22nd of October 2020. This reads:-

"The Company and the Respondent had a course of dealings whereby the Company previously responded to requests to deviate from terms and conditions of contract which included provisions as to variations. On each previous occasion viz since 2016 when the Company was carrying out work on various of the Respondent's side, the Company did and the Respondent's express request vary the said contract and at no time did the Respondent invoke the formal contractual variations procedures and at all material times the Company was paid by the Respondent in full for any additional works or variations. The said conduct amounts to a course of dealing between the parties and relates to additions, variations of contracts between the Respondent and Company relating to projects at Hanover Quay;

Churchfields, Ashbourne; Marianella, Rathgar; Cowper Road, Rathmines; Killiney and Parkside, Dublin 7.

The past variations included oral variations to Marianella, Rathgar contracts as per spreadsheets. The contract terms and conditions were orally varied by the Respondent's: Joe Kelly, Gareth O'Neill, Liam O'Brien, Jude Byrne, Edel Baramino and Brian Heverin. The variations of the Marionella contracts were extremely significant. One of the original contracts awarded related to house bases which had a value of €112,916.92 and after the oral variations were carried out the value of that contract amounted to €275,000 which was paid by the Respondent to the Company. In respect of the second Marionella contract which was for drainage and services and had a value of €515,454.35. However, after the oral variations were carried out the value of the contract was agreed at €1,935,630.00 which was paid by the Respondent to the Company. This represented a 300% increase in the contract value and is indicative of how the Respondent operated their business and the course of dealings between the parties.

The oral variations to the Marionella contract instructed by the above persons involved an increase in works by 20%: works outside the site, works to resolve design and construction difficulties, and the company picking up the pieces from other Cairn subcontractors and finishing the work of those subcontractors when same were unable to carry out Cairn's requirements.

The other contact referred to in paragraph 2 included variations which often exceeded the value of the written contract. The account was agreed for this. For example, in Hannover Quay in a Contract between the Company and the Respondent dated November 2018, the company deviated from the terms and conditions of the contract at the request of the Respondent's John McNichol, Jude Byrne and Tommy Carey on the Respondent's behalf and Kevin Reilly and other staff. The variations included major changes to the scope of the works and additional working hours."

9. Not only is the reference to the wrong paragraph of the Replies to Particulars, the document containing that paragraph is also wrongly described in the request for discovery. As counsel for Cairn pointed out, the relevant pleading is at paragraph 11(b)(iii) of the same Replies:-

"The company had planned under the written contract to carry out the contract using labour priced at normal working hour rates but due to the acceleration variations imposed on the company by the Respondent the Company had to work at weekends with no holiday periods and through adverse weather conditions whilst paying temporary agency rates which were significant and expensive, ongoing requirements of Irish Water, caused additional financial pressure on the company combined with the unreasonable timeframe 8 months the demands by the Respondent's management to increase labour constantly which the company did also resulted in overmanning causing increased costs and a loss of per capita of

productivity. The acceleration and variation caused the company to have to use its own retained earnings/capital reserves to fund the extra site costs attributable to the acceleration at the Respondent's site. The company workforce grew from a max of 50 to 157 to carry out the acceleration. The acceleration deviated the terms of the planning permission the Respondent had received and did not correspond with the Respondent's development design nor did it accord with the Irish Water code of practice which caused additional onsite conflict and delay, and increased site costs for the Company. The Respondent effectively took control of some of the company's subcontractors by contacting them directly and directing them to work on site causing the company to have to fund same."

10. A similar form of words is used at paragraph 45 of the Reply.

11. However, a mere reference to Irish Water in the pleadings does not justify an order for discovery of the category sought. In his replying submission, counsel for the liquidator argued that:-

"The Irish Water matter is deeded and it did cause – it was more because of the problems that arose for the company in carrying out the contract at Maria Villa and all we simply want is the specification for the works, so the contractual provision for the works basically essentially required us to comply with the requirements of any statutory body, including Irish Water and the experience -- the problem basically with Irish Water as the Court may or may not be aware is that Irish Water took over the water services and foul services in January 2014 and they only actually came and were organised sufficiently so that they now control each site individually, in other words you have to -- it's basically going back to the old days of working with the Dublin local authorities where you had to bring their inspectors or their field officers out to inspect all of your work. That's the reason why we're asking or seeking that information from the respondent. In other words, what information they had from Irish Water and what were the terms of the actual licence agreement between Irish Water and Care Homes in respect of the development at the Maria Villa site, which I would have thought is not an unreasonable thing to seek in those circumstances."

12. The central issue between the parties, on this part of the case, is whether Cairn required Brandon to carry out works for which Brandon was entitled to be paid. The reason why such works may have been commissioned by Cairn (at least as far as Irish Water is concerned) is not relevant to this issue. For example, there is no pleading brought to my attention which claims that Cairn is liberated from any obligation to pay Brandon because the relevant works were needed in order to meet the requirements of Irish Water. As counsel for Cairn argued, the relevant documents in this regard are those encompassed by categories ten (which I have already described) and 25; the latter reads:-

"(a) A copy of all emails and requests for the period 22 November 2018 and 11 March 2020 between the Company and the Respondent relating to the Donnybrook Greenfield contracts including oral contracts; and

(b) a copy of all variation requests to the written contracts and the terms and conditions hereof requested by the Respondent to the Company for the period between 22 November 2018 and 11 March 2020.”

13. Discovery in these terms relating to Mariavilla would certainly cover some of the relevant documents relevant to the actual claim made by the liquidator. Counsel contrasted these sort of documents, which are plainly relevant, to the category sixteen documents.
14. In his response, counsel for the liquidator did not reply to this submission.
15. As neither relevance nor necessity has been established by the liquidator, I will refuse this category.

C. Category 20 and Category 22

16. These read:-

“20. All documents evidencing the contractual steps pursuant to the terms and conditions of the written contract and calculation methodology engaged by the Respondent in certifying payment to the Company in respect of the works carried out by the Company for the Respondent pursuant to written contracts at the Respondent’s site at Marianella Rathgar, Hanover Quay, and Churchfields, Ashbourne, County Meath. The written contracts between the Company and the Respondent are:

- (1) Marianella, Rathgar;
- (2) Hanover Quay; and
- (3) Churchfields, Ashbourne, County Meath Phase 1 and Phase 2.

22. All documents enclosing an explanation pursuant to the written contract explaining the reasons for the difference in payments made to the Company from the total contract value amount specified in the written contracts for the Marianella, Hanover Quay and Churchfields Ashbourne projects. The contract price for the Marianella was €112,916.72 and was varied orally to €275,000. The value of the second Marianella Rathgar contract for drainage and services was €515,454.35 and was orally varied to €1,955,630.00.”

17. These categories relate to other developments. The only pleading relied upon by the liquidator, in making this request, is paragraph eleven of the Points of Claim:-

“The acceleration variations of the said contract were agreed by the parties and made orally and partly by conduct and/or as a result of a course of dealing between the Company and the Respondent.”

18. That remained the only plea relied upon by the liquidator until the relying submission of his counsel, despite the fact that the relevance (by reference to the pleadings) of either category was questioned by Cairn’s solicitors in correspondence.

19. In his reply, counsel for the liquidator also relied upon paragraph twelve of the Points of Claim:-

“Insofar as the said contract acceleration variations were made by conduct the Respondent’s conduct can be inferred as it well knew from the previous course of dealings between the parties that at its request the Company would vary and did in the past vary terms and conditions of written contracts to facilitate the Respondent and were at all times paid thereafter by way of the application of the standard and agreed rates.”

20. While not expressly prayed in aid by counsel for the liquidator, I noted during the hearing the plea at paragraph 20 of the Points of Defence and Counterclaim:-

“If, which is denied, such acceleration variations occurred, it is denied that same were made orally and/or partly by conduct and/or as a result of a course of dealing between the Company and the Respondent, whether as alleged at paragraph 12 of the Points of Claim, or at all.”

21. In addition, in a notice for interrogatories the liquidator asked (at item 31):-

“Did the Respondent waive formal contract procedures as regards variations in its previous dealings with the Company.”

22. The reply, sworn on behalf of Cairn, was “No”.

23. Counsel for Cairn accepts that the course of conduct between the parties is a “live issue in terms of what’s pleaded.” She argues however that what happened in other contracts is not probative of what happened in the three relevant developments.

24. The pleadings show a dispute between the parties as to whether there was a course of dealing to the effect that Brandon would informally or orally vary the terms of written agreements in order to facilitate Cairn, and would then be paid for the resulting works. Discovery on this issue is relevant to the disputes crystallised by the pleadings. It is also necessary, in that access to papers held by Cairn (which are likely to include internal papers) could advance the liquidator’s position on this point and damage the position of Cairn. If Brandon relied solely on its own evidence, and the documents available to it, it is likely to be in a less advantageous state than if it has access to Cairn’s papers on this question. Even if there are no documents made available to it on discovery, knowledge of that fact is a benefit to the liquidator as he may well use this information to take stock of the strength of his case. The liquidator has attempted to avoid the need for discovery through the use of interrogatories, but this has if anything made the difference between the parties starker.

25. Not only is this a live issue in the action, it is one which is potentially of some importance. The liquidator’s case is advanced if he can show that in other sites formal contract procedures were waived, as this fact could make more credible the contention (denied by

Cairn) that this happened in the relevant sites. Such documentation may not be conclusively probative, but could well have supportive probative value.

26. I think that some form of discovery on this point should be provided by Cairn, but find the present formulations of categories 20 and 22 quite unsatisfactory. Category 22 is particularly difficult to understand, and its connection to the stated reason justifying discovery of this class appears tenuous (inasmuch as I comprehend it).
27. I propose therefore to invite the parties to agree, in the light of this judgment, a category which reflects the actual issue in the pleadings and which is proportionate given the scale of the other developments involved. If the parties cannot agree such a category, I will fix its terms.

D. Category 23

28. This category reads:-

“All documents evidencing all oral instructions including variation requests associated directly or indirectly with both written Donnybrook Greenfields contracts, the first contract being entered in August 2019 between the Company and the Respondent and the second written contract signed on 28th February 2019 from the Respondent’s Jude Byrne.”

29. As we have seen, the pleaded case of the liquidator is that accelerated variations to the Donnybrook contract were agreed orally (though not on all occasions). Documents relating to such instructions are relevant, and are also necessary in that they constitute material not inevitably available to the liquidator. Four reasons are advanced by Cairn for the refusal of this category. They are:-
- (i) “By virtue of the fact that the Applicant is seeking evidence of oral instructions allegedly issued by the Respondent, the logical conclusion is that there would be no document evidencing same”. I am not favourably impressed by this exercise in logic. It is entirely probable that an oral instruction is subsequently recorded in a note made by Cairn. Indeed, the prior decision to issue the oral instruction may well be recorded in an internal document.
- (ii) “To the extent that there is any document evidencing any oral instruction, this is most likely to be in the possession of the Applicant (in the form of a record of the alleged oral instruction)”. It is difficult to ignore the lack of consistency between reason (1) and reason (2). Reason (1) concludes that there will be no document; reason (2) accepts that there may well be relevant documents, but concludes that they will be in the possession of the liquidator. No reason is given as to why I should find that Cairn would not have created internal documents, or that any such internal documents must be (or “are likely” to be) in the liquidator’s possession.
- (iii) “To the extent that there are any documents relating to variation requests, these will relate to written requests in accordance with the contracts”. This is an extraordinary argument, and in itself justifies the decision that I have made to

order some form of discovery in respect of categories 20 and 22. It invites me to presuppose, despite the pleaded case, that no oral variations occurred and that there was not a course of dealing between the parties that formal contract procedures were waived. It is not a winning point. Clearly, I cannot leap to the conclusion that Cairn's position on these issues is inevitably correct.

(iv) Documents are being sought which relate "indirectly" to variation requests. I agree that this form of words should be excised from any category ordered.

30. Rather than rely upon any of these reasons, counsel for Cairn submitted that there was a significant overlap between category 23 and category 25. While it is the case that there is some overlap, category 25 as agreed does not capture Cairn's internal notes evidencing oral requests for variations; these are precisely the type of notes which are likely to exist (in the event that there were oral requests for variations) and which would not otherwise be available to the liquidator. As such, they are both relevant and necessary, and no evidence is provided that discovery of an appropriately worded version of category 23 would be disproportionate or oppressive. The liquidator is therefore entitled to discovery of documents evidencing all oral variation requests by Cairn in respect of the Donnybrook Greenfield contracts. There should be a temporal limitation to this category. As this is a different formulation to the category as debated between the parties, I will hear them on the appropriate scope and wording. To avoid, in as far as possible, the same documents being discovered twice the parties should also consider how to deal with the limited overlap with category 25.

E. Category 26

31. This category reads:-

"All documents evidencing the internal planning process by the respondent for oral variations and acceleration to the Mariavilla contract both to the written contract between the Respondent and the Company and any oral contracts relating to works on or about the Mariavilla site prior to or post the Respondent and the Company entering into the written contract."

32. The liquidator did not ground the need for this category in any specific pleading, until his counsel's replying submission which referred to paragraph 14 of the Points of Claim. This pleading reads:-

"In order to complete the Maynooth contract variations as per the Respondent's request the Company accelerated the said contract. The acceleration led to difficulties for the Company including additional costs, crowding of labour, other site difficulties including stacking of trades, delays caused by the weather and the alteration of works sequencing and placed additional financial pressure on the Company which resulted in a loss of productivity and additional costs. A term and condition of the written contract between the parties was that Phase III annual turnover would be circa €5 million but the Respondent's compressed schedule forced the Company to overtrade raising its annual turnover to approx.. €15

million. Following completion of Phase I and Phase III the Respondent completed the sale of the 150 units to Urbeo in December 2019. The Company performed the said contract.”

33. Counsel accepted that this plea ultimately relates or leads to the variations which the liquidator claims were directed by Cairn, but not fully paid for by that company. Like the Irish Water issue, any problems caused by planning complications are at the very best the background to the variations. The relevant dispute is whether variations were requested by Cairn, and whether payments were due on foot of such requests. Even if the pleadings had contained a more direct reference to the internal planning process I would have needed to be convinced that discovery of this category was truly relevant, necessary and proportionate. However, the plea relied upon by the liquidator is one which, quite correctly, focuses on the effect of the alleged variations. The documents sought are not relevant, on the submissions made to me on behalf of the liquidator, and I will refuse this category.
34. I will list this matter for 10am on the 20th of July to deal with the few outstanding matters relating to discovery, including the costs of this motion.