THE HIGH COURT

[2023] IEHC 61

[Record No. 2011/5069 P]

BETWEEN

PAUL BARRY, JP BYRNE & COMPANY (ELECTRICAL) LTD, BRID DONOHOE, VALENTINE DONOHOE, ROSE FINLAY, MARY INGLIS, EITHNE LALOR, FINTAN LALOR, MICHAEL KEARNEY, RONAN MCMAHON, BILL SLEATER, THE MATTHEW TYNAN PENSION FUND, MICHAEL WALSH, NUALA WALSH, ANNA WILKINSON, GERARD WILKINSON

APPLICANTS

AND

BDO [A FIRM PRACTICING UNDER THE STYLE AND TITLE OF BDO]

RESPONDENT

JUDGMENT of Ms. Justice Bolger delivered on the 8th day of February 2023

1. The plaintiffs in these proceedings seek an order giving them liberty to use discovery made by the defendant in separate proceedings and an order releasing them from their implied undertaking not to use that discovery. For the reasons set out below, I am refusing this application.

Background

2. In 2004, the defendant put together a consortium of 65 investors to purchase a shopping centre in the UK, called the Parish Consortium. It decided to sell ten units of the shopping centre and the defendant put together a separate consortium of investors to purchase those ten units comprising of 39 investors, called the Jubilee Consortium. There were a small number of investors who were members of both, including some of the plaintiffs in these proceedings. The investors in both consortia sustained losses of their investments.

3. In 2010 some of the investors in the Parish Consortium instituted proceedings against the same defendant as is defendant in these proceedings. In 2011, these proceedings were instituted in which the plaintiffs sought compensation in respect of the losses they sustained from their investment in the Jubilee Consortium. Seven of the plaintiffs in these proceedings were also plaintiffs in the Jubilee Consortium proceedings and the remaining plaintiffs were only involved in the Parish Consortium.

4. The plaintiffs in the Parish proceedings had sought discovery from the defendant by letter dated 16 June 2014. The defendant agreed to make voluntary discovery by letter dated 3 July 2014 and furnished around 5,000 documents in an affidavit of discovery. These proceedings were compromised in 2017. Some of the plaintiffs in these proceedings now seek to be released from their implied undertaking not to use the Parish discovery for any purpose other than that litigation and seek liberty to use the Parish discovery in these proceedings.

Submissions

5. Both parties acknowledge the existence of a rationale for the implied undertaking as recognised by the Supreme Court in *Ambiorix Ltd v Minister for the Environment (No. 1)* [1992] 1 IR 277 and acknowledge that a breach of the implied undertaking is a contempt of court. The plaintiffs and defendant differ in the test for securing a release from the undertaking.

6. The plaintiffs contend that the principal test is the interests of justice although they concede that establishing relevance of the documentation to the litigation can assist in demonstrating that the interests of justice lies in favour of allowing disclosure of the discovery documentation. They contend that the two consortia were intertwined in that they both involve the defendant using a similar trust structure, the defendant was involved in advising both vendor and purchaser of the ten units, the defendant was a trustee to the plaintiffs who were beneficiaries, and the defendant used the same lending bank and had the same amount of borrowings. They claim that securing the documentation will assist them in dealing firstly with a motion the defendant has brought to dismiss the proceedings for delay and secondly with a motion they intend to bring to have an issue pertaining to the independence of a valuation report dealt with as a preliminary issue, which they say will resolve the entire proceedings. They claim that there are special circumstances as identified in the authorities. They say it is relevant that much of the documentation is now admissible evidence pursuant to the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 and, in particular, s. 13 thereof.

7. The defendant disputes special circumstances or the relevance of the documentation to the pleaded case as the documentation relates to a different investment for which there was a different investment memorandum in respect of different investors. They say that the case the plaintiffs have made in this application, in particular around the alleged lack of independence of a valuation report, has not been pleaded in the Plenary Summons and Statement of Claim. They also say that they will suffer injustice if disclosure is allowed as a lot of confidential information pertaining to the Jubilee plaintiffs is included, that the volume of documentation comprising some 5,000 documents renders disclosure inappropriate and that, because the documentation is not relevant and is their documentation, that it should not be disclosed. They also seek to rely on a claim made by the plaintiffs at an earlier stage in the proceedings in their Replies to Particulars to the effect that they would require additional discovery in any event, but the plaintiff then maintained at the hearing of this application that, if they secured disclosure of this documentation, it was unlikely they would require further discovery. The defendant argued that the plaintiffs should simply seek the documentation relevant to their pleaded case in the usual way and that that will serve the interests of justice. The plaintiffs say they are concerned that this will cause delay.

8. Insofar as there has been considerable delay already in this case, I did not understand the plaintiffs to suggest that any of this rested particularly with the defendant other than insofar as the defendant did delay in furnishing some of their pleadings which necessitated motions. Some delay was caused by the death of the plaintiffs' solicitor in

2017 and some by the pandemic. The plaintiffs referred in the course of the hearing of this application to their concern that the defendant would drag their heels on making discovery, even though discovery was made expeditiously in the Parish proceedings where the defendant had indicated their intention to provide the discovery sought on a voluntary basis by the plaintiffs within a very short time after the initial letter seeking voluntary discovery had been sent. The plaintiffs' counsel referred to the "burden" of discovery by which he seemed to mean the risk of costs. He also referred to the discretion the court has in directing discovery or not and to what he called the "battles on relevance and necessity" by which I understood him to mean there was concern that they might not succeed in securing all of the documentation that had been provided in the Parish proceedings by way of a usual discovery request or application in these proceedings.

9. The plaintiffs' counsel suggested that the court could have sight of the affidavit of discovery made in the Parish proceedings and that their legal team would go through the documentation in order to confirm what documentation was confidential, and any dispute about the confidentiality of the documentation could be determined by the court. Those suggestions seem to the court to involve a process that could become as, if not more, complex than the usual discovery process the plaintiffs wish to avoid.

The law

10. An application to allow a party to proceedings to use discovery made in other proceedings is not commonly made but the courts have set down the test for when it might be appropriate, most notably by Kelly J. (as he then was) in Roussel v. Farchepro Ltd & ors [1999] 3 IR 567. The plaintiff claimed that the defendant had infringed its patent right without their permission and had similar litigation against the same defendants in Spain and Switzerland. They sought to use discovery made in the Irish proceedings in their foreign litigation. Kelly J. set out the following test:

> "So it seems to me that in the exercise of this discretion, first there has to be a demonstration of special circumstances and secondly, it has to be shown that the making of an order of this type will not occasion injustice to the person giving discovery. But as the matter is one of discretion, it doesn't appear to me that the exercise of discretion simply stops there.
>
> I am of the view that in deciding whether or not to grant leave, the appropriate approach for the court is to look at all of the circumstances, including, if necessary, the circumstances of the original disclosure, the nature and the strength of the evidence, the type of wrongdoing which is alleged to be involved and the interests of both the applicant and the party providing discovery as well as any public interest which may be involved".

11. Kelly J. considered the following to be special circumstances:-

> "I do not propose to list them in an exhaustive fashion, but amongst the matters that appear to me to be germane as demonstrative of special circumstances are the fact that we are here dealing with an alleged infringement of either the same or

> similar patents. The product which is the subject matter of the litigation is the same. We are dealing with both transnational and indeed international alleged infringements and the products appears to emanate from the same source."

He concluded that there was a risk of injustice to the party disclosing the information because the confidentiality the defendants wanted to afford to the documents might be lost by the documents being placed into the domain of the Swiss court which Kelly J. viewed as a risk he ought not to take. He found no such risk in the Spanish proceedings and, therefore, permitted the documents to be used in the Spanish proceedings.

12. The decision in *Roussel* has been followed consistently, for example, in *Smyth v. Tunney & ors* [2004] 1 ILRM 464 , *O'Connor v. Commissioner of An Garda Síochána* [2018] IEHC 223, *Point Village Development Ltd v. Dunnes Stores* [2017] IECA 159, *Director of Corporate Enforcement v. Independent News and Media* [2019] IEHC 467 and *Independent News and Media Plc v. The Companies Act 2014* [2020] IEHC 384.

13. The decision of Hogan J. in the Court of Appeal in *Point Village Developments* merits particular consideration as he found it to have been

> "implicit in *Roussel* that the court would only direct the release of the parties from the implied undertaking where the documentation covered by that undertaking was of obvious relevance to the later proceedings, so that such release was genuinely necessary in the interests of justice.

14. The relevance of documentation was explored by Clarke C.J. in his decision in Waterford *Credit Union v. J & E Davy* [2020] IESC 9, [2020] 2 ILRM 344 which concerned an application for discovery but also touched on the lifting of the implied undertaking because the plaintiff's solicitor had been aware of the documentation being sought by way of discovery as a result of their involvement in other proceedings against the same defendant while acting for a different client. The Court of Appeal held that the plaintiff should be deprived of discovery of those documents because of their solicitor's breach of an undertaking given in the other proceedings. The Supreme Court found this to have been incorrect because:-

> "by considering the question of relevance and necessity without reference to any of the information wrongfully deployed, a court would deprive Waterford of any litigious benefit which it might otherwise wrongfully obtain. To go further would be to impose a sanction on Waterford in circumstances where, at a minimum, the person primarily responsible for the breach of undertaking was its solicitor".

15. There is a separate requirement of relevance to the case pleaded for any discovery application, as that is central to the purpose of discovery i.e. to enable a person to advance their case or damage their opponent. In *Smyth*, O'Sullivan J. rejected the defendant's claim that the plaintiff's allegations lacked specificity and described them as giving "a clear indication of the nature and gravamen of the alleged telephone calls, albeit

not with the greatest degree of particularity. This arises to a determinative extent, in my view, in the present case because of the hidden nature of the alleged defamation".

16. The type of documentation sought has influenced the court in reaching decisions in these applications. Discovery was refused in *Point Village* where Hogan J. found it:-

> "difficult to discern how documentation generated in relation to the 2008 agreement could have a direct relevance to the construction of the subsequent 2010 agreement. Besides, the conduct of the parties between 2008 and 2010 in relation to securing tenants at Point Village would not, generally speaking at least, be relevant to interpreting the 2008 agreement. It would have even less immediate relevance to the construction of the later 2010 agreement. In other words, the obvious lack of immediate relevancy of these documents to the issues now arising in these proceedings is in itself a ground for refusing to grant an order releasing Dunnes Stores from the implied undertakings in relation to the category 13 documents".

In my view the court can also be influenced by the volume of documentation sought. It does not seem to me that any of the authorities cited to me involve the amount of documentation at issue here of approximately 5,000 documents. *Roussel* involved a small amount of documentation in a case where Kelly J. found the causes of action in all proceedings to have been the same. Both *Independent Newspaper* cases involved affidavits that had been opened in court previously where neither the Director of Corporate Enforcement nor the deponents who swore the affidavits objected to their disclosure. *Smyth* concerned a single schedule of phone calls made. All of those cases allowed the implied undertaking to be lifted.

17. Some of the authorities have also had regard to the availability of discovery as an alternative method of securing the documentation sought. In *Point Village*, Hogan J. was critical of the plaintiff's application which he considered was an attempt to circumvent a previous decision of the High Court to refuse discovery of the documentation sought. Other authorities have found it would be an injustice on the party seeking the documentation to require them to go through the time and expense of seeking discovery. In *O'Connor v. Commissioner of An Garda Síochána* [2018] IEHC 223, Baker J. found she could not assume that the documentation would be made available to the other court through the European Arrest Warrant system that was available and because matters of liberty were at issue, she found she should take a "cautious approach" to determining the jurisdiction. In *Smyth*, in considering whether any injustice would be caused, Hogan J. had regard to the cost and inconvenience of a discovery application. In *Independent News and Media Plc v. The Companies Act 2014* [2020] IEHC 384, Simons J. found that allowing the plaintiffs access to the documentation did not confer a litigious advantage and that they would be "relieved of the paradoxical exercise of having to seek an order for discovery in respect of documents which they already have". (at para. 78). Kelly J. in the earlier *Independent Newspapers* case had found there would be an injustice in refusing to permit the applicants to use documentation obtained in separate discovery "since they

would then be obliged to seek the material on discovery, thus facing increased costs and delay" (at para. 57).

18. I conclude the following to be required before a court can exercise its discretion to release the plaintiff from their implied undertaking not to use discovery secured in other proceedings:-

    (1) Special circumstances;

    (2) The order will not cause an injustice to the party who made the discovery;

    (3) The documentation covered by the undertaking is of obvious relevance to the proceedings such that its release is generally necessary in the interests of justice;

    (4) The nature and extent of the discovery that was made and the circumstances in which it was originally furnished;

    (5) Whether the documentation could be sought by way of a separate discovery application and whether allowing or avoiding that would represent an injustice to either party;

    (6) Whether the allegations for which the moving party seeks the documentation has been pleaded.

The affidavits

19. The plaintiffs claim that special circumstances are outlined on affidavit in their very detailed analysis of the connections and commonality between the Parish and Jubilee Consortium, including that they were both managed by the defendant involving the same lender, the same minimum investment amount and both had investment memorandum, albeit that both memoranda were different. In his grounding affidavit, the plaintiffs' deponent emphasises the relevance of the valuation report obtained by the defendant's lender even though it was described to the plaintiffs as an independent valuation report. There are several more affidavits sworn by the plaintiffs' deponent which goes into more detail about the defendant's involvement in the Parish Consortium which he says is critical to understanding the defendant's behaviour in relation to the Jubilee Consortium. At para. 38 and 44 of his second affidavit, he refers to he and his legal advisors having been in possession of certain information and documentation as far back as 2007 before any discovery was made. He focuses heavily on the valuation report which he says was misrepresented by the defendant to the plaintiffs. In his third affidavit, he says that the Parish discovery documentation "lend themselves to immediate trial of a preliminary issue as to whether there was an independent valuation as represented by BDO before it acted as trustee in effecting a purchase on the plaintiffs' behalf".

20. The defendant's affidavits respond to the factual issues raised by the plaintiffs' deponent, but their primary contention is that the Parish discovery is irrelevant to the Jubilee investment as the two investments were entirely separate involving different investors, albeit from investors common to both, with different investment memoranda, funded by

way of different borrowings with distinct obligations imposed on each set of investors. The defendant's deponent says that the sixteen categories of documents disclosed in the Parish proceedings were specific to the particular issues that arose in that case and criticise the plaintiffs for having failed to explain why any one of the sixteen categories of documents is relevant to the issues in dispute in these proceedings or why discovery of that material is necessary. The plaintiffs' deponent's response to that in his third affidavit is, at para. 25, to say:-

> "It is not the categories of documents which are important but the material disclosed by way of discovery."

Discussion

21. Much of the plaintiffs' belief about the defendant's motivation for establishing the Jubilee Consortium in order to purchase the ten units that the Parish Consortium needed to sell, including their belief that a price had been agreed without their input, could form the basis for an application for discovery of what is in the Parish documentation. Such an application would require the plaintiffs to satisfy a court that the documentation in question was both relevant and necessary to the case they have pleaded in these proceedings. The plaintiffs asserted that they do not have to satisfy the requirements of ordinary discovery where they are seeking to be excused from the undertaking in relation to the Parish documentation.

22. At the same time the plaintiffs sought to impose on the defendant the professional obligation that a solicitor owes when advising a client whether a document that they have been directed to furnish by way of discovery is relevant or not. I do not agree. The defendant's denial of relevance is part of its case that the burden of proof in seeking disclosure of the documents rests on the plaintiffs to establish both special circumstances and relevance, which the defendant claims the plaintiffs have failed to do.

23. The plaintiffs dispute relevance. In line with that position their counsel made no attempt to rely on the categories of discovery set out in the Parish plaintiffs' letter seeking voluntary discovery, which was exhibited in this application. The plaintiffs' counsel instead suggested that the court could examine the categories of documentation in the affidavit of discovery. That would involve the court in a very detailed exercise and before that could ever be embarked upon, the court would have to be satisfied that there was a basis for doing so.

24. Whilst the plaintiff contended that relevance of the documentation was not required, the plaintiffs' counsel did concede that relevance would help. Even on that lesser requirement of relevance helping to establish the interests of justice that the plaintiffs' counsel contended was the test he would have to satisfy in order to secure disclosure of the documentation, no attempt was made to engage in any exploration at all of the detail one normally encounters when assessing the relevance of documentation in a discovery application.

25. The plaintiffs say that this is not discovery and that it is, in effect, all about the interests of justice. Whether that is correct or not, the relevance of the documentation must be part of the equation, whether as an element of the interest of justice (if the plaintiffs are correct in their analysis of the test) or a standalone essential proof (as is contended by the defendant). In my view, relevance can only be established by examining the categories of discovery. I reject the plaintiffs' contention that the categories of documents are not important but that the material disclosed by way of discovery is. The plaintiffs' approach would have to involve the court in examining some, if not all, of the Parish discovery documentation. That is an entirely impractical suggestion, particularly given the quantity of documentation involved.

26. I am satisfied that I must have regard to the categories of documentation sought in the letter seeking voluntary discovery in determining this application. The categories all focus on the Parish investment memo and the various arrangements specific to that investment, exactly as one would expect in a request for voluntary discovery in a case claiming legal wrongs in how the investors in that specific investment consortium were treated. Only eight of the Parish investors were also Jubilee investors. Category 4 of the Parish discovery is documentation relating to the payments of fees to the defendant arising from the Parish investment. It is difficult to see how the fees paid to the defendant in relation to the Parish investments, could be relevant to the claims made by the plaintiffs in these proceedings relating to the losses they sustained when the Jubilee investment failed. Category 5 is a particularly stark example of the questionable relevance of the Parish discovery to these proceedings as it seeks documentation relating to the selection and engagement of Transllloyd Group, which was appointed as property manager over the shopping centre. It is not at all clear how the property manager's appointment is relevant to the sale of ten units of the shopping centre. Category 6 goes on to seek documentation relating to the management of the centre by the defendant and/or Transllloyd Group. The defendants say that that has nothing to do with these proceedings and it does not seem to me that that assertion has been disputed by the plaintiffs. Category 8 seeks discovery of documentation relating to the refinancing of the lender's facility. That could only be the lender's facility in relation to the Parish investment and, again, it is difficult to see how that could be relevant to the Jubilee investments. Category 9 relates to documentation about the plaintiffs' prepayment penalty liability to the lender but the defendant says no such penalty is asserted in these proceedings and that has not been disputed by the plaintiffs. Category 10 seeks documentation relating to insolvency of Woolworths and the inability to rent vacant units in the centre and the inability of tenants to service their rent. Again, it is very difficult to see how that is relevant to these proceedings. Category 13 relates to documentation in the Parish proceedings about the repayment of tranche B of the lenders facility, but no similar plea is made in these proceedings.

27. I do not suggest those documents are not relevant such as would definitely preclude an ordinary application for discovery by the plaintiffs in the appropriate manner, but any such application would require the plaintiffs to identify why they say the documentation is relevant and necessary. In this application the plaintiffs have chosen not to explain to the

court why that documentation is relevant or necessary, but simply claim that the overlap between the Parish and Jubilee investments means that it is fair and appropriate for them to have disclosure of all of the large volume of documentation provided by the defendant by way of voluntary discovery in the Parish proceeding and that the interest of justice lie in favour of allowing that disclosure.

28. There are some categories of the Parish discovery that the plaintiffs confirmed in the course of this application that they were not seeking, but it seems to me that that concession was made at a very late stage and, up to that, the plaintiffs had asserted in a generalised way that they were entitled to the entirety of the Parish discovery on the basis that there was a marked similarity between the structures put in place by the defendant, viz-a-viz the Parish Consortium and the Jubilee Consortium.

29. I do not accept that the plaintiff is entitled to disclosure of this documentation on the grounds they will be able to use it in the defendant's application to dismiss the proceedings for delay. The plaintiffs waited some considerable time before bringing this application and, had they done so earlier, they may very well have had the opportunity to seek the same documentation by way of discovery. It still open to them to seek the documentation by way of discovery and it will be a matter for the parties as to how they deal with the delay application in the light of an outstanding application for discovery.

30. Neither am I convinced by the plaintiffs' arguments that they are entitled to it because the documentation would enable them to deal with the issue of the valuation report as a preliminary issue. There is no trial of a preliminary issue currently before the court and I have not been advised of any steps taken to seek a trial of a preliminary issue. The plaintiffs may or may not be successful in persuading the court to determine the valuation report issue as a preliminary issue, but given that it is a little more at this stage than what appears to be part of the plaintiffs' intended strategy and could be subject to all sorts of other matters, such as the defendant's attitude to it and ultimately whether or not the court permit the issue to be tried as a preliminary issue, I do not consider that there is sufficient merit to the plaintiffs' argument that their ability to deal with such a trial of a preliminary issue is a basis for strengthening their entitlements to disclosure of this documentation.

31. For completeness, I should also comment on the defendant's argument firstly that the plaintiff has failed to provide an explanation as to what, if anything, the plaintiffs have done in relation to their implied undertaking, i.e. whether they have complied with their implied undertaking. The plaintiffs have declined to furnish that information and argue that they are not obliged to do so. Had the court been satisfied that special circumstances and relevance had been established, etc., this is a point that the court may have had to consider in the exercise of its discretion in whether or not to grant the relief sought. Secondly in relation to the plaintiff's suggestion that s.13 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 is relevant as it renders much of the documentation admissible, I do not agree that s.13 assists the plaintiffs' case or gives rise to any sort of entitlement to disclosure of the Parish discovery. Section 13 creates an

exception to the rule against hearsay in providing for a presumption (that can be rebutted) that a document compiled in the ordinary course of business is presumed to be admissible as evidence of the truth of the facts asserted therein. If that presumption is accepted, it will not be necessary for a person to give evidence of the provenance of the document, as it was prior to the inception of s.13. The section does not permit the plaintiffs to acquire or use documentation that is subject to their undertaking not to use it for anything other than the litigation within which it was furnished to them. I do not consider s.13 assists the plaintiffs in this application.

Conclusions

32. The law requires the plaintiffs in this application to establish the existence of special circumstances and to satisfy the court that the documentation in question is of obvious relevance to these proceedings, such that the relief they seek is necessary in the interests of justice. The plaintiffs have not established the existence of special circumstances or the relevance of the documentation such as would render it appropriate for the court to even consider allowing disclosure of the extensive amount of documentation in the Parish discovery or to release the plaintiffs from their undertakings. There are other matters which the authorities confirm the court would have to have regard to, as I have set out above, including any injustice that would be caused to the person who made discovery, the nature and extent of the discovery in circumstances in which it was made and whether the documentation could be sought by way of a discovery application in the usual way. I am of the view, in relation to all of those matters, that it is inappropriate that disclosure of this documentation would be allowed.

Costs and final orders

33. I will list the matter for mention before me on 21 February at 10:30 to allow the parties to make such further submissions as they may wish to make in relation to costs and any final orders to be made. If either party wishes to lodge written submissions they should be furnished at least two days before the matter is back before me.

Counsel for the plaintiffs: Alan Doherty SC, Ross Gorman BL

Counsel for the defendant: Peggy O'Rourke SC, Eoghan O'Sullivan BL