



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 355

Record Number: 2018/108

Peart J.
Whelan J.
Baker J.

BETWEEN:

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINTIFF/RESPONDENT

- AND -

GARRETT KELLEHER

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 15TH DAY OF NOVEMBER 2018

1. By order of the High Court (Twomey J.) dated the 9th March 2018 the sole relief which the defendant had sought in its notice of motion dated the 29th January 2018 was refused, and he now appeals to this Court against that refusal.

2. The relief so sought was unusual, and not one provided for by the Rules of the Superior Courts. It was in the following terms:

"1. An Order requiring the plaintiff to make discovery in accordance with the Order of this Honourable Court dated 13th October 2016, and Order of the Court of Appeal dated 3rd March 2017 and as agreed between the parties or in the alternative an order staying the plaintiff's claim until it does so."

3. As appears, the High Court had ordered that the plaintiff make certain discovery, and on appeal to this Court that order had been varied so as to include a further category of discovery. In addition, the plaintiff had subsequently by letter dated the 28th March 2017 agreed to make discovery of two further categories of documents. The present controversy relates to (i) whether or not the plaintiff has properly complied with its discovery obligation in respect of what is referred to as Category A (iii), and (ii) whether they have failed to make discovery of certain documents particularly minutes of meetings which the defendant says occurred with the plaintiff, and which he maintains must exist within NALM.

4. In relation to (i) the order of this Court dated the 3rd March 2017 ordered that discovery be made of the following:

"all documentation in the power, possession or procurement of the plaintiff which evidences *any consideration* by NALM of the adequacy of the cooperation provided from the 1st day of November 2010 to the 28th day of March 2014". [Emphasis provided]

5. The plaintiff maintains that it has fully complied with the terms of this order, and in so far as the defendant is maintaining that any actual investigation reports obtained by NALM are included in this order, as opposed to "any consideration ... of the adequacy of [the plaintiff's] consideration of the [defendant's] cooperation", NALM submits that the wording of the order is clear in its terms and that any investigations themselves that may have been carried out by or on its behalf are not documents related to any consideration of such investigations. NALM also refers to their letter dated the 28th March 2017 which clarified to the defendant's solicitor what it believed was covered by the said order, and specifically that documents sought by the defendant at (8) in his solicitor's letter dated the 20th March 2017 were not included. Indeed, NALM's position was reiterated in a letter dated the 19th January 2018 from NALM's solicitors to the defendant's solicitors. Paragraph (8) of that letter dated the 20th March 2017 stated:

"No documentation has been received in relation to any investigations the plaintiff or its agents made in relation to the assets of the defendant for the purpose of assessing whether he had hidden or transferred assets. Clearly if the defendant had hidden assets he was being uncooperative and this category will fall under Category 1 (iii). We require confirmation that you accept that this is the position."

6. The plaintiff's reply dated the 28th March 2017 stated that documents that the defendant's solicitor had referred to at paras. 1,7,9 and 10 of that letter dated the 20th March 2017 reasonably fell to be discovered but in relation to (8) stated:

"Our client also accepts that to the extent that it considered that investigations were necessary or considered your client's cooperation in light of the results of those investigations, documents evidencing same would fall under Category 1(iii)."

7. As to the defendant's second complaint in relation to the failure of NALM to make discovery in relation to internal memoranda or minutes of meetings which he says were held, and which must reasonably be considered to exist, NALM has filed affidavits from relevant personnel which categorically state that comprehensive searches have been carried out, and no further documents exist, and therefore that no further discovery is to be made.

The trial judge's ex tempore judgment

8. Having given a brief background to the application before him (which he described as "curious" since it sought an order to compel the plaintiff to comply with orders of the High Court and this Court), the trial judge referred to sworn affidavits by employees of NAMA which stated that all documents had been discovered. He then referred to the judgment of Kenny J. in *Sterling-Winthrop Group v.*

Farbenfabriken Bayer A.G. [1967] I.R. 100 to the effect that further and better discovery "will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit". He referred also to the judgment of Murphy J. in *Phelan v. Goodman* [2000] 2 I.R. 577 at 583 where it was stated:

"The authorities which I have mentioned established that the Court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong. None of these matters has been established and I must therefore, refused to make order sought."

9. The trial Judge then went on to state at para 12 of his *ex tempore* judgment:

"In this case, this Court has not been provided with any documents which Mr Kelleher can show were not discovered by NAMA in breach of the discovery orders. For this Court to take the very significant step of concluding that a party has given false sworn evidence, this Court needs more compelling evidence than that which has been provided by Mr Kelleher, which amounts essentially to his belief that NAMA has misunderstood the issues in the action or that NAMA may not have used correct search terms for their electronic discovery."

10. The trial judge went on at para. 15 to state that on the evidence before him "if this Court was to make the order sought by Mr Kelleher ... all that would result is that there would be another affidavit from the relevant employees of NAMA confirming that it had discovered all relevant documents", and that in those circumstances the Court would not be making a meaningful order.

11. As to the merits of the defendant's application, and on the basis that the trial judge treated it as being an application for further and better discovery, I find no error in the approach taken by the trial judge and in relation to his overall conclusion that no further order should be made. In the light of the submissions made by the parties on the merits, I would dismiss the appeal for the same reasons as articulated by the trial judge. The affidavit evidence makes clear the position of NALM in relation to any documents minuting or otherwise detailing any alleged meetings as alleged by the defendant. As to the possible misinterpretation of the discovery order in relation to category A (iii) as regards the investigation reports themselves, the order on its face is clear. The obligation related to documents "evidencing ... (iii) any consideration by NAMA of the adequacy of cooperation provided ...".

12. I would however go on to state that on the appeal before this Court counsel for the defendant stated explicitly that he was not in fact seeking "further and better discovery". He eschewed the notion that he was seeking what is referred to as "further and better discovery" in the traditional sense. When pressed by this Court as to what rule he was moving under, he confirmed that there was no particular rule under which the present application has been brought, and that in reality what was sought in the application to the High Court was clarification as to whether what was required of NALM included discovery of the actual investigation reports carried out in relation to the cooperation by the defendant, and not simply any consideration of such reports.

13. I have referred to the fact that the trial judge considered the defendant's application to be "curious". I would go further and say that there was no proper basis for bringing the application in the terms in which it was brought. It seems to me that under the Rules of the Superior Courts there were three possible applications that the defendant might have brought: (i) to seek further and better discovery; (ii) to strike out the plaintiff's claim for failure to make proper discovery, or (iii) an application to the Court to speak to its order for the purpose of providing any clarification that the defendant considered might be lacking in the range of discovery intended. But to seek an order directing NALM to comply with an order already made seems meaningless, and is not envisaged by the Rules of the Superior Courts, and in my view the application ought not to have been brought in that form. The hearing of that motion and an appeal from the order refusing the application has wasted court time, and has added to the cost of the proceedings in respect of which a trial date for the commencement of this trial has been fixed for the 4th December 2018, and which is estimated by the defendant to last some four weeks.

14. For the above reasons, I would dismiss this appeal.