

BETWEEN

HIRE SERVICES LIMITED (E) AND HIRESERVICES (I)

PLAINTIFF/RESPONDENT

V.
AN POST

DEFENDANT/APPLICANT

JUDGMENT of Ms. Justice Creedon delivered on the 29th day of June, 2018.

RELIEFS SOUGHT

1. The case concerns a motion by the above named defendant against the plaintiff seeking the following reliefs:

- (a) an order striking out the plaintiff's claim for failure to comply with their agreement with the defendant with regard to discovery;
- (b) further, or in the alternative, an order directing the plaintiff to make further and better discovery;
- (c) further, or in the alternative, an order for the following three further categories of discovery:
 - (i) all documentation evidencing correspondence, communication and/or discussion between its servants or agents of the plaintiff (including but not limited to Richard Pender) in respect of the hiring of vehicles by the plaintiff to the defendant;
 - (ii) all documentation evidencing correspondence, communication and/or between the plaintiff its servants or agents (including but not limited to Richard Pender) and the defendant its servants or agents (including but not limited to its servant or agent Gerry Cunningham) in respect of the hiring of vehicles by the plaintiff to the defendant;
 - (iii) the plaintiff's template contracts for longer term leases of motor vehicles (i.e. leases in the region of five years duration) and samples of such contracts as concluded with customers (redacted if necessary to protect to protect commercial confidentiality).

BACKGROUND

2. The motion arises from High Court plenary pleadings seeking specific performance of the contract between the plaintiff and the defendant, or in the alternative: damages for breach of contract and ancillary relief arising from the plaintiff's claim that vans, which they supplied to the defendant, were supplied on the basis of a five year lease. The defendant's position is that the vans were supplied to it by the plaintiff on an "as needed basis", whereby the defendant would lease the vans on a week by week basis and could return the vans to the plaintiff at any stage once they were no longer required.
3. Plenary proceedings were originally issued on the 21st January, 2009. An amended plenary summons issued on the 28th March, 2011 and an amended statement of claim was delivered on the 28th day March, 2011. A defence and counterclaim was delivered on the 24th October, 2011 and a reply and defence to counterclaim was delivered on the 27th November, 2012.
4. The defendant wrote to the plaintiff by letter dated 28th November, 2012, seeking voluntary discovery under eleven separate categories. There followed an exchange of correspondence between the parties in respect of the various categories of discovery sought, and it was ultimately agreed that the plaintiff would provide discovery in respect of all eleven categories sought and that category 2 was to be understood in light of the defendant's letter of 12th February, 2013.
5. An affidavit of discovery in purported compliance with that agreement was sworn on behalf of the plaintiff by Mr. Joe Jackson on 29th June, 2013.
6. In that affidavit, the deponent agreed on behalf of the plaintiff to make discovery in respect of 11 categories of documents, by reference to the letter of request of the defendant dated the 28th November, 2012. The deponent set out the 11 categories of documents in the body of the affidavit. The court assumes that the 11 categories tendered are the same as those set out in paragraph 4, above. What was set out in that affidavit were categories 1, 2, 3, 4, 5, 6, 7, 8 (twice) 10 and 11. Category 9 was not specifically set out in the affidavit. In paragraph 6 of that affidavit, reference is made by the deponent to 9 categories of documentation.
7. It is asserted by the defendant that between 29th January, 2014 and 25th January, 2017, the plaintiff took no subsequent steps in furtherance of the proceedings.
8. On 25th January, 2017, the defendant wrote to the plaintiff, taking issue with the discovery already made by the plaintiff and seeking further and better discovery in respect of category 1, 2, 4, 7, 8, 10 and 11. No issue was taken with the omission of category 9 in the text of the affidavit and the court assumes that it was contended by all sides that category 9 was being included as agreed.
9. In that letter, the defendant also goes on to seek discovery of three further categories, which it names A1, A2 and A3. In its correspondence, in respect of those categories, the defendant states as follows:

"Arising from this concern and in ease of all parties, we set out below a number of further categories of discovery which are intended to provide a clear breakdown of the various categories of correspondence, which our client had expected to receive by way of discovery from your clients."

They go on to say in that letter:

"The above is no more than an example of the manner in which the defendant says that the discovery made is incomplete."

10. The issues raised in that correspondence and the further three categories of discovery requested are set out in the affidavit of Freda Mahon, on behalf of the defendant, which she swore on 19th August, 2017.

11. The court understands from the correspondence, the contents of the defendant's affidavit, and what was stated orally in the course of the hearing of this motion, that the three categories, A1, A2 and A3, were not additional categories in the sense of seeking new material, but were rather a further setting out of material which the defendants says it "expected" to receive on foot of their original request, but did not receive.

12. In response to that affidavit, a supplemental affidavit of discovery was furnished by the plaintiff on 28th November, 2017.

13. In that supplemental affidavit, the plaintiffs aver to the fact that further documentation has come to light since the 29th of June, 2013, which falls within the agreed categories of discovery. Further, in respect of the defendant's request for further and better discovery in their affidavit of the 17th of August, 2017, in respect of categories 1, 2, 4, 7, 8, 10 and 11, it was alleged that the plaintiff have in its power, possession or procurement of those documents in respect of categories 10 and 11 only and it claims privilege in respect of documentation in the first schedule, part 2, which it says was generated in contemplation of these proceedings. The plaintiff further says that the three new categories are not relevant or necessary and are declined.

LEGAL CONTEXT

14. The court proposes at this stage, merely to summarise the relevant legal principles on discovery. They are well known and well established. It is unnecessary to outline and discuss those principles in any detail in this judgment.

15. The law of discovery is codified to some degree in the Rules of the Superior Courts, Order 31, Rule 12, which dictates that the court must be satisfied that the documents sought are *relevant* to the issues in the proceedings and that discovery is *necessary* for disposing fairly of the matter or for saving costs.

16. The Court of Appeal recently summarised the relevant principles on discovery by reference to a significant body of case law in the area, in *O'Brien v. Red Flag Consulting Ltd & Ors* [2017] IECA 258 ("*Red Flag*"). In that case, having referred to a number of the leading cases on discovery in Ireland, including *Hannon v. Commissioners of Public Works* [2001] IEHC 59, *Framus Ltd v. CRH Plc* [2004] 2 IR 20, *Ryanair Plc v. Aer Rianta CPT* [2003] 4 IR 264 and *Hartside Ltd v. Heineken Ireland Ltd* [2010] IEHC 3, Ryan P in delivering the judgment of the court, summarised the relevant principles as follows:

"1. The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties. [Stafford v. Revenue Commissioners].

2. Relevance is determined by reference to the pleadings. Order. 31, r. 12 specifies discovery of documents relating to any matter in question in the case. [Hannon, para. 2].

3. There is nothing in the Peruvian Guano test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly to the matter in issue between the parties in the proceedings.

4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information. [Peruvian Guano, p. 65].

5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments. [Framus Ltd v. CRH plc [2004] 2 I.R. 20, pp. 34 – 35].

6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [Hartside Ltd v. Heineken Ireland Ltd, para. 5.9].

7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases that their discovery is necessary for the fair disposal of those issues, the question of whether discovery is necessary for 'disposing fairly of the cause or matter' cannot be ignored. [Cooper Flynn v. Radio Telefís Éireann [2000] 3 IR 344].

8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [Ryanair Plc v. Aer Rianta CPT [2003] 4 IR 264].

9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. [Framus, p. 38].

10. In certain circumstances, a too-wide ranging order for discovery may be an obstacle to the fair disposal of proceedings. [Independent Newspapers (Ireland) Ltd v. Murphy [2006] 3 IR 566, p. 572].

11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties. [Hannon, para. 4].

12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly. [McCabe v. Ireland [1999] 4 IR 151, p. 156]."

17. The Irish law on discovery is based on the twin requirements of relevance and necessity. Relevance is still determined by reference to the principles outlined by Brett LJ of the Court of Appeal of England and Wales, in *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55. The requirement to demonstrate that the documents sought by way of discovery are necessary for disposing fairly of the case or for saving costs is a separate requirement. Relevance must be determined by reference to the pleadings. If relevance is established, the documents are normally regarded as being necessary for disposing fairly of the case or for saving costs. However, that is not always the case. An example of where documents were found to be relevant but not necessary is the decision of the Supreme Court in *PJ Carroll & Company Ltd v. Minister for Health and Children (No.3)* [2006] 3 IR 431.

18. It is also clear from the summary of the principles on discovery, conveniently set out by Ryan P in *Red Flag*, that an excessively broad or “too-wide ranging” order for discovery may amount to an “obstacle to the fair disposal of proceedings”, and that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which they are likely to advance the case of the party seeking discovery or to damage the other side’s case.

19. The burden of satisfying the court with regard to these requirements lies with the applicant.

20. In relation to the law on the making of an order for further and better discovery, the case of *Sterling Winthrop Group Limited v. Farbenfabriken Bayer Aktiengesellschaft* [1967] 1 IR 97 was opened to the court. In this case, Kenny J held *inter alia* that the plaintiff’s application for discovery should be refused because they had failed to show that further documents, relevant to the issues in the action were in the possession of the defendants, or that the person making the affidavits of discovery on behalf of the defendants had misunderstood the said issues, or that such person was in error in holding the view that any further documents were not relevant to said issues.

21. In the body of that judgment, Kenny J stated at p. 100:

“Although the rules of court have never provided for an application by either party for an order that the other party should make a further affidavit of discovery—other than Or. 31, r. 20 (3)—the Courts in Ireland and England have always had power to order that either party should make a further affidavit. Such an order 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. The Court will, however, order a further affidavit of documents when it is satisfied (a) from the pleadings, (b) from the affidavit of discovery already filed, (c) from the documents referred to in the affidavit of discovery, or (d)from an admission by the party who has made the affidavit of discovery that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. The Court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it. The cases reported in Ireland and England during the last eighty years show a progressive extension of the grounds on which the Court will order a further affidavit.”

22. The above judgment and passage was quoted with approval by Laffoy J in the case of *O’Leary v. Volkswagen Group Ireland Limited* [2015] IESC 35, and that judgment was further referred to with approval by Costello J in the case of *James Elliot Construction Limited v. Lagan and others* [2016] IEHC 372, both of which were referred to in this application.

GENERAL ARGUMENT

23. Counsel on behalf of the defendant indicated to the court that while his motion includes an application to strike out proceedings, in reality he is looking for further and better discovery, in particular the three additional categories set out, which the plaintiff says are not relevant. It is stated that the defendant simply does not believe that there is not a further volume of documentation in existence which is relevant.

24. The defendant says it is relying on the proceedings and that there must be other relevant documents. They find it difficult to accept that this is how the plaintiffs normally do business, that there are grounds for suspecting a misunderstanding between the parties as to what is relevant.

25. Counsel referred to the case of *Sterling Winthrop Group Limited*, and to the text of Declan McGrath, *Evidence* (2nd Edn, Round Hall 2014) in respect of further and better discovery. Counsel also opened the Superior Court Rules in this area.

26. Counsel for the defendant further indicated that the plaintiff’s claim of privilege is insufficient for the purposes of the rules. He says that in the first schedule part 2, the documents, over which privilege is being claimed, have to be individually listed. It was alleged that the plaintiff’s way of dealing with said documents in the affidavit is insufficient.

27. Counsel for the plaintiff stated that that there was an agreement to make voluntary discovery and that discovery has been made. With regard to the three new categories, he maintains that two of them have already been covered. The plaintiff contended that the third category is irrelevant as it relates to other types of documents in respect of other transactions not concerned with these pleadings.

28. With regard to the privilege issue and how it is canvassed in the affidavit of discovery, counsel for the plaintiff indicated that the form of affidavit is a typed, customary affidavit. He indicated that there was extensive correspondence between the parties in advance of the issuing of the notice of motion and that issue was never taken with the form of affidavit before the hearing of the motion.

29. Counsel for the defendant stated that the affidavit in question postdates the notice of motion. He contended that the plaintiffs are obliged to list the documents over which they claim privilege and he referred to *Smurfit Paribas Bank Ltd v A.A.B. Export Finance Limited* [1990] 1 IR 469. In this case, Finlay CJ states at 477:

“The existence of a privilege or exemption from disclosure for communications made between a person and his lawyer clearly constitutes a potential restriction and diminution of the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice. Such privilege should, therefore, in my view, only be granted by the courts in instances which have been identified as securing an objective which in the public interest in the proper conduct of the administration of justice can be said to outweigh the disadvantage arising from the restriction of disclosure of all the facts.”

30. Counsel for the defendant referred to the case of *O’Leary* and opined that to say that these categories are irrelevant is wrong; they relate directly to the proceedings or to the additional category, A3. He confirmed that the other contracts will demonstrate to the defence how the plaintiff usually does business, how they did business in this case and that it is a directly relevant category.

31. The defendant stated that if there are particular commercial sensitivities, that these can be redacted.

32. The defendant further stated that the additional three categories, as set out in the notice of motion, are not new but that they are further specifications of existing categories.

SPECIFIC ISSUES AND CATEGORIES

The defendant opened the various categories as previously agreed before the court as follows:

33. Category 1:

In respect of category 1, the defendant asserted that the plaintiff has failed to discover any individual vehicle hire documents, which would have been proffered to servants or agents of the defendant for signing, when each individual vehicle, the subject matter of the within proceedings, was delivered by the plaintiff to the defendant. The defendant indicated that it sought an explanation as to why no such documents had been discovered. It said that these documents would be of potentially great importance to the within proceedings, insofar as they may help to establish on what basis the plaintiff indicated and the defendant's personnel believed that the vans were being supplied. The defendant went on to say that these would have been important documents which they would have expected the plaintiff to retain.

The plaintiff's response to this is that they do not have any such documents. The plaintiff went on to refer to the case of *O'Leary* and contended that it is not sufficient for the defendants to say that there must be further documents and that they are obliged to demonstrate through an existing document a reference to another such document. The defendant stated that it is basing its application on the documents discovered and says there wasn't an individual document for each van.

34. Category 2:

In respect of category 2, the defendants maintain that the plaintiff has failed to discover any pre-contractual documentation (such as notes, memoranda, emails or text messages) relating to ordering and/or purchasing, whether from Lombard Asset Financiers or any other supplier or finance provider of the 44 Citroen Berlingo/Peugeot Partner vans referred to in para 16 of the amended statement of claim. The defendants indicated that they sought an explanation as to why no such documents have been discovered. The defendant says that these documents would be of potentially great importance to the within proceedings insofar as they may help to establish the basis on which it would supply the vans to the defendant. The defendants say that they would have expected a large volume of such documents (such as emails, notes of telephone calls and other correspondence with the plaintiff's asset finance providers) to have existed given the size of the orders in question. The plaintiff's response to this assertion is that they do not have any such documents.

35. Category 4:

With respect to category 4, the defendants indicate that the plaintiff has failed to discover any documentation in respect of same, notwithstanding its allegation that it spent approximately €5,500 on "*additional equipment and supplies*" beyond two invoices from an Aniar Solutions Ltd dated the 31st October, 2006 and 30th October, 2007, apparently in respect of information technology supplies totalling €3,254.90 (including VAT). The defendants indicated that they sought an explanation as to why no such documents have been discovered. The plaintiff asserted that it is not sufficient for the defendants to say that they would have expected such documents and that the plaintiff has sworn an affidavit saying that there are no such further documents. The plaintiff stated that €3,254.90 is the total amount expended and that this has been confirmed in the affidavit of Mr. Joe Jackson. Accordingly, the plaintiff asserted, this is no longer a live issue.

36. Categories 7 and 8:

The defendants indicated that they have raised, with the plaintiff, its failure to discover any documentation in respect of category 7 and 8. The defendants said that category 7 relates to the contractual terms on which the plaintiff allege that the vans were supplied. As such, the defendants argued that these categories are obviously central to the proceedings. The defendants further stated that category 8 relates to the alleged contracts (which the plaintiff described in the amended statement of claim as Rental Agreement 10638 and Rental Agreement 10674) pursuant to which it is alleged to have been agreed on the 5th December, 2006 and the 28th February, 2007, that vans would be supplied by the plaintiffs to the first named defendant. The defendant indicated that it is expressly pleaded by the plaintiff, in the amended statement of claim, that the latter document was returned to the plaintiff by an employee of the defendant, Mr. Gerry Cunningham, with a handwritten note on the face of the agreement. The defendant indicated, that on further review of the discovery documents provided to them, they noted that there were copies of two rental agreements, numbers 10638 and 10674, included, and that each one is one page in length, with a set of terms on a second page. The defendants asserted that it may be that these documents cover the full extent of the documents in the plaintiff's power of procurement in respect of categories 7 and 8, but the defendants asserted that the plaintiff has not confirmed that this is the case, despite repeated requests for it to address the issues set out in the defendant's letter of the 25th January, 2017. The plaintiff contended that this issue is no longer live and that it has confirmed the position in the affidavit of Mr. Joe Jackson.

37. Category 10:

The defendant asserts that the plaintiff has failed to discover any documentation in respect of category 10. This category relates to rental agreements 10639 to 10673 inclusive. The defendants say that access to these agreements would allow the defendants to establish the extent to which rental agreements 10638 and 10674 the terms of which are obviously crucial to the proceedings are similar to or different from other rental agreements concluded by the plaintiff at the relevant time. The defendant indicates that they sought an explanation as to why no such documents have been discovered and that the defendant would have expected these documents to have been retained and to be available to the plaintiffs. Counsel for the plaintiff indicates that they did produce the additional documents but do not consider that the rental agreements 10639 to 10673 are relevant.

38. Category 11:

The defendants asserted that it is particularly concerned regarding the dearth of documentation discovered evidencing correspondence, communication and/or discussion (whether by way of email, text messages, notes of calls, notes or memoranda) between the defendants and the plaintiff and as between the plaintiff and its personnel. The defendant asserted that this documentation is of particular importance in circumstances where the alleged contracts, concluded on the basis alleged, would have amounted to a very significant and high value series of contracts. As such, the contracts would reasonably have been expected to have been the subject of significant correspondence, communication and/or discussion both between the plaintiff and its personnel and also between the plaintiff and the defendant. In this regard, the defendant asserts that they are particularly concerned that no substantial discovery is being provided in respect of category 11 in circumstances where Richard Pender was the plaintiff's primary contact with the defendants in respect of the supply of vehicles and it is reasonable to expect that he would have generated significant documentation evidencing correspondence, communication and/or discussion in respect of the alleged arrangements. In response, the plaintiff referred to the supplemental affidavit of Joe Jackson and said that the emails which it has are listed in the first part of the first schedule and that it is all that they have. The Supreme Court case of *O'Leary* was referred to and the High Court case of *James Elliot Construction Ltd* was referred to.

39. Further Categories:

With regard to the three further categories of discovery sought by the defendants, the plaintiff contends as follows:

(1) It is highly unorthodox that a party would agree discovery and then come back to court and add three further categories. Referring to how the categories are referred to in the notice of motion they indicate that category C(i) has already been made and similarly that discovery under category C(ii) has already been made.

(2) The plaintiff asserts that Category C(iii) relates to other types of documents and that it is not relevant or necessary.

DECISION

40. The law on further and better discovery is clear and the court sets out again the quotation from Kenny J in the case of *Sterling Winthrop Group Limited* as follows:

"Although the rules of court have never provided for an application by either party for an order that the other party should make an affidavit of discovery – other than Or.31 r. 20 (3) – the Courts in Ireland and England have always had power to order that either party should make a further affidavit. Such an order 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. The court will however, order a further affidavit of documents when it is satisfied (a) from the pleadings (b) from the affidavit of discovery already filed (c) from the documents referred to in the affidavit of discovery or (d) from an admission by the party who has made the affidavit of discovery that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. The court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has in consequence omitted documents from it. The cases reported in Ireland and England during the last eighty years show a progressive extension of the grounds on which the court will order a further affidavit."

41. The defendant, in raising issues with regard to the discovery furnished, adopted an incorrect approach in creating three additional categories, which they say are not new but are further specifications of existing categories. These are the categories listed in their notice of motion.

42. In their correspondence in respect of those categories, which they name A1, A2 and A3 they state as follows:

"Arising from this concern and in ease of all parties, we set out below a number of further categories of discovery which are intended to provide a clear breakdown of the various categories of correspondence, which our client had expected to receive by way of discovery from your clients."

They go on to say in that letter:

"The above is no more than an example of the manner in which the defendant says that the discovery made is incomplete."

43. The court notes the aforementioned judgment of Kenny J where he states that:

"Such an order 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."

And further, where he states that:

"Such an order will not be made where the court is not satisfied (a) from the pleadings (b) from the affidavit of discovery already filed (c) from the documents referred to in the affidavit of discovery or (d) from an admission by the party who has made the affidavit of discovery, that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit."

44. The court is of the view that the plaintiff has complied with the agreement reached between the parties in respect of discovery and that the defendant have not met the test set out in the case of *Sterling Winthrop Group Limited* and which has been followed in subsequent Irish cases.

45. Accordingly the court refuses the reliefs sought by the defendant/applicant as set out in their notice of motion, under paragraph 1 (a) (b) and (c).