[2020] IEHC_287

THE HIGH COURT
COMMERCIAL

[2019 No. 7703 P]

BETWEEN

CLYDAVILLE INVESTMENTS LIMITED

PLAINTIFF

AND

SETANTA CENTRE UNLIMITED COMPANY

DEFENDANT

BETWEEN

SETANTA CENTRE UNLIMITED COMPANY AND TERNARY LIMITED

COUNTERCLAIM PLAINTIFFS

AND

CLYDAVILLE INVESTMENTS LIMITED

COUNTERCLAIM DEFENDANT

JUDGMENT (ex tempore) of Mr. Justice Twomey delivered on the 4th day of June, 2020

Introduction

1. This is a discovery application by the plaintiff/counterclaim defendant ("Clydaville"), which is a tenant of the defendant/counterclaim plaintiff ("Setanta", which term includes Ternary Limited a company involved in the re-development of the Setanta Centre, which is owned by Setanta Centre Unlimited Company). The hearing involved a claim from Clydaville's expert on eDiscovery that the costs to Setanta of providing the documents sought by Clydaville would be €400,000, while Setanta relies on a specialist opinion from its solicitor that the discovery costs could be twenty times that amount, namely up to €8.3 million.

2. Quite apart from highlighting the enormous costs of High Court litigation (and this estimated €8.3 million cost relates only to the discovery costs and not solicitors', barristers' and other experts' costs), this hearing also highlighted the massive difference between two expert views on the cost of searching and providing copies of relevant documents to the other side in litigation, in order to comply with orders for discovery.

Background

3. The premises at the centre of the dispute is a shop known as the Kilkenny Design Centre on Nassau Street in Dublin which is part of a larger development known as the Setanta Centre. Setanta wishes to redevelop the Setanta Centre. Clydaville claims that by issuing certain rules regarding the rights of tenants in the Setanta Centre, Setanta is restricting Clydaville's rights as a tenant, which rights, it claims, arise as implied rights under the terms of its lease, by prescription, as easements, by estoppel or by oral licence (the "Tenant's Rights"). The leased premises consists of a shop fronting onto Nassau Street as well as an annex to the rear which was built 20 years ago and is part of the most recent version of the lease dated 13th February, 2013 between the parties (the "Lease").

4. Clydaville claims that the Kilkenny Design Centre has operated from the Nassau Street premises for 40 years and during this time it has exercised these Tenant's Rights in various ways. For example, it has plant and equipment such as air conditioner units on

the roof of, rather than inside, the leased premises and it has bailors, compactors and waste bins in the common area/car park adjacent to the annex.

5. The issue came to a head on the 16th April, 2019 when Setanta, pursuant to the terms of the Lease, issued a document to tenants in the Setanta Centre entitled "Setanta Estate Rules and Regulations" (the "Rules") which Clydaville claims restricts the exercise of the Tenant's Rights. For example, these Rules provide that tenants shall not dispose of or store waste in the compactors or skips in the common areas and all plant and equipment should be located *within* a tenant's demised premises.

6. Counsel for Setanta acknowledged that while the purpose of the Rules was for the good estate management of the Setanta Centre, a material reason for the issue of the Rules was to facilitate the redevelopment of the Setanta Centre. Counsel also accepted that the Rules dealt with matters that historically had not caused a problem for Setanta, but that now cause a problem for it. It is relevant to note that while this submission was made by Setanta's counsel, the pleadings do not contain any admissions on the part of Setanta of the previous existence or exercise of the Tenant's Rights alleged to exist for many years. Rather, Setanta, in its defence, has in broad terms denied the existence or exercise of any of these Tenants' Rights and thus Clydaville is put on proof of them. Clydaville claims that this is why it needs discovery of any documents which evidences Setanta's knowledge of these Tenant's Rights.

7. It is also relevant to note that Setanta has filed a counterclaim, which is effectively the mirror image of Clydaville's claim, in the sense that Setanta claims that not only does Clydaville not have these alleged Tenant's Rights, but also that Clydaville's insistence upon and exercise of these rights entitles Setanta to significant damages arising from the delay caused to its redevelopment of the Setanta Centre. Setanta is claiming in the region of €16 million per annum arising from loss of rents and other costs caused by Clydaville's insistence on these alleged Tenant's Rights.

Discovery sought by Clydaville

8. On 5th February, 2020 Clydaville issued a Notice of Motion seeking certain categories of discovery from Setanta. One of the categories of discovery originally sought has been agreed between the parties and so this judgment deals with the outstanding three categories of discovery.

Category 1

9. As noted in the introduction, the core dispute between the parties centres on the exercise by Clydaville of its alleged rights as a tenant and its claim that the Rules will restrict these rights. Clydaville is seeking in Category 1 discovery of the following documents:

> "All documents created from 1 January 1997 onwards evidencing and/or recording: -
>
> (a) The knowledge or awareness of Setanta, Ternary, their predecessor(s) in title and/or their respective servants and/or agents of the exercise by Clydaville, its predecessor(s) in title and/or their respective servants and/or agents of

any of the Tenant's Rights or any rights in similar terms; and

(b) Any permission, approval or consent by Setanta, Ternary, their predecessor(s) in title and/or their respective servants and/or agents relating to the exercise by Clydaville, its predecessor(s) in title and/or their respective servants and/or agents of any of the Tenant's Rights or any rights in similar terms."

10. In essence, the items set out in Category 1 are documents which Setanta might have, which support Clydaville's claim that there was agreement, knowledge and/or acquiescence on the part of Setanta to the placing of, for example air conditioner units on the roof and bailors and compactors in the car park for many years and in some cases over 20 years.

11. It is to be noted that in *Tobin v. Minister for Defence* [2019] IESC 57, Clarke C.J. held at para 7.16 that the default position is that if a document is relevant the production of that document is then necessary:

> "Having regard to the importance which discovery can play in at least some cases, it should, in my view, remain the case that the default position should be that a document whose relevance has been established should be considered to be one whose production is necessary. However, that remains only a default position and one which is capable of being displaced for a range of other reasons. If it can be demonstrated that compliance with the obligation to make the discovery sought would be particularly burdensome, then a court will have to weigh in the balance, in deciding whether discovery is truly "necessary", a range of factors, including the extent of the burden which compliance will be likely to place on the party concerned, the extent to which it might reasonably be expected that any of the contested documentation whose discovery is sought will play a reasonably important role in the proper resolution of proceedings and, importantly, the extent to which there may be other means of achieving the same end as that which is sought to be achieved by discovery but at a much reduced cost. "

12. It seems clear to this Court that, since the legal claims of Clydaville regarding implied tenant's rights, estoppel, prescription etc. are based on the knowledge and acquiescence of Setanta, any documents which might prove that knowledge or acquiescence are both relevant and necessary.

13. However, Setanta's primary objection to the discovery set out in Category 1 is that it will cost between €3 and €8.3 million to comply with this discovery because of the number of documents involved and the fact that the documents sought go back over 23 years. Accordingly, it claims that an order of discovery of this category would be disproportionate. In this regard, Setanta rely on the affidavit of Mr. David Torpey, who relies for this estimate of discovery costs, on the opinion of Setanta's solicitors in these proceedings. Clydaville counters this opinion on the costs of discovery with an affidavit from Mr. Eugene O'Neill, the Executive Vice President of Reveal, an eDiscovery company.

It is the opinion of Mr. O'Neill that the estimated costs involved in the discovery will be in the region of €400,000, which counsel for Clydaville points out approximates to two weeks' worth of the damages which Setanta is claiming in its counterclaim. On this basis, Clydaville submits that the discovery sought is not disproportionate.

14. Counsel for Clydaville suggests that the opinion of Mr. O'Neill of Reveal should be preferred since he is an independent expert providing this evidence to the Court, while he implies Setanta's solicitors are conflicted as they act for Setanta. While superficially appealing, this argument ignores the fact that not only is it the case that litigants can shop around for experts who will provide evidence to support their claims, it is also the case that the Irish courts have regularly remarked upon the fact that independent experts have too often in the past had their interests too closely aligned with the interests of the client who is paying for their independent expert view. See for example the comments of Irvine J. in *Byrne v. Ardenheath Company Ltd*. [2017] IECA 293 at para. 31:

> "It was my experience as a trial judge that the effectiveness of the assistance offered by expert witnesses in almost all disciplines, whether that evidence was in respect of the standard of care proposed or a party's compliance therewith, was frequently compromised by the fact that, all too often, *their opinions all too often appeared to correspond too favourably with the interests of the parties who retained them*. I continue to remain of that view as an appellate court judge where the transcript may lead one to the conclusion that a given expert had become so engrossed in their client's position that they were clearly incapable of providing truly independent guidance for trial judge." (Emphasis added)

15. Similarly, O'Donnell J. in *Hanrahan v. Minister for Agriculture, Fisheries and Food* [2017] IESC 66 stated at para. 4:

> "In considering this matter the Court also cannot ignore the fact that both parties presented expert evidence as to the calculation of damage, which diverged quite dramatically. On behalf of the plaintiff, it was maintained that he had suffered losses in excess of € 834,638 before interest, while the expert retained by the defendant estimated the losses at € 1,979, and in effect virtually nil. Experts are permitted to give evidence of their opinion, while lay people are not. This is because experts are understood to have professional expertise, and to owe an obligation to the Court to give their own expert opinion to the Court. I do not wish to criticize the individuals who gave evidence in this case, since this was a difficult case and in any event the "high ball – low ball" approach which occurred here is only an example of a more widespread phenomenon. *However, it is surely not coincidental that it was the independent expert on behalf of the plaintiff whose opinion was that the damages were extremely substantial, and the expert on behalf of the defendant who considered that in effect there was no loss at all*. I addressed this issue in my judgment in *Lett & Co v Wexford Borough Council* [2012] I.R. 198. Parties, and witnesses, should appreciate that an approach which presents unrealistically high claims or low responses may well be counterproductive. If, for

example, a court correctly rejects the method of calculation of loss a plaintiff will not be in a strong position to challenge the Court's own calculation and may receive less than a more reasonable approach may have yielded The time and cost involved in the assessment of damages could be reduced, sometimes significantly, by a more realistic approach to the dispute by the experts involved, and if necessary, a more robust approach by courts to the evidence. The acceptance of any expert evidence is dependent upon the reputation of the witness. An expert who merely advances a party's case rather than his or her own independent opinion may, and perhaps should, be criticised, sometimes severely." (Emphasis added)

16. This is not in any way to suggest that Mr. O'Neill has not expressed an entirely independent expert opinion. However, it does mean that this Court does not believe that it can simply prefer the views of Mr. O'Neill, who it must be assumed has been paid by Clydaville to provide this opinion, simply because he is put forward as an "independent expert", where the other estimate is from the firm of solicitors acting for the one of the parties to the litigation.

17. It is also relevant to note that this is not a case of just a 20% or 30% difference between the estimates. One estimate put forward by the law firm acting for Setanta (€8.3 million) is twenty times, or a 2000% increase on, the estimate put forward by Mr. O' Neill (€400,000). Before this Court would prefer one party's opinion over another party's opinion on such widely diverging estimates on costs of discovery, it would be necessary for there to be cross-examination of the parties who are proposing their respective estimates, which is not something which was available to the Court when it heard this discovery application. For this Court to simply choose between these two diverging figures would be inappropriate since it would lead to the type of unsatisfactory situation envisaged by O'Donnell J. in *Lett & Company Ltd. v. Wexford Borough Council & ors.* [2012] 2 I.R. 198 (albeit in a different context of assessing compensation for loss), since he stated at p. 260:

> "I do not think it is at all satisfactory that the judge should be faced with calculations which are so strikingly different, that he should be forced either to choose one or other, or devise his own approach, with the inevitable difficulty that such an approach itself would not have been based on any expert account, or tested by any expert evidence."

18. In the circumstances, this Court cannot rely either on Clydaville's claim that that the discovery is proportionate because it will cost only €400,000 (which is itself a significant cost to disclose documents) or Setanta's claim that it is disproportionate because it could cost up to €8.3 million.

19. In these circumstances, because this Court has concluded that the discovery requested in Category 1 is both relevant and necessary, it cannot see how it can conclude that the discovery should not be ordered, and so it will do so in the terms sought by Clydaville.

Category 2

20. As regards Category 2, this seeks:

> "All documents created between 22 August 2017 and 3 October 2019 evidencing and/or recording the reason(s) or purpose(s) for which any iteration of the Rules was proposed, prepared, drafted, introduced, implemented or delivered by or on behalf of Setanta, Ternary or their respective servants and/or agents."

21. It seems clear that in this category of discovery, Clydaville is seeking documents which might show that Setanta created the Rules with an ulterior purpose, i.e. not for good estate management (which is the purpose of the Rules under the relevant clause in the Lease) but rather to progress the redevelopment of the entire Setanta Centre, of which Kilkenny Design Centre is a part.

22. Setanta has agreed to give discovery of such documents but denies that this category should be extended to its servants or agents. This is because Mr. Torpey on behalf of Setanta has given evidence on oath that Setanta made the decision to introduce the Rules itself. He also confirms on oath that if there is any documentation to help the Court on the reasons for the introduction of the Rules, it will have been created by, sent by or received by Setanta and that therefore the extension of this category to its servants or agents is unnecessary.

23. Because of these clear affirmations on oaths, which are very serious averments for Mr. Torpey to have made, and no doubt he was legally advised of their seriousness, it seems to this Court that it would be disproportionate for an order to be made seeking discovery from third parties such as engineers, architects, planning consultants, environmental consultants etc., since it would require all those third parties to go through their documents to confirm what Mr. Torpey has sworn on affidavit. Furthermore, this Court has not been advised of any reason or provided with any evidence to support a suspicion that Mr. Torpey might have given false testimony.

24. In this these circumstances, this Court will not extend the discovery category to third party servants or agents and will grant discovery in the following terms:

> All documents created between 22 August 2017 and 3 October 2019 evidencing and/or recording the reason(s) or purpose(s) for which any iteration of the Rules was proposed, prepared, drafted, introduced, implemented or delivered by or on behalf of or received by Setanta or Ternary.

Category 5

25. As regards Category 5, these documents go to the counterclaim of Setanta and can be broken up into six sub-categories. These sub-categories relate to various heads of damages which Setanta is claiming from Clydaville and obviously Setanta will have to prove the various heads of damages which it is claiming it has suffered. It is also important to note that some of these heads of damages deal with future losses and so there is an element of prediction about these heads of loss and indeed when the trial is

held it may well be that some of these heads of loss may look different from how they look today.

Sub-category (a)

26. The first sub-category seeks discovery as follows:

> "All documents created since 1 January 2017 evidencing and/or recording: -
>
> (a) Any actual or projected change in the construction costs of the proposed redevelopment of the Setanta Centre."

27. This first sub-category relates to any actual or projected change in construction costs. Again, in this context, there is an averment made under oath by Mr. Torpey to the effect that the KSN Construction Consultant Report and demolition and constructions contracts for the Setanta Centre are the only documents which Setanta possess, which evidence this head of loss. This is a very serious averment which Mr. Torpey has made and he was no doubt similarly advised of its significance. This Court has no evidence or reason to suspect that Mr. Torpey has made a false statement under oath and so it has no reason to go beyond Mr. Torpey's averment. The consequences for Mr. Torpey are serious if this averment were false, whether he makes this averment at this stage or in the body of his affidavit of discovery. Based on this averment therefore, this Court will restrict this sub-category of discovery to the following:

(i) The KSN Construction Consultants Report dated 8 October 2019

(ii) Copies of the demolition and construction contracts (redacted where necessary) in respect of the redevelopment of the Setanta Centre.

Sub-category (b)

28. This sub-category seeks discovery of the following:

> "All documents created since 1 January 2017 evidencing and/or recording: -
>
> (b) The actual or projected cause of any delay to the proposed redevelopment of the Setanta Centre."

29. This head of damage relates to documents evidencing the actual or projected cause of any delay in the building project, since Setanta allege this delay was solely caused by Clydaville's insistence on its Tenant's Rights. Setanta claims that this is a matter of evidence and that it must adduce evidence at the trial to support its claim in this regard and that, accordingly, there is no meaningful category of documents that will evidence the actual or projected cause of any delay. To an extent, this is true, however, it does not mean that there are no documents in Setanta's possession that might either support or undermine the claim that Clydaville caused the delay in the redevelopment of the Setanta Centre. Therefore, this Court will grant discovery of this sub-category in the terms sought by Clydaville.

Sub-category (c)

30. This sub-category seeks as follows:

"All documents created since 1 January 2017 evidencing and/or recording: -

The projected rental income from the Setanta Centre."

31. This head of damage claimed by Setanta relates to its claim that, as a result of Clydaville's reliance on its alleged Tenant's Rights, the redeveloped Setanta Centre will be let out a year later than if there was no such reliance on the alleged Tenant's Rights (with no delay to the development work). In one sense, this is very much a future tense claim, relating to future loss of rental income, rather than one which relates to past events. It seems to this Court that in those circumstances, the period of two and a half years of documents suggested by Setanta is a proportionate and reasonable period, particularly since it relates to a future projection of loss that will not arise for some years and will, if it is to have any prospect of success, be based on evidence and perhaps expert evidence, which may of course be refuted by Clydaville's own expert evidence. This Court will therefore grant discovery in the following terms:

All documents created since 1 January 2018 evidencing and/or recording: -

The projected rental income from the Setanta Centre.

Sub-category (d)

32. This sub-category seeks discovery of the following:

"All documents created since 1 January 2017 evidencing and/or recording: -

Any actual or projected change in the value of the Setanta Centre."

33. This category relates to documentary evidence of the diminution in value of the Setanta Centre. It seems clear that this head depends on future values of property and when this matter comes to trial it is likely to involve predictions regarding the value of the completed development in say 2025 versus 2026. For that reason, this head of damage is somewhat speculative, and it is certainly arguable that it is uncertain for the very reason that no one knows which way the market is likely to go in future years and Setanta might not be able to prove a loss under this heading. On this basis, it is this Court's view that Setanta is unlikely to be in a position to discover anything that is particularly relevant or necessary to either support or undermine that future claim.

34. For this reason, this sub-category is refused.

Sub-category (e)

35. This sub-category seeks the following discovery:

"All documents created since 1 January 2017 evidencing and/or recording: -

The actual or projected staff costs of Setanta and/or Ternary relating to the Setanta Centre."

36. Setanta has pleaded that the delay, which it alleges is being caused by Clydaville, to the redevelopment will increase its staff costs, in the sense that the later in time that the development runs, the greater the wage inflation.

37. It seems to this Court that a time period of two and half years of documentary evidence of staff overheads is sufficient and so this category of discovery should be limited to read as follows:

> All documents created since 1 January 2018 evidencing and/or recording: -
>
> > The actual or projected staff costs of Setanta and/or Ternary relating to the Setanta Centre.

Sub-category (f)

38. The final sub-category relates to professional fees. It seeks discovery of the following:

> "All documents created since 1 January 2017 evidencing and/or recording: -
>
> > The computation, invoicing or discharge of any professional fees, costs and expenses incurred by Setanta and/or Ternary in relation to the alleged actions pleaded at paragraph 37 of the Defence and Counterclaim."

39. This relates to the claim that Clydaville has engaged in certain unauthorised actions including, *inter alia*, the use of the car park for the purpose of deliveries and the use of the car park for storage of waste. Clydaville therefore seek discovery of documents relating to any fees incurred by Setanta as a result of having to engage professional services as a result of these alleged unauthorised actions.

40. Setanta has offered to discover all invoices and receipts from relevant professionals, as distinct from all documents received or sent to those professionals, regarding professional fees. It seems to this Court that all that is relevant and necessary under this heading is the actual invoice and receipt from any relevant professional, since the key issue is how much Setanta paid for the services of these professionals. Accordingly, this category of discovery should read:

> All documents created since 1 January 2017 evidencing and/or recording: -
>
> > The invoicing or discharge of any professional fees, costs and expenses incurred by Setanta and/or Ternary in relation to the alleged actions pleaded at paragraph 37 of the Defence and Counterclaim.

Conclusion

41. This Court will order discovery to be made of the following documents:

Category 1

All documents created from 1 January 1997 onwards evidencing and/or recording: -

(a) The knowledge or awareness of Setanta, Ternary, their predecessor(s) in title and/or their respective servants and/or agents of the exercise by Clydaville, its predecessor(s) in title and/or their respective servants and/or agents of any of the Tenant's Rights or any rights in similar terms; and

(b) Any permission, approval or consent by Setanta, Ternary, their predecessor(s) in title and/or their respective servants and/or agents relating to the exercise by

Clydaville, its predecessor(s) in title and/or their respective servants and/or agents of any of the Tenant's Rights or any rights in similar terms.

Category 2

All documents created between 22 August 2017 and 3 October 2019 evidencing and/or recording the reason(s) or purpose(s) for which any iteration of the Rules was proposed, prepared, drafted, introduced, implemented or delivered by or on behalf of Setanta or Ternary.

Category 5

(a)(i) The KSN Construction Consultants Report dated 8 October 2019

(ii) Copies of the demolition and construction contracts (redacted where necessary) in respect of the redevelopment of the Setanta Centre.

(b) All documents created since 1 January 2017 evidencing and/or recording: -

The actual or projected cause of any delay to the proposed redevelopment of the Setanta Centre.

(c) All documents created since 1 January 2018 evidencing and/or recording: -

The projected rental income from the Setanta Centre.

(e) All documents created since 1 January 2018 evidencing and/or recording: -

The actual or projected staff costs of Setanta and/or Ternary relating to the Setanta Centre.

(f) All documents created since 1 January 2017 evidencing and/or recording: -

The invoicing or discharge of any professional fees, costs and expenses incurred by Setanta and/or Ternary in relation to the alleged actions pleaded at paragraph 37 of the Defence and Counterclaim.