Neutral Citation Number: [2007] IEHC 247

THE HIGH COURT

[2001 No. 7739 P]

BETWEEN
CORK PLASTICS (MANUFACTURING), AND (BY ORDER) HANIMEX (IRELAND) LIMITED, CORK PLASTICS AND CORK PLASTICS SYSTEMS LIMITED

PLAINTIFFS

AND
INEOS COMPOUNDS UK LIMITED (FORMERLY KNOWN AS EVC COMPOUNDS LIMITED) AND BY ORDER TIOXIDE EUROPE LIMITED

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 26th July, 2007.

1. Introduction

1.1 In these proceedings, which have been assigned to me by the President of the High Court for case management, the plaintiffs ("Cork Plastics") claim, under a number of headings, for very substantial losses arising out of an allegation that certain compounds supplied to them for use in making fascias, and associated products to be used in house construction, were defective. It is said that the compounds caused "pinking" in the products manufactured by Cork Plastics. In consequence, it is said, very serious damage was caused to the Cork Plastics business.

1.2 There are many complex legal issues in the proceedings which derive, at least in part, from the precise contractual arrangements entered into between some of the parties and which involve the extent of the duty of care owed by and to those parties who had not direct contractual relations. There are also very significant factual questions concerning the alleged defects in the supplied compounds. The alleged losses are also in significant controversy.

1.3 These cases have been under management for some time and, it has to be said, the parties have, in my view, generally been constructively engaged in attempting to resolve the many pre-trial questions which have arisen and whose determination is necessary in order that these proceedings can be made ready for hearing. That constructive engagement can be seen from the fact that, despite the legal and factual complexities of the case, I have only been required to deliver one previous reserved judgment in respect of the issues which have arisen (concerning the possible trial of a preliminary issue).

1.4 The management of the case so as to make it ready for trial is reaching towards its conclusion. With that in mind I requested that the parties should supply an issue paper of all outstanding matters. It is again a testament to the constructive engagement of the parties that, at the case management hearing in respect of such outstanding matters, all bar one were either the subject of ready resolution or gave rise to acceptable proposals as to how matters might be brought forward with a view to ensuring that any remaining questions not capable of resolution between the parties should be determined at a final case management meeting now scheduled for late October. In passing I should note that I have adopted a practice in this case of directing that any costs associated with the orderly conduct of the case management, should be costs in the cause, in circumstances where I am satisfied that both sides have been constructively engaged in attempting to resolve any outstanding issues. It is only where a significant and separate issue requires independent argument and a formal judgment that I have considered making individual cost orders in respect of discrete elements of the process. It seems to me that the constructive engagement of parties with a case management process in complex litigation such as this is advanced by such a practice.

1.5 However, at the last case management hearing, one issue of principle concerning the discovery of documents was the subject of significant disagreement between the parties leading to a discrete hearing. This judgment is directed to that question.

2. The Issue

2.1 As indicated the issue was one of principle. There has, already, been significant litigation in the United Kingdom concerning similar allegations of defects in products associated with the defendants. The second named defendant ("Tioxide") has already sworn an affidavit of discovery which, I am told, discloses the existence of some 70 odd lever arch files of documents. In the course of that affidavit of discovery Tioxide disclosed the existence of certain documentation prepared in the course of those United Kingdom proceedings. In fairness to Tioxide it should be noted that, while disclosing the existence of that documentation, it was indicated that the relevant documents had not, as yet, been assessed by their legal advisors as to relevance. The fact, however, that the documents were mentioned at all, seems to imply that it is likely that at least some of the disclosed documentation may be relevant to these proceedings.

2.2 However Tioxide maintains that the documents concerned are governed by the provisions of the English Civil Procedures Rules ("CPR"). Rule 31.22 of the CPR provides as follows:-

> "(1) a party to whom a document has been disclosed may use the document only for the purposes of the proceedings in which it is disclosed, exempt where –
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> (a) the document has been read to or by the court, or referred to, at a hearing which has taken place;
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> (b) the court gives permission; or
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> (c) the party who disclosed the document and the person to whom the document belongs agree.
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> (2) The court may make an order restricting or prohibiting the use of the document which as been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has taken place in public.
>
> (3) An application for such an order maybe made –
>
> (a) by a party; or
>
> (b) by any person to whom the document belongs."

2.3 That rule replaced the former practice in England whereby documents which were disclosed to another party in the course of

litigation, were taken to be subject to an implied undertaking not to use the document other than for the purposes of the litigation concerned. This latter position remains the case in this jurisdiction.

2.4 It is common case that the rule applies to the documents in dispute. It is also common case that none of the documents are excluded by virtue of the provisions of subrule (1)(a). The documents concerned can, therefore, only be disclosed with the agreement of the relevant party or parties under sub rule (1)(c) or with the courts permission under sub rule (1)(b).

2.5 In those circumstances Tioxide maintains that, as a matter of Irish procedural law, there is no obligation to seek the relevant consents or permissions. Cork Plastics disagree. That is the issue which I have to decide. Nothing turns on the specific nature of the documents concerned, it being common case that they are all the subject of the restriction on use specified by the CPR. The issue, therefore, depends on the resolution of the principle of law applicable rather than on the specific facts of this case.

3. The Law

3.1 While the prohibition on use of disclosed documents in the United Kingdom is now described as a restriction on collateral use, the basic obligation does not appear to be, in substance, different from that which arose under the former implied undertaking which applied in that jurisdiction and which continues to apply in this jurisdiction. In the circumstances it seems to me that the principles applicable in this jurisdiction are likely to be the same or very similar to those applied, in a like case, in the United Kingdom. In those circumstances Tioxide places reliance on a passage from *Matthews and Mallek on Disclosure* (3rd Ed., 2007) at para. 5.53 in the following terms:-

> "In some cases, however, the terms and circumstances under which such rights arise may impose a duty of confidentiality upon the information thus acquired and this may prevent the right satisfying the test in the CPR.
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> This would be so, for example, in relation to documents disclosed in other proceedings and therefore subject to the restriction on collateral use (formerly implied undertaking of confidentiality). Of course, if the party is supplied with copies, they will belong to him, and will be in his physical possession. They will therefore be disclosable on that basis, though still covered by the implied restriction on collateral use (or undertaking)."

3.2 Subsequently at para. 8.16 the authors note that:-

> "A similar problem arises where a party obtains copy documents from his opponent by disclosure in one set of proceedings and subsequently finds that they relevant to a second set of proceedings in which he is now involved. The r. 32.22 obligation (formerly the implied undertaking on discovery) while it lasts certainly means that he cannot make use of those documents in the second proceedings without the permission of his erstwhile opponent and the owner of the documents, or of the court. However it seems doubtful that the obligation prevents the party from at least disclosing that the documents exist, by listing them in the second of the three classes in the list of documents."

3.3 The reference to the "second of the three classes in the list of documents" refers to the relevant provisions of the CPR which relate to documents whose existence is disclosed but in respect of which the party disclosing their existence maintains an objection to production.

3.4 However in particular, and against that background, Tioxide places reliance on a further passage from *Matthews and Mallek* at para. 5.41 where it is commented that:-

> "Under the old rules it was clear that the courts had no power to require a party to create particular documents for the purposes of the proceedings, where these documents did not already exist. Nor did they have the power to require a party to do all that can be reasonably done to obtain materials from third parties."

3.5 The latter proposition derives from Dubai *Bank Limited v. Ebrahim Galadari* (The Times 14th October, 1992). That case was decided before the change in rule in the United Kingdom and was thus based on the provisions of the English Rules of the Superior Courts Order 242 Rule 1(1) which appears to be, for all practical purposes, the same as the existing Irish rule. Glidewell LJ noted that a document, under the rule, is said to be within the power of a person, even though not in his custody, if he is "entitled in law to require the person having possession of it to give possession of it".

3.6 The question which arose in that case was as to whether an order made in the High Court in the relevant proceedings which required a party to "use all lawful means to obtain documents held by a third party" was within the jurisdiction of the courts having regard to that rule.

3.7 The relevant passage seems to me to be one in which Glidewell LJ said the following:-

> "But we agree with Mr. Davis that this order is an extension of the power to order discovery for which there is no legal justification. In some cases (of which this may well be one) the making of such an order may be an aid to a just and practical solution to a problem. Nevertheless in our judgment we do not have it in our power to extend the ambit of discovery in this way as Sir Henn Collins MR reminded us, we 'are limited by the express provisions of the rules on the subject'."

3.8 The Court of Appeal, therefore, determined that, while there might be some practical benefit in making an order of the type sought, it was outside the scope of the existing rules of the Superior Courts in the United Kingdom. For that reason the court had no power to make an order. I am satisfied that a similar position obtains in this jurisdiction. It, therefore, follows that this court, under the existing discovery rules, has not the power to make an order requiring a party to use "best endeavours" to obtain a document from a third party. A document is either within the "power" of a party to the proceedings or it is not. If it is within his "power" then he must obtain it and make it available to his opponent. If it is not within his "power" then he cannot be ordered by discovery to try to obtain it.

3.9 Relying on that authority counsel for Tioxide argues that there can be no obligation to seek the consent of a third party (or, indeed, the permission of the United Kingdom courts) to secure the release of Tioxide from an obligation not to utilise the relevant documentation other than for the purposes of the United Kingdom proceedings.

3.10 Counsel for the Cork Plastics draws attention to a distinction between the circumstances with which the court was concerned in *Dubai Bank* and the circumstances which arise in this case. In *Dubai Bank* the party against whom discovery was sought did not have the document. Nor was it within that parties "power" even though there might have been some reasonable prospect of the party

concerned obtaining the document had it asked for it. The case was, therefore, dependent on the proper interpretation of the limits of the term "power" as used in both the English Rules of the Superior Courts at that time and the current Irish rules. However in this case the party concerned actually has physical possession of the documents. It is not an absence of physical possession which represents the barrier to their production. Rather it is that their production to the other side would amount to a breach of an obligation owed to the English courts. In those circumstances counsel for Cork Plastics argues that it is not, as such, the scope of the documents which can properly be regarded as coming within the ambit of discovery which is in issue. Rather, it is said, that the issue relates to the extent to which a party may escape from an obligation which otherwise exists (that is to produce the document) by reason of the existence of its obligations to the United Kingdom courts. In those circumstances, it is said, different considerations apply.

3.11 It seems to me that the starting point for a consideration of this net issue has to be to consider what the position would be if the issue arose from other litigation within this jurisdiction. There clearly are additional complications which exist by virtue of the fact that the disclosure is required for proceedings in one jurisdiction whereas the obligation of confidentiality is owed to a court in another jurisdiction. However, in its simplest form, an issue, such as the one with which I am concerned, can easily arise where both sets of relevant proceedings are within the same jurisdiction and, indeed, the same court.

3.12 The courts in Australia have held that the implied obligation arising from discovery in one action must yield to the requirements of curial process in other litigation. See *Esso Australia Resources Limited v. Ploman* (1995) 18 C.L.R. 10 at 33 (a decision of the High Court of Australia) and *Australian Securities Commission v. The Amploex Limited* (1995) 38 N.S.W.L.R. 504 (which involved an overriding statutory authority).

3.13 In *Patrick v. Capital Finance Pty Limited* (No. 4) (2003) F.C.A. 436 the Federal Court of Australia held that, in a subsequent action, the court could order discovery of a document which had been disclosed in an earlier case without an application needing to be made to the court in the earlier action for a release or modification of the undertaking. In delivering judgment Tamberlin J. said:-

> "There is a clash of two important public interest considerations in this case. First, there is the public interest in protecting the discovery process in the interest of encouraging openness and frankness in discovery made in the County Court proceeding by way of consistent and effectively enforced assurance to the party faced with compulsory discovery that the documents will not be used for any other purpose than the purpose for which they were discovered in that court. Second, there is the competing important public interest in the due and proper administration of justice in the proceedings before this Court by ensuring compliance with its orders. In these circumstances if the document was one which ought to have been discovered I am not persuaded either as a matter of power, discretion or comity that release of the undertaking must or should be first obtained from the County Court."

3.14 It should be noted that all of the relevant cases cited involved situations where both sets of proceedings were within Australia. In addition, in *Patric*k, the court ordering discovery in the second proceedings was superior to the court to whom the implied undertaking arose on foot of the earlier proceedings.

3.15 However, it seems to me that the principle noted by the Australian courts in *Patrick* is one which ought to be applied in interpreting the broadly similar rules in this jurisdiction. It does not seem to me that the fact that the earlier proceedings were in a lower court affected the application of the principle in *Patrick*. The principle stems from the fact that, in the ordinary way, the requirements of justice in the second set of proceedings will, normally, mandate that documents which are relevant to those proceedings be disclosed so as to allow a proper and just determination of the second set of proceedings. That principle would seem to apply irrespective of the status of the relevant courts. While there does not appear to be a specific determination of the United Kingdom courts on this point it is worthy of note that *Matthews and Mallek* refer to the Australian case law which I have cited.

3.16 It should, of course, also be noted that there may be particular circumstances where it would be inappropriate to direct the production of documents. The party who disclosed the documents in the original proceedings is, at least, entitled to be consulted. In my view the proper course of action to be adopted, where both relevant proceedings are in this jurisdiction, is the following.

3.17 Firstly I adopt the proposition stated in *Matthews and Mallek* that the existence of an obligation not to make collateral use (or an implied undertaking to the same effect) does not prevent the disclosure, as opposed to the production, of the documents concerned. The documents are in the "possession or power" of the party concerned. It is production which is not, without further action, possible. In those circumstances any documents in respect of which an appropriate obligation exists should be referred to in the affidavit of discovery concerned but, if desired, an appropriate objection to production can be made.

3.18 Secondly if the party in whose favour the order of discovery was made wishes to, nonetheless, seek the production of the documents concerned, then it is appropriate to join, as a notice party to any motion seeking production, any party in whose favour the obligation not to produce existed. That party should, of course, be given an opportunity to agree to production so as to obviate the necessity for an application to the court. The court should pay due regard to any legitimate basis put forward by such party as grounds for not directing disclosure.

3.19 Thirdly, and finally, in assessing the weight to be attached to, on the one hand, the existing obligation on foot of the implied undertaking and, on the other hand, the obligation to disclose in the second set of proceedings, the court should place a heavy weight on the obligation to ensure that the second proceedings come to a just result and should not, in the absence of some significant countervailing factor, decline to direct production. By directing disclosure the Court would, in effect, overrule or discharge the existing implied undertaking subject to any conditions that might seem appropriate.

3.20 Being satisfied that the above represents proper process in this jurisdiction, it is necessary to go on to consider the complication that arises where the difficulty in production stems from an implied undertaking (or a prohibition on collateral use) owed to the courts of another jurisdiction. It does not seem to me that the question of the availability or otherwise of documents, which are relevant to a judicial process in one jurisdiction, and where there is already a prohibition on collateral use by virtue of previous litigation, should be dependent on the happenstance of whether that previous litigation was in the same or another jurisdiction.

3.21 There is, obviously, one significant complication. It stems, of course, from the fact that an order made by a court in the second proceedings cannot have the automatic effect of releasing the party concerned from its pre-existing obligations. That is because those pre-existing obligations are to a court of another jurisdiction. However it seems to me that the comity of courts would require, that the courts of the second jurisdiction would give significant weight, in considering whether to direct a release of a party from its obligations, to the need to ensure that the courts in the jurisdiction having seizin of the second proceedings could arrange for the conduct of those proceedings in the way most calculated to achieve a just result .

4. Conclusions

4.1 In those circumstances I am satisfied that the argument put forward on behalf of Cork Plastics is correct. This is not a case about whether documents are within the "power" of Tioxide. The documents are in their possession and are, therefore, within their "possession or power". They have physical possession of them. The issue in this case is as to whether Tioxide is entitled to be absolved from the obligation, which would ordinarily arise, to produce the documents for inspection. That issue is not dependent on whether it can, properly speaking, be said that the documents are within their "possession or power". A privileged document is within the possession or power of a party and must be disclosed in an affidavit of discovery even though a legitimate objection to its production can be advanced.

4.2 The true issue in this case is as to whether Tioxide has a legitimate objection to the production of the documents concerned even though they are within its possession and power. It is the production of the document, rather than the document itself, that may be said not to be within the power of Ineos. As the legitimacy of the objection is dependent on the relevant party not consenting and the English Court declining to release Ineos from its obligations, it seems to me that it would be inappropriate for this court to uphold the objection to production until such time as the results of a process designed to secure those consents or permission had been completed. In saying that I should emphasise that this court has no jurisdiction, in anyway, to seek to second guess whatever determination the English Court may come to. Nor is it appropriate for this court, in anyway, to attempt to indicate to the English Court as to what determination it should reach. I should only note, in that context, that the original determination that these documents (or at least some of them – subject to the review as to relevance) ought to be included in the affidavit of discovery amounts to a determination that the availability of these documents is necessary for the proper disposal of the litigation with which I am concerned. As in all cases it is not possible to say just how important the documents may be until the trial. It must, however, remain the case that there is at least a possibility that the failure to disclose relevant documentation could affect, in some material way, the result of the trial. The weight to be attached to that factor, and, indeed, any other matters urged before it, are, of course, solely for the consideration of the English Court.

4.3 In the circumstances, and at this stage, it seems to me that I should confine myself to determining that an objection to produce documents properly discovered, which is based upon an obligation of the type asserted to the courts of another jurisdiction, cannot, as a matter of Irish procedural law, be finally determined until the party, upon whom the obligation to disclose and produce rests, has invoked whatever process may be appropriate, having regard to the procedural law of the second country, to seek to obtain a release from its obligations.

4.4 If it fails to *bona fide* invoke that process, then the party concerned would, in my view, be in breach of its obligations in respect of discovery. It could not, of course, be the case that this court, in default, could, nonetheless, direct disclosure notwithstanding an existing obligation to the courts of another jurisdiction. What other sanction the court might properly impose is a matter which I would leave to a case in which the relevant circumstances arose.