

THE HIGH COURT

Record No.: 2009/10751P

BETWEEN

JAMES O'BRIEN AND MATTHEW WALL AND SONS LIMITED

PLAINTIFFS

AND

ELIZABETH NOLAN, ANNE NOLAN, PATRICIA NOLAN, JOHN NOLAN, RAYMOND NOLAN, SEAMUS NOLAN, NOEL NOLAN,
BRENDAN NOLAN, RICHARD NOLAN KEVIN NOLAN, OLIVER NOLAN, SALLY NOLAN, JOAN NOLAN AND N.T. LOGISTICS LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 9th day of April 2013

1. Before the court are four motions all dated the 26th March, 2012, which have been brought by the plaintiffs. One motion is against defendants one to eleven, a second is against defendant twelve, a third against defendants thirteen and fourteen and a fourth against Nolan Transport, a non party. Each of the motions seeks discovery of certain categories of documents. Essentially, in each motion the plaintiffs are seeking access to the same documents. The documents sought correspond to those listed by the plaintiffs in an issue paper dated the 8th January, 2013, where five categories of documents are set out.

2. The documents set out in that issue paper were as follows:-

(1) All documents relating to the provision of finance by Nolan Transport (Oaklands) Ltd. (whether in the possession of that company or Nolan Transport) for the payment of the deposit on behalf of the Purchasers in respect of the contract for sale, the subject matter of these proceedings.

(2) All documents relating to the financial standing and financial assets of N T Logistics Ltd. for the period 1st January 2005 to date.

(3) All documents contained in the files of Messrs Coughlan Kelly Solicitors of and relating to the purchase of the lands, the subject matter of these proceedings, including correspondence, memoranda, reports of surveyors, auctioneers, engineers, planners and architects and all papers relating to the preparation and drafting of the transfer of the said lands to the first to thirteenth named Defendants.

(4) All documents relating to the purchase by the Defendants or any of them, and John Bradley, of lands at Butlersland, New Ross, immediately adjoining the lands the subject matter of these proceedings.

(5) All documents howsoever arising, relating to matters of planning and planning applications by or on behalf of the Defendants or any of them relating to the proposed development of sites/dwelling houses on the aforesaid lands at Butlersland adjoining the lands the subject matter of these proceedings.

3. Of these five categories, categories two and three have been the subject of a consent order made by Murphy J. on the 5th July, 2012, in relation to the thirteenth and fourteenth named defendants. I have been told that there are issues as to the adequacy of discovery made in relation to categories two and three on foot of the order of Murphy J. and that the plaintiff is unhappy in that regard. Nonetheless, in a situation where categories two and three are already the subject of a court order, an application in respect of categories two and three has not been pressed. Accordingly the issue before me is confined to categories one, four and five.

Background to the proceedings

4. The first named plaintiff is a businessman and resides in County Kilkenny, the second named plaintiff is a limited liability company with registered offices at New Ross, County Wexford. Defendants, one to thirteen are all members of the same County Wexford family, though the twelfth named defendant is now resident in Australia.

5. From the general indorsement of claim it emerges that the plaintiffs' claim is for an order for specific performance of a contract in writing dated the 22nd December, 2005, made between James O'Brien and Matthew Wall and Sons Limited, the plaintiffs of the one part and the thirteenth named defendant, Joan Nolan in trust, as the plaintiffs contend for herself and for the first twelve defendants. The contract in question was for the sale of approximately eighteen acres of development land in New Ross, County Wexford for a total purchase price of €8,122,500.00. Defendants one to thirteen say that the thirteenth named defendant signed the contract in question in trust for the fourteenth named defendant. The fourteenth named defendant is a limited liability company. In the course of argument it has been said it is a company that has not traded and has no significant identifiable assets. A number of draft contracts were exchanged between the party's solicitors which indicated that defendants one to twelve along with defendant thirteen were the purchasers. The plaintiffs argue that the thirteenth named defendant had signed the contract on behalf of herself and defendants one to twelve. They argue that the first mention of the fourteenth named defendant was three years after the contract had been signed and one of the reliefs sought in the plenary summons is a declaration that the fourteenth named defendant was not a party to the contract. It is clear that a very major issue in the case, indeed perhaps the issue will be to identify the intended purchasers, with the plaintiffs contending that against a background of dramatic change in the economic climate the defendants have sought to withdraw the actual intended purchasers of development land and instead nominated as purchaser, a limited liability company which has not traded and has no assets.

6. The request for discovery focuses attention on the question of whether the documents, discovery of which are sought are relevant. The classic statement of how relevance is to be addressed is to be found in the judgment of Brett L.J. in *Compagnie Financiere Du Pacifique v. Peruvian Guano Company* [1882] 11 Q.B.D. 55 at p. 63 where he commented:

"It seems to me that every document relates to the matters in question in the action, which would not only be evidence

upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words “either directly or indirectly”, because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.”

It is not the case that the party seeking discovery has to establish that the documents sought are absolutely necessary but rather that he would suffer a litigious disadvantage by not seeing them. See *Cooper Flynn v. Radio Teilfis Eireann* [2000] 3 I.R. 344 and *Ryanair p.l.c. v. Aer Rianta C.P.T.* [2003] 4 I.R. 264.

7. The useful summary of the principles to which a court should have regard are to be found in the judgment of *Hartside Limited v. Heineken Ireland Limited* [2010] IEHC 3 where Clarke J. referred to an earlier judgment of McCracken J. in *Hannon v. Commissioner for Public Works* (Unreported, High Court, McCracken J., 4th April, 2001) and the following principles emerge:

- (1) The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.
- (2) Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents...
- (3) ...[A] party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other parties documentation is not permitted under the Rules.
- (4) The court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties.

8. I would simply add the observations that the procedure of discovery is capable of being used as a tactic in the war between the parties by a party seeking discovery but can equally be a tactic employed by a party resisting discovery which ought to be made.

9. There are two issues to which I would draw attention as relevant to assisting determining what documents are relevant. First of all, it is appropriate to draw attention to the fact that it appears that the contract deposit of 5% that was payable on signing was paid by way of a cheque drawn on Nolan Transport (Oaklands) Limited now Nolan Transport. Secondly, it is of significance that defendants one to thirteen along with a Mr. John Bradley owned an adjoining strip of land. It appears that at one stage it was agreed that the use of the adjoining strip would be restricted in a certain manner with a view to improving access to the lands to be acquired. This diminution in the use and in consequence of the value of the adjoining lands was reflected in a reduction in the purchase price that had originally been agreed for the purchase lands by €295,000.

10. Bearing those factors in mind and seeking to apply the legal principles to which I have referred I will deal with the application for discovery as follows. Category 1. On the basis that the deposit was paid by Nolan Transport the plaintiffs contend that it is reasonable to assume that this payment was by way of loan paid on behalf of the actual intended purchasers. If documentation discovered establishes or supports a suggestion that the loan was for the defendants one to thirteen, then it will be highly relevant. However, if the documentation does not go that far but does not offer any support for the suggestion that the payment was on behalf of NT Logistics Limited, the fourteenth defendant, that itself would potentially be a matter of very considerable significance. In my view the probability is that documentation falling within this category will be relevant and I will make an order for discovery against defendants one to fourteen. I am aware that the point has been made that the twelfth named defendant is currently residing in Australia and the case has been made that she is distant from the controversy, not just in terms of geography but in terms of having any involvement with other family members in their business dealings. However if, she is distant from the current controversy, then making discovery will not be an onerous task.

11. So far as categories 4 and 5 are concerned, the starting point for consideration of their potential relevance is that the first thirteen defendants, who the plaintiffs claim were the purchasers of the contracted lands were, part owners of the adjoining lands, between them owning 50% thereof. Decisions were taken in relation to the adjoining land which when each parcel of land, the contract land and the adjoining land were viewed in isolation, diminishes the value of the adjoining lands and increased the value of the contracted lands.

12. In these circumstances the plaintiffs would be keenly interested in how the adjoining lands came to be acquired, and what was planned and intended for the lands is entirely understandable. The question arises, their interest notwithstanding, whether what is proposed amounts to an impermissible trawl. It seems to me that the plaintiffs can put the matter well beyond that. This is not a question of seeking documents because they *might* be relevant. The documents sought under these headings are likely to cast light on the key question of the identity of the purchasers of the contracted lands. They are, in my view, documents which may contain information which advances the plaintiffs' case or damages the defendants' case. It may be that the documents, if discovered, will do that directly, or it may be that the documents will do that indirectly by identifying a train of inquiry to be pursued.

13. In these circumstances, I will direct that discovery be made of documents in categories 4 and 5 on the issue paper.

The Position of Nolan Transport

14. Nolan Transport is a non-party. In the ordinary course of events, a litigant should look to the parties to the proceedings in the first instance. In the circumstances, I will defer making an order in relation to Nolan Transport but will adjourn that portion of the motion with liberty to re-enter. It may be that discovery from the other defendants will satisfy the plaintiffs' needs or, it is possible that what is discovered by the other defendants would have convinced the plaintiffs that the further pursuit of the non-party for discovery would serve little purpose. However, for the moment, I will simply make an order requiring discovery to be made by defendants one to fourteen in respect of categories 1, 4 and 5.