

**THE HIGH COURT**

**COMMERCIAL**

**[2014 No. 2229 P]**

**[2014 No. 39 COM]**

**BETWEEN**

**JAMES ELLIOTT CONSTRUCTION LIMITED**

**PLAINTIFF**

**AND**

**KEVIN LAGAN, TERRY LAGAN, JOHN GALLAGHER, IRISH ASPHALT LIMITED AND LAGAN CEMENT GROUP LIMITED**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Costello delivered on 28th day of July, 2016**

1. This judgment is an addendum to the judgment I delivered in this matter on 15th June, 2016, in respect of four motions for discovery and my decision on the costs of those motions. During the course of the exchange of affidavits in relation to the application for discovery brought by the non-IAL defendants, the plaintiff sought discovery of what it referred to as the mirror image of category 3(c) and (d) and category 5(ii) of the non-IAL defendants' motion for discovery against the plaintiff. This is dealt with at paras. 63 – 68 of my earlier judgment.

2. Mr. Daragh O'Donovan, solicitor for the plaintiff, swore an affidavit on 18th April, 2016, in opposition to the discovery sought by the non-IAL defendants. At para. 18 he said, in the event that the Court considered that discovery would be ordered in the terms sought or a variation thereof at category 3(c) and (d) and category 5(ii), then the plaintiff would seek leave to seek discovery from all defendants of:-

*"Documents relating to testing and test results on material supplied to the Fourth or Fifth Named Defendants by quarry owners other than IAL up to the date of the institution of the within proceedings."*

3. This matter was overlooked and was not included in the schedule of categories for decision by the Court and the matter was briefly reargued before this Court on 14th July, 2016. On that occasion Ms. Barrington S.C., counsel for the plaintiff, accepted that it would be sufficient if the category was confined to testing and test results on material supplied to the fourth or fifth named defendants by Cement Roadstone Holdings ("Roadstone") from its Huntstown quarry.

4. Counsel for the plaintiff argued that if the quality of the Roadstone rock used at the Sillogue 4 development and the other developments set out in the schedule to the statement of claim in this case was relevant then so was the defendants' state of knowledge of the product supplied by Roadstone from the Huntstown quarry. In this regard counsel relied upon para. 28(h) of the statement of claim which provides:-

*"IAL never used the Bay Lane quarry to source aggregate for its hot mix asphalt plant at Ballycoolin despite the fact that it was less than 2 kilometres away and was the closest aggregate quarry to the plant. Rather, IAL continued to source aggregate from Cement Roadstone Holdings".*

5. Counsel submitted that the defendants ought not to be permitted to adduce evidence which seeks to show that the Roadstone product used at Sillogue 4 (and possibly other developments set out in the schedule to the statement of claim) did not comply with the requirements of clause 804 or 3 inch down while they have in their possession contemporaneous test results which indicate that in fact the product was not defective in the sense of being unsuitable for the production of clause 804 or 3 inch down. She submitted that if the defendants had in their possession test results on the Roadstone product that showed that the product met or was capable of meeting the requirements of clause 804 or 3 inch down and these results contrasted with the results they had in relation to their own product that this is of relevance both to the objective quality of the two products and to the knowledge of the defendants in respect of the two products and therefore of their knowledge of the inadequacy of their own product.

6. The non-IAL defendants submitted that the issue in the case was not about the quality of the material supplied by Roadstone to IAL. The issue was the quality of the material IAL supplied to the plaintiff and the quality of material supplied by other producers to the plaintiff was relevant if the Court was called upon to draw inferences from the objective test results. The discovery sought was of no probative value to the plaintiff. It was argued that if Roadstone supplied defective material to the plaintiff and compliant material to the fourth named defendant that did not advance the plaintiff's case in terms of establishing dishonest intent on the part of the defendants. Likewise, if Roadstone supplied defective material to both the plaintiff and the fourth named defendant that did not assist in establishing a dishonest intent either. The non-IAL defendants objected that essentially these were corporate documents which ought to be obtained primarily from the fourth named defendant or possibly the fifth named defendant but not from the individual director/former director defendants. It was also objected that the category was not limited as to time other than up to the date of the institution of these proceedings.

7. The fourth named defendant objected to the discovery sought against it on the grounds advanced by the non-IAL defendant. It also argued that the category had not been properly sought as against it. It had been raised in a replying affidavit in the motion brought by the non-IAL defendants. As the fourth named defendant had not sought discovery in terms of that sought by the non-IAL defendants, it in no way could be described as the mirror image of any discovery order made in favour of the fourth named defendant. The plaintiff had not established that it was relevant or necessary and therefore the category should be refused.

## Decision

8. I do not accept that this is a mirror image of the discovery sought and ordered to be made by the plaintiff to the non-IAL defendants. That category is concerned with the test results of materials supplied by producers other than the defendants and which may or may not comply with the requirements for clause 804 or 3 inch down. I held that it was relevant as a court may be called upon to infer knowledge *on the part of the defendants* that material generating certain test results was unsuitable for the production of clause 804 or 3 inch down. If a competitor producing product resulting in similar test results proceeded nonetheless to supply the product as clause 804 or 3 inch down, a court might infer that both parties supplied the product fraudulently or that both parties supplied the product innocently or it might infer that one acted deceitfully and the other innocently. The material was relevant to assist the trial judge in any inferences that may have to be drawn from the evidence relating to the rock originating from or at the Bay Lane quarry.

9. This is different from saying that the defendants' knowledge of test results on products supplied by a competitor, Roadstone, is relevant to either the state of knowledge of the defendants in supplying their own material to the plaintiff or the inference which a court might draw from the test results of materials provided by other suppliers of unbound aggregate actually used on the plaintiff's sites. Therefore discovery cannot be ordered on the basis that the category sought by the plaintiff is the mirror to that ordered to be provided by the plaintiff to the non-IAL defendants. The category has not been argued to be relevant to an issue in the proceedings on any other ground.

10. The question then is whether the pleading at para. 28(h) of the statement of claim changes the argument and renders discovery of these documents relevant to an issue to be decided at trial. In this respect, I note that the fourth named defendant has agreed to make discovery up to the 31st August, 2007, of:-

*"All documents related to the decision by the fourth Defendant to not supply aggregates from Baylane to their Ballycoolin asphalt plant and to continue to rely on aggregate from a third party."*

In the circumstances, I am satisfied that this category of discovery adequately meets the requirements of the plaintiff. While the category does not expressly require the discovery of all testing or test results on the products supplied by Roadstone, it does encompass documents related to the decision of the fourth named defendant to continue to rely on aggregate provided by a third party. If it has test results in its possession or procurement from that time, it is difficult to see on what basis they would not be discovered under this category. The third party referred to was Roadstone and its product came from the Huntstown quarry. In the circumstances, I am not satisfied that the additional discovery sought is relevant or necessary and accordingly, I refuse this additional category of discovery.

## Costs

11. There were four motions for discovery in these proceedings. Numerous categories were sought, categories were revised and new categories were added. Some categories were abandoned or not pursued. Agreements were reached on many matters in dispute which no doubt involved compromises by all parties. It could not be said that any of the motions were improperly brought, not least because they were brought in accordance with the directions timetable ordered by the Court but could not be pursued pending the resolution of motions for particulars of the statement of claim. Between the date of the requests for voluntary discovery and the ultimate hearing of the four motions for discovery there was a considerable evolution of proceedings. In those circumstances, in my judgment, the appropriate order in respect of all four categories of discovery is that the costs up to the date of the hearing of the motions (excluding the costs of written submissions) be costs in the cause.

12. The plaintiff sought the costs of the motions against each of the defendants on the basis that it was necessary to bring the applications in the first place and that it had achieved a measure of success which it would not otherwise have achieved. The defendants argued that in respect of the categories which were actually argued and determined by the Court, the plaintiff was largely unsuccessful and therefore they should be entitled to the costs both of their motions against the plaintiff and of the plaintiff's motion against them.

13. The starting point, of course, is the fact that costs follow the event. It is particularly difficult to identify the event in the context of these complex applications for discovery. Clarke J. pointed out in *Veolia Water U.K. plc. v. Fingal County Council (No. 2)* [2007] 2 I.R. 81 that if a party is obliged to bring an application in order to secure a procedural entitlement which could not be obtained without the hearing concerned that the party will be regarded as having succeeded even if not successful on every point.

14. The fourth named defendant pursued three categories of discovery against the plaintiff and was successful in respect of the three categories. Costs must follow the event in respect of this motion and therefore the fourth named defendant is entitled to the costs of the hearing and the written submissions in respect of its motion which should be limited to half a day.

15. The non-IAL defendants pursued category 3(c) and (d) and category 5(ii), though in truth this was pursued as essentially one category. The non-IAL defendants were essentially successful, though the category ordered was not as wide as originally formulated. It arose late in the day. Nonetheless it cannot be said that they were not successful in the event and they would not have achieved the result sought had they not brought the motion. Accordingly, they are entitled to their costs as against the plaintiff to include any written submissions in respect of their application. The costs should be limited to half a day.

16. In the plaintiff's motion against the non-IAL defendants, six categories ultimately were disputed. Orders were made in respect of two categories. Three were rejected outright, one was largely agreed but the objection of the non-IAL defendants was upheld. In the circumstances, I believe that the fairest result is to make no order as to costs in respect of this motion.

17. The majority of the hearing was concerned with the plaintiff's application for discovery against the fourth named defendant. Ultimately the Court was required to make a decision in respect of 27 categories. Fourteen of the categories were rejected and in respect of five of the categories, the proposal offered by the fourth named defendant was upheld. Thus the fourth named defendant obtained approximately 70% success in opposing the plaintiff's application for discovery. On the other hand, undoubtedly the plaintiff obtained orders for discovery which it would not otherwise have obtained and it was obliged to come to court in order to achieve the result. In the circumstances, I believe the most just order as to costs is that the costs of this motion (including the costs of the written submissions) should be costs in the cause. In the event that the plaintiff is successful in the cause, the plaintiff will be entitled to one day's costs in respect of this motion. In the event that the fourth named defendant is successful in the action, it will be entitled to 3 days' costs in respect of this motion.

18. The costs of the dates taken to deal with the outstanding category of discovery and the costs applications since I delivered judgment on 15th June, 2016, will be costs in the cause.

