Neutral Citation Number: [2009] IEHC 158

THE HIGH COURT

2001 6543 P

BETWEEN

WALTER CROKE

PLAINTIFF

AND

WATERFORD CRYSTAL LIMITED

AND

IRISH PENSION TRUST LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Birmingham delivered the 31st day of March, 2009

1. This matter is before the court in relation to an application for discovery brought by the plaintiff against the second named defendant.

2. In the course of a judgment that I gave on 29th April, 2008, I reviewed the nature and history of the present proceedings and I will not do so again. However, in the context of the motion now before the court I simply draw attention to the fact that the second named defendant has pleaded in its defence that the plaintiff's claim is statute barred and the plaintiff in reply has sought to defeat the statute by pleading that the first named defendant fraudulently concealed the cause of action.

3. The position is that the plaintiff initially sought discovery on 29th July, 2005, that application related to twenty-five categories of documents and then on 9th July, 2008, again sought discovery, this time in respect of six categories. The parties and their advisors have in a truly commendable manner sought to reach agreement in relation to the scope of discovery and have achieved a very considerable measure of success. The result of these efforts is that out of a starting total of 31 categories, albeit with some element of overlap and repetition, that there is now only one category in respect of which there is a fundamental difference of principle between the parties.

4. In respect of a limited number of other categories, the position is that while there is agreement in principle that discovery should be made, the parties are not agreed on the details and specifically are not in agreement in relation to the time duration that is appropriate and also in disagreement as to whether drafts of particular documents are discoverable.

5. The legal principles that apply in relation to these situations are well-known, at this stage and have not been the subject of any controversy between the parties.

6. In particular it is not in dispute that the plaintiff, if he is to succeed must establish in respect of the documents that remain in dispute that they are relevant to the issues as they emerge from the pleadings and are necessary for either a fair disposal of the case or to save costs. This second leg of the test requires that consideration be given to issues of proportionality.

7. The one issue where there remains fundamental disagreement relates to category 6 of the request of the 9th July, 2008. A request was made in these terms,

> "All documents, correspondence, memoranda, minutes or other notes of whatever kind (including all correspondence between the second defendant and its legal advisors and/or attendances taken by the second defendant's legal advisors of meetings and/or discussions between the second defendant and its legal advisors), in the second defendant's possession, power or procurement which came into existence at any time
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> (i) After the plaintiff had left the employment of the first defendant and/or
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> (ii) in particular after the commencement of High Court proceedings by ninety-four plaintiff's against the first defendant and second defendant (and which were settled in or about the 3rd November, 2000), (hereinafter referred to as "the November, 2000 proceedings") in which the first defendant or second defendant averted to, considered and/or assessed the position and/or entitlements of any other former employees who had been made redundant under the redundancy scheme in or about 1992.

8. The reasons advanced for requiring this category of documentation makes clear that the request is put in the context, of the plaintiff's plea that his right of action was fraudulently concealed.

9. The matter that springs from the page is the reference on three occasions to the legal advisers of the second named defendant. It seems clear that what the plaintiff has in his sights is documentation relating to earlier proceedings, the *Gray* proceedings.

10. Mr. Cregan S.C. has urged that the appropriate course is to direct that discovery be made, leaving it to the second named defendant to claim privilege, if so minded, with the possibility that on another day, the plaintiff might seek to challenge the claim for privilege if advanced.

11. It seems to me that such an approach would wholly fail to reflect the central importance of legal professional privilege. The document to which reference is being specifically made is one that is *prima facie* privileged. A similar situation was considered by the Supreme Court in *Bula Limited (In receivership) and Others v. Tara Mines*, [1994] 1 I.R. 494. At p. 498 Finlay C.J. commented "secondly I am satisfied that in any instance where the documents specified are created out of the proceedings and would therefore *prima facie* be exempt from production as privileged documents, that the court should not make an order unless it is satisfied on proof that for some special reason that exemption must be lifted.

12. While strictly speaking it is not the case that the documents sought now were created out of the present proceedings, they are nonetheless clearly of a category that is *prima facie* privileged.

13. In these circumstances I am not prepared to direct discovery at this stage.

14. That is not the end of the matter. It was made clear in argument that it was intended to catch not just the legal documents created but documents of this general character created internally within the second defendant.

15. Having regard to the issue in relation to fraudulent concealment, it seems to me if such documents exist they potentially are of considerable relevance and access is necessary if justice is to be done. I do not believe that the plaintiff's interest in this category amounts to "fishing" and I am prepared to order discovery on the basis of deleting reference to the legal advisors. I will discuss the terms of the order in this regard with counsel.

I turn now to those areas where while there is an acceptance of the appropriateness of discovery, there is disagreement as to its scope. Dealing first with the desire of the plaintiff, that the drafts of certain categories should be disclosed, it seems to me from first principle, that if a document in its final form is relevant, that drafts of that document are potentially of relevance. Access to earlier drafts can assist in interpretation of the document in its final form and give context to that document.

16. The fact that a number of the documents to which the plaintiff has gained access are headed draft or indeed revised draft strongly suggests that there may have been significant amounts of drafting and redrafting. The complexity and indeed sensitivity of the issues under consideration would strongly suggest that such redrafting was very likely to have occurred. I can see no reason why the plaintiff should be confined to accessing the document in its finessed or polished form. However, while at the level of the general, it seems to me that the plaintiff's interest in drafts is not unreasonable, after all discovering drafts should not be particularly onerous on the second defendant and would not involve any significant additional commitment of time or resources, the case is far less compelling in respect of some of the individual categories where the request is made. Accordingly I turn now to consider the individual categories where the question of access to drafts is in issue:

(i) July, 2005 – Category 6. What is in issue here is the plaintiff's employment file. It does not seem to me redrafting and the evolution of a document in to its final form can have any application. I do not propose to direct discovery of any drafts that may exist.

(ii) July, 2005 – Category 9. *Documents in respect of the value of the benefit arising from the plaintiff's pension scheme*.

Again, I cannot see this as an area where drafting or redrafting is likely to have taken place. The documents under this heading would seem to be largely mathematical or perhaps actuarial in character.

(iii) July, 2005 – Category 10. *Documents in respect of information and/or details and/or advices and/or options provided to the plaintiff regarding his pension entitlement.*

Documents in this category are likely to be right at the very core of the case. Here it seems to me that the plaintiff does have a legitimate interest in tracing the history of the document. It appears very likely documents generated in this category will have received the most detailed consideration with words chosen with real care and deliberation. In these circumstances it seems to me reasonable to suppose that drafts of the documents contain information which may assist the plaintiff in advancing his case or damaging the defendant's case. Accordingly, I will direct that all drafts of documents in this category should be discovered.

(iv) July, 2005 – Category 19. *All documents and minutes of all the meetings held between Waterford Crystal and IPT and/or any union representative following the written complaint of Walter Cullen dated the 27th April, 2002*.

It should be noted that this category refers to all documents and minutes. If the reference was to minutes alone, I would not have been minded to order discovery. The minute of a meeting is simply a purported record and ordinarily would not go through a redrafting process of the type that we have been discussing. However, the reference to all documents is wider and it seems to me reasonable to suppose documents of importance were generated which would have undergone extensive redrafting and which would offer a realistic prospect of assisting the plaintiff in his efforts to advance his own case or undermine the defendant's case. Accordingly it is proper the plaintiff should have access to these documents.

(v) July 2005 – Category 23. *All documents which relate to advice or information or communication given by Waterford to IPT*. Once more, these documents are at the very heart of the case. Given the importance and complexity of the matters in issue, it seems virtually certain that there would be substantial redrafting and editing. It seems to me reasonable to suppose that carrying out a forensic examination of the history of the documents offers the reasonable prospect of assisting the plaintiff in the manner described. The potential relevance and importance of such draft documents, if they exist, becomes apparent if one pauses to consider the use to which such drafts would be put in the hands of cross-examining counsel.

(vi) July 2005 – Category 25. *Communication, correspondence and documents from the second defendant to the first defendant and the plaintiff in respect of furnishing to the plaintiff full and accurate information in relation to his entitlements*. The observations I have made in respect of category 23 apply with equal force here and so I will direct discovery in respect of categories 23 and 25.

(vii) July, 2008 – Category 4. It is now agreed that this category overlaps with category 10 of July, 2005 to the extent that the substantive issue as to whether discovery should be made was not the subject of argument. In these circumstances, the ruling I made in respect of category 10 of July, 2005 which was that discovery of drafts should take place will apply here also.

Before moving on from the question of drafts I should say that in respect of category 6, July, 2008, it is also appropriate that discovery of drafts should be made.

Time

17. The period in respect of which discovery should be made is in issue between the parties. In broad terms the second defendant is offering discovery in respect of the period 1990-1994 while the plaintiff says that the appropriate period is 1987-2000 save in the case of category 6 of July, 2008 where the plaintiff argues that it is appropriate that discovery be made right up-to-date.

18. The issue of duration brings into particularly sharp focus, the issue of proportionality and the importance of the avoidance of placing an unnecessarily onerous burden on the defendant.

19. In terms of the scale of the burden, whatever period is decided upon, the dimension and duration of the discovery period will be defined and determined by the pleadings.

20. In this case the first named defendant has pleaded as it was entitled to do, that the plaintiff's claim was statute barred. This gave rise to the plaintiff contending that there had been fraudulent concealment of the cause of action. These two pleas, that the cause of action was statute barred and that the cause of action was fraudulently concealed have broadened the controversy by introducing additional elements. An inevitable consequence of that is that the scope and requirement for discovery is broadened. It also seems necessary to bear in mind that the question whether or not there was fraudulent concealment of the cause of action is in no way marginal to the case between the plaintiff and this defendant but, rather is likely to be one of the central issues in the case, if not indeed the central issue.