Neutral Citation [2015] IEHC 480

THE HIGH COURT

COMMERICAL

[2014 No. 2229 P.]

BETWEEN

JAMES ELLIOTT CONSTRUCTION LIMITED

PLAINTIFF

AND

KEVIN LAGAN, TERRY LAGAN, JOHN GALLAGHER,

IRISH ASPHALT LIMITED & LAGAN HOLDINGS LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered 14th day of July, 2015

1. These proceedings concern a claim for damages for deceit against the defendants in the context of the sale of crush rock products by the fourth named defendant, Irish Asphalt Limited ("IAL"), to the plaintiff. The plaintiff seeks damages for deceit together with a declaration that the plaintiff is entitled to be indemnified by the defendants in respect of any damages that the plaintiff may be held liable to pay or may reasonably pay out of claims arising from the use of the fourth named defendant's products by the plaintiff in a number of construction projects.

2. The defendants brought motions seeking to compel the plaintiff to reply to notices for particulars raised on their behalf. I delivered a judgment on 20th November, 2014, and on 3rd December, 2014, ordered that certain particulars were to be delivered. The plaintiff delivered replies to the particulars ordered and the defendants say that the plaintiff has failed to reply properly to the particulars which were ordered to be provided on 3rd December, 2014. They brought motions seeking various reliefs including a strike out of the proceedings due to the failure to provide the particulars in accordance with the Order of 3rd December, 2014. In the first instance they were seeking orders from the Court directing the plaintiff to comply with the existing Court Orders and furnished the particulars sought and that the Court would adjourn the motions for a period of time to ascertain whether or not the plaintiff properly replied to the particulars. At this point they were not seeking to strike out any part of the pleadings. This judgment should be read in the light of my prior judgment delivered on 20th November, 2014.

Motion of first, second, third and fifth named defendants

3. The question for determination is whether or not the replies furnished, adequately particularised the plaintiff's claim. The requirement is that the plaintiff specifies in sufficient, albeit general terms, the nature of the fraud alleged together with specifying the alleged consequences of the fraud. Quite clearly, this is not a rehearing of a motion for particulars. An Order has been made directing the plaintiff to reply to particulars. In this regard, the judgment of Clarke J. in *Ryanair Ltd. v. Bravofly Ltd.* [2009] IEHC 224 offers useful guidance of the approach this Court should take on this Motion. Having concluded that the defendant had not complied with the Order directing it to provide particulars in relation to software systems which were at the heart of that case, he turned to consider what action the Court should take. He noted that the defendant had *"encountered some difficulty in being able to supply the relevant information, and may be in a position to mend its hand."* He said:-

> *"5.2 In those circumstances it seems to me that the justice of the case requires that Bravofly be given some realistic opportunity to now comply with the order for particulars…*
>
> *5.3 In making an allowance in favour of Bravofly it is, however, important that I point out that there is already in being a court order requiring the relevant particulars to be delivered. It does not seem to me to be appropriate to re-visit that issue at this stage."*

4. These defendants were not satisfied with the replies of 14th January, 2015, in a number of respects and sought to pursue three categories which they say were inadequately replied to:-

> (a) They say the plaintiff has not identified with sufficient particularity the tests alleged to have been failed and of which the defendants are aware.
>
> (b) They say the quantum of the claim remains inadequately particularised.
>
> (c) The applications and locations of where Clause 804 or 3 Inch Down were used in the developments, set out in the Schedule to the Statement of Claim and in respect of which the plaintiff seeks all indemnity from the defendants remain inadequately particularised.

5. The first exercise to be conducted is to ascertain whether or not the particulars have been adequately replied to.

Particular 5.5

6. This particular arises out of the plea at para. 18 of the Statement of Claim as follows:-

> *"The requirement for quarry operators to properly identify and document the raw material source is fundamental. In the case of the Bay Lane Quarry, IAL failed to comply with these requirements governing the production of unbound aggregates in Ireland."*

7. In relation to particular 5.5, the plaintiff was directed to provide particulars of the details of facts relied upon to support the

allegation that IAL failed to comply with the requirements governing the production of aggregates; the minimum test standards alleged not to have been complied with; and full particulars as to how those "*minimum test standards*" have not been complied with. In reply the plaintiff set out in detail the appropriate steps to be undertaken prior to opening a quarry. It points out that the scope of testing depends on the intended aggregate markets and types and that assuming the operator only intends to manufacture aggregates for unbound applications it then lists a suite of initial type tests that should be undertaken. It concludes that either these steps were deliberately or recklessly not undertaken or they were undertaken and the defendant failed to act on the results. They expressly state:-

> *"In support of the allegation that IAL failed to comply with the requirements, the plaintiff will rely inter alia on the fact that no credible initial type testing results were produced on discovery in previous court cases related to the Bay Lane quarry. Furthermore, a geophysical survey was undertaken but despite it yielding unfavourable results with respect to the suitability of the Bay Lane rock as a source for a viable commercial quarry, this information was disregarded and some 8 years later, a quarry went into production at the site despite no credible test results confirming its suitability for that purpose."*

8. The reply included a quote from the judgment of the High Court in the case of *James Elliott Construction Limited v. Irish Asphalt Limited* [2011] IEHC 269 which was approved in the Supreme Court[1], finding that the material was not merchantable or fit for purpose. They referred to the evidence in the case in relation to total sulphur content and stated that:-

> *"From the facts as found in this judgment IAL failed to comply with the requirements governing the production of unbound aggregates."*

9. When pressed by these defendants that this reply did not answer the particular at 5.5, the plaintiff confirmed that it did not intend to rely on any types of tests that were not listed in the reply furnished on 14th January, 2015. It stated that the whole area of testing and appropriate testing regimes is not a simple or straightforward one which can be easily condensed to several sentences. It stated that the obligation on IAL was not restricted to just the tests specifically relevant to Clause 804 and 3 Inch Down and that a quarry operator is required to have detailed knowledge of the nature and characteristics of the rock in the quarry that is the raw material for the products. It pointed out the fact that rock is inherently variable and that rock quarries are highly complex:-

> *"It is possible the type of rock and its characteristics could change on a daily basis. The operator must know what these variations are in advance of production. A quarry attempts to produce a uniform manufactured product from a non-uniform source rock. Essentially, the standards only require a full suite of tests on an annual basis. However, this assumes that the operator fully understands the characteristics of the source rock and its variability…*
>
> *This 'knowledge of the raw material' goes beyond the basic test suite listed in a product specification. There is an obligation on the quarry operator to know all the relevant characteristics, including chemical, mineralogical and physical/mechanical properties of the quarry source rock."*

They also attached an appendix to the letter, a summary of the test results for the *"face samples"* taken at Bay Lane Quarry by IAL in September, 2007 and state that none of the 17 samples tested met the requirements for Clause 804.

10. These defendants claim that this is a totally inappropriate reply to a specific request for particulars. They especially take issue with reliance on quotes from the judgment in the case of *James Elliott Construction Limited v. Irish Asphalt Limited* as being a wholly inappropriate way in which to provide particulars in this case. I accept that a considerable portion of the replies to particulars consists of narrative, much of which is not directly relevant to answering the particular posed.

11. However, I am satisfied that the plaintiff has identified what the minimum test standards are and that these defendants understand the whole panoply of tests which must be satisfied before rock can be considered to meet the requirements of Clause 804 or 3 Inch Down. On the other hand, the plaintiff has not specified how the rock failed to comply with these requirements and has not furnished details of the tests or standards which it says were failed and so has not replied adequately to part of this particular.

Particular 9.2

12. In relation to particular 9.2, the plaintiff was directed to provide particulars of how the rock at the quarry at Bay Lane which was described as argillaceous rock with excessive disseminated pyrite did not comply with the provisions of the NRA testing regime or the European testing regime. The plaintiff has given particulars of the tests which it says were failed. These defendants state that they need to know what are the alleged minimum standards described by the NRA or the European requirements.

13. It is pleaded in para. 24 of the Statement of Claim that Clause 804 is defined by the NRA as a material that can pass a specific set of tests described by European standards (as is referenced in IS EN 13242:2002). It is pleaded that this is the only definition of Clause 804 and the onus is on the supplier to ensure conformity with the standard tests prior to offering for sale products purporting to meet such standards. I accept the plaintiff's submission that adequate particulars had been furnished in this regard and that these defendants know and understand the case they have to meet. In the circumstances, I do not accept that there has been a failure to reply adequately to particular 9.2.

Particular 14.3

14. This particular arises out of para. 28(a) of the Statement of Claim which is headed "*Particulars of Deceit by IAL*". It reads as follows:-

> *"By reason of its experience, that of its board members and that of the Lagan Group generally, IAL was well aware of the nature and quality of rock required for the production of aggregates used in construction and more particularly, Clause 804 and 3 Inch Down. IAL knew from investigations conducted prior to the representation made that the quality of rock at Bay Lane was low grade."*

15. The plaintiff was asked to specify what was meant by rock being "*low grade*". In reply, the plaintiff said that for present purposes in the context of the Statement of Claim that low grade rock means rock that would fail to meet all the requirements contained in IS EN 13285, IS EN 13242, NRA Specification for Road Works Series 800 and associated guidance documents. In other words, the plaintiff is advancing the case that if any one of these tests is failed, the rock is low grade. These defendants were dissatisfied with this reply and requested that the plaintiff identify any failure on the aggregate material to pass tests. The plaintiff was ordered to provide these particulars and on 14th January, 2015, the plaintiff stated that the aggregate produced from the rock at Bay Lane was

low grade because it failed to meet the minimum requirements on all eleven listed test procedures. However, the plaintiffs themselves are aware of the fact that this reply is imprecise as they continue in the reply, as follows:-

> *"The question of what tests were actually failed is also a matter that will be the subject of further particularisation after discovery pursuant to the Court's order that various particulars, including Particular 89 in IAL's Particulars Motion be particularised only after discovery has been made.*
>
> *The plaintiff has indicated to the Defendants its intention to seek inspection from this Honourable Court pursuant to Order 50, r.4 RSC so that it can obtain rock samples from Bay Lane, if the Fourth Named Defendant does not consent to such inspection and sampling. When the results of this testing is received, the Defendants will know with further specificity precisely how the rock fell short of the required tests."*

16. It was argued by these defendants that the plaintiff was ordered to reply to this request for particulars and that it was not entitled to postpone its reply until after discovery had taken place. It was said that it was not open to the plaintiff to rewrite the Order of the Court in this way. It was also submitted that the results of any tests on rock taken from the Bay Lane quarry in 2015 cannot establish that the rock in situ and which was tested by the IAL prior to, and during, the production of Clause 804 and 3 Inch Down was low grade and would fail to satisfy the specifications for Clause 804 and 3 Inch Down. This latter point relates to the substance of the reply and the evidence which the plaintiff will lead at trial. It does not address the question as to whether or not the plaintiff has given adequate particulars of the case it wishes to advance.

17. The plaintiff was ordered to reply to the particulars prior to any discovery in the case and therefore, this part of the reply to particular 14.3 cannot be an answer to the question as to whether this particular has been adequately answered to date. It must be assessed in the light of the answer actually furnished.

18. This answer states that the aggregate produced from the rock at Bay Lane was low grade because it failed to meet the minimum requirements of all of the following test procedures which were then listed in some considerable detail. That is the case which the plaintiff wishes to advance. It is not for the defendants to ask which of these many tests the plaintiff says was failed. The plaintiff has clearly stated that its case is that all of these tests were failed. It is not specified why each of these tests had been failed. The particular has adequately been replied to in respect of what tests were failed but not as regard to why the tests are alleged to have been failed.

Particular 30.1

19. The particular raised at 30.1 related to the quantum of the plaintiff's claim. The plaintiff was directed to give full particulars of all loss suffered to date including the nature of the loss and the amount of the loss and when the loss was incurred. In its reply the plaintiff said the losses suffered had not yet been quantified but said that they came under the following headings:

- Reduction in net shareholders equity.
- Loss of profit.
- Losses incurred due to premature disposal of plant and equipment.
- Reinvestment of Sillogue 4 claims amount and contractors excess in pyrite remediation.
- Reinvestment of monies received to date on foot of Ballymun Youth Facility proceedings in dealing with pyrite.
- Estimated losses associated with Ballymun Regeneration Limited over and above loan.
- Losses suffered to date are also reflected in the plaintiff's taking of a loan from Ballymun Regeneration Limited.

The plaintiff also stated that it was a substantial general building contractor with a turnover, in excess of €69million for the year ended 31st January, 2008, and therefore, the company had the ability to pre-qualify for large projects. It lost this ability as a result of matters complained of in these proceedings.

20. In a further reply dated 13th February, 2015, the plaintiff estimated the losses of the ability to pre-qualify for construction work as being in the region of €12million. It is said that this is the estimate of a cost of acquiring a debt free construction company with zero asset value that would have the ability to pre-qualify for contracts and generate profitable work, which ability the plaintiff had lost as a result of the pyrite crisis. It also claimed there was a reduction in the net asset value of the plaintiff between 31st January, 2008, and 31st January, 2014, amounting to €10,609,046.00. It is said the plaintiff needs to engage an expert to properly quantify its claim to a loss of profits caused as a result of the pyrite crisis. It indicates that no such expert has presently been engaged. It estimates that losses incurred due to premature disposal of plant and equipment to be in the region of €1million.

21. It is clear from the terms of the replies, this is not in any sense a detailed statement of the losses alleged to have been suffered by the plaintiff to date. Despite the fact that these proceedings were nearly two years in preparation and they were admitted into the Commercial Court by an Order of 24th March, 2014, as of February, 2015, the plaintiff has not engaged in an expert to assist in quantifying part of its claim. The plaintiff indicated that it was of the view that the question of the calculation of damages would arise later in the case and, by inference, that it believed that there would be a modular trial and the issue of damages would be left over all issues of liability have been determined. While this may indeed be an appropriate manner to proceed in this case, this suggestion was never maintained when the original Motion was argued before me. I accept that this particular has not been properly replied to and, in effect, the plaintiff seeks to postpone its obligations to provide the particulars the subject of the Order of 3rd December, 2014.

Particular 8.3

22. In particular 8.3, these defendants requested the plaintiff to properly particularise where, by reference to each project in the Schedule to the Statement of Claim, each of Clause 804 and 3 Inch Down had been used. In the reply to particulars, the plaintiff stated that Clause 804 and 3 Inch Down were used in each of the projects. In respect of 14 of the 16 projects, Clause 804 and 3 Inch Down was used, inter alia, on the following applications:

- under floor slabs;

- site works;
- drainage; and
- site services, car parks, roads and footpaths, filling in foundations and rising walls.

23. In essence, that is reverting to the answer previously given on 28th April, 2014, where it was stated that 3 Inch Down tends to be used in the lower levels as infill with Clause 804 being used in the upper levels. Clause 804 was used as sub-base under roads, driveways, kerbs and footpaths and in service trenches.

24. I accept that the reply does not differeniate between where Clause 804 is used or 3 Inch Down is used, or whether they are both used together. However, the plaintiff has offered to provide these defendants with the drawings in respect of each of the projects indicating the materials specified by the project engineer. It is to be borne in mind that this information relates to the plaintiff's claim for an indemnity in respect of future losses which it anticipates it will suffer in the light of damage which it is anticipated will arise in these projects from pyritic heave. It should not, therefore, be necessary for these defendants to analyse the entirety of each of the 16 projects to ascertain where precisely each of the products was employed. If claims arise out of any of the 16 projects, the information necessary to ascertain whether the particular damage arose in an area or location where Clause 804 and/or 3 Inch Down was used should be ascertainable from these plan, specifications and drawings. To ask the plaintiff at this stage in the proceedings to provide greater further particularity than has been provided by the combination of the answer and the offer of the drawings for inspection is unnecessary and oppressive in order for the plaintiff to particularise its case and these defendants to understand it. This particular has, in the circumstances, been adequately replied to.

Particular 23.1

25. The last category of reply which these defendants challenged was particular 23.1 which provided particulars of the deceit alleged against these defendants.

26. This arises out of para. 28(c) of the Statement of Claim which states as follows:-

> *"In particular the First, Second and/or Third Named Defendants were actively involved in all decision making in relation to IAL and knew of test results performed on the rock and yet authorised the misrepresentations."*

27. The plaintiff was asked to provide particulars of each and every test result that each of the first, second and third named defendants was alleged to have been aware of. They wished to know what tests were carried out and which they individually knew failed. The plaintiff provided very lengthy replies to this particular on both 14th January, 2015, and 13th February, 2015. Much of the reply was directed towards the plaintiff's assertion that each of the three defendants were aware of the presence of pyrite in the rock at Bay Lane. The reply states:-

> *"The plaintiff also alleges that the First, Second and Third Named Defendants were aware of testing on the core samples which had been extracted by GWP…[the first named defendant] was aware of the test results on the samples taken by Geoffrey Walton, and of all other test results. The plaintiff indicated that it intended to rely on the Celtest results which were discovered in the Menolly proceedings."*

They stated:-

> *"It is alleged that each of the First, Second and Third Named Defendants was aware of the results of surveys and tests carried out by BMA on the Bay Lane site in 1995…*
>
> *The Plaintiff also alleges that each of the First, Second and Third Named Defendants was aware of the results of tests conducted on the 'Lansdowne site' [a related site] 9as referred to in the Statement of Claim), which tests were carried out in 1983, 1998, 1999 and 2001. In light of the results of these tests… these Defendants knew that Bay Lane was not suitable to provide Clause 804 or 3 inch down…*
>
> *The First, Second and Third Named Defendants were also aware of the findings of a published 1988 paper by Jones et al to the effect that dominant rock in the Bay Lane area was mudstone."*

The reply referred to tested samples of Bay Lane aggregates carried out on behalf of customers dated 2006 which the plaintiff alleges were made known to these defendants. It also alleges that the first, second and third named defendant were aware of all other tests and survey results referred to in the course of the Menolly proceedings and were aware of testing conducted associated with their defence of those proceedings.

28. From the above, it is clear that while the plaintiff has been at pains to emphasise the awareness and knowledge of these test results by the first, second and third named defendants, it nowhere actually identifies any test result. The one exception is the reply at 23.1.10 where the plaintiff says that the first, second and third named defendants were aware of the results of environmental testing from in or around 2005 on discharge water from the quarry which showed excess sulphate concentrations. The plaintiff stated that they would provide further particulars after discovery. However, the order was to provide these particulars as they related to the plaintiff's allegation that these defendants knew of test results performed on the rock and yet authorised fraudulent misrepresentations.

29. The plaintiff in the course of its reply also indicate that:-

> *"…the true result of any test results of rock actually sourced from Bay Lane would have either revealed that it was unsuitable for use as Clause 804 or 3 Inch Down, or would have made it reckless for anyone to hold the product out as Clause 804 or 3 Inch Down. To the extent that test results purported to indicate otherwise, the Plaintiff alleges that these were not genuine results. Expert evidence was adduced in the Menolly proceedings tending to cast doubt on the veracity of certain test results purporting to be the results of testing on Bay Lane rock. Owing to the concealed nature of fraud the Plaintiff is not at present aware how any such results were falsified, although this may have been due to the use of material from other IAL or Lagan Group quarries…"*

On 13th February, 2015, the plaintiff replied stating:-

"Regarding test results not being genuine, it is clear that the Plaintiff is contending that if any test results are produced on discovery or in evidence which indicate that the rock taken from Bay Lane was suitable for use as Clause 804 or 3 Inch Down that those results are not genuine in light of what is now known about the quarry, and indeed what is found to be the case by the courts.

The [plaintiff] specifically refers to the testing on core samples taken by GWP in 1999. What was stated to be the results of those tests on core samples is not compatible with a summary of the 2007 Quarry Face sample testing which tested rock samples from around the full perimeter of the Bay Lane Quarry and confirmed that all samples tested failed at least 2 of the basic Clause 804 tests. Further, the stated tests on core samples are also incompatible with the extensive testing carried out by the Plaintiff's experts on aggregate supplied from Bay Lane and presented at previous court proceedings."

30. Undoubtedly, these are serious and new allegations of deceit and fraud. The plaintiff is perfectly entitled to bring a claim based on this fraud if it so wishes. However, it must be properly pleaded and it is not appropriate to introduce it in the fourth version of a reply to particulars arising out of the Statement of Claim dated 4th February, 2014. The conclusion I have reached is that the plaintiff has not adequately answered the particular raised and has introduced a new plea of fraud with replies to particulars.

Motion of the fourth named defendant
31. The fourth named defendant said that seven of the particulars which the plaintiff was directed to furnish, had not been adequately or properly replied to. These were numbers 42, 43, 55, 69, 72, 88 and 93.

Particular 42

32. At particular 42, the plaintiff was requested to provide particulars of the dates upon which the plaintiff alleged that the material quarried and produced by IAL at Bay Lane failed specified industry standard acceptance tests and/or criteria and how the material is alleged to have failed those tests. The reply of 14th January, 2015, stated:-

"The aggregate fails the specified industry standard acceptance tests for Clause 804 and 3 Inch Down as follows:-

(a) In 1995 the results of a geophysical survey at the site by BMA indicated the rock to be argillaceous and unlikely to be suitable as a construction aggregate.

(b) In 2000 when the rock core from Bay Lane was tested.

(c) From 2003 onwards, the crushed rock produced at Bay Lane would have failed the relevant testing (if carried out)."

33. The reply continued on by referring to the decision of Charleton J. in *James Elliott Construction Limited v. Irish Asphalt Limited* in the High Court and the judgment of the Supreme Court. The plaintiff says that the findings of the High Court and Supreme Court support the "*grave suspicions on the part of the plaintiff regarding IAL's evidence of testing*" and they noted that Charleton J. did not accept that the tests IAL produced for 2003 and 2004 were carried out on the same material seen and tested by the plaintiffs. The defendant was referred to paras. 15, 16 and 18 of the Supreme Court judgment. The reply also stated that the rock failed many of the relevant tests in 2007/2008 when IAL tested what they referred to as "*face samples*" from the quarry and that it failed most of the "*relevant tests*" performed from 2007 onwards on samples of the aggregate supplied by Bay Lane and recovered from houses and apartments, from industrial/commercial buildings and from institutional buildings where it was used.

34. The reply goes on to state:-

"With respect to the industry standard acceptance tests that would have demonstrated the failure of the Bay Lane aggregate to meet a suitability requirements for Clause 804 and Three Inch Down, refer to the second list under reply 18 above for the initial type testing and refer to the list of tests under reply 41 above for those tests relevant during the period of aggregate product productions. The aggregate failed by not meeting the minimum test result requirements referred to in the relevant standards."

35. The defendant complains that these replies leave the issue as to what tests the rock is alleged to have failed completely unclear. Certainly, it is most unusual to see references to paragraphs in a decision of the Supreme Court in a reply to notice for particulars. It is also important to note that a new allegation of fraud was introduced in this reply: a falsification of test results which were adduced in evidence in the case of *James Elliott Construction Limited v. Irish Asphalt Limited.*

36. Particulars of the deceit which is the core of the claim are to be found in para. 28 of the Statement of Claim. On balance, in my opinion, the fourth named defendant had not been furnished with adequate particulars to understand the case it has to meet and to defend the case. The answer to the request to identify precisely how the material is alleged to have failed the standard industry tests has not been answered other than in a generic way.

Particular 43

37. At particular 43, the plaintiff was directed to provide full and detailed particulars of the results of all tests carried out and which it is alleged the material consistently failed. The answer referred the defendant to the reply to particular 42 and 51. Particular 51 was directed towards the knowledge of the defendant in the context of an allegation that it fraudulently misrepresented the quality of the product or was reckless as to whether the representation was true or false. In replies furnished before the Order of 3rd December, 2014, it had identified some tests which it alleged the material failed to satisfy, namely the total sulphur, magnesium sulphate, soundness and (prior to May, 2004) 10% fines value. It specified that the minimum soluble sulphate content should have been less than 0.2% and the total sulphur content should have been less than 1.0%. As these were said to be non-exhaustive and examples of where the rock from Bay Lane quarry failed to meet the relevant standards, the plaintiff was directed to provide further and better particulars as sought. In reply up to the particular as ordered, the plaintiff said the test results had not been provided to date but will be sought through the discovery process. They state that the only independently sampled and tested samples of Bay Lane aggregate carried out on behalf of customers during the production at Bay Lane (and the plaintiff's knowledge) were dated 2006 and were reported in the *Menolly* transcripts (a reference to a different trial) the test results were presented in detail in the *Menolly* transcripts on days 87 and 123. The plaintiff says that they identified the standards and the precise results of which they presently are aware. They have pointed to the existence of other results and alerted the defendants to the fact that they do not accept the rest results in evidence in the case *James Elliott Construction Limited v. Irish Asphalt Limited*. It is as comprehensive answer as they can provide at this stage of the proceedings.

38. The fourth named defendant argues that on its face and in substance this does not and cannot amount to a reply to the particulars sought. I accept this submission. I also accept the submission of counsel for the plaintiff that the plaintiff has gone as far as it can go based on its current state of knowledge in the replies it has furnished to date. However, it is pleaded in the Statement of Claim that the aggregate quarried at Bay Lane consistently failed industry standard accepted tests for Clause 804 and/or the criteria for 3 Inch Down. Having made that plea, I directed that the fourth named defendant was entitled to a reply to the particular raised. In my judgment, despite the lengthy recitation of evidence which the plaintiff will no doubt seek to lead at trial in this regard, it has not, in fact, adequately answered the particular raised.

Particular 55

39. At particular 55, the plaintiff was ordered to provide full and detailed particulars of the material facts by which it is alleged the fourth named defendant knew (from investigations conducted ***prior*** to the alleged representations) that the quality of rock at Bay Lane was low grade and particulars of the precise test(s) and the minimum test standards for an unbound aggregate that it is alleged rock must fail in order to be considered "*low grade*". The reply to this request was as follows:-

> *"The geological information available about the source rock at Bay Lane from 1995 onwards (including the BMA tests, mapping and reports by the Geological Survey of Ireland and Jones et al paper), the testing on the core in 2000, and testing carried out after 2006 by IAL, by a number of customers, and by HomeBond all confirmed that rock from Bay Lane was not construction quality. The results of the initial type testing as described in particular 18 above indicated the unsuitability and 'low grade' of the rock at Bay Lane for the production of construction aggregates. The results obtained from the series of tests listed in particular 41 above confirmed that the rock at Bay Lane was not of suitable quality for the production of aggregate meeting the requirements of NRA Clause 804 material or for civil engineering construction applications in accordance with IS EN 13242."*

40. This was elaborated upon by reference to the results of samples taken from the Bay Lane quarry in September, 2007. The fourth named defendant says that a reference to samples taken in September, 2007 cannot afford an answer in relation to matters it is alleged IAL knew from investigations conducted prior to 2003 (when the fourth named defendant offered Clause 804 and 3 Inch Down from the Bay Lane quarry to the industry). It is said that it was seeking clarity and that this reply did not bring clarity to its original query. It is said there was no minimum test standards for an unbound aggregate that it was alleged that rock must fail in order to be considered "*low grade*".

41. The plaintiff says that it has provided adequate replies to this particular. It has specified certain pre-2003 tests and no real issue has been taken with that by the fourth named defendant. It says that post 2003 tests are relevant as the representation continued for the duration of the supply of material to the industry as Clause 804 and/or 3 Inch Down. Whether the fourth named defendant is correct in its objection, nonetheless, the plaintiff has provided the information which it will rely upon when it seeks to advance its case at trial and has replied to the particular raised in relation to the dates of the tests concerned.

42. The plaintiff was also asked to identify the precise tests and the minimum test standards for an unbound aggregate rock that it is alleged rock must fail in order to be considered to be low grade. The answer referred to replies to two other requests for particulars which detailed the tests and minimum test standards applicable to the two products. The fourth named defendant complained that these were not particulars directed towards the results of tests but rather towards the applicable tests and therefore did not provide an answer to the question raised. The particular asked the plaintiff to state the minimum test standards for an unbound aggregate that the plaintiff alleges rock must fail in order to be considered low grade I am satisfied in the circumstances that this particular has been properly replied to and that the thrust of the complaint of the fourth named defendant in truth relates to the substance of the reply rather than the adequacy of the reply.

Particular 69

43. At particular 69, the plaintiff was directed to provide full and detailed particulars of the material facts upon which the plaintiff intended to rely in support of the allegation that the fourth named defendant knew that product placed on the market by it would lead to serious structural damage to buildings in which it was used and:-

> *(i) "Please provide full and detailed particulars of the results of the testing undertaken on behalf of 'Lagan' on 'quarry face samples' taken from the perimeter of the Bay Lane quarry in September 2007.*
>
> *(ii) Please identify the provisions of the European Standard alleged to impose on aggregate suppliers the responsibility to establish total sulphur and acid soluble sulphate contents of construction aggregates.*
>
> *(iii) Is it alleged that pre-quarry development testing was not carried out by the Fourth Defendant? If so, please identify the precise test(s) the Fourth Defendant should have carried out.*
>
> *(iv) Is it alleged that production testing on aggregate was not carried out by the Fourth Defendant? If so, please identify the precise test(s) the Fourth Defendant should have carried out."*

44. In reply, the plaintiff stated that IAL sold aggregate to the plaintiff as Clause 804 and 3 Inch Down when it was neither of those products. They rely on an excerpt from an expert report prepared in the *Menolly* proceedings summarising test results and on the findings of Charleton J. in *James Elliot Construction Limited v. Irish Asphalt Limited*. They also referred to a geophysical survey undertaken apparently in 1995 which they said yielded unfavourable results with respect to the suitability of the Bay Lane rock as a source for a viable commercial quarry. They say this information was disregarded eight years later when the quarry went into production.

45. In answer to the four subparagraphs of this particular, they state:-

> *"(i) These test results are in the possession of Lagan. Copies were provided in discovery in the Menolly proceedings. Evidence related to these test results was presented in that case. This evidence is described in the Court Transcripts, see days 127, 128 and 130.*
>
> *(ii) IS EN13242:2002*

- *Section 6*

NSAI S.R. 21:2004

- *Section 2.4*
- *Section 3.4*
- *Annex A*
- *Annex B*
- *Annex C*
- *Annex D*

(iii) Refer to the tests set out in particular 18 above.

(iv) The allegation is that if production testing was carried out then it was not done properly or it was done properly and the results were disregarded. For production testing for the supply of Clause 804 and 3 Inch Down, refer to the list of tests in particular 41 above. The replies to be provided after discovery at 53, 54, 87 and 89 will also be relevant here."

46. The fourth named defendant argues that this does not answer the queries at (i) and (iv) as directed. They say it is inappropriate to be obliged to search through transcripts in search of information that the plaintiff has been ordered to provide. They say the plaintiff is referring back to the indiscriminate and non-exhaustive lists of tests provided and that this does not answer the query. They say that neither report contains any reference to the results of testing undertaken on behalf of "*Lagan*" on "*quarry face samples*" taken from the perimeter of the Bay Lane quarry in September, 2007. They do not say that they do not have their own test results.

47. The plaintiff says that it does not have the result of the tests which were undertaken on behalf of Lagan but it has referred the fourth named defendant to the *Menolly* proceedings and the test results given in evidence on three days of hearing. In the circumstances, where the plaintiff does not have the copy of the fourth named defendant's own test results and the plaintiff makes specific references to the results as discussed in a transcript in a case in which the fourth named defendant was a party, I believe that the fourth named defendant has received adequate information in reply to particulars in this instance to know and understand the case it has to meet, albeit that it has been provided to it in a somewhat unorthodox fashion. In accepting the adequacy of this reply I am not to be taken as holding in general that a reply to particulars referring to an opponent's own information and a transcript of evidence in a separate case in which the litigant was not a party is a proper or appropriate way to reply to a request for particulars, whether or not a court has ordered the reply to the particular in question. The plaintiff has clearly indicated that after discovery it will provide particulars presumably in a more orthodox fashion. However, insofar as the test I should apply at this stage is whether or not adequate information has been given to the fourth named defendant by the plaintiff of the plaintiff's case, I am satisfied in relation to (i) that this is so.

48. In sub-paragraphs (iii) and (iv), the fourth named defendant asked the plaintiff whether it was alleged that testing was not carried out either prior to the development of the quarry or during production. It is the fourth named defendant who framed the particular in that way. The plaintiff replied in the alternative as it maintained that it did not and could not know whether the tests were actually conducted and the results ignored or no relevant or appropriate tests were conducted at all. I have accepted that the plaintiff is entitled to advance its case in this way prior to discovery. I have also accepted that it is entitled to postpone giving particulars of pleas where it makes its case in this way until after discovery given the nature of the claim in fraud and deceit. Simply because the fourth named defendant asked in a request for particulars for the plaintiff to specify whether or not it is alleging that certain tests were or were not conducted, it cannot thereby force the plaintiff into making a case it did not seek to advance and which was not pleaded by it in the first place and which I have held they may postpone (selecting between either of the two alleged alternatives) until after discovery. In the circumstances, I refuse to direct that the plaintiff provide further replies to this particular, 69.

Particular 72

49. At para. 28(d) of the Statement of Claim, the plaintiff pleaded that it was known at the time that rock containing disseminated pyrite could not or should not be used in Clause 804 and/or 3 Inch Down and as a minimum required more detailed investigation and specific testing as recommended in writing by GWP. The fourth named defendant asked for particulars concerning the basis for the alleged belief. In reply, the plaintiff referred to the fact that sulphates in soil and aggregate are damaging to concrete and that GWP had advised the fourth named defendant to undertake specific testing to further evaluate the suitability of the rock for the manufacture of aggregate. Arising out of this reply, the fourth named defendant asked the plaintiff to identify:-

"(i) Please identify the test for sulphates referred to.

(ii) Please identify the specific testing alleged to have been advised by GWP.

(iii) Is it alleged that such test(s) were not carried out by the Fourth Defendant?"

50. The fourth named defendant took issue with the replies to (ii) and (iii). In reply to (ii), the plaintiff quoted from a document prepared by Mr. Geoffrey Walton which was extracted from the Menolly transcripts as follows:-

"Testing as to durability of selected samples in addition to the usual binding, stripping and strength testing (AIV, 10% fines). *This is needed since the clay content and the pyrite might lead to freeze-thaw and wetting-drying breakdown."* (emphasis added)

51. The plaintiff continued the reply by stating that since pyrite is the main source of sulphur in the rock, the notification of disseminated pyrite in the rock from Bay Lane required testing to establish the levels of water soluble sulphate and for acid soluble sulphate and total sulphur. The fourth named defendant complained that this response failed to identify specific testing alleged to have been advised by GWP. In a further response, the plaintiff said that the quote from GWP specifically pointed out that the aggregate contains clay and pyrite and testing to confirm durability is requested. It then refers to specific tests set out in reply to particular 49 (which does not relate to any advices provided by GWP) and to the document referred to in sworn testimony in the

Menolly proceedings and says that the specific tests are referred to in that document. The plaintiff also refers to the tests in reply to (iii) which they say ought to have been set out under (ii).

52. In reply to (iii), the plaintiff states that the tests were:-

- *"Method for qualitative and quantitative petrographic examination of aggregates*
- *Tests for general properties of aggregates – procedure and terminology for simplified petrographic description*
- *Tests for chemical properties of aggregates and soils*

  acid soluble sulphate

  total sulphur and

  water soluble sulphate."

53. In the reply to (iii), the plaintiff does not state whether or not the tests were carried out by the fourth named defendant. It alleges that either the tests were carried out and the results were disregarded or the tests were not carried out at all. It refers to the replies which will be delivered in particular 87 and 89 which is to be delivered after discovery has been made. It said that based on the results of these tests further testing was warranted.

54. The plaintiff says that in reply to (ii) they have quoted from the Mr. Geoffrey Walton document which stated that testing as to durability of selected samples was required in addition to the usual binding, stripping and strength testing. As the particular relates to what was recommended by Mr. Walton and this is a quote from his document, I am satisfied that this particular has been adequately replied to. Insofar as there may be a lack of particularity in the answer, it is attributable to the original document prepared by Mr. Walton and not to the replies furnished by the plaintiff.

55. In relation to (iii), the plaintiff had responded to the request for particulars raised by the fourth named defendant in the alternative. For the reasons set out in dealing with the reply furnished in relation to particular 69 I am satisfied that the plaintiff is entitled to reply in the alternative to this particular but that it must give further particulars of its allegations after the discovery is furnished in this case.

Particular 88

56. In para. 28(h) of the Statement of Claim, it was pleaded:-

> *"IAL failed to implement any or any appropriate system of testing or quality control during the operation of the quarry at Bay Lane to ensure the products sold from Bay Lane as Clause 804 or 3 Inch Down conformed with the relevant criteria or suitable for construction purposes".*

The plaintiff was asked to provide particulars of the testing and/or quality control it is alleged the fourth named defendant should have implemented. In reply, the plaintiff referred to the reply to particular 84 where it was asked to identify the testing regime it is alleged to the fourth named defendant should have implemented. This reply comprises an extremely lengthy and detailed answer which deals with the relevant standards and standard practices that the plaintiff says ought to be complied with. Some of them are extremely generic, for example: building regulations, technical guidance documents C and D, Department of Environment (current version at the relevant times); Department of Environment and Local Government *"Recommendations for Site Development Works for Housing Areas"*, 1998; HomeBond, *"House Building Manual"* (relevant for products used in house building in Ireland); and relevant Irish, British or European laboratory test standards as referred to in those documents. It says that the reply is without prejudice to its position that the matters named are matters for evidence.

57. The fourth named defendant accepted the reply to particular 84 as an answer to that query. It does not accept that it is an appropriate reply to particular 88. It says it is confusing as this makes no distinction between preproduction and production systems and regimes.

58. In reply, the plaintiff says, in essence, there was no distinction between particular 84 and particular 88. The fourth named defendant asked the plaintiff to make a distinction between the appropriate regime for preproduction for a quarry and the appropriate regime and system for when a quarry is in production. If it is the plaintiff's case that they are the same, then they should be clarified. If the plaintiff says that there is a distinction, then the differences between the two should be fairly stated. While the plaintiff may say that the matter is clear, the fact that particular 88 is replied to by reference to particular 84 allows for scope for confusion in this regard. In the circumstances, I believe it is appropriate to clarify the distinction (if any).

Particular 93

59. The final particular that the fourth named defendant claims was not adequately answered in accordance with the order of the court was number 93. In para. 28(h) of the Statement of Claim, the plaintiff pleads:-

> *"Between December 2006 and February 2007 IAL was notified by two separate customers who had commissioned independent testing on aggregate supplied as Clause 804 from the Bay Lane Quarry, that the material supplied failed to meet the specified test requirements."*

The plaintiff was ordered to provide the results of the independent testing alleged to have been commissioned by the two customers between December, 2006 and February, 2007.

60. In reply, the plaintiff stated:-

> *"Testing initiated by customers of IAL showed that the results for Particle Size Distribution, Liquid Limit and Plastic Limit testing were outside the acceptable limits for Clause 804. These tests were carried out on aggregate supplied by IAL from the Bay Lane quarry or material sold as Clause 804. The details of the actual test results will require discovery and possibly non-party discovery. Further information on the circumstances of the testing are provided in the Menolly Transcripts."*

61. When they were challenged that this particular was to be answered prior to discovery, the plaintiff replied that it was directed to provide particulars of the results of independent testing and the plaintiff had provided particulars of the tests and also stated that those tests were failed. It was said that this was consistent with the finding of the High Court and Supreme Court in *James Elliott Construction Limited v. Irish Asphalt Limited*. It attached to its reply a letter from HomeBond dated June, 2007, that was sent to all their home builder members requesting that they put their aggregate suppliers on notice of expansion problems with respect to aggregate containing pyrite. They also attached a letter from Unicorn Homes Ltd. sent to IAL and received by IAL on 12th July, 2007.

62. In submissions, the plaintiff stated that it could identify the customers (as it had previously) but it did not have the test results and therefore could not furnish the replies as directed until after discovery and possibly third party discovery. It, therefore, accepts that this particular has not been replied to at this stage in the proceedings.

Conclusion

63. The plaintiff has not furnished adequate replies to particulars raised by the first, second, third and fifth named defendants at numbers 5.5, 14.3, 30.1 and 23.1 as I have held above. It has failed to provide adequate replies to particulars raised by the fourth named defendant at particulars 42, 43, 88 and 93. The defendants have agreed that the plaintiff in the first instance should be afforded more time in which to reply adequately to these particulars. This is in accordance with the decision of Clarke J. in *Ryanair Ltd. v. Bravofly Ltd.*, which I have cited at para. 3. In the circumstances, I will hear submissions from the parties as to the appropriate order to make on the Notice of Motion in the light of these findings. I will also hear submissions from the parties in relation to the necessity or otherwise for the plaintiff to amend the Statement of Claim in relation to a plea of fraud based upon the alleged falsification of test results used in other litigation and which was referred to in replies to notices for particulars raised by each of the defendants.

[1] [2014] IESC 74