THE HIGH COURT

COMMERCIAL

2015 No. 8144P

BETWEEN:

LAGAN CONSTRUCTION GROUP HOLDINGS LIMITED, LAGAN CONSTRUCTION GROUP LIMITED. LAGAN CONSTRUCTION LIMITED AND CHARLES BRAND

AND

BEN MCARDLE LIMITED

AND BY ORDER

CITYNET INSURANCE BROKERS

Defendants

JUDGMENT of Ms. Justice Costello delivered on the 30th day of June, 2017

Introduction

1. In this case, the first named defendant made an application for an order for further and better discovery and for an order pursuant to O.31, r.20 (3) of the Rules of the Superior Courts to compel the second defendant to swear an affidavit in relation to a document which is central to this dispute. O.31, r.20 (3) states: -

> "*The Court may, on the application of any party to a cause or matter at any time, and whether an affidavit or list of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them*."

Background

2. Prior to the 1st October, 2013, the plaintiffs instructed the first named defendant (who are insurance brokers) to procure for the plaintiffs and their subsidiaries, including the third and fourth named plaintiffs, a policy of professional indemnity insurance in respect *inter alia* of their civil engineering business. The plaintiff required two layers of excess policies to be underwritten on the Lloyds market. The first named defendant is not licensed on the Lloyds market and so used a second insurance broker who was licensed to Lloyds, the second named defendant to place these insurance policies.

3. The Primary Layer was placed by the first named defendant as the plaintiffs' broker with Royal Sun Alliance Insurance plc. The first named defendant instructed the second named defendant to place both excess layers on the Lloyds market for the period from the 1st October, 2012 to the 30th September, 2013. The second named defendant placed the first layer but failed to place the second layer with CNA Insurance Europe Limited ("CNA")

4. After October, 2012, the plaintiffs changed brokers and appointed Lockton Companies LLP ("Lockton") to be their new brokers. On the 10th April, 2013, Lockton emailed the second named defendant looking for a cover slip for the second excess layer. This was said to have been placed with CNA.

5. The second named defendant placed cover with CNA on the 18th April, 2013, but this was not retrospective and the policy was endorsed to that effect. Thus, there was no cover on this policy for the period 1st October, 2012 to the 18th April, 2013. It appears that the second named defendant sent the first named defendant a copy of the coverslip on the 18th April, 2013, but it was not dated or endorsed to show that there was no cover in place prior to the 18th April, 2013.

6. In the course of their business, the plaintiffs designed and constructed a number of windfarms. On the 23rd January, 2013, the first named plaintiff became aware that there were allegations of damage in respect of one of these developments which could give rise to a claim against some or all of the plaintiffs. The first named plaintiff duly notified Lockton of the fact that a claim may be made on the policies. Subsequently it notified Lockton of four other possible claims in respect of other windfarms it had designed and constructed.

7. On foot of these notifications of possible claims by some or all of the plaintiffs on the policies, the gap in the layers of insurance cover came to light and the plaintiffs instituted these proceedings against the first named defendant for failing to arrange for one of the two layers of excess insurance for the year the 1st October, 2012, to the 30th September, 2013, as instructed, with the result that the plaintiffs were not fully covered in respect of a number of claims.

8. A serious discrepancy came to light in respect of the CNA cover slip of the 18th April, 2013. The plaintiffs' solicitors wrote to the first named defendant on the 17th June, 2014. The letter stated that CNA provided the plaintiffs with a cover slip. The slip was dated the 18th April, 2013. The slip was endorsed: -

> *"… CNA Insurance Europe Limited will not be liable for any claim or notification which has been notified to the primary insurer before 18 April 2013."*

9. Previously a cover slip had been furnished by the first named defendant to the plaintiffs, but it was undated and was not endorsed. The first named defendant said this cover slip was furnished by the second named defendant. This document appeared to show that cover was in place from the 1st October, 2012 to the 30th September, 2013. In fact, it was not. How this came about and who is responsible are hotly contested issues for the trial of the action.

10. The first named defendant sought discovery from the second named defendant. The second named defendant agreed to make discovery of three categories of documents, provided it was to be limited from the date of the initial communication of instructions in respect of the policy year 2012-2013 up to the 17th June, 2014, the date of the letter of claim. This offer was accepted by the solicitors for the first named defendant and discovery was made on this basis.

11. The different categories of discovery were: -

> ***"Category 1***
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> *All documents relating to the instruction by the First Named Defendant to the Second Named Defendant with respect to the placing of Policies of Insurance for the Plaintiff for the 2012 to 2013 and all documents relating to the placing or attempted placing by the Second Named Defendant of the said policies of insurance and in particular all documents in relation to the placing of the first and second excess layers of the Plaintiff's professional indemnity insurance.*
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> ***Category 2***
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> *All documents in relation to the process whereby the Second Named Defendant actually placed the second excess layer including, but strictly without prejudice the generality to the foregoing, all documents in relation to the alleged representations made by the First Named Defendant to the Second Named Defendant in respect of the Plaintiff's claims experience and all documents in relation to the calculation and payment of the premium referable to the second excess layer.*
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> ***Category 3***
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> *All documentation in relation to all subsequent interactions and discussions between the First Named Defendant and the Second Named Defendant in relation to the placing of second excess layer and in particular all documentation howsoever referring or relating or referring to the First Named Defendant or the Plaintiff raising any issue in relation to the placing of the second excess layer.*

The affidavit of discovery for the second named defendant was sworn in September, 2016.

12. Subsequently, disputes developed in relation to the scope of the discovery and the adequacy of the discovery and the first named defendant issued the motion heard by me on the 31st May, 2017.

13. There are three grounds of complaint:

> • The second defendant discovered the cover slip which was undated and unendorsed but not the dated coverslip with the endorsement. The first named defendant required the second named defendant to swear an affidavit explaining whether the endorsed dated slip is or had at any time, been in its possession or power and if not then in its possession when it parted with it and what has become of it under the provisions of O.31, r. 20 (3).
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> • It wanted to expand the time limit in respect of which the second defendant had made discovery in respect of the agreed three categories.
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> • It raised complaints about the adequacy of the discovery actually made. At the hearing of the motion, this was reduced to the complaint about the dated and endorsed coverslip and the manner in which documents in respect of which legal privilege was claimed were discovered.

The CNA Coverslip

14. The arguments in relation to this matter were very heated. There are certain undisputed facts.

> (i) The plaintiffs instructed the first named defendant to renew the cover for the period of the 1st October, 2012 to the 30th September, 2013.
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> (ii) The first named defendant placed the cover for the primary policy.
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> (iii) The first named defendant instructed the second named defendant to renew the two layers of excess cover.
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> (iv) The second named defendant renewed one layer of excess cover for the period October 2012 to 2013.
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> (v) The second named defendant did not renew the second layer of excess cover with CNA immediately.
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> (vi) Cover was put in place by the second named defendant with CNA on the 18th April, 2013, with an endorsement on the policy as quoted above.
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> (vii) CNA has a copy over the coverslip dated the 18th April, 2013, and endorsed as quoted above.
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> (viii) The second named defendant sent a copy of the cover slip to Lockton which was undated and not endorsed.
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> (ix) There are two versions of a cover slip in existence apparently in respect of the one policy of insurance.

15. The first named defendant complained that the second named defendant should have discovered both versions of the cover slip. The second named defendant discovered the undated copy of the cover slip without the endorsement page. The first named defendant contends that the second named defendant must have received a copy of the policy from CNA endorsed and dated. This could have been discovered in either part one of the first schedule or the second schedule of its affidavit of discovery depending on whether it was still in its possession.

16. The second named defendant's solicitor swore at para. 24 of her replying affidavit in this motion: -

> *"… I say and believe and am advised that insofar as complaint is made that there is more than one version of the "cover slip" provided by the Second Named Defendant to Lockton, I am satisfied that the Second Named Defendant has made*

discovery of the cover slip which it has in its possession in relation to this matter."

17. This is incomplete in that it does not deal with the clear inference that the document was previously in its possession and now no longer is. No one has suggested that CNA did not send the dated and endorsed version of the cover slip on the 18th April, 2013, to the second named defendant. The issue of the existence of two versions of this cover slip is central to the proceedings. The first named defendant's solicitor has averred that the second named defendant has not discovered the document originally furnished to it by CNA with the endorsement. The document clearly relates to the matters in question in the case and ought to have been discovered.

18. The second named defendant maintains that the application under O.31, r.20 (3) is flawed, because the application does not specify the document(s) to which the application relates.

19. This is undoubtedly so. But, does that automatically mean that the application must be rejected? Order 31, rule 20 (3) is of some vintage. Order 31, rule 19A (3) (as it then was) was considered in *White v Spafford & Co.* [1901] 2 K.B. 241 by the Court of Appeal. Collins LJ. held that the object of the rule: -

> *"… is that a litigant who can point to specific documents, which he is able to name and specify in his affidavit, and who is in a position to swear that in his belief they are or have been in the possession of his opponent, and that they relate to the matters in question in the action, shall have a right to discovery of those particular documents."*

The requirement is to specify the documents in the affidavit grounding the application. It is required to avoid a party seeking classes of documents under the rule, rather than specific documents. In addition it means that: -

> (1) The scope of any order is clear and precise.
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> (2) It enables the opposing party to agree to the request without the need for a court order if possible.
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> (3) It enables the court clearly to assess what is sought and the reasons for seeking relief.
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> (4) It avoids any party being taken by surprise.

20. There is no injustice caused to the second named defendant in this case by reason of the fact that the notice of motion does not specify the document to which it relates. The grounding affidavit makes clear what was sought and why, so the second named defendant knew that the issue of discovery of the other version of the CNA cover slip was at the heart of the application. There was no suggestion by counsel for the second named defendant, that it was disadvantaged or taken by surprise, otherwise prejudiced, or that it could not comply with the order, if made. The argument that the application is fatally flawed is hollow and of little merit in the circumstances.

21. In *Sports Direct International Plc v Minor & ors* [2015] I.E.H.C. 650 Barrett J. stated at para. 92: -

> *"The court notes in passing that an application under O.31, r.20(3) must "be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them." Unstated in r.20(3), but intrinsic to a process which is designed to facilitate the efficient despatch of litigation, is the requirement that such belief must enjoy some support in the facts as established in evidence and/or as a matter of general logic. Otherwise what hope has a deponent of satisfying the court that, to echo the wording of Laffoy J. in O'Leary (considered later below), at para.56, "relevant documents are or have been in the possession of the Defendant which should have, but have not, been discovered in its original affidavit of discovery or its supplemental affidavit of discovery"?*

22. The first named defendant's belief in this case is supported by the facts as I have set out. There is no affidavit to say that the second named defendant never received the document from CNA or that it only received an undated, unendorsed copy of the cover slip. Counsel referred to an unrelated plea in the defence of the second named defendant, which is not relevant to this particular issue. Counsel referred to paras. 5 and 6 of Mr. Richard Seeley's affidavit of discovery. He averred: -

> *"5. There may be documentation which was held in electronic format or in hard copy which would fall within the Agreed Categories but which the Second Named Defendant had but now does not have in its possession power or procurement as the documents were destroyed in accordance with existing document retention policies. However I say that the Second Named Defendant has used its best endeavours to recover all documents of relevance.*
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> *6. According to the best of my knowledge, information, and belief the Second Named Defendant has not now, and never had in its possession, power or procurement or in the possession, custody or power of its solicitors or agents, or in the possession, custody or power of any other persons, or person on its behalf, any document of any kind or any electronically stored information, or any copy or extract from any such document or information, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, and falling within the Agreed Categories other than and except the documents set forth in the said First Schedule hereto."*

23. The averment at para. 6 is standard, that at para. 5 is ambiguous. Given the stark facts of this case, the centrality of the document, the admitted existence of two versions of the document, the fact that the affidavit of the second named defendant's solicitor fails to address the issue as to whether the second named defendant ever had the endorsed version of cover slip in its possession or power all indicates that the matter cannot be left as it stands. I will exercise my discretion to order an affidavit be sworn by the second named defendant under O.3,1 r.20 (3) explaining whether the CNA cover slip dated the 18th April, 2013, and endorsed as set out in para. 8 above, is or had at any time been in its possession or power and if not then in its possession when it parted with it and what has become of it.

Whether the Categories of Discovery Should Be Expanded

23. The first named defendant says that it erred in agreeing to the temporal limitation in respect of discovery and seeks an order extending the period after the 17th June, 2014. All of the information upon which it advances its case to the court to remove the temporal limitation, was known, or ought to have been known, to the first named defendant before agreement was reached. The

arguments it now advances were open to it at that time.

24. The second named defendant argues that the first named defendant has not identified any misapprehension on its part when it reached agreement in relation to discovery as required by authorities. But in fact this is not a requirement to the relief sought as evidenced by *Irish Bank Resolution Corporation v Quinn* [2015] I.E.C.A. 84 where Peart J. stated: -

> *"70. The decision in Irish Commercial Society Limited v. Plunkett [1987] I.L.R.M. 504 (SC) ; [1986] I.L.R.M. 624(HC) follow that of Purcell v Trigell Limited . In the High Court, Costello J., stated:*
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> *"As pointed out by Lord Denning M.R. in Purcell in Trigell Limited, the Court always has control over interlocutory Orders and it may in its discretion vary or alter them even though originally made by consent…. Whether or not it should exercise it in a given case will largely depend on the circumstances in which the Consent Order was made and the reasons for its discharge…*
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> *73. It could never be the case that in those circumstances [of serious criticism of purported compliance with consent order for discovery] a court's hands should be restricted in the exercise of its inherent jurisdiction to alter or vary a process which had been entered into in good faith, and in a belief that it was workable and would promote the overall efficient management of the litigation in question, where clearly this is not the case…*
>
> *75. Furthermore, it could never be the case that even in the absence of such (or any) misapprehension, a discovery or inspection process ordered by a Court for the purpose of the good management of the litigation could never be altered or varied by subsequent Court Order merely because the original process had been agreed by the parties. If this was the case, a Court would be effectively prevented from exercising its inherent jurisdiction to oversee the management of litigation because of the fact the parties had entered into an improvident or unworkable discovery or inspection process, and thereby effectively rendered the litigation impotent. That is an entirely different situation to circumstances where an agreement by parties to litigation relates to a substantive issue or matter central to that litigation.".*

25. I am satisfied that the court has the jurisdiction to consider whether or not to expand the categories of discovery in this case notwithstanding the fact that the parties previously agreed to confine the discovery to be made by the second named defendant to the three categories set out in para. 11. The jurisdiction is not dependant on the party seeking to revisit a consent order identifying, as a pre-condition to the court having jurisdiction to engage in the matter, a misapprehension or other mistake sufficient to justify varying an order made upon consent. As is clear from the judgment of Peart J, this is wrong in principle and undermines the court's inherent jurisdiction to oversee the management of litigation.

26. Even if the court were to approach this matter *de novo*, the expanded discovery now sought is neither relevant nor necessary to the issues in the case, and therefore would not be ordered in any event. In respect of Categories 1 and 2, the documents must all predate the 17th June, 2014, so there is no basis for extending the time for these categories beyond this date. The instructions to place the policies of insurance clearly predated the 18th April, 2013, when the CNA policy was finally obtained. Similarly, documents relating to the placing or attempted placing of the policies must predate the issuing of these policies. Category 2 relates to the actual placement of the second excess layer policy which it is agreed was placed on the 18th April, 2013. It is therefore not necessary to extend the time limited for making discovery in respect of these two categories.

27. The arguments advanced in the first named defendant's solicitor's affidavit do not answer these arguments or explain why the documents within these categories and created after the 17th June, 2014, would be relevant to any of the issues in the case. In para. 10 of Mr. Millar's affidavit, he stated:

> "*… at the very least Mr. Scott's letter of the 6th October 2014 would be captured together with any attendance notes of the call between Mr Scott and Mr McArdle on the 4th July 2014 and the subsequent meeting in London with Mr McArdle would also be captured. It is also difficult to believe that there are no other documents within the power, possession or procurement of the Second Named Defendant generated after the issue became a live issue in June 2014 save the letter from Richard Scott of the 6th October 2104 (sic) given that the matter is of such seriousness for the Second Named Defendant*."

This does not in fact address the issue of documents falling within either Category 1 or 2 at all.

28. I am not satisfied that the discovery now sought under the expanded Categories 1 and 2, is either relevant or necessary in this case, and I refuse this relief.

29. Category 3 deals with all subsequent interactions between the first named defendant and the second named defendant in relation to the placing of the second excess layer of insurance. "Subsequent" refers to subsequent to the 18th April, 2013. The letter of the 11th July, 2016, outlines the reasons for this category of discovery. The first named defendant says it was misled by representatives from the second named defendant to the effect that cover was in place and it acted to its detriment in reliance on the representation. The second named defendant says the first named defendant was actually aware from April, 2013 of the issue in relation to the second excess layer.

Therefore, this category was sought on the basis of alleged misrepresentations by the second named defendant which misled the first named defendant.

30. The second named defendant submitted that it was known and accepted that there was only cover for the second excess layer from the 18th April, 2013, and therefore there could no longer be any misrepresentation to the contrary by the second named defendant to the first named defendant after that date, and the first named defendant could no longer be misled (if it ever was) about the issue of the second excess layer.

31. On the case of the first named defendant, the second named defendant conceded to the first named defendant on the 4th July, 2014 that the CNA excess layer had not been placed. On that basis, according to the second named defendant, there is no reason to extend thus category of discovery from the 17th June, 2014, to the 4th July, 2014, a period of seventeen days during which there could not have been any misrepresentation by the second named defendant to the first named defendant in relation to this issue.

32. I find the argument of the second named defendant in relation to Category 3 to be compelling and I refuse to order that the period for discovery in respect of this category be expanded.

33. Finally, the first named defendant claimed that the second named defendant wrongfully failed to discover any documents in relation to its own internal investigation into the matter and how (a) the insurance was not placed in September 2012 and (b) how it was handled in April, 2013 and thereafter. These documents are not captured by any of the categories of discovery agreed by the parties. Accordingly the second named defendant was not obliged to discover them. I reject the criticism of the discovery made by the second named defendant based on this ground.

Privilege
34. The second named defendant apparently claimed privilege in respect of certain documents which fall within the scope of the agreed categories of discovery. The documents handed in to the court list no documents in respect of which it claimed privilege. A supplemental affidavit of discovery was sworn which was not given to the court. Apparently privilege was asserted in that affidavit in a generic way.

35. Where a deponent claims privilege in an affidavit of discovery, the documents must be listed individually, described and the basis of the claim for privilege stated. This has long been the requirement. It is to enable a party to challenge a claim to privilege which may be wrongly asserted. This is impossible unless the deponent complies with the requirement.

36. In addition, it shows the documents in respect of which privilege is claimed and thereby avoids allegations, as raised here, that documents were not discovered, when in fact they were intended to be discovered under a generic claim of privilege.

37. I direct that if the second named defendant claims privilege over any documents which fall to be discovered, it must comply with the rules and list and describe the documents individually, and specify the basis upon which it asserts a claim to privilege. If it has not already sworn such an affidavit, it may do so when it swears the affidavit pursuant to O31, r(20) (3) previously ordered.