Neutral Citation: [2015] IEHC 10

**THE HIGH COURT**

**[2010 No. 2605 P]**

**BETWEEN:**

**MICHAEL LEAHY**

**PLAINTIFF**

**AND**

**OSB GROUP LIMITED, DOLLKEN-KUNSTSTOFFVERARBEITUNG GMBH AND EIRFOAM**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Noonan delivered the 15th day of January, 2015**

**Background**

1. This is an application brought by the second and third-named defendants herein ("the defendants") pursuant to O. 31 r. 21 of the Rules of the Superior Courts for an order dismissing the plaintiff's action for want of prosecution and more particularly, for failing to make discovery in accordance with the order of the court made herein on the 11th June, 2012.

2. The plaintiff is a sole trader and carries on a kitchen manufacturing and sales business. He alleges in his statement of claim that in 2003 and 2004 he was interested in setting up a new business to manufacture and sell customised laminated worktops for the kitchen and other furniture manufacturing industries. He alleges that on the 6th April, 2004 he purchased a specialised piece of equipment known as a BAZ machine to make these worktops. The plaintiff claims that he entered into a contract with the defendants for the supply of the raw materials required to manufacture the worktops. This material was to be produced to the plaintiff's specification by the second-named defendant, a German company. The first and third-named defendants appear to be the Irish distributors/agents for the second-named defendant.

3. In essence, the plaintiff claims that the contracted raw materials were not produced, or at least not produced to specification or on schedule, with the result that his business ultimately failed and he suffered substantial losses which he quantifies at some €6.5 million. He claims damages for breach of contract from the defendants.

**The Proceedings**

4. These proceedings were commenced by Plenary Summons dated the 11th March, 2010 probably fairly close to the statutory six-year limitation period. At that time, the plaintiff was represented by solicitors and counsel. He now appears in person having discharged his legal team. The proceedings have followed a fairly leisurely course. An amended Statement of Claim was delivered on the 20th January, 2011. The defendants delivered their Defence on the 4th October, 2011. Notices for Particulars, Replies and Rejoinders of extraordinary length were exchanged between the parties.

5. By letter dated the 15th November, 2011, the defendants' solicitors sought voluntary discovery of 16 categories of documents from the plaintiff. This was not responded to and a motion issued. Because the motion was contested, it was too lengthy for a Monday list and was eventually heard by Birmingham J. on the 11th June, 2012 when he ordered the plaintiff to make discovery of all the categories sought within 9 weeks from that date.

6. On the 12th August, 2012, the plaintiff furnished some documents to the defendants but no affidavit of discovery. On the 20th August, 2012, the defendants' solicitors wrote to the plaintiff advising him that the purported discovery made was inadequate. The plaintiff did not respond to this letter and on the 12th November, 2012, the defendants issued a motion to dismiss the claim for failure to make the discovery ordered. This was due to come on for hearing on the 28th January, 2013 and shortly before, on the 18th January, 2013 the plaintiff filed a duly sworn affidavit of discovery. When the matter came before the court, the motion was struck out on consent and the costs reserved.

7. On the 22nd April, 2013, the defendants' solicitors wrote to the plaintiff seeking to have the defendants' forensic accountants liaise with the plaintiff's accountant with a view to inspecting the plaintiff's business accounts, an offer made by the plaintiff in an affidavit sworn in March, 2012 to contest the original discovery application. There was no response to this letter or subsequent reminders in May and June. Eventually the solicitors wrote on the 26th June, 2013 to say that if no response was forthcoming, a further motion would be brought to strike out the claim for failing to make discovery. Again there was no response and on the 9th January, 2014, the present notice of motion was issued.

**The Documents in Issue**

8. The affidavit grounding this motion was sworn by the defendants' solicitor, Mr. Hugh O'Neill, on the 8th January, 2014. I think it is fair to say that the primary complaint made in the affidavit relates to a failure on the part of the plaintiff to discover the documents in category 2 of the order of the 11th June, 2012, being:

> "2. All records, notes, statements, reports, correspondence, or other documents comprising the plaintiff's business accounts relation to the plaintiff's business (or intended business) of the manufacturing and sales of kitchen countertops."

9. Mr. O'Neill averred that the plaintiff's purported compliance with the discovery order under this category extended to 2 documents only, each comprising one page. Both documents purport to be balance sheets identifying the client as the plaintiff, the first dated the 31st December, 2004 and the second being for the two years ending on the 31st December, 2006. These appear to emanate from the plaintiff's accountant. At paragraph 19 of his affidavit, Mr. O'Neill notes that despite the fact that these balance sheets disclose expenditure of some €12,000 for accountant's services, no further documents relating to the plaintiff's business accounts have been forthcoming. He further comments that despite these balance sheets showing very substantial expenditure under the headings of wages, rent, equipment hire and costs, no documents have been discovered in relation to the making of these payments or the accounting for same. Mr. O'Neill goes on to set out a number of classes of document that he considers the plaintiff and/or his accountants should have.

10. On the 11th April, 2014, Mr. Richard Berney, the forensic accountant retained by the defendants, wrote directly to the plaintiff's accountant, Mr. John Conway, asking that Mr. Conway make available to him all relevant files and calculations around the figures being claimed by the plaintiff in the proceedings, being loss of profits of €2.8 million and loss of investment in the worktop venture of €1.7 million. These were in fact the figures claimed in the original statement of claim which had been superseded by the amended statement of claim.

11. The motion was originally listed for hearing on the 19th May, 2014 and on the 6th May, the plaintiff wrote to Mr. O'Neill taking issue with a number of matters and explaining why he did not have various documents. In this letter, the plaintiff confirmed that "my accountant has all the financial records for my business for the years 2000 to 2007..."

12. On the 14th May 2014, the plaintiff's accountants furnished Mr. O'Neill with accounts for the five years from 2004 to 2008 inclusive and on reviewing these, Mr. Berney emailed Mr. O'Neill pointing out that he had not received the workings behind the claims for loss of profit and loss of investment. Later the same day, the defendants' solicitors emailed Mr. Conway saying that the defendants needed to see the files, notes and calculations supporting the plaintiff's claim and the files, notes and calculations supporting the accounts provided. Again on the same date, Mr. Conway responded that the plaintiff should be contacted for all further information.

13. On the next day, 15th May, 2014, the defendants' solicitor emailed the plaintiff saying that Mr. Conway had informed them that the plaintiff had all the documents. The plaintiff's response was he would contest the motion. The matter was listed for hearing before the President of the High Court on the 19th May, 2014, when the plaintiff sought an adjournment which the President granted on the plaintiff's undertaking to produce the books and records on which his claim was based to the defendants within four weeks. The motion was adjourned to the 7th July, 2014.

14. Rather than comply with the undertaking given to the President, the plaintiff filed a replying affidavit on the 4th July, 2014 which sought to explain his failure to discover the documents on the basis that his accountants only keep paperwork for four years and the plaintiff was too busy to seek the documents from his accountants at the material time. In this affidavit, the plaintiff argued the defendants knew the case they had to meet. This is a recurring theme in all of the plaintiff's evidence and submissions and points to a clear misunderstanding, deliberate or otherwise, by him of his discovery obligations. By this stage, the plaintiff had still not sworn an affidavit of discovery listing the accounts already produced by his accountants in May.

15. The motion was again listed for hearing on the 7th July, 2014 and on the same day, Mr. O'Neill swore a further affidavit updating the history of the matter. The case was not reached that day and was adjourned for hearing to the 7th November, 2014, when it came before me. On the 16th July, 2014, Mr. O'Neill wrote to the plaintiff referring to the fact that at the conclusion of proceedings on the 7th July, the plaintiff had asked him to write and advise him of what additional documents he had failed to make discovery. In a detailed letter, Mr. O'Neill set out 15 categories of document he believed from his accounts the plaintiff must have.

16. On the 4th November, 2014, three days before the matter was again before the court, the plaintiff sent 26 emails to the defendants' solicitors attaching a large volume of documents claimed to be the working calculations behind the accounts delivered in May. The explanation offered in court by the plaintiff for the fact that these documents were not previously produced is that they were contained on a laptop computer used by his secretary which he recently retrieved from his attic in a damaged and non-functioning condition but he had managed to extract the hard drive which had enabled the documents to be recreated.

17. Mr. Berney examined these documents the next day, which he categorised as the accounts preparation working files for the years 2004 to 2008 and which were quite detailed. Although he felt that the working papers were detailed, in his opinion they shed no further light on the calculation of the claim as they related to a business that was in existence both prior and subsequent to the business the subject matter of the proceedings.

18. In the course of the hearing, I asked the plaintiff if he had any further documents to discover and he assured me that he had not and had now produced everything.

**Submissions**

19. Counsel on behalf of the defendants, Mr. Trainor SC, submitted that the plaintiff was evidently a sophisticated businessman who clearly understood what was required of him in discovery. The defendants' solicitors had explained this to him on numerous occasions to the extent of furnishing him with detailed extracts from a leading text book on discovery and setting out details of documents he ought to have which should be discovered. Mr. Trainor said that when one analysed the documents, one could only come to the conclusion that the plaintiff had not been truthful with the court and that he had deliberately refused to comply with the order for discovery. The effect of this would be to preclude the defendants from having a fair trial and the only way that could be prevented was by making the order sought.

20. Mr. Trainor SC relied on a number of authorities in support of that proposition and in particular the judgment of Barron J. in *Radiac Abrasives Inc. v. Prendergast* (Unreported, High Court, Barron J., 13th March, 1996) where he said (at p. 7):

> "This Motion has been argued on the basis that the Defendants have deliberately concealed documentation which would establish or at any rate materially support the Plaintiff's case. The Defendants deny this. If this was so, then the proper remedy would be to strike out the Defence. A party to proceedings who has deliberately concealed documents in its discovery cannot, when it has been found out, be allowed merely to amend its discovery. Such a situation is in no way comparable to a Motion for further and better discovery in which the issue is whether a particular document or class of documents is relevant or subject to privilege, where the remedy sought is essentially for a declaration as to the correct legal position."

21. Barron J. went on to say that although there were elements in the present motion which suggested such deliberate conduct, it seemed to him that the defendants must be given a further opportunity to place a full affidavit of discovery before the court.

22. In *W. v. W.* (Unreported, Supreme Court, 25th November, 1999), the same judge remarked (at p. 3):

> "When the failure to make proper discovery is deliberate, this is perjury. The courts have the remedy to strike out the pleading of the perjuring party. Unfortunately, this remedy is seldom granted because, in my view, too great a leniency is given to persons in default. It is one thing to indulge in a bona fide legal dispute as to whether or not any particular document is relevant and should therefore be discovered. It is a totally different thing to delay deliberately in furnishing discovery or in concealing deliberately documents which are known to be relevant. It is this latter behaviour for which there should be an adequate sanction."

23. Although the plaintiff addressed the court at some length in reply, his submissions were mainly concerned with the merits of his case and other matters not particularly relevant to the issues in this motion. In that regard, the plaintiff accepted that he had got the matter of discovery wrong but had now complied albeit at the eleventh hour.

**The Law**

24. Mr. Trainor helpfully referred me to a book of authorities containing the relevant case law which is conveniently set out and discussed in two recent judgments delivered by Ryan J., as he then was. In the first, *Campion v. Wat* [2013] IEHC 45, the court was dealing with a similar application to the present one to strike out the plaintiff's claim for failing to make discovery as ordered by the court. In that case, the defendant alleged, as here, that an analysis of the documents actually discovered by the plaintiff strongly suggested that the plaintiff must have further documents he had not discovered. Ryan J. said (at para. 14):

> "14. But once discovery has actually been made, it is not generally the function of this Court to make determinations of fact in order to decide whether the claim should be struck out. It would not be possible on the basis of the affidavits alone for this Court to do that. It would obviously be necessary to have a hearing at which the plaintiff was cross-examined. This is in accordance with the jurisprudence in respect of discovery of the Supreme Court as decided in *Murphy v. J Donohue Limited* [1996] 1 I.R. 123 and the cases therein cited. The headnote states at para. 2 as follows:-
>
> 'That O. 31, r. 21 of the Rules of the Superior Courts, 1986, existed to ensure compliance with orders for discovery rather than to punish those who default; and that while cases might exist where a defence should be struck out because one party might not be able to get a fair trial as a result of the other parties wilful refusal to comply with an order for discovery, such cases would be extreme.'
>
> "Since the plaintiff has now made discovery in appropriate form, I do not think that it is for me to determine on the basis of probability or improbably whether his explanations are correct or not. Neither am I able to contrast the pleadings to date with the contents of the discovery affidavit or affidavits in order to determine the truth. In the circumstances, it is not appropriate for me to make an order dismissing the plaintiff's case and it would not be just to do so."

25. In a further passage indicating some similarity to the present case, Ryan J. said (at para. 17):

> "17. It was clearly reasonable and prudent and appropriate for the defendant to bring this motion, because it was only at the last minute that the plaintiff actually produced the affidavit in proper form. As to whether it is correct or credible or is any other way to be criticised, that is best considered in the context of the trial as a whole in light of the evidence. Nothing in my decision will inhibit the exploration by the defendant's counsel of any of the matters that he raises by way of comment or criticism of the conduct of the plaintiff including, in particular, the manner in which he has dealt with the order of Cross J. in respect of discovery of documents. Indeed, it is in my view most convenient just and appropriate that the consideration of the veracity of assertions made by the plaintiff should be carried out in the course of the trial of the issues in accordance with the pleadings."

26. In *Green Pastures (Donegal) v. Aurivo Co-Operative Society Ltd & Anor* [2014] IEHC 209, the plaintiff applied for an order striking out the first defendant's defence for failing to make discovery or alternatively for further and better discovery. Ryan J. reviewed the law and the submissions of both parties and said (at p.8):

> "In *Mercantile Credit Company of Ireland & Anor. v. Heelan & Ors.* [1998] 1 I.R. 81, in considering an application to strike out a defence for failure to make discovery as per O. 31, r. 21 RSC, Hamilton C.J. held at p. 85:-
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> 'The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.
>
> It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect.
>
> The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order.'

27. The Plaintiff also cites *Johnston v. Church of Scientology* (Unreported, Supreme Court, 7th November, 2001) where the Supreme Court reiterated that the courts have jurisdiction to strike out a claim or a defence when they are satisfied that the extent of non-compliance with the order is such that it is not possible to have a fair trial. The Plaintiffs submit that *Johnston* supports their contention that the Defendant's non-compliance with discovery obligations will prevent them from having a fair trial. As Keane CJ held (at p.11):

> "[…] The court has a jurisdiction and there is no issue about this, to strike out proceedings or to strike out a defence filed by a defendant where it is satisfied that the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result and of course that may also arise where it appears from the affidavit that some particular documents or some category of documents have been in fact destroyed by the party concerned, whether innocently or whether deliberately in order to interfere with the further conduct of the case."

28. Keane CJ then cited the decision of Barrington J. in *Murphy v. J Donoghue Ltd* [1996] 1 I.R. 123, where he said (at p. 142):

> '[U]ndoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and such cases will be extreme cases.'

29. Dealing then with the defendant's submissions, Ryan J. said in *Green Pastures* (at p.10):

> "On the application to have the defence struck out, the first defendant submits that if any default on their part had been identified, striking out the defence would not be appropriate in light of *Campion v. Wat* [2013] IEHC 45. A more appropriate method to query assertions made by the plaintiff on affidavit would be by way of cross-examination. While O. 31, r. 21 RSC gives the court authority to strike out a defence if a party fails to comply with an order for discovery, the jurisdiction is exercised in the most extreme cases. This point was affirmed by the Supreme Court in *Murphy v. J. Donohue*

*Limited* [1996] 1 I.R. 123 where Barrington J. held at p. 142:-

"Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court."

This approach is outlined more recently in *Dunnes Stores v. Irish Life Assurance* [2010] 4 I.R. 1, where Clarke J. held at p 8:-

"I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned."

**Analysis of the Issues**

30. It appears to me from the above authorities that before I could accede to an application to strike out the plaintiff's claim, I would first have to be satisfied that there is an ongoing failure to comply with the discovery order herein, secondly that such failure is clearly deliberate and thirdly the consequence of that failure will be to deprive the defendants of a fair trial. It is certainly true to say that there is at least an ongoing technical failure to comply with the order in the sense that although the plaintiff says he has now produced everything he has, he has not sworn a formal supplemental affidavit of discovery. However, that can presumably be remedied easily and quickly.

31. If that deficiency is cured, then it is in my view not absolutely clear that there is a continuing failure to comply with the order. It seems to me that it is as a minimum arguable that the defendants have gone considerably outside the scope of the order in seeking documents from the plaintiff. The plaintiff was ordered to make discovery of his business accounts. The order does not apply to the accounts of every business that the plaintiff is or has been involved in but rather to his business (or intended business) of the manufacturing and sale of kitchen countertops. That business appears to have been short lived. The documents that have been discovered by the plaintiff appear to relate to his pre-existing kitchen manufacturing business and on one view therefore are not captured by the order at all.

32. Even overlooking that point for a moment, it seems to me that what comprises "business accounts" is somewhat debateable. Accounts of some description have been produced by the plaintiff. The defendants however have in correspondence with the plaintiff and his accountant sought considerably more than just "business accounts". In the original affidavit grounding this application, Mr. O'Neill says at para. 20 that the plaintiff and/or his accountants should at least have the following documents:

a. *Documents evidencing or vouching the purchasing of machinery by the plaintiff*. This does not appear to be covered by the order.

b. *Documents in relation to the wages and salary, rent, insurances, hire equipment and other matters referred to in the Schedule Expenditure in respect of the two year period ending 31 December 2006; Copy accounts, VAT returns, tax returns and relevant bank statements vouching and evidencing the foregoing and recording the plaintiff's business during this period*. These documents appear to be sought on the basis that the two sheets discovered by the plaintiff referred to above either refer to these or indirectly infer their existence. This does not make such documents discoverable under the terms of the order and indeed, it is again debateable whether the two documents in question were in themselves covered by the order since they evidently relate to the plaintiff's kitchen business, not the new worktop venture.

c. *Documentation in relation to any computation relating to the plaintiff's claims for loss of profits arising out of the cessation of his worktop business*. Again, beyond the business accounts expressly mentioned by the order, any further documents under this heading seem not to be covered.

d. *Documentation relating to any other businesses carried out by the plaintiff in the period February 2004 - December 2008 including in relation to his retail kitchen business*. This is plainly not covered by the order.

e. *All relevant accounts or financial returns prepared for and on behalf of the plaintiff during this period; regarding each and all of his businesses*. As before, this is well outside the scope of the order which only captures accounts of the worktop business and no other.

33. Indeed reading these five categories, one would be forgiven for thinking that this was the basis for an entirely new application for discovery rather than related to anything that had gone before. The situation has been compounded somewhat by virtue of the defendants' accountant, Mr. Berney, communicating directly with the plaintiff's accountant, Mr. Conway, in order to obtain documents which he, Mr. Berney, considered relevant to the computation of the losses claimed by the plaintiff. Thus, documents were sought by Mr. Berney without any reference to the order for discovery. It is of course perfectly understandable that a forensic accountant retained for the defence would want to see all documents that he considered relevant to the computation of the claim so that he could critically evaluate them and provide a report to the defendants to assist in the defence of the claim. Mr. Berney clearly faced a difficulty in this regard as is to be seen from the affidavit of Marcus Lynch sworn on the 16th May, 2014 in support of this application. At para. 13, Mr. Lynch sets out in some detail the problems Mr. Berney was having in understanding the claimed losses against the background of the accounts recently discovered by the plaintiff. In particular, Mr. Berney said that the accounts did not allow him to understand how either the loss of profits or loss of investment as claimed in the pleadings had been calculated.

34. This was also a complaint echoed by Mr. Trainor in his submissions to the effect that the inadequacy of the discovery meant that the defendants were unable to see how the losses claimed by the plaintiff were computed and this would ultimately have the effect that the defendants could not get a fair trial. If this is a difficulty that the defendants face, it seems to me that it does not emanate from a failure by the plaintiff to comply with the order for discovery but rather from a failure to seek the documents in question by way of discovery in the first place. How losses are computed by a plaintiff is normally a matter for particulars and of course discovery may be sought of the documents underlying the particulars given. It must be remembered that the onus of proving his losses rests with the plaintiff so if the documents supporting the calculations do not exist, that is an even bigger problem for the plaintiff than the defendants. If such documents do exist, then the plaintiff cannot rely on them if he has not discovered them, assuming always that they are covered by the order for discovery.

35. The fact that the documents now sought by the defendants are not easily reconciled with the discovery order is further exemplified by Mr. Berney's email of the 5th November, 2014, following his examination of the documents attached to the plaintiff's 26 emails. Mr. Berney could not separate out from the general accounts of the plaintiff's kitchen business those items that related to the new venture and thus could shed no further light on the computation of the losses. As I have said, what is sauce for the goose is sauce for the gander.

36. Quite apart from all of the foregoing, dealing with the second limb of the test, even if it were clear that there was non-compliance with the order for discovery, I find myself in a similar position to that of Ryan J. in *Campion* in that I am unable to come to a conclusion as to whether the non-compliance was deliberate or inadvertent based on affidavit evidence only. Whilst the defendants have raised suspicions in that respect, I think ultimately the issue can only be resolved by way of cross-examination at the trial. If it were to emerge at the trial that there was in fact non-compliance and it was deliberate, that would have a major bearing on the plaintiff's credit and all aspects of his claim.

37. Although in the light of my findings herein, the third limb of the test does not arise, for completeness I should say that I am far from convinced that any perceived failure to comply with the order for discovery will result in any unfairness to the defendants at the trial for the reasons already given.

**Conclusion**

38. In the event, I decline to make an order striking out the plaintiff's claim. However, I am of the view that it was appropriate to bring this application having regard to the fact that there was little or no response from the plaintiff to the order for discovery and little effort made by him to comply with it until the last possible moment. As I have already mentioned, the plaintiff has even now failed to swear a supplemental affidavit of discovery in respect of the documents he has produced since swearing his first affidavit of discovery and I will direct him to do so within three weeks of this date.