THE HIGH COURT

COMMERCIAL

[2014 No. 2229 P]

BETWEEN

JAMES ELLIOT CONSTRUCTION LIMITED

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 9th day of May, 2017

1. On 28th of July, 2016, I made orders for discovery in these proceedings after five days of hearing before the court. The issue for decision now is whether the parties have complied with their respective obligations to make discovery in accordance with those orders. I do not propose to repeat the nature of the case in this judgment as it is fully set out in previous judgments I have given in this case.

2. The first, second, third and fifth named defendants ("the non IAL defendants") pursued eight complaints in relation to discovery made by the plaintiff. They related to category 10 of the order which directed the plaintiff to discover:

> *"All documents relating to damage to the Plaintiff (whether accrued or potential) in connection with the sixteen projects referred to in Schedule 1 to the Statement of claim where materials supplied by the Fourth Named Defendant was used by the Plaintiff, including but not limited to the following:*
>
> *(a) All documents relating to structural damage which has occurred at projects built by the Plaintiff where it is alleged that such damage was caused by the material supplied by the Fourth named defendant;*
>
> *(b) All documents relating to remedial works carried out (or being carried out) by or on behalf of the Plaintiff at projects where it is alleged that such remedial works are required as a result of material supplied by the Fourth Named Defendants;*
>
> *(c) All documents relating to the threat of proceedings against the Plaintiff in connection with developments where material supplied by the Fourth Named Defendant was used by the Plaintiff;*
>
> *(d) All documents relating to the possibility that the Plaintiff will be the subject of future claims in connection with material supplied by the Fourth Named Defendant;*
>
> *(e) All documents relating to loss, damages, costs, or expenses suffered or yet to be suffered by the plaintiff in connection with the supply of material by the fourth named defendant to the plaintiff;*
>
> *(f) Insofar as the direct impact upon the deterioration in the Plaintiff's financial and trading position and consequential loss is alleged to be attributable to the supply of material by the Fourth Named Defendants, please furnish:*
>
> - *All documents relating to notifications to customers of pyrite problems relating to the fourth defendant's material and/or any third party's infill material and response thereto;*
> - *All documents relating to notifications by any third parties to the plaintiff relating to pyritic material;*
> - *All documents relating to communications involving the Plaintiff and any third party stone or infill suppliers concerning pyritic material;*
> - *Audited accounts recording the Directors' salaries for the five years prior to 2008;*
> - *Documents evidencing efforts to source or acquire construction performance bonds from 2008 to 2015."*

Roadstone material

3. The non IAL defendants complained that the plaintiff had failed to discover all correspondence concerning test failures by Roadstone and the compliance of Roadstone materials with standards or specifications for the period from October 2009 onwards. They also alleged that the plaintiff had failed to discover all correspondence concerning the cost of replacing the Roadstone material and the development referred to as Sillogue 4.

4. The plaintiff's solicitor, Mr. O'Donovan, said that his client never corresponded with Roadstone on this issue and therefore there were no such documents to discover. As very little Roadstone material was actually removed from the Sillogue 4 site there was very little correspondence concerning the cost of replacing the Roadstone material at the Sillogue 4 site. Mr. O'Donovan also denied that the Roadstone material was defective as alleged by the non IAL defendants.

5. The non IAL defendants said that this was at odds with documents which have been discovered by the plaintiff and which referred to the Roadstone material at Sillogue 4 as being not acceptable and to having failed certain tests for clause 804. The non IAL

defendants were sceptical of Mr. O'Donovan's averments made on instructions from his client. The managing director of the plaintiff, Mr. James Elliot, offered to swear an affidavit confirming what was deposed to by Mr. O'Donovan. Counsel for the non IAL defendants accepted that they could not put the matter any further for the purposes of pursuing discovery and on that basis were prepared to accept an affidavit from Mr. Elliot.

6. I directed that Mr. James Elliot is to swear an affidavit confirming the fact that the plaintiff has no further documents responsive to these classes of documents and explaining why this is the case.

Primary books of the plaintiff
7. The non IAL defendants argued that there were omissions from the plaintiff's affidavit of discovery. They identified various categories of records and books of the company that a forensic accountant would require to examine in order to interrogate the plaintiff's claim for damages against the non IAL defendants. They identified four such categories.

(A) Job Costings Ledger and Solicitors Client Account

8. When the non IAL defendants queried the plaintiff's failure to discover the job costings ledger and the solicitor client account, the plaintiff responded that it did not prepare these ledgers or accounts on an annual basis. It cannot be required to discover documents which it never created and it cannot be required to create a document for the purposes of making discovery. These latter two submissions were accepted by counsel for the non IAL defendants.

9. In submissions to court, counsel for the plaintiff accepted that on occasion once off job costs documents or solicitors client accounts were prepared. The plaintiff indicated that Mr. Elliot was prepared to swear an affidavit confirming that the company did not prepare costs ledgers and solicitor client accounts on an annual basis.

10. The non IAL defendants accepted the matter cannot be pursued further in the context of this motion, though they said that the plaintiff should discover the once off documents to which its counsel referred.

11. I direct the plaintiff, if it has not already done so, to make discovery of those once off job costs ledgers or solicitors client accounts which were prepared on an ad hoc basis. I further direct that Mr. Elliot is to swear an affidavit confirming that these documents were not prepared on an annual basis.

(B) Primary Books for 2003 to 2007
12. The plaintiff discovered its audited accounts, its general ledgers and its management accounts for the years 2003 to 2007. It did not discover the day books for payments, purchases, receipts or sales. Likewise, it did not discover its auditor's adjustments. These books were discovered for the period 2008 up to 2016, save in the case of auditor's adjustments which were not available for 2016.

13. The plaintiff says that the documents now sought are not discoverable as they are not caught by the provisions of category 10 of the order for discovery. The non IAL defendants dispute this. The resolution of the dispute lies in the construction of category 10 of the order for discovery of 28th July, 2016.

14. The plaintiff says that category 10 relates to all documents relating to damage to the plaintiff in connection with the sixteen scheduled projects. Only subcategory (f) deals with the consequential loss said to arise from the direct impact upon the deterioration in the plaintiff's financial and trading position from the supply of material from the Bay Lane Quarry. Five subcategories are identified by bullet points. The first three relate to notifications and communications by the plaintiff to customers or by third parties to the plaintiff relating to pyrite problems. The fourth bullet point identifies the audited accounts recording the directors' salaries for the five years prior to 2008. The final bullet point is in a different category and relates to documents evidencing efforts to source or acquire construction performance bonds from 2008 to 2015.

15. The plaintiff submits that the documents now sought by the non IAL defendants do not relate to the loss sustained by the plaintiffs. They say that they have sufficient information in relation to the plaintiff's financial and trading situation prior to 2008 as they have its audited accounts, management accounts and general ledgers.

16. The non IAL defendants say that these documents are relevant and necessary but critically they are captured by the terms of category 10. They say that the plaintiff is misconstruing category 10 of the order for discovery. It is in effect treating subcategory (f) as a standalone category, which it is not. The whole of category 10 is governed by the opening words: *"All documents relating to damage to the Plaintiff… in connection with the projects…"*. They say that they are documents relating to damage allegedly caused to the plaintiff in connection with the sixteen scheduled projects. They say that they are necessary to enable forensic accountants properly to assess the plaintiff's claim for damages arising out of the supply of allegedly deleterious material by the fourth named defendant.

17. The plaintiff's claim against the defendants is limited to the sixteen scheduled projects. This means that it would be relevant to establish which losses (if any) were sustained by the plaintiff in relation to the sixteen projects (and the degree or amount of such damage) and which losses are not attributable to the sixteen projects. The non IAL defendants are entitled to explore whether the catastrophic failure of the plaintiff's business can be attributed to causes other than the supply of material by the fourth named defendant from its quarry at Bay Lane. It therefore seems to me that these documents may fairly be described as documents relating to damage to the plaintiff in connection with the sixteen projects referred to in the schedule. They will undoubtedly include material that was purchased from the fourth named defendant and sold to the developers of the sixteen scheduled projects. I am of the opinion that the category of documents sought by the non IAL defendants is within the scope of category 10 and therefore ought to be discovered.

(C) Fixed Asset Register for 2003 – 2009
18. The plaintiff did not discover the fixed asset register for the period 2003 to 2009. The plaintiff explained that previously the plaintiff's fixed asset register was maintained by its auditors. The auditors only kept the documents for a period of six years. The auditors no longer have the fixed assets ledgers for the years 2009 back to 2003. Mr. Elliot has offered to swear an affidavit to that effect.

19. I direct Mr. Elliot to swear an affidavit in those terms. The non IAL defendants asked that the plaintiff discover its tax returns for those years as a substitute for the inability to discover the fixed asset ledger. I hold that there is no requirement for the plaintiff to make a form of alternative discovery in the circumstances and I refuse this application by the non IAL defendants.

(D) Company Adjustments for the years 2003 to 2016

20. The plaintiff's solicitor Mr. O'Donovan averred that no such documents existed. The plaintiff did not maintain or keep a set of journal entries showing the company adjustments separately as they relied upon the company's general ledgers in this regard. The non IAL defendants accept that they cannot put this matter any further at this stage and Mr. Elliot is to swear an affidavit confirming this to be the fact.

(E) Bank Statements and Invoices
21. During the course of the hearing, as a pragmatic solution to the dispute as to whether the plaintiff should make discovery of all of its invoices, the plaintiff offered to make all of its invoices available for inspection and to allow the non IAL defendants to take copies of the invoices. It made this offer in order to avoid the expense of discovering the very large number of invoices in question and with a view to resolving the dispute. This offer was accepted by the non IAL defendants. I therefore direct that the plaintiff is to make available to the non IAL defendant's solicitors for inspection all of its invoices in accordance with the offer made in open court.

22. No agreement was reached between the parties as to the issue of the discoverability of the plaintiff's bank statements. The plaintiff had objected to discovery of bank statements and invoices without differentiation. It was argued that it clearly went beyond "what is necessary" as the plaintiff was discovering the general ledgers of the plaintiff for all relevant years. Mr. O'Donovan stated that "… *the onerous obligation of discovering all bank statements and invoices will provide no new information to the Defendants*".

23. While I can appreciate that discovering tens of thousands of invoices would undoubtedly be onerous, I do not accept that discovering the bank statements of a company, even for thirteen years, could be described as onerous. Certainly, the plaintiff has not made out a case that it would be so onerous as to be oppressive and disproportionate to require the plaintiff to make discovery of the bank statements.

24. The plaintiff has not argued that they are not relevant documents or that they are not captured by category 10. I believe that they are captured by category 10 and they are necessary for the purposes of carrying out the forensic analysis of the plaintiff's claim as I have discussed above. I therefore direct the plaintiff to make discovery of its bank statements for the period 2003 to 2016.

Arbitration between the Plaintiff and Quinn Insurance
25. The non IAL defendants said that the plaintiff ought to have made discovery of the submission to arbitration, all pleadings and inter partes correspondence and any arbitral award or settlement agreement in relation to the arbitral dispute between the plaintiff and Quinn Insurance as this is relevant to the issue of the plaintiff's losses. The plaintiff accepted that the award or settlement would be relevant to the issue of the plaintiff losses but that it should not be obliged to discover the other documentation sought.

26. There had been a dispute between the non IAL defendants and the plaintiff in relation to the plaintiff's claim of privilege over certain documents relating to the Quinn Insurance arbitration. This was resolved once the non IAL defendants were satisfied as to the correct dates of the documents and of the claim. They did not seek discovery of any documents in respect of which the plaintiff was entitled to claim privilege arising out of the Quinn Insurance arbitration. They confined their case to those documents which clearly would not be privileged.

27. They argued that if the arbitral award or settlement was relevant to the issue of the plaintiff's losses, and therefore discoverable, that they were also entitled to discovery of the submission to arbitration and the pleadings and the inter partes correspondence as these were necessary to elucidate any award or settlement of the arbitration. The plaintiff's losses were not confined to the sixteen projects the subject of these proceedings and therefore it was necessary to identify that part of the award or settlement agreement which related to those projects.

28. The plaintiff argued the non IAL defendants were in fact seeking further discovery and this was outside the scope of the order and in particular outside the scope of category 10.

29. I agree with the submissions of the non IAL defendants in this regard. The plaintiff accepts that the arbitration award or settlement agreement is relevant to the question of losses and therefore within the scope of category 10. I accept that it is necessary to consider the submission to arbitration and the pleadings in order to properly understand any award or settlement agreement. I therefore direct the plaintiff to make discovery of the submission to arbitration, the pleadings and the arbitral award or settlement agreement in relation to the arbitral dispute between the plaintiff and Quinn Insurance. I do not direct that there should be discovery of all *inter partes* correspondence as much of this would be irrelevant to the assessment of the award or settlement as the case may be.

A Motion of the Fourth Named Defendant.
30. The fourth named defendant likewise claimed that the plaintiff's discovery was incomplete. The plaintiff had confirmed that the claim for damages advanced against the non IAL defendants was also advanced against the fourth named defendant. It submitted therefore that it was entitled to the same documents in relation to the losses claimed by the plaintiff as the non IAL defendants. It adopted the submissions of the non IAL defendants in respect of the categories sought by the non IAL defendants save for the material in relation to Roadstone and Sillogue 4.

31. The plaintiff submitted that the discovery it was required to make for the fourth named defendant in relation to its damages claim was in accordance with category 42 of the order of the court. Category 42 provided:

> *"All documents evidencing and/or relating to the losses claimed by the Plaintiff to date to include, but not limited to, alleged financial loss, loss of profits, consequential loss, costs, damages, claims and expenses to include all counts, books and records which evidence and record the basis for the financial state of the company since 31st January 2008."*

32. It was submitted that this category did not apply to documents predating 2008 and therefore the fourth named defendant was not entitled to the discovery it sought.

33. In reply, the fourth named defendant said that the temporal limitation in respect of category 42 was confined to the accounts books and records of the plaintiff and that it did not limit the entire category to documents from 2008 onwards. Therefore, the discovery was not excluded by the terms of the order in respect of the fourth named defendant. Insofar as the court was directing that the plaintiff should make further discovery in response to the motion brought by the non IAL defendants, a similar order should be made in respect of the fourth named defendant.

34. I believe that the fourth named defendant's interpretation of category 42 is correct. Therefore, insofar as I directed the plaintiff to discover its various day books between 2003 and 2007, its bank statements and the documents relating to the arbitration between the plaintiff and Quinn Insurance, the discovery is to be made available to the fourth named defendant also. In addition, the fourth

named defendant is to be entitled to inspect the plaintiff's invoices and to take copies of the invoices on the same terms as the non IAL defendants.

The Plaintiffs Motion against the Director Defendants

35. The plaintiff alleges that the first, second and third named defendants ("the director defendants") have sworn affidavits of discovery which do not comply with the Rules of the Superior Courts or with the agreement reached between the parties and included in the order for discovery of 28th July, 2016. The agreement reached between the parties was that the director defendants would each swear affidavits of discovery after the fourth named defendant made its affidavit of discovery. The director defendants would discover documents in their "*personal possession*" irrespective of the capacity in which they received those documents. Their affidavits of discovery would identify documents which they individually formerly had in their possession. They would identify those documents by reference to the IAL affidavit of discovery. This agreement was reflected in the fourth schedule to the order which stated:

> *"Unless otherwise stated below [the director defendants] will each swear affidavits making discovery of documents in their "personal possession" irrespective of the capacity in which they received those documents … [The director defendants] will also identify documents they formerly had in their possession".*

36. The rules require that each document to be discovered should be listed individually (see appendix C form no. 10 of the Rules of the Superior Court). The principal reasons for requiring the provision of a list of documents has been explained as:

> *"First, it is intended to ensure that all [discovery] has been given. Secondly, it enables the opposite party to identify the documents of which discovery is being made and to request particular documents to be produced for inspection or for copying. Thirdly, it will enable the court, if necessary, to make an effective order for the production of particular documents …".*

37. In this case the affidavits sworn by the director defendants list no documents in either part of the first schedule. The second schedule does not list any documents. It provides a table of 79 (or, in the case of the third named defendant, 80) classes of document types and a commentary opposite each type stating whether to the deponent's best knowledge and belief it is likely or it is possible that he would or would not have had such documents or it is possible that he would or would not have had some or all of such documents in his possession prior to the threat of proceedings in respect of the Bay Lane Quarry arising in May 2007 in his capacity as a director of the fourth named defendant.

38. The classes of documents are organised thematically. They do not correspond to the categories of discovery as either agreed or ordered to be discovered. They do not correspond to the classes of documents under which the fourth named defendant made discovery by agreement with the plaintiff. The director defendants' solicitor has provided a key which indicates into which classes in the fourth named defendant's discovery the document classes of the director defendants' discovery fall. This would enable the plaintiff to identify, for example, that site investigation reports regarding the Bay Lane Quarry as referred to in the affidavits of discovery of the director defendants are to be found discovered in the affidavit of discovery of the fourth named defendant under classifications A and C. However, it does not clarify which of the documents listed by the fourth named defendant under A or C are referred to by the director defendants and it does not identify them by individual document number. Thus, even if this were an acceptable method of complying with the obligation to make discovery in accordance with the order of the court, it is not possible to identify any particular document as being discovered by any of the director defendants.

39. This uncertainty as to whether any individual document has been discovered by any of the director defendants is compounded by the fact that they each state that certain classes of documents were likely to have been in their possession or were not likely to have been in their possession or possibly were or were not in their possession. Thus, even if it is possible to identify a particular type of document to which the deponent refers by cross referencing to the discovery of the fourth named defendant, such as for example, draft EIS reports, it is still not possible to confirm whether or not any of the deponents states definitively whether the document was or was not within his possession.

40. The defendants explain this approach in the affidavit of their solicitor, Mr. Hartnett. They acknowledge that they were required to identify documents they either have or formerly had in their possession. They note that the fourth named defendant discovered approximately 30,000 documents and that they assessed that it would not be "

> *"… a practicable or meaningful exercise for each Defendant to attempt to analyse, purely from recall, on an individual document basis which documents each of these defendants had in their possession prior to August 2007, a decade ago. …*
>
> *It was decided that the more robust approach was to systematically identify the types of the documents which were comprised in [the fourth named defendant] discovery, and thereafter the defendants could make an informed and reliable assessment as to whether they would have been in their respective possessions at one time."*

41. They stated that the alternative "document identifier" approach would be oppressive and it was estimated that this would be likely to take a minimum of 60 full working days for each of the defendants to undertake. It was argued that such discovery would not likely yield to greater certainty by reason of:

> *"(i) the volume of documents involved;*
>
> *(ii) the passage of time since August 2007; and*
>
> *(iii) the fact that many of these documents have since been brought to these defendant's attention in the context of recent pyrite litigation. This latter fact is likely to lead to significant "false positives" if the defendants are asked to individually specific (sic) whether they had documents in their possession."*

It was submitted that the approach adopted was methodology more robust and more likely to accurately ascertain which documents the defendants previously had in their possession.

42. There may well be considerable merit in the explanation advanced by Mr. Hartnett on behalf of the director defendants. However, it does not provide an answer to the plaintiff's motion. The discovery made is not in accordance with what was ordered or what is required by the Rules of the Superior Courts. It does not accord with the agreement reached with the plaintiff. The director defendants did not seek or obtain the agreement of the plaintiff to this approach to making discovery. This is in contrast with the

fourth named defendant which sought and obtained an agreement from the plaintiff as to the manner in which it was to comply with the order for discovery. The director defendants made no application to court to permit them to make discovery in this fashion. The director defendants advanced no explanation as to why they did not seek the agreement of the plaintiff or make an application to court for what amounted to a unilateral decision on their part in relation to the manner in which they would comply with the order for discovery.

43. There are certain worrying aspects of the approach taken by the director defendants to their obligations to make discovery. It was confirmed by their counsel in court that the director defendants did not review the entire discovery of the fourth named defendant prior to swearing their own affidavits. Obviously the discovery in this case is vast and clearly the director defendants would rely very considerably on the assistance of their solicitors in complying with their obligations. The courts have acknowledged the importance of the role of legal advisors in the discovery process. In *Nationwide Building Society v. Charleton* (unreported Supreme Court 5th March 1997), Murphy J. noted that a solicitor "*owes a duty to the court carefully to go through the documents disclosed by the client to make sure, as far as possible, that no relevant document has been withheld from disclosure*". However, he emphasised that "*the deponent cannot abdicate his duty in relation to disclosure to his legal advisors nor could the lawyer accept the responsibility of inspecting all of the documents in the possession of his clients*".

44. There are unexplained inconsistencies between the affidavits. Each of these defendants were at the relevant time directors of the fourth named defendant. In respect of different classes of documents one director says that he was likely to have had certain documents in his possession as a director of the company but the other says the contrary. The individual classes of documents into which their affidavits have been organised do not permit them to definitively confirm that they had in their possession documents of which they themselves were the author. This rather inescapable fact was only confirmed by their solicitor in the replying affidavit to the motion.

45. It must be acknowledged that the task of the director defendants in making discovery of documents which were previously in their possession is a difficult task. The task is made more complicated by the fact that many or all or some of the documents may not originally have been in their possession prior to August 2007 (or indeed May 2007), being the date when the director defendants say that pyrite litigation was first contemplated and they may subsequently have come into their possession in the context of litigation rather than in the context of the ordinary business of the fourth named defendant. However, even allowing for the admitted difficulties in this regard, the affidavits of discovery prepared by the director defendants are not in accordance with the order and the rules and thus not acceptable.

46. The director defendants say that it was more onerous for them to discover documents in their possession as opposed to documents which would have been in their possession, power or procurement. They also say that it is more difficult to make discovery by reference to the discovery of another party, in this case the fourth named defendant. Whatever about the merits of these submissions, it is not open to them to raise either of these objections at this point. The reason the discovery is being made in this manner is because they asked that they make discovery after and by reference to the discovery of the fourth named defendant and they specifically agreed to make discovery of documents in their personal possession. Having specifically requested that they be permitted to make discovery in this fashion, it is not open to them now to object that the requirement of making discovery as ordered is too onerous.

47. It is therefore necessary that each director defendant must swear a new affidavit of discovery. They must review the documents themselves with the assistance of their solicitors. The obligation to make a discovery rests upon them individually.

48. The documents should be listed individually by reference to identified document number used by the fourth named defendant in its discovery. It would be permissible to group them by reference to numbers 1 to 52 for example if this appropriate or convenient.

49. The parties may agree if they wish that the director defendants make discovery in the same classes as the fourth named defendant. This is not part of the order for 28th July, 2016, and I am not so ordering now.

50. The agreement and the order was that the director defendants would swear affidavits making discovery of documents in their personal possession irrespective of the capacity in which they obtained the document. This may well be of limited utility to the plaintiff at trial, as was pointed out by counsel for the director defendants. It is not for the court now (or indeed the director defendants) to revisit the utility of the discovery which was agreed and ordered nine months ago. All parties have been represented by very experience Counsel and solicitors. An agreement was reached and an order made. The parties should abide by the terms of the order unless all sides agree to vary it (or it is discharged or varied on appeal).

51. Finally, it is not acceptable that the entirety of the discovery by the director defendants is caveated by saying to the best of their knowledge, information and belief that the documents were likely or may possible have or have not been in their possession prior to either May 2007 or August 2007. While it may not be possible to be definitive in respect of every document given the very considerable lapse of time, the director defendants may not avoid their discovery obligations in a blanket fashion, as is the effect of their existing affidavits of discovery in this regard.

Conclusion

52. Mr. Elliot on behalf of the plaintiff will swear an affidavit setting the explanations referred to in paras. 6, 11, 18 and 19. The plaintiff will swear a supplemental affidavit of discovery discovering the documents previously omitted from its affidavits plural of discovery referred to paras. 11, 17, 24 and 29. The additional affidavit of discovery will be for the benefit of all of the defendants.

53. The director defendants will swear for new affidavits of discovery identifying the documents by individual document identifier number as used in the affidavit of discovery of the fourth named defendant. I will hear the parties in relation to the time to be fixed for the swearing of the affidavits.