

THE HIGH COURT

[Record No.2012/3060 P]

BETWEEN

TONY KEOGH & ANNE O'MALLEY

PLAINTIFFS

AND

BYRNE WALLACE SOLICITORS

DEFENDANTS

[Record No.2012/1054 P]

BETWEEN

DERMOT DARCY

PLAINTIFF

AND

BYRNE WALLACE SOLICITORS

DEFENDANTS

[Record No.2011/8517 P]

BETWEEN

MICHAEL BYERS & LUCINDA McCOLGAN

PLAINTIFFS

AND

BYRNE WALLACE SOLICITORS

DEFENDANTS

[Record No.2012/3053 P]

BETWEEN

PHIL MONAGHAN & PAUL MONAGHAN

PLAINTIFFS

AND

BYRNE WALLACE SOLICITORS

DEFENDANTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 15th day of July 2015.

Introduction

1. The motions dealt with in this judgment arise in the context of litigation against the defendants by 47 plaintiffs who invested in a property scheme, referred to as "Project Ivanovici", in Montenegro. There were four categories of investor and the four plaintiffs named above have been selected as representatives of those categories.

2. In each case, investors were invited to subscribe to a fund to purchase properties. If the subscriptions met a target figure by a given date – the "back stop date" - the monies were to be invested. If the target amount was not reached the monies were to be returned.

3. It appears that the funds invested in the project were not used to purchase properties in Montenegro and are missing. The plaintiffs say that the defendants are liable in damages, on the basis that, according to them, the target amounts were not reached by the relevant back stop dates and their funds should have been returned to them.

4. The defendants say that they were the legal advisers to the promoters of the project, and not to the investors. In this regard they rely on the terms of the application form for investors. They also held the monies obtained from investors and transferred those monies to third parties when the target subscription amounts were met. It is pleaded that in each case where funds were transferred it was because the target had been reached.

5. A request made by the plaintiffs for discovery has been agreed in full.

6. The plaintiffs served a notice for further and better particulars on the defendants on the 15th January, 2015, and now seek an order compelling the defendants to fully and adequately reply to that notice. (Reflecting the different categories of plaintiff, the requests for particulars are also divided into four categories.)

7. The defendants say that the outstanding issues relate to matters for evidence, and that the plaintiffs are attempting to use the particulars as a means of cross-examination or interrogation.

Category 1: Tony Keogh & Anne O'Malley v. Byrne Wallace Solicitors

8. The plaintiffs in this category say that the scheme was to raise €12.5 m for the purchase of five properties. Request 1 arises from the defendants' plea that the target subscription amount of €1,500,000 applicable to this category was reached by the 3rd December, 2007.

9. The plaintiffs request the defendants to:

- a. Identify, and state by name, the investors whose sums the defendant will allege made up the target subscription amount of the plaintiffs by the 3rd December, 2007.
- b. Identify the sums alleged by the defendants to have been received which it is alleged made up the target subscription amount of €1,500,000 by the 3rd December, 2007.

10. The plaintiffs submit that they should know these details in advance and should not be ambushed in regards to which investors had contributed to these amounts.

11. Request 2 arises from the defendants' plea that they advised on the investment structure for the Irish investors. The plaintiffs seek particulars in respect of the investment structure.

12. The plaintiffs believe that there were various changes or restructuring to the investment structure during the course of the defendants' retainer and that the original mandate was not adhered to. The plaintiffs submit that the facts relating to this structure should be included in the particulars, on the basis that the defendants are its "architects".

Category 2: Dermot Darcy v. Byrne Wallace Solicitors 2012/1054 P

13. Request 1 arises from the defendants' plea that the target subscription amounts of €12,730,975.00 and €3,709,530.00 related to "*two distinct tranches of the Montenegrin Project*".

14. The plaintiffs request for the defendants to provide full and detailed particulars of each "*tranche of the Montenegrin Project*", stating:-

- a. The target subscription amount for each "*distinct tranche*"
- b. The Back Stop Date for each "*distinct tranche*"
- c. The properties to be acquired and charged using investor funds in each "*distinct tranche*" as referred to in the relevant deed of authorisation and declaration of trust.
- d. The sums received, from whom and the date on which such sums were received which were applied towards each "*distinct tranche*"

15. Request 2 in Category 2 is the same as Request 2 in Category 1 in relation to the particulars of the investment structure

Category 3: Michael Byers & Lucinda McColgan v. Byrne Wallace Solicitors 2011/ 8517 P

16. Request 1 arises from the defendants' plea that the target subscription amount of €3,709,530.00 applicable to the Category 3 plaintiffs was reached by the 6th December, 2007.

17. The plaintiffs request the defendants to:

- a. Identify, and state by name, the investors whose sums the defendant will allege made up the target subscription amount of the plaintiffs by the 6th December, 2007.
- b. Identify the sums alleged by the defendants to have been received which it is alleged made up the target subscription amount of €3,709,530.00 by the 6th December, 2007.

18. Request 2 in Category 3 is the same as Request 2 in both Category 1 and Category 2, in relation to the particulars of the investment structure.

Category 4: Phil Monaghan & Paul Monaghan v. Byrne Wallace Solicitors

19. Request 1 arises from the defendants' plea that the target subscription amount of €3,709,530.00 applicable to the Category 4 plaintiffs was reached by the 6th December, 2007.

20. The plaintiffs request the defendants to:

a. Identify by name the investors whose sums the defendant will allege made up the target subscription amount of the plaintiffs by the 6th December, 2007.

b. Identify the sums alleged by the defendants to have been received which are claimed to have made up the target subscription amount of €3,709,530.00 by the 6th December, 2007.

21. Request 2 in Category 4 is the same as Request 2 in Category 1, Category 2 and Category 3, in relation to the particulars of the investment structure.

Reasons for request

22. The plaintiffs submit that the delivery of replies will assist in the saving of costs and time at the trial of the action by compelling the defendants to identify with precision the pleas made by the defendants in their Defence and Counterclaim.

Defendants' replies to requests for Further and Better Particulars

23. In relation to the identity of the investors and the sums which, it is pleaded, made up the target subscription amounts the defendants say:

"This is not a proper matter for particulars. A reply to this particular is not necessary for the Plaintiffs to know the Defendants' case. Further and importantly, this is a matter for evidence at the trial of the action. Insofar as it is a matter for evidence, the Plaintiffs have sought, and the Defendants have agreed to provide, discovery of relevant documentation and accordingly, the Plaintiffs do not require replies to these particulars."

24. As far as the details of the investment structure are concerned it is stated that:

"This is a request for particulars that was not previously raised in the initial notice for further and better particulars and the Plaintiffs offer no basis for now seeking additional information. This is, self evidently, not a matter that arises from the Defence nor is it a matter to which a reply is necessary to enable the Plaintiffs know the case that the Defendant makes by way of defence. The request for this particular represents an impermissible attempt to obtain evidence and, in this context, insofar as several of the sub-paragraphs seek "confirmation" of certain facts, the request for particulars is more accurately described as an impermissible attempt to raise interrogatories without leave of the Court other than in the form required by the Rules of The Superior Courts. Finally and importantly, the discovery sought by the Plaintiffs, and agreed to by, the Defendants encapsulates the matters raised in this particular (and each sub-paragraph thereof) so that replies are not necessary."

Authorities

25. Order 19, Rule 7, Rules of the Superior Courts

Rule 7:

(1) A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

(2) Before applying under this rule to the Court a party may apply for particulars by letter. The costs of each letter and of any particulars delivered pursuant thereto shall be allowable on taxation. In dealing with the costs of any application for particulars, the provisions of this paragraph shall be taken into consideration by the Court.

(3) Particulars shall not be ordered under this rule to be delivered before defence or reply, as the case may be, unless the Court shall be of opinion that they are necessary or desirable to enable the defendant or plaintiff, as the case may be, to plead or ought for any other special reasons to be so delivered.

26. In *Civil Procedure in the Superior Courts*, Delany & McGrath (3rd ed., Round Hall) it is stated at paragraph 5-89 that:

*"[T]he general principle is that particulars will be ordered if they are necessary to clarify the issues so that the party requesting them can know the case he has to meet or if there is a danger that he may be taken by surprise at the trial of the action. An order compelling a party to reply to a notice for particulars will be refused where the court is satisfied that the party seeking the particulars knows the broad outline of the case that it will have to meet. Neither will particulars be ordered of the evidence on which a party will rely on trial. The courts enjoy a broad discretion in deciding whether to order particulars, and as acknowledged by Murnaghan J in *Caulfield v George Bell & Co. Ltd* the exercise of that discretion will often depend "on a view of fairness or convenience which is essentially a matter of degree".*

27. In *Mahon v. The Celbridge Spinning Co. Ltd* [1967] I.R. 1 Fitzgerald J. said:

"The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at the trial."

28. It was noted in *Coyle v Hannan* [1974] NI 160 that particulars may not be sought in relation to matters not alleged in the statement of claim, and that it was long established that the court will not sanction an attempt to serve interrogatories under the guise of seeking particulars.

29. The test in *Mahon v Celbridge Spinning Co. Ltd* was approved in *McGee v O'Reilly and The North Eastern Health Board* [1996] 2 I.R. 229 where Keane J. said:

"In our system of civil litigation, the case is ultimately decided having regard to the oral evidence adduced at the trial. The machinery of pleadings and particulars, while of critical importance in ensuring that the parties know the case that is being advanced against them and that matters extraneous to the issues as thus defined will not be introduced at the trial, is not a substitute for the oral evidence of witnesses and their cross examination before the trial judge."

30. More recently, Dunne J. gave the following analysis in *Quinn Insurance Ltd & Ors. V. Tribune Newspaper PLC & Ors* [2009] IEHC 229:

"There is no doubt whatsoever that a party is entitled to know the nature of the case being made against them. However, the role of particulars is not to require a party to furnish detailed particulars of specific aspects of the case. It is sufficient that the issues between the parties should be adequately defined and that the parties should know in broad outline what is going to be said at the trial of the action..."

...I think it is clear from the outline of the arguments I have set out, that the issue I have to consider is whether the defendants have, in fact, provided a broad outline of the case being made in justification against the plaintiffs, or are the plaintiffs attempting, by means of the notices for particulars, to force the defendants to disclose the names of the witnesses who will be giving evidence on their behalf at the trial of the action..."

... having referred at length to the authorities opened to me in the course of argument, it seems that certain principles can be derived from those authorities. It goes without saying that a party is entitled to know the case being made against them. If necessary, particulars may be ordered to clarify the issues or to prevent the party from being taken by surprise at the trial of the action. However, a party is only entitled to know the broad outline of the case that he/she will have to meet. A party is not entitled to know the evidence that will be given against them in advance of the hearing. Further, it is not usual to order the names and addresses of witness to be furnished in advance of the hearing of an action."

31. Finally, I wish to refer to *Burke v Associated Newspapers (Ireland) Ltd* [2010] IEHC 447 in which Hogan J. said at paragraph 17:

"In general, therefore, while a litigant is entitled to know from the pleadings the nature of the case he has to meet, he is not entitled to learn in advance the evidence which his opponent will lead in support of that contention. The distinction between what is a matter for pleadings on the one hand and what is a matter for evidence on the other is often a fine one and it is also one which is sometimes difficult to apply consistently in practice. Nevertheless, it seems clear that a plaintiff (or a defendant, as the case may be) is not entitled to further particulars once the essence of the case which he has to meet is clear from the proceedings."

Discussion and Conclusion

32. I think that it should be noted that the parties in the case have adopted a very practical approach to this litigation and are running it in an efficient and focused manner. Agreement has been reached as to the representative plaintiffs, and discovery agreed in full.

33. However, it seems to me that the defendants are correct in arguing that what the plaintiffs are attempting to do here is to compel them to provide what would be, in effect, witness statements without the benefit of the witness being able to put his or her answers in context. The plaintiffs know what the defence in the case is and have been given everything they have asked for in discovery relevant to that defence. It is neither necessary nor desirable that, on top of the discovery, and on top of the answers already given to the particulars raised, the defendants should be ordered to give in advance an analysis of the evidence upon which they will rely.

34. I therefore dismiss the application.