

## THE HIGH COURT

[2002 No. 9916P]

BETWEEN

VLM LIMITED

PLAINTIFF

AND

XEROX (IRELAND) LIMITED

DEFENDANT

**Judgment of Mr. Justice Clarke delivered the 25th February, 2005.**

1. This matter comes before the court by way of an appeal from the decision of the Master of the High Court made on the 17th November, 2004. On that discovery in respect of certain areas was directed by consent of the parties to be made on behalf of the defendant but in respect of the matters which were in contention between the parties the order sought on behalf of the plaintiff at paragraphs 1 to 9 and 12 of his request was refused.

**The Substantive Case**

2. It is common case that there are four written agreements between the parties being three lease agreements (dated respectively the 12th October, 2000, the 17th April, 2001 and 30th August, 2001) and a full service/maintenance agreement dated 12th October, 2000 all of which relate to printing machines and the service and maintenance thereof. In substance the plaintiff claims that the relevant machines failed to conform with both the reasonable and therefore implied expectations in respect thereof and also in accordance with, what he contends, were representations in respect of the level of performance that could be expected. The plaintiff pleads his case as a breach of contract, breach of warranty, misrepresentation and in relation to negligence, breach of duty and breach of statute as alternative causes of action. However it should be noted that the representations alleged at paragraph 9 of the statement of claim are in identical terms to the contentions as to the express or implied terms of either the lease agreements or the service maintenance agreement as specified in paragraphs 4 and 5. Similarly it is difficult to see that the plaintiff's claim in negligence could extend any further than the claims in respect of breach of contract or misrepresentation in the circumstances of this case.

3. The substance of the plaintiff's case is, therefore, that the machines failed to comply with either the general standard which could reasonably be expected from them and/or with the specific performance requirements which he contends were represented to him. If he establishes such a failure then he would appear likely to succeed under one or all of the headings of claim made to the extent that he can establish loss. Equally if he fails to establish the above it is difficult to see how he could succeed under any of the headings of claim.

4. However before completing a review of the issues likely to arise at the substantive hearing of this case it is also necessary to have regard to the defendant's position. Much of what is set out in the defence amounts to a simple traverse of the contentions set out in the statement of claim. However paragraph 17 contains a new plea which is stated to be without prejudice to the other matters and contains an assertion that any loss or damage was caused solely or was contributed to by reason of "the negligence breach of duty and/or breach of contract on the part of the plaintiff its servants or agents in the use of the said machines". Various particulars are set out which specify the contention that the plaintiff failed in a variety of respects to operate the machines in a proper manner.

5. In those circumstances it seems likely that in general terms the issues in respect of liability which will need to be addressed at the trial of this action will be as follows:-

(a) whether any of the specific representations alleged on the part of the plaintiff as to the performance of the machines were made;

(b) in the light of (a) what were the obligations of the defendant in respect of the machines either as to general merchantable quality or arising from any specific representations found to have been made;

(c) did the machines fail to perform at the level indicated at (b); and

(d) if so was that failure to perform either in its entirety or in part caused not by any defect or other failings inherent in the machines or the maintenance thereof as carried out by the defendants but rather due to a failure on the part of the plaintiff to operate same in a proper manner.

6. It is as against that background that the disputed areas of discovery need to be considered.

**The Law**

7. In *Ryanair plc v. Aer Rianta CPT* [2003] 4 I.R. 264 the Supreme Court had to consider the effects, if any, of the substitution of certain provisions of the rules of the Superior Courts brought about by the Rules of the Superior Courts (No. 2) (Discovery) 1999. The amended rule required an applicant for discovery to apply "by letter in writing requesting that discovery be made voluntarily, specifying the precise categories of documents in respect of which discovery is sought and furnishing the reasons why each category of documents is required to be discovered". See Rule 12(4)(1)(a). The rule as amended further provided that an order should not be made if the court is "of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs". See Rule 12(3). The Supreme Court determined that the amendment to the rule was intended to remedy the mischief of automatic and unnecessary resort to blanket discovery. However the amendment did not change the parts of the rule dealing with the necessity for discovery and the court had a broad discretion to refuse discovery where it considered that it was not necessary either for disposing fairly of the cause or matter or for saving costs. The court noted that the effect of the amendment to the rule was to alter the onus of establishing that discovery was not necessary. Prior to the amendment, this onus vested upon the party against whom discovery was sought. After the amendment the onus, vested on the applicant for discovery so that it was necessary for such applicant to establish, on a *prima facie* basis, that the discovery sought was necessary.

8. However the court did note that the amendment to the rules did not make any other serious or fundamental change in the law regarding discovery so that the celebrated test set out in *Compagnie Financiere du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55 as applied in Ireland in *Brooks Thomas Limited v. Impac Limited* [1999] 1 I.L.R.M. 171, remained operative.

9. Finally the court noted that in considering the overall test for necessity it should be guided by a consideration of the overriding interest in the proper administration of justice which, was not confined to the relentless search for perfect truth but also encompassed the objectives of expedition and economy so that the court in exercising the broad discretion conferred on it by the rule

must be willing to confine categories of documents sought to what was genuinely necessary for the fair disposition of the litigation.

10. The reference to *Compagnie Financiere du Pacifique* refers to a passage in which it was explained that a document relates to the matters in question in the action "which it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary". That dicta of Brett L.J. has been, as was pointed out by Geoghegan J. in *Taylor v. Clonmel Healthcare Limited* (unreported Supreme Court 11th February, 2004) time and again being referred to and approved by the courts in this jurisdiction.

11. On that basis it seems to me that the questions I must ask myself in respect of each category of contested discovery in this case is firstly whether there are real grounds for believing that discovery of the category concerned might advance the plaintiffs case or damage the defendants case.

12. In having regard to the overall requirements of the administration of justice in expedition and economy and also having regard to the question of whether documents are really necessary for the fair disposition of the case I should also have regard to whether there is any lesser category of documents which would in substance be likely to give the plaintiff the same opportunity to advance his case or damage the defendants case but which would be less onerous in terms of compliance.

#### **Applications to the facts of this case**

13. The contending positions of the parties are in substance set out in the correspondence written request for voluntary discovery dated 25th June, 2004 which, in compliance with Order 31 Rule 12(4) as referred to above, specifies the category sought and the reasons therefore was made. It was replied to on the 14th July, 2004 in a document which specifies the reasons why the defendant declined to make voluntary discovery of those categories which are now in dispute. There are two main areas of dispute. In respect of categories 1, 2, 3, 5, 9 and 12 the defendant accepts that he will make discovery in respect of relevant materials which are referable to the three machines the subject matter of these proceedings. The categories of documents encompassed within those requests relate to complaints, problems, tests, quality controls, repairs, improvements or modifications together with software and hardware modifications upgrades, maintenance records/service history and specifically (under category 12) complaints in respect of problems associated with black and white printing. The dispute under those categories is, therefore, concerned with the plaintiffs request for records under those headings in relation to all machines. In passing it should be noted that while the written request sought records in respect of all machines described as docucolor 2045/2060 the application was only pressed in respect of 2065 before the Master and is only pressed in that regard before this court.

14. The net dispute is, therefore, as to whether discovery of documents which might show that there were defects in other machines of the same type are necessary for the fair disposition of this case.

15. Were it not for the provisions of the defence to which I have referred I would have little difficulty in concluding that the relevant documentation is not necessary for the fair disposition of this case. At a simple level the case turns on whether it can be shown that the machines concerned failed to live up to the reasonable standards implied by the term of merchantable quality or such specific performance criteria as may have been incorporated into the contract or otherwise represented to be so by the defendants. In such a context the reason why the machines failed to live up to the appropriate expectations is not really relevant. Thus the fact that there were other machines which failed to live up to similar expectations would not, it seems to me, be relevant either to establish the plaintiffs case or to damage the defendants case.

16. However that part of the defence which contends that the plaintiff was guilty of failing to operate the machine in a proper manner does, it seems to me, complicate matters. Even if it can be established that the machine did not perform in accordance with a reasonable or a represented standard a further question will necessarily arise as to whether any such failure of performance was either caused or contributed to by failings on the part of the plaintiff. The establishment by the plaintiff of a failure to perform will not, therefore, necessarily bring home his case. In those circumstances it seems to me that the existence of similar complaints in respect of the same machine "might" damage the case of the defendant by making it less likely that any failure to perform on the part of the machines was due to a lack of proper care on the plaintiffs part. In principle, therefore, I am satisfied that some degree of documentation in relation to other machines and possible defects therein is necessary for the proper and fair disposition of these proceedings. However mindful of the other criteria specified in *Ryanair* I have come to the view that the breath of the discovery sought under these headings by the plaintiffs is excessive and goes beyond that which is necessary.

17. The only issue to which these documents might be relevant is as to whether any failure to perform can be attributed to fault on the plaintiffs part. It seems to me, therefore, that the only documents which could be relevant are complaints or other records of any of the types set out in categories 1, 2, 3, 5, 9 and 12 which relate to contentions on the part of the users thereof that the machine was defective in a manner similar to the manner in which the plaintiff contends that his machines were defective. I would therefore confine the requests under those categories to cases where the complaint made, problem experienced, test or quality control carried out, repairs, improvements or modifications recommended or carried out, software and hardware modifications/upgrade carried out, maintenance record/service history report, related to any of the problems identified at paragraph 7 of the statement of claim. I have not included category 12 as same seems to be encompassed within category 1 even with the modification which I have just indicated.

18. Furthermore I am not satisfied that a complete trawl through the relevant records of all machines wherever in use throughout the world is necessary for the purposes of fairly disposing of this case. In the circumstances it seems to me that confining the requirement to any relevant records (as defined above) in respect of machines operating within Ireland and the United Kingdom would be sufficient to enable the plaintiff to make the case (if such a case can be made) that any failure of the machines to perform was due to an inherent defect rather than a failing on his part to use them properly.

19. That leaves categories 4, 6, 7 and 8 (orders having been made in respect of categories 10 and 11 consent). I am not satisfied that orders should be made under any of those headings. Category 4 seeks details of customer sites where the relevant machines have been upgraded. The mere fact of an upgrade would not of itself establish anything. If the upgrade was, to the knowledge of the defendants, as a result of a perceived failing on the part of the existing machine then any records recording such failing (provided it is within the United Kingdom or Ireland and relates to a failing of a similar type to that contended for by the plaintiff in respect of his machines) will need to be disclosed under one or other of the categories already referred to. If, on the other hand, the records do not disclose any complaint or concern on the part of the person seeking the upgrade then it is difficult to see how the fact of the upgrade could have any material effect on these proceedings.

20. Similarly categories 6, 7 and 8 seek general documentation relating to the development programme of the range, the corporate policy on customer equipment maintenance of the defendant together with the upgrade policy for software and hardware for the relevant machines. For similar reasons to those for which I indicated that I was not prepared to direct discovery under category 4 it

seems to me that insofar as any of these matters may have been as a result of customer concerns of a type similar to that voiced by the plaintiff, documentation recording such concerns will be caught by the other provisions of the order which I propose to make. Insofar as these matters are not related to such customer concerns it does not seem to me that they are likely to be relevant.

### **Conclusion**

21. In the circumstances I uphold the order of the Master in respect of categories 4, 6, 7 and 8. I would, however, allow the appeal in respect of categories 1, 2, 3, 5, 9, and 12 but with the limitation that in each case relevant documents need only be disclosed where it meets both of the following criteria:-

(a) it relates to a docucolor 2060 printing machine which is in use in the United Kingdom or Ireland; and

(b) it discloses a possible concern relating to the performance of such machine of a type similar to those contended for by the plaintiff in these proceedings as set out at paragraph 7 of the statement of claim.

22. While the making of such discovery will amount to something of a burden on the defendants I am satisfied that in balancing the reasonable possibility that should any such documents disclose a significant number of complaints similar to those which the plaintiff contends occurred in respect of his machines same could have a significant and material bearing on the outcome of the proceedings. However ordering any wider range of discovery would, in my view, be oppressive in circumstances where the additional documents ordered to be discovered would be so unlikely to have any significant bearing on the case that they cannot properly be said to be necessary for the purposes of its fair disposal.