Neutral Citation: [2013] IEHC 541

THE HIGH COURT

COMMERCIAL

2010 11862 P

BETWEEN

IBB INTERNET SERVICES LIMITED, IRISH BROADBAND INTERNET SERVICES LIMITED (TRADING AS IMAGINE NETWORKS) AND IMAGINE COMMUNICATIONS GROUP LIMITED

PLAINTIFFS

AND

MOTOROLA LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Charleton delivered the 19th November 2013

1. This action was commenced by plenary summons on 23 December 2010. While the plaintiffs are separate legal entities, they claim to be a single economic entity and assert the right to be treated as such in law and in fact. They claim damages for breach of contract and in negligence and in misrepresentation against the defendant due to alleged delay in the rollout of a broadband Internet network and in the dysfunction of such portion of that network as was provided. The relevant contract was negotiated between March and October 2009 and was to become operational in December of that year. The parties agree that on 13 October 2009 a written contract, called a master services agreement, was signed between the second named plaintiff and the defendant and that this was later novated to the first named plaintiff on 10 November 2009. In addition, the plaintiffs allege that the third named plaintiff entered into a collateral agreement, apparently oral, with the defendant. Representations and warranties seem crucial to the case made by the plaintiffs as to the suitability and functioning of the network. The main contract of 13 October 2009 contains clauses limiting liability and confining the relationship between the parties to contract in the terms as therein set out. The series of sites over which this network was to operate was to be supplied by the defendant to the plaintiffs in groups of 15, amounting eventually to 120 sites actually supplied, and there were 5 others included in a test module. In all, 402 sites were projected ultimately. Provisional acceptance of the sites under a term of the written contract is alleged by the defendant to be a warranty of satisfaction. Of these there are said to be 51 signed acceptances, on behalf of which plaintiff or on behalf of all plaintiffs, together with 74 deemed acceptances by virtue of the elapse of time. In addition, the contract provided for a final acceptance of which 31 were signed, in the same context, and 94 are deemed. The terms of the contract seem to be such that unless a batch of 15 sites is ordered, by whichever of the plaintiffs is responsible, there is no obligation on the defendant to supply anything or on the plaintiff to order anything. Because of dissatisfaction, whether for good reason or not, no sites have been ordered since July 2010.

2. It is more than unusual for a case entered into the commercial list to be three years old and not to have been tried. This case has not even proceeded to the stage of discovery. The plaintiffs claim to have been bombarded by procedural motions, of which they say this is the latest. The defendant claims that by reason of pleading alternate facts, there has been a necessity for the plaintiffs to recast the statement of claim on three occasions, the current version being the fourth. There are three prior written judgement of the High Court on this claim about this very lengthy statement of claim; of Kelly J on 6 July 2011, of Clark J on 9 November 2011 and of McGovern J of 12 October 2012. In addition, the High Court has refused the defendant security for costs, which ruling has been appealed to the Supreme Court and is awaiting judgement. It is impossible to feel satisfaction with the progress of this case even since that date of the last version of the statement of claim; the fourth. The Court is entitled to emphasise that, whatever the rights and wrongs of this series of pre-trial manoeuvrings, about which no comment is made, the parties are under a duty to the court to prepare a case for hearing through cooperating with each other in aid of the fundamental obligation of identifying the issues to be tried and making the case ready for hearing.

Issues

3. Fundamental to the management of any case is that the Rules of the Superior Courts are to be used to advance what is in issue and to facilitate a fair hearing. The parties to any proceeding are expected by the court to cooperate to bring the case to trial. Central to that fundamental obligation is defining what the cause is about. Increasingly, in complex cases issues are being lost sight through concentration on peripheral orders as an end in themselves. The spectre of *Jarndyce v Jarndyce* is one that no court should forget. Discovery motions seem to be increasingly self justifying, rather than an aid to litigation; this despite the repeated warnings of the Supreme Court against oppressive discovery. Yet, nothing has changed. Statements of claim now increasingly plead evidence and defences can be read with mystification as to what the answer to a claim is beyond denial. Hogan J has rightly, in *Armstrong v Moffatt* [2013] IEHC 148, expressed frustration at the futility and waste of costs occasioned by endless notices for particulars in personal injury cases. In the commercial list, issues central to the disposal of the cause are to be identified by clear and precise pleadings and the proper use of pre-trial procedures in aid of appropriate notice as to facts. The late Rory Brady SC used to finish opening a case by concisely telling the judge the numbered points of law and fact necessary to the decision. This lucidity must be brought to bear on every case. If the parties do not do so, the judge may, and should, act. Order 63A rule 6(1)(IV)(ii) provides that the judge may of her or his own motion and "after hearing the parties … give … directions to facilitate the determination of the proceedings … fixing any issues of fact of law to be determined in the proceedings." The Court does not propose to now define issues with any precision. The Court proposes, instead, to attempt to draw this case back on a track that will further the possibility of a fair hearing. A suggestion which follows, on the Brady model, as to what the case is about might be kept in mind and refined by the parties. Here the problem has been an expansion of procedural controversy while the essential factors that make up the case are being lost. These seem to be:

1) Is the master agreement the whole of the agreement between the parties or not?

2) Was there a collateral agreement, and if so, what are the terms of it?

3) What is the alteration by reason of the interaction, if any, of the collateral agreement and the master service

agreement?

4) Who was the agreement made with? Maybe the first plaintiff and maybe the second. It seems that it is the first, having been made by the second and then novated, and if there is a collateral agreement then it was made by the third.

5) Is there a factual basis and is there a legal basis to support the proposition that the plaintiffs are an economic entity and what are the liability consequences of that?

6) What was required under the contract?

7) What was actually rolled out?

8) Was it adequate?

9) Why was there a provisional acceptance or a deemed provisional acceptance if performance of the contract was inadequate?

10) Is relief to be denied or limited by reason of clauses in the master services agreement, as a matter of law, or of fact?

4. This suggestion is one made with a view to helping this now very old case to progress. The parties are now obliged to interrogate this in a spirit of cooperation. It is not to be used for obsessive correspondence. Some expert evidence may be needed on issues 6, 7 and 8 but it should be remembered that the court has an inherent jurisdiction to disallow repetitive evidence, especially where one side or the other proposes to overwhelm the aim of a fair and balanced hearing with multiple expert witnesses.

Issue on interrogatories

5. This latest motion concerns interrogatories. In cases outside the commercial list, Order 31 rule 1 allows interrogatories in cases of fraud or breach of trust and otherwise with the leave of the court. In the commercial list, interrogatories are permitted under Order 63A rule 9 without leave. Interrogatories were served here on 7 May 2013. The original reply to interrogatories by the plaintiffs was on 4 June 2013. In the cascade of correspondence which followed, on 20 June the solicitors acting for the defendant pointed out that some of the replies had to be incorrect. The solicitors for the plaintiffs replied on 2 July agreeing and engaging with a query as to what should be done. Immediately, the solicitors for the defendant replied that this was a matter for the plaintiffs. A new reply was then drafted and it was served on 15 July. This document, sworn by the secretary of the companies, contained the following paragraph:

> I say that I make this affidavit in order to correct certain typographical and referencing issues contained in my prior affidavit sworn herein on the fourth day of June 2013. I say that since the swearing of that affidavit I have become aware that there were certain typographical and referencing issues that required to be addressed. The purpose of this affidavit is to correct such issues. The material issues can be found at answers 20, 21, 90, 116, 129, 124 and 155. Set out below in full by the answers of the … plaintiff to the interrogatories for its examination by the defendant.

6. Further correspondence ensued. Then, on 22 July a motion was brought returnable to 25 July, which was heard by this Court on 31 October, seeking that the secretary of the plaintiff companies should be required "to answer by means of viva voce examination the interrogatories delivered by the defendant to the first plaintiff, the second plaintiff and the third plaintiff respectively on 7 May 2013." In consequence of a generous exchange of affidavits, the plaintiffs have set out in documentary form and underlined a later set of answers which shows the original and the corrections. The defendant makes this case in a letter from the solicitors dated 30 August 2013:

> Rather, the defendant wishes to examine [the company secretary] regarding his sworn answers to interrogatories because-having regard to the matters outlined above-it is not clear which answers are correct and which answers are not correct, nor is it clear how the admitted errors in the first set of answers to interrogatories arose; and [the company secretary] is the only person who can provide the necessary explanations in this regard. Alternatively the plaintiffs might now deliver sworn answers to the defendant's notice of interrogatories clearly identifying (by underlining or strikethrough) each and every change to the answers sworn on 4 June 2013 and clearly and satisfactorily explaining why [the company secretary] is changing the evidence (in each instance) to the truth of which he swore on 4 June 2013.

Probable origin of error

7. As to what went wrong, the company secretary of the plaintiff companies points out that only 48 of the 473 answers were incorrect. They affirm that the answers provided on 15 July are correct. This seems probable. This is only a preliminary view and a different attitude can be taken by the trial judge. Questions can also be asked at trial.

8. With increasing complexity in cases, the method of answering notices for particulars simply by reference numbers has been shown to cause both error and confusion. This case is illustrative. The same principle applies to interrogatories and replies thereto. A simple means of avoiding this, which might be adopted in the commercial list in future, is for solicitors to obtain an electronic copy of any notice for particulars or any interrogatories and put the answering the same document in the same paragraphs but differentiated by using a bold typeface or just calling it 'answer'. There is nothing in this case to suggest that anything other than the complexity of dealing with hundreds of questions in respect of three different companies at the same time led to these errors.

The law

9. Order 31 rule 11 provides:

> If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court for an order requiring him to answer, or to answer further, as the case may be; and an order may be made requiring him to answer or answer further, either by affidavit or by viva voce examination, as the court may direct.

10. That rule is not applicable. The company secretary has answered sufficiently the questions asked of him. There is no question of confusion. There an averment on affidavit by the plaintiffs that the answers provided, following correction, are now to be relied on as fact. Any question as to how the error arose, or as to whether it amounted to a prior inconsistent statement, is a matter for cross-examination at the trial. The trial must not be further delayed by this process. Whereas the rules supply the governance of actions and contain many remedies to assist parties, it must always be remembered that resort to them is for the purpose of the fair administration of the case. Furthermore, since the object of justice is invariably tied to a quest for the truth, the use of procedures

should be sparing and must be directed towards what is reasonable in terms of costs and court resources. In deference to the argument on both sides, the observations which follow are appropriate.

11. Since interrogatories tend to be directed towards both general questions in the case and also to specific fact, it is incumbent upon a company secretary, or a director or liquidator of the company, in answering interrogatories, to make all reasonable enquiries from the present and past officers and servants of the company so that the answers will reveal what was known to the company. In *Stanfield Properties Limited v National Westminster Bank plc* [1983) 1 WLR 568, the fraudulent issue of a cheque drawn on a third party was in issue. The liquidator of the company in question had made diligent enquiries but was obstructed by the emigration, imprisonment or retirement of former directors. Sir Robert Megarry VC, in referring to the almost identical English rule, held that the court had a discretion as to whether to order further answers and as to whether the appropriate remedy was to require an affidavit or an oral examination before the court. In Matthews and Malek - Disclosure (fourth edition) 20.105 the authors offer the view that where a response has been filed, that an interrogatory should not be changed without filing a correction; and that is said to be appropriate only with a witness statement explaining the need for the correction. A corrective affidavit is said to be permitted only with the consent of the parties. It is hard to see that practice being desirable in every case. The discretion of the court as to the order the court makes under this rule is undoubted. The circumstances under which a party may make an error in answering interrogatories can vary between thought-through, cunning or structured lies, at one extreme, to simple errors due to the multiplicity of material, the difficulty in obtaining instructions or typographical and referencing errors, all of which are clearly on the other end of the spectrum. It is appropriate for a party who notices that answers to interrogatories are incorrect to immediately take steps to correct the answers and to offer a general explanation as to how this occurred. There should be immediate notice to the opposite party. If there is to be a change of factual narrative by reason of a ledger being checked or a computer record being noticed for the first time, or an agent been finally contacted who is able to give a materially different account of events, then this should be noted in furnishing corrected interrogatories. These are errors, the explanation for which can be in aid of truth. That procedure has the added advantage of ensuring that court time is not wasted in the pursuit of giving explanations in testimony which could just as easily have been given in a written document prior to trial. The other party may, of course, accept that explanation or challenge the relevant testimony in court. Nothing in the Rules of the Superior Courts requires a party to bring a motion before the court in order to allow such correction. The proper course is for this to be done in a timely and efficient manner as part of the cooperation that is expected of solicitors in bringing a case efficiently to trial. Clearly, the more germane the explanation, the more readily the issue can be finally thus disposed of in aid of efficiency in litigation. Where the errors occurred by reason of not following the obvious procedure of reproducing each question and then answering each question immediately afterwards with a different typeface, or by putting in a following paragraph marked 'answer', then that is really all that needs to be said. That assertion may be challenged in testimony, as to how such mistake could be made; but it seems that any reasonable person can see that the procedure currently adopted in our courts of answering hundreds of questions on three different documents solely by reference to number and sub number is likely to lead to this kind of error. It is hoped that this ruling may assist in avoiding these problems in the future.

12. Even had there been a failure to satisfactorily answer an interrogatory, it is impossible to imagine the circumstances under which a party answering should be brought to court to be examined generally. Even an examination on specific questions will be rare indeed. An examination of some kind would not be impossible, since that is provided for in the rule. Before embarking on such course, however, the court should bear in mind that the principle adopted in our system is that the unitary trial is in general the mode of disposal of the case, unless a preliminary issue of law or a modular issue will genuinely help in disposal and not cause irremediable prejudice. Is also important that any examination of a party or a witness prior to trial, should not become the trial itself. There is provision in the rules and in the inherent jurisdiction of the court for the trial of a preliminary issue of law and for a modular trial, but such jurisdiction should only be invoked where a departure from the basic rule of a unitary trial will be genuinely helpful in terms of saving court time and in minimising costs and will truly help, rather than hinder, the ultimate trial; *Weavering Macro Fixed Income Fund Limited (in liquidation) v PNC Global Investment Servicing (Europe) Limited* [2012] IESC 60. Should discretion on this rule be exercised in favour of either requiring a party to swear an affidavit or to appear and be questioned in court, any such leave must and should be directed towards specific numbered questions. It seems outside the text of the rule to envisage circumstances where a party would be granted leave to engage in a general cross-examination in advance of the trial. Any such procedure is properly to be confined to trial. Furthermore, what is at issue in the rule is whether a party has answered an interrogatory or has answered the interrogatory sufficiently. It is no part of the discretion vested in the court to make any such order on the basis that it may appear that the answer is untruthful. That is a matter for the trial. As Cotton LJ shrewdly stated in *Lyell v Kennedy* (number 3) [1884] 27 Ch D 1: "… with regard to the form of discovery by answer to interrogatories, what the court has to consider is simply whether the answer is insufficient. It has not to go into the question of the truthfulness of the answer, but must see whether it is insufficient or not." Finally, interrogatories and discovery and replies to particulars are methods whereby a fair appraisal of opposing claims may be made prior to trial. These methods are not to be abused through any pretence of relevancy when their existence depends upon the probability of their being of assistance, relevance to the claim as pleaded and the requirement that oppression through the use of pre-trial procedures is avoided. It is for that reason that discovery is a remedy at the discretion of the court and that interrogatories and replies to particulars may be subject to court supervision in appropriate circumstances. New procedures that are not of assistance should not be allowed to spring up whereby the courts' resources are used to split up trials unnecessarily or to impose burdens that do not help litigation. In Duncan v Governor of Portlaoise Prison [1997] 1 IR 558, the applicant alleged that the governor had not made proper discovery and sought cross-examination in aid of that pre-trial remedy. Kelly J reiterated that the power of the courts to govern their own procedure should include the exceptional ability to enquire by allowing cross-examination into the adequacy and accuracy of an affidavit of discovery. Within the context of the remedy of discovery, however, a party dissatisfied with discovery could seek further and better discovery. It might be commented in the instance of interrogatories that the rule dealing with a failure to answer, or answering with statements that are not satisfactory, allows the court a remedy similar to discovery in requiring further written answers. In that regard, the remarks of Kelly J at 573 are apposite:

> It appears to me that there are circumstances in which it may be permissible to cross examine on an affidavit of discovery. However, I am satisfied that such circumstances are extremely rare. This is because of the variety of other remedies which are available with a view to testing matters contained in an affidavit of discovery. These other remedies include orders for further and better discovery, the delivery of interrogatories and the inspection by the court itself of documents referred to in an affidavit of discovery. Furthermore, it appears to me to be wholly undesirable that the court should, save in the most exceptional cases, be called upon to deal with questions such as the existence or non-existence of a document in circumstances were such a question might impinge to a serious extent on the issues in the action. Clearly, at the stage when an issue of discovery of this type has been argued, the court cannot be fully au fait with all the issues in the proceedings. I do not in this judgement wish to specify the rare circumstances in which cross-examination on an affidavit of discovery may be permitted. But it does appear to me that when permitted at all, it should only arise in circumstances where it is both necessary and for other remedies, such as those already mentioned, prove inadequate.

Result

13. In the result, the error arising from a failure to reproduce questions both in notices for particulars and interrogatories and then give the answer in a unitary document using a different typeface is likely to have led to the errors identified in this case as being "typographical and referencing". In future, it is desirable that notices for particulars and interrogatories should be answered within a unitary document which contains both questions and answers. Where such errors occur in answering, the leave of the court is not required to correct them. Where errors due to evidence coming to light after answers to interrogatory are given, a brief explanation as to why the evidence should be different will properly accompany any correction. Again, the leave the court is not necessary. Any correction should be made as quickly as possible so as to avoid inefficiency or delay of the trial through insufficient notice. Where a court is faced with a failure to answer or an unsatisfactory answer, the ordinary remedy is to require an affidavit giving an answer appropriately. An answer is not made unsatisfactory by reason of an allegation that it is a lie. That is a matter for cross-examination at trial. Any order by the court to swear an affidavit in answer to an interrogatory, should be directed to specific questions. Any order by the court that a witness should appear and be examined in relation to an interrogatory that has not been answered or has been insufficiently answered, should be directed rarely and should always be specifically directed to a particular question or questions. Before making any such order, all alternative remedies should either have been exhausted or should be shown to be futile. A general examination of a witness prior to trial is not to be permitted.

14. The motion is therefore refused with costs.