

THE HIGH COURT

COMMERCIAL

[2014 No. 2229 P.]

BETWEEN

JAMES ELLIOTT CONSTRUCTION LIMITED

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Ms. Justice Costello delivered on the 19th day of July, 2017

1. This is the plaintiff's motion for further and better discovery as against the fourth named defendant. All but three issues had been resolved by the time the matter came on for hearing. The plaintiff now seeks further and better discovery in relation to: -

- (1) Documents relating to a scoping document from September, 1998;
- (2) The hand written test results regarding quality control and aggregate gradation test results from the Bay Lane Quarry;
- (3) Email correspondence to and from and relating to the first, second and third named defendants (the director defendants);

2. I have already delivered a number of judgments in these proceedings and I will not reiterate the facts which have been previously set out. Extensive discovery was ordered to be made by all parties and on 16th January, 2017, the fourth named defendant delivered the documents it had discovered to the plaintiff. This motion issued on the 14th June, 2017, and the fourth named defendant objected to the significant delay in bringing the motion. The question whether the delay was unwarranted or should disentitle the plaintiff to the relief it seeks are matters I will consider further below.

Issue 1

3. These proceedings concern the products supplied by the fourth named defendant to the plaintiff from the quarry at Bay Lane, County Dublin. Prior to operating the quarry it was necessary for the fourth named defendant to obtain planning permission. The fourth named defendant instructed Frank L. Benson and Partners ("Frank Benson") to act on its behalf. In September, 1998 they prepared "A scoping document to Fingal County Council in respect of a proposed application for the development of a quarry and associated development at Bay Lane, St. Margaret's, County Fingal prepared on behalf of the fourth named defendant by Frank Benson".

4. In para. 1 of the document it states: -

"This Scoping Document has been prepared for the consideration of Fingal County Council in advance of the preparation of the planning application documentation and the EIS. The document outlines details of the proposed development, the site, and the environmental conditions of the subject lands. In doing so, the document identifies the likely and significant potential environmental impact associated with the proposed development."

The document stated that the preparation of the EIS will be coordinated by Frank Benson. Six specialist consultants are then listed including Frank Benson, Geoffrey Walton Practice, Roger Goodwillie and Associates, TNS Environment, McCarthy and Partners and Archaeological Consultancy Services. The last four were to study respectively ecology, air quality and noise, traffic impacts and archaeology and cultural heritage and so would not be relevant to any of the categories of discovery in this case. At para. 4.0, the report identifies the content of the EIS: -

"Set out below is a proposed structure of the Environmental Impact Statement, formulated in accordance with the Environmental Protection Agency's guidelines on the information to be contained in environmental impact statement, and supplemented by the agency's advice on current practice."

At para. 4.2 the document states:

"The preparation of the Environmental Impact Statement will be undertaken by Frank L. Benson and Partners in association with specialist sub consultants. This scoping document has been informed by the relevant specialist sub consultants who have assessed the proposed development. "

The paragraph goes on to state that the EIS will be prepared in accordance with the requirements of the relevant regulations. Para. 2.1 of the document notes that extractive uses are "open for consideration" under the zoning in the draft Fingal Development Plan, 1998.

5. The plaintiff says that not a single document associated with the preparation of the scoping document has been discovered. It seeks documents referred to in the scoping document and documents evidencing the creation of the scoping document. It submits that these documents clearly exist based upon the actual terms of the scoping document itself. They state that Frank Benson were the agent of the fourth named defendant and thus the documents in their possession are within the procurement and power of the fourth named defendant.

6. The fourth named defendant says that it does not have any document other than the actual scoping document itself. It emphasises the fact that the scoping document was generated by Frank Benson and not by the fourth named defendant. It says it does not have the public documents such as the draft development plan, the EPA guidelines or the EPA's advice on current practice. It also says that the reference to a minute of a meeting of the fourth named defendant from September 1995 in a transcript in earlier proceedings, referred to as the *Menolly* proceedings, arose as a result of an error on the part of counsel and that no such minute

exists.

7. The plaintiff's claim is based upon its belief that these documents clearly existed as is evidenced by the text of the scoping document itself. It is by no means clear to me that the fourth named defendant- as opposed to its planning consultants- would ever have had in its possession or power the draft development plan or the EPA guidelines or advices. There might have been an issue as to whether Frank Benson had copies of these documents and therefore whether they ought to have been discovered. However, Ms. Ciara Cassidy, who swore the affidavit of discovery on behalf of the fourth named defendant on the 28th November, 2016, stated at para.11: -

"The Fourth Defendant's solicitors also contacted relevant third parties requesting copies of any documents relevant to the current categories of discovery, which were not previously provided by those parties in the previous proceedings. Any documentation received was included in the review process. In the unlikely event that any additional documentation is received from the relevant third parties following the swearing of this affidavit, same would be reviewed and, if falling within the categories of discovery, will be discovered by the Fourth Defendant pursuant to its continuing discovery obligation."

8. On the basis of this averment I am satisfied that in fact Frank Benson do not have copies of the draft development plan or the EPA guidelines or advices from 1998.

9. I am also satisfied, on the basis of the averment in Ms. Ciara Cassidy's affidavit in reply to this motion, that counsel in the *Menolly* proceedings erred in referring to a minute of September, 1998. Ms. Cassidy referred to a number of similar errors in the same transcript. Counsel was not giving evidence under oath nor addressing the issues in this case. Ms Cassidy has expressly addressed this issue and sworn that no such minute exists. I accept her evidence in this regard.

10. The real issue in dispute in respect of this category of further and better discovery related to the reports or other documents which the plaintiff believed were prepared by sub consultants leading up to the creation of the scoping document or are referred to in it. The fourth named defendant has said that there are no such documents. I am not satisfied that in fact there are any such documents.

11. A careful reading of the scoping document shows that it is explaining that these consultants *will* provide "specialist inputs" in the preparation of the EIS. The scoping document sets out the proposed structure of the EIS and states that the document has been "informed" by the relevant specialist sub consultants "who have assessed the proposed development." I am not satisfied that this is sufficient to indicate that there must have been written documents generated by the proposed sub consultants prior to the writing of the scoping document. The headings are generic and refer to the matters upon which they will be advising; they do not imply that there was prior written involvement by any of them.

12. In *O'Leary v. The Volkswagen Group Ireland Ltd* [2015] I.E.S.C. 35 Laffoy J. reviewed the jurisprudence as to the circumstances in which the court may order further and better discovery. She quoted with approval the decision of Murphy J. in *Phelan v. Goodman* [2000] 2 I.R. 577 which in turn approved the judgment of Kenny J. in *Sterling Winthrop Group Ltd v. Farbenfabriken Bayer A.G.* [1967] I.R. 97 at p. 105 where he concluded: -

"The authorities which I have mentioned establish that the Court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong. None of these matters has been established and I must therefore, refuse to make the order sought."

Laffoy J. concluded in the light of the observations of Murphy J. in *Bula Ltd (in receivership) v. Crowley* [1991] 1 I.R. 220 that the test is whether the evidence presented is insufficient to satisfy the court that relevant documents are or have been in the possession of the defendant which should have, but have not, been discovered in its original affidavit of discovery or its supplemental affidavit of discovery.

13. Applying this test, I am not satisfied that the plaintiff has adduced evidence to show that there are other relevant documents in possession or procurement of the fourth named defendant in relation to this scoping document. I refuse to order further and better discovery in respect of this issue.

Second Issue

14. The plaintiff says that there are no aggregate test results discovered for the first two years of the working life of the Bay Lane Quarry. In correspondence the fourth named defendant's solicitors referred to a witness statement in previous proceedings, referred to as the breach of contract proceedings, of Mr. Sean Cassidy, where he stated that all of these test results were lost. He explained that there was no computerised proceeding of archiving in existence at that time. The plaintiff does not accept that the documents were lost. It points to the fact that the supplemental affidavit of Ciara Cassidy sworn on behalf of the fourth named defendant does not state that these documents were lost. Her affidavit in this regard is not from her own direct knowledge.

15. At para. 7 of her supplemental affidavit sworn on the 16th June, 2017 Ms. Cassidy stated as follows: -

"I am informed and believe that a computer system was first installed in the Fourth Defendants' in-house laboratory in Ballycoolin in mid-2004, for recording the testing of asphalt materials. Once the computer system was up and running and had proved to be reliable, the Fourth Defendant extended the computerised system to record the testing of aggregates and materials from the Bay Lane and Duleek quarries. I am informed and believe that prior to the introduction of this computerised system test results taken by the Ballycoolin laboratory technician were recorded on hand written worksheets. There was no formalised archiving or record keeping in place and these handwritten records are no longer in the fourth defendant's possession, power or procurement. The in house testing results and worksheets relating to testing carried out in the Ballycoolin laboratory on material from Bay Lane quarry, dating from approximately January 2003 to March 2005, are included in the second schedule to my initial Affidavit of Discovery."

16. The plaintiff says that the witness statement of Mr. Sean Cassidy and the affidavit of Ms. Ciara Cassidy are inconsistent. It asks the court to direct that an affidavit is sworn by a person who can swear of his or her own knowledge what in fact happened to these hand written test results.

17. In a reply, the fourth named defendant says that the plaintiff well knows that Mr. Cassidy says that these documents were lost. He was extensively cross examined on this point in the breach of contract case. Ms. Ciara Cassidy's affidavit is not inconsistent with

his statement and his evidence.

18. Ms. Cassidy said in her affidavit that these documents are included in the second schedule to her initial affidavit of discovery. However, it would appear that she does not explain when these documents were last in the possession of the fourth named defendant and why they no longer have possession of those documents. In para. 10 – 134 of Delaney and McGrath, *Civil Procedure in the Superior Courts*, 3rd Ed., (Dublin, 2012) the authors state: -

"The second schedule to the affidavit lists relevant documents which the deponent had but no longer has in his possession, power or procurement. In the body of the affidavit, the deponent should state when those documents were last in his possession, power or procurement and what has become of them and in whose possession they are now."

Although no authority is cited by the authors for this proposition, I accept that it is a correct statement of the law and practice in relation to affidavits of discovery. Insofar as the initial affidavit of discovery does not explain when these documents were last in possession of the fourth named defendant and why they no longer have possession of these documents, the affidavit of discovery is not in compliance with the requirements of the rules and a new affidavit of discovery will be necessary in order to meet the obligations of the fourth named defendant in this regard.

Third Issue

19. This relates to the emails of the three director defendants. The discovery ordered involved many thousands of electronically stored documents, including the emails of the director defendants. After some testy exchanges between solicitors for the plaintiff and the fourth named defendant, the parties agreed to search the electronic platform of documents using 435 keywords. In her original affidavit of discovery Ms. Cassidy averred: -

"In carrying out the discovery exercise regard was had to all documents discovered, and all documents provided by the Fourth Defendant to its solicitors in the context of discovery, in the Hansfield proceedings and the James Elliott Construction proceedings, as well as all potentially relevant files uploaded to the eDiscovery platform used in the Hansfield proceedings. In addition, regard was had to all potentially relevant hard and soft copy solicitors' files and approximately 400 compact discs containing documents created during and related to the various pyrite related proceedings..."

The Fourth Defendant engaged a specialist ediscovery provider, EY, to extract all electronic data from the relevant servers and devices of the fourth defendant. The Fourth Defendant's solicitors engaged proactively with the Plaintiff's solicitors to agree the scope of key words to be applied to filter the data recovered. The agreed key word searches and relevant date limits were applied to same and the resultant documents were included in the review process.

EY were engaged for the purpose of assisting the Fourth Defendant with the identification, compilation, processing, review and production of all electronic documents in the power, possession or procurement of the fourth defendant, all within the relevant categories of documents specified in the Order..."

20. In her affidavit opposing this application Ms. Cassidy stated at para. 55: -

"I say that the solicitors for Irish Asphalt have also confirmed in correspondence that all electronically stored information including all emails relating to Kevin Lagan, Terry Lagan and John Gallagher (within Irish Asphalt's possession, power or procurement) were extracted and reviewed where they were responsive to the key words and within the relevant temporal limitations."

21. The plaintiff is concerned that the use of key words had not resulted in the discovery by the fourth named defendant of all the relevant emails to or from the director defendants. Its concern is based upon three facts: -

(1) The number of emails discovered in schedule 1 part 1 (220) when contrasted with the number of emails in respect of which privilege was claimed (9,642).

(2) The fact that very few of the discovered emails were in fact to or from any of the defendant directors and none of them are to or from Mr. Kevin Lagan.

(3) They referred to the minutes of two management meetings held on the 24th January, 2003 and the 15th August, 2003.

They say these indicate that Mr. Kevin Lagan was using emails in 2003. The minute of the meeting of the 24th January, 2003 states: -

"... K.L. wants to know if it is going to cost. CC to email Kevin."

Further down the notes record: -

"TL said to J.D. to talk to Keegan. Do not start until 7 am (email Kevin)."

CP hire to deal directly with Goode (email Kevin)."

The minutes of the meeting of the 15th August, 2003 referred to email K.L. to talk to Jackie and: -

"... CC to email K.L. to get response from C.J."

The plaintiff concludes that the directors and in particular Mr. Kevin Lagan, were using emails and that the contrast between the number of documents discovered in respect of which privilege was claimed when contrasted with the paucity of the overall number of emails discovered in respect of which no privilege was claimed strongly suggests that the use of key words was inadequate as a means of filtering emails from the universe of documents. It says it is very difficult to believe that there was no email to or from Kevin Lagan relevant to any of the categories of discovery and which was not privileged. It therefore concludes that the only way in which the fourth named defendant can comply with its discovery obligations is to review all the emails to or from the director defendants individually. It seeks an order directing the fourth named defendants to carry out this exercise and to swear a supplemental affidavit of discovery in the light of this exercise.

22. The fourth named defendant says that all emails relating to the director defendants within the possession, power or procurement of the fourth named defendant were extracted and reviewed and, where they were responsive to the agreed key words and within the temporal limitation, they were discovered.

23. The fourth named defendant says that this application is brought extremely late in the day when they are in the middle of preparing witness statements for trial which is due to commence in November 2017. What is proposed now would be very burdensome and disproportionate. It refers to the decision of the Supreme Court in *O'Leary v. Volkswagen*. It submits that the obligation is on the moving party to establish that there are further documents in existence which have not been discovered and that the moving party needs to adduce cogent evidence before a court will order further and better discovery. It says the plaintiff has failed to establish that there are relevant undiscovered documents and so the application should be refused.

24. Both parties refer to the decision of Clarke J. in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland)* [2012] I.R. 528. He stated: -

"14.... any search by key words has the potential for getting things wrong. It may be that the selection of key words results in a failure to throw up a document which may turn out to be relevant to the case (a so called false negative). No matter what key words are chosen there must be some risk that this will happen. However, it would seem that many relevant professionals have now acquired some expertise in the selection of key words such as ought to minimise the risk of that happening.

15. It is important to recall that the obligation on the party making discovery is to disclose, insofar as it may be reasonably possible, all documents which come within the categories agreed or directed by the court. However, the courts have always accepted that there is some risk, particularly in large discovery, that there will be an innocent failure to disclose documents which may be relevant. Clearly, where documents emerge which should have been, but were not, disclosed, the court needs to assess the reason for the failure to disclose. It seems to me that where a party adopts a reasonable approach to the search of a large universe of documents by means of key words and the like, then it is unlikely that the party would suffer any adverse consequences if it were to transpire that, notwithstanding its best efforts, some documents fell through the net. It should, of course, be noted that the assumption in that last statement is that the party acted reasonably and used its best efforts. A clever use of key words which might raise a suspicion that some were deliberately designed to minimise the risk of damaging documents being selected might, of course, lead to the court reaching entirely different conclusions...

17. It needs be recalled that there is, in reality, a balancing exercise involved here. The whole reason for a search, of the type with which I am concerned, is that the most time consuming and costly part of the process is the physical review of the remaining documents (that is those remaining after the selection process) by trained lawyers on a document by document basis. Clearly, the selection process will not have achieved its end if it does not significantly reduce the number of documents that need to be subjected to that costly direct review. If too many documents remain for review which turn out not to need to be discovered (so called false positives), then the cost and time of discovery will unnecessarily be lengthened. The whole point of narrowing the universe by means of key word searches is to reduce the number of documents that require direct personal review. If the key words are too wide, then the selection process will not do that job. If the key words are too narrow (or, perhaps, deliberately or inappropriately skewed), then same is likely to enhance the risk of false negatives. Some reasonable balance has to be achieved between those two ends. Provided that a party acts bona fide, and that the approach to the use of search tools is along the lines which I have described, it does not seem to me that a party should face criticism or adverse consequences if it should transpire that, despite those best efforts, some documents slipped through the net. In addition, I should note, in that context, that if truly key documents were to slip through the net that might, of itself, lead to real questions as to whether anyone could reasonably have believed that the methodology was right in the first place."

25. The following principles may be drawn from this decision: -

(1) The obligation of a party making discovery is to disclose, insofar as is reasonably possible, all documents in its possession, power or procurement coming within the categories agreed or directed to be discovered.

(2) The discovery process is not a search for perfection (*Framus Ltd v. CRH Plc* [2004] 2 I.R. 20).

(3) Both when ordering discovery and when assessing the compliance of a party with its obligations to make discovery, the court is engaged in a balancing exercise between a discovery of documents that is as comprehensive as possible and the disproportionate costs that may be incurred in achieving this end.

(4) It is reasonable to employ a selection process when making discovery of a very large number of documents from a large volume of electronically stored material.

(5) The use of appropriate key words as a selection process is an acceptable means of complying with a party's discovery obligations.

(6) The use of key words is acceptable even though potentially it may fail to throw up a document that may be relevant to the case.

(7) The fact that a key word search may not retrieve a relevant document does not mean that the party making discovery has not complied with its obligations.

26. It is important to note that Clarke J. was not saying that where documents do not emerge where it was expected that they would emerge, that the universe of documents or a portion of a universe should be individually reviewed. If there is no issue taken with either the key words or with the methodology employed by the party carrying out discovery, including retrieving documents from all appropriate custodians, their devices or servers when preparing the universe of documents to be searched by the key words, it is difficult to say that that party has not acted reasonably and used its best endeavours to comply with its discovery obligations. There may of course be issues in relation to outmoded or outdated technologies, previously deleted data and technological issues surrounding the retrieval of such data, but no such issues arise in this case. Assuming there are no issues taken with either the key words or the methodology, then individual document review would defeat the whole purpose of a selection process, which is to attempt to narrow the range of documents that are to be subjected to physical review by trained lawyers. This is done to reduce the overall cost and burden of discovery involving huge numbers of documents in a proportionate manner fair to all parties. Clarke J.

accepted this while also accepting that the failure to throw up a relevant document, despite the use of appropriate key words, can be an unfortunate but “unavoidable” accident.

27. In O’Leary, Laffoy J. endorsed Clarke J.’s approach that: -

“The basic obligation on any party is to comply, to the best of its ability, with any order for discovery made.”

She also accepted his observations on proportionality that: -

“Since the decision of the Supreme Court in Framus Ltd v. CRH Plc...[2004] 2 I.R. 20, it has been clear that the court must pay attention to the principle of proportionality in deciding on the breadth of discovery to be ordered.”

28. Applying these principles to the facts in this case, I note that there was an extremely thorough use of key words and that the fourth named defendant accepted all of the key words proposed by the plaintiff. The key words included “terry lagan”, “kevin lagan”, “john gallagher”, “Terry”, “Kevin” and “Gallagher”. The plaintiff did not suggest, never mind evidence, that the fourth named defendant did not search all relevant devices or servers. It did not challenge the methodology employed by the fourth named defendant or its use of the key words. It employed an appropriate expert to assist it in its task. In the circumstances, there is no evidence that the fourth named defendant has not acted reasonably or that it failed to use its best endeavours in carrying out the discovery ordered in this case.

29. In the circumstances I have described, it is difficult to see why such a thorough process would not have retrieved any relevant emails in the circumstances if they existed. The court is asked to infer that they do exist and that this method, which has been approved and utilised in many cases involving large electronic discoveries, where the use of key words has been agreed and is exceptionally comprehensive, and where it specifically includes the names of the individuals in respect of which the plaintiff raises concerns, where the exercise has been carried out with the assistance of independent specialists, is not reasonable because it has failed to retrieve relevant emails to or from the individuals which are presumed to exist. The plaintiff’s case is that this inferred failure of the process must be remedied by searching and reviewing every single email to or from the director defendants over a number of years by a reviewing lawyer.

30. In my judgment this exercise is not required to meet the fourth named defendant’s discovery obligations and would be a disproportionate response to the outcome of a very thorough process which has not been impugned. The fourth named defendant has explained the methodology and the fact that all emails relating to the director defendants within the possession, power or procurement of the fourth named defendant were extracted and reviewed where they were responsive to the agreed key words and within the relevant temporal limitation. I am not satisfied that the two minutes of the meetings referred to by counsel for the plaintiff establish that there were many emails in use between 2003 and 2005 and more particularly that there were many relevant emails that were not responsive to key word searches. I am not prepared to draw the conclusion that when 435 agreed key words are applied to all of the emails that nonetheless they have failed to retrieve potentially relevant documents. The plaintiffs have not disputed the methodology. In effect they are saying that, despite the use of 435 key words, the system must be at fault because there must be relevant emails from Mr. Kevin Lagan and more emails from Mr. Terry Lagan and Mr. John Gallagher than have been discovered by the fourth named defendant relevant to the many categories of discovery in this case. I do not accept this conclusion and I accept the evidence of Ms Cassidy as to the process engaged in by the fourth named defendant and the fact that there are no such emails.

31. I am not satisfied that the plaintiff has shown that there are other relevant documents in the possession of the fourth named defendant which have not been discovered. As those matters have not been established I therefore refuse to order further and better discovery in respect of this issue. In light of this conclusion, it is not necessary to decide whether the delay of the plaintiff in bringing the motion was excusable or justifiable or whether it should disentitle it to an order which the court might otherwise grant but for the alleged prejudice occasioned by the delay.

Conclusion

32. I refuse to order the fourth named defendant to make further and better discovery in respect of issues 1 and 3. I direct the fourth named defendant to swear an affidavit of discovery with a second schedule which sets out when the hand written test results regarding quality control and aggregate gradation test results from the Bay Lane quarry were last in its possession and what has become of them to the best of its knowledge information and belief. If possible the affidavit should be sworn by a person with personal knowledge of the documents and what became of them, though I accept that this may not be possible in this case.