

**THE HIGH COURT**

**COMMERCIAL**

**[2014 No. 5751 P]**

**[2014 No. 142 COM]**

**BETWEEN**

**PATRICK WHEELOCK**

**PLAINTIFF**

**AND**

**MICHAEL O'LEARY, DOLORES O'LEARY, JUSTIN MCCONVILLE, A FIRM TRADING UNDER THE STYLING AND TITLE OF MICHAEL O'LEARY AND COMPANY, ARCHDALE CONSTRUCTION LIMITED. SAPOL ELECTRICAL LIMITED, SINEAD O'LEARY, THOMAS BOLGER AND ANDREW O'LEARY**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Costello delivered the 13th day of May, 2015**

1. These proceedings arise from an alleged extensive fraud which the plaintiff claims was perpetrated upon him by the defendants. It is alleged that they misappropriated his assets and income and in the process of doing so have falsified or caused to be falsified his signature on various documents including business documents, loan facility letters, security instruments, Revenue returns and other documents. He says that the first, second and third named defendants are a firm of accountants and professional business advisors practising under the style and title of Michael O'Leary & Company, accountants, tax and management consultants. He says that he reposed unqualified trust and confidence in Michael O'Leary personally and in his company from 1980 up until 2014. In particular he says that Michael O'Leary and/or Michael O'Leary & Company throughout this period controlled or managed all of his income derived from his profession as an engineer, controlled and/or managed all of his bank accounts, were responsible for all financial matters relating to an ancillary business of farming and growing Christmas trees, purchased land and properties on his behalf and collected all income derived from properties owned by him and dealt exclusively with his tax returns to the Revenue Commissioners as is more particularly set out in the Statement of Claim.

2. The application before the Court was an application for discovery against the second and third named defendants ("the practice defendants").

3. The first named defendant is represented separately to the practice defendants. It is common case that the first named defendant was the founder of the practice Michael O'Leary & Company and the major, if not the 100%, equity owner of the partnership. The plaintiff has sought very extensive discovery against both the first named defendant and the practice defendants. The plaintiff and the first named defendant have reached an agreement as to the scope of the discovery which he will make and it is to be on the basis of the documents which are within his possession only. The plaintiff has reserved the right to revisit the discovery which will be made by the first named defendant to seek documents within the terms of the discovery agreed to those documents which are within his power or procurement. In this application the plaintiff proposes that the practice defendants should in the first instance make discovery on the same basis.

4. It is for the moving party to establish that the discovery sought is relevant to the issues in the case and is necessary for disposing fairly of the cause or matter or for the saving of costs. The legal principles are well known and are agreed between the parties and I do not propose to restate them here.

5. In respect of many of the categories of documents sought by the plaintiff, the practice defendants sought to limit the categories to those documents that were held by the practice of Michael O'Leary & Company. The practice defendants say that it was the first named defendant in his personal capacity largely who dealt with the business affairs of the plaintiff. They say that the first named defendant is the 100% equity owner of the practice (this is disputed by the plaintiff) and that he is the person intimately concerned with all of the allegations advanced by the plaintiff in this case. Quintessentially he is the appropriate person in the normal way to swear the affidavit for discovery on behalf of the practice. As he is separately represented from the practice defendants, the affidavit of discovery to be made by the practice defendants necessarily will have to be sworn by another defendant. It is unavoidable on the facts in this case that the first named defendant is the only person with the detailed and intricate knowledge of events and matters going back to 1980. They say that this is an important factor which the Court should bear in mind in exercising its discretion in making any orders for discovery against the practice defendants. The first named defendant will be making very extensive discovery on his own behalf and in respect of documents which are in his possession as the principal partner in (if not sole owner of) the practice.

6. It is submitted by the practice defendants that as a matter of law and practice they do not have possession of the first named defendant's personal documents or documents held in his personal capacity. It is only those documents which are practice documents which they can discover. They therefore say that many of these categories should be expressly confined to documents held by the practice Michael O'Leary & Company. The plaintiff is concerned that if the categories of documents are limited in this fashion, the practice defendants will not necessarily make as wide a discovery as ought, in the circumstances, to be made. Of necessity, discovery is a process of trust and the Court has to proceed on the basis that the professionals involved will properly advise their clients of their discovery obligations and ensure that, to the best of their ability, those obligations are faithfully carried out. The submission is predicated upon a fear that these obligations will not be carried out in a bona fide manner. I cannot proceed on the basis solely of a submission unsupported by evidence that this obligation will not be faithfully carried out.

7. The plaintiff was more concerned with the possibility that if he was obliged to revisit the adequacy of the discovery made, with his agreement, solely on the basis of the documents in the possession of the practice defendants, that he would be limited in such

discovery as he would then seek on the basis of documents which would be within the power or procurement of the practice defendants. I believe this concern is misconceived. The practice defendants could only ever be obliged to make discovery of documents in their possession, power or procurement. These must be confined therefore to the documents held by the practice or those which would be within their power or procurement on the basis that the defendants, as members of the practice, were entitled to any such documents held by any party other than the practice defendants. Therefore the limitation sought by the practice defendants in truth does not amount to a limitation of the scope of the discovery sought by the plaintiff. While, in truth, it may be unnecessary, it may avoid subsequent disputes as to the scope of the discovery obligations of the practice defendants.

8. In respect of the following categories I accept that the limitation proposed by the practice defendants is appropriate. In reaching this conclusion I have, in addition, had regard to the fact that the first named defendant has in these categories agreed to make discovery in like terms of the documents which are in his possession. It is undeniable that they will be in his possession if they are practice documents as well as if they are personal documents. It therefore seems to me, quite apart from the issue of the right of the practice defendants to the documents, that the extension of these categories, as sought by the plaintiff is not necessary for fairly disposing of the action as required by O. 31, r. 12 of the Rules of the Superior Courts. These categories are category 6, 9, 10, 11, 12, 13, 18, 19 and 27. In category 6, the category is to be limited to the matters therein set out and so the words "*including, but not*" [limited] should be deleted. In relation to category 9, the words "[*t*]o the extent not contained within category 4 above" should be deleted.

9. Category 1 has been agreed. In relation to category 5, the words "[*t*]o the extent not contained in Category 4 above" should be deleted and discovery made in those terms.

10. In category 8 the plaintiff seeks discovery of the following:-

**All correspondence and/or communications between Michael O'Leary & Company and any third party in relation to the Plaintiff or his affairs, including but not limited to correspondence with Anglo Irish Bank Corporation plc, Anglo Irish Bank Limited, Irish Bank Resolution Corporation, the National Asset Management Agency, any local authority and/or Liam Hipwell & Company, Solicitors.**

11. The plaintiff sought discovery from the first named defendant in virtually identical terms; the change being that it is correspondence and/or communications between Michael O'Leary and/or Michael O'Leary & Company. The first named defendant has agreed to make discovery in those terms. The practice defendants have agreed to make discovery in the terms sought with the exception of the reference to correspondence and/or communications between the practice and any local authority. They object to the expansion of the category to any local authority on the grounds of relevance. Having reviewed the pleadings, I accept this submission. The plaintiff's case is that certain property which he owned was developed and then sold and he did not receive his due share of the proceeds of those sales. Correspondence with the local authority is not relevant to any fraud allegedly perpetrated upon the plaintiff. I therefore make an order for discovery in terms of category 8 save for the deletion of the words "*any local authority*".

12. In category 15 the plaintiff seeks the following:-

**All documents evidencing, recording or relating to services (including audit services) provided by Michael O'Leary & Company to the fifth named Defendant.**

13. This is not limited in time. However, in the reasons given for seeking this category of documents the plaintiff avers that in these proceedings he alleges that monies earned by him in his profession as a pipe design engineer have been misappropriated by the fifth named defendant from the period 2011 to 2013. In submissions on his behalf it was urged that he was seeking to address misappropriation of fees earned by the plaintiff and also to assess whether the practice was wrongly paid fees where no services had been provided. I therefore propose to confine this category to the period 2011 to 2013 and to include:-

*"All invoices for fees by Michael O'Leary & Company to the fifth defendant together with supporting documentation indicating services in respect of which payment was claimed and all receipts from the fifth named defendant."*

14. In category 16 the plaintiff seeks:-

**All documents evidencing, recording or relating to invoices issued by Archdale Construction Limited, Monvoy Developments Limited, Woolven Limited and/or the fifth named Defendant in respect of piping design engineering service provided or carried out by the plaintiff.**

15. The reason the plaintiff seeks this category is that, on the advice of the first defendant and/or Michael O'Leary & Company, fees which were due to him in respect of piping design engineering services were paid at various times to each of these four companies. He says that the companies in turn failed to account properly to him for these monies and he has suffered a loss as a result. He says that the practice put the invoicing arrangement described into effect and "[*i*]n these circumstances, it is likely that... Michael O'Leary & Company will be in possession of documentation pertaining to those invoices and the invoicing arrangements aforesaid". The practice defendants have offered to make discovery of this category if it is confined to documents evidencing, recording or relating to the involvement of the practice of Michael O'Leary & Company in the issue of invoices to the companies in respect of services provided by the plaintiff. The plaintiff says that this is inadequate and it will avoid the main reason why the discovery is actually sought.

16. I do not accept that the plaintiff has adequately established this argument. Primarily these are documents which the plaintiff should seek from the individual companies. The plaintiff states that he has sought documents from the Liquidator of Monvoy Developments Limited but these had been refused. There was no explanation why the documents were refused nor any indication of any further steps the plaintiff intended to take in response. I am not satisfied as to the necessity of the category of discovery from the practice defendants as drafted by the plaintiff. It seems to me that the proposed reframing of this category by the practice defendants is reasonable. I therefore order discovery in terms of this category as offered by the practice defendants.

17. The plaintiff at category 17 seeks:-

**All documents evidencing, recording or relating to services (including audit services) provided by Michael O'Leary & Company to Monvoy Developments Limited and/or Monvoy Developments Limited (In Liquidation).**

The practice defendants object to this category on the basis that it does not truly address the real issues in the case. The issue in the case is one of fraud and whether money to which the plaintiff was lawfully entitled from the development carried out by Monvoy

Developments Limited was wrongfully diverted and not paid to him. The issue of the provision of services by Michael O'Leary & Company to Monvoy Developments Limited is not strictly speaking an issue in the case. It is pleaded that Michael O'Leary & Company prepared the audited accounts for Monvoy Developments Limited for the year ended 30th June, 2007, and that those audited accounts show payments to the plaintiff in the sum of €534,500.00 which he says he never received. This is the only illustration of a service provided by the practice to this company in respect of which the plaintiff raises complaint. The practice defendants have indicated that they are prepared to discover the supporting audit documents relating to this figure. The first named defendant has agreed to make discovery in terms of this category of documents provided it is limited to those documents evidencing or recording services provided by either himself or the practice. The first named defendant was intimately involved in the Monvoy development and the affairs of Monvoy Developments Limited. Thus, the plaintiff ought to receive from him all the documents relevant to the development and the business of Monvoy Developments Limited. Any other documents of the company should be in the possession of the Liquidator of the company. While I have been informed that he has refused to provide documentation to the plaintiff I have not been informed of any further steps which the plaintiff has taken to secure the relevant documentation he says he needs from the company centrally concerned in his complaints and allegations. I refuse to order discovery of this category of documents against the practice defendants.

18. At Category 14 the plaintiff sought:-

**All documents evidencing, recording or relating to services (including audit services) provided by Michael O'Leary & Company to the fourth named defendant or any other corporate entity involved in the Monvoy Development (to which Michael O'Leary & Company provided such services)**

As with the preceding category, category 17, the difficulty with this category is that the true issue in the case is one of fraud and whether monies due to the plaintiff from the Monvoy development were wrongfully diverted and not paid to him. The provision of services by the practice of Michael O'Leary & Company to the fourth named defendant or any other company involved in the Monvoy development is not directly at issue in the case as appears from the pleadings. Counsel for the plaintiff submitted that the documents held by the practice relating to the audit of the fourth named defendant would disclose material relevant to the alleged fraud. He alleges that his signature was forged on many of the official documents of the fourth named defendant: his purported appointment as a director of that company on 15th October, 2008, and the relevant return to the Companies Office of the appointment and annual returns filed on behalf of the fourth named defendant. On the other hand, the fourth named defendant is a party to these proceedings and is not in liquidation. *Prima facie*, the company documents should be in the possession, power and procurement of that company. Insofar as they are company documents, the practice of Michael O'Leary & Company would not be entitled to discover the company documents. Insofar as the plaintiff seeks audit documents prepared by Michael O'Leary & Company in preparing the accounts of the fourth named defendants I make an order for discovery confined to those terms. Insofar as the plaintiff sought to extend the discovery sought to "*any other corporate entity*" associated with the Monvoy development, this is simply too vague and I refuse to extend the discovery sought in this way.

19. Central to the plaintiff's case is the allegation that the first named defendant and/or Michael O'Leary & Company executed documents either on behalf of the plaintiff pursuant to a power of attorney or in his name upon his instructions by signing his name to documents. In the Defence of the first named defendant at para. 53 it is pleaded that "[t]he plaintiff gave the Defendants and/or each of them power of attorney." In the Defence of the practice defendants it is denied that the practice of Michael O'Leary & Company purported to enter into agreements on behalf of the plaintiff or was the subject of any power of attorney. It is clear that this is at the heart of the allegation of fraud in this case. To that end the plaintiff has sought discovery in categories 20 and 21 in the following terms:-

**20. All documents evidencing, recording or relating to the power or authority of Michael O'Leary & Company, its servants or agents, to execute and/or enter into agreements on behalf of the Plaintiff.**

**21. All documents or agreement signed on behalf of the Plaintiff by any person other than the Plaintiff.**

22. The first named defendant has agreed to make discovery in terms of category 20 and in relation to category 21 he has agreed to make discovery provided it is confined to such documents as the first named defendant has signed or purported to be signed by him. The practice defendants objected to these two categories on the basis that they are excessively vague and called upon the plaintiff to identify the agreements to which he was referring. They indicated that they were prepared to make discovery of any documents held by the practice with reference to the documents identified in the Statement of Claim at para. 114 (a)-(k). These documents were various company forms filed in the Companies Office purported to be signed by the plaintiff and which the plaintiff says he never signed. In reply to the objection of the practice defendants, the plaintiff urged that he could not identify any such list of agreements as he never gave Michael O'Leary & Company authority to falsify his signature in the first place. He submitted that by definition the purported exercise of this alleged right was without his knowledge and/or consent. He said he was unable to state what documents were executed or what power was purportedly exercised in so doing. In relation to category 21 the practice defendants argued that his category was simply unknowable as they could not know which documents the plaintiff said were not executed by him. It is to be borne in mind that these two categories are not limited as to time and the plaintiff has not related to them specific pleas and issues in the case. He has simply said: I have come across instances where my signature has been forged; I do not know of the other instances where it has been forged. I require the defendants to make discovery of all of those documents which, by definition, I cannot identify. It is of course not possible for the plaintiff to identify documents of which he is unaware upon which he says his signature has been forged or appended without his authority or consent. However his claim is not and cannot be a claim *simpliciter* that his signature was forged on an unknown number of unidentified documents at unspecified times dating back to 1980. He must relate this allegation to specific facts which in turn give rise to a claim known to the law. For this reason I reject category 21 as too vague and not relevant to specific matters pleaded by the plaintiff other than those identified at para. 114 of the Statement of Claim. The practice defendants have agreed to make discovery in those terms. In relation to category 20 I order that the practice defendants make discovery of this category. It is properly framed and relevant and necessary. The fact that there may in fact be no such documents is not, in the circumstances of this case, a reason not to order the discovery sought.

23. Categories 24, 25, 26, 27 and 28 arise out of the Defence of the practice defendants. At para. 166 they plead as follows:-

*"If, (which is denied), the Plaintiff has suffered the alleged or any loss and damage, such has been caused by the breach of obligations on the part of the Plaintiff as taxpayer in failing to discharge his liability to the Revenue Commissioners and by his failure to exercise due skill and diligence in carrying out of his affairs. Without prejudice to the generality of the foregoing, these defendants will rely upon:-...*

*(c) the failure to read or understand the documents made available to him from time to time in respect of his business and financial affairs;...*

(d) the failure to examine statements or accounts in order to establish the whereabouts and amounts of any sums receivable by him and in the manner in which same were applied;...

(m) failing to consider or act on information in relation to the borrowings which were undertaken by him;

(n) authorising transactions which he later sought to disown; and

(k) using an irregular means of recording income calculated to conceal the nature of the income and to misrepresent its character;".

24. The plaintiff raised particulars in respect of each of these matters to which the practice defendants replied. In relation to para. 166 (c) they stated:-

*"It is inferred that the Plaintiff received documentation from the Revenue Commissioners whose practice it is to furnish documents not merely to a person's agent but also to the Tax payer. It follows on the basis of such practice that the plaintiff must have received such documents whether he read them or not. It is inferred therefore that Revenue Commissioners furnished such documents and the Plaintiff presumably is in a position to say what documents he received."*

25. In relation to para. 166 (d) they stated:-

*"This refers to Bank Statements. These are accessible to the Plaintiff and not to the practice. The Plaintiff is presumably aware of his own bank accounts/loans/facilities."*

26. In relation to para. 166 (m) they replied:-

*"This relates to matters which are outside the knowledge of the practice. It is however self-evident that the Plaintiff, in his pleadings, has failed to make any effort to discover or ascertain the nature of the liability which gave rise to the claim by NAMA. It seems an irresistible inference from the nature of the liability to NAMA that there was in fact a prior liability to a financial institution believed to by Anglo Irish Bank Corporation. The pleadings however disclose a complete lack of curiosity on the part of the Plaintiff in relation to the underlying and antecedent liability and it is to this information that paragraph 166(m) pre-eminently relates. As the Plaintiff has not provided any sensible explanation for how the liability arose and has made no reference to the antecedent documentation or facilities which must have existed, this represents the extent of the information which the practice can advance."*

27. In relation to para. 166 (n) they replied:-

*"The Plaintiff has put forward a version of events in which a liability to the Revenue Commissioners was apparently the subject of a settlement which he then reneged upon. The extent to which the Plaintiff was aware of, authorised or approved these transactions are all issues in the case and would undoubtedly have been the subject of communication between the Revenue Commissioners and the Plaintiff. Because of the fundamentally inconsistent positions which are being put forward by the Plaintiff, the practice is unable to say which transaction specifically the Plaintiff authorised but will contend that the Plaintiff certainly disowned the settlement with the Revenue Commissioners."*

The only agreement referred to in the balance of the replies is the settlement with the Revenue Commissioners.

28. Finally, in relation to para. 166 (k) the response was:-

*"(a) If, as the Plaintiff now contends that monies properly receivable by him were recorded as the turnover of various companies, then the Plaintiff provided false information in relation to his income.*

*(b) To the extent that the practice was furnished with information in relation to the Plaintiff's income, any information which it failed to disclose the full extent of the Plaintiff's income was, by that omission, the provision of false information to the practice (sic).*

*(c) On the basis of the matters pleaded by the Plaintiff, the Plaintiff failed to disclose his income over a substantial number of years extending to decades by permitting these monies to be recorded as the income or turnover of another business which was itself not involved in the supply of the relevant services.*

*(d) The information provided by the Plaintiff for the purpose of making Returns were P.60's with reference to his capacity as employee and information in relation to rental. The omission of the true position represented the furnishing of information which was materially incomplete."*

It is in the light of those Replies to Particulars arising out of the Defence that the Court has to consider whether or not it is appropriate to order that the practice defendants make discovery of the documents referred to in para. 166 (c), (d), (m), (n) and (k) of the Defence of the practice defendants. In my opinion it is abundantly clear from the Replies to Particulars that the pleas relate to documents which in the normal way the plaintiff would have received. The pleas clearly state that they are not documents which the practice defendants ever received or were ever in their possession. The pleas are advanced on the basis that this reflects the normal practice of the Revenue Commissioners and financial institutions. The pleas may fail if the plaintiff establishes that the normal practices were not followed in his case. The Replies to Particulars in respect of sub-para. (m) clearly states that the reply represents the extent of the information available to the practice. At para. 166 (n) they specifically have indicated that they have no documentation in relation to any of these disowned transactions and the only transaction to which they refer is the settlement with the Revenue Commissioners. The reply in relation to particulars raised in respect of sub-para. (k) is clearly based upon conclusions rather than documents. In the circumstances, I refuse discovery of these categories of documents.

29. The first category in respect of which the plaintiff sought an order for discovery was in fact category 4. I have left this to the end as it was a more general category of discovery. At category 4 the plaintiff sought:-

**All documents evidencing, recording or relating to any money, asset or property of the Plaintiff which have been held, controlled and/or managed by Michael O'Leary & Company in the period from 1980 to date.**

30. Essentially this category is a catch all category in case any relevant documents have been omitted from the other specific categories. The practice defendants have either agreed or I have directed that discovery be made in respect of: the plaintiffs banking documents (category 5); correspondence relating to his business affairs, property interests, income investments and companies (category 6); his tax affairs (category 7); any involvement with Anglo Irish Bank Corporation, Anglo Irish Bank Limited, IBRC and NAMA (category 8); any income relating to eight identified property investments and the proceeds of sale of lands to the ESB (category 10); the proceeds of the Christmas trees (category 11); the purchase of the 70 acres of land located at Monvoy, Co. Waterford (category 12); documents relating to the development, sale and/or profit from the Monvoy development (category 13); and documents relating to the loan facilities including prior or pre-existing loan accounts or facilities relating to the IBRC loan of the 23rd December, 2011, to the plaintiff and the first named defendant (category 18). The plaintiff was refused an order for discovery against the practice defendants in relation to invoicing for his services by certain companies including the fourth named defendant. In my opinion, it is unnecessary in the circumstances to order the practice defendants to make discovery in terms of category 4. It is extremely vague and covers a period of 35 years. I am not satisfied that it is necessary in light of the discovery which will be made and nor am I satisfied as to the relevance given the vagueness of the plea.

31. I direct that discovery be made pursuant to the Notices of Motion in accordance with this judgment.