

Between:**SRETAW****Plaintiff****– AND –****CRAVEN HOUSE CAPITAL PLC****Defendant****JUDGMENT of Mr Justice Max Barrett delivered on 10th October, 2017.****I. Background**

1. This is a discovery and discovery-related application made in the context of proceedings in which: (i) Sretaw seeks (a) a declaration that it is not party to a binding contract with Craven House, pursuant to a document entitled 'Heads of Agreement' ('HOA')[1] and dated 21st May, 2015, and (b) declaratory relief (if required) that insofar as the HOA might be deemed to be a valid contract (which is obviously disputed) such contract has been determined and/or Sretaw is no longer bound by the terms of same; (ii) Craven House seeks specific performance of the HOA and/or damages thereon.

[1] The HOA relates to a purported agreement on the part of Sretaw to sell to Craven House, and for Craven House to purchase from Sretaw, the entire share capital of Adnap 1 ISOM Limited and all associated subsidiaries for the sum of €78m.

II. Notice of Motion

2. By notice of motion of 10th May, 2017, Sretaw seeks the following reliefs:

(1) an order compelling Craven House to discover all documents as per Categories 1-8, 10-11 and 13, as agreed with Sretaw, and Categories 9, 12 and 14 as ordered by the High Court on 13th February, 2017;

(2) in the alternative, and without prejudice to the foregoing, an order for further and better discovery pursuant to O.31, r.12 of the Rules of the Superior Courts 1986 (as amended) ('RSC');

(3) in the alternative, and not without prejudice to the foregoing, an order pursuant to O.19, rr. 27 and/or 28, and/or O. 31, r.21 of the RSC and/or the inherent jurisdiction of the court striking out the whole or part of the defence and counterclaim as delivered by Craven House on 1st November, 2016, on the grounds that (a) Craven House has failed to comply with its discovery obligations, and (b) in light of the discovery made by Craven House, the defence and counterclaim is frivolous, vexatious, discloses no reasonable cause of action per the counterclaim, would constitute an abuse of process if permitted to proceed, and would delay the trial of the action;

(4) in the alternative, and without prejudice to the foregoing, an order precluding Craven House from producing further documents up to or at the trial of the action that ought to have been discovered per the terms of the categories of discovery as previously agreed/ordered.

III. Problems Presenting?**(i) Overview.**

3. The parties to these proceedings initially agreed to exchange discovery by 10th April, 2017. At that point Craven House had decided not to instruct an independent e-discovery expert and tasked its in-house counsel with performing the necessary discovery exercise. A personal matter affecting the in-house counsel required that the date of discovery be extended to 24th April, 2017. However, it was becoming increasingly clear to Craven House that it had, doubtless in good faith, underestimated the scale of the discovery required of it. On 24th April, 2017, at a directions hearing, the court ordered that unless an affidavit of discovery was filed on or before 2nd May, 2017, the defence and counterclaim would be struck out. An affidavit of discovery was sworn by Craven House's in-house counsel on 2nd May, 2017. On 10th May, 2017, the solicitors for Sretaw issued a motion seeking various reliefs, including an order for further and better discovery and an order that Craven House's defence and counterclaim be struck out. This motion was returnable to the court on 15th May, 2017. On that date the motion was adjourned to 29th May, 2017, and Craven House was given until 25th May to file a supplemental affidavit of discovery. Between 2nd May, 2017 and 25th May, 2017, Craven House instructed Informa as an independent e-discovery expert. Though Craven House does not, the court understands, accept all of Sretaw's concerns as to the original affidavit of discovery, in the interests of fully complying with its discovery obligations and in progressing the within proceedings, Craven House instructed an independent expert: to alleviate concerns that Sretaw had raised in relation to the 'searchability' of Craven House's discoverable documents; to ensure that complete discovery was made using their software and to ensure that all such documents were properly scheduled and categorised with the retention of appropriate metadata. A supplemental affidavit of discovery of 25th May, 2017, was prepared in conjunction with Informa and utilised its software and expertise in relation to searching, collating, scheduling and hosting the discoverable documents.

(ii) Failure to engage positively.

4. It has been contended by Sretaw that Craven House has failed to positively engage in relation to discovery. This aspect of matters has been addressed at some length by Ms Sarah Brown, a solicitor within the firm of solicitors acting for Craven House. It is not entirely clear to the court that this remains a live issue but it is clear from the affidavits of Ms Brown, Mr Winters (in-house legal counsel with Craven House) and the submissions of counsel at the hearing of the within application that there is now no failure to engage positively.

(iii) Searchable Format.

5. Complaint was made as to the 'searchability' of the documentation initially discovered. The court understands from the evidence

that this aspect of matters has now effectively been resolved with the assistance of Informa.

(iv) Native Format of Documents.

6. Craven House acknowledges that, in error, certain documentation was not initially provided in its native format. The court understands from the evidence that this aspect of matters has now effectively been resolved with the assistance of Informa.

(v) Loss of Metadata and Accessible Format.

7. The issue of format has been touched upon in the preceding paragraph. As regards metadata, Craven House acknowledges that, in error, certain difficulties arose concerning the loss of metadata. The court understands from the evidence that this aspect of matters has now effectively been resolved with the assistance of Informa.

(vi) General Deficiencies.

8. Certain general deficiencies were complained of by Sretaw (want of reasons as to redaction/claim of privilege; non-discovery of non-privileged e-mail attachments; and omission of discoverable material). The court understands from the evidence that these deficiencies have now effectively been resolved.

(vii) Documents Contained Within Particular Categories.

9. As the court understands the difficulty presenting under this heading, it is that documentation has not been provided in duplicate form when it is relevant under more than one category. Although duplicate documentation is not, the court understands, being sought (and rightly so), nonetheless the relevant documentation should be listed on a per category basis.

(viii) Amount of Discoverable Documents.

10. Sretaw has complained about the amount of documentation latterly discovered. Custom House Capital has explained that this is not due to any failure to engage positively or some improper motive. Because it has been necessary to correct such errors as previously occurred, there has been some duplication of attachments, entire strings of e-mails have now been provided, there are certain glitches with the search-and-review software and the removal of duplicate images (but not in such a way as appears to impact on the adequacy of discovery), and the inclusion of a significant number of third-party files not previously discovered.

(ix) Custodians of Files.

11. Sretaw has complained that there has been an intermingling of the files of Mazars and Mason Hayes and Curran Solicitors in such a way that Sretaw cannot determine how everything unfolded from the advisors' perspective and cannot assess the files in relation to any claim for special damages. In point of fact, it appears that Custom House Capital has provided electronically searchable documentation, with documentation capable of being accessed on a per custodian basis. Thus the court does not accept that the deficiencies which Sretaw contends to arise in this regard are the obstacle contended for.

(x) Third Party Files; Professional Fees.

12. Sretaw complains that certain documentation that is in the possession of third parties has not been provided to it. In this regard, Mr Winters avers as follows:

"I say the following in relation to each of those third party files:

a. Sparks Advisory – I say that I orally requested the file from [named person]...who was the main contact for the Defendant within the organisation. I say that the request for a copy of their file or access to same was refused on the basis that they had no obligation to provide the Defendant with same but they also advised that we were already in possession of all relevant documentation;

b. N+1 Singer – I say that I orally requested the file from [named person]... Partner, and that this request was refused on the basis that they were unwilling to incur the costs in review and provision of their file but they also advised that we were already in possession of all relevant documentation;

c. Houlihan Lokey – I say that I requested the file from [named person]. I was initially advised that they did not want to incur the additional costs in the review and provision of this file and that they believed we were already in possession of all relevant documentation but that they would revert to me as soon as possible. They did not revert to us in advance of the date by which discovery was due to be made and have not reverted to the Defendant in relation to this to date. I say that this request and their response are evidenced in emails contained within the discoverable documents made available to the Plaintiff....

I say that the Defendant has also requested the files of GEM, who have advised that they will require payment in full of their invoice before they will respond or provide assistance with this matter....

I say that the Defendant has also requested a copy of the file the Fortress holds in relation to this matter but they have been unresponsive. I believe that the [named person]...who the Defendant was dealing with in this organisation is on indefinite medical leave and this may be the reason for their failure to respond....

I say that it is therefore clear from the above that the Defendant has discovered the third party files that are within its procurement, and that any third party files not so discovered are outside of the power of procurement where requests have been made of those third parties and they have been refused or gone without response."

13. Though the point was not made at hearing, it might perhaps be queried whether a party that has not indicated itself to be unable to pay its bills as they fall due can properly claim to be doing what it can to comply with its discovery obligations when (assuming it is able to pay its bills as they fall due) it appears to be electing (at least when it comes to GEM) not to pay its bill and thus, in this respect, to be impeding the process of discovery. However, this point was not expressly canvassed at hearing or in the affidavit evidence and it may be that there is some good explanation presenting. But when it comes to the documents in the possession of other third parties, i.e., other than GEM, those documents do not appear to be in the possession, power or procurement of Craven House and hence the appropriate means for Sretaw to get its hands on same would be to make application for non-party discovery.

14. As to professional fees, it is a notable feature of a case involving a counterclaim which particularises over €1m of professional advisor costs and which reserves the right to furnish further particulars of loss that discovery has been made of less professional advisor (and professional advisor fee-related) documentation than Sretaw (perhaps not unreasonably) anticipated would be forthcoming. Moreover, Mr Winters' affidavit evidence suggests Craven House to be blessed with professional advisors who, perhaps

contrary to general experience, appear not to be rushing to issue their fee notes. But just because discovery does not yield the documentation that one might expect does not mean the discovery process is flawed; and, as to non-issued fee notes, one cannot make discovery of the unissued and hence un-received. Given the general scepticism of Sretaw as to the want of documentation presenting in this regard, it might perhaps have been expected to bring an application to cross-examine on the affidavits of discovery. Perhaps surprisingly, it has not done so.

IV. Reliefs (1) and (2)

15. As to Reliefs (1) and (2) in the notice of motion, there is no basis in the foregoing analysis or otherwise in the evidence before the court for it to make the order for discovery or the order for further and better discovery sought by Sretaw. It appears on the evidence that Craven House is now doing as it ought to comply with its discovery obligations.

V. Relief (3)

16. As to relief (3), the court notes that it does not consider that either of the bases on which Sretaw has sought in the within application to avail of such relief is well-founded, at least on the evidence now before it. Thus, although Craven House appears, to use a colloquialism, to have gotten off to a 'rocky start' in terms of compliance with its discovery obligations, the evidence before the court does not establish that Craven House has failed to comply with its discovery obligations. Additionally, as to the contention that in light of the discovery made by Craven House, the defence and counterclaim is frivolous, vexatious, discloses no reasonable cause of action per the counterclaim, would constitute an abuse of process if permitted to proceed, and would delay the trial of the action, that contention (for the reasons aforesaid and having regard to the evidence now before the court) appears, with respect, to be without any good basis. There is nothing in the foregoing that would justify the court granting the strike-out remedy that Sretaw now seeks. That is, as counsel for Sretaw properly admitted at hearing, a "*draconian*" remedy; and cases such as *Aer Rianta cpt v. Ryanair Ltd* [2004] IESC 23 and *Grant v. Roche Products (Ireland) Ltd* [2008] IESC 35 testify to the correctness of this admission. There is nothing in the pleadings before the court, no vexation or frivolity apparent from the pleadings, no claim that is bound to fail, no absence of a reasonable cause of action, nothing to suggest that the proceedings are unsustainable, no challenge to the integrity of the judicial system, no abuse of process, simply nothing which suggests that the draconian strike-out remedy now sought is in any way merited.

VI. Relief (4)

17. As to Relief (4), that remedy does not, if the court might use an idiom, 'get off the starting blocks' at this time. A party must comply with its discovery obligations – the court accepts on the evidence before it that this is now happening – and if documents are unearthed at a later stage in proceedings of which discovery ought to have been made, then discovery will need to be made of them at that time and a good explanation provided as to how discovery was not initially made of them. (See, *inter alia*, *Moorview Developments Ltd v. First Active plc* [2009] 2 I.R. 788, 817). Consistent with the judgment of Henchy J. in *McCarthy v. O'Flynn* [1979] IR 127, 129, it may be that any such documentation (if there be such documentation) will not then be allowed to be introduced into evidence, being documents that ought to have been, but were not discovered. However, what is to happen in the event of any (if any) documents being found by Craven House at some future stage that it realises ought to have been discovered but were not, is a matter to be addressed when or after such eventuality occurs, not now.

VII. Conclusion

18. For the reasons aforesaid, all the reliefs sought by Sretaw in the within application are respectfully refused.