

## THE HIGH COURT

2004 No. 19669 P

BETWEEN

OPPERMANN ASSOCIATES LIMITED

PLAINTIFF

AND

ANTHONY JOHN CASEY, ANDREW GERARD NOONE AND  
BRIAN TERRY PRACTICING UNDER THE STYLE AND TITLE OF NOONE CASEY

DEFENDANTS

**Judgment delivered by Mr. Justice Herbert on the 31st day of October 2008**

1. In these plenary proceedings, the claim of the plaintiff as ascertained from a consideration of the statement of claim delivered on the 27th October, 2006, and from replies made on the 26th October, 2007, to a notice for particulars dated 15th June, 2007, appears to be as follows.

2. In or about April 1998, Mr. Anthony Casey on behalf of the defendants orally agreed that the defendants would act, inter alia, as financial adviser to the plaintiff. This agreement was made with Mr. Oppermann, Mr. Horan and Mr. O'Kennedy representing the plaintiff. He furnished these gentlemen with a document bearing the title, "New Client Pack" which stated, inter alia, that the defendants focused on providing proactive taxation advice to clients, to enable them to increase profits in a tax efficient manner. Various pleaded express, or alternatively implied, terms of this alleged agreement are stated to be partly contained in this "New Client Pack". Alternatively, these and other pleaded terms of this agreement are alleged to arise by inference from oral representations made by Mr. Anthony Casey or by implication from the relationship between the plaintiff and the defendants of client and accountants and professional advisers.

3. In January 1999, initially orally and, then by letter dated the 23rd February, 1999, Mr. Anthony Casey recommended to Mr. Stephen Oppermann that the defendants adopt an "Approved Profit Sharing Scheme". On these occasions, Mr. Anthony Casey also advised Mr. Oppermann about how this particular scheme worked. This advice included a representation that after three years, shares issued to employees pursuant to this scheme could be purchased by the company and the relevant employees would be liable only for Capital Gains Tax and not for Income Tax on the proceeds. The defendants allege that it was clear from the terms of the letter of the 23rd February, 1999, that prior approval of this Scheme by the Revenue Commissioners was essential.

4. In or about February 1999, Mr. Oppermann, Mr. Horan, Mr. O'Kennedy and Ms. Theresa Caulfield on behalf of the plaintiff orally instructed Mr. Anthony Casey to establish this Approved Profit Sharing Scheme and ensure that it would comply with the requirements of the Revenue Commissioners, with the provisions of the Finance Act 1982, and ss. 509 – 518 of the Taxes Consolidation Act 1997, and be approved by the Revenue Commissioners. The defendants introduced to the plaintiff a solicitor who would act in setting up a company to operate this Scheme. In February or March 1999, the defendants instructed this solicitor to incorporate and register a limited liability company to be known as Inkberry Limited to operate this Scheme.

5. Throughout the years 1999, 2000 and 2001, Mr. Anthony Casey orally and, the defendants through audited accounts prepared by them for the plaintiff and for Inkberry Limited, by a letter dated the 23rd March, 2000, sent in accordance with instructions from the defendants by Mr. Stephen Oppermann as a director of Inkberry Limited to the Revenue Commissioners and, through the preparation and furnishing by the defendants to the plaintiff of "Rules of Inkberry Limited Approved Profit Sharing Scheme", advised, represented and led the plaintiff to believe that the establishment and the operation of this Scheme had been approved by the Revenue Commissioners. Alternatively, the defendants failed, neglected and additionally or alternatively omitted to advise the plaintiff that the approval of the Revenue Commissioners had not been obtained.

6. The plaintiff claims that the defendants should have advised the plaintiff of their failure to obtain the approval of the Revenue Commissioners, at the very latest prior to the completion of the Audit by the defendants of the plaintiff and of Inkberry Limited at the end of March, 2000.

7. By agreements in writing, made in or about October 1999, the plaintiff, in reliance on the advice and representations of the defendants provided three key employees of the plaintiff, with an enhanced remuneration package. This involved a transfer of these employees from the plaintiff to Inkberry Limited and participation in the Scheme. In or about March 2000, Mr. Anthony Casey on behalf of the defendants represented to Mr. Oppermann, Mr. Horan and Mr. O'Kennedy on behalf of the plaintiff, that Mr. Stephen Oppermann, as director and company secretary of Inkberry Limited was required to make a Declaration in writing to the Employee Share Scheme Section of the Revenue Commissioners, that the shares to be appropriated and acquired under the Scheme satisfied the conditions specified in ss. 509 – 518 of the Taxes Consolidation Act 1997. This was done on the 23rd March, 2000.

8. Acting on the representation and advice of the defendants, their servants or agents, the plaintiff, in order to comply with the requirements for the operation of the Scheme set aside a sum of IR£10,000 (former currency) for each of the three employees, the subject matter of the Scheme in each of the three financial years ending 31st March, 2000, 31st March, 2001, and 31st March, 2002. The Accounts for these financial years were audited and approved by the defendants, their servants or agents.

9. In March 2001, Mr. Anthony Casey on behalf of the defendants came to the premises of the plaintiff and advised Mr. Paul Connolly on behalf of the plaintiff, that the Finance Act 2001, had abolished Approved Profit Sharing Schemes established under the Finance Act 1982, but that the operation of the instant Scheme in the years 1999, 2000 and 2001, would not be affected. This was confirmed by Mr. Anthony Casey by a letter dated 6th June, 2001, to the directors of the plaintiff. In the course of checking this advice, Mr. Paul Connolly ascertained that the instant Scheme had not in fact received the approval of the Revenue Commissioners, contrary to the advice given by the defendants to the plaintiff. The plaintiff claims that the defendants, their servants or agents misrepresented, or negligently misstated to the plaintiff that Scheme had been approved by the Revenue Commissioners. As a result, the plaintiff claims that it has suffered loss, damage, expense and inconvenience, particulars of which are given in the statement of claim and in the replies to particulars.

10. At para. 23 of the Statement of Claim, the plaintiff alleges that on the 1st April, 2000, 30,000 shares in Inkberry Limited were issued and returns filed in the Companies Office. The plaintiff claims that on or about the 27th March, 2002, a document purporting to be signed by Mr. Stephen Oppermann, but not in fact signed by him, was sent to the company's office by persons unknown to the plaintiff, purporting to cancel these shares in Inkberry Limited. This paragraph in the Statement of Claim concludes by stating the further particulars of the matter would be furnished after discovery in these proceedings.

11. A defence was delivered on behalf of the defendants on the 15th June, 2007, this defence consists of a complete denial and full traverse of all aspects of the claim contained in the Statement of Claim other than the identity of the parties and puts the plaintiff on proof of everything contained in the foregoing.

12. By a letter dated the 28th March, 2008, the solicitors for the plaintiff sought a voluntary discovery of the following nine categories documents:-

1. All documents relating to the agreement and the terms and conditions thereof made in or about April 1998, between the Plaintiff and the Defendants wherein the Defendants agreed to act as accountants and financial advisers for the Plaintiff.
2. All documents relating to the advice given by the Defendants to the Plaintiff, that the Plaintiff should establish an Approved Profit Sharing Scheme pursuant to the Finance Act 1982, and Sections 509 – 518 of the Taxes Consolidation Act 1997.
3. All documentation relating to the advice given by the Defendants to the Plaintiff that a new company/Inkberry Limited be incorporated to provide specific management services to the Plaintiff.
4. All documentation relating to all or any steps taken by the Defendants to establish the Approved Profit Sharing Scheme on behalf of the Plaintiff and to ensure that the scheme as established would comply with the requirements of the Revenue Commissioners and be in compliance with the provisions of the Finance Act 1982, as amended and be approved by the Revenue Commissioners.
5. All documentation relating to all or any steps taken by the Defendants to incorporate a new company (Inkberry Limited) to administer the Approved Profit Sharing Scheme and to hold the shares and the money, the subject of the scheme in trust on behalf of the Plaintiff.
6. All correspondence between the Defendants and the Revenue Commissioners in respect of the establishment of the Approved Profit Sharing Scheme and the incorporation of Inkberry Limited.
7. All documentation regarding all or any advices and representations by the Defendants to the Plaintiff indicating and/or confirming that the Approved Profit Sharing Scheme (and all of the necessary procedures and documents required for the establishment and operation of the scheme) had been approved by the Revenue Commissioners as an allowable scheme pursuant to the legislation.
8. All documentation relating to any correspondence between the Defendants, their servants or agents and the Companies Office concerning the incorporation of and status of Inkberry Limited.
9. All documentation concerning the Defendants representation to the Plaintiff that an Approved Profit Sharing Scheme established pursuant to the Finance Act 1982, and Sections 509 – 518 of the Taxes Consolidation Act 1997, could only subsist for a three year period.

12. In compliance with the provisions of O. 31, r. 4(1)(a) of the Rules of the Superior Courts this letter seeking voluntary discovery furnished detailed specific reasons why each of these nine categories of documents was required to be discovered and stated in each case that this discovery was necessary and relevant for the purpose of disposing fairly of the issues in dispute between the parties and for the purpose of reducing the expense and the duration of the trial. A period of twenty one days from the date of the letter was given to the defendants within which to furnish an affidavit of discovery. A further letter dated the 1st May, 2008, was sent by the solicitors for the plaintiff to the solicitors on the Record, representing the defendants, giving the defendants a further period of fourteen days from the date of that letter to furnish voluntary discovery of the documents sought. As the defendants failed to furnish voluntary discovery by a notice of motion dated the 16th day of May, 2008, the plaintiff sought an order of the Master of the High Court pursuant to the provisions of O. 31, r. 12 of the Rules of the Superior Courts directing the defendants to make discovery on oath of the documents sought.

13. By Order made and perfected on Friday the 11th day of July, 2008, the Master of the High Court directed the defendants to make discovery on oath, within ten weeks from the date of that order, of the following documents which are or have been in their possession or power:-

1. Any correspondence with the Plaintiff or memorandum of advice given concerning a proposal to establish an approved profit sharing scheme.
2. The Defendant's file of documents prepared and executed for the purposes of the approved profit sharing scheme aforesaid.
3. Any correspondence with the Revenue Commissioners upon which the Defendant is intending to rely at the trial together with internal memoranda of the Defendant as to the progress of any application for Revenue Commissioners approval.

14. By a notice of motion dated the 21st day of July, 2008, grounded upon the affidavit of Gerard O'Shea, solicitor of Gerard O'Shea, Solicitors of Meridian House, 13 Warrington Place, Dublin 2, solicitors on the Record for the plaintiff, the plaintiff appealed to this Court from the whole of the said Order of the Master of the High Court.

15. I have come to the conclusion, a conclusion reached after considerable hesitation, that the discovery allowed by the learned Master of the High Court was unduly restrictive of the rights of the plaintiff. In my judgment the plaintiff is entitled to discovery on oath of the general type of documents sought by it, as reasonably necessary for disposing fairly of this cause. I am however satisfied, that the plaintiff is not entitled to have discovery in the form of the nine categories of the Notice of Motion. It appears to me, that if the court were to order discovery in terms of these nine categories, this might give rise to a reasonable perception of prejudgment of the issues in the case, as directing discovery of documents on oath by reference to agreements, a Scheme, documents and representations, the existence of which is denied by the defendants.

16. The principles applicable in determining whether or not this Court should permit discovery of documents, (which is not available as of right in our jurisprudence), are comprehensively set out by Murray J. (as he then was) in delivering the judgment of the Supreme

17. Having carefully read and analysed the pleadings in this case, I am satisfied that the plaintiff is not seeking a form of, “blanket discovery”, nor is it, “fishing for a case”. In the letter of 28th March, 2008, seeking voluntary discovery, the plaintiff clearly identified why it was seeking discovery of each of the nine categories of documents and, why it considered that such discovery was necessary for disposing fairly of the cause. These reasons are repeated under oath in the affidavit of Gerard O’Shea, Solicitor, grounding the Application to the learned Master of the High Court dated 16th May, 2008.

18. The type of documents sought by the plaintiff are clearly related to the matters at issue between the parties as disclosed by the pleadings. Having regard to the issues so disclosed, it is manifest that the type of documents sought would, as a matter of probability, enable the plaintiff to advance its case or damage the case of the defendants. In my judgment, the defendants would enjoy a most unfair advantage and, the plaintiff would suffer an unfair disadvantage in the conduct of this litigation if discovery were to be confined to the three categories of documents limited by the Order of the Master of the High Court.

19. While accepting that it is not for this Court to redraft the plaintiff’s application, I am satisfied, by reference to the type of documents sought to be discovered in the nine categories advanced by the plaintiff and, remaining strictly within the ambit of the plaintiff’s application, that categories of documents may be identified and defined which are fairly and reasonably necessary for the fair disposal of the matters in issue between the parties on the pleadings in this cause.

20. In my judgment, the defendants should make discovery upon oath, of all documents and records which are now or have been in their possession or power or, of any solicitor or agent on their behalf:-

1. Relating to any contact or communication with the plaintiff or with Stephen Oppermann, Colm Horan, Oran O’Kennedy, Theresa Caulfield or Paul Connolly, or any one or more of them or with Inkberry Limited, in connection with financial advice, taxation advice or tax planning advice, in the period 1st January, 1998, to 31st June, 2001, inclusive, or any measures to be taken by any of the aforementioned to implement such advice.

2. Relating to any contact or communication had with any Section of the Revenue or with the Companies Office in connection with the plaintiff or with Inkberry Limited or the affairs of either of them in the period 1st January, 1998, to 31st June, 2001, inclusive.

21. In my judgment, such discovery is not so extensive either in content or in time, as to be disproportionate or, to be unduly oppressive of the defendants. The court will therefore make an Order accordingly.