

**THE HIGH COURT**  
**COMMERCIAL**

**2008 3370 S**

**BETWEEN**

**C.B. RICHARD ELLIS**

**PLAINTIFF**

**AND**

**SEÁN DUNNE**

**DEFENDANT**

**JUDGMENT of Mr. Justice Kelly delivered on 22nd day of May, 2009**

**Introduction**

This is my judgment on a contested application for discovery. The defendant and counterclaimant by letter of 22nd April, 2009 sought discovery of seven categories of documents. In a response of 6th May, 2009, the plaintiff agreed to make full discovery in respect of some of the categories sought, limited discovery in others and declined to make discovery in respect of the remainder categories. As no question of ordering discovery can arise unless the documents sought are demonstrated to be relevant to the issues to be tried, I must first identify those issues.

**The Litigation**

The plaintiff claims a sum of €1.25m exclusive of VAT in respect of an allegedly agreed fee due to it by the defendant. The fee arose in respect of services concerning, *inter alia*, the sale by the defendant of a premises known as Block A, Riverside IV, Sir John Rogerson's Quay, Dublin. As part of the transaction, the defendant agreed to acquire Hume House, Northumberland Road, Dublin.

On an application for summary judgment, the defendant filed replying affidavits, offered to lodge the sum of €1m in court and was, by consent, given conditional leave to defend.

In his Defence and Counterclaim, the defendant admits the agreement alleged between him and the plaintiff subject to certain additional terms and conditions which are outlined in that document.

Amongst those terms are the following:-

*"(a) That the plaintiff was retained in connection with the sale of the investment not only of Block A Riverside IV ( which came to involve the acquisition of Hume House as part consideration for the sale of Riverside IV) but also Blocks B and C, Riverside IV, Sir John Rogerson's Quay, Dublin 2 and would be paid a substantial sum for and on completion of the provision of the entirety of those services;*

*(b) That the plaintiff, its servants and/or agents had the necessary skill to render the services contracted for;*

*(c) That the plaintiff, its servants and/or agents would supply the services with the due skill care and diligence;*

*(d) That the plaintiff, its servants and/or agents would advise the defendant fully and accurately on all matters within their knowledge and competence in the course of the negotiation for the sales of Riverside IV, Blocks A, B and C;*

*(e) That the plaintiff, its servants and/or agents would advise the defendant fully and accurately as to the value of the properties the subject of the said negotiations and transactions. In circumstances where it is contended that the defendant and/or his companies were requiring property at a value significantly in excess of the valuation of the said properties by the plaintiff, the plaintiff would ensure that the defendant received written advice both as to the valuation of the property and the fact that the proposed purchase price/requisition price was significantly in excess of the market value as assessed by the plaintiff;*

*(f) That the plaintiff, its servants and/or agents would advise the defendant in writing, of the valuation it placed on the property so that the basis of the said valuation could be ascertained and considered;*

*(g) That the plaintiff, its servants and/or agents would afford due loyalty to the defendant as befitted the nature of the services to be rendered pursuant to the said agreement, and having regard to its role as principal adviser to the defendant and his associated companies in all but a very limited number of their property transactions;*

*(h) That, in particular, the plaintiff, its servants and/or agents would keep the defendant fully and accurately and promptly informed of all matters of fact that came to their knowledge in the course of the said negotiations and transactions;*

*(i) That the plaintiff, its servants and/or agents would not conceal from the defendant any information relevant to the said negotiations or transactions;*

*(j) That the plaintiff would disclose all or any matters affecting, tending to affect or likely to affect their independence or loyalty in the course of the said negotiations or transaction or likely to affect the defendant's confidence in their independence or loyalty;*

*(k) That the plaintiff, its servants and/or agents would act independently of any other party or parties involved in or affected by the said negotiations or transactions;*

*(l) That the plaintiff, its servants and/or agents would not solicit or accept any inducement, direct or indirect, either for themselves or for any person connected with any of them, from any other person involved in or affected by the said negotiations or transactions;*

*(m) That the plaintiff, its servants and/or agents would not either themselves or for the benefit of any person connected with any of them, procure any secret profit from the transaction the subject matter of the agreement herein either at the date the purchase/sale was concluded or at any date in the future;*

*(n) The plaintiff reserves the right to raise further pleadings as to the express and/or implied terms of the agreement between the parties, such as shall have relevance to the within action, prior to and at the trial of this action."*

Paragraph 6 of the Defence and Counterclaim alleges a breach by the plaintiff of the various terms which I have just reproduced. In particular, it is alleged that the plaintiff misadvised the defendant that the Hume House property was worth €130m in circumstances where he asserts its true value was somewhere between €65m and €95m. He also alleges that the plaintiff advised him that an offer of €130m was required in order to secure the acquisition of Hume House when in fact the competing bid for that property was only €102m. It is also alleged that the plaintiff concealed from the defendant the full extent of discussions with representatives of Irish Life Assurance Plc and/or Irish Life Investment Managers and/or their connected persons or companies. The defendant also alleges a failure on the part of the plaintiff to act independently of Irish Life which he alleges was a party involved in or affected by the transaction in suit and he also contends that the plaintiffs discussed and/or agreed or in fact received a fee from Irish Life in connection with the transaction. The defendant counterclaims in respect of these alleged breaches of contract contending that he paid €35m more than the true market value for Hume House and €28m more than was necessary to defeat the only competing offer for the property.

In the amended Reply and Defence to Counterclaim, the plaintiff accepts that it owed a fiduciary duty of trust, confidence and loyalty to the defendant but denies any breach of any contractual or other obligation owed to him. In addition, the plaintiff asserts that one of its officials, Mr. Seán O'Brien, expressly advised the defendant that it could not justify paying more than €65m for the property. Notwithstanding that advice, it is the plaintiffs' contention that it was given express instructions by the defendant to submit a bid of €90m for Hume House. When that bid was rejected by Irish Life Investment Managers, the defendant instructed the plaintiff to submit a bid of €92m on his behalf which was similarly rejected. Thereafter, the defendant instructed the plaintiff to submit a bid of €130m and that was accepted by Irish Life.

The plaintiff also contends that the allegations made by the defendant that it concealed information from him or failed to act independently and with loyalty to him or discussed or agreed to receive or in fact received a fee directly or indirectly from Irish Life are unsubstantiated pleas made by the defendant knowing them to be false and untrue and maintains that they constitute a malicious abuse by the defendant of the process of the court.

### **Discovery**

It is well settled both by reference to the precise terms of O. 31, r. 12 of the Rules of the Superior Courts and the substantial jurisprudence which has developed on foot of that rule that discovery will only be ordered in respect of documents which are (a) relevant to the issues in the proceedings and (b) are necessary in order to dispose fairly of the cause or matter or to save costs.

As to relevance, the court must be satisfied that the documents sought are relevant directly or indirectly to the matters in issue between the parties. Even though the documents may be considered relevant, discovery may still be refused if the court is of the view that they are not necessary in order to dispose fairly of the cause or matter or to save costs.

In considering whether documents are necessary for the fair disposal of an action, I must bear in mind observations made by members of the Supreme Court on this topic. In particular, I have regard to the observations of Fennelly J. in *Ryanair Plc v. Aer Rianta CPT* [2003] 4 I.R. 264 where he said:-

*"The change made to O. 31, r. 12, in 1999, exemplifies, however, growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy."*

Fennelly J. went on to say that when exercising its discretion to grant discovery the court, in addition to having regard to the issues, should consider:-

*"the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for fairness of the litigation."*

In *Framus Limited v. C.R.H. Plc* [2004] 2 I.R. 20, the topic was revisited by Murray J. where he said:-

*"I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial."*

Bearing in mind the criteria prescribed by the rules of court and the jurisprudence which has developed on those rules, I now turn to consider the contest between the parties.

### **The Documents**

In considering the areas of dispute between the parties, it is appropriate that I bear in mind the discovery which has been agreed to be given by the plaintiff to the defendant.

The first category of discovery sought encompassed:-

*"All letters, notes, memoranda, research publications, reports, press releases and other documents (including documents in electronic form and including minutes of Board and other internal meetings) referencing the value of Hume House or Riverside IV arising within the period 1st January, 2005, to the commencement of these proceedings." (These proceedings were commenced on the 24th November, 2008.)*

The plaintiffs have agreed to provide discovery of those documents.

The second category of documents sought is as follows:-

*"All letters, notes, memoranda and other documents (including documents in electronic form and including minutes of Board and other internal and inter-group meetings) evidencing communications between the plaintiff and its representatives of the one part to include all C.B. Richard Ellis company/affiliate/entities within the C.B. Richard Ellis Group Inc and Irish Life Assurance Plc, Irish Life Investment Managers, any other company connected with the foregoing entities and each of their respective servants or agents relating to Riverside IV Block A or Hume House (to include all telephone records, both mobile and landline, of the plaintiff, Sean O'Brien, Willie Dowling, Enda Luddy and Colm Luddy for the period from 1st January, 2006, to 1st April, 2006)."*

The reason which the defendant gives for seeking this discovery arises from his contention that the plaintiff did not adequately advise him or keep him informed of all relevant matters in the transaction under negotiation with the Irish Life Group. He says:-

*"In the context where representatives of the plaintiff have sworn affidavits indicating that they informed the defendant that he was notified of all communications, which is denied, the documentation sought will show that the plaintiffs representatives did not properly communicate all relevant information to the defendant, did not properly advise him and did not afford due loyalty to him. For this reason the documentation sought is relevant and necessary and will result in the saving of time and costs in the proceedings."*

In response to this request for discovery the plaintiff agreed to discover all documents relevant to its communications with Irish Life Assurance Plc, Irish Life Investment Managers and any other company connected with the foregoing entities relating to Riverside IV Block A or Hume House, from the 1st January, 2006, to the 1st April, 2006, notwithstanding the fact that they believed that that category was already encompassed by category 1, and indeed the later category 4. However, the plaintiff took the view that no other company in the CBRE Group was involved in the transaction in question in any way and, therefore, there was no reason to seek discovery from any other entity in the C.B.R.E. Group.

I agree with the plaintiff's contention. I do not identify any legitimate basis upon which discovery should be expanded so as to encompass other entities within the group of companies to which the plaintiff belongs. Although no replying affidavit was filed counsel told me, and this was not controverted, that the plaintiff belongs to an international group involving very many companies. I do not see how they can be considered relevant to the issues in this case, nor could any documents in their possession be considered necessary to dispose fairly of this cause or matter. A discovery order of the type sought under this category would in my view be disproportionate and oppressive.

The third category of documents sought is described in the following terms:-

*"All letters, notes, memoranda and other documents (including documents in electronic form and including minutes of Board and other internal meetings) evidencing invitations to treat, quotations, offers, invoices, payments and solicitations exchanged between the plaintiff and its representative of the one part to include all C.B. Richard Ellis company/affiliate/entities within the C.B. Richard Ellis Group Inc and Irish Life Assurance Plc, Irish Life Investment Managers, and any other company connected with the foregoing entities and each of their respective servants or agents of the other part resulting in the payment of monies for services rendered by the plaintiff and/or its representatives by the said Irish Life Group within the period 1st January, 2005, to the commencement of these proceedings (to include all telephone records, both mobile and landline, of the plaintiff, Seán O'Brien, Willie Dowling, Enda Luddy and Colm Luddy) for the period from 1st January, 2006, to 1st April, 2006."*

The reasons stated for requiring this category is given by the defendant's solicitors as follows:-

*"The defendant pleads that the plaintiff discussed or received a fee from the Irish Life Group directly or indirectly associated with the benefit accruing to the Irish Life Group from the sale of Hume House at the price agreed. In addition, the business relationship between the plaintiff and its representatives and the Irish Life Group is relevant to the duty of loyalty to the defendant and constitutes information that ought to have been given to the defendant in the context of rendering services to him in relation to the transaction the subject matter of these proceedings. The documentation sought will prove such discussions and/or payments and will disclose information regarding the business relationship between the plaintiff and the Irish Life Group that is relevant to the quality of the service rendered to the plaintiff and the trust and confidence the defendant might have afforded to the plaintiff had he been supplied with this information at the appropriate time. For this reason the documentation sought is relevant and necessary and will result in a saving of time and cost in the proceedings."*

The plaintiffs solicitors responded by characterising this request as a fishing exercise on the part of the defendant who they say has based his counterclaim on speculation rather than evidence. They say that that is illustrated by the defendant's refusal to properly particularise his case. They also contend that the discovery sought is unnecessary, onerous and that no attempt had been made to delineate or focus the defendant's request. They go on to point out that notwithstanding that and on the clear understanding that there is no basis whatsoever to the defendant's allegation that the plaintiff received payment from Irish Life in relation to the transaction in suit, the plaintiff is nonetheless prepared to discover all documents evidencing payments received by the plaintiff from Irish Life in relation to the transaction. They point out, however, that there are no such documents.

On the exchange of pleadings which has occurred, I do not think that there could be any justification for expanding discovery so as to encompass every company/affiliate/entity within the C.B. Richard Ellis Group Inc and any company connected with them and their respective servants or agents. This is a claim for the payment of monies for services rendered by this plaintiff to this defendant. Other companies with which the plaintiff may be associated are not involved. Neither are they involved in respect of the defendant's counterclaim. That counterclaim is brought only against the plaintiff and no other company or entity. The plaintiff is agreeable to make discovery of all documents evidencing payments received by it from Irish Life in relation to the transaction in suit. On the basis that the term "Irish Life" is understood in the meaning which is attributed to it at para. 6(I) of the defence and counterclaim, i.e. as encompassing Irish Life Assurance Plc and/or Irish Life Investment Managers and/or their connected persons and/or companies, I am

satisfied that the discovery offered is adequate and sufficient and that I would not be justified in directing any wider or greater discovery.

The plaintiff has agreed to make discovery of the fourth category of documents sought. It consists of all letters, notes, memoranda and other documents (including documents in an electronic form) save as herein before categorised constituting the plaintiffs file in relation to the transaction the subject matter of these proceedings including any correspondence with the defendant, associated companies and employees for the period 1st January, 2005, to 31st December, 2005.

It is clear, therefore, discovery will be made of all documents in the plaintiffs file concerning the transaction the subject matter of these proceedings.

The fifth category of documents is in respect of all valuations and associated working papers created by the plaintiff in the context of sales, acquisitions and advices handled for or given to the defendant and/or the Mountbrook Homes Group by the plaintiff and/or its servants and/or agents within a period from 1st January, 2003, to 31st October, 2008.

The reason given for this extraordinarily wide category of documents being sought is stated to be as follows:-

*"The plaintiff has denied that it valued Hume House at €130,000,000 as alleged by the defendant. The defendant requires the documentation in this category in order to prove the course of dealing between the plaintiff on the one hand and the defendant and companies in the Mountbrook Homes Group, with which he was associated, on the other. This will show that, as a matter of course, the defendant and the said group regularly sought and relied upon valuations in contexts such as this. A valuation of Hume House was prepared by the plaintiff and provided to the defendant in February, 2007 which accords with the valuation given in February, 2006: the documentation and working papers will help to establish the connection between the oral and the written valuation by reference to that course of dealing."*

The plaintiff contends that the defendant has not established the relevance of all valuations and working papers for all work carried out over a five year period. It points out that the defendant has complained in relation to this particular transaction and has not raised any issue in relation to any other valuation. Any valuations and associated working papers in relation to the transaction will, it is said, fall within the other categories of documents in respect of which discovery is being made and so will be disclosed by the plaintiff. However, valuations produced over the years in other cases have no relevance to what occurred in respect of this transaction or the other matters pleaded by the defendant.

In my view the plaintiff is perfectly correct in this approach. Discovery of the type sought here in my view goes outside the issues which the court will have to try, and in any event could not be regarded as necessary for the fair disposal of the action. It would be disproportionate to order it and would not be consonant with the proper administration of justice which encompasses, in the words of Fennelly J., the objectives of expedition and economy. Accordingly it is refused.

The sixth category of documents sought is as follows:-

*"All letters, notes, memoranda and other documents (including documents in electronic form and including minutes of Board and other internal meetings) evidencing invitations to treat, quotations, offers, invoices, payments, inter-group charges and/or payments and solicitations exchanged between the plaintiff and its representatives of the one part and all C.B. Richard Ellis companies/affiliates/entities within the C.B. Richard Ellis Group Inc and each of their respective servants or agents of the other part resulting in the payment of monies or the effecting of inter-companies/group charges to/from the plaintiff and/or its representative within the period 1st January, 2005, to the commencement of these proceedings."*

The reason given for seeking these documents is stated as follows:-

*"The defendant pleads that the plaintiff discussed or received a fee from the Irish Life Group directly or indirectly associated with the benefit accruing to the Irish Life Group from the sale of Hume House at the price agreed. In addition, the business relationship between the plaintiff and its representatives and the Irish Life Group is relevant to the duty of loyalty to the defendant and constitutes information that ought to have been given to the defendant in the context of rendering services to him in relation to the transaction the subject matter of these proceedings. The documentation sought will prove such discussions and/or payments and will disclose information regarding the business relationship between the plaintiff and the Irish Life Group that is relevant on the quality of the service rendered to the plaintiff and the trust and confidence the defendant might have afforded to the plaintiff had he been supplied with this information at the appropriate time. For this reason the documentation sought is relevant and necessary and will result in the saving of time and costs in the proceedings."*

The plaintiffs solicitors responded by refusing to make discovery of this category. They said:-

*"The defendant (sic) does not consent to making discovery of the documentation sought in the sixth category. The reason which the plaintiff (sic) cites for this documentation does not coincide with the documentation sought. The defendant has failed to establish any relevance of this category of documentation to his claim. In the plaintiffs submission it amounts to little more than a fishing exercise by the defendant in circumstances where he is unable to or has failed to provide any particulars of his plea that the plaintiff discussed or received a fee from the Irish Life Group."*

It is clear that the sixth category in the way in which framed in the letter of request is well in excess of anything that might be required for the purpose of this litigation. During the hearing I was told that the defendant was prepared to limit it to material of the type described dealing with the plaintiff and all of the C.B. Richard Ellis company/affiliates/entities within the C.B. Richard Group Inc, and each of their respective servants or agents resulting in the payment of monies or the effecting of inter-company group charges to/from the plaintiff and/or its representatives and Irish Life and its affiliates within the period of 1st January, 2005, to the commencement of these proceedings.

Even with this limitation, I am of opinion that this request for discovery goes outside the issues which the court will be called upon to try and even if I am wrong in that, is unnecessary for the fair trial of these proceedings and would be disproportionate to what is in issue. Accordingly, I refuse discovery under this category.

The seventh category seeks discovery of all other letters/notes/memoranda and other documents (including documents in electronic form) intended to be relied upon by the plaintiff in the trial of the action.

Counsel on behalf of the plaintiff indicated that in accordance with the normal pre-trial procedures of the Commercial List, the plaintiff would be delivering a précis of the evidence which will be led by it at trial and that appended to that evidence will be all documents which the plaintiff will be relying upon during the course of the hearing. Such being the case I see no need to order discovery.

### **Conclusion**

I am satisfied that having regard to the discovery which the plaintiff has agreed to make and which I have identified in the course of this ruling, there is no necessity for the further and very extensive discovery being sought by the defendant. Much of what he seeks has little or no relevance to the issues which will have to be tried and in any event could not be regarded as necessary for the fair disposal of the actions. The request for the additional discovery if granted would place an entirely disproportionate burden on the plaintiff and would not be a just and proper conduct of the litigation in the sense in which that term is used by Fennelly J. in the quotation from his decision in *Ryanair Plc v. Aer Rianta CPT* which I have already quoted.

Accordingly this application fails.