

THE HIGH COURT

[2020] IEHC 636

[2018/7984 P]

BETWEEN

THE MINISTER FOR EDUCATION AND SKILLS

PLAINTIFF

AND

WESTERN BUILDING SYSTEMS LIMITED.

DEFENDANT

AND

(1) OPPERMANN ASSOCIATES LIMITED; (2) STEPHEN OPPERMANN; (3) TEAGUE & SALLY LIMITED; (4) MARTIN BRUNTON AND (5) DERMOTT BRUNTON (BOTH TRADING TOGETHER AS "CLASSIC TIMBER FRAMES"); (6) VARMING CONSULTING ENGINEERS UNLIMITED COMPANY; (7) VARMING CONSULTING LIMITED; (8) SEAN SMYTH CONSTRUCTION LIMITED; (9) BARRY BRUNTON (TRADING WITH MARTIN BRUNTON AND DERMOTT BRUNTON AS "CLASSIC TIMBER FRAMES") & (10) FIRETEC (IRELAND) LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 30th day of November, 2020.

1. In these proceedings the Plaintiff ('the Minister') claims damages against the Defendant ('Western') arising from the manner in which Western constructed a building at Ardgillan Community College in County Dublin. The claim is grounded on allegations of breach of contract, negligence, breach of duty, negligent misstatement and/or misrepresentation on the part of Western. A full Defence has been delivered on behalf of Western; as well as denying almost all of the allegations contained in the Statement of Claim, Western pleads that any defects in the school at Ardgillan were caused by the negligence of the Minister (including her agents) or alternatively by third parties. Western has joined a large number of persons as third parties to this action.
2. This action is one of a series of claims taken by the Minister against Western; each action, as far as I am aware, relates to a different school. While every claim is important, taken together the disputes between the Minister and Western constitute a very significant class of litigation before the High Court.
3. The current motion is one in which Western seeks further and better discovery against the Minister. It is worthwhile to set out how this application came into being, and how it evolved after it was issued.
4. While these proceedings began in September 2018, the parties agreed discovery only in January 2020; the terms of the discovery to be made by the Minister and by Western are set out in a letter of the 20th of January from Western's solicitors (Caytons).
5. The Minister's affidavit of discovery was sworn (by Richard Dolan) on the 20th of May 2020, and made available to Caytons on the 25th of May.
6. On the 11th of June, Caytons wrote suggesting that all issues in this action (including the third party claims) should be tried together. In so doing, it was proposed that "any letters complaining of Discovery to be received by late June 2020 [...]". It was also suggested that, following an exchange of correspondence, any motion "in relation to want of further

discovery” would be issued and served by the end of July. Of course, it was open to Western to issue any motion for what I might prosaically call further and better discovery when it was ready to do so; it did not require any schedule for issuing such motions to be agreed with the Minister.

7. No such correspondence issued from Caytons by the end of June, or by the end of July. On the 25th of August, Caytons stated that ‘it shall be necessary for both parties, should they so wish, to issue letters addressing any “wants” or shortcomings in the discovery provided.’ Caytons proposed that there would be an exchange of letters identifying such “wants” on the 7th of September 2020, with motions to be issued by the 30th of September. The Minister’s solicitors (the CSSO) responded the following day denying any “want” in her discovery, and asking Caytons to “revert by return” if Western had any difficulty with the discovery made.
8. On the 1st of September, Western’s motion seeking a unitary trial of all issues between all parties could not proceed because of technical problems with the remote hearing. However, as this question of any inadequacy in the Minister’s discovery was still hanging fire at that time, and as Caytons had still not identified any shortcoming of any type in the discovery received by Western, I gave directions that a motion challenging the Minister’s discovery be issued by the 9th of September and made returnable for the 22nd of September.
9. Despite the fact that they had initially suggested that complaints about the Minister’s discovery would be set out in correspondence to be circulated by the end of June, it was not until two days before the motion for further and better discovery was ordered to be issued that Caytons first described why Western felt that the Minister had not made proper discovery. This is entirely unsatisfactory. The fact that the Minister did not agree to the schedule proposed by Caytons on the 11th of June is irrelevant. It was the responsibility of Western and its legal team to scrutinise the Minister’s discovery promptly, to raise any issues within a reasonable period, and issue any motion without delay. I know, from Caytons’ own correspondence, that it was possible for any inadequacies in the Minister’s discovery to be identified and described by the end of June. It is unacceptable that this was not done until the 7th of September. It is particularly unfair on the Minister, and her legal team, to be expected to reply over one working day to a five page letter setting out general defects in discovery and a thirteen page spreadsheet raising issues about seventy one individual documents.
10. The affidavit grounding the current motion states (at paragraph 11):-

“[...] by letter dated 8 September 2020, the Plaintiff’s solicitors provided a response to the said letter dated 7 September 2020, offering a number of comments and confirming an intention to seek instructions but offering no commitment to make the further and better discovery sought [...] Having regard to the directions of the Court given on 1 September 2020 with regard to the requirement to issue this motion on 09 September 2020, the Defendant has no alternative but to issue its said motion forthwith.”

11. The deponent then states that "appropriate consideration" will be given to any further response from the CSSO.
12. It is entirely the fault of Western that the Minister could not, between receipt of the letter of the 7th of September and the issuing of this motion on the 9th, address fully the complaints about her discovery. It is also unreal to hint that it was the Order of the 1st of September that lead to this unhappy situation.
13. Given this history, it is unsurprising that the issues in the motion had shrunk considerably by the time it was heard on the 9th of October. By then, the parties had been able to have the sort of dialogue that should have preceded the issuing of the motion. Opening the motion, Counsel for Western identified two complaints about the Minister's discovery.
14. Firstly, Western is concerned that the Minister (in making discovery under Category 1) has not interrogated her own records but rather had relied upon a separate entity (KSN) as the only source of documents. KSN are described by Western's counsel as project managers who (he submits) supervised the relevant works at Ardgillan on behalf of the Minister.
15. Category 1 reads as follows:-

"All contracts of engagement and retainers of KSN Project Management Services, O'Mahony Pike, Barrett Mahony, D&K Partnership and Kerrigan Sheanon Newman in relation to the Works and any documents evidencing the monitoring and supervision of the construction works by any of those parties."

16. Mr. Dolan, in his first affidavit resisting this motion, has sworn that KSN was approached about any records that it may have in respect of this subcategory (amongst others). He has also given evidence that records in relation to Ardgillan maintained by KSN had been destroyed. Counsel for Western does not dispute this evidence at this time, but instead contends that the Minister must herself have records regardless of what has happened to KSN's archive.
17. Counsel for the Minister's position is straightforward. He says that the departmental records were fully searched in respect of Category 1, and that the Minister did not rely solely on the records maintained by others. When I asked where I would find evidence to this effect, Counsel conceded that "it might be a more general averment." Subsequently, at the end of the morning session and having heard the reply of Counsel for Western, Counsel for the Minister referred to paragraph 9 of Mr. Dolan's second affidavit, as follows:-

"Following receipt of WBS's Solicitors' letter dated 7 September 2020 and the attached spreadsheet, the Department instructed documentary counsel to review the spreadsheet. The Department deployed Department officials as well as external resources in DDLETB, ARUP, AFEC, KSN, NDFA & JPD Delaney to review the alleged "wants".

18. Counsel then went on to offer a further affidavit on this specific point, if it was required.
19. After lunch, Counsel for the Minister read out a comprehensive email about the discovery process which suggests strongly that the Minister arranged for her own records to be searched in respect of all categories of discovery; through her Counsel, the Minister has offered to put this account on affidavit. I note this offer and will direct that Mr. Jason McCabe swear such an affidavit.
20. This offer on the part of the Minister was not the end of the dispute before me on this first issue. In response, Counsel for Western submitted that, while the email made it clear that there had been "an extensive trawl through all of the documents followed then by a sieving of that trawl through the categories of discoverable documents by documentary counsel" there remained a concern that documents relating to monitoring and supervision by KSN and others had been 'excluded' by the Minister as it was not accepted that KSN or others had a role in supervising the works at Ardgillen.
21. I will make three observations on this submission.
22. Firstly, dealing with Category 1, I put a proposition to Counsel for Western. I now set out the proposition and the reply:-

"Mr. Justice O'Moore: So the essence of your complaint is in respect of this category, as I understand it, that the State has interrogated KSN as a source of documents. Its files are not complete for the reasons set out in Mr. Dolan's affidavit at page 142 onwards. But you say that the State must have some documents provided to it by KSN and it appears not to have interrogated their own files for that purpose.

Mr. Trainor: That is it in a nutshell. And the Court sees that reason why the State says it doesn't have to do that because it says KSN wasn't monitoring and surveying therefore it doesn't have to do it. We say that is not correct, the position is that there is prima facie evidence they are and that would come within category 1 so that is essentially the dispute on that issue, Judge. I don't think I need say very much more on that unless the Court wants to hear me on it.

Mr. Justice O'Moore: No."

23. Given that the Minister will provide sworn evidence that the departmental files have been searched for documents within Category 1, it follows that the concern described by Counsel is misplaced. There would have been no search for documents in respect of Category 1 if the Minister took the view that these records were not discoverable because KSN or the other entities were not engaged to monitor or supervise the works.
24. Secondly, the further affidavit to be provided on behalf of the Minister will make it absolutely clear that documents relating to the monitoring and supervision of the works by KSN and others have not been excluded from her discovery because of the Minister's

position that KSN, O'Mahony Pike and/or Barrett Mahony had no role or only a limited role in either supervising or monitoring the relevant works.

25. Thirdly, as Counsel for Western fairly acknowledged, the obligation on the part of KSN and others to monitor or supervise the works is a matter for the trial. I do not read the relevant paragraphs in Mr. Dolan's affidavit as suggesting that a view was taken that, because of this dispute, a decision was made by the Minister not to discover documents in respect of any such monitoring or supervision (if it occurred). Instead, I think that paragraphs 24 and 27 of Mr. Dolan's first affidavit merely explain why little or no such documents exist.
26. My conclusion on this first issue remaining in Western's motion is that I will direct that a supplemental affidavit, as described earlier in this ruling, be sworn on behalf of the Minister.
27. The second outstanding complaint by Western relates to eighteen individual documents discovered by the Minister. Western says that documents either referred to, or attached with, the discovered documents must themselves be discovered. As mentioned earlier in this ruling, there were some 71 documents in this category in the original schedule to the letter of the 7th of September; that has now been reduced to eighteen documents.
28. This challenge to the Minister's discovery is set out in a spreadsheet produced for the hearing.
29. As is plain from the document, Caytons have set out the document number, the category in respect of which it was discovered, other details of the document, and the complaint Caytons make about the "want of discovery" suggested by the document. The spreadsheet goes on to record the response of the CSSO, and the closing comment from Caytons.
30. The spreadsheet is very helpful, and Counsel for Western was content to leave me to read it after he had opened the first three tabs; I was then to read the other fifteen, and come to my own view. However, one unavoidable aspect of the spreadsheet is that someone has to have the last word. In this spreadsheet, I have the initial position of the CSSO but that is often expressed rather tersely. In most of the eighteen entries, the position of the Minister is confined to a statement that the documentation sought "does not fall within the agreed categories of discovery". The spreadsheet then sets out Caytons' reasons as to why the sought documentation is said to be discoverable; in the context of this format, the reasons given are often quite detailed. Inevitably, nowhere on the spreadsheet can one find any argument by the CSSO rebutting Caytons' rationale.
31. That rebuttal could have been made during the oral submissions on the motion. However, Counsel for the Minister told me that he "did not intend to go into the spreadsheet [...]". Among the reasons given for that approach was:-

“There are a number of documents, 18 I think or so, you can see them there, Judge, where we literally haven’t had time to get to the bottom of the query.”

32. The Minister sought no adjournment in order to “get to the bottom” of the 18 tab spreadsheet. Had that been sought, the Minister would have been accommodated. I have already referred to the abortive hearing of the 1st of September 2020; when it was plain that that hearing could not proceed, I offered the parties a fresh hearing date later that month. A similar accommodation would have been granted to the Minister on the discovery motion, not least because of the quite unsatisfactory notice of Western’s complaints given before the motion was issued.
33. Counsel also submitted that the mere fact that a document was attached to a discovered document does not make the attachment discoverable. I agree with this submission. However, Counsel also submitted that Western’s Counsel “hasn’t actually identified any deficiency here other than to say they are linked to discovered documents, therefore they must be.” It is clear from the spreadsheet that, rightly or wrongly, Caytons had provided reasons (in the last column of the document) as to why specific attachments should be discovered.
34. The end result is that Counsel for both parties have invited me to look at the spreadsheet. While Counsel for the Minister ended his submission by raising the possibility that I would ask him “to address any issues in relation to the spreadsheet or anything else [...]” he had stated on a number of occasions that he had decided not to address the spreadsheet item by item. The upshot of this approach is that I have no detailed argument to weigh in the balance against the case made by Western in respect of each of the 18 items.
35. As requested, I have looked at each of the 18 entries. Given that the attachments are not automatically discoverable (and nor do they, in my view, even attract a presumption of discoverability) I have considered separately the documents which Western claim should be discovered. I have concluded as follows:-

Item 1; I accept that the “as built” drawings should be discovered. The fact that the drawings may already be in the power or possession of Western does not relieve the Minister of responsibility to discover them.

Item 2; This attachment should be discovered, for the reasons set out by Caytons.

Item 3; The “information” referred to in the string of emails already discovered appears to be the documents described in the email from Stefan Matthews at 9.21 on the 2nd of October 2019. From the CSSO response, these documents are already discovered. No further discovery is therefore required.

Item 4; A “procurement programme” will not necessarily evidence the scope of remedial works. The Minister may well choose to disclose this document in order to avoid ongoing disputes about discovery; the same is true of many of the challenged

documents. However, I do not have enough evidence from Western to find that this item falls within the agreed discovery.

Item 5; For the reasons given by Caytons, the Minister should discover sub items 1, 3 and 4.

Item 6; Notes of the relevant part of this meeting appear to fall within Category 10, and (if they ever existed) should be discovered.

Item 7; This attachment appears to fall within Category 10, and should be discovered.

Item 8; Western has not established, by means of the necessary evidence or submission, that the Minister is in breach of her discovery obligations in respect of this item.

Item 9; There is no reason to dispute the position of the Minister that this document is not in her "power procurement or possession", and Western has therefore not established any "want of discovery" on her part.

Item 10; For the reasons identified by Caytons, I will order discovery of these two sets of attachments.

Item 11; This is clearly not still in issue, given the response of the CSSO. In light of the fact that the documents are to be provided to Western, I fail to understand the Caytons response in respect of this item.

Item 12; On balance I believe that these documents should be discovered, in the absence of any detailed argument to the contrary by the Minister.

Item 13; As I understand it, Western seeks two documents. The first is a Ground Floor Sketch Layout. The second is the proposed sketch layout for the remediation programme, attached to the email from Shane Bligh of the 30th of January 2020. Both appear to relate to remediation of Ardgillan, and would therefore be caught by Category 10. As such, they should be discovered. I note that the CSSO response says two apparently contradictory things; the documents sought do not fall within the agreed discovery, but nonetheless at least some of them have been discovered. If the two documents sought have in fact been discovered already, that need not be done again. It would have been helpful to have a clearer exposition of the Minister's position.

Item 14; I will direct discovery of the documents listed at numbers 1,2,5 and 7. Western has not made out, to a sufficient level of proof, that the other documents sought should have been discovered.

Item 15; I will direct discovery of these two documents for the reasons given by Caytons.

Item 16; The Barret Mahony report for Ardgillan should be discovered. Western has not satisfied me that the second item requested falls within the discovery.

Item 17; If there is a minute of any meeting of the 9th of October 2018, the relevant part should be discovered.

Item 18; This Item arises from a note of a meeting of the 16th of October 2018 (headed Fire Remedial Works) about works to be carried out in respect of a range of schools. There is a specific section of the minute relating to Ardgillan. None of the allegations of 'wants' in the Minister's discovery arise from the Ardgillan section. Instead, seven assertions of failure to make discovery are alleged (without any evidence that the asserted documents relate to Ardgillan). Caytons say that from their "review of the documents it seems that sections 1 – 3 relate to all schools, including Ardgillan." Caytons then say expressly that this belief is the 'basis' upon which the Item 18 discovery is pursued. Caytons have not satisfied me that this belief is well founded; the onus is on them to do so.

36. Section 1.3 describes an exercise which quite clearly does not include 'all schools'; this is, however, a section which Caytons assert gives rise to a failure of the Minister to make discovery. Equally, section 2.3 refers to meeting with "11 counties Fire Officers [...]" ; there is no reason suggested to me as to why this engagement relates to Ardgillan yet records of all these meetings are sought.
37. By the same token, section 3.2 of the document already discovered refers to "18 scopes of work." While Caytons assert that the Minister is in breach of her discovery obligations in not having produced these "scopes of work" there is no reason to believe that any of these relate to Ardgillan. The onus is on Western to establish that these other documents are relevant, and it has not even sought to do so in any meaningful way.
38. The position, therefore, is that Western asserts that further discovery is required under Item 18 because sections 1 – 3 of the note of the meeting of the 16th of October relate to 'all schools'. This is wrong, and therefore the basic premise put forward by Western cannot be sustained. However, I have also considered each constituent part of Item 18. For the reasons given by Caytons, the documents sought at (1) and (3) of Item 18 are discoverable inasmuch as they relate to Ardgillan in the case of class (1).
39. I should say that, in considering this motion, I have sought to apply the principles set out by the Supreme Court in *O'Leary v. Volkswagen Group Ireland Limited* [2015] IESC 35, as further considered by Murray J. in *Daly v. Ardstone Capital* [2020] IEHC 200.
40. I will therefore make orders as indicated earlier in this ruling. I will deal with all other adjectival matters (including costs) when the matter is next before me, which will be for the purpose of assessing the progress made in the third party proceedings.