

THE HIGH COURT

[2021] IEHC 423

[2020/5783 P]

BETWEEN

COLUMBIA LAKE PARTNERS GROWTH LENDING (LUXCO) SARL

PLAINTIFF

AND

JAMES EGAN

AND

ADRIAN MURPHY

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 22nd day of June, 2021.

1. This is an unusual case. The Plaintiff ('Columbia') operates as an investment fund. In that capacity, it extended a loan facility of up to €6.75 million to Shaw Education Group plc ('SEG'); any sums advanced to SEG under this facility was guaranteed by two subsidiaries of SEG.
2. On the 2nd of January 2019 Columbia issued a demand letter for the sum of €5,559,255.56. On the 9th of January 2019 SEG and associated companies filed Petitions for Examinership; these Petitions were granted by McDonald J. on the 18th of January 2019, who also on the 29th of March 2019 confirmed a Scheme of Arrangement. On the 1st of April 2019, each member of the Shaw group of companies entered into the relevant Scheme of Arrangement as approved by McDonald J. Under the terms of these schemes, Columbia was paid a total of €1,299,754 euro thereby sustaining a significant loss.
3. Columbia now sues two individuals who were, at the relevant times, directors of SEG and certain subsidiaries. Put simply, Columbia claims that:-
 - (a) it learned in December 2018 that one of these subsidiaries ('SAL') had a VAT liability of about €450,000;
 - (b) this liability was hidden from Columbia by the Defendants;
 - (c) the Defendants represented to Columbia that SAL had no VAT liability;
 - (d) had these representations not been made, Columbia would not have entered into the facility agreements in the first place, it would not have released funds for drawdown, it would not have exercised forbearance, nor would it have failed to take steps to recoup the funds loaned. Columbia also claims that, absent these representations, it would have entered into facility agreements or released funds on different terms to those that actually applied.
4. The Defence is a very full one. Apart from denying much of the claim made by Columbia, the Defendants also plead that this action is, *inter alia*, an abuse of process and submit (through their counsel) that it is "an attempt to circumvent the consequences of Mr. Justice McDonald's order approving the Scheme of Arrangement and writing down the debt".

5. During the course of the hearing of these motions for discovery, all disputes in connection with the Defendants' motion were resolved. I will now deal with the outstanding issues arising from the motion brought by Columbia. I am very grateful to the parties, and their legal teams, for the work done in addressing in a sensible way the bulk of the differences between them. I am also appreciative of the realistic level of agreement about the relevant legal principles. This judgment essentially involves the application of settled rules, and in that context the recital of portions of judgments describing these rules is not necessary.

A. Categories 3, 4 and 6

6. These categories, as they now stand, are:-

"Category 3

All documents:

- (i) Referencing or relating to any potential or actual VAT liability on the part of SAL, including but not limited to the VAT status of intercompany charges associated with any direct or indirect subsidiary of SEG and / or SAL in India.
- (ii) Evidencing and / or recording communications and / or discussions relating to VAT in connection with the formation and / or operation of any direct or indirect subsidiary of SEG and / or SAL in India.

Category 4

To the extent not included in Category 3, all documents referencing or relating to any professional and / or expert advice sought and / or received regarding any potential or actual liability for VAT on the part of during the period up to 31 December 2019.

Category 6

All documents relating to or referencing communications with the Revenue Commissioners regarding any potential or actual liability for VAT on the part of SAL during the period 1 January 2015 to 31 December 2019."

7. The only dispute relates to the end date for these categories. Columbia want an end date of the 31st of December 2019, though it does not seriously dispute that there is a somewhat arbitrary aspect to that date. The Defendants suggest the 9th of January 2019 (as we have seen, the day the Petitions for Examinership were presented). As a fallback, they suggest the 29th of March 2019 (when the Schemes of Arrangement were approved by the Court).
8. The 9th of January 2019 end date is, in my view, too early. At that time, as counsel for Columbia submitted, the position taken by SEG and its associated companies was that the VAT at the centre of these proceedings was not in fact payable. Paragraph 62 of the SEG Petition reads:-

"This aforesaid VCT fund completed its diligence during December 2018 and cited a potential €450,000 value-added tax ("VAT") issue as a key reason for refusing to provide the proposed investment. The potential VAT issue identified arises from the accounting treatment by the Group of VAT on the intercompany management charges with its subsidiary in the Republic of India during 2016 and 2017. The position of the Group is that VAT is not applicable given the VAT status of the business of the Group. The Group is currently seeking advice on this and has treated the VAT as a contingent liability. The Group has put forward several solutions to the investor in relation to the VAT issue and as part of the due diligence cash savings were identified which would be significantly greater than the possible VAT liability."

9. By the end of the examinership process, it was accepted by the Sage Group that there was a VAT liability of about €450,000. The examinership period is therefore of great importance in the evolution of the Sage Group's attitude towards this issue. The mere fact that there was ultimately an acceptance of this liability by the companies (or any of them) does not mean that discovery is not required. The Defendants are quite entitled to plead (as they do) at Paragraph 17(a) of the Defence that:-

"The Defendants make no admission in respect of the Alleged VAT Liability and require full proof of the particulars thereof [...]."

10. However, having pleaded in such categorical terms the Defendants cannot then insist on excessively narrow discovery being ordered against them; *Clarke C.J. in Tobin v. Minister for Defence* [2019] IESC 57. Columbia is clearly entitled to an end date that is after the 9th of January 2019 and is no earlier than the end of the examinership.

11. I have decided that the end date should be the 30th of June 2019. One of the reasons why discovery to the end of 2019 is sought by Columbia is that the Defendants have been put on full proof of this plea at Paragraph 15(f) of the Defence:-

" [...] no attempt has been made by the Revenue Commissioners to revisit or impugn the terms of the Schemes of Arrangement since the making of the Scheme Order."

12. Of course, any application to the High Court in respect of the Schemes of Arrangement would have probably involved Columbia, as a significant creditor of SEG and its relevant subsidiaries; discovery in respect of any such formal application would not be necessary. However, private concerns expressed by Revenue to the Sage Group which could have been preparatory to (or in contemplation of) any revisiting or impugning of the terms of the Schemes of Arrangement would be unlikely to be known to Columbia. On my reading of the pleadings, such communications would fall within Paragraph 15(f) of the Defence as they would fall under the rubric of 'attempts' to 'revisit or impugn' the schemes; certainly, the thrust of the plea is to the effect that Revenue never had any serious second thoughts about the schemes or, if it did, it chose not to act on them.

13. I do not think that this justification supports an end date of the 31st of December, some nine months after the approval of the Schemes of Arrangement by McDonald J. I think that, if Revenue at any time expressed concerns about the schemes after the approval of the Court, this would have been increasingly unlikely to happen with the passage of time. I therefore find that an end date of the 30th of June 2019 is the proper and proportionate one to fix. I am not taken by the submission on behalf of Columbia that a significantly later date should be set as the burden on the Defendants will be light if there is nothing to discover. Such an approach elides a number of the requirements which must be satisfied by a party seeking discovery, not least the obligation to show that there is reason to believe that relevant documents will have been generated within the disputed period.
14. I will therefore order that discovery be made by the Defendants in terms of paragraphs 3, 4 and 6 as they currently stand, with the variation that the end date is the 30th of June 2019. Category 6 specifically catches correspondence from Revenue in connection with VAT, even postdating the approval of the Schemes of Arrangement. Categories 3 and 4 will also catch, among other things, the discussions and advice concerning VAT liability which (even in the absence of communications from Revenue about the schemes) could have occurred as part of any look back on the affairs of the Sage Group after the successful examinership. While an argument could have been made that there should be different end dates for each of these three categories, this has not been strongly advanced by either side; in any event, I think that the end of June 2019 is appropriate for each category.

B. Category 5.

15. Category 5, as now sought, reads:-

“All documents:

- (i) Provided to any party in connection with any due diligence exercise arising from a potential or actual provision of financing to, or investment in, SEG, SAL and / or AFTEL.
- (ii) Referencing or relating to any due diligence undertaken by any party in connection with the prospective or actual provision of financing to and / or investment in SEG, SAL or AFTEL, including but not limited to any documents concerning a potential or actual liability for VAT on the part of SAL.”

16. The Defendants offer the following:-

“All documents:

Referencing or relating to any due diligence undertaken by (i) the Plaintiff during the period from 1 June 2017 to 4 August 2017 or (ii) Octopus Investments Ltd during the period 1 June 2017 to 31 December 2018 in connection with the prospective or actual provision of financing to SEG, SAL or AFTEL, including but not limited to any documents concerning a potential or actual liability for VAT on the

part of SAL arising by reference to the VAT status of intercompany charges associated with Shaw Academy Education Private (India No. 83781).”

17. In seeking this discovery, Columbia rely upon the following pleadings in the Defence:-

“30. In support of the foregoing pleas, the Defendants shall rely upon:-

- (a) [...]
- (b) The express and/or implied representations made by the servants and/or agents of the Plaintiff to the Defendants, their servants and/or agents to the effect that the Plaintiff did not regard the Alleged VAT Liability to be a material issue.

[...]

34. Without prejudice to all other pleas contained in this Defence, if the Plaintiff has suffered the alleged or any loss, damage, inconvenience and/or expense, the Defendants plead that the same has been caused wholly and exclusively (or strictly in the alternative, contributed to) by the negligence on the part of the Plaintiff, its servants and/or agents.

- (a) Failing, refusing and/or neglecting to conduct appropriate due diligence in relation to the members of the Group prior to creating the Facility Agreement and/or advancing funds on foot of the terms and conditions thereof;

[...]

- (g) Preventing and/or hindering the members of the Group from entering into re-financing arrangements with third parties which would have avoided the necessity for the Examinership Proceedings and/or which would have avoided the effects of the Schemes of Arrangement;

[...]

36. Without prejudice to all other pleas contained in this Defence, if the Plaintiff has suffered the alleged or any loss, damage, inconvenience and/or expense, the Defendant pleads that same was not proximate to, nor was it a reasonably foreseeable consequence of, the conduct of the Defendants, their servants and/or agents.

37. Without prejudice to all other pleas contained herein, if the Plaintiff has suffered the alleged or any loss, damage, inconvenience and/or expense, the Defendants plead that the Plaintiff has failed in its duty to mitigate such loss, damage, inconvenience and/or expense.

[...]”

18. Counsel for Columbia submitted that Category five, in the form sought by it, should be ordered for three reasons:-

- (i) The plea that Columbia did not conduct adequate due diligence means that “the level of due diligence carried out by others will assist and will show how the Shaw Group engaged with those others.” I do not agree that the level of due diligence applied by others justifies this discovery request. Whether or not Columbia conducted adequate due diligence will be judged by reference to a general standard. While it could be that the approach taken by one potential financier may be of some interest, I do not think that this means that discovery of these interactions with other potential funders is necessary in order to show that the due diligence carried out by Columbia was appropriate.
- (ii) “[...] the documents which show the effect or consequences of a third party investor learning of the VAT liability are relevant to the question, the counterfactual, if you like, of what [Columbia] would have done had it learnt or known of the VAT liability.” I do not think that the reaction of another potential investor can be of any real assistance in assessing the likely reaction of Columbia, had it been told of any VAT liability of the type which it alleges existed. Other financiers might have had a completely different appetite for risk, might have a greater (or lesser) need for the business with the Sage Group, or might have had more alluring alternative uses for their money than Columbia did. The response of other potential financiers could well create a distracting and ultimately unhelpful sideshow at the trial of this action. In any event, discovery in respect of such a counterfactual is not necessary in order to enable Columbia to advance its claim against the Defendants.
- (iii) The documents “will assist in establishing the true reasons why refinancing wasn’t obtained and the relevance of the VAT liability to that particular issue”. However, Category 8(iii) of the discovery sought by Columbia would provide:-

“All documents evidencing and/or recording all attempts on the part of SEG, SAL and/or AFTEL to enter into re-financing arrangements with third parties.”

- 19. These documents will presumably show, inasmuch as any documents can, the reasons why refinancing was not obtained. The Defendants have agreed to make this discovery, subject to a dispute about the time period covered by the category. Discovery of Category 5 does not therefore appear to be necessary for the third reason advanced on behalf of Columbia.
- 20. Columbia also rely on an affidavit of Mr. Craig Netterfield, who is a director of Columbia. At paragraphs three and four of this affidavit, Mr. Netterfield swears:-
 - “3. In particular, I set forth herein certain facts which I am advised are relevant to the Court’s assessment of the Plaintiff’s category 5 – pertaining to due diligence exercises conducted in relation to SEG, SAL and AFTEL (as defined in the Amended Statement of Claim). These facts are as follows:

- 3.1 On or around 21 December 2018, I had a conversation with Richard Court of Octopus Investments Limited ('Octopus'). During the course of the conversation, Mr. Court and I discussed a prospective investment in the Shaw Group that Octopus has been considering but ultimately opted not to proceed with.
- 3.2 During the course of the 21 December conversation, Mr. Court informed me that the VAT liability (as defined in the Amended Statement of Claim), which was a key reason Octopus did not proceed with the prospective investment, may have come up with 'Mayfiar'. I understood this to be a reference to a prospective investment in the Shaw Group by a different investment firm called Mayfair Equity Partners. Mayfair Equity Partners also did not ultimately pursue an investment in the Shaw Group. I say and believe that Mayfair Equity Partners undertook – and had completed – its due diligence exercise in relation to the Shaw Group companies well before the Plaintiff's first contact with the Defendants in May 2017.
4. I say and believe that the other third party investors may also have conducted due diligence exercises in relation to the Shaw Group companies, including SEG, SAL and AFTEL, in respect of prospective investments which were not pursued because of the VAT Liability (prior to May 2017). I believe and am advised that documentation pertaining to those exercises would be highly relevant to, and necessary for, the fair determination of the issues in dispute."
21. It is of course the case, as Barniville J. observes at paragraph 21 in *Nolan v. Dildar* [2020] IEHC 244, that affidavit evidence can be considered in a motion such as this where that evidence "sets out in greater detail the parties' respective contentions on the issues raised on the pleadings". However, the dealings between the Shaw Group and Mayfair Equity Partners (or any other unknown investment firm) are not issues raised on the pleadings, and are not issues to be decided at the trial of this action. For the reasons I have set out earlier in this decision, details of the dealings (if any) between the Shaw Group and other prospective investors may well be quite unhelpful and distracting in considering the relevant interactions between the Shaw Group and Columbia. Even if I am wrong in that view, I find that Columbia has not made out that this documentation is highly relevant or necessary for the fair determination of any issues in dispute in this claim.
22. I will therefore order discovery in the form offered by the Defendants in respect of this category.

C Category 8

23. Category 8(i) and 8(iii), as currently sought, read:-

- "(i) All alternatives available to examinership for SEG, SAL and / or AFTEL, including but not limited to all documents evidencing and / or recording the consideration by the Defendants, SEG, SAL and / or AFTEL, or their advisers, of examinership and / or any alternative to it, in the period 1 July 2018 through 9 January 2019.

- (iii) All attempts on the part of SEG, SAL and / or AFTEL to enter into re-financing arrangements with third parties, in the period 1 July 2017 through 9 January 2019.”

During the hearing, Counsel for Columbia indicated that a start date of the 1st of November 2017 would be satisfactory.

24. The first sub-category is required, Columbia says, because of the plea at paragraph 34(f) of the Defence; the second sub-category is required because of the plea at paragraph 34(g) of the Defence. I have already set out the latter of these two pleas. The plea at paragraph 34(f) reads:-

“34. Without prejudice to all other pleas contained in this Defence, if the Plaintiff has suffered the alleged or any loss, damage, inconvenience and/or expense, the Defendants plead that the same has been caused wholly and exclusively (or strictly in the alternative, contributed to) by the negligence on the part of the Plaintiff, its servants and/or agents.

[...]

- (f) Causing the members of the Group to initiate the Examinership Proceedings, in circumstances where a more commercially prudent alternative existed;

[...]”

25. The difference between the parties is confined to the start date for each sub-category. While the Defendants make the fair point that one would expect that alternatives to examinership, and refinancing which might avoid the need for examinership, would ordinarily be explored most intensely around the time that the examinership petition is about to be launched, this limitation is not pleaded by the Defendants. Had the Defendants made the case that commercial alternatives or refinancing possibilities were disrupted by Columbia from the 6th of December 2018 onwards I would have little hesitation in accepting the Defendants’ submission that this should be the start date. However, the Defence is completely open ended in this regard; the Defendants are free to lead evidence that a potential refinancing in, say, September 2018 would have put the Shaw Group on a sound medium term financial footing (thereby avoiding examinership) but that this was subverted by Columbia. Without appropriate discovery, it is very difficult to see how Columbia could meet such evidence.
26. I therefore propose broadly to fix the start dates proposed by Columbia, as refined by its counsel at the hearing of the motions. The start date for Category 8(i) will be the 1st of July 2018, as that seems to me to be a reasonable period (of some six months) over which commercial alternatives to a potential examinership might have been considered or canvassed. The start date for category 8 (iii) will be the 1st of January 2018, as the possible refinancing of the Shaw Group may have been a somewhat longer term enterprise; however, a year before the Petition was presented seems to be quite sufficient.

27. Category 8 (ii) is more problematic, though some significant progress in agreeing the terms of this sub-category was made in correspondence which followed the hearing. Columbia's position is;

"All documents evidencing and / or recording ... (ii) the financial condition of SEG, SAL and / or AFTEL during the period 4 August 2017 through 9 January 2019, including any damage to the value of the business of SEG, SAL and / or AFTEL arising from, or connected to, the matters pleaded at paragraph 5(d)(i)-(iii) of the Defendants' Replies to Notice for Particulars."

28. In reply, the Defendants offer:-

"All documents (generated during the period 4 August 2017 through 9 January 2019) evidencing and/or recording any damage to the value of the business of SEG, SAL and / or AFTEL arising from, or connected to the matters pleaded at paragraph 5(d)(i)-(iii) of the Defendants' Replies to Notice for Particulars."

29. I will order the following category:-

"All documents evidencing and/or recording any damage to the value of the business of SEG, SAL and/or AFTEL during the period 4 August 2017 through 9 January 2019 arising from, or connected to the matters pleaded at paragraph 5(d)(i) – (iii) of the Defendants' Replies to Notice for Particulars."

30. I will now explain my decision. The discovery sought arises from the plea at paragraph 34(h) of the Defence, where it is alleged that Columbia was guilty of contributory negligence in this respect:-

"Causing damage to the value of the business of the members of the Group"

31. In replies to particulars, this strikingly broad claim was apparently limited to three more specific matters. However, the position taken in those replies remained that the details of the plea in the Defence was a matter for evidence, and that the three matters described in the replies were essentially by way of example.
32. At the hearing, counsel for the Defendants confirmed that the three allegations contained in the replies to particulars exhaustively described what is involved in the plea at paragraph 34(h).
33. While the Defendants continue to maintain that no discovery is required in this regard, I do not accept this submission. The documents sought are relevant to the identified plea, they are necessary for a fair disposal of the proceedings, and (as ordered) are proportionate.
34. I am not requiring the Defendants to make discovery of all documents evidencing and/or recording the financial condition of these companies over a seventeen month period; the form of words is too wide for what is needed, and could run to a very broad swath of

documents. The discovery ordered will capture all documents which evidence or record damage to the value of the business; this is the harm claimed by the Defendants, and will therefore disclose all documents needed by Columbia to meet this aspect of the Defence.

35. I have not confined the discovery to documents generated over the relevant period. Columbia need to see relevant documents relating to that period, not simply documents produced during it. Confining the discovery in the way proposed by the Defendants would lead to the needless exclusion of documents generated after the relevant time. It is a commonplace that documents which are produced after a cut-off date can provide important information about events occurring before that date. I will, however, consider an end date for the generation of documents covered by this sub-category.
36. I will hear the parties on the need for any such end date, and any other matters arising from this Decision on the 22nd June 2021.