

**THE HIGH COURT  
COMMERCIAL**

[2022] IEHC 197  
[2021/5806P]

**BETWEEN**

**BRANDON POINT HOLDINGS LIMITED AND OTHERS**

**PLAINTIFF**

**AND**

**MALIN CORPORATION PLC**

**DEFENDANT**

**Ex tempore JUDGMENT OF Mr. Justice Twomey delivered on the 25th day of March, 2022**

1. This is a relatively minor matter which was heard on 24th March, 2022, namely how to allocate the costs of a motion for discovery which was withdrawn. Yet it took well over an hour of hearing time (and thus well over 25% of the court's daily hearing time) in which it was disputed who should pay the legal costs for the issuing of the motion and the ancillary costs such as the preparation of the grounding affidavit by Brandon Point and the replying affidavit from Malin.
2. The motion for discovery was initially brought by Brandon Point Holding Limited and the other plaintiffs (collectively "Brandon Point") against Malin Corporation plc ("Malin"). It was issued on 24th February, 2022 and then withdrawn before the hearing.
3. The Brandon Point plaintiffs are all either individuals or companies who were officers of Malin and were shareholders of a particular class of share in Malin. They allege they have a right to convert their shares into ordinary shares in the events of a 'change of control event' in Malin, as defined in the constitution of Malin.
4. Malin invests in companies in the health care and pharmaceutical sectors. Malin sold its investment in a company called Altan Pharma Limited ("Altan") and decided to return part of the proceeds to ordinary shareholders. Brandon Point contend that this sale of Malin's entire shareholding in Altan amounts to a change of control event, and Malin contests this. The alleged change of control event occurred on 1st October, 2021, and the proceedings were issued on the 12th October, 2021. This is the net issue between the parties which is the subject of this litigation. This issue has significant financial consequences since if Brandon Point is correct and it is entitled to have its shares converted into ordinary shares, it says that they would be worth €19,206,037.
5. Discovery was pursued by Brandon Point regarding the effect of the sale of Altan by Malin on the business and assets of Malin.
6. Brandon Point claims that the motion was withdrawn as a result of clarifications which were obtained from Malin in the replying affidavit to the discovery motion. In these circumstances, Brandon Point claims that the appropriate order should be that the costs involved in the motion should be costs in the cause, so that whoever wins the litigation will have these costs paid by the losing party.

7. For its part, Malin claims that the clarifications contained in its affidavit were previously contained in correspondence issued prior to the issue of the motion. On this basis Malin claims that the costs of the motion should be awarded to it.
8. Brandon Point's response is that while the averments contained in Malin's affidavit cover the same grounds as earlier correspondence from Malin, those averments provide points of clarification which were crucial to Brandon Point's decision to withdraw the motion.
9. For example, it is averred in Malin's affidavit dated 3rd March, 2022 that the effect of the sale of Altan on the business of Malin falls to be determined by reference to relevant '*financial statements*'. An earlier letter dated 9th February, 2022 from Malin makes the same point, but by reference to '*financial information*', rather than financial statements. Brandon Point says that there is a significant difference between the financial statements of a company and financial information relating to that company and that this important clarification that Malin was referring only to financial statements was contained in the affidavit, which was sworn after the motion issued. Accordingly, Brandon Point claims that this clarification was a valid reason for the withdrawal of the motion after the affidavit was filed.
10. Similarly the Malin affidavit contains an averment that the internal views, discussions or considerations of Malin regarding the sale of Altan (which were sought in the discovery) are not relevant to the issues between the parties. The previous letter from Malin dated 9th February, 2022 made a very similar point. However that letter stated that such views, discussions etc. were not '*in principle*' relevant to any issues in dispute. Brandon Point claims therefore that prior to that affidavit, the wording in the Malin letter left open the possibility that internal views, discussions etc. might in certain exceptional cases be relevant to the issues in dispute.
11. On this basis, Brandon Point argues that it was reasonable for it to only withdraw the discovery motion once this clarification in the Malin affidavit had been provided.
12. Finally, Malin also claims that Malin had provided confirmations regarding the types of documents it intended to rely on in the proceedings prior to the issue of the discovery motion, which obviated the need for discovery. This is because by letter dated 23rd February, 2022 Malin confirmed that its witnesses would only refer to certain publicly available documents. On this basis, Malin claims that there was no need for the discovery motion to issue.
13. However in relation to this letter of clarification from Malin to Brandon Point which is dated 23rd February, 2022 the timing in is relevant. This is because Brandon Point had until 16th February, 2022 to issue a motion for discovery if it required discovery in these proceedings. However it sought an adjournment from Malin of the agreed deadline from 16th February, 2022 for a further week.
14. By letter dated 17th February, 2022, Malin agreed to extend the deadline to 23rd February, 2022 on condition that any '*application for discovery will be issued by [Brandon*

*point] on or before Wednesday 23rd February 2022'. It did so also on the further condition that no 'further adjournments will be sought by [Brandon Point] in respect of issuing any motion for discovery'.*

15. In those circumstances, to the extent that Brandon Point had, upon receipt of the letter dated 23rd February, 2022, any queries on the clarification and confirmations provided by Malin in that letter (or indeed any of the issues contained in the letter dated 9th February, 2022), Brandon Point had no option but to issue the motion for discovery immediately on that date since this was the condition imposed by Malin i.e. Brandon Point's discovery motion had to issue '*on or before Wednesday 23rd February 2022*' (*albeit* that the motion was in fact issued on the following day). It is also the case that the extension of time to the 23rd February, 2022 which had been granted to Brandon Point by Malin, was expressly conditional on Brandon Point not even requesting any further adjournments from Malin.
16. It seems to this Court that if Brandon Point had not been obliged by Malin to seek no further adjournment, then the clarifications of Malin's position, contained in Malin's affidavit, were likely to have come out in correspondence. It also seems to this Court that it is likely that this would then have obviated the need for the discovery motion to be brought by Brandon Point. Indeed, this view is supported by the fact that the grounding affidavit and the replying affidavit in the discovery motion are very much in the nature of a continuation of the type of correspondence one generally sees between parties when one party is seeking and another is replying to discovery and so providing necessary clarification to obviate the need for that discovery.
17. For this reason, the issuing of the motion for discovery by Brandon Point, upon receipt of the letter of 23rd February, 2022 from Malin, (rather than, what would have been more appropriate namely a letter from Brandon Point to Malin seeking clarification), arose in part because of Malin's approach, which was in effect, an ultimatum either to issue a motion immediately or not at all. This is because as a condition of its initial agreement to extend the deadline for issuing a motion of discovery, Malin had prohibited Brandon Point from even seeking from Malin additional time for clarification of Malin's responses to the discovery requests.
18. In this Court's view, the distinction between the previous Malin correspondence and Malin's affidavit are not on their own sufficient to support Brandon Point's claim that it was justified in issuing the motion and therefore sufficient for Brandon Point to avoid a costs order against it.. However, what tips the balance is the fact that Malin put Brandon Point in a corner to bring a discovery motion on 23rd February, 2022 , or not at all, and made it clear that Brandon Point could not even request more time from Malin for any further clarifications of Malin's position including in its letter of that very date.
19. In these circumstances, this Court concludes that the appropriate order is that the costs of the motion should be costs in the cause. In this way if Malin wins the substantive action it will obtain the costs of this motion and if Brandon Point wins the substantive action it will be awarded the costs of this motion. In either case there will at least be a

possible future saving on court time, since there will be no need for the trial judge to visit the merits of this withdrawn application for discovery when deciding on the overall costs of the case.