

**THE HIGH COURT
COMMERCIAL**

[2022] IEHC 20
Record No. 2018/1872 P

BETWEEN

PAT RYAN

PLAINTIFF

AND

DENGROVE DESIGNATED ACTIVITY COMPANY

DEFENDANT

JUDGMENT OF Mr. Justice Twomey delivered on the 19th day of January, 2022

INTRODUCTION

1. This is a case in which discovery is being sought by the plaintiff ("Mr. Ryan") from the defendant ("Dengrove") arising from a loan by Dengrove's predecessor (Anglo Irish Bank plc) of more than €12 million to Mr. Ryan and his partners (who were involved in partnerships known as the City Arts Partnership and the City Partnership) to purchase certain properties on City Quay, Moss Street and Gloucester Street, Dublin 2 (the "Property").
2. The borrowings are claimed to be subject to 'all sums due' mortgages and while the outstanding liability of the partnerships, in relation to the acquisition of the Property, to Dengrove amounted to approximately €22 million, the various partners in the partnerships had outstanding borrowings of approximately €430 million owed to Dengrove.
3. The key issue in dispute between the parties is whether Mr. Ryan was entitled to redeem the mortgage on the Property for a sum of approximately €22 million and thereby become entitled to develop the property himself, or whether the mortgages should only be redeemed on the discharge of all the sums due to Dengrove by all the partners (including Mr. Paddy Kelly ("Mr. Kelly") and John, Alan, Niall and Brian McCormack (the "McCormacks")), i.e. a sum of approximately €430 million.
4. This is clearly a matter of interpretation of the mortgages, which will be decided by the trial judge at the hearing of the action.
5. This judgment considers whether discovery should be ordered on the particular facts of this case, including the fact that discovery was previously ordered and not objected to by Mr. Ryan. In this regard, the hearing of this action had in fact been commenced before a trial judge when it came to a halt as a result of a settlement agreement. However, that settlement has since unravelled and hence this trial is due to recommence at a later date. This discovery application considers, *inter alia*, whether the discovery now being sought by Mr. Ryan should be ordered, in light of the fact that the Statement of Claim has, since the original discovery was ordered, been amended as a result of certain emails that were provided anonymously to Mr. Ryan.

BACKGROUND

6. Discovery was previously agreed and ordered by the High Court on the 19th November, 2018 (perfected on 22nd February, 2019) in this case in relation to the various categories of documents sought by Mr. Ryan.
7. Dengrove did make discovery in February 2019 to Mr. Ryan and he has had those discovered documents since that date. He did not seek further and better discovery and the trial commenced in October 2019. The parties reached a settlement agreement on the third day of the trial. However, a dispute arose between the parties regarding the implementation of the settlement agreement and hence Mr. Ryan is seeking to proceed with the litigation.
8. It is against this background that Mr. Ryan has claimed that certain emails involving Dengrove and its agents, that were provided to him anonymously and without authorisation by Dengrove, entitled him to obtain a court order to amend his Statement of Claim, which he duly did on the 15th April, 2021.
9. In this application, he relies upon his amended Statement of Claim to seek additional discovery from Dengrove.

Unauthorised emails and allegations of increase of interest from 6% to 19% to avoid tax

10. After the original discovery was ordered, Mr. Ryan's son, Mr. Padraic Ryan, was anonymously sent certain emails, between Dengrove and its agents on the one hand and on the other hand some of Mr. Ryan's partners (and/or their agents) dealing with interest payable on loans to Dengrove and the tax consequences thereof for those partners.
11. In his written submissions Mr. Ryan claims that:

“[Dengrove] had engaged with [Mr Ryan's] former partners to *inflate the indebtedness purportedly secured on the sites while seeking to avoid tax*, including through the alteration of relevant interest rates applicable to the facilities. [Dengrove] appeared to have concluded a Co-Operation Agreement, or other compromise agreement, to this effect with [Mr Ryan's] partners.” (Emphasis added)
12. Thus, it is alleged by Mr. Ryan that in the email of 1st December, 2017, an agent of Dengrove (Mr. Tony Waters of HWBC) is writing to Mr. Alberto Magrinelli of Situs, which was servicing the loans on behalf of the lender, referencing an interaction with Mr. Kelly's son (Mr. Chris Kelly) in which it is stated:

“Hi Alberto,

Chris Kelly gave me the schedule for the potential tax position for 2017. I met with him. I added in a few additional columns to the schedule and which is attached.

I highlighted 2 of the cells where I think the existing & default rates need to be checked by you as they look incorrect. *I amended the target rates we would need to clear out the tax liability for 2017 and which you might check are correct.*”
(Emphasis added)

13. Attached to this email was a document which provided for an interest rate of 19% for the 'City Arts Site', which differs from another document with the same details but showing an interest rate of 6% (that latter document is attached to an email dated 11th December, 2017 from Mr. Waters to Mr. Chris Kelly.).

14. In another email dated 15th December, 2017, Mr. Waters states:

"Thanks Alberto

I think we *have to apply an interest rate to the figures supplied by Chris below and ensure this matches the rent roll.*" (Emphasis added)

15. In his email of 18th December, 2017 to Mr. David O'Dwyer of Alanis Capital (a company associated with the McCormack family), with a copy to Mr. Brian McCormack, Mr. Waters states:

"Hi David,

By any chance can you help on this? *Dengrove are working on minimising the tax leakage on surplus rent over interest for the 2017 tax year* and looking for the allowable amount of the loan balance net of equity releases which are unlikely to be allowable." (Emphasis added)

Financial Statements of Dengrove

16. As further background to this discovery application, Mr. Ryan references the financial statements of Dengrove for the year ending on 31st December, 2018 which were signed on 8th July, 2019 (which, it is relevant to note, was after the date of the original order for discovery was made in this case on the 19th November, 2018).

17. At paragraph 9 of the Directors' Report it is stated:

"PRINCIPAL RISKS & UNCERTAINTIES

The Company faces the following risks:

- Amounts and timing of actual recoveries from the portfolio differing from the portfolio net collections targets. *This is in part a function of the ability to negotiate restructurings or discounted payoffs with the debtors* and/or the ability to enforce the underlying mortgages and to a lesser extent, the timing of foreclosure actions in courts. Such proceedings will involve significant periods of time and expense that are difficult to predict and quantify.
- The expected collections are based in part on the valuation of the current and future rental income of the properties. No assurance can be given that the expected rental income can be generated by the properties and captured in the expected amount and timing.

The above risks are managed and mitigated by the dedicated team of asset and property managers, lawyers and advisers. *The Company has also in place a cooperation agreement which supports its ability to negotiate restructurings or discounted pay-offs with the debtors and to enforce the underlying mortgages.*" (Emphasis added)

18. In reliance upon these emails and these financial statements, Mr. Ryan amended his Statement of Claim on 15th April, 2021. In this amended Statement of Claim (at para. 72) he alleges, *inter alia*, that he is entitled to exercise the right under his partnership agreements to require his partners to contribute to the redemption of the mortgage of the Property (which he says can be redeemed for a sum of €22 million) and if they fail to do so, to exercise his rights in respect of each defaulting partner under the partnership agreements.
19. At amended para. 74, Mr. Ryan pleads

"[Dengrove] has come to a series of compromise agreements with [Mr Ryan's] partners under the Partnership Agreements. It is pleaded that as a result of, inter alia, section 17 of the Civil Liability Act that [Mr. Ryan] should be indemnified and/or absolved from making any payment to [Dengrove] on the basis of settlement or compromise agreement entered into between [Dengrove] and [Mr. Ryan's] partners under the various Partnership Agreements. The effect of the compromise or settlement agreement is to reduce the amount of indebtedness owing to [Dengrove]."
20. At amended para. 75, Mr. Ryan pleads that the settlement or compromise agreements represent a release or accord by Dengrove with Mr. Ryan's partners resulting in any claim by Dengrove against Mr. Ryan being reduced accordingly.
21. At amended para. 76 Mr. Ryan pleads as follows

"It is pleaded that [Dengrove] has sought to procure a breach of the Partnership Restrictions contained in the Partnership Agreements by John McCormack, Alan McCormack, Brian McCormack, Niall McCormack and Paddy Kelly by entering into a Co-Operation Agreement with them and seeking for those partners to act contrary to the Partnership Restrictions and the interests of [Mr. Ryan]. It is pleaded that this action by [Dengrove] in procuring this breach has impeded [Mr. Ryan's] equity of redemption."
22. In support of this claim is the fact that two of Mr. Ryan's partners, Mr. Kelly and the McCormack family, have entered a compromise agreement with Dengrove. Mr. Ryan exhibits a letter dated 30th October, 2017 from Mr. Brian McCormack to Mr. Ryan in which Mr. McCormack supports the interpretation by Dengrove of the 'all sums' mortgages over the Property, which is favourable to Dengrove and contrary to Mr. Ryan's interests:

“As you would be aware, each one of us is a party to the terms of those facilities and the security granted to Anglo Irish Bank Corporation plc *which looks like it very clearly provides that the security held by Anglo Irish Corporation plc extended to all of the indebtedness of each partner to Anglo Irish Bank Corporation plc* and we are therefore all bound by that fact. Since then the loans were transferred to NAMA and subsequently Colony North Star Inc. As such, you should be aware that the amount required to redeem the indebtedness secured on the City Arts Site is likely to be greater than the amounts owing under the Facility Letters.” (Emphasis added)

23. Uncontroverted submissions were made on behalf of Mr. Ryan that this was also the position taken by Mr. Kelly (since he has provided a Witness Statement in support of Dengrove’s position that the mortgages secure the €430 million debt, not the €22 million debt) and that this was not the position taken by the other partners, Mr. Philip Monaghan and Piers Contracting (which it should be noted is in insolvent liquidation).

24. Then at amended para. 77 Mr. Ryan makes the following plea

“It is further pleaded that [Dengrove] has compelled John McCormack, Alan McCormack, Brian McCormack and Paddy Kelly to unlawfully seek to allow increased interest amounts be applied to loans for the purpose of reducing tax leakage in circumstances where [Dengrove] has made the loans non-recourse to those partners. It is pleaded that [Dengrove’s] actions have caused [Mr. Ryan] loss and further impeded his equity of redemption in circumstances where [Dengrove] has engaged with those partners in seeking to inflate the sums due and owing under the loans.”

25. This is the background against which the categories of discovery fall to be considered.

Law in relation to discovery

26. There is no dispute between the parties regarding the relevant case law which applies to discovery applications such as this one, such as *Tobin v. Minister for Defence* [2020] 1 I.R. 211. Accordingly, it is not necessary to set this case law out in any detail, but reference will be made hereunder to those principles which are particularly relevant in this case.

Applicable principles and allegations which are relevant to discovery to be ordered

27. Dengrove relies, *inter alia*, on the Supreme Court case of *Keating v. RTE* [2013] IESC 22 to object to categories D, E and F. In particular, it relies on some of the following arguments to resist discovery.

A. No discovery because just bare assertions and speculation?

28. In this regard, Dengrove claims that discovery should not be granted on the grounds that the categories seek to substantiate bare assertions and mere speculation and therefore fail the primary test of relevance for discovery applications, which is based on the pleadings (see *Framus v. CRH plc* [2004] 2 I.R. 20 at p. 35), as they amount to a fishing expedition.

29. While Mr. Ryan has not provided convincing evidence at this stage of the proceedings (nor is he required to) that his partners were induced by Dengrove to breach their partnership agreements with him, the evidence to which reference has been made above, does mean that the allegations set out in the amended Statement of Claim could not be said to be unsupported by any evidence. For this reason, this Court concludes that they do go beyond mere assertion and speculation.
30. Accordingly, this Court concludes that Mr. Ryan has passed the

“limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent’s relevant documentation.” (per Clarke J. in *Hartside Ltd v. Heineken Ireland* [2010] IEHC 3 at para. 10)

B. No discovery because a ‘second bite at the cherry’ of discovery?

31. Dengrove also relies on the case of *Hireservices Ltd (E) v. An Post* [2020] IECA 120 to object to the discovery application on the grounds that the categories are directed at the same disputed issues in the pleadings as categories which were previously sought and agreed or ordered in November 2018.
32. However the *Hireservices* case was concerned with a subsequent application for discovery after discovery had been agreed but the defendant alleged that certain documents had not been discovered. Murray J. observed that subsequent orders for discovery in those circumstances should only be made in exceptional cases where there is good reason for such an order. Murray J. noted that the correct approach is that an application be made for further or better discovery pursuant to Order 31 Rule (12)(11).
33. This case is different since one is dealing in effect with a fresh order for discovery based on new pleas in an amended Statement of Claim. This was not the situation in *Hireservices* and accordingly the principles stated therein regarding the reopening of previous interlocutory orders for discovery being done only where there is good reason, such as a material change in circumstances, does not apply to this case. This is because the discovery application in this case is a fresh one based on new pleas in the amended Statement of Claim.

C. But same discovery is being sought based on original grounds?

34. However a distinction needs to be drawn regarding any application for discovery now, which is in fact based, or could have been based, on the pleas in the original Statement of Claim, and those based on new pleas in the amended Statement of Claim.
35. To the extent that Mr. Ryan’s current application for discovery is based on the same or similar pleas to those in the original Statement of Claim, and for which there is an order of discovery or agreed discovery, then the principles set out in the *Hireservices* case are applicable.
36. In those circumstances, the principles underlying the *Hireservices* case do apply and discovery should not be ordered since the appropriate approach is for further and better

discovery to be sought, to the extent that Mr. Ryan believes that the original discovery is insufficient.

37. In this regard, Dengrove alleges that the discovery now being sought by Mr. Ryan does not arise from any amendments to the pleadings made by Mr. Ryan. It claims that the issues at which the categories are directed have been in dispute since the proceedings were commenced and so should be refused.

D. Categories are too broad, particularly as they breach third parties' confidentiality?

38. The other point made by Dengrove in objecting to the categories of discovery is that they are particularly broad and that, in reliance upon the judgement of Barniville J. in *Dunnes Stores v. McCann* [2018] IEHC 123, it suggests that if any order was to be granted it should be restricted to 'documents "recording" a particular issue' rather than all documents otherwise "'relating to" a particular issue'(para. 22).
39. Combined with this is the fact that Dengrove claims that Mr. Ryan seeks documents relating to persons who are not parties to the proceedings relating to their confidential banking affairs. This is because Mr. Kelly and the McCormack family are not parties to these proceedings, yet the categories of discovery will encompass documents held by their bank regarding their financial affairs and possibly the affairs of others (other than Mr. Ryan, with whom they are in partnership).
40. There is some validity to these two points, since a very broad category of documents to be discovered, where there is likely to be a breach of confidentiality, is not appropriate. This is because as noted by Clarke CJ in *Tobin v. Minister for Defence* [2020] 1 I.R. 211 at p. 225, when considering discovery that might breach the confidentiality:
- "While this case is concerned with problems arising from what is said to be over-burdensome discovery, *similar issues can also arise where there are other considerations, such as confidentiality*, which might be said to play a role. Where an application for an order for discovery is made in respect of confidential documentation, the court should only order discovery in circumstances where it becomes clear that the interests of justice *in bringing about a fair result of the proceedings* require such an order to be made." (Emphasis added)
41. Furthermore, where such an order is to be made, as noted by Clarke J., as he then was, in *Independent Newspapers (Ireland) Ltd. v. Murphy* [2006] 3 I.R. 566 at p. 572
- "[i]t seems to me to be appropriate to interfere with the right of confidence *to the minimum extent necessary* consistent with securing that there be no risk of impairment of a fair hearing."
42. In this case, the persons whose confidentiality is primarily affected, are persons who, while they are not parties to the proceedings, are not completely unconnected persons. This is because, they are persons who are alleged to have breached their partnership agreements with Mr. Ryan, *albeit* that this breach was induced by Dengrove.

43. In all these circumstances, this Court concludes that some breach of confidentiality of Mr. Ryan's partners is inevitable in these proceedings.
44. Indeed this is recognised by Dengrove, which has already conceded that some breach of confidentiality of Mr. Ryan's partners' affairs is necessary, by Dengrove's agreement to provide in relation to Category D, a table showing what remains secured on the Property, the underlying contractual obligations of Mr. Ryan's partners that Dengrove say is secured on the Property and any compromise agreements entered into by Dengrove with Mr. Ryan's partners (see Transcript p. 49, line 16).
45. Thus, some orders for discovery may be justified in these circumstances, even though they may breach Mr. Ryan's partners' confidentiality, in order to bring about a fair resolution of the proceedings in light of the allegations against Mr. Kelly and the McCormack family (*albeit* that they have not been sued in these proceedings by Mr. Ryan). However, they should nonetheless be as limited as possible.
46. In considering the extent of the categories of discovery to be ordered, it is relevant also to note that while this is a case where there is some evidence to support the claims being made in the amended Statement of Claim, nonetheless in ordering discovery

"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 trial [Framus v. CRH Plc [2004] 2 I.R 20, page 38]." (Emphasis added) per Ryan P in *O'Brien v. Red Flag Consulting Ltd [2017] IECA 258* at para. 21.9.

E. Breach of earlier discovery order by Dengrove?

47. In support of its claim for discovery, Mr. Ryan claims that the disclosure anonymously to him of the emails to which reference has already been made amounts to a failure by Dengrove to comply with the discovery ordered in 2018. Mr. Ryan alleges that the emails are '*patently relevant and necessary*' and so this nondisclosure amounts to a breach of the discovery which was ordered. However, no attempt was made by Mr. Ryan to identify under which ordered category of discovery those emails ought to have been discovered. In these circumstances, this Court cannot rely on an alleged breach of a previous court order, which is simply asserted by Mr. Ryan, as a basis for granting discovery in the terms now sought by Mr. Ryan. In any case, as is clear from the *Hireservices* case at para. 12, if there is a concern that

"documents captured by the new categories ought to have been, but were not, discovered in the original affidavit of discovery [that concern] is properly addressed within the application for further and better discovery."

48. Thus, the appropriate response is not to seek new discovery and to justify it by reference to an alleged failure to comply with an existing order for discovery, but rather to seek an order for further and better discovery.

Application of these principles to the categories of discovery

49. Reliance is now placed on the foregoing analysis to reach conclusions in relation to each of the four categories of discovery.

Category A

“All records, notes, agreements, memoranda or other documents recording or otherwise evidencing that an amount of €430 million is secured on the properties situate at City Quay, the subject matter of these proceedings (the ‘City Quay Properties’).”

50. It seems to this Court that this issue, namely the amount of liabilities which have been secured on the Property has been in issue since these proceedings commenced and there has already been discovery sought in relation to a similar category, which resulted in agreement being reached between the parties that Dengrove provide discovery on affidavit identifying the amount of the indebtedness of each borrower. As already noted, Mr. Ryan commenced the trial based on this discovery and did not seek further and better discovery before so doing.
51. Combined with this is the fact that, as already noted, Dengrove has agreed to provide a table showing what remains secured on the Property and the underlying contractual obligations of Mr. Ryan’s partners, that Dengrove say is secured on the Property.
52. In addition, there is nothing in the amended pleadings which affect this category of discovery, such that it could not have been sought, in this exact same form, based on the original set of pleadings.
53. In these circumstances, this Court refuses this category.

Category D

“All records, notes, memoranda, or other documents recording, describing or otherwise relating to any compromise agreement or agreements between the Defendant and the Plaintiff’s co-partners.”

54. In contrast to Category A, this category could be said to be directly and solely linked to the amendments to the Statement of Claim by Mr. Ryan, since it seeks documents relating to the alleged compromise agreements, which was not originally pleaded.
55. As previously noted, the ‘*limited threshold of being able to specify a legitimate basis*’ for access to these documents has been reached. In addition, since this alleged compromise agreement between Dengrove and Mr. Ryan’s partners appears to be the key claim by Mr. Ryan in the amendments to his Statement of Claim (i.e. that Dengrove engaged with Mr. Ryan’s partners to inflate the indebtedness secured on the property in order to avoid tax), it is this Court’s view that, while Dengrove has offered to discover any compromise agreement, it is appropriate that the discovery go beyond just the compromise agreement

itself. This category is still proportionate since the documents must relate to a very specific item, a compromise agreement.

56. In those circumstances, this category will be ordered.

Category E

“All documents, records, memoranda, notes or other agreements recording, describing or otherwise relating to communications that the Defendant has had with the Plaintiffs co-partners relating to any aspect of the indebtedness of €430 million which the Defendant claims is secured on the City Quay Properties.”

57. This category appears to this Court to amount to a general trawl of every communication that has taken place between Dengrove and Mr. Ryan’s partners in relation to their debt owed to Dengrove. It is not justified by the amendments to the Statement of Claim and in particular, it is not justified, as claimed by Mr. Ryan, by the plea at para. 76 that Dengrove has sought to procure a breach of the partnership agreements by Mr. Ryan’s partners. This is particularly so, when one bears in mind that Category D is being permitted regarding any documents relating to the alleged compromise agreements.

58. Furthermore, since one is dealing with confidential matters relating to persons who are not parties to this litigation, this broad trawl of documents could not be said to breach that confidentiality to the ‘*minimum extent necessary*’ as required by *Independent Newspapers (Ireland) Ltd. v. Murphy* [2006] 3 I.R 566.

59. Accordingly, this category is being rejected.

Category F

“All documents, board minutes and or other records dealing with or recording describing or otherwise relating to interest which has been charged or secured on the City Quay Properties.”

60. This category may be relevant to the plea at para. 77 of the amended Statement of Claim that Dengrove compelled Mr. Ryan’s partners to unlawfully allow increased interest amounts to be applied on the loan, in order to reduce their tax liabilities, in circumstances where the loans were non-recourse to those partners.

61. It may also be relevant to the plea at para. 76 of the amended Statement of Claim, that Dengrove sought to procure a breach of the partnership agreements.

62. However, it must also be borne in mind that Mr. Ryan has already obtained discovery in relation to interest, i.e.

“All documents that evidence [Mr Ryan’s] liability to [Dengrove], to include default interest and/or penalty interest, which will include bank statements to 05 March 2018.”

63. Similarly, it should be borne in mind that one is again dealing with the disclosure of confidential information of persons who are not party to this litigation,

64. In these circumstances, a proportionate category of discovery, in this Court's view, is one which reads as follows:

"All documents, board minutes and/or other records referencing any change or proposed change to the rate of interest which has been charged or secured on the City Quay Properties."

65. Accordingly, this amended category of discovery will be ordered.

CONCLUSION

66. Discovery will therefore be ordered in the matter outlined above in regards to Category D and the amended Category F.

67. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention on one week from today's date, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).