

THE HIGH COURT

[2014 No. 6156 P.]

BETWEEN
IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)
PLAINTIFF

AND
PATRICK MCKILLEN
DEFENDANT

JUDGMENT of Mr. Justice Noonan delivered on the 9th day of October, 2019

1. This is an application for discovery brought by the defendant in the within plenary proceedings.
2. In July 2008, the defendant agreed to purchase 10,200,000 ordinary shares in the plaintiff, which was then known as Anglo Irish Bank Corporation Plc. By the terms of a facility letter dated the 10th July, 2008, the plaintiff offered to advance a loan to the defendant for the purpose of buying these shares. The defendant was one of ten individuals, who became known as the Maple Ten, who entered into similar arrangements with the plaintiff.
3. The defendant alleges that the purpose of this transaction was to manipulate the plaintiff's share price on the stock market to prevent it decreasing in value in response to what the defendant claims was an existential threat to the plaintiff arising from its exposure to positions taken by Mr. Sean Quinn in the plaintiff's shares. The defendant claims that Mr. Quinn had built up a position representing approximately 28% of the issued share capital of the plaintiff by the use of contracts for differences which were funded and underwritten by the plaintiff in a sum exceeding €2 billion.
4. The plaintiff pleads that it issued a facility letter to the defendant on the 10th July, 2008, which was accepted by him, sanctioning borrowings of up to €60 million which were to be secured by a charge over the shares with recourse to the defendant, limited to 25% of the balance outstanding under the loan. Interest was to be rolled up for the term of the loan which was repayable on demand but in any event, on the 31st January, 2009.
5. It is alleged, and not disputed by the defendant, that he accepted the terms of this facility letter, on foot of which he drew down a sum in excess of €45 million on the 17th July, 2008 which was used to purchase the shares. Certain repayments were made on behalf of defendant in the course of 2008 through the use of a power of attorney granted by him to the plaintiff. In its statement of claim, the plaintiff alleges that on the 31st January, 2016, the total outstanding on foot of the loan agreement was a sum in excess of €46 million and the defendant's liability on foot of the facility letter, being 25% of that sum, stands at slightly in excess of €11.5 million.
6. The plaintiff goes on to plead that a second facility letter was issued in October 2008 which was backdated to the 17th July, 2008 which provided that:

“Recourse to the borrower will be limited to 25% of the balance outstanding under the facility or the value of the shares at the expiry of the facility”.

7. The new repayment date stipulated in the second facility letter was the 30th September, 2009. The plaintiff pleads that the second facility letter was not supported by any valid consideration and is accordingly not binding on the plaintiff. The plaintiff also pleads that the second facility letter was not binding because it was never executed by the defendant and this was a condition precedent to it coming into effect. The defendant for his part pleads that the second facility is in fact binding and supersedes the first facility letter. He pleads that the effect of the clause above referred to is that his liability under the facility is confined to the lesser of 25% of the balance or the value of the shares at expiry of the facility. The defendant says that as the shares had a zero value on expiry, he has no liability.
8. This is the essence of the defendant's defence as pleaded. It is relevant to note that the defendant does not plead that the loan agreement is unenforceable by virtue of any alleged fraud or illegality or that it is void or voidable as a result of any alleged misrepresentations made by the plaintiff. Rather, the kernel of the defendant's defence is a reliance on the second facility letter and its terms as he contends they should be interpreted, contending for an alternative construction.
9. Although the defendant pleads that the scheme devised by the plaintiff for the purchase of its shares was unlawful and improper, no particulars of this are given either in the defence, in the reply to notice for particulars nor does it appear to be suggested that this gives rise to a defence to the plaintiff's claim. It would further appear that a third facility letter was issued by the plaintiff on the 5th January, 2009 but neither party places any reliance on this or suggests that it became effective.
10. The defendant has also brought a counterclaim. In essence, this pleads that the contract between the plaintiff and the defendant was subject to the terms of the Code of Conduct for the Investment Business Services of Credit Institutions. The defendant pleads that the terms of the Code of Conduct were implied terms of the agreement between the plaintiff and the defendant and further that the plaintiff owed the defendant a duty of care to act in accordance with the Code of Conduct. The defendant then goes on to set out a number of particulars of breaches of the Code of Conduct which are said to amount to negligence, breach of duty and breach of contract.
11. The defendant claims that as a result of these breaches, the plaintiff has suffered loss and damage in the amount of any successful claim by the plaintiff against him. He further pleads that he has suffered damage to his character and reputation. As well as including a claim for damages for breach of contract, negligence, breach of duty and breach of statutory duty in his prayer for relief, the defendant also includes a claim for damages for deceit although no particulars of this appear to be given either in the counterclaim itself or in subsequent replies to particulars.

12. It is important to point out that in his defence, the defendant pleads that the share purchase scheme was unlawful and improper, but does not suggest that anything flows from this which is relevant to the defence as I have already noted. Similarly, in the counterclaim, the defendant says that the motive for the transaction was dishonest and unlawful and the plaintiff falsely represented to the defendant that the transaction was suitable for him. These are said to be particulars of negligence, breach of duty and breach of contract. Fraud is not pleaded as a cause of action.
13. A request for voluntary discovery was made by the defendant's solicitors on the 8th March, 2018 seeking discovery of twelve categories of documents. This was responded to by the plaintiff's solicitors on the 5th July, 2018 refusing some of the categories but agreeing to others in modified form. The motion now before the court seeks ten categories of discovery. The first seven of these are in terms similar or identical to those sought by the letter for voluntary discovery but the last three differ somewhat from the remaining categories originally sought.
14. For ease of reference, I am attaching to this judgment a document prepared by the plaintiff which usefully sets out the different categories of discovery sought by the defendant with the plaintiff's response thereto.
15. It is for the party seeking discovery to establish that the documents sought are both relevant and necessary. As noted in the recent judgment of the Supreme Court delivered by Clarke C.J. in *Tobin v. The Minister for Defence* [2019] IESC 57, once a document has been established as being relevant, the default position is that it will be assumed to be necessary subject to a significant number of exceptions. Several recent judgments of the Superior Courts emphasise the necessity for the application of proportionality in the context of determining whether documents are necessary for disposing fairly of the cause or matter. Procedures including seeking admissions and delivery of interrogatories may be relevant to the question of proportionality. The court may be required to consider in this regard the burden of making discovery as against the likely benefit that may accrue to the party seeking it.
16. Relevance is the first criterion to be established as is clear from the provisions of O. 31 r. 12 (1). What may be ordered by the court is discovery of documents "relating to any matter in question" in the cause or matter. The matters in question are of course defined by the pleadings and it is to those that the court must look when deciding whether documents are relevant or not – see *BAM PPP PGGM Infrastructure Cooperative UA v. National Treasury Management Agency* [2015] IECA 246.
17. It is not sufficient that a matter is simply mentioned in pleadings entitle a party to discovery of documents that relate to that matter. It must be a matter "in question", in other words, a matter in respect of which there is a dispute, the resolution of which is necessary to determine the case. Accordingly, facts may be pleaded by one party which are either admitted or not disputed by the opposing party so that they are no longer in issue in the case. Discovery will not be ordered in respect of such an admitted or undisputed fact because that fact is not "in question". It is not necessary to resolve and

accordingly discovery can be neither relevant nor necessary to assist in the resolution of that fact.

18. Even where relevance is established, O. 31 r. 12 (3) provides that an order shall not be made if the court is of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs. It is in the context of disposing fairly of the matter that issues of proportionality arise.
19. Bearing these general considerations in mind, I turn now to the specific categories sought by reference to the lettering as it appears in the notice of motion and attachment to this judgment.
 - (a) The documents sought in this category relate to the selection of the plaintiff as a participant in the scheme to purchase shares. There is however no fact pleaded in either the defence or counterclaim that is disputed concerning the defendant's selection. It is common case that the defendant entered into the loan agreement with the plaintiff and purchased the shares. The defendant pleads that he has no liability to repay the loan because of the terms of the second facility letter. He pleads in his counterclaim that the plaintiff breached the Code of Conduct giving rise to a cross claim for damages. How, or in what circumstances the plaintiff was selected for participation in this venture, is not relevant therefore to any issue pleaded in either the defence or counterclaim. The defendant contends that discovery is necessary to enable him to prove the fraud of which he complains. He submits that the authorities on discovery in fraud cases make clear that discovery will not be refused on the grounds of failure to plead fraud with specificity where the fraud itself is the reason for the inability to do so. That is however, entirely distinguishable from the circumstances here where fraud is in fact neither the defence nor cause of action relied upon. Discovery of this category is therefore refused.
 - (b) This seeks documents concerning the agreement by the defendant to purchase the shares. However, as already explained, there is no dispute about the fact that the plaintiff agreed to purchase the shares and did in fact do so. There is accordingly no dispute of fact arising on the pleadings in this regard for which discovery is either relevant or necessary. I therefore refuse this category.
 - (c) This concerns documents relating to the facility letter of the 10th July, 2008. It seems to me that the offer of discovery set out at items 1 to 1.5 of the plaintiff's response more than adequately meets any entitlement the defendant may have to discovery of this category and moreover, the defendant has not explained why the discovery offered is not sufficient in the context of any pleaded issue in the case. Accordingly, I will direct discovery of this category limited to the documents already offered by the plaintiff.
 - (d) This repeats the same request, now in respect of the facility letter of the 17th July, 2008 and the same observations apply to this category.

- (e) The defendant has sought discovery of all documents relating to the facility letter of the 5th January, 2009 despite the fact that neither party places any reliance upon it. It is therefore somewhat difficult to see how it forms part of any issue arising in the case but notwithstanding that, the plaintiff has offered quite extensive discovery in this category and the defendant has not sought to explain why this is not adequate. Accordingly, I will direct discovery in the terms offered.
- (f) This essentially relates to any advice received by the plaintiff concerning the share purchase scheme. Here again, I am unable to identify any issue in the pleadings to which this category could be said to relate and I will accordingly refuse it.
- (g) This again relates to advice, this time concerning compliance with stock market rules, and the same comments apply as in the foregoing categories. I will accordingly refuse this category.
- (h) This category is agreed.
- (i) This category is also agreed.
- (j) The documents sought here relate to the sale of the shares in question which were sold pursuant to a power of attorney granted by the defendant. The plaintiff has offered this category as sought, subject to the inclusion of the underlined words "instructions given regarding". The defendant refuses to accept this limitation on the basis that he is entitled to discovery referable to the wider consideration given by the plaintiff to the disposal of the shares which the defendant's solicitor on affidavit says is part of the wrongful and fraudulent share purchase scheme. However, nothing is pleaded in that regard that is relevant to an issue in the case. What is pleaded is that the defendant asked for the shares to be sold at a particular point in time but the plaintiff refused. It seems to me therefore that the amended category as offered by the plaintiff is all that is either relevant or necessary to the pleaded case.

20. There will be an order accordingly, the final form of which I will discuss with counsel.