[2020] IEHC 200

THE HIGH COURT

Record Number: 2016/7316P

MURRAY J.
BETWEEN/

JOHN DALY

PLAINTIFF

- AND -

ARDSTONE CAPITAL LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Murray delivered on the 30th day of April 2020

Background:

1. The plaintiff is a former employee of the defendant. In these proceedings he claims that he is entitled to a 10% share of the defendant's profit in a commercial investment fund known as the Added Value Fund ('AVP'). The AVP was established by the defendant in December 2013. It involved seven large commercial properties in Dublin which were to be acquired, improved and sold on at a profit. The plaintiff says that the defendant would typically receive 20% of any profits of the AVP generated over a 10% internal rate of return threshold, the remaining 80% being returned to investors in the AVP. Both parties refer to the defendant's share of the AVP profits as '*the Promote'*.

2. The plaintiff commenced employment with the defendant in September 2013. He pleads that in the course of the interview process preceding his appointment he was offered a 5% entitlement to the Promote. He says that this was to be earned at the determination of the AVP, that in turn occurring upon disposal of its last asset.

3. It is the plaintiff's case that during and following a lunch meeting in July 2015 the defendant agreed to increase the share of the Promote to which the plaintiff was entitled, to 10%. On 8 July 2016 the plaintiff's employment was terminated. He says that this termination was unlawful. He claims that the termination was effected by means of a 'sham redundancy' and that this was done with a view to denying him his entitlement to his 10% share of the Promote. He seeks declaratory relief as to his ownership of the profit share, orders directing payment of that share, and damages for breach of contract, breach of duty, and misrepresentation.

4. The defendant denies that there was any agreement to grant the plaintiff the interest in the Promote claimed by him. It says that in September 2013 the plaintiff was offered a short-term role with the defendant, that the AVP did not exist at that time, and that no representations or assurances of any kind were made to him. It says that in July 2015 the plaintiff expressed his dissatisfaction with an increase in salary then offered to him and that he sought 10% of the Promote, not on the basis of any alleged prior representation but because he felt he deserved this. It claims that while an employee of the defendant the plaintiff unlawfully took information of and concerning the defendant's business. The defendant has counterclaimed for relief against the plaintiff arising from this allegation.

5. By Order of 15 March 2018 Stewart J. directed that the defendant make discovery. Some of the categories of documents to be so discovered had been agreed between the parties.

Stewart J. resolved a dispute between the parties as to the remaining categories. Her order refers, in general, to the agreed categories and then specifies what is to be discovered under four disputed categories. She required that the defendant make discovery of documents falling within those categories within eight weeks of the making of the order. An affidavit of discovery on behalf of the defendant was sworn on 27 July 2018 by Donal Mulcahy.

6. The plaintiff's solicitors issued their first correspondence complaining of inadequacies in the defendant's discovery on 18 January 2019. In the course of the ensuing exchanges between the solicitors for the respective parties, the defendant delivered two supplemental affidavits of discovery – on 27 February 2019 and 14 June 2019. The plaintiff contends that the defendant's discovery remains deficient and has brought this application seeking further and better discovery consequent upon that alleged default.

Relevant legal principles.

7. This application brings into focus a number of distinct issues that can present themselves where discovery has been made on foot of an agreement between the parties and/or a court order and the party in whose favour that discovery is made contends that there are other documents which they believe should be discovered. That issue can present itself because the party says that there are documents that fall within the categories that ought to have been discovered but were not, and it can arise where the party says that there are documents which are not within the agreed or directed categories but which they believe are relevant and which they say should now be discovered. Sometimes, either or both of these issues can present themselves where there is a dispute as to what the agreed or directed category actually means. While these issues frequently present themselves before the courts, in this case it seemed to me to be important to separate and define them. In so doing, I was greatly assisted by the helpful oral and written submissions of Ms. Clare Hogan (for the plaintiff) and Ms. Mary Paula Guinness (for the defendant). Following a consideration of the authorities referred to by them, the principles seem to me to be as follows.

8. First, further and better discovery will only be directed where it has been shown that there are documents which the party that has made discovery was required to discover but has not discovered and/or that the person making the affidavit of discovery has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong. *(Sterling Winthorp Group Limited v. Farben Fabriken Bayer AG* [1967] IR 97 at pp.100, 103 and 105). While the older cases described this inquiry by reference to whether the person making the affidavit of discovery has in his possession or power relevant documents, with the introduction in 1999 of discovery obligations defined by agreed or directed categories of document the appropriate question is addressed to whether it has been established that documents are or have been in the possession or power of the defendant which should have been, but were not, discovered in its original affidavit of discovery. This is how the test was expressed by Laffoy J. in *O'Leary v. Volkswagon Group Ireland Ltd*. [2015] IESC 35 at para. 56. That means establishing that the party alleged to be in default has, but has not

discovered, documents within the scope of the agreed or directed categories. Contrary to a suggestion made by the plaintiff in submissions in this application, it is not sufficient to show that the defendant has documents that are relevant to the issues in the proceedings and that he has not discovered them. Documents that are relevant but which fall outside the categories, fall to be addressed by reference to a different procedure, and different principles.

9. Second, an order of this kind will not be made when the application is based solely on an affidavit asserting that the other party has documents in his possession that ought to have been, but were not, disclosed in the first affidavit of discovery *(Sterling Winthorp Limited v. Farben Fabriken Bayer AG* at p. 100). It is a matter for the party seeking the order to establish that there has been a default so as to raise '*a reasonable suspicion that the party who had already made an affidavit had other documents relating to the matters in question in his possession' (Lyell v. Kennedy (No. 3)* (1884) 27 Ch.D. 1, 20). In this regard, it is clear that the Court in Sterling Winthorp was of the view that such a suspicion could be grounded upon the pleadings, the affidavit of discovery, the documents referred to in the affidavit of discovery or upon an admission of the party making discovery that he had other relevant documents (at p.100). However, I do not read the decision as suggesting that this is the only material to which the Court can have regard. In order to decide whether the person making the affidavit has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong, it may be necessary to have regard to other evidence. Explanations of the issues in the case, of the reasons specific documents have been excluded from the discovery and of the context in which documentation that is alleged to exist is said to have come into being may be taken into account provided those explanations are tendered by persons who are in a position to properly aver to them (see *Victoria Hall Management Limited and ors v. Cox and ors* [2019] IEHC 639 at paras. 97 and 99). In this regard hearsay evidence should not be admitted as of course but only where this is unavoidable for genuine and identified reasons of urgency, or difficulty in procuring direct evidence *(Joint Stock Company Togliattiazot v. Eurotoaz Limited* [2019] IEHC 342 at para. 16).

10. Third it is – obviously – neither within the capability nor function of a court when hearing an application for further and better discovery to resolve disputed issues of fact. This is important in the context of this application. In this case, whether some documents fall within certain categories depends upon disputed facts such as whether certain persons are employees similar in function to the plaintiff and whether certain contractors were undertaking work on the AVP at the time of the plaintiff's dismissal. Where in an application of this kind each party presents a different factual account of such matters, the Court must try to resolve the issues in such a way that the agreed or directed categories of discovery work.

11. At the same time, however, the court cannot decide that it will make its orders on the assumption that the version of fact averred to by one party is to be preferred to that of the other. In some cases, it may be possible to decide that where the evidence advanced

by one party in support of their version of events is properly admissible while that of the other is second hand, it will base its order on the version advanced by the party with proper evidence. In other situations it may be possible to decide that one party's account of the facts is so corroborated by independent documentary evidence while that of the other is bare assertion, that it will make an order on the basis of the facts alleged by the former. However, where the evidence in support of such a matter is equal and opposite, the court has to apply the onus of proof so as to determine that the party seeking the order for further and better discovery has failed to establish a default so as to justify such an order. It should be said that when categories of discovery are properly drawn, these disputes should not arise. A category should be framed so as to avoid disputed factual predicates, and the court should not on an application for further and better discovery have to confront these issues at all. Where categories are not so defined, the consequence is applications for further and better discovery which become swamped by evidence as to fact. That is in no-one's interests.

12. Fourth, the power of the court to direct further and better discovery was, until 2011, not provided for in the rules. The jurisdiction derived from the court's inherent power to ensure that its own orders were complied with. It follows from the nature and purpose of that jurisdiction that upon an application for further and better discovery, the court can stop short of directing further and better discovery per se and instead direct the swearing by the respondent of affidavits to address one or more of the specific concerns raised in the application with a view inter alia to ensuring that the party against whom such an order is made confirms that the process of making discovery has been correctly undertaken. This occurs frequently in practice. Recent examples include the decision of Barniville J. in *Victoria Hall Management Limited and ors v. Cox and ors* at para. 73 and of Quinn J. in *Kelland Homes Limited v. Ballytherm Limited and ors* [2019] IEHC 46 at para. 89.

13. Fifth, it is necessary to differentiate between an application for further and better discovery (to be resolved according to the principles I have outlined above) and application for *additional* discovery. An application for further and better discovery is addressed to the enforcement of categories of discovery which have been agreed or directed. An application for additional discovery outside those categories after they have been agreed or directed now falls to be determined in accordance with Order 31 Rule 12(11) RSC. That enables application to the court so as to vary the terms of a discovery order or agreement. It appears to me to necessarily follow from the inclusion of this power that it exhaustively defines the circumstances in which additional discovery can be directed after orders for discovery have been agreed or made in an action (see *Hireservices E and anor. v. An Post* [2020] IECA 120 at para.16).

14. Sixth, it follows that when a party in whose favour orders for discovery have been agreed or made apprehends that his or her opponent is possessed of documents that are relevant to the proceedings but have not been discovered, they must adopt one of two courses of action (although of course there is no reason in a case of doubt that these cannot be pursued in the alternative). If the party believes that their opponent is possessed of

documents that are within the directed or agreed categories of discovery, they can seek an order for further and better discovery pursuant to the court's jurisdiction to enforce the order originally made.

15. If the documents are not within those agreed or directed categories, they must proceed under Order 31 Rule 12(11). However, an application pursuant to latter provision will not be granted simply because the documents are relevant and necessary in the sense explained most recently in *Tobin v. Minister for Defence* [2019] IESC 57. The interests of all in the efficient disposition of proceedings requires that a party has one chance to seek discovery and having agreed to or obtained orders for discovery of particular categories of documents must have good reason for coming again. A discovery order (and an agreement as to discovery is treated as an order – Order 31 Rule 12(4)(2)) is an interlocutory order. An interlocutory order can generally only be reopened where there is a good reason for doing so such as a material change in circumstances (*Bank of Ireland v. Gormley* [2020] IECA 102 at para. 27). Bearing in mind that the purpose of an order for discovery is not merely the advancement and protection of the interests of the parties to an action, but that it also places on the court record for the benefit of the parties and the court a sworn statement itemising relevant documents (*Cleary and ors v. Sheehan* [2013] IEHC 456 at para. 26), the court retains the power to make such an additional order when it determines that an injustice would be done without such a direction (see *Victoria Hall Management Limited and ors v. Cox and ors* at para. 109; *Lagan Construction Group Holdings Ltd. v. Ben McArdle Ltd*. [2017] IEHC 427 at para. 25). However, all of this is the exception rather than the norm. The default position is that the discovery is as agreed or directed, and that some good reason must be given for revisiting that agreement or order (see *Hireservices E and anor. v. An Post* [2020] IECA 120 at para.19).

16. This leads to one final consideration relevant to the determination of this application. This relates to how the interpretation of agreed or directed categories of discovery should be approached. In this regard, it may be necessary to distinguish between categories that are agreed, and those ordered by the court following a contested hearing. As to the former, the starting point should be that the categories are interpreted in accordance with the rules generally applicable to written instruments, that is determining the meaning of the words used by the parties having regard to the relevant factual matrix, and seeking, having regard to those words and that matrix, an interpretation which avoids absurdity. In the context of categories of agreed discovery that factual matrix will include the issues in the proceedings, the reasons given for seeking discovery in the first place and the necessary assumption that the underlying purpose of the discovery category is to obtain disclosure of material that is relevant, as that term is generally understood in this context. The same principles of construction suggest that it may be significant in some cases that a category was drafted by one or other of the parties: any ambiguity should normally be construed as against the party who prepared it. At the same time, it must follow that obvious errors in the formulation of a category can, through construction, be corrected so as to give effect to the clear intention of the parties. As with the generally applicable rules of construction, that power should be resorted to only exceptionally and in particular where there is both a clear mistake and where it is clear what the correction

ought to be (see by way of analogy *Moorview Developments Limited v. First Active plc* [2010] IEHC 275 at para. 3.5).

17. These rules of construction combine to invest the court with ample jurisdiction to ensure that categories of discovery, where they prove ambiguous or give rise to contentious (and sometimes happens, semantic) disputes of construction, can be resolved by the Court in a way that sensibly implements the intention of the parties. I think that the decision of Cooke J. in *Cleary and ors v. Sheehan* [2013] IEHC 456 is properly viewed as an example of the application of this jurisdiction. There, faced with agreed categories which he felt were ambiguous (at para. 16) the court redefined the categories so as to avoid any further misunderstandings as to their proper scope when viewed in the light of the issues in the proceedings (at para. 28).

18. A court order following a contested hearing may present other issues. Exceptionally, where the discovery is directed by the court following a contested hearing, the party may be able to speak to the order of the court for the purposes of providing any clarification that the party considered might have been lacking in the range of discovery intended *(National Asset Loan Management Ltd. v. Kelleher* [2018] IECA 355 at para. 13). Where this is not possible, the order of the Court directing the making of discovery should be construed in its own terms. In *Victoria Hall Management Limited and ors v. Cox and ors*, one of the questions before Barniville J. related to the proper construction of an order for discovery made by McGovern J. Although deciding that on the facts of the case the issue was academic, Barniville J. observed that in principle, an order made by a court should not be construed by reference to a submission made by counsel (at para. 102). However, a court subsequently interpreting such an order is entitled to have regard to the fact that a specific category of documents was sought before the court and not directed. In *Victoria Hall* Barniville J. attached some significance to the fact that McGovern J. had not directed discovery of a specific category sought by the moving party. Barniville J. felt that this justified the conclusion that documents of the type thus sought were not intended to be captured by the order of the court (see para. 105). That being so, the appropriate response to the failure of the court to direct that category of documents was to appeal the decision of McGovern J., not to seek the same documents by way of an application for further and better discovery. Aspects of the decision of the High Court in *Victoria Hall* were appealed to the Court of Appeal, which refused to interfere with the decision of Barniville J. ([2020] IECA 79).

Category 1(i):

19. The first issue arises from category 1(i) as it appears in the Order of Stewart J. This requires the defendant to make discovery of:

> *'All documents relating to an entitlement to the Ardstone Promote as a term or condition of employment including but not limited to:*
>
> *(i) The promote promised to the Plaintiff prior to the commencement of his employment with the Defendant and throughout said employment*

(Emphasis Added.)

20. The background to the dispute around this category is as follows. The plaintiff, as well as instituting these proceedings relating to his asserted entitlement to a share of the 'Promote' also took proceedings against the defendant arising from the termination of his employment. Those proceedings were brought pursuant to the provisions of the Unfair Dismissals Act 1977 as amended and were heard by the Workplace Relations Commission ('WRC'). In a decision of 20 February 2019 the WRC determined that the plaintiff's dismissal was unfair.

21. In the course of the hearing of the matter before the WRC in May 2018, a spreadsheet was produced by the defendant. A copy of that spreadsheet was retained by the plaintiff. It refers to the plaintiff having, on one sheet, a 5% share and on another a 10% share, of the Promote, quantifying it as '*275,000'* and '*550,000'* respectively. It also refers to another person '*SC*' having a share in another fund, described as the '*ARP'*. The plaintiff says that this document is highly relevant to the proceedings, and within category 1(i). He says that he sent an e-mail to Mr. Donal O'Neill of the defendant after a meeting in a restaurant in August 2015 attaching this excel spreadsheet illustrating his Promote level as compared to that of another employee, SC. He says that both documents fall within this category and complains that neither have been discovered. His solicitor explains in the course of the affidavit grounding this application that on the date the plaintiff's employment was terminated, he was asked to leave the defendant's premises and has had no access since to his email account and files.

22. The defendant says that this document is outside this category. The defendant's position is that there was no '*entitlement'* to a Promote and that no Promote was ever '*promised'* and therefore – by definition - no documents exist within this category. Thus stated, the issue between the parties reduces itself not to whether particular documents do or do not exist – clearly the spreadsheet exists and it is not disputed that the e-mail is also in the possession of the defendant – but instead to the proper construction of the category.

23. Approaching in the light of my earlier comments category 1(i) (which was framed by the plaintiff, and appeared in his letter seeking voluntary discovery of 22 August 2017), it requires discovery of documents 'relating to an entitlement to the Ardstone Promote .. including … [t]he promote promised to the Plaintiff'. There are two possible interpretations of this phrase. The first – that following from the defendant's arguments - is that the plaintiff must establish as a proven fact that he enjoyed the '*entitlement'* he claims before he can get discovery of documentation that touches it, and that a Promote must have been actually promised to him. Thus, in their letter of 22 February 2018 the defendant's solicitors' reason for refusing to make discovery of this category of documents was that '*[t]here are no documents promising a promote to your client as no promote was promised'*.

24. The second – that following from the plaintiff's argument – is that the conjunction of the four words '*relating to an entitlement'* and the words '*the promote promised'* should be interpreted as referring to documents which relate to any entitlement or promise of the

kind alleged by the plaintiff, not as assuming that there was such an entitlement or promise in the first place. Documents relate to such an entitlement where they touch and concern it and may directly or indirectly enable the party requiring discovery to advance his own case or damage the case of his adversary in respect of it.

25. The first construction would require that the defendant admit the plaintiff's case in a disputed particular before making discovery of documents which advance a critical part of the case he makes. It would render discovery meaningless unless the defendant was admitting that there was such an entitlement. It would mean that the court could only conclusively resolve an issue around discovery (whether the defendant ought to have discovered a document in its possession) by resolving the underlying issue between the parties. It would make no sense for either party to have agreed to this, nor for the court to have directed it. Such a construction also ignores the fact that the category was sought *because* of the dispute as to this issue. The plaintiff's solicitor's letter of 22 August explained this category:

> *'The category of documents sought is therefore highly relevant to an issue in dispute; namely whether it was agreed between the parties that the Plaintiff would receive the Promote as a condition of his employment. The Plaintiff seeks reliefs securing his 10% of the Promote, and thus it is a central issue.'*

26. Thus, it seems to me to follow from the correct approach to the construction of the discovery categories as I have outlined it above, that the clause should be construed as the plaintiff contends. That construction involves approaching the language of the category sensibly and in accordance with its context. On this basis, the defendant is required to make discovery of documents relating to the entitlement alleged by the plaintiff, so that to come within the category documents must touch or concern the entitlement alleged by the plaintiff and, in particular, the allegation of such a promise (that is an entitlement to a fixed percentage of the Promote).

27. It follows that the pdf and e-mail, and any other documents related in this sense to the asserted entitlement of the plaintiff, are properly discoverable. This does not mean that the defendant in discovering the documentation is accepting that there is such an entitlement or that there was such a promise. It is merely acknowledging that the documents refer to the plaintiff obtaining 5% and 10% of the AVP, and that this is the entitlement he claims. While the defendant may wish to tender explanations at the trial as to the meaning or effect of this document, it clearly touches and concerns the plaintiff's claim that he has one.

28. While fully understanding and acknowledging the justification for the position adopted by the defendant in respect of these documents, both should now be discovered, as should any other documents touching and concerning the entitlement alleged in these proceedings in the sense in which I have explained this term.

Category 1(ii):

29. However, while a category that is ambiguous or which if interpreted in a particular way would produce an absurd result can be construed so as to avoid that consequence, a clause that admits of only one possible and reasonably plausible interpretation must be given effect to in its own terms. This is aptly demonstrated by the issue that has presented itself around Category 1(ii). This states as follows:

> *'All documents relating to an entitlement to the Ardstone Promote as a term or condition of employment including but not limited to:*
>
> *(ii) all documents within the Defendant's power, possession or procurement relevant to Promotes promised or paid by the Plaintiff to other employees of the same category or position as the employee during the period of his employment.'*

30. The category of discovery sought by the plaintiff under this heading referred to '*all other employees of the Defendant'*. Stewart J. limited this and did so in very clear terms restricting the category to employees '*of the same category or position'* (Emphasis Added.).

31. The defendant has made discovery of only one contract of employment within this category. The plaintiff contends that there are other employees who are '*of the same category or position*' as the plaintiff, and that the contracts of those persons – if relevant to Promotes promised or paid to those persons – should be discovered. The defendants say that the employees identified by the plaintiff are not in fact of the same category or position as the plaintiff.

32. In respect of this complaint, the plaintiff has failed to discharge the onus imposed upon him in seeking further and better discovery. The affidavit grounding the application does not aver any facts on the basis of which it can be concluded that there are other employees of the defendant '*of the same category or position'* as the plaintiff in respect of whose contracts discovery ought to have been, but was not, made. The correspondence exhibited in that affidavit identifies six other persons alleged to be employees of the defendant whom, it is said, *'are at a similar level or carried out similar work to our client within Ardstone'*. This is the first difficulty that arises from the plaintiff's approach to this issue. The category is addressed not to persons at a '*similar'* level or carrying out '*similar'* work but to persons of the '*same'* category or position. Having regard to the fact that the plaintiff originally sought documents of this kind in respect of *all* employees and given that Stewart J. declined to make an order of this breadth instead restricting it as she did, it seems to me to be inappropriate to do anything other than apply the order (which could have been but was not appealed) strictly. To that extent, this reflects the approach adopted in *Victoria Hall*. Absent an application for additional discovery or to refine or vary the category (and there is no such application before the Court), the court cannot expand the category in the manner suggested by this aspect of the plaintiff's application.

33. The second difficulty arises from the plaintiff's engagement with the response of the defendant's solicitors to this complaint in their letter of 22 February. They addressed each of the six persons named by the plaintiff. They said that one (NO) was not and never was employed by the defendant or any of its group companies, that three (CMcD, SC and JP) were managing directors and shareholders in subsidiary companies and did not operate at the same level as the plaintiff, and that no Promote was offered to two (NC and JC). The plaintiff's solicitors responded presenting their interpretation of the category that, in the absence of a contract of employment, the defendant was obliged to discover contracts of '*all employees of Ardstone who performed similar work to our client*'. As I have noted, that is *not* what the category provided. It is directed not to '*work*' but to '*category or position*' and the qualifying adjective is '*same*' not '*similar*'.

34. In that letter, the plaintiff's solicitors addressed each of the six employees identified in their first letter. They have not been in a position to discharge the onus imposed upon them in relation to any of these persons:

(i) As to NO, the plaintiff's solicitors record that NO was introduced to the plaintiff at a skiing trip to which Ardstone staff were invited, as a member of Ardstone. It is not stated by whom that introduction was made, and it is not possible to conclude that this establishes the incorrectness of what the defendant's solicitors have said.

(ii) In relation to CMcD the letter records that his role was '*on a par*' with the plaintiff's role. That does not necessarily render him in the same category or position. It is, in any event, merely asserted.

(iii) The explanation tendered in relation to SC, is that he initially reported to the plaintiff and Mr. O'Neill, it being accepted that he later '*came on board to run the residential fund*'. In itself, these claims establish nothing germane to the issue.

(iv) It is stated that JP looked after Ardstone operations in Spain in conjunction with Mr. O'Neill and that the plaintiff later looked after operations in Ireland in conjunction with Mr. O'Neill. Looking after operations on conjunction with the same person in different countries does not, of itself, render the persons' positions the same.

(v) Nothing is said of NC, whom the defendant's solicitors have stated did not participate in the Promote.

(vi) Nothing is said in response to the proposition that JC did not participate in the Promote (which would render her contract outside the category).

35. It follows that in respect of each of these persons (i) the starting proposition advanced by the plaintiff – that they did work that was similar – does not reflect the category, (ii) the initial evidence to support the proposition that their contracts fell within the category does not establish that fact, (iii) the response to the position explained by the defendants in their correspondence does not ground a reasonable suspicion that documents relating to

these persons were discoverable and not discovered. Thus, no basis is disclosed for seeking further and better discovery in respect of this category.

Category 3(i):

36. Under category 3(i) as directed, the defendants were required to make discovery of :

> *'All documents relating to the decision to dismiss the Plaintiff on 8th July 2016 including but not limited to:*
>
> *(i) All documents detailing the progress of the AVP and its remaining work at the time of the dismissal of the Plaintiff on 8th July 2016.'*

37. In their letter of 18 January the plaintiff's solicitors stated that they required under this heading a copy of the terms of reference between a firm called Bannon and the defendant in relation to the consulting arrangement entered into with respect to a property - the Crampton Buildings - following the dismissal of the plaintiff. They base this on the contention that Bannon were engaged at the time of dismissal of the plaintiff in relation to the completion of Crampton Buildings and for which they were paid Euro 20,000. The defendant responded in its solicitor's letter of 22 February stating that Bannons were retail experts hired in relation to preparing the property for sale and subsequently selling it, that appointment being made after 8 July 2016. Accordingly, they say, it falls outside the discovery order.

38. The plaintiff's solicitors responded in their letter of 30 April 2019 disputing this, and asserting that Bannon were appointed from the outset, their mandate being increased following the dismissal of the plaintiff. The matter has been left there. Neither party has tendered any sworn evidence on this issue, neither has corroborated their position by reference to any specific documentation and the Court is faced with claim and counter claim mediated not even through solicitors averring as to their instructions, but solicitors averring to correspondence written on instruction. This renders it impossible to determine the matter one way or the other. Having regard to what I have already outlined above regarding the onus of proof on the plaintiff in this application, this aspect of his complaint must be refused.

Category 3(ii):

39. Category 3(ii) is directed to:

> *'All documents relating to the decision to dismiss the Plaintiff on 8th July 2016 including but not limited to:*
>
> *(ii) documents detailing the amount of work carried out by the Plaintiff in the residential fund ("the ARP") limited to the period of the Plaintiff's employment.'*

40. This has been reduced to a request for two specific types of documents. The first are copies of all residential investment presentations issued that included the plaintiff's profile and the second, residential investor presentation slides, including drafts, sent by the

plaintiff, to Mr O'Neill of the defendant between June 2015 and April 2016 inclusive. No explanation was given in the letter from the plaintiff's solicitors of January 18 for their claim that these documents were in the possession of the defendant and had not been discovered. This was simply asserted.

41. In their letter of 22 February, the defendant's solicitors stated that the retail investment presentations did not show the work carried out by the plaintiff and were thus not discoverable. The plaintiff's solicitors responded stating in their letter dated 30 April that the plaintiff worked on ARP presentations from April 2015 to May 2016 where his profile was included and issued to various investors. They say that the plaintiff prepared a significant number of slides in these investor presentations, and that the presentations were used to attract investors to invest circa Euro 110 Million into a first round close by Q1 2016. They say that Donal O'Neill subsequently asked the plaintiff to work with him to update the investment power point slides to attract further investment as part of a second close after March 2016. The defendant's solicitors did not respond to this.

42. This aspect of the dispute between the parties thus reduces itself to whether the requirement to discover documents that '*detail'* work carried out by the plaintiff is in some sense limited to documents that themselves itemise that work, or whether it includes documents that evidence it. It does not appear to be disputed that the documents sought exist. Documents which demonstrate the work done by the plaintiff do, in my view, detail it. These documents should, accordingly, be discovered.

43. As to the residential investor profiles, the defendant's solicitors stated in their letter of 22 February that the defendants had no record of such slides being sent by the plaintiff during the period in question. The defendant's solicitors stated that they had found such e-mails, one from May 2015 and one from May 2016, and that they would discover these, as they subsequently did. This is responded to by the plaintiff's solicitors in their letter dated 30 April where there response is:

> *'We are advised that our client worked on numerous drafts and particular sections on economic overview, property market overview, investment process charts and deal pipeline summaries.'*

44. This is not sufficient to discharge the onus imposed on the plaintiff in seeking further and better discovery. The statement in the correspondence establishes that the plaintiff believes these documents must have existed. The defendants have said that they did not. There is nothing in the nature of evidence before the Court that would enable it to decide that the plaintiff's version of fact is correct to the standard I have identified earlier. This aspect of his application must accordingly fail.

Category 4:

45. Category 4 required discovery of :

> *'All documents demonstrating pursuit of other property acquisition and/or development and/or fund generation projects not inside the scope of the AVP or*

ARP by the Defendant's partners and/or employees during the period of employment of the Plaintiff.'

46. This category of documents arises not from the plaintiff's claim, but from the defendant's counterclaim. The plaintiff says that by showing that other members of staff engaged in what are described as '*ancillary projects*' his defence to the counterclaim will be advanced. Under this heading, the plaintiff seeks to obtain further and better discovery of four types of documents.

47. The first comprise all memos issued by the plaintiff on behalf of the defendant to Aidan Hume of Pont Mondial LLC and FL Partners regarding the potential acquisition of 100 Mount Street in May 2015. The defendant in its solicitor's letter of 22 February says that these documents could not fall within the category of discovery in question. They say that under the AVP prospectus the defendant was obliged to offer all potential investments that would meet the investment policy of the AVP fund to the defendant on behalf of the AVP fund on a right of first refusal basis. They say that this opportunity was presented to CBRE in March 2015 and declined as they did not wish to take on the risk of refurbishment of the building without a pre-let of at least part of it. Therefore, they say, it made sense for the defendant to see if it could procure another investor for the building. This, they said, was not in conflict with the AVP prospectus but fell within the normal scope of business of the company. Subsequently, they say, when an agreement for lease with a tenant was secured CBRE agreed to proceed with the acquisition.

48. The plaintiff's solicitors response refute the claim that memos issued by their client on behalf of DO'N to Pont Mondial LLC and FL Partners regarding the potential acquisition of 100 Mount Street fall within the normal scope of business of the defendant and thus outside this category of discovery. They say that the defendant submitted a bid letter to Lone Star for 100 Mount Street in March 2015 identifying the purchaser as Ardstone Value Partners Fund and confirming that funding would be provided from the AVP fund. They say that they are advised that at his time Mr. O'N asserted that AVP had no interest in that asset until a tenant was located during the summer of 2015, and that these actions were clearly outside the scope of AVP.

49. Second, the plaintiff seeks all correspondence between DM and RM with respect to the purchase of apartments at Robswall in Malahide and attempts to acquire residential units at Farmleigh in Castleknock. The defendant's response to this is that this correspondence relates to an actual transaction to acquire 27 apartments in Malahide and the potential acquisition of a similar number of units in Castleknock. They say that these matters fall within the normal business of the defendant for which the defendant earned fees. They say that as part of the acquisition of the 27 units Mr. M. acquired two units in the Malahide development, the acquisition of which was disclosed in the discovery made.

50. This is also disputed by the plaintiff. His solicitor's letter of 30 April records their denial of the assertion that Mr. M's acquisition of two units in Robswall fell within the normal business of the defendant. They say that the apartments in Malahide and a similar number of units in Castleknock were identified as part of a market trawl carried out by

the defendant for residential assets for the ARP. They say that Mr. M used this information to target those assets for himself personally and for a named private client of his. They say that the ARP prospectus clearly sets out that the investment advisor (the defendant) will not act as an advisor to another fund with the same investment strategy in Ireland until after the expiry of the commitment period and will offer all potential investments that would meet the investment policy of the fund on a right of first refusal basis. They say that the advisory board should be informed if a potential investment was subsequently acquired by another fund associated with the investment advisor. They say that these investments were not offered to the fund nor was the advisory board advised of the purchase by the investment advisor.

51. Third, the plaintiff seeks all documents relating to DM's attempts at acquiring a site in Kerry. The solicitors for the defendant say in their letter that Mr. M did not acquire a site in Kerry. The defendant, they say, acquired a site in Kerry in January 2016 and any documentation in respect of same falls outside of the scope of the discovery ordered. In their response the plaintiff's solicitors say that the category of documents relates to all documents demonstrating the pursuit of other property acquisition and/or development and/or find generation projects not inside the scope of the AVP or ARP by the defendant's partners. They say that whether these pursuits come to fruition is not relevant. They say that Mr. M did not present this to the ARP fund and accordingly acted outside the terms of the ARP prospectus.

52. Finally, the defendant seeks discovery of information relating to SC's work outside of Ardstone including work carried out with Cassidy Property Consultants during the period of the Plaintiff's employment. In relation to this heading, the defendant says that SC worked as a sole practitioner property consultant trading through his company. They say that SC joined as an employee, shareholder and managing director of Ardstone Homes Limited on 1 January 2017. They say that as part of the negotiation of his contract it was agreed that he could spend 15% of his time working on existing activities in Cassidy Property Consultants. They say that this is reflected in his contract of employment, the relevant extract of which will be discovered.

53. The plaintiff's solicitors say in their response that the plaintiff was reporting to SC prior to January 2016. They say that the fact that a contract was not signed until January 1 2016 is irrelevant. They say that while SC was working with Ardstone in establishing the ARP fund they are advised that he was spending significant time working on personal projects. They say that their client was informed during the time and it was confirmed during the Asadot meeting that SC was 'on board' and was receiving 25% of the fund.

54. Each of the claims and counterclaims advanced by the parties in respect of these four issues, have in common the following features. None of the issues in dispute depend on the scope of the discovery categories themselves. None of them depend on whether documents do or do not exist. Instead, the only issue as between the parties relates to a series of disputed issues of fact, some of which involve persons who are not party to the case at all. There is no averment on affidavit advanced by either party in support of their

respective positions. There is no affidavit from any of the persons directly concerned in any of the issues. No documentation of any kind is exhibited by either party in support of the position they adopt. In those circumstances, the disputes presented cannot be resolved one way or the other. As the party bearing the relevant burden, the consequence of that must fall on the plaintiff. Therefore, all relief under this heading must be refused.

The deleted e-mails:

55. The defendant's first substantive response to the plaintiff's correspondence complaining of alleged deficiencies in the defendant's discovery was in the defendant's solicitors' letter of 22 February 2018. They stated as follows:

> *'We have reviewed the issues which you raised and our client will make further discovery in relation to a number of documents. Our client will be putting this on affidavit, but in relation to some of the documents which our client will now discover and had not previously discovered, this was as a result of your client's e-mails being deleted when he ceased to be an employee of our client. Our client has since been able to recover a large portion of these mails and accordingly will now discover same. They are detailed below.'*

56. Before the WRC, it was the defendant's case that at the meeting on July 8 2016 at which his employment had been terminated, the plaintiff had said '*see you in court'* – although the plaintiff himself appears to have denied ever making this statement. What is clear is that the plaintiff's solicitors say in their letter dated 30 April 2018 that on 18 August 2016 they formally requested the defendant to retain all correspondence relating to their client's employment with the defendant. It follows that at the very latest upon receipt of the letter dated 18 August 2016 and (depending on the facts) potentially on July 8, the defendants knew that there was a prospect of litigation arising from their relationship with the plaintiff. Once they knew this, documents relevant to that dispute should not have been destroyed.

57. No reference of any kind was made to deleted e-mails in the affidavit of discovery delivered by the defendant on 27 July 2018. This was not an insignificant default. The e-mails that had been deleted were the plaintiff's e-mails. By definition they were likely to have comprised at least some discoverable documents. Yet, the second schedule to the affidavit of discovery – by reference to which the deponent of the affidavit of discovery is required to identify documentation which it once, but no longer, had within the scope of the documentation required to be discovered - simply stated '*No such documentation'*. This was wrong. Reference should have been made to the deleted e-mails, and an explanation tendered as to when they had been deleted and what attempts had been made to reconstitute them.

58. Thereafter, the defendant delivered a supplemental discovery sworn on 27 February 2019. This categorises the documents discovered by reference to five files, referenced in turn to categories 2, 3(ii) and 4 of the discovery ordered. The affidavit does not state when the e-mails were deleted, and it provides no detail of when or how they were

reconstituted or of the steps taken to ensure recovery of these documents. The supplemental affidavit of discovery most definitely does not - as the defendant's solicitors implied in their letter of 22 February 2019 it would – refer in any way to the deletion of e-mails. It just states:

> *'I have ascertained and established that there are further records/reports/correspondence which fall within the categories of documents ordered by the Court in the Order dated 25th May 2018.'*

59. That being so, the response to the inquiry by the plaintiff's solicitors in their letter dated April 30 as to when the e-mails were deleted was not informative. The defendant's solicitors replied:

> *'In relation to your requests for us to advise when emails were deleted, our response of the 22nd February 2019 is clear in that it occurred when your client left employment in July 2016.'*

60. This strongly implies – but does not actually state – that the emails were deleted on the date the plaintiff left employment with the defendant (July 8). It could mean that they were deleted on some other date in July after his departure. Or it could mean that they were deleted at some unspecified time after his departure, and not in July.

61. This is a matter on which the plaintiff is entitled to receive, and the defendant obliged to give, a complete and comprehensive response. It should not have been necessary for the plaintiff to seek this, as the matter should have been addressed in the first affidavit of discovery. Not having been addressed there, it should have been addressed in the second affidavit of discovery. The matter was not clarified either in the affidavit of the defendant's solicitor sworn in connection with this application on 29 October 2019. He simply says of the e-mails '*those emails had been deleted when the Plaintiff's employment with the Defendant ended'*.

62. In these circumstances, the plaintiff seeks an order requiring the defendant to swear an affidavit which addresses:

    (i) The exact date on which (a) the plaintiff's e-mail account was shut down and (b) the plaintiff's e-mails were deleted.

    (ii) The date on which the defendant began a retrieval process in relation to the emails.

    (iii) The identity of the person or persons engaged to retrieve those mails, and how that task was undertaken.

    (iv) How many emails were successfully retrieved and how many were not.

    (v) The nature of the emails which were not successfully retrieved including how they relate to the categories of discovery ordered by the Court on 25 May 2018.

63. The plaintiff is entitled to such an order on two distinct basis. Items (i), (iv) and (v) follow from the obligation to aver to, and the mandatory contents of, the second schedule to an Affidavit of Discovery. These arise from the terms of the *Affidavit as to Documents* set out at Appendix C to the Rules of the Superior Courts. In it, the deponent must identify the documents which *'they have had, but have not now, in [their] possession or power'.* The nature and extent of the obligation arising from this requirement is explained by Abrahamson et al "*Discovery and Disclosure*" 3rd Ed. (Dublin, 2019) at para. 7-85, as follows:

> *'The deponent is required to include in the second schedule to his or her affidavit all documents in the specified categories relevant to the matters in question in the proceedings which were at one time but are no longer in his or her possession, power or procurement. Importantly, the deponent must explain what has become of the documents and, where possible, in whose possession they are at the time of swearing the affidavit. The form appended to the RSC suggests that this information might be contained in the body of the affidavit. However, it is acceptable to include this detail in the second schedule where there is a large number of documents necessitating a variety of explanations. The body of the affidavit, which contains the sworn evidence, should verify any such information set out in the schedule.'*

64. The obligation thus imposed requires that where a deponent knows that a body of documentation has been destroyed which is likely to have included discoverable material, he must aver to the best of his ability to that fact, to what classes of documents insofar as captured by the agreed or directed categories are likely to have been so destroyed and to when that destruction occurred. The latter, in particular, follows from paragraphs 5 and 6 of Appendix C; paragraph 5 requires that the deponent state when those documents were last in his possession or power with paragraph 6 requiring that the deponent state what has become of these documents.

65. Items (ii), and (iii) as sought by the plaintiff comprise information which the Court, in the exercise of the power to which I have earlier referred in an application of this kind to require explanations of the discovery process itself, is entitled to, and should direct. As Quinn J. explained in *Kelland Homes Limited v. Ballytherm Limited* (at para. 87) the retention of documents forms part of the discovery obligations of a party, at least from a time at which litigation is in contemplation. Not having done so to date, the defendant must – in discharge of those obligations – provide a full explanation of each of these matters. In particular, it seems to me that the plaintiff is entitled to have fully explained the precise steps taken to reconstitute the e-mails. If, as a consequence of that exercise, it becomes apparent that there are other emails that ought to have been discovered this should be regularised.

Conclusion:

66. I will make the following orders:

(i) An order that the defendant make further and better discovery of the spreadsheet appearing as exhibit CQ 3 to the affidavit of Connor Quigley sworn on the 4 July 2019, together with the e-mail with which that spreadsheet was sent to the defendant;

(ii) An order that the defendant make further and better discovery of any documents in addition to that specified at (i) relating to any entitlement or promise of the kind alleged by the plaintiff.

(iii) An order that the defendant make further and better discovery of all residential investment presentations issued that included the plaintiff's profile.

(iv) An order requiring the defendant to swear an affidavit which addresses:

(a) The exact date on which (a) the plaintiff's e-mail account was shut down and (b) the plaintiff's e-mails were deleted.
(b) The date on which the defendant began a retrieval process in relation to the emails.
(c) The identity of the person or persons engaged to retrieve those mails, and how that task was undertaken.
(d) How many emails were successfully retrieved and how many were not.
(e) The nature of the emails which were not successfully retrieved including how they relate to the categories of discovery ordered by the Court on 25 May 2018.

67. I will direct that the affidavit identified above be sworn within eight weeks of the date of this judgment, subject to the defendant having liberty to apply in respect of that time period.

68. All other aspects of the plaintiff's application for further and better discovery are refused.

69. As this judgment is being delivered electronically, it will be necessary for the parties (in the event that they cannot agree as to the appropriate costs order to be made), should deliver to the Central Office a letter outlining their position on costs, and (briefly) advancing any arguments they wish to make in this regard. These letters should be delivered within fourteen days of the date of this judgment.