[2020] IEHC 455

THE HIGH COURT

[2016 No. 7489 P]

BETWEEN

DEERFIELD COMMERCIAL SERVICES

PLAINTIFF

AND

RONAN MCNAMEE AND JACKIE MCNAMEE

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on Thursday the 24th day of September, 2020

1. The plaintiff claims to have had a contract with the defendants as a financial adviser and to be entitled to over €2 million on foot of that agreement as a percentage of a financial haircut given to the defendants by lending institutions. However, the statement of claim doesn't specify what work was done. It doesn't specify when this alleged work was done. It is also extremely vague as to the contract. It alleges that the terms were express terms or alternatively implied terms, or alternatively alleges representations made by the first-named defendant (at para. 5). Nothing specific is referred to in terms of documents, dates, actions – simply nothing.

2. The statement of claim and invoices raised don't specify when the alleged haircut was given. The invoices raised were raised years after the alleged work and years after the alleged haircut. The plaintiff doesn't seem to have very much knowledge of the alleged haircut. Given that the monies were payable only if the haircut was as a result of its services, the whole claim seems somewhat tenuous from the outset. It also has an opportunistic flavour in that the plaintiff found out after the event that the defendants got a haircut following further work done by other people. Counsel for the plaintiff majored on the plaintiff having come up with a "*plan*", and to be entitled to a couple of million for doing so even if it didn't bring anything across the line. It seems at first sight questionable whether the defendants intended to enter into such an improvident contract. Having on its own case already pocketed the retainer under the alleged agreement in full, the plaintiff now reappears years later and tried to claim credit for the final result. Maybe it's entitled to do that, but then again maybe not. We will have to await the trial.

Facts

3. Turning to the facts in more detail, the first-named defendant says that in 1997 he sold his substantial shareholding in Cuisine de France and used the proceeds to invest in commercial property. That property encountered a loss of value in the global financial crisis of 2008 onwards. However, as a result of a conservative investment strategy he said he was able to service the loans, but had concerns about possible issues from the banks about loan/asset ratios. He got involved with a Mr. Dan O'Connor, former CEO of General Electric and Director and Executive Chairman of AIB up to 2010, whose company, Deerfield Commercial Services, is the plaintiff in this action.

4. The plaintiff claims that a contract was entered into in November 2010 providing for advice from the plaintiff for a monthly retainer fee and a percentage fee of any haircut given to the defendants in the event that there was a liquidity event. It is also alleged

that there was to be a fee of €120,000 if the plaintiff made a significant and tangible contribution to the restructuring.

5. The plaintiff's claim is that the defendants got a haircut of €47 million and that it is entitled to a percentage fee accordingly. The defendants on the other hand, say that their agreement was with Mr. O'Connor rather than his company and that in July 2011, Mr. O'Connor's role was reduced and other advisers were brought in. Payments were made not by the defendants, but by their companies, and on advice were made not to Mr. O'Connor but to the plaintiff company in December 2011. Insofar as the plaintiff relies on this as proof that the contract was with the plaintiff, that doesn't follow. Mr. O'Connor may have supported the idea that the payments be made to the company. The plaintiff's interpretation of the payments is somewhat one-sided because it takes comfort from having received the money, but ignores the fact that it received that money from the defendants' companies rather than the defendants personally. Again, one will have to wait until the trial for any final resolution of that.

6. In July 2013 a further payment was made to the plaintiff by one of the defendants' companies. Some years after that event, on 27th April, 2016, the plaintiff issued two invoices seeking a sum of over €2 million. The invoices claim that a haircut was given by Bank of Ireland, Ulster Bank and Anglo Irish Bank, but didn't say when or how. They also included a VAT rate of 21%; but the VAT rate had increased to 23% on 1st January, 2012, over 4 years beforehand. When this point arose at the hearing there was no particular explanation offered and instructions were sought from Mr. O'Connor, who replied that he simply didn't know the position. Not knowing the VAT rate for its own services four years after that rate was changed, or apparently even since then, doesn't necessarily bode well for a claim for €2 million premised on the plaintiff's financial genius.

7. There may also be a public policy issue as to whether a plaintiff should be entitled to sue on foot of an invoice with an undervalue of VAT. That perhaps can also be left to the trial. Reflecting on the matter since the hearing, it is perhaps strange that the issue did not come to light when the plaintiff made its VAT return shortly thereafter for March/April 2016 on an invoice basis, as it presumably did, seeing as, on the face of things, it might not have been entitled to proceed on a moneys received basis. That is of course just a question, not a finding.

8. On 30th June, 2016, the defendants made an open offer to settle the matter. Such an offer can in no way be construed as an admission of liability and if anything, speaks to the extent to which the defendants felt extorted in the situation. That offer was refused and so (leaving aside its hypothetical relevance to costs) it is just water under the bridge at this stage. As the plaintiff in *The Merchant of Venice* learned to his discomfiture, refusing an offer doesn't guarantee that you will win your case, and nor can such refusal be revisited merely because things don't turn out as planned. Of course again we will need to await the trial.

9. On 17th August, 2016, proceedings were issued, the primary relief being damages of €2,014,650. A defence was delivered on 13th January, 2017 which essentially contended

that there was no contract with the plaintiff and no contract as alleged. The work alleged was also denied. The defendants' position was that they had an agreement with Mr. Dan O'Connor to act as their principal adviser up to May 2011. He agreed that the fees already paid to him covered work up to July 2011 when his role was reduced to a part-time adviser to the defendants' team. By the time the haircut arose, the defendants had multiple other advisers. The quantum of the haircut was also denied.

10. On 5th May, 2017 the plaintiff sought voluntary discovery. The defendants sought voluntary discovery on 15th May, 2017. A motion for discovery was filed by the defendants on 13th July, 2017 although the motion itself was undated. It was made returnable for 9th October, 2017. The plaintiff issued a motion for discovery on 17th July, 2017.

11. The defendants brought a motion seeking to have the proceedings struck out on a number of grounds; and in *Deerfield Commercial Services v. Ronan McNamee and Jackie McNamee (Ex tempore*, Not circulated, High Court, 7th December, 2017), O'Regan J. struck out the proceedings as bound to fail on the grounds that the contract was with Mr. Dan O'Connor rather than the plaintiff.

12. The plaintiff then appealed to the Court of Appeal [Record No. 2017/572]. The appeal against the strike-out order was heard in October 2019 and the Court of Appeal delivered a reserved *ex tempore* judgment, *Deerfield Commercial Services v. McNamee* [2019] IECA 271 (*Ex tempore*, Not circulated, Court of Appeal, McGovern J. (Whelan and Baker JJ. concurring), 17th October, 2019), allowing the appeal. All that decided was that the proceedings were not *bound* to fail as matters then stood, but of course the question of the identity of the parties to any agreement is still very much in play for the trial.

13. The plaintiff says it sought to re-enter the motions the following day, on 18th October, 2019 but they weren't listed until May 2020, and then they were adjourned again due to the COVID-19 emergency. I am now dealing with the two discovery motions, and in that regard, I have heard helpful submissions from Mr. Pearse Sreenan S.C. (with Mr. Eoin Sreenan B.L.) for the plaintiff and from Mr. Gavin Mooney S.C. for the defendants. On 8th September, 2020 having heard the parties I announced the order and indicated that reasons would be provided later, which I now do.

Legal principles

14. The law in relation to discovery is helpfully summarised in Hilary Delany, Declan McGrath & Emily Egan McGrath, *Delany and McGrath on Civil Procedure*, 4th ed. (Dublin, Round Hall, 2018), and has been reviewed recently by the Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57 (Unreported, Supreme Court, Clarke C.J. (McKechnie, Dunne, Charleton and O'Malley JJ. concurring), 15th July, 2019). The essential tests are relevance, necessity and proportionality. However, there are a number of specific issues relevant to the present case.

Discovery is not a mechanism to enable the plaintiff to make a case that it cannot prove otherwise

15. Under the heading of relevance, a party cannot include bare assertions or speculative pleas in their pleadings and then use discovery to obtain the evidence for them. This principle is well discussed in *Delaney & McGrath on Civil Procedure*, at paras. 10-31 and 10-32, referring to *R. v. Secretary of State for Health, ex parte Hackney London Borough Council* (Unreported, Court of Appeal (E&W), 24th July, 1994) at p. 82 *per* Bingham J., as he then was; *Shortt v. Dublin City Council* [2003] 2 I.R. 69 at 82; *Framus Ltd. v. CRH P.L.C.* [2004] IESC 25, [2004] 2 I.R. 20 *per* Murray J., as he then was, at 34-35; *Carlow Kilkenny Radio Ltd. v. Broadcasting Commission* [2003] IESC 200, [2003] 3 I.R. 528 at 534, *per* Geoghegan J.; and *Keating v. Radio Teilifís Éireann* [2013] IESC 22, [2013] 2 I.L.R.M. 145, *per* McKechnie J.; see also *Galvin v. Graham-Twomey* [1994] 2 I.L.R.M. 315.

Discovery is not appropriate where the defendant otherwise has access to the documents

16. Under the heading of necessity, discovery may be refused if the party can get the documents somewhere else, or already has access to them: see *Delaney & McGrath on Civil Procedure* at paras. 10-42 to 10-45, citing *Cooper-Flynn v. Radio Teilifís Éireann* [2000] 3 I.R. 344, *per* Kelly J., as he then was, and *Ryanair P.L.C. v. Aer Rianta C.P.T.* [2003] IESC 62, [2003] 4 I.R. 264.

No automatic reciprocity as between parties

17. Mr. Sreenan argues that if the plaintiff is refused discovery then the defendants aren't entitled to discovery either and similarly if he is granted discovery, then the defendants would probably be entitled to some discovery. But that doesn't follow. There is a significant difference in principle between a party seeking to make a case and a party being required to meet a case. A party trying to make a case is not entitled to discovery in order to make a case that it can't make otherwise, whereas the party seeking to meet a case is entitled to reasonable discovery of material relevant to contested issues in the context of allegations against it. So it doesn't in any way follow that if the plaintiff is refused discovery, the defendants should not get discovery themselves.

Plaintiff's motion for discovery

18. Category A seeks documents relevant to the agreement with the plaintiff, but proving an agreement is core to the plaintiff's case, and as noted above, nothing specific has been put forward in the statement of claim as to how that agreement was constituted, in writing or otherwise. The plaintiff can't seek discovery in order to make the case of there being a documentary agreement out of nothing.

19. Category B comprises documents relating to an agreement with Mr. O'Connor. That has already been agreed.

20. Category C relates to full disclosure of the indebtedness of the defendants between 1st January, 2010 and 31st December, 2016. That is far too wide and scattergun, but in any event lacks an adequate foundation in the pleadings. Those dates are not properly anchored in anything alleged in the pleadings that would make discovery of the type sought relevant, still less necessary.

21. Category D is documents relating to advice and assistance provided by the plaintiff itself to the defendants between 1st October, 2010 and 27th April, 2016. The plaintiff as the person providing this assistance already must have any relevant documents and so the claim does not appear to be necessary, but even if it was necessary, there is no basis for this category of discovery in the pleadings. It is not alleged in the statement of claim that the services were provided between 1st October, 2010 and 27th April, 2016 or during any particular dates at all. This is a classic instance of fishing and of unnecessary discovery. The plaintiff is seeking discovery from the defendants in order to make a case and in any event is in a position itself to give evidence as to what assistance, if any, was provided.

22. Categories E, F and G relate to all documents regarding renegotiation of debts with the Bank of Ireland, Anglo Irish Bank and Ulster Bank. In relation to this, the defendants made an offer to give contractual documents regarding the financial haircut involved if the plaintiff agreed to voluntary discovery. While the plaintiff did not so agree and strictly speaking the offer has lapsed, Mr. Mooney says he is still willing to provide this, so I will make an order in terms of the defendants' offer which is set out at pp. 3-4 of the letter of 28th August, 2020.

23. Insofar as categories E to G go beyond that, they are a classic example again of seeking discovery to make the plaintiff's case. Core to the plaintiff's case is a claim that a haircut was provided as a result of the plaintiff's efforts, but the plaintiff doesn't seem to know much about those efforts or the haircut or be in a position to prove that there was a haircut as a result of those efforts independently of discovery. There is a definite analogy here with *Galvin v. Graham-Twomey* referred to above. The plaintiff's application under this and other headings is a genuine instance of that much abused term in the discovery lexicon, the fishing expedition.

24. Category H relates to documentation regarding crystallisation of a liquidity event. However, that doesn't seem to be a major issue because the defendants are not denying that they achieved some liquidity.

Defendants' motion

25. Category A relates to documents evidencing the agreement claimed by the plaintiff. That is clearly relevant and necessary. The agreement is denied in the defence.

26. Category B relates to documents evidencing the advice and assistance allegedly provided by the plaintiff. Again, the alleged work is denied in the defence and it is a central basis of the claim, the defendants are clearly entitled to this as relevant and necessary.

27. Category C relates to statements of affairs and other financial documents relevant to the defendants. That seems to be relevant and necessary, with the rider that the material should be provided insofar as the material is relevant to the work allegedly done by the plaintiff for the defendants.

28. Category D relates to documents evidencing the plaintiff's quantification of the haircut. That again was the core basis of the invoices and is utterly central to the plaintiff's claim. That is clearly necessary and relevant discovery from the defendants' point of view.

Order

29. Accordingly, the order I made on 8th September, 2020 was as follows:

(i) the plaintiff's motion was dismissed save as to category B which was agreed, and to the offer at pp. 3-4 of the defendants' letter of 28th August, 2020;

(ii) I granted the defendants' motion with the qualification that para. C would only apply insofar as the material was relevant to the work allegedly done by the plaintiff for the defendants;

(iii) having heard the parties on consequential matters, I allowed twelve weeks for discovery, the deponents to be Mr. O'Connor and Mr. McNamee;

(iv) I ordered that the costs follow the event in favour of the defendants on both motions;

(v) at the plaintiff's request, I stayed the order for costs until the conclusion of the trial; and

(vi) I granted the usual stay on the discovery order (28 days or until determination of any appeal lodged within that period).