

Neutral Citation No. [2013] NIQB 51

Please also see [2013] NIQB 26 (Discovery No. 1)

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Ref: **WEA8783**

Delivered: **28/02/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

DAVID CHRISTOPHER WALSH and Others

Plaintiffs

-v-

BANK OF SCOTLAND plc

Defendant

(Discovery No 2)

WEATHERUP]

[1] I delivered a judgment in relation to discovery by the defendant on 28 January 2013 - Neutral Citation [2013] NIQB 26. There remains a dispute about discovery in categories 1, 3, 4 and 8 of the documents. After the judgment the defendant produced documents in pursuance of the Order made on foot of the judgment. Some documents were redacted on the basis of commercial confidence. The plaintiffs objected to some of the redactions. The issues were set out in correspondence between the parties. Unredacted copies were produced to the Court to determine whether any of the contested redactions should be removed. Mr Hanna QC and Mr Shields appeared for the plaintiffs and Mr Shaw QC and Mr Colmer for the defendant. Mr Higgins appeared for a notice party, Certus Limited.

[2] Category 1 concerns documents relating to the issue of incentivisation of staff to put profits before risk, as was stated to have been the position in the corporate division of the defendant in an FSA report. I made an Order for the disclosure of such documents to the extent that they related to a Mr McDonald a former employee

of the defendant and now a witness for the plaintiff who supports the case of the plaintiff that the defendant provided incentivisation to staff to put profit before risk in dealings with the plaintiffs.

[3] Differences emerged between the parties as to the nature of the documents that were sought to be disclosed by the defendant. Mr Hanna for the plaintiff sought to define the category as documents from the corporate division of the defendant that were the subject of the FSA inquiry that showed the culture of incentivisation of staff to put profit before risk that was said to pervade the defendant. The actions concerning the plaintiff occurred in the international division of which Mr McDonald had been a part. The incentives in relation to the international division have been produced in the form of an 'Xtra scheme' and therefore the defendant contends that the documents now sought in relation to the corporate division are not relevant.

[4] I conclude that the plaintiffs request is wider than is necessary for the purposes of the action. The judgment on the documents specified that the documents were to be those that had a bearing on Mr McDonald. That was directing the disclosure of those documents that might be said to have borne on Mr McDonald's incentivisation to take a certain course in relation to his dealings with the plaintiffs. The present request is related to the culture in another division of the defendant. It is the culture affecting Mr McDonald's division that is the issue. There may of course be an overarching culture that applied to the corporate division and to the international division and to Mr McDonald and that is something captured by the initial Order. Any such overarching documents should have been disclosed already. However what is now being sought is wider than is necessary for the purposes of the action. I make no further Order for disclosure of documents under category 1.

[5] Categories 3 and 4 are dealt with together. Category 3 seeks documents on the incentive scheme for Certus Limited employees, servants and agents to achieve the wind down of the loan book with particular reference to time of payment. Category 4 concerns the instructions to Certus at senior management level from Lloyds Bank or Bank of Scotland as to the strategy in dealing with the loan book, in particular the timetable for exiting the loan book. Certus is the company engaged by the defendant to administer the wind up of the defendant's business within Ireland. A Service Agreement entered into between the defendant and Certus has been disclosed in redacted form.

[6] Certus was put on notice of the application for disclosure of unredacted copies of documents. Mr Higgins appeared at the hearing to represent Certus. An affidavit was filed on behalf of Certus by Brian McKenzie, a senior solicitor in the Legal Department of Certus described as the service provider to the defendant. Mr Hanna for the plaintiff objected to representation on behalf of Certus as a non-party to the proceedings. In the event Mr Shaw on behalf of the defendant adopted the

affidavit of Mr McKenzie and raised the objections concerning the Certus documents.

[7] I have on other occasions, when faced with disputes about the disclosure of documents where there are confidentiality issues affecting a non-party, directed notice to the non-party and heard representations on behalf of the non-party before deciding on the disclosure issue between the parties. While confidentiality is not in itself a ground for refusing disclosure of relevant documents, commercial confidentiality should be respected and accommodated in a manner consistent with the entitlement of the parties to disclosure of relevant non-privileged documents, where necessary.

[8] Mr McKenzie states that the Service Agreement is a highly commercially sensitive document and that key provisions relating to the service provision which appear in particular in schedules 4 and 5 of the Service Agreement would be of considerable interest to commercial rivals. The schedules deal with cost structures and performance bonuses and incentives. However, the affidavit asserts that none of this bears on the defendant's staff but is limited to the Certus employees. Further the affidavit addresses a concern of the plaintiff that there are common personnel on the staff of Certus and of the defendant or corporate connections between Certus and the defendant. Mr McKenzie avers that there are no such connections.

[9] The Service Agreement at schedules 4 and 5 provides the incentivisation scheme for Certus and the particulars have been redacted. Taking into account the contents of Mr McKenzie's affidavit and on viewing the document in unredacted form I am satisfied that the contents deal with Certus staff and do not bear on the defendant's employees or on Mr McDonald. Accordingly I am satisfied that the disclosure of the redacted parts of the Service Agreement is not relevant to the issues in the proceedings and disclosure of those parts is not necessary for the purposes of the proceedings.

[10] However this leaves open, as emerged in the exchanges between Counsel, the incentives offered to the defendant's staff as opposed to the incentives to Certus staff. Incentives offered by the defendant to the defendant's staff in the international division are relevant to the issues in the action, in the first place for the expansion of the defendant's business and secondly for the winding up of that business in Ireland. I am not aware of any such documents in the redacted material.

[11] Category 8 relates to the disposal plan of the defendant, of Certus and of Lloyds Bank for the properties in the Irish loan book. I ordered disclosure of these documents. The defendant has made disclosure of the category 8 documents. The documents are largely redacted. I have examined the unredacted documents. The contents deal with this issue of the circumstances of the wind up of business in Ireland and should be disclosed. There will be an Order for disclosure of unredacted copies.

[12] However I am unable to digest the significance of every entry in the tables and contents in the documents falling under category 8. It may be that within the text there are particular matters of commercial sensitivity that are not relevant to the issue of incentivising the wind up and where it is not necessary that they be disclosed. While the Order requires disclosure of unredacted copies of the category 8 documents this matter may have to be revisited.

[13] Finally there is a letter of 23 November 2003 which has been the subject of debate between the parties. In correspondence the defendant made a proposal on 22 February 2013 to deal with that matter. I did not hear any submissions from the plaintiffs in relation to the issue. I assume that the plaintiffs are proceeding along the lines of the defendant's proposal. Should that matter remain unresolved the parties may return to Court.