

THE HIGH COURT
COMMERCIAL

[2011/4336P.]

BETWEEN

CIARA QUINN, COLETTE QUINN, BRENDA QUINN, AOIFE QUINN, SEAN QUINN JNR AND PATRICIA QUINN

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND KIERAN WALLIS

DEFENDANTS

AND

SEAN QUINN, DARA O'REILLY AND LIAM MCCAFFREY

THIRD PARTIES

JUDGMENT of Ms. Justice Costello delivered the 27th day of November 2014

1. By notice of motion dated 22nd July, 2014, the plaintiffs sought an order striking out the defence of the first named defendant by reason of the alleged failure of the first named defendant to comply with an order for discovery made on 26th July, 2012. In the alternative, an order directing further and better discovery is sought. The plaintiffs issued the proceedings on 16th May, 2011, seeking declarations that share pledges granted by them and guarantees and indemnities provided by them to IBRC are invalid and unenforceable and that the appointment of the second named defendant as receiver over those shares is likewise invalid. The plaintiffs allege that the instruments of secure lending provided by IBRC to Quinn Companies which they say was used to meet margin calls on contracts for difference (CDF) which they say breached s. 60 of the Companies Act 1963 and the Market Abuse Directive.

2. These proceedings are exceptional in relation to their complexity, the range of issues, both factual and legal, to be determined, the value of the claims and the expected duration of the trial. Moriarty J. made an order on 26th July, 2012, ordering the first named defendant to make discovery. This was in addition to the very considerable discovery which the first named defendant had agreed to make on a voluntary basis. The terms of the order of the 26th July, 2012, were:-

"(i)(a) Lending files in respect of loan facilities made by the First Defendant to the Plaintiffs from 1 January 2003 to 31 August 2007;

(b) Document referring to, relating to or evidencing any loans/advances (or motivations for same) made by the First Defendants to the Plaintiffs (including but not limited to the making of the loans referred to at paragraph 72 of the Statement of Claim) from 1 September 2007 to 31 March 2009.

(ii) Documents generated between 1 January 2007 and 31 March 2009 evidencing the First Defendant's knowledge of the Quinn stake holding/CFD positions in its shares, and/or relating to the potential effect of the disposal of the stake holding/CFD positions on the First Defendant's share price.

(iii)(a) Documents generated between 1 July 2008 and 31 December 2008 referring to or evidencing the procurement by Anglo and the execution by the Plaintiffs of the personal Guarantees (including the original executed versions of these Guarantees) referred to at paragraph 76 of the Statement of Claim.

(b) Documents relating to actions on the part of the First Defendant to seek that the Plaintiffs will be provided with a retrospective advice on those personal Guarantees.

(iv) Documents generated from 1 January 2003 to 31 March 2009 referring to or evidencing the procurement by the First Defendant and the execution by the Plaintiffs of the share pledges referred to at paragraphs 65 and 66 of the Statement of Claim, including the original executed versions of the share pledges.

(v) All Board minutes, Board packs and relevant documents circulated to Board Members relating to or evidencing the awareness of the Board of Directors of the financial difficulties facing the First Defendant from 1 September 2007 to 31 December 2008."

3. The solicitor acting for the first named defendant, Ms. Karyn Harty, has averred that the discovery made by the first named defendant in these proceedings has been extensive and extremely thorough. In two affidavits she sets out in detail the steps taken by the first named defendant to comply with the order for discovery. At para. 12 of her affidavit of 8th September, 2014, she stated:-

"In total the first Defendant conducted a trawl of approximately 10,034,000 electronic documents, 80 hard copy files and 5,236 audio recordings. 178,000 electronic documents were found to be responsive to the key word searches and they, along with the hard copy files and audio files, were reviewed for relevance by a team of 10 reviewers supervised by solicitors from my team, and ultimately by me personally over a period of 5 months."

She said that the total costs of the first named defendant of making discovery up to and including the drafting of the affidavit and the delivery of the discovery in November, 2012, including expert technical support was approximately €1.55 million. Since making discovery in November, 2012 it was necessary to swear three supplemental affidavits of discovery, one on 1st July, 2013, and one

29th May, 2014. This was because various documents required to be discovered which had not been discovered in November 2012.

4. The plaintiffs took the view that "the first named defendant has either adopted an attitude of negligence towards the discovery process or else has deliberately concealed relevant material and may well continue to do so". On that basis they brought this motion seeking to strike out the defence of the first named defendant and in the alternative directing further and better discovery on the part of the first named defendant.

Preliminary

5. Firstly, as was observed at the hearing of the motion for discovery in this case, there is an inherent need for professional honour on each side in making discovery. It is necessary that the documentation be properly relevant and necessary and this requires that professional judgment be exercised in compiling and finalising an affidavit of discovery. Secondly, the court does not and cannot micromanage the process of discovery where one is dealing with discovery in the order of the magnitude of discovery in this case. The courts have long recognised that where extensive and complex discovery is concerned, as in this case, there may be errors and an additional affidavit or affidavits of discovery may be required to correct those errors. The errors may be entirely innocent despite a party's best efforts to comply with its obligations or due to a failure to properly seek to comply with these obligations. Therefore, in assessing an application such as the present one, it is important for the court to consider how egregious the default alleged is and also to consider the steps which have been taken by the alleged defaulting party to rectify the errors.

Striking out proceedings of defences

6. Before considering the particular complaints in this case it is useful to consider the law in relation to striking out defences for failure to comply with orders of discovery. In *Mercantile Credit Company of Ireland Ltd. v. Heelan* [1998] 1 I.R. 81 the Supreme Court, through Hamilton C.J., stated at p. 85:-

"The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.

It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect."

7. In *Murphy v. J Donohoe Ltd.* [1996] 1 I.R. 123 at pp. 141-142, Barrington J. held:-

"The courts have repeatedly stated that rules of procedure exist to serve the administration of justice and must never be allowed to defeat it.

...Order 31, r. 21 exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court.

Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order of discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendant's defence. But such cases will be extreme cases"

8. In *Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance Plc* [2010] 4 I.R. 1 Clarke J. at p. 7 stated:-

"[18] It has often been said that discovery relies to a large degree on trust. This is true. Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligation of the parties concerning disclosure of documents. The buck then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. It is, of course, the case that mistakes can and do happen. Such mistakes can range from the entirely innocent and understandable, to those which might be characterised as blameworthy to a greater or lesser extent. At the other extreme are cases where there has been a deliberate failure to disclose material information.

...[21] It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place, that the failure concerned was designed for the purposes of not giving access to the other side to relevant information, and where it would be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the court's decision on the merits of the case."

9. It is thus clear that the test establishes a very high threshold which must be met before a court will exercise its power to strike out a defence or a claim for failure properly to comply with an order for discovery.

10. Plaintiffs' complaints in relation to the discovery of the first named defendant

The plaintiffs raised a variety of complaints concerning the discovery made by the first named defendant. In this regard it is important to note as a preliminary matter the fact that prior to the delivery of the second supplementary affidavit of discovery on 29th May, 2014, the solicitors for the plaintiffs had indicated that they were not proposing to bring any motion in relation to the discovery made to date by the first named defendant. This is relevant insofar as the plaintiffs now make complaint in relation to matters of which they were aware prior to the 29th May, 2014, when the second supplemental affidavit of discovery was sworn.

11. It was accepted by the first named defendant that it had made errors in relation to its initial affidavit of discovery which errors required to be corrected. For example, there was a notebook which contained private personal material in respect of an employee of the first named defendant. Due to the extremely confidential nature of the material in the notebook, it was kept separately in a safe and only one member of staff of the solicitors acting for the first named defendant reviewed this document. However, due to human error, having reviewed the document and ascertained which part of it fell to be discovered under the terms of the order of Moriarty J., the individual omitted to actually discover those extracts. When that error was realised, the appropriate steps were taken to rectify this omission and the documents have now been discovered to the plaintiffs. I am satisfied that the first named defendant and its solicitors acted *bona fide* in this regard and the plaintiffs have not suffered any prejudice as a result of this omission.

12. The first named defendant had asserted a claim of privilege in respect of a number of documents in its original affidavit of discovery. These were reviewed in conjunction with Whitney Moore, solicitors then acting for the plaintiffs. It was agreed to waive the claim of privilege in respect of a number of documents which had been discovered in the privilege section of the affidavit of 9th

November, 2012. Due to an oversight, when the first supplemental affidavit of discovery was sworn these documents were not listed in the first schedule first part as they ought to have been. Clearly this was an error but equally clearly no prejudice was suffered by the plaintiffs as a result of the error. These documents were discovered in the second supplemental affidavit of discovery. The exercise shows that the first named defendant and its solicitors were making a *bona fide* attempt to comply with their obligations to make proper discovery in accordance with the order.

13. Certain officers of the first named defendant were involved in a criminal trial and many of the documents falling within the scope of the order for discovery were in the possession of the office of the DPP. After the conclusion of the trial the documents were furnished by the DPP to the solicitors for the first named defendant. It then became apparent that certain employees of the former Anglo Irish Bank Corporation Plc (now the first named defendant) had retained in their possession documents which ought to have been left in the possession of the first named defendant. This alerted the first named defendant to the possibility that there were documents outside of its possession but within its power or procurement in the hands of former employees which could fall within the scope of the order for discovery. The appropriate enquiries were made and certain discoverable documents came to light. These were the subject of the affidavit of discovery of 29th May, 2014. Again, while ideally these documents ought to have been discovered in November, 2012, what actually occurred in no way indicates that the first named defendant was seeking to either avoid its obligations to make proper discovery in accordance with the terms of the order of Moriarty J. or were negligent in approaching the performance of the task. On the contrary, once the additional information came to light on the initiative of the first named defendant and its solicitors, and without the intervention of any other party, including the plaintiffs, the first named defendant and its solicitors took the appropriate steps and rectified the omission.

14. Under cover of a letter dated 14th January, 2012, certain documents were copied to the solicitors for the plaintiffs. These were documents which ought to have been discovered and which had not been included in either the first affidavit of discovery or the supplemental affidavit sworn thereafter. Complaint was made that these documents had not been discovered properly. They were discovered subsequently in the affidavit of 29th May, 2014. There was no question of the first named defendant seeking to suppress relevant documents. Copies were furnished to the plaintiffs, the omission was in failing to list them properly in the previous affidavits of discovery. The omission was rectified in due course. Again, no *male fides* attaches to the first named defendant in this regard.

15. One of the documents discovered by the first named defendant was a memorandum from the team in the former Anglo Irish Bank Corporation Plc dealing with the plaintiffs and Sean Quinn Snr addressed to the Financial Regulator. That document referred to eleven appendices which were not discovered. The plaintiffs sought discovery of the appendices. The response of the first named defendant was that they no longer had any copies of these documents and the originals had been sent to the Financial Regulator. They say that these appendices are not in their possession or power or procurement as they are in the possession of the Financial Regulator (now the Central Bank) and they cannot compel discovery of them in the circumstances. While this may be surprising, it is the uncontraverted testimony before the court. As has been pointed out, the courts will not micromanage discovery and are obliged to place trust in the officers of the court conducting the discovery exercise on behalf of their clients. I have no reason, therefore, not to accept that this is the position. It was suggested in argument that the defendants could write to the Central Bank and ask for copies of the appendices. I do not know if this was done. It is not required in order to comply with the obligations under the Order for Discovery. As a counsel of perfection, the appendices ought to be discovered in the second part of the first schedule to the supplemental affidavit the first named defendant proposes to swear.

16. The next complaint raised by the plaintiffs concerned non party discovery made by a company in the Quinn Group of companies on foot of a non party order for discovery obtained by the first named defendant. The first named defendant furnished the plaintiffs with this affidavit of discovery. The plaintiffs' complaint is that there are documents discovered by the non party emails to and from the non party and the first named defendant which are not discovered by the first named defendant. It is argued that this therefore shows that the discovery of the first named defendant is deficient and incomplete. While it may well be surprising that emails should be discovered by the non party but not by the first named defendant, it does not necessarily follow that the first named defendant has thereby failed properly to comply with the terms of the order of Moriarty J. The court has not been furnished with the terms of discovery directed to the non party. It may well be the case that the scope of non party discovery was not precisely the same as the scope of the discovery ordered to be made by the first named defendant at the suit of the plaintiffs. It therefore cannot be said, without further evidence, that the first named defendant has automatically breached its obligations under the terms of the order of July, 2012 simply because material has been discovered by the non party which was not discovered by the first named defendant.

17. The non party discovery included discovery of what were referred to as the Bazzely boxes. These documents relate to a company in the Quinn Group heavily involved in the Contracts for Difference which are at the heart of these proceedings. In argument the court was informed that they were in the possession of Risk Management International who took possession of them on behalf of the first named defendant. The plaintiffs say that they were thus in the hands of the agent of the first named defendant and were discoverable by the first named defendant. However Ms. Harty says that the documents were not in fact within the first named defendant's possession, power or procurement. I accept this averment and note that the plaintiffs suffer no prejudice as they will be furnished with the documents by way of non party discovery. It does not amount to a failure on the part of the first named defendant to make proper discovery.

18. It is of course highly relevant to note that the first named defendant took the step of firstly seeking non party discovery and secondly of furnishing the non party discovery which it received to the plaintiffs. It can in no way be inferred therefore that the first named defendant is seeking either to hide material or is failing properly to make discovery as ordered by Moriarty J. It is important to emphasise that discovery is an aid to litigation and not an end in itself (with the exception of *Norwich Pharmacal* proceedings). Indeed, it was submitted in the course of argument on behalf of the first named defendant that many of the documents which the plaintiffs complain have not been discovered are documents which are already in possession of the plaintiffs. Also, it is said that the plaintiffs are arguing about the discovery of further copies of documents which they already have. In one example, complaint was made regarding the failure made to discover and provide for inspection a particular document upon which the plaintiffs themselves relied in an application in court in Cyprus. In another instance, the first named defendant had already discovered copies of the document 35. This is highly relevant in determining whether or not the prejudice allegedly suffered by the plaintiffs by reason of the alleged failure of the first named defendant to make proper discovery is such as to justify the striking out of its defence.

19. The plaintiffs complain that there has been incomplete discovery of bank statements in this case. The defendants say that in respect of the vast majority of the relevant accounts, bank statements in fact never issued to the parties. They have discovered actual statements where statements had been generated. They did not generate bank statements from the electronic records in respect of the various accounts. It seems to me that this approach is overly rigid and does not comply with the spirit of the Order for Discovery in relation to bank statements. The information is undoubtedly relevant and it is a relatively simple matter to generate bank statements from the electronic records available to the defendants. This information should be discovered by either furnishing the information in an electronic format readable by the plaintiffs or by generating statements.

20. Complaint was made that many emails were discovered which disclosed that they had attachments but that the attachments themselves were not separately discovered. Ms. Harty deals with this complaint at para. 56 (xii) of her first affidavit. She states:-

"The Plaintiffs identified 84 documents as not including an attachment or as having been provided in an incomplete format. The first Defendant has made every effort to identify these documents and Table C furnished to the Plaintiffs on 14 January 2014 dealt with each such document as far as it was possible to do so, including for example the attachment to MAFA-02220 and MAFA-20985."

It is important to note that this reply was furnished to the plaintiffs then solicitors, Whitney Moore, on the 14th January, 2014. The current solicitors acting for the plaintiffs had indicated that they were not intending to bring any motion in relation to the discovery made by the first named defendant subsequent to the receipt of this letter. It was only after the receipt of the second supplemental affidavit of discovery that the plaintiff's solicitors then wrote on 8th July, 2014, making complaint about the alleged failure to make proper discovery in relation to the attachments. I have reviewed Table C of the letter of the 14th January, 2014, and it appears to me that the first named defendant has made every effort to identify the documents within the discovery made.

21. The plaintiffs sought discovery of one or more emails which were password protected by a former employee of the first named defendant, Mr. David Drumm. Mr. Drumm is no longer within the jurisdiction and he has not furnished the defendants with the password. The defendants state that they have been unable to open the emails without the password. Ms. Harty has detailed the very significant efforts made by the first named defendant and its solicitors to comply with the extraordinarily extensive discovery in this case to date. In these circumstances, I must accept the *bona fides* of the defendants in this regard and conclude that the email, though within their possession, is not within the procurement of the defendants in the peculiar circumstances that arise.

22. The plaintiffs have also challenged the claims to privilege over some of the discovered documents. The application was not proceeded with at the hearing before me and accordingly I make no determination in respect of that relief.

23. The main complaints which were the subject of the motion before the court concerned the discovery of audio tapes and the inspection of original documents.

24. Audio Tapes

Ms. Harty in her affidavit of 8th September, 2014, outlined the position in relation to audio recordings at para. 38 and following:-

"As a financial institution the first Defendant had a practise of recording certain telephone lines for regulatory purposes. For example, all lines within the dealing room were recorded as a matter of practice and certain other lines throughout its various premises were also recorded. Every call or putative call for these phone lines was recorded. The number of lines recorded fluctuated over the years but in 2008, for example, there were 247 recorded lines across the first Defendant's premises."

[39] I have not been able to obtain an estimate of the total number of audio recordings held by the first Defendant as technically it is extremely difficult to place a figure on that. Having regard to the fact that for every recorded line there is a record of every call made and received during the period during which it was a recorded line, there is a vast number of audio recordings in the first Defendant's audio archive. A single recording may contain several different calls. It is not possible to search these recordings for content as matters stand and the only way to identify relevant calls is to select an extension, request a copy of the audio calls for that extension over a defined period and listen to the calls in real time. That is a very time consuming process. It is also costly because it is extremely labour intensive and the process of retrieving the data is difficult from a technical perspective and very expensive. In any such review often many of the calls are non calls (consisting only of a dial tone) or are of a personal nature, and the entire call must be listened to in case some of the content is relevant."

[40] For that reason, as the solicitor managing the discovery exercise I had to assess which individuals were likely to have made or received calls relevant to the discovery categories. I then had to ascertain from the first Defendant whether those individuals' lines were recorded. In this case, the only person identified as likely to have made or received relevant calls whose line was recorded was John Bowe. My firm therefore arranged for Mr. Bowe's calls for the period covered by the relevant discovery categories (1 January 2007 to 31 March 2009) to be retrieved and reviewed. This amounted to 5,236 audio calls which were reviewed by the discovery review team during the 5 month discovery review. 257 of these calls were found to be relevant to the discovery categories and these were discovered in November 2012. There was nothing to indicate to the first Defendant or to me at that point that there was any other relevant audio material held that had not been discovered or that any of the other individuals' phone lines were likely to contain relevant material. I accordingly believe that the trawl and review conducted in 2012 in respect of this material was diligent and constituted a reasonable and proportionate search, having regard to the first Defendant's discovery obligations and duties owed by this firm as solicitors and as officers of the Court."

...[42] In August 2013 the Director of Corporate Enforcement served a statutory order requiring the first Defendant to produce audio calls from the lines of 6 named individuals for the period 1 May 2008 to 30 September 2008. The first Defendant complied with that order and arranged for the retrieval and production of that material, which contained approximately 14,000 audio recordings, to the ODCE within a very short timeframe. It cost €95,000 to retrieve the data using a specialist firm. The first Defendant subsequently instructed my firm to review all of those audio calls, save for John Bowe's calls which had been reviewed as part of the original discovery exercise. That audio review took a team of 6 reviewers 5 weeks, as again the calls had to be listened to in real time. 16 of the calls reviewed were found to be relevant to the discovery categories in these proceedings. 2,075 of the calls reviewed related to Peter Fitzgerald's phone line. Mr. Fitzgerald was a senior executive within the first Defendant and a member of the Board. None of the 2075 calls were found to be relevant to the discovery categories."

...[44] Accordingly around 18,000 audio recordings have been reviewed on behalf of the first Defendant for the purposes of this discovery. I estimate the cost of the first Defendant of the review of the audio recordings at around €600,000, including the retrieval costs. A tiny proportion of these calls has been found to be relevant to the discovery categories. Ms Quinn believes that there may be other relevant calls within possession of the first Defendant. I cannot rule out the possibility that such calls may exist. However I am not aware of any objective evidence that they in fact exist. A further issue is whether it is proportionate to require the first Defendant to conduct a full review of calls from the phone lines of the many individuals within the Bank who were not directly involved in the matters the subject of these proceedings, particularly where there is no objective reason for believing that any of those calls may be relevant to these

proceedings and having regard to the very high retrieval costs and the time and cost involved in conducting a review.

...[46] It is not feasible to review all audio calls held by the first Defendant for the period 1 January 2007 to 31 March 2009, if it is suggested that that is required, as I estimate that there will be more than 2,190,000 audio calls for that period.

[47] By way of context, assuming an average call duration of 5 minutes (and that is not very scientific) it would take a team of 10 reviewers working 10 hour days a total of 5 years to complete the audio review of that number of calls. A review of all calls for the much more limited period covered by the ODCE order referenced above (1 May 2008 to 30 September 2008) would involve the review of an estimated 580,000 calls. Any such review would take a corresponding team of 10 reviewers working full time on the review almost 2 years. Having regard to the fact that the audio review of the 18,000 calls involved costs of more than €600,000, the cost of such a review would be phenomenally high and there is, based on my knowledge of the personnel involved, a very limited possibility of further relevant material emerging. While there are methods available to the Plaintiffs to use technology assisted review to analyse electronically stored data for relevance, I am not aware of any similar commercially available technology that would allow for the searching of audio files for relevant content without the need for "real time" reviewing by individual reviewers".

25. These averments of Ms. Harty were hotly contested on behalf of the plaintiffs. They referred to expert opinions that stated that it was possible to search the audio data and there was an exchange of lengthy affidavits in relation to the disputed technical difficulties in retrieving and then searching the recordings. This court is not in a position to resolve conflicts of facts where there has been no cross examination of the deponents. It is very easy to lose sight of the wood for the trees when there is an exchange of affidavits dealing with expert technical issues. It is important to note the following matters were not contested. All of Mr. John Bowe's calls for the relevant period were reviewed and only 2% of those calls contained any relevant material. The fact that they may or may not be highly relevant does not alter the fact that it is a very small proportion of the total number of calls. They are also the calls of the person whose line was recorded who was most likely to be involved in the matters the subject of the proceedings.

26. A separate exercise was conducted by the first named defendant pursuant to a statutory order of the ODCE involved searching six lines for a period 1st May, 2008, to 30th September, 2008. Approximately 14,000 audio recordings were reviewed and the exercise incidentally produced 16 calls relevant to the discovery categories in these proceedings. Ms. Harty has estimated that there may be in excess of 2 million audio calls for the period 1 January 2007 to 31 March 2009 if all of the recorded lines of the first named defendant are to be reviewed. Even if the court accepts for the purposes of argument that the recordings can be digitised and an appropriate search devised as is argued by the plaintiffs, nonetheless there will still ultimately have to be a human review of the audio recordings to ascertain whether or not any particular recording is discoverable. That must be done in real time. It is self evident that even on the plaintiffs' case, this would be a vastly expensive and extremely time consuming exercise, given the figure referred to in Ms. Harty's affidavit.

27. It is therefore important to assess whether or not it would be proportionate to order the first named defendant to make discovery of these audio tapes as is sought by the plaintiffs in this notice of motion. In considering the question of proportionality, it is highly relevant that the line most centrally involved in the issues in this case has been reviewed and approximately 2% only of the total calls were relevant. Further, 16 calls have been discovered to the plaintiffs from reviewing six lines between 1st May, 2008, and 30th September, 2008. Ms. Harty correctly points out that it cannot be ruled out that there exists further relevant material which has not been discovered and will most likely not be discovered if further searching of the audio recordings is not ordered. On the other hand the plaintiffs have been unable objectively to identify any evidence that would suggest that further relevant material will be produced. The court is asked to assume that there must be more material on the basis that after John Bowe's audio tapes had been reviewed, further highly relevant recordings came to the attention of the solicitors acting for the first named defendant while complying with a statutory order of the ODCE. This ignores the tiny percentage of the overall recordings that were reviewed which proved to be relevant. John Bowe was the individual whose line was most likely to produce relevant material therefore it follows that it is likely any search of other lines would yield less than 2% relevant material, and possibly considerably less than 2%. The plaintiffs wish to oblige the first named defendant to search approximately 2 million audio tapes for a likely return of relevant recordings of less than 2%. If the percentage return from the 6 lines searched in compliance with the statutory order is representative, this is of the order of 0.1% Even if the plaintiffs' expert view is completely accepted regarding the feasibility of digitising the recordings and then searching them, the culled recordings will still each have to be reviewed in order that the relevant recordings found may be discovered. This would vastly add to the expense of the discovery for a disproportionately small return, if any. It would also delay the trial for some considerable time.

28. I am of the opinion that the return for the effort required to conduct the exercise contended for by the plaintiffs, both in time and in money would be grossly disproportionate to the potential return. The first named defendant has made a vast discovery in this case. In particular, it has discovered 278 audio recordings to the plaintiffs. Insofar as they seek the discovery of the audio recordings in order to identify further individuals who may have been involved in the events the subject of the proceedings this seems to be completely unnecessary. It is highly likely that any person who may have been involved in these events has by now been identified to the plaintiffs whether through the documents or recordings discovered. The plaintiffs either have or will have more than sufficient material in which to assess which witnesses they may wish to interview or to call at trial, which was one reason advanced for the necessity of the full discovery of all audio recordings of the first named defendants. I do not accept that it is necessary. It is very important to bear in mind the observations of Fennelly J. in *Ryanair Plc v. Aer Rianta cpt* [2003] 4 I.R. 264 at p. 277:-

"The change made in o.31, r.12, in 1999, exemplifies, however, growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy"

29. In *Atlantic Shellfish Ltd v. Cork County Council* [2007] IEHC 215 Budd J. stated:-

*"An order for discovery under the Superior Courts Rules carries with it the duty to search archives of records and files diligently for material documents including computer records... **A party is required to make a reasonable search for documents falling within the scope of the order.**"*

30. It would appear from the judgment of Moriarty J. of 19th July, 2012, in respect of the order for discovery in this case, that the question of the audio recordings was not fully debated at the hearing of the motion. It would appear that neither party was aware of or addressed the potential scope or costs of full audio discovery. It appears therefore that it was not within the contemplation of Moriarty J. when he made his order in July, 2012.

31. Furthermore, the provisions of o. 31, r. 12(11) seem to me to be highly relevant. Sub rule 11 provides as follows:-

"Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that-

(i) Further discovery is necessary for disposing fairly of the case or for saving costs, or

(ii) The discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery."

While no such motion has actually been brought by the first named defendant, I am clearly entitled to have regard to the fact that the rules contemplate varying an order for discovery if the original order is unreasonable having regard to the cost or other burden of providing discovery. To impose the burden upon the first named defendant to make the discovery sought in respect of the audio recordings in my opinion would be unreasonable having regard to the evidence of Ms. Harty: the cost and other burden of providing the discovery would be unreasonable as set out in rule 12(11). The standard as Budd J. pointed out, is to make a reasonable, diligent search for documents falling within the scope of the order, no more.

32. In all the circumstances I am satisfied that the first named defendant has made a conscientious attempt to comply with the order for discovery of the 12th July, 2012. Certainly there were errors and omissions. However, either the first named defendant itself corrected these errors when they came to its attention or, when the solicitors for the plaintiffs drew matters to the attention of the solicitors for the first named defendant, then appropriate steps were taken to rectify the situation. It certainly is very far from being the case that the first named defendant was endeavouring to avoid giving discovery or that there was wilful refusal to provide information. As is pointed out in Barrington J. in *Murphy v. J Donohoe Ltd.* quoted above. Order 31, rule 21 does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court. This case is very far from being a case where the defence should be struck out for failure to comply with the order of discovery and indeed it is not an appropriate case in which to order further and better discovery.

33. Inspection

The plaintiffs also brought an application pursuant to o. 31, r. 18 seeking an order directing the first named defendant to make available for inspection documents specified in a notice to produce served by the plaintiffs on the first named defendant date 8th May, 2014. Order 31, rule 18 provides as follows:

"(1) If the party served with notice under rule 15 omits to give such notice of a time for inspection... the Court may, on the application the party desiring it, make an order for inspection in such place and in such manner as it may think fit; and, except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made, or disclosed in his affidavit or list of documents, such applications shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them and that they are in the possession or power of the other party.

(2) An order shall not be made under this rule if and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs."

34. The plaintiffs have sought inspection of a large number of original documents. There was correspondence between the parties from which it was clear that the documents would be made available for inspection. It was clear that the solicitors for the first named defendant were in the process of collating original documents and that this would take some time, as Ms. Harty made clear in her affidavit of 8th September, 2014. Difficulties arose from the fact that some original documents were held by other firms both here and in other jurisdictions on behalf of the first named defendant or by investigative bodies. Inspection facilities in respect of approximately 670 items listed in the schedule to the notice to produce were afforded to the plaintiffs by agreement on 5th August, 2014, after this motion issued. However, the solicitors still had not obtained possession of approximately 300 original documents. For some reason Ms. Harty describes this as a small number of documents in para. 51 of her affidavit. I would disagree with the characterisation of this number of documents as small. Nonetheless, it is clear that the first named defendant is endeavouring to comply with the notice to produce in respect of these original documents. By any standards the litigation involving various members of the Quinn family and the Quinn Group of companies and the IBRC and related companies is extraordinary. Proceedings have been brought in Sweden, Moscow, Kiev and Cyprus. It is perfectly understandable that the first named defendant's solicitors may need time to gather original documents into their possession so that they can be made available for inspection by the plaintiffs. It is clear that in some cases the documents are within the State and held by other firms of solicitors acting on behalf of the first named defendant. The provision of the original documents the subject of the notice to produce ought to be expedited in respect of this class of documents. On the other hand, where documents are held by parties other than agents of the first named defendant, they are not within the power and procurement of the first named defendant. These are documents in other jurisdictions which were used in litigation involving the parties hereto or related entities. Producing original documents from these jurisdictions may legitimately take time. In relation to personal guarantees of the plaintiffs, Ms. Harty indicated in her second affidavit of 10th October, 2014, that these were in the possession of the ODCE and therefore were not at that time within the power of procurement of the first named defendant as required by order 31, rule 18. She offered to write to the plaintiff's solicitors with a list of the original documents held by the ODCE which are in the notice to produce so as to facilitate the plaintiffs making arrangements with the ODCE for inspection of the documents.

35. Rule 18 (2) states that an order for inspection will not be made unless the court is of the opinion that it is necessary either for disposing fairly of the cause or matter or for saving costs. The plaintiffs have not sought to address this test in the affidavits grounding the application. In my opinion the application for an order to compel inspection of documents pursuant to o. 31, r. 18 (2) is premature in circumstances of this case and therefore by definition not necessary at this stage as required by sub rule 2. In this regard it is important to note that the trial date has been fixed for April, 2015. The plaintiffs have copies of the documents. They state that original documents do not exist. On the assumption that this allegation is maintained at trial, then it will be necessary for the first named defendant to produce the originals at trial or suffer the consequences (if any) if it fails to do so. The first named defendant has indicated that it will comply with the notice to produce and seeks time in order to locate and gather in the outstanding 300 documents. This is not a case of a party wilfully failing to comply with a notice to produce. If, nearer to the trial date it is still in default the application may be renewed. Certainly, the failure to produce the documents for inspection at this stage in no way hinders the plaintiff's preparation for trial. In making this ruling I emphasise that I do not preclude the plaintiffs from renewing this application in the future nearer to the date for trial.

Conclusion

36. The temptation in litigation as extensive and complex as this litigation is for the parties to become immersed in the pre trial

procedures to the detriment of focusing upon the trial of the action. Litigation is not an exercise in perfection. Many trials take place in the absence of perfect discovery and indeed in the absence of major relevant witnesses for a variety of reasons. It is important to bear in mind the immense discovery which has been made in this case and which will be completed.

37. The first named defendant has already indicated that it will swear a supplemental affidavit and it should deal with the matters referred to in this judgment in relation to bank statements and documents no longer in the possession of the first named defendant. The plaintiffs have not established that they are entitled to further and better discovery and therefore I refuse relief (b) of the Notice of Motion. The errors and omissions made during the discovery process were rectified in each occasion by the first named defendant as they came to the attention of their solicitors. They fall very far below the egregious default that would justify striking out the defence. I therefore refuse relief (a) in the Notice of Motion. There is no credible testimony before this court to suggest that the first named defendant will not make every effort to comply with the requirement to produce original documents for inspection once it has completed the steps necessary to locate and retrieve all of the relevant documents sought to be inspected by the plaintiffs.

It is premature to order inspection in this case and therefore I refuse relief (f) in the Notice of Motion. In relation to the balance of the reliefs sought, they either were not pursued or there was no reason advanced to support the application. In particular, give the extent of the affidavits exchanged for this motion, it is not necessary for the first named defendant to explain the steps it has taken to comply with the order for discovery. The plaintiffs are not entitled to review the first named defendant's exercise or to seek to micromanage the process either directly or through the court.