Neutral Citation: [2013] IEHC 573

**THE HIGH COURT**

**[2013 No. 1915P]**

**BETWEEN**

**MICHAEL KINSELLA, GREG KINSELLA, BARBARA KINSELLA, AMANDA KINSELLA FERGUSON, GREG KINSELLA DESIGN STUDIO LIMITED, SOUTHERN CARPETS LIMITED, MICHAEL KINSELLA INVESTMENTS LIMITED**

**PLAINTIFFS**

**AND**

**KIERAN WALLACE, PADRAIC MONAGHAN AND BANK OF SCOTLAND PLC**

**DEFENDANTS**

**Judgment of Ms. Justice Laffoy delivered on 13th day of December, 2013.**

**The application**

1. The application to which this judgment relates is the plaintiffs' application for an order that the defendants make discovery on oath of five categories of documents outlined at sub-paragraphs (a) to (e) of paragraph 1 of the notice of motion dated 13th May, 2013 and certain documents specified in paragraph 2 of the said notice of motion. As the dispute between the parties relates primarily, if not entirely, to the reliefs sought in paragraph 1, the focus in this judgment will be on paragraph 1 and paragraph 2 will be addressed at the end of the judgment.

2. The notice of motion was preceded by a request dated 2nd May, 2013 from the plaintiffs' solicitors for voluntary discovery and the response of the defendants' solicitors dated 9th May, 2013 thereto, which were exhibited in the grounding affidavit of Edward John O'Beirne, a member of the firm of solicitors on record for the plaintiffs. The replying affidavits on behalf of all of the defendants was sworn by Jonathan Henderson, an officer of the third named defendant. The third named defendant and its predecessor, Bank of Scotland (Ireland) Limited, will be referred to in this judgment as "the Bank". The first and second named defendants (the Receivers) are receivers, who were appointed by the Bank on 20th February, 2013 over the assets of the plaintiffs.

3. I have already dealt with an application for an interlocutory injunction in these proceedings in a judgment delivered in this matter on 12th March, 2013 ([2013] IEHC 112). As I observed in the first sentence in that judgment, the factual background to the application to which that judgment related was extremely complex.

4. While that complexity remains in the background, the principal problem to which the dispute between the parties on this application has given rise is identifying the issues between the parties on the pleadings. In general terms, at the heart of the dispute between the parties is the relationship which has existed for at least ten years between the plaintiffs as borrowers, guarantors, and mortgagors, on the one hand, and the Bank as lender, creditor, and mortgagee, on the other hand. Against that broad picture, it is necessary to consider the pleadings in some detail.

**The pleadings**

5. The pleadings which will be considered hereunder are:

(a) the statement of claim delivered on 27th March, 2013;

(b) the replies dated 18th April, 2013 delivered by the solicitors for the plaintiffs (the particulars ) to a notice for particulars dated 11th April, 2013 raised by the solicitors for the defendants; and

(c) the defence delivered on 25th April, 2013.

6. The core of the plaintiffs' case against the Bank is that on 19th July, 2012, they made a complaint to the Financial Services Ombudsman (the FSO) in relation to the manner in which they had been treated as consumers by the Bank. While there were ten grounds of complaint set out in the complaint form, only three of the grounds, which are referred to as "Issue 1", "Issue 2", and "Issue 4", are addressed in the statement of claim.

7. In paragraph 11 of the statement of claim the plaintiffs plead the existence of the complaint to the FSO and give particulars of the three grounds of complaint in issue, the substance of which is as follows:

(a) As regards Issue 1, the complaint was that the Bank had resiled from an agreement entered into or representations made to the plaintiffs in 2005 regarding the development being carried out by the plaintiffs, or some of them at Bray, County Wicklow known as Southpoint, the alleged agreement and/or representations having been to the effect that the Bank, being fully aware and accepting that the build cost and additional premises acquisition cost in connection with the development would generate a shortfall of €7.6m, would finance the sum of €7.6m over a twenty year principal reducing loan, which would be secured and serviced from rental income generated from the commercial units in Southpoint. In paragraph 1(a) of the notice of motion the order for discovery sought relates to documents regarding –

> "the agreement/representations to provide finance to the plaintiffs in the period 2004 – 2005, including but not limited to all documents touching upon the estimated loan repayment shortfall of €7.6 million, the financing of that shortfall over a twenty year principal reducing loan to be secured and serviced from the rental income generated from the retained commercial units."

(b) As regards Issue 2, the complaint centered on an allegation that after the building contractor had moved onto the site at Southpoint and work had commenced in 2006, the Bank demanded additional security from the plaintiffs as a condition to making payments to the building contractor, the additional security being either €3m in cash or security over properties in the ownership of the plaintiffs, or some of them, outside the Southpoint development, which were referred to as "the non-core properties", but on the basis that the requirement for additional security would not be long-term and that it would be released when the development reached a certain height. The complaint was that, despite the fact that the

development had been completed, the non-core properties over which additional security had been given to the Bank had not been "returned" (obviously meaning that the security had not been released), despite the alleged agreement and representations to do so. On 20th February, 2013 the Receivers had been appointed as receivers over the non-core properties. Issue 2 is reflected in paragraph 1(b) of the notice of motion. There, discovery is sought of documents regarding –

> "the demand in September 2006 for additional security of €3m in cash or the security over the non-core assets".

(c) As regards Issue 4, the complaint was that the Bank did not adhere to an agreement entered into with, and representations made to, the plaintiffs, whereby allegedly the Bank promised to support the plaintiffs, and the plaintiffs and the Bank agreed to hold off reducing prices and selling apartments in Southpoint and "to wait out the market", and rent out the properties. The plaintiffs' contention as pleaded is that the Bank must adhere to the alleged agreement and representations and is estopped from reverting to its alleged contractual right to appoint receivers under the loan documentation. It is specifically pleaded that –

> (a) the Bank's position was influenced by its interest in adjoining developments in Bray, a development known as Florentine Centre being given as an example, because, if the sale prices of the Southpoint apartments were reduced, that would have a significant effect on the Bank's interest in adjacent developments; and
>
> (b) in keeping with the representations made and the agreement entered into, the Bank advanced a loan of €300,000 to the plaintiffs to buy and install furniture to facilitate renting out the apartments.

Issue 4 is reflected in paragraphs (c), (d) and (e) of the notice of motion, where discovery is sought of documents regarding –

> (i) the plaintiffs' proposal to reduce the selling prices in accordance with a specified document produced by Douglas Newman Good and the Bank's response to the proposal, including documents evidencing the Bank's position not to reduce prices, to wait out the market, to rent out the properties and the Bank's promise to support the plaintiffs and roll over the loans;
>
> (ii) the €300,000 loan advanced to the plaintiffs by the Bank to furnish and fit out the apartments for renting in pursuance of the representations and agreements made to the plaintiffs on or after June 2008; and
>
> (iii) communications by the Bank with Gabriel Dooley and/or Florentine Developments and/or Ballymore Properties Bray regarding the plaintiffs' development at Southpoint and the selling prices of the apartments.

8. The defendants' response to the allegations in paragraph 11 of the statement of claim, as pleaded in the defence, is that it is admitted that a complaint was made by the plaintiffs on or about 19th July, 2012 to the FSO, outlining what the defendants understand to be the relevant documentation, including correspondence commencing with a letter of 5th March, 2012 (the reference to 5th March, 2013 is obviously a typographical error) of complaint from the first named plaintiff to the Bank's agent and subsequent correspondence, as well as communications directly with the FSO. It is specifically pleaded that the defendants do not admit that the matters which were the subject of the complaint to the FSO are properly or fully described in paragraph 11 of the statement of claim and it is stated that the defendants will refer to the complaint for its proper meaning and effect. The defendants comprehensively reserve their position in relation to every aspect of the complaint, including whether the FSO has jurisdiction. The position, accordingly, is that the defendants have put in issue, as regards factual content and legal effect, the three matters underlying the complaint to the FSO (Issue 1, Issue 2 and Issue 4), which are addressed in the statement of claim.

9. In paragraph 13 of the statement of claim it is pleaded that on 23rd January, 2013, the plaintiffs rejected a request from the Bank and refused to withdraw their complaints to the FSO believing, *inter alia*, that they could obtain an effective remedy under the Central Bank Act 1942 (the Act of 1942), as amended. In the defence, while it is admitted that there was a meeting between both sides on 23rd January, 2013, it is denied that any such request was refused, as, it is alleged, no request was made that the complaint be withdrawn.

10. In paragraphs 17 and 18 of the statement of claim it is pleaded that the appointment of the Receivers was intended to, and/or had the effect of, prejudicing, negating and/or interfering with the plaintiffs' statutory right to make a complaint to the FSO under the Act of 1942, as amended, and their statutory right, *inter alia*, to obtain an effective remedy, if the complaint should be substantiated in whole or in part. Further, it is pleaded that the appointment of the Receivers was conduct which was likely to prejudice or negate the effect or implementation of a decision of the FSO, if the complaint was wholly or partly substantiated. The defendants have joined issue with each of those pleas in their defence. Counsel for the defendants pointed to the fact that the plaintiffs' response in the particulars to an inquiry as to how the appointment of receivers would prejudice or negate or interfere with the plaintiffs' statutory rights, was that the matter was fully and adequately pleaded in the statement of claim and the defendants were invited to join issue with the plaintiffs' plea, which they did. The relevance of that point is not obvious to me. The Court is not addressing the adequacy of the plaintiffs' pleading of their case on this application.

11. In paragraph 22 of the statement of claim it is pleaded that the defendants have prejudiced, negated and interfered with the plaintiffs' statutory right to make a complaint to the FSO, to have the complaint investigated and adjudicated on and to obtain an effective remedy, if the complaint is substantiated in whole or in part. Further, it is pleaded that the Bank has prejudiced, negated and interfered with the performance by the FSO of its statutory and public functions under the Act of 1942. In the defence, the position of the defendants is that they do not admit any of the matters aforesaid and require proof of the nature and extent of the statutory rights alleged and the entitlement on the part of each plaintiff to invoke such alleged rights. In particular, they deny that any actions on the part of the defendants have or had the effect of prejudicing, negating or interfering with the ability of the FSO to provide an effective remedy, if the plaintiffs' complaint is substantiated. Counsel for the defendants pointed to the fact that the plaintiffs' response to an inquiry as to how it was alleged that the plaintiffs are entitled to seek a remedy in respect of the allegations that the Bank prejudiced, negated and interfered with the performance by the FSO on the statutory and public functions in the particulars was to the effect that the point had been fully and adequately pleaded in the statement of claim. However, as has been observed, the Court is not addressing the adequacy of the plaintiffs' pleading of their case.

12. The primary reliefs sought by the plaintiffs in the statement of claim are declaratory reliefs, namely:

> (a) a declaration that the appointment of the Receivers was improper and otherwise unlawful in circumstances where the properties over which they were appointed Receivers and the conduct of the Bank was the subject of the complaint to the FSO; and

(b) a declaration that the Bank has wrongfully and improperly sought to take steps likely to prejudice or negate the effect of the implementation of a decision of the FSO on the plaintiffs' complaint.

Ancillary reliefs are also claimed, including an order setting aside the appointment of the Receivers as receivers over the relevant properties. There is also a claim for damages, including aggravated and exemplary damages. In the defence, the defendants deny that the plaintiffs are entitled to any of the reliefs claimed.

13. In response to an inquiry as to what remedy the plaintiffs believe they would obtain from the FSO, the plaintiffs in the particulars stated that they believed that they would get an effective remedy, stating that the FSO has wide powers of direction where a complaint is substantiated under the Act of 1942, setting out the various directions which the FSO may make. There followed a summary of what the plaintiffs require to have "things put right", namely:

(a) as regards Issue 1, they want the Bank not to be permitted to resile from the agreement in relation to the financing of the €7.6m shortfall over a twenty year period;

(b) in relation to Issue 2, they want the Bank not to be permitted to resile from the agreement to "hand back" the non-core assets; and,

(c) as regards Issue 4, they want the Bank to be estopped from reverting to alleged contractual rights to appoint receivers.

Additionally, they believe they should be compensated by way of a sum of money for the losses suffered.

14. In outlining the relevant elements of the pleadings above, I have focused on the aspect of the pleadings adverted to by counsel for the parties in their submissions. For completeness, it should be recorded that the defendants have made the following preliminary objections in their defence;

(a) that the statement of claim does not disclose any cause of action known to the law;

(b) that the proceedings are not maintainable having regard to s. 57CP of the Act of 1942 (as amended by the Central Bank and Financial Services Authority of Ireland Act 2004), asserting that proceedings to restrain a financial service provider from engaging in conduct likely to prejudice or negate the effect or implementation of a decision that the FSO might make lie only at the suit of the FSO; and

(c) that the Receivers, who have been appointed receivers over the assets of the fifth, sixth and seventh named plaintiffs, which are corporate bodies, have not authorised the institution or maintenance of the proceedings by those plaintiffs and the proceedings, which seek to interfere with the performance by the Receivers of their functions with regard to assets over which they have been appointed, are not maintainable by those plaintiffs.

**Judicial review proceedings**

15. As recorded in the judgment of 12th March, 2013, contemporaneously with the application for the interlocutory injunction, the plaintiffs initiated judicial review proceedings against the FSO consequential on the FSO having made a decision on 5th March, 2013 that he would not investigate the plaintiffs' complaint. On 6th March, 2013, the plaintiffs obtained an order from the High Court giving them leave to apply by way of judicial review for an order of *certiorari* quashing that decision of the FSO. Subsequently, on 17th April, 2013, by consent of the FSO, an order was made in the judicial review proceedings quashing that decision. The plaintiffs' position accordingly is, as indicated in the particulars in response to an inquiry from the defendants, that the plaintiffs' complaint remains pending before the FSO.

**The defendants' response to the application for discovery**

16. Counsel for the defendants was critical of the plaintiffs' request for voluntary discovery and submitted that the reasons why discovery was relevant and necessary were not articulated. In relation to each of the requests now encompassed in paragraph 1 of the notice of motion, it was submitted that the plaintiffs had adopted the same approach, namely: the underlying complaint was summarised; it was pointed out that in the defence the defendants did not admit the basis of the underlying complaint; reference was made to the fact that the Bank also rejected the complaint on the basis that there was no documentary evidence to support it; and there was then a bald assertion that the documentation was relevant and necessary for the trial of the action and that discovery was necessary for disposing fairly of the cause or matter and for saving costs.

17. In the response to the request for voluntary discovery, the basis of the defendants' refusal to make discovery, as set out in the letter of 9th May, 2013, in relation to the categories now encompassed in paragraph 1 was as follows:

(a) that they go to the substantive issues raised in a complaint before the FSO, rather than the fact of such complaint or the defendants' knowledge thereof;

(b) if the material issues are put before the High Court, the FSO will not have jurisdiction to deal with them;

(c) it is not appropriate for the plaintiffs to seek to litigate the matters before the High Court while they are before the FSO; and

(d) discovery of the documents is unnecessary for the plaintiffs' case, as pleaded.

18. The point made at (b) in the preceding paragraph was elaborated on in the replying affidavit of Mr. Henderson and in the submissions made by counsel for the defendants. Reference was made to s. 57 BX(3)(a) of the Act of 1942. That provision is contained in Chapter 5 of Part VIIB of the Act of 1942, as inserted by the Central Bank and Financial Services Authority of Ireland Act 2004. Chapter 5 deals with how consumer complaints are dealt with. Sub-section (1) of s. 57BX sets out the type of complaints which an eligible consumer may make. Sub-section (2) confers sole responsibility for deciding whether or not a complaint is within the jurisdiction of the FSO on the FSO. Sub-section (3) provides:

"A consumer is not entitled to make a complaint if the conduct complained

of –

(a) is or has been the subject of legal proceedings before a court or tribunal . . ..”

There is an exception to subs. (3)(a) in subs. (3A), but that exception is not of relevance to the situation here because these proceedings have not been begun by a regulated financial service provider.

19. It is the case that the current position is that the plaintiffs’ complaint initiated on 19th July, 2012, is still pending before the FSO, because of the outcome of the judicial review proceedings and the position adopted by the plaintiffs. Under s. 57BX it is for the FSO to determine whether, having regard to the existence of these proceedings, the plaintiffs are entitled to prosecute that complaint, although, of course, such determination would be subject to review by the Court. In the circumstances, I consider that it would be inappropriate for this Court to decide that the plaintiffs are not entitled to the discovery sought in reliance on the defendants’ argument as to the application of s. 57BX, because to do so would be to purport to determine an issue which is not properly before the Court.

20. Similarly, I consider that it would be inappropriate for this Court to express a view on the submission made on behalf of the defendants that the motive of the plaintiffs is to get the documents in respect of which discovery is sought to advance the complaint before the FSO. The task of the Court on this application is to determine whether the documents sought to be discovered are relevant to the issues in these proceedings and, if so, if discovery is necessary for disposing fairly of the matter or for saving costs.

**Relevance: the law**

21. As is pointed out in Delany and McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) at paragraphs 10 – 22, the *locus classicus* of the test of relevance is to be found in a passage in the judgment of Brett L.J. in *Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882) 11QBD 55 at p. 63, which was quoted by Fennelly J. giving judgment in the Supreme Court in *Ryanair plc v. Aer Rianta cpt* [2005] 4 I.R. 264. Brett L.J. stated (at p. 63):

> “It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of the adversary.”

22. Counsel for the parties addressed the issue of relevance by reference to the helpful analysis contained in Chapter 6 of *Discovery and Disclosure* by Abrahamson *et al*. (Thompson Round Hall, 2007). In particular, counsel referred the Court to paragraphs 6 – 11 to 6 – 16 in which the authors address what they describe as the refinement of the *Peruvian Guano* test. In paragraph 6 – 11, the authors cite the decision of the High Court (McCracken J.) in *Hannon v. Commissioners of Public Works* (Unreported, April, 4, 2010) in support of the proposition that the standard of proof that must be discharged in meeting the test has been raised from “reasonable to suppose” to a “matter of probability”, as McCracken J. stated in the following passage:

> “The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.”

23. The authors also point to the fact that McCracken J. held that, when seeking to connect documents to particular issues, it was necessary to demonstrate that the issues in question had already been raised in the pleadings and not only on affidavit, quoting the following passage from his judgment:

> “Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in affidavits . . .. It should be noted that Order 31, rule 12 of the Superior Court Rules specifically relates to discovery of documents ‘relating to any matter in question therein . . .’.”

By reference to that paragraph, counsel for the defendants emphasised that an issue must be raised in the pleadings.

**Relevance: application of law to facts**

24. The question which the Court has to determine, accordingly, is whether the relevance of the documents sought to be discovered has been demonstrated by the plaintiffs by reference to the issues raised in the pleadings.

25. A plea in paragraph 20 of the statement of claim which the defendants understandably have denied is that the plaintiffs are “in a peculiar and special position as regards the performance of the statutory and public functions under the Act of 1942”. While it is neither necessary nor appropriate for the Court to express the view on that controversy, there is no doubt that, in the events which have happened, the current status of these proceedings is peculiar given that, while the complaint to the FSO was in being when the proceedings were commenced on 25th February, 2013, it subsequently went into limbo by reason of the decision of the FSO of 5th March, 2013, but in consequence of the consent order made in the judicial review proceedings, the complaint to the FSO has been resurrected and is now pending. The peculiarity is that the reliefs sought by the plaintiffs address the historical situation. For instance, both declaratory reliefs sought by the plaintiffs, which have been outlined earlier, relate to historical events: the appointment of the Receivers on 20th February, 2013, which was alleged to be improper and otherwise unlawful because of the existence of the complaint before the FSO and the Bank’s actions which are alleged to seek to prejudice or negate the implementation of the decision on the complaint. The ancillary order which has already been pointed to, an order setting aside the appointments of the Receivers, is also based on alleged historical wrongdoing. However, the consent order in the judicial review proceedings restores the parties to the position they were in vis-à-vis the complaint to the FSO when these proceedings were instituted. Moreover, the reliefs also look to the future to the extent that the plaintiffs seek an injunction restraining the Bank from interfering with the process of investigation, mediation and adjudication by the FSO in the matter of the complaint.

26. So the crucial question is what are the issues to be tried in these proceedings on the basis of the pleadings? It was submitted on behalf of the defendants that the central allegation in the proceedings, and by implication the central issue, is whether the complaint was made and that it is accepted by the defendants that it was made, but the defendants do not accept that the complaint was valid. That, in my view, is not a correct analysis of the pleadings.

27. In a nutshell, the wrongdoing alleged by the plaintiffs is, in reality, alleged against the Bank and it is that the Bank interfered and continues to interfere with the plaintiffs’ statutory right to make the complaint to the FSO, to have it adjudicated on and to obtain an effective remedy, if the complaint was or is substantiated. The complaint can only be substantiated by the plaintiffs establishing the underlying factual and legal basis of the three elements of the complaint, Issue 1, Issue 2 and Issue 4. The approach adopted by the defendants in the defence does not eliminate those matters; rather it puts them in issue. While the defendants admitted that the

complaint was made, they have expressly not admitted the basis of the complaint as pleaded by the plaintiffs and they have denied the wrongdoing alleged against the Bank by the plaintiffs.

28. Contrary to the submission made on behalf of the defendants, I consider that there is an issue between the parties beyond whether a complaint was made to the FSO. There is an issue arising in the proceedings as to whether the factual and legal bases of the elements of the complaint pleaded by the plaintiffs could give rise to an outcome on the complaint which would result in an effective remedy for the plaintiffs and an entitlement on the part of the plaintiffs to the reliefs they claim. The documents relating to the elements of the complaint of which the plaintiffs have sought discovery, as a matter of probability, would enable the plaintiffs either to advance their own case or to damage the defendants' case. Therefore, I am satisfied that the documents sought in paragraph 1 of the notice of motion are relevant to the issues in the proceedings.

**Necessity**

29. As I have found above, contrary to the defendants' stated position, the substance, factually and legally, of the plaintiffs' complaint to the FSO is an issue which arises on these proceedings. It is fully understandable that the defendants are unable to admit to the validity of the complaint in the proceedings while the complaint, having been resurrected, is pending before the FSO. The implication of the awkward situation in which the defendants find themselves is not for this Court to resolve on this application. What the Court is now concerned with is whether discovery of the documents sought is "necessary for disposing fairly of the cause or matter". In the *Ryanair* case, Fennelly J. stated that the discussion in the judgment of Bingham M.R. in *Taylor v. Anderton* (C.A.) [1995] 1 WLR 447 at p. 462 "gives guidance as to the context in which the matter has to be considered". The test, as stated by Bingham M.R., is whether one party enjoys an unfair advantage or suffers an unfair disadvantage in the litigation as a result of a document not being produced for inspection. Fennelly J. stated that, within that context, the Court has to reach a conclusion as to the likely effect of the grant or refusal of the discovery on the fair disposal of the litigation.

30. In the light of the express plea by the defendants in their defence, which has been referred to earlier, in which they do not admit that the matters the subject of the complaint are properly or fully described by the plaintiffs in the statement of claim and reserve the right to refer to the complaint for its proper meaning and effect, the defendants would unquestionably enjoy an unfair advantage and the plaintiffs would suffer an unfair disadvantage if the Court's determination was to refuse discovery of the documents on which, as a matter of probability, the proper meaning and effect of the complaint can be ascertained.

31. For the avoidance of doubt, I wish to clarify that I have attached no weight, one way or the other, to the fact that it is disclosed in the grounding affidavit that the plaintiffs have obtained certain documentation on foot of what was described as a "data protection request". The submission made on behalf of the defendants that the plaintiffs do not need discovery because they have got documentation from an alternative source has no merit. On the other hand, the plaintiffs' complaint that the documents received were in a disorganised state without any index in five plastic bags, that many were not stapled and had become mixed up, and that it was impossible to put order on the documents is not a matter which this Court should have regard to on this application. Finally, the Court has attached no weight to the assertion in the grounding affidavit that a number of the documents thus obtained corroborate the plaintiffs' version of events and undermine the defence of the defendants.

**Discovery sought in paragraph 2 of the notice of motion**

32. Paragraph 2 of the notice of motion reflects category 4 of the request for voluntary discovery and relates to documents "regarding the security documentation permitting the appointment of [the Receivers]". The response of the defendants' solicitors in the letter of 9th May, 2013 in relation to category 4 was that the security documents relied upon for the appointment of the Receivers had already been furnished. The defendants were willing to make discovery of the same documents but pointed out that this would appear to simply be a waste of costs. It was further stated that, insofar as category 4 related to discovery of documents "relating to the security documentation", rather than the security documentation relied on to appoint the Receivers, the defendants were not willing to make discovery on the ground that they were not necessary for the plaintiffs to prove their case. It would appear from paragraph 5 of the grounding affidavit of Mr. O'Beirne that the plaintiffs accepted that the defendants agreed to make voluntary discovery of category 4. That being the case, it is not clear to me why category 4 was effectively included in paragraph 2 of the notice of motion. In any event, I am satisfied that the defendants have indicated a willingness to make adequate discovery in relation to category 4, being the security documents which empowered the Bank to appoint the Receivers.

**Order**

33. There will be an order for discovery against the defendants in the terms of paragraph 1 of the notice of motion.