Neutral Citation Number [2009] IEHC 292

THE HIGH COURT

2002 10315 P

BETWEEN/

LINFEN LTD., ZEIST ENTERPRISES LTD., THE SIMMONS TRUST CO., KINGSLINE PROPERTIES LTD., MARTIN SIMMONS, CHARLIE SHERLING, VINCENTE ALONSO AND JOHN PARNELL

PLAINTIFFS

AND

PATRICK J. ROCCA, LAURA ROCCA MAHONY, BERNARD ROCCA, BELETON LTD., PATRICK N. ROCCA, ARTHUR COX (A FIRM), BDO SIMPSON XAVIER (A FIRM) AND NATIONAL IRISH BANK LTD.

DEFENDANTS

JUDGMENT of Mr. Justice John MacMenamin dated the 13th day of March, 2009.

1. This matter comes before the court on foot of two notices of motion brought respectively by the plaintiffs, and the sixth named defendant (Arthur Cox), appealing orders made by the Master directing discovery. The judgment deals with the tests of necessity and relevance as understood in the context of discovery pursuant to O. 31, r. 12 of the Rules of the Superior Courts 1986 (as amended); considerations which arise in identifying whether orders for discovery should be made as against a principal, agent, or a professional adviser who combines both roles, and also certain discretionary factors which may be taken into account in identifying which party should appropriately make discovery in a multi-party action.

The proceedings

2. The proceedings arise out of the sale of two companies, Rocca Tiles Ltd. and Tilebusters Ltd. ("the companies") pursuant to a share sale agreement dated 26th May, 2000, by the first five named defendants ("the Rocca defendants") to the first named plaintiff ("Linfen"). The plaintiffs, who were investors in Linfen, and thereby effectively the purchasers of the Rocca companies, make a number of claims of breaches of warranty, misrepresentation and deceit against these first five defendants. It is alleged that there was want of disclosure and/or concealment of certain financial information relating to the business of the companies at the time of the sale and beforehand. The allegations against the sixth named defendant are set out below. The Rocca defendants are not directly concerned in these applications.

3. Arthur Cox, the sixth named defendant, acted for both the plaintiffs and the Rocca defendants in relation to the sale. That firm pleads that this situation arose at the request and with the consent, of all parties and that an arrangement was put in place whereby Mr. Michael Meghen, one partner in the firm, acted on behalf of the purchasers/plaintiffs and Mr. Rory Williams, another partner, acted on behalf of the Rocca vendor/defendants. It is said that this arrangement allowed for a "Chinese wall" between the solicitors who were acting for the parties to the sale.

4. The plaintiffs' case specifically against Arthur Cox is that they acted in breach of contract and negligently in the transaction. Particulars of the allegations are set out in the statement of claim. *Inter alia* the plaintiffs say that a conflict of interest arose in that Mr. Rory Williams (who acted on behalf of the vendors/Rocca defendants) was aware of a dispute between the Rocca companies and their largest trade debtor, a Mr. Patrick O'Connor, prior to the completion of the sale. They say that this dispute was wrongfully not disclosed to the plaintiffs/purchasers. This allegation is denied by counsel for Arthur Cox, for the reasons outlined. This respondent says that the plaintiffs' essential concern that there was a failure of duty is unfounded and that the solicitors for the parties to the sale in fact performed their obligations to their respective clients in a manner entirely consistent with their professional and fiduciary duties.

The discovery as originally sought by the plaintiffs

5. Before the Master, the plaintiffs sought discovery of twelve categories of documents from Arthur Cox. For clarity these categories must be fully identified. They were:

> *"1. All documentation relating to the role of the sixth defendant in acting for both parties in the purchase and sale of Rocca Tiles Ltd. and Tilebuster Ltd. ("the Rocca companies").*
>
> *2. All documentation relating to measures or arrangements put in place or to be put in place to enable the sixth defendant to act for both sets of parties.*
>
> *3. All documentation relating to the terms of the sixth defendant's retainer as solicitors for the plaintiffs.*

4. All documentation relating to provisions of finance for the purchase of the Rocca companies and the provision of finance facilities to Linfen Ltd. and the Rocca companies.

5. All documentation including in particular correspondence or other communications between the sixth defendant and the seventh defendant BDO relating to purchase of the "Rocca companies" by the plaintiffs and the involvement of BDO therein.

6. All documentation relating to the terms and conditions of the engagement of Chapman Flood Mazars, including any advice given by the sixth defendant with respect thereof and all documentation relating to the due diligence conducted by Chapman Flood Mazars, including any advices given by the sixth defendant to the plaintiffs in respect thereof.

7. All documentation relating to advices concerning the negotiation, drafting and completion of the share purchase agreement including but not limited to advices on the provision of a reasonable mechanism to test compliance of the vendor's financial obligations under the said agreement.

8. All documentation relating to advice, if any, given by the sixth defendant to the plaintiffs regarding compliance by the vendors with their financial obligations under the share purchase agreement.

9. All documentation concerning actions, if any, taken by the sixth defendant to enquire into or otherwise check the performance of the Rocca companies between 26th May, 2000 and 16th June, 2000, including, at completion, and any advice given to the plaintiffs in respect thereof.

10. All documentation of whatever nature relating to the account of Rocca Tiles Ltd. and/or Tilebuster Ltd. and their customer known as Mr. Patrick O'Connor including all documentation relating to litigation between Mr. O'Connor and/or any of the defendants and all documentation relating to the cessation of trade between Mr. O'Connor and the "Rocca companies" or either of them.

11. All correspondence and other communications of whatever nature between the sixth defendant and the "Rocca defendants" or one or more of them concerning the disclosure of the O'Connor debt to the Rocca companies or either of them and/or concerning proceedings threatened or issued as between O'Connor and "Rocca companies" or either of them or the "Rocca defendants" or any of them and/or concerning the cessation of trade by Mr. O'Connor with "Rocca companies" or either of them.

12. All documentation of whatever nature relating to the options and remedies available to the plaintiffs pursuant to the share purchase agreement following the discovery of breaches of warranty, negligence, misrepresentation and breach of duty on the part of the "Rocca defendants" including any advices given to the plaintiffs in respect thereof."

The application before the Master and his order

6. On 9th April, 2008, the Master heard the application for discovery. It is important to point out that Arthur Cox had, a number of years previous to the application, already provided their full file to the plaintiffs. Clearly it was with this critical fact in mind that the Master ordered that the firm should make discovery of certain items, but only within the following four categories of documents, and limited in scope to documents that may not have been encompassed in the disclosure of the files in 2002. Therefore the terms of discovery as ordered by the Master were as follows:

"1) All correspondence or internal memoranda between Mr. Meghen and Mr. Williams concerning the terms of their respective retainers and practical arrangements arising therefrom limited to documents generated prior to 31st December, 1999. (See reliefs 1-3 sought by the plaintiffs in the original notice of motion.)

2) Any correspondence between Mr. Meghan and the National Irish Bank following the initial refusal to finance the purchase. (See relief no. 4 sought by the plaintiffs in the original notice of motion.)

3) Any correspondence from either the seventh named defendant or Chapman Flood Mazars to Mr. Meghen seeking clarification of the terms of their respective engagements to report and Mr. Meghan's replies thereto. (See reliefs no. 5 and 6 sought by the plaintiffs in the original notice of motion.)

4) Any document upon which the sixth named defendant will rely concerning its alleged failure to check the performance of the Rocca companies (as described in the notice of motion dated 1st day of November, 2007) between 26th day of May, 2000 and 16th day of June, 2000. (See reliefs 7, 8 and 9 sought by the plaintiffs in the original notice of motion.)"

The context of the Master's Order

7. In order to place these orders in context a number of observations are necessary. I infer that the reason for the order set out in Category 1 was to encompass documents which might have been generated within the firm prior to the active negotiations which took place in the year 2000, being the year of the sale.

8. With regard to Category 2, it appears that the order was made because it is pleaded in the proceeding that National Irish Bank, the eighth named defendant, entered into financial arrangements with the plaintiffs to finance the purchase of the companies. It is said that the bank acted negligently and in breach of duty in failing to disclose material financial information to the investors/purchasers.

9. With regard to Category 3, Chapman Flood Mazars, who are financial advisers, had carried out a financial assessment of the Rocca companies for another potential purchaser at a time prior to the transactions in question. It appears that this financial assessment was utilised in the course of consideration of the financial position of the Rocca companies. Chapman Flood Mazars are not joined in these proceedings.

10. Finally, it will be seen that the Master's order was carefully limited and phrased in such a manner as to exclude discovery of documents which had already been provided by Arthur Cox in the file. In this context, and as a matter of fairness, it must be said that the plaintiffs have not identified any deficiency or omission whatsoever in the identified documents which were provided by Arthur Cox to the plaintiffs. In fact the plaintiffs frankly say that the motions are brought partly on a precautionary or prudential basis lest there be deficiencies in discovery elsewhere.

The two appeals – The plaintiffs' case

11. By notice of appeal dated 15th April, 2008, the plaintiffs appealed against the Master's order seeking to vary it. In general the plaintiffs contend that the categories of discovery ordered by the Master are insufficiently broad, and in the case of internal communications within Arthur Cox, should be expanded to include correspondence, emails and other electronic communications and attendances on telephone conversations. The reasons advanced by the plaintiffs and the defendants are dealt with in greater detail in consideration of each of the categories in this judgment.

12. The plaintiffs now renew their request for discovery in terms of categories 10, 11 and 12 of the original notice of motion. Categories 10 and 11 relate to the O'Connor issue, that is the contention that there was a failure of disclosure relating to a serious dispute between the Rocca companies and their largest customer. Category 12 in that notice of motion relates to the issue of advices which Mr. Meghen might have given to the plaintiffs as to their options when defects and deficiencies in the financial accounting procedures of the Rocca companies allegedly came to light.

The respondent's case

13. By notice of motion dated 30th April, 2008, Arthur Cox also appealed against the order of the Master, seeking discharge of the order on the basis that the discovery ordered was not relevant or necessary to the issues that arose as pleaded in the proceedings. Strong reliance is placed on the provision of the full file. It is unnecessary to address any time issue in relation to the bringing of the appeals.

Legal principles applicable

14. There is no fundamental dispute between the parties as to the law applicable to discovery. The true issue is as to how these legal principles should be applied, especially in this, an action with multiple plaintiffs and defendants. The issues which the court must consider concern not only the range or scope of discovery but whether these respondents should properly be directed to make discovery of certain categories of documents at all. It will be necessary in this context to distinguish between documents prepared by parties as principals, agents, or by legal advisers who may be acting both as agents and professional advisers. (For a comprehensive exposition of the general legal principles see *Discovery and Disclosure*; Abrahamson, Dwyer & Fitzpatrick, (Dublin, 2007) C. 6 *et seq*.

The order

15. Order 31, r. 12(1) and (2) of The Rules of the Superior Courts, 1986, provides:

> *"12. (1) Any party may apply to the Court by the way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in* ***his or her possession or power****, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:*
>
> *(a) verify that the discovery of documents sought is* ***necessary*** *for disposing fairly of the cause or matter or for saving costs;*
>
> *(b) furnish the reasons why each category of documents is required to be discovered.*

(2) On the hearing of such application the Court ***may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance*** *with the provisions of subrule 4(1), or make such order on terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes or documents as may be thought fit." (emphasis added)*

The emphasised portions of each of these two sub-rules are the main focus of this judgment, and are dealt with in greater detail below.

16. One of the issues which arises in this case is whether Arthur Cox, in so far as that firm was acting as a mere agent, should be treated solely qua agent as opposed to principal. The respondent says that in the case of a mere agent, acting qua agent, application at least in the first instance should be made for discovery as against that agent's principals (the Rocca defendants) especially where such documents may be privileged or confidential.

Are documents within the "possession or power" of the respondents?

17. At the outset of this consideration it is necessary to explain in some detail the applicable law on the words "possession or power" as they apply. As a matter of principle there is of course, a distinction between the relationship of client and professional adviser and that of principal and agent. In the latter circumstance, if an agent brings documents into existence, these belong to the principal. However documents prepared by *professional* advisers for their own assistance in carrying out expert work cannot be said to be the property of the principal. Therefore these documents should lie outside the power of such principal for the purposes of discovery.

18. But not all relationships fall neatly within categories. One such area is that of agents who may also be professional advisers.

19. Where for example, professional advisers hold a document arising out of a professional relationship with their client, such documents will not necessarily be in the "possession" of the client. In *Leicestershire County Council v. Michael Faraday and Partners* [1941] 2K.B. 205, MacKinnion L.J. contrasted the rights of a principal and agent with those of a professional adviser and client holding at page 216 that –

"*If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any sense the property of the plaintiffs, any more, as I suggested to Mr. Macaskie (counsel for the plaintiff) during the argument, that his solicitor client or his lay client could assert that his notes of the argument he addressed to us could be claimed to be delivered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and therefore, they cannot be said to be the property of the principal*."

20. *Leicestershire County Council* was approved in this jurisdiction by the Supreme Court in *Bula v. Tara Mines Ltd*. [1994] 1 I.L.R.M. 111. At issue there was whether documents which were in the possession of professional advisers were within the "power" of the client. The plaintiffs in *Bula* sought discovery of certain documents in the possession of advisers formerly employed by the Minister for Energy, those advisers being accountants, a bank and a firm of solicitors. That authority differs from the instant case in that the plaintiffs there sought documents that the Minister himself requested be delivered, this it was not an order for discovery directed to the professional advisers.

21. The then Order 31, rule 12(1) of the Rules of the Superior Courts did not differ substantially from the rules as amended in 1999 (as cited above) and provided that:

"*Any party may, without filing any affidavit, apply to the court for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein*."

O'Flaherty J. observed in *Bula* at p. 113 that:

"*A document is within the power of a party if he has an enforceable right to obtain from whoever actually holds the document inspection of it without the need to obtain consent of anyone else*."

22. As a general principle therefore, I take the view expressed by Abrahamson et al, *Discovery and Disclosure* (Dublin, 2007) at p. 36 that documents held by an agent *in that capacity* are deemed to be in the possession of that agent's principal, while, by contrast, documents prepared by a professional adviser in that affidavit are not deemed to be in the client's possession. Whether Arthur Cox acted for a client either as agent or professional adviser, this judgment makes that distinction, depending on the activity in question.

Necessity and relevance

23. Order 31, rule 12(1) provides for the discovery of documents "*relating* to any matter in question" if necessary, or necessary at that stage of the cause or matter in the proceedings. Rule 12(2) provides that on hearing the application

the Court may refuse or adjourn the application "*if satisfied that such discovery is not necessary*". Rule 12(3) further provides that:

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

24. Thus the criteria of relevance and necessity, as established in evidence at the time of the application for discovery are also factors to which I must have particular regard.

25. The general principle setting out the basis of discovery is to be found in the judgment of Brett L.J. in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co*. [1882] 11 Q.B.D. 55. This quotation is now so familiar as to require no further repetition.

26. Under the previous rules of the Superior Courts, and in turn their predecessors from other jurisdictions, the general principle was that discovery could be ordered against any party, albeit subject to the proviso sometimes applied, that there should exist some adjustable or justiciable right or issue between the applicant and the respondent. The test of necessity lay more in the background.

27. But the rationale underlying the revised Rules of the Superior Courts, (S. I. 233 of 1999), embodying the amended discovery order is different; it is reductionist in intent, directed to render discovery more limited in scope, proportionate to its objective and less onerous.

28. In a multi-party case such as this, a court should seek to ensure that discovery is in fact *necessary* between a particular applicant and respondent. To lose sight of this consideration is to run the risk of needless duplication, and to impose on parties an unwarranted financial burden. Thus, later in the judgment, I discuss particular factors to which I give weight on the facts of this case. I should emphasise that these considerations arise in the exercise of discretion as to whether or not to order discovery – as matters presently stand on the evidence. The necessity for a discretionary order such as discovery can only be assessed in the light of material available to the court at the time of the application. A court must identify whether an order against another party might be less burdensome or onerous than to a respondent in a motion before it. But these considerations must at all times be balanced by the objective of discovery which is to ensure that justice is achieved. If necessary the issue may be reviewed in the light of further evidence as to the conduct of other parties.

Relevance and necessity: Ryanair and Framus

29. In *Ryanair plc v. Aer Rianta* [2003] 4 I.R. 264, the Supreme Court identified relevance and necessity as now being the primary requirements in an application for discovery. Fennelly J. lay particular emphasis on Kelly J.'s decision in *Cooper Flynn v. Radio Telefis Éireann* [2000] 3 I.R. 344, the first reported decision dealing with the requirements following the enactment of the new rule, although that judgment dealt with inspection as opposed to discovery. However that judge observed that the test identified by Kelly J. was equally applicable to discovery having previously pointed out that the amendment to the rule by the 1999 statutory instrument had shifted the primary burden of proof to the applicant so as to demonstrate that the discovery sought was necessary for disposing fairly of the cause or matter. He observed further at p. 276:-

"*In order to establish that discovery of particular categories of documents is 'necessary for disposing fairly of the cause or matter', the applicant does not have to prove that they are, in any sense absolutely necessary. Kelly J. considered the matter in his judgment in Cooper Flynn v. Radio Telefis Éireann [2000] 3 I.R. 344. He derived the useful notion of ' litigious advantage' from certain English cases…. It may not be wise to substitute a new term of art, 'litigious advantage' for the words of the rule. Nonetheless, the discussion gives guidance as to the context in which the matter has to be considered. 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*." (At p. 276).

30. The guidance provided by *Ryanair* was further developed by the judgment of the Supreme Court in *Framus Ltd. v. CRH plc and Ors*. [2004] 2 I.R. 20 where Murray J. considered the development of the case law on relevance and endorsed the approach taken in *Ryanair*. He observed at p. 38:

"*It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out, the crucial question is whether discovery is necessary for 'disposing fairly of the cause or matter'. I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues*."

31. Of course the mere fact that a document is relevant will not inevitably lead to a finding that discovery of that document is also necessary, as against that particular respondent. The issue may hinge on evidence as to the conduct of other respondents. Discovery of documents may not be necessary if the applicant has sufficient alternative means available to deal with the matters at issue in the trial, or whether, in the first instance the applicant should appropriately seek discovery against another party.

Real grounds and the issues as pleaded

32. A court must also have regard to the issue as to whether there are real grounds for believing that discovery of the category concerned might advance the plaintiff's case or damage the defendant's case. See *VLM Ltd. v. Xerox (Ireland) Ltd*. [2005] I.E.H.C. 46, (Clarke J.). The Court must also have regard to the issues as pleaded (see the judgment in *Framus* where Murray J. cited with approval the decision of McCracken J. in *Hannon v. Commissioner for Public Works* (Unreported, High Court, McCracken J., 4th April, 2001.)

Application of the principles

33. *Ryanair* and *Framus* both lay particular emphasis on the fact that the courts should be guided by consideration of the overriding interest in the administration of justice, encompassing the objectives of economy and expedition as well as the search for truth. *Ryanair* emphasises that in order to safeguard these objectives, a court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. Fennelly J. at p. 277 identified the following factors as suitable to be considered by a court on an application for discovery:

(i) The issues in the action as they appear from the pleadings;

(ii) The reasons furnished by the applicant to show that the specific categories of documents are required;

(iii) The necessity for discovery having regard to the burden, scale and cost of the discovery sought;

(iv) The alternative means of proof available to the applicant;

(v) The behaviour of the other party.

These first three principles were expressly approved by Murray J. in *Framus*.

34. In the light of these authorities I turn now to how this guidance should apply here in giving effect to the rationale of Order 31 and applying the principles just identified in this action.

35. In considering whether discovery should be ordered against a respondent party in this, a multi-party action, I think a court must have regard to questions such as:

(i) the evidence on the extent of discovery or disclosure already made, i.e. whether discovery is necessary at that stage of the cause or matter;

(ii) the identity and legal status of the parties to the motion (for example as to whether they are principal or agent);

(iii) issues in the action as between the parties to the motion as they appear from the pleadings;

(iv) degree or nature of engagement of the parties in such disputed issues;

(v) whether discovery directed to another party might be more expeditious, economic, effective, or less burdensome;

(vi) whether there is an alternative or more economic means of proof available to the applicant;

(vii) the attitude of the defendant or other defendants as discernible from the pleadings, correspondence or their responses to discovery already brought;

(viii) whether there are any identified deficiencies in the discovery order obtained.

36. There are, of course other balancing factors, such as the need to ensure, ultimately, as a matter of justice, that all necessary and relevant documents are available for the purposes of truly determining the issues between the parties. Here a court might have regard to whether there is evidence that parties other than an applicant and respondent may have been less than assiduous in complying with orders for discovery.

37. It may be observed that the terms of O. 31, r. 29 are somewhat broader than those of O. 31, r. 12. Rule 12 provides for discovery of documents "relating to any matter in question" in the proceedings whereas the latter rule makes provision for non-party discovery of documents "which are relevant to an issue arising or likely to arise out of the cause or matter". The issue here is one between parties to the proceedings and not one of what is termed "non-party" discovery where different considerations may apply.

Consideration of the four categories of discovery ordered by the Master

38. It is quite clear that the Master properly sought to reduce the very wide range of reliefs which were sought by the plaintiffs. In the course of what must always be a busy list, he had regard also to necessary limitations on the order

because Arthur Cox had made disclosure of the entire file. He sought to give effect to the rationale of O. 31, r. 12.

39. For the purposes of convenience I will, in the first instance, direct the focus of this judgment on the four categories of discovery actually ordered and thereafter consider the balance of the reliefs now sought by the plaintiff in this appeal. These latter reliefs are reliefs (10 – 12) claimed in the original notice of motion but not encompassed in the Master's order.

Discovery against the Rocca defendants

40. I note that discovery was previously sought and obtained against the Rocca defendants. In this judgment I have regard to the fact that the range of discovery sought by the plaintiffs there did not generally fall within the issues which arise here.

41. In fact the only category potentially overlapping was Category 4 identified in the discovery affidavit sworn by Patrick J. Rocca on 15th October, 2008. This category was:

"*Any advices received, written or otherwise concerning the significance of the companies' dealings with Mr. Patrick O'Connor and whether same should be disclosed from the sixth named defendant together with any documents furnished to the sixth named defendant either before or after such advices concerning such issues*."

To this the response was simply "*none*". I think this response is a matter for the plaintiffs to consider. I would not wish to pre-judge any issue in the absence of evidence or hearing from any other party.

42. I add one further word. Clearly it would be impracticable for all the many files provided to be brought into court. This judgment can only be based on the submission and evidence, much of which is on the one hand assertion of *prima facie* necessity and relevance, and on the other, denials based on previous disclosure. I have endeavoured to strike a balance on the evidence before me in the absence of any information as to the reasons for the Masters order. If it transpires on compliance with that order as varied, that the appeal on all, or parts of it, were in fact unnecessary because of the prior disclosure, this fact will be reflected in costs. The judgment proceeds too on the basis that the schedule to the letter providing disclosure of the files by Arthur Cox might have been somewhat clearer in its identification of categories of documents, and the fact that in a number of identified instances, the plaintiffs are entitled to the degree of reassurance which would be provided by a confirmatory affidavit in specific terms provided by a solicitors firm of high repute.

Category One

"*All correspondence or internal memoranda between Mr. Meghen and Mr. Williams concerning the terms of their respective retainers and practical arrangements arising therefrom limited to documents generated prior to 31st December, 1999.*" (See reliefs 1-3 sought by the plaintiffs in the original notice of motion.)

43. Without identifying any deficiencies in the disclosure process by the respondents to date, the plaintiffs nonetheless contend that there may be other forms of communication namely in the forms of emails or other electronic communications and also telephone conversations between Mr. Meghen and Mr. Williams. Consequently they contend that a limitation of the order to correspondence only might not capture such other forms of communication. They identify other, more junior solicitors, within that firm who they say worked closely with Mr. Meghen and Mr. Williams. They contend that this category should be expanded to include those persons and also such electronic communications, attendances, telephone conversations and correspondence which relate to the period prior to the act of negotiations for the sale of the companies in the year 2000.

44. Arthur Cox point out that as and from 30th October, 2002, they had furnished sixteen categories of documents to the plaintiffs' then solicitors and identified a further eleven categories of documents which would be available if required. Two categories come within the later category that is to say

> "1. Internal/administrative matters (billing).
>
> 2. Correspondence, etc. post 7th November, 2001."

45. I do not think this description is sufficiently clear as matters stand. Against that, there is no evidence that the plaintiffs requested any material from any of the eleven categories and found any deficiency. Through their counsel the solicitors say that at no stage has there been any complaint that the material sent has been incomplete or inadequate. They say that they themselves and McCann Fitzgerald the solicitors acting for them, were alert to the issue of emails, and these were included in the file. They say that the material supplied identifies or consists of all the material in the firm's possession relating to the interests of the plaintiffs in the transaction to which the proceedings refer. They contend that a number of the categories sought are not relevant at all to the issues that arise between the plaintiffs and themselves. They further state that the documents not furnished by Arthur Cox to the plaintiffs are ones that came into existence in connection with the retainer by the Rocca defendants and are therefore *prima facie* confidential or privileged, and that in any case Arthur Cox holds these documents as agents rather than principal. Therefore they claim that, at least in the first instance, any application for discovery of those documents should be made against the principals rather than the agent, particularly in circumstances where such documents are or may be privileged.

Consideration and decision in relation to the Category 1 documents identified by the Master

46. The first observation with regard to these documents is that what was directed for discovery here are essentially internal "Arthur Cox documents". They relate to the terms of the retainers and the arrangements arising therefrom. The terms of the order postdates the year 2000. There is evidence that there was significant contact between the plaintiffs, the defendants and Arthur Cox prior to any formal engagement for the purposes of the contract negotiations. It is not sufficiently clear that all or any relevant Arthur Cox "Chinese wall" protocols which were devised fall within the category as ordered or not.

47. I bear in mind that these are documents prepared by Arthur Cox as professional advisers for their own assistance. They are *prima facie* discoverable therefore on the basis of the allegations made against the firm as professional advisers. A principal would not have property in these documents. They lie outside the power or control of a principal. They relate to the issue as to whether there was an irreconcilable conflict of interest in the roles of the respective solicitors in the firm. In this capacity such documents would be discoverable .

48. Clearly any variation in discovery should be limited to any documents not captured by the Master's order which comes within the category.

49. Having regard to the issues as pleaded I also think that this order should be varied to include documents relating to the retainer of Arthur Cox by the Rocca defendants. The issue between the plaintiffs and the firm is that there was negligence, breach of duty and failure of disclosure by that firm as their professional advisers, in advising or continuing to advise all parties throughout the transaction.

50. In directing such discovery I am alive to the fact that claims of legal privilege and confidentiality may well arise. However the fact that such issues may arise does not absolve a party from an obligation to make discovery, although subject to the right to assert such claims.

51. The order under this heading should be limited to documents relating to the nature of the retainer of Arthur Cox. It cannot relate to documents which are within the power or control of the Rocca defendants as principals. Such documents in the first instance should be sought by way of discovery from the Rocca defendants.

52. Category 1 as varied will therefore now provide that Arthur Cox should make discovery of the following:

"*Any correspondence or internal memoranda between Mr. Meghen and Mr. Williams other partners, or members of the staff of the sixth named defendant working to or for the aforementioned Mr. Meghen and Mr. Williams (including emails) relating to the matters in issue; both concerning the terms of the retainers of that firm by the plaintiffs and the defendants, as professional advisers but not as their agents insofar as any such documents have not been already provided by the sixth named defendant to the plaintiffs' solicitors*."

53. In framing the order in this way I bear in mind that there is risk of unnecessary or wasteful duplication if the plaintiffs' were to seek the same categories of documentation from the Rocca defendants. Furthermore, if these have been provided in the files and there are no other documents within the category it is necessary only to so depose. To obviate the possibility of duplication, I should indicate that any motion for discovery brought by the plaintiffs against the Rocca defendants should be framed in such a manner as to ensure that there is no risk of duplication.

Category 2 of the Master's order

"*Any correspondence between Mr. Meghen and the National Irish Bank following the initial refusal to finance the purchase*".

54. The plaintiff contends that Category 2 of this order is insufficiently broad and should be expanded to include all correspondence, emails and other electronic communications, attendances and telephone conversations; and further that it should be expanded to include such correspondence and communications between Michael Meghen and/or Nichola McGrath on behalf of the plaintiffs and National Irish Bank.

55. Here I have difficulty with the Masters order as phrased. Mr. Meghen acted for the purchasers who now seek discovery. In my view, by its very terms, correspondence of this nature was engaged in by Arthur Cox as agent and not as principal. *Prima facie* documents in this category are ones to which *the plaintiffs themselves* as Mr. Meghen's principals would be entitled. No deficiency in the disclosure has been identified by the plaintiff/applicants herein. I again have regard to the fact that the full file has been furnished by the plaintiff's former solicitors. Perhaps there was a misunderstanding on this point.

56. Furthermore, I think that any documents in this category should be seen as being in the possession or control of either the plaintiffs themselves, or in the possession or control of National Irish Bank another defendant in the proceedings, but not Arthur Cox.

57. The affidavit of the plaintiffs' solicitor Orla Byrne, deals with the allegations against that bank. She states that National Irish Bank was the banker for the Rocca companies prior to the completion of the share sale agreement, and that its role in the acquisition was to provide part of the capital to acquire the shareholding of the Rocca defendants in the two companies and also to provide working capital. As part of the consideration for so doing it is said that it required, and was provided with, personal guarantees from Mr. Simmons, Mr. Sherling and Mr. Alonso (three of the plaintiffs) and Mr. Patrick Rocca, Jnr., one of the defendants.

58. Ms. Byrne avers that National Irish Bank assisted the Rocca defendants in converting rebate cheques made out to the Rocca companies into cash at their personal disposal and says that the Rocca companies' banker participated in this activity to the detriment of the companies, which fact was not disclosed to the plaintiffs. It is contended that the position of the Rocca companies was rendered substantially weaker than had been disclosed in the projections and other financial information. It is said that National Irish Bank did not provide finance on foot of that information but on foot of other arrangements or other understandings it had with the Rocca defendants with the result that the three named plaintiffs who believed information provided by BDO Simpson Xavier, the seventh named defendants, to be true were induced into providing personal guarantees to National Irish Bank and proceeding with the purchase.

59. When one considers these averments it is clear that the documents which are sought do not relate to issues in which Arthur Cox were primarily involved as principals but rather to matters in which they were engaged as agents of the plaintiffs. It is not said that there is any deficiency in the disclosure provided by Arthur Cox to those plaintiffs. Consequently I am unable to conclude that discovery should be provided under this heading. Were there some established necessity or deficiency in disclosure, an applicant might renew its application by way of motion for further discovery. But no basis for this is established here. I think the plaintiffs should primarily seek any such discovery against National Irish Bank. I do not think it necessary or justifiable in accordance with the tests applicable to order discovery against Arthur Cox, a party secondarily involved as agent, when the relief should first be pursued against parties primarily involved. The applicants have not in any way established that they have been denied or deprived of material to which they are entitled. "Necessity" has not been made out. The "possession" and "power" tests have not been satisfied either.

Category 3 ordered by the Master

"*Any correspondence from either the seventh named defendant or Chapman Flood Mazars to Mr. Meghen seeking clarification of the terms of the respective engagements to report and Mr. Meghen's replies thereto*."

60. The plaintiffs allege that BDO Simpson Xavier were retained by the plaintiffs in respect of the acquisition or securing of funding for the transaction. They allege that BDO provided information concerning the financial performance of the Rocca companies which they knew, or ought to have known, would be the subject of reliance by the plaintiffs. It is contended that they acted negligently and in breach of contract in providing such information in a defective manner.

61. Chapman Flood Mazars were a firm of financial consultants who had prepared a report on the Rocca companies for another client previously. They are not joined in the proceedings. However it is contended that BDO assumed responsibility to advise the plaintiffs on the limitations of the reports provided by Chapman Flood Mazars.

62. I again take into account the averments made on behalf of Arthur Cox that any documents containing or relating to communications between that firm and BDO that relate to the transaction have already been furnished to the plaintiffs under cover of the letter to the plaintiffs' previous solicitors of 30th October, 2002, that is to say the disclosure letter.

63. I think similar considerations apply to this category of documentation as to those in category 2. Insofar as Mr. Meghen (who was the *plaintiffs*' solicitor) obtained this documentation from either BDO or Chapman Flood Mazars he did so as agents for the plaintiffs. *Prima facie* they are entitled to that documentation as Mr. Meghen's principal. Equally, as principals they are entitled to his replies as agent. In the absence of any identified deficiency in the disclosure I do not consider that the necessity for this discovery has been demonstrated. In any case these are documents which *prima facie* are under the power and control of the plaintiffs. The onus is on the plaintiffs as moving parties to demonstrate that there has been a want of discovery, which give rise to necessity. This has not been shown.

Category 4

"*Any document upon which the sixth named defendant will rely concerning the alleged failure to check the performance of the Rocca companies (as described in the notice of motion dated 1st day of November, 2007) between 26th day of May, and 16th day of June, 2000.*"

64. It is contended by the plaintiffs that this general category of discovery is necessary in that it is claimed that Arthur Cox failed to advise or provide any reliable mechanism in the share purchase agreement to ensure compliance by the vendors (the Roccas) with their financial obligations and failed to advise the plaintiffs in a number of ways with regard to such financial issues. These allegations are denied by Arthur Cox in the defence. The firm relies on the points outlined earlier, which need no repetition.

65. Here I think the balance must be weighed differently. First, the order is phrased in a limited way. But I do not think discovery should be limited to any document upon which the sixth named defendant will *rely*. That would be a subjective test focussing on the defendants. I do not think it consistent with the objective *Peruvian Guano* principles. Second, what is sought here are documents which may have been brought into existence by Arthur Cox as *advisers*. Primarily the gist of the category relates to the work which the firm did in a fiduciary relationship. This may give rise to documents which could not be deemed to be in the clients' "possession". More particularly, the category sought relates specifically to issues between the plaintiffs and this defendant, that is to say, the allegations of negligence and breach of duty made against Arthur Cox. In my view this factor weighs heavily in favour of an order for discovery.

66. The plaintiffs contend that the category of documentation ordered at number 4 is inadequate, firstly on the basis that the category, as ordered by the Master, refers simply to what transpired between 26th May and 16th June, 2000. The former was the date of the contract, the latter that of completion. However the order does not refer at all to advice given by the sixth named defendants to the plaintiffs prior to that time.

67. For these reasons, in my view, the plaintiffs are entitled to a variation of discovery under this heading. Although I must have regard to considerations of proportionality, economy and efficiency, the category as described should I think be somewhat broader. If there is no additional material over and above the disclosure made it will be necessary only to depose to that effect.

68. I will therefore make the following order that the sixth named defendant should make discovery of:

"*Any document which has not already been disclosed concerning the sixth named defendants advices to the plaintiffs on the issue of alleged failure by the defendant to check or identify deficiencies in the financial performance of the Rocca companies*."

The further orders sought

I now turn to the original notice of motion, categories 10 - 12 apparently not encompassed in the terms in the Masters order. It may be that it was intended that Category 4 of the Master's order would encompass this material. If so, this would only be by implication. As a matter of fairness to both parties I consider what may have been implicit should be rendered explicit.

Categories 10 and 11 of the original notice of motion

The categories as originally sought were:

> *"10. All documentation of whatever nature relating to the account of Rocca Tiles Ltd. and or Tilebuster Ltd. and their customer known as Mr. Patrick O'Connor including all documentation relating to litigation between Mr. O'Connor and/or any of the defendants and all documentation relating to the cessation of trade between Mr. O'Connor and the Rocca companies or either of them.*
>
> *11. all correspondence and other communications of whatever nature between the sixth named defendant and the "Rocca defendants" or one or more of them concerning the disclosure of the O'Connor debt to the Rocca companies or either of them and/or concerning proceedings threatened or issued between Patrick O'Connor and the "Rocca companies" or either of them or the "Rocca defendants" or any of them and/or concerning the cessation of trade by Mr. O'Connor with the Rocca companies or either of them."*

69. Patrick O'Connor was apparently one of the main customers of the Rocca tile companies. It appears that not only was he in dispute with those companies but was involved in litigation with them. It is contended by the plaintiffs that this is material which should or ought to have been disclosed by the sixth named defendant under a duty of disclosure even and albeit if the solicitor in question was acting for the Rocca defendants. The plaintiffs plead in the statement of claim that Rory Williams, the vendors' solicitor, revealed that he was aware of the O'Connor dispute, and that he had advised the Roccas to disclose this issue.

70. At para. 20 of the defence, Arthur Cox denies that Michael Meghen who acted for the plaintiffs/purchasers was aware of the O'Connor dispute. It denies that it furnished to the plaintiffs information that the knowledge of any solicitor was incomplete or misleading. But the nature of the plea in relation to Mr. Williams is different. That plea is contained at para. 21 of the defence. For reasons properly appertaining to privilege, there it is "not admitted" that Mr. Williams was aware of the O'Connor dispute, or that he had advised the Rocca defendants to disclose this issue. I understand that the nature of some of the pleas in the defence must take into account any issue of privilege which may arise. At para. 22 of the defence it is denied that Arthur Cox was in a position of conflict of interest or duty towards the plaintiff.

71. It is contended that on this basis the category sought is irrelevant and unnecessary. I do not accept this contention. This category goes to the kernel of the plaintiffs' case against the respondents. However elegantly pleaded, the fact is that the respondents deny that they *owe a duty of care*. The issue is not one simply of state of knowledge. That denial is unaffected by those pleas in the defence to which I have just referred. That issue is pre-eminently one to be decided in reference to its factual context. Once breach of duty is denied, a court is put on inquiry of what an adviser knew and when they knew it. It is not an issue to be determined *ex hypothesi* or divorced from the documentary evidence.

72. These issues bring the relief sought into the distinct category of issues as pleaded and arising directly between the plaintiffs and the solicitors firm as parties. It relates the question of whether there was a specific duty in the solicitors *qua* adviser rather than as agent. It is in my view a category both relevant and necessary to the issues between these parties. It is essentially an "Arthur Cox" issue as opposed to a "Rocca" issue. It goes to a material question of whether there was a legal duty on the solicitors acting for the vendor to disclose matters to the purchaser, whether issues of confidence or privilege arise or not, or further, whether circumstances might have arisen where a retainer simply could not be further fulfilled.

73. I consider that this material should be discovered and will so order. I consider that such relief is necessary for the disposal of the issues between these parties not simply on the basis of any "conflict of interest", but on the basis of an allegation and denial of failure in a duty of disclosure. Discovery within this category may of course be subject to a plea of privilege. The fact that privilege is raised or asserted is of course in no way a bar to discovery. The question as to whether any plea of privilege will succeed is a matter for a court on another day.

74. For clarity therefore I will make one order encompassing paras. 10 and 11 of the original notice of motion. This order (as all of the others) is limited to documentation not encompassed in the disclosure already furnished. If there is no such additional material it will be necessary only to depose to that effect. The order will therefore be in the following terms that the sixth named defendant will discover:

> *"Documentation relating to the dispute as to the account of Rocca Tiles Ltd. and/or Tilebuster Ltd. and their customer Mr. Patrick O'Connor, including documentation relating to litigation between Mr. O'Connor and the first to fifth named defendants and documentation relating to the cessation of trade between Mr. O'Connor and the 'Rocca companies' if such has not been disclosed to the plaintiffs."*

Category 12 in the original notice of motion

> *"All documentation of whatever nature relating to the options and remedies available to the plaintiffs pursuant to the share purchase agreement following the discovery of breaches of warranty, negligence, misrepresentation and breach of duty on the part of the 'Rocca defendants' including any advices given to the plaintiffs in respect thereof."*

75. I consider this category as sought far too broad. However, similarly to categories 10 and 11, it relates to issues directly between the plaintiffs and the defendants as pleaded. It concerns the question of whether the plaintiffs were given appropriate advices regarding the courses of action available to them following the alleged wrongs committed by the Rocca defendants. This clearly goes to the issues between the plaintiffs and *these* defendants. The plaintiffs contend that they were considering walking away from the deal and requiring the Rocca defendants to rescind the share sale agreement and were advised by Michael Meghen to proceed to arbitration. The respondents deny any breach of duty.

76. I do not think that the plaintiffs' pleading is sufficient to justify such a broad range of discovery. There is however an obligation to discover in the capacity as professional advisers which would warrant relief. The respondents say that this is unnecessary as the material has already been disclosed. I will take this into account in framing the order. If there is no such additional material it will be necessary only to depose to this effect. Therefore the order will be that the sixth named defendant will make discovery of:

> *"Documentation insofar as the same has not already been provided to the plaintiffs relating to any advices given by Michael Meghen to the plaintiffs as to the options and remedies available to those plaintiffs following the identification of any alleged breaches of warranty, negligence, misrepresentation and breach of duty on the part of the Rocca defendants pursuant to the share purchase agreement."*

77. I will direct that the affidavit of discovery may be sworn by Donnagh Crowley the original deponent. That affidavit should be provided in four weeks.

78. With purely prudential considerations in mind I am sure that Arthur Cox will undertake to maintain and protect the originals of all documents within their possession, power and control in relation to the matters in issue. I use these three terms advisedly albeit at variance from O. 31, r. 12 (1) and (2). A simple averment to this effect in Mr. Crowley's affidavit will be sufficient on this point.