Neutral Citation [2015] IEHC 530

THE HIGH COURT

[2011 No. 387P]

BETWEEN

ANNE MAYE

PLAINTIFF

AND

ALAN ADAMS, DENNIS AGNEW, JULIAN BOSGRIDGE, FEARGAL P BRENNAN, GERARD BUTLER, GARY BYRNE, THOMAS G BYRNE, AILEEN B COSGROVE, DARREN N DALY, OLIVE A DOYLE, MARY DUNNE, RONAN A EGAN, CATHERINE M GUY, SIAN L HARPER, DUNCAN INVERARITY, KIERAN J J JOHNSTON, MARK N KAVANAGH, SINEAD M KEARNEY, ELAINE P KELLY, MICHAEL KENNEDY, ROSEMARY KIRWAN, DEIRDRE M MCBENNET, PAUL MCGENNIS, DAVID F MACSWEENEY, JAMES F MORAN, DANIEL M MURPHY, ENDA NEWTOWN, MICHELLE NI LONGAIN, LOUISE O'DONOVAN, FIONA O'NEILL, EILEEN PREDERGAST, COLIN SAINSBURY, GAVIN N A SIMONS, GAVIN P SMYTH, EOGHAN P WALLACE, SEAN WALLACE, MICHAEL D WALSH, HELEN A WILKINSON, PRACTICING UNDER THE STYLE AND TITLE OF BYRNE WALLACE SOLICITORS FORMERLY KNOWN AS BCM HANBY WALLACE SOLICITORS AND KIERAN DUGGAN

DEFENDANTS

JUDGMENT of Ms. Justice Kennedy delivered on 31st day of July, 2015

Introduction/Background

1. This is the defendants' motion dated 16th June, 2015, seeking an order pursuant to Order 31 Rule 18 of the Rules of the Superior Courts; requiring the plaintiff, Mrs. Anne Maye of Weaver's Hall, Plunkett Avenue, Foxrock, Co. Dublin to produce documents pertaining to a settlement agreement entered into by the said plaintiff with NAMA on 2nd October, 2013, to allow for inspection and for copies to be made of such documents by Byrne Wallace Solicitors (Byrne Wallace).

2. The within proceedings issued by way of plenary summons on 17th January, 2011 against Byrne Wallace, wherein the plaintiff's claim was primarily for indemnification in respect of any cost, expenses, loss, liabilities, claims or payments arising from an agreement dated 7th August, 2008 known as the "Costello Agreement". Proceedings were instituted by NAMA against the plaintiff in 2013 and the settlement agreement was made in the context of those proceedings. In 2014, a new set of proceedings was instituted by the plaintiff against Byrne Wallace and Kieran Duggan (a consultant retained by Byrne Wallace). The 2011 proceedings were consolidated with the 2014 proceedings by an order made by Gilligan J. on 11th December, 2014. The plaintiff's claim, in the consolidated proceedings, expanded considerably from that which was made in the 2011 proceedings. The plaintiff pleads, in the consolidated statement of claim, that she had no option but to compromise the NAMA proceedings by way of the NAMA settlement agreement. She pleads that in so far as she incurred any liability to NAMA, and as a consequence, had to settle any such liability; this, she pleads, is a matter for which the defendants and/or Mr. Duggan are responsible. She has, in the consolidated statement of claim, particularised her claim in this respect arising from the NAMA settlement agreement of approximately €37.5 million (including legal costs) with additional costs, expenses and tax liabilities "unascertained and ongoing".

3. By letter dated April 17th, 2015 solicitors for Byrne Wallace (Messrs. Ronan Daly Jermyn Solicitors) requested production of the settlement agreement in accordance with Order 31, Rule 16 of the Rules of the Superior Courts, 1986 (as amended). A notice to produce was delivered on 28th April, 2015 wherein the defendant sought inspection of certain documents pleaded in the statement of claim, including the settlement agreement.

4. On May 14th, 2015 the plaintiff's solicitors (Matheson Solicitors) provided a redacted copy of the settlement agreement, explaining that portions of the agreement were redacted, which contained information which was irrelevant and confidential. These documents were exhibited in the affidavit of Mr. Jamie Olden, solicitor with Ronan Daly Jermyn. An offer of inspection was extended to the solicitors and counsel for the defendant. The solicitors for Byrne Wallace requested an unredacted copy thereof, or in the alternative, to withdraw so much of the plaintiff's claim that derived from the settlement agreement. Three offers of inspection were made, which were agreed to on 21st July, 2015.

5. In June, 2013 NAMA instituted proceedings against the plaintiff, as executrix of the estate of Mr. Liam Maye, deceased, seeking an order revoking the grant of probate and granting administration of the estate to Mr. McAteer of Grant Thornton. The plaintiff agreed to step down as executrix and consented to the relief sought against her.

Party Submissions

6. The defendant contends that the settlement agreement is a document by reference to which the plaintiff has grounded a substantial part of her claim against Byrne Wallace and, in respect of which, she seeks substantial damages. The settlement agreement was negotiated in 2013, at a time when the plaintiff had proceedings in being against Byrne Wallace. The plaintiff contends she intended to expand her claim against Byrne Wallace by virtue of the settlement agreement, which she duly did by issuing the 2014 proceedings. The defendant submits that, having regard to the fact that the plaintiff's claim is framed by reference to this settlement agreement, inspection of the entire unredacted agreement is necessary for disposing fairly of the cause or matter. Furthermore, Mr. Gleeson, S.C. (for the defendant), contends that the redaction has been effected in a somewhat random manner and, while the plaintiff asserts that certain information is confidential, she has failed to evaluate the quality of the information posed. Mr. Gleeson, S.C. questions, for example, how the plaintiff can claim clauses are confidential relating to her personal wealth, where she discloses clauses revealing aspects of her personal assets.

7. The plaintiff asserts that, if it were not for the advice she received from Byrne Wallace—which she contends was negligent— she would not have placed the relevant assets at risk. Such a risk, the plaintiff states, she sought to mitigate by entering into the settlement agreement. It is, in the context of assessing the reasonableness of the mitigation of her loss, that the defendant seeks the information which is the subject of these proceedings.

8. The plaintiff, by way of an affidavit sworn on her behalf by her solicitor, acknowledges that Byrne Wallace is entitled to inspection

of the settlement agreement, but asserts that she is entitled to redact parts thereof on the grounds that the redacted material is not necessary for disposing fairly of the proceedings, or for saving costs, and that the redacted material is confidential.

9. The issue therefore, in this motion, is whether the defendants (hereinafter Byrne Wallace), are entitled to inspection of an unredacted copy of the settlement agreement. There has been extensive correspondence between the parties on the issue of the redacted materials and the plaintiff relies on three grounds to resist disclosing the settlement agreement in its unredacted form. These are:-

> a. That the redacted material includes confidential information in relation to the plaintiffs' personal finances; clause 6, schedule 1 (part) and schedule 5;
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> b. That the redacted material includes confidential information in respect of co-obligors of the plaintiff, who are not party to the proceedings; clauses 8.9, 14 and 15.3; and
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> c. That the redacted material includes confidential information relating to the agreement concluded between the plaintiff and NAMA in relation to the conduct of these proceedings and the application of any proceeds; clause 13.

10. Mr. McGrath, S.C. for the plaintiff, submits that the information redacted from categories 1 and 2 above is confidential and irrelevant to the claims made against Byrne Wallace. Furthermore, clause 6, he contends, refers to information in a statement of affairs over which the plaintiff maintains a claim of 'without prejudice' privilege. In relation to category 3, he contends that the redacted information is completely irrelevant to the substantive issues for determination and, that disclosure of this information, would provide Byrne Wallace with an unfair tactical advantage in the conduct of the proceedings. In the course of the hearing of this motion, Mr. McGrath, S.C., indicated that while he maintained that the material was irrelevant and confidential, his client was prepared to make available the information in category 1 to Byrne Wallace, in an unredacted form, subject to two conditions:-

> a. It would be 'without prejudice' to the plaintiff's entitlement to claim privilege regarding any document referred to in that category, including, but not limited to, the Statement of Affairs; and
>
> b. That reference should be made to the 'reconciliation figure', rather than the actual figure referred to in clauses 6.3. and 6.5.

Mr. Gleeson, S.C. conceded that the offer went a considerable way towards addressing clause 6. It transpired that this offer was made on the morning of the hearing. In respect of category 2, Mr. McGrath, S.C. indicated that the plaintiff was also willing to disclose this category to Byrne Wallace in an unredacted form, but with the requirement that this category, relating to the co-obligators, should not be disclosed in open court due to the confidentiality aspect. Mr. McGrath, S.C. asserted that the plaintiff has a contractual obligation to NAMA to maintain confidentiality. This, Mr. Gleeson, S.C. argued, was unworkable. I will address both these categories in due course. Category 3 remains very much in issue and is really the substantive dispute between the parties.

The Relevant Rules of Court
Order 31, Rule 15 of the R.S.C.

11. Order 31, Rule 15 provides:-

> "15. Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings, or affidavit or list of documents reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit copies thereof to be taken; and any party not complying with such notice shall not afterwards be at liberty to put any such documents in evidence on his behalf in such cause or matter, unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice; in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit."

12. Order 31, Rule 18 provides:-

> "18. (1) If the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the Court may, on the application of 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 application 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."

13. It is undisputed that there is no requirement that pleadings must be closed before a notice to produce is served. It is also agreed that documents provided for inspection under Order 31 are subject to an implied undertaking that they will be used only for the purpose of those proceedings.

14. Order 31, Rule 18 is clearly discretionary in its terms and the jurisprudence confirms that the court has a broad discretion, which such discretion being exercised on the facts of any given case. It is also clear, from an analysis of the jurisprudence, and, on reading Order 31, Rule 18(2), that an order for inspection will not be made, unless the court is satisfied that it is necessary, either for disposing fairly of the cause or matter, or for saving costs. This was confirmed recently by Costello J. in *Lowry v Mr. Justice Moriarty* [2014] IEHC 602. The courts may, and have taken, steps to address the loss of confidentiality by redacting portions of a document or restricting disclosure in an appropriate manner.

Necessary for Disposing Fairly of the Cause or Matter
15. In *Cooper Flynn v Radió Teilifís Éireann* [2000] 3 I.R. 344, Kelly J. referred to an English Court of Appeal decision in *Wallace Smyth Trust Company v Deloitte* [1997] 1 W.L.R. 257, wherein Browne L.J. set out the principles governing the application of the equivalent rule in that jurisdiction. Kelly J. held that these principles govern the proper application of Order 31, Rule 18(2). The principles are as follows as outlined at p.352 of the report:-

"2 The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action. I need not refer further to the question of "saving cost", the other limb of rule 13(1), that not being relevant here.

3. If no element of confidentiality (or of course, public interest immunity – but that only becomes relevant on the cross appeal) is asserted in the documents, routinely they will be produced for inspection without the need for a rule 13 hearing on the issue of necessity. As Lord Scarman said in *Air Canada v Secretary of State for Trade* [1983] 2 A.C. 394 at page 444:-

"It may well be that were there is no claim of confidentiality or public interest immunity or any objection on the ground of privilege, the courts follow a relaxed practice, allowing production on the basis of relevance. This is sensible, bearing in mind the extended meaning given to relevance in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co.* (1882) 11 Q.B.D. 55.'

4. If, however, confidentiality is asserted or any other ground of objection arises, rule 13 assumes relevance and it becomes necessary to decide whether inspection is necessary for the fair disposal of the action. As Lord Scarman had earlier said in *Science Research Council v Nasse* [1980] A.C. 1028 at pg.1089:-

'The only complicating factor is the confidential nature of the relevant documents in the possession of the party from whom redress is sought. The production of some of these may be necessary for doing justice to the applicants' case. If production is necessary, they must be produced. The fact of confidence however militates against general orders for discovery and does impose upon the Tribunal the duty of satisfying itself, by inspection if need be, that justice requires disclosure.'

5. Disclosure will be necessary if: (a) it will give "litigious advantage" to the party seeking inspection, *Taylor v Anderton* [1995] 1 W.L.R. 447 at p.462 and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source (e.g. *Dolling–Baker v Merrett* [1990] 1 W.L.R. 1205 at p.1214) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (*CEG Science Research Council v Nasse* [1980] A.C. 1028 at pg.1076 per Lord Edmond – Davies).

6. If a *prima facia* case is made out for disclosure, then as several of the speeches in *Science Research Council v Nasse* make plain, the court will first inspect the documents: (a) to ensure that inspection is indeed necessary (that very safeguard of itself makes the court generally readier to accept the threshold test for disclosure is satisfied) and (b) assuming it is so, to see if the loss of confidentiality involved can be mitigated by: (i) blanking out parts of the documents and/or (ii) limiting the disclosure to legal advisers only… those basic principles I have sought to distil from all of the many authorities which are placed before us. Several passages in the various judgments are relevant; it would however, be wearisome and, I think, ultimately unproductive to cite them…".

16. Mr. McGrath, S.C. in his submissions, sets out by way of summary, the application of these general principles to this case as follows:-

a. The burden lies on Byrne Wallace, as the party seeking inspection, to show that it is necessary for the fair disposal of the action.

b. In circumstances were the plaintiff has objected to the production of an unredacted copy of the settlement agreement on the grounds of confidentiality and irrelevance, it is required that the court decide whether inspection is necessary for the fair disposal of the action.

c. Disclosure will be necessary, if it will give a litigious advantage to the party seeking inspection and the material is not otherwise available to the party seeking inspection.

d. The reference to litigious advantage must be understood as relating in someway to an issue between the parties in the substantive proceedings. In order for inspection or disclosure of the redacted information to be appropriate, the redacted material must be relevant by reference to a pleaded issue in the case.

e. If a *prima facie* case is made out for disclosure; then the court will first inspect the documents to ensure that inspection is indeed necessary.

I pause at this point to note that the court adjudged it necessary to consider and, to inspect the documents, and duly did so.

f. If the court concludes that inspection is necessary, the court may consider whether the loss of confidentiality involved can be mitigated by blanking out parts of the documents and/or limiting the disclosure to legal advisors only.

g. If the redacted information is relevant, then confidentiality does not, of itself, provide a barrier to its disclosure.

h. The court is required to exercise some balance between the likely materiality of the redacted information to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials.

i. The confidence of third parties will be given added weight.

17. In considering the circumstances in which disclosure is necessary, in terms of Order 31, Kelly J. adopted the dicta of Lord Bingham, M.R. in *Taylor v Anderton* [1995] 1 W.L.R. 447 at pg.462:-

"The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not been produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and will gain no litigious advantage by seeing it. That, in my judgement, is the test."

18. It is clear from *Irish Press Publications Ltd. v Minister for Enterprise and Employment* [2002] 4 I.R. 110, that documents may not be discovered due to irrelevance, as well as for reasons of confidentiality. It is also the position, according to *G.E. Capital Corporate*

Finance Limited v Bankers Trust Company [1995] 1 W.L.R. 172, that aspects of a sentence may be redacted as long as the general sense of the sentence remains. The real test for redaction, however, appears to be whether the information is relevant, rather than confidential, as observed by Carroll J. in *Irish Press*. Clarke J. summarised the relevant principles applicable to discovery, or disclosure, in *Telefonica O2 Ireland Limited v Commission for Communications Regulation* [2011] IEHC 265 as follows, at para. 3.2. of the judgment:-

> "(1) In order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.
>
> (2) If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.
>
> (3) The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight….
>
> (4) In attempting to balance those rights, the court can seek to fashion an appropriate order designed to meet the facts of the individual case so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence asserted...".

19. I accept, as submitted by Mr. Gleeson, S.C., that the courts afford a lesser form of protection to assertions of confidentiality in contradistinction to privilege. Therefore, if the court is satisfied that it is necessary for the information to be disclosed and inspected in order to dispose fairly of the proceedings, and where issues of confidentiality arise; the court must engage in a balancing exercise, that is to reconcile the competing interests of the parties and, if appropriate, to take steps to mitigate the loss of confidentiality. The burden lies on Byrne Wallace to demonstrate that the information is necessary in terms of Order 31. Disclosure of the unredacted agreement will be necessary if it will give a litigious advantage to Byrne Wallace and if it is not otherwise available to the party seeking it. If a court decides inspection is necessary, it may seek to mitigate any loss of confidentiality by taking certain steps to this end.

Decision

Information Relating to the Plaintiff's Personal Finances
20. The plaintiff has agreed to disclose the clauses relevant to the plaintiff's personal finances subject to the caveat that the term 'reconciliation figure' be used, rather than the figure itself. I will therefore make an order for inspection in relation to clause 6, schedule 1 (part) and schedule 5 of the agreement, on the condition that this term be adopted. This is of course without prejudice to the plaintiff's right to assert privilege regarding any documents referred to in that category.

Co-Obligors/ Co-Borrowers
21. The plaintiff is willing to disclose the relevant clauses, but subject to the condition that the information in relation to the co-obligors is not disclosed in open court. This is the principle concern of the plaintiff. The plaintiff asserts that the defendant may plead, without necessarily referring to the specific clauses in question, but the issue does not end there. How can the defendant cross-examine in court at trial, if restrained in this fashion? This material, in my view, is relevant and is necessary in terms of Order 31, Rule 18 (2) and I do not accept, therefore, that the confidentiality outweighs the proper administration of justice. Whilst the plaintiff opposes the inspection on the basis of relevance, clearly the greater concern for the plaintiff is that of confidentiality. If the documents are relevant, confidentiality does not prevent their disclosure. Whilst it is the position that the court is required to exercise some balance between the materiality of the information and the degree of confidentiality attaching to the information, which is greater in the instance of third parties, it would appear to be too great a restraint on the defendant in cross-examination if the information were not to be disclosed in open court.

22. I will order the inspection of the information at clauses 8.9, 14.1, 14.2 and 15.3, with the condition that the names of the co-obligors should not be mentioned on the pleadings, or in open court, but may be referred to as 'AB' and so on, or in some other manner to be agreed between the parties.

Clauses 13.4, 13.5, 13.9 and 13.10
23. Solicitor for the plaintiff, Ms. Daly, avers in her affidavit, that the redacted portions of clause 13 contain information "in relation to the conduct of the proceedings, the application of any proceeds and the treatment of costs of the proceedings."

24. Mr. McGrath, S.C. objects to the inspection of these clauses. He contends that they are irrelevant, that Order 31, Rule 15 does not have application and that such would confer an unfair litigious advantage on the defendant. Mr. McGrath, S.C. further contends that the defendant has conflated litigious advantage— in context of inspection— and unfair litigation advantage and, he argues that they are two very different concepts.

Relevance
25. What is the test for relevance? It is clear that in order to satisfy the test, the material must enable the person seeking the disclosure to advance his case or damage his opponent's case. In *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd* [2011] 3 I.R. 654, Clarke J. refused to make an order disclosing the identity of a third party funder. He accepted that giving detailed information about the funding of an adversary would confer an unnecessary and disproportionate litigation advantage on the party seeking disclosure, which was not warranted by the need to preserve its legitimate entitlement to seek a third party funder costs order, should the circumstances dictate.

26. Clarke J. was speaking in a different context in *Thema* than in the present case, where there is no issue in relation to a third party funder. In *Thema,* the defendant argued that the court had jurisdiction to award costs against a third party funder and, therefore, the court had an ancillary jurisdiction to require the disclosure of the identity of the funders. Clarke J. was of the view that in order to give effect to the costs jurisdiction, the court had power to require the disclosure of the identity of third party funders prior to the proceedings, but that post-judgment disclosure would be equally effective and, that earlier disclosure would confer an unnecessary and disproportionate litigation advantage on the other party.

27. In *Persona Digital Telephony Ltd. v Minister for Public Enterprise* [2015] IEHC 457, the defendants sought disclosure of the litigation funding arrangement. The plaintiff objected on the grounds that the documents were confidential and privileged and that if disclosed to the defendants, would confer on them an unfair and disproportionate tactical advantage. Disclosure was ordered but was

limited.

28. The defendant contends that the matters in clause 13 (as referenced by Ms. Daly), are clearly relevant to the proceedings. It is submitted that provisions relating to the application of proceeds must be relevant to the question whether the settlement agreement was appropriate and/or operated to mitigate the plaintiff's losses.

29. On analysis of the jurisprudence, the courts have found that the disclosure of third party funding information, or of a litigation funding arrangement, is bound to confer a litigation advantage. Where the disclosure may confer an unfair and disproportionate litigation advantage, the basis of the need for production of the information for the fair disposal of the issue must be carefully examined. Litigious advantage must, in my view, relate to an issue between the parties and cannot mean giving a party knowledge of the other party's litigation tactics.

30. Byrne Wallace contend that inspection of these clauses is necessary to enable them to engage in an informed assessment of the plaintiff's case that the settlement agreement, in its terms, represent appropriate action on her part.

31. Ms. Daly deposes at para. 41(c) that the question for determination will be whether it was reasonable for the plaintiff to enter into the settlement agreement:-

> "whereby she…compromised her personal exposure to liabilities to NAMA totalling more than €900 million in return for the payment by her of the sum of approximately €37 million...".

The inference to be drawn from the above, according to the defendant, is that compromise of a potential exposure of €900 million in return for a payment of €37 million was reasonable.

32. Applying the relevant authorities, with particular emphasis on *Cooper Flynn v RTE* [2000] 3 I.R. 344, where Kelly J. applied *Taylor v Anderton* [1995] 1 W.L.R. 447, it is clearly stated that production and inspection will be necessary if disclosure of the material would provide the requesting party with a litigious advantage and where the information is not otherwise available. Order 13, rule 15 applies to the interlocutory stages of proceedings and therefore applies to the present application, in that this application concerns the fair disposal of a stage or cause of the matter. This is an application concerning the substantive issues and is not external to the substantive issues in the case in any meaningful sense.

Decision on Clause 13
33. The information in the present case, according to Ms. Daly's affidavit, is that of material relating to the conduct of the proceedings, the application of any proceeds and the treatment of costs of the proceedings. I have considered the material at clauses 13.4, 13.5, 13.9 and 13.10. Insofar as any of the clauses refer to the conduct of litigation, I am satisfied that this information is not relevant to the pleaded case and I find, on inspection of the unredacted information, that disclosure is not necessary for disposing fairly of the cause or matter or for saving costs in terms of Order 31, Rule 18(2). The defendant would gain no litigious advantage in seeing this material, while the disclosure of this type of information could confer an unfair and unnecessary tactical advantage on the defendant. Therefore, I am not satisfied to order the inspection by Byrne Wallace of clauses 13.4 and 13.5.

Clauses 13.9 and 13.10
34. In order to assess whether any of the clauses should be inspected in an unredacted form, it has been necessary to examine the pleaded case. I consider paras. 102 and 113 of the consolidated statement of claim to be apposite.

35. The plaintiff pleads at para. 102, that she had no option but to compromise the proceedings instituted by NAMA by way of the settlement agreement, that "the said compromise represented the best means reasonably open to the plaintiff to mitigate her loss". In effect, the plaintiff pleads, that insofar as she incurred any liability with NAMA and had to settle that liability, Byrne Wallace and Mr. Duggan are responsible for that state of affairs. She particularises her claim arising from the agreement at para. 113 of the consolidated statement of claim. The plaintiff particularised her claim arising from the settlement agreement at €37,094,268 with "costs and expenses, including tax liabilities, incurred in the implementation of compromise concluded with NAMA – unascertained and continuing".

36. The plaintiff pleads that this compromise represented the best means reasonably open to her to mitigate her loss and Byrne Wallace wish to interrogate that plea. In order to do so, it is contended that the defendant needs sight of the entire unredacted material.

37. Applying the legal principles, and having scrutinised the clauses, I conclude that these clauses are relevant to the pleaded case and that inspection is necessary to fairly dispose of the cause/matter.

38. In coming to this conclusion, I am satisfied that the material is not otherwise available and to refuse the order regarding these clauses would be to the litigious disadvantage of the party seeking the inspection.

The Order
39. I therefore make an order directing the plaintiff to permit inspection by Byrne Wallace and copies to be taken of clauses 6, 8.9, 13.9, 13.10, 14 and 15.3, subject to the condition that reference should be made to a 'reconciliation figure', rather than the actual figure referred to in clauses 6.3. and 6.5.

40. To mitigate any loss of confidentiality regarding the co-obligors, the names of each should not be used in the pleadings, or in court, and reference can be made to them by the initials 'AB' and so forth, or as agreed between the parties.

41. Such disclosure is subject to an implied undertaking that the material will not be used for any collateral purpose, but will be confined for use in the proper conduct of these proceedings.