The High Court

Commercial

Record No. 2011/4336P

Between

Ciara Quinn, Colette Quinn, Brenda Quinn, Aoife Quinn, Seán Quinn (Junior) and Patricia Quinn

Plaintiffs

And

Irish Bank Resolution Corporation Limited and Kieran Wallace

Defendants

And

Seán Quinn (Senior), Dara O'Reilly and Liam McCaffrey

Third Parties

JUDGMENT OF MR. JUSTICE MORIARTY, DATED 13TH JULY, 2012

GENERAL

1. Following upon prior Orders made by Kelly J. in these proceedings, Motions for Discovery of documents sought by the Plaintiffs against the First Defendant, and by the First Defendant against the Plaintiffs, together with a further Motion by the First Defendant against the Plaintiffs for Security for the costs of any such Discovery, were heard on 11th, 12th and 13th days of July, 2012. Judgment was reserved upon these applications, and was listed for 13th July, 2012. Finalisation of the written content of that Judgment was delayed by the requirement to consider the full terms of the Supreme Court Judgment in the case of Angela Farrell -v- The Governor & Co. of the Bank of Ireland, and other related proceedings, which addressed in some depth the matter of Security for Costs applications, and which was delivered on 10th July, 2012. What accordingly transpired was that a verbal indication of findings made on the respective Motions was communicated to the parties on 13th July, 2012, along with notification that this written Judgment would be made available in the week following. The salient matters at issue in the Statement of Claim, Defence and Counterclaim, and subsequent related pleadings are in their nature and scale extraordinary, vast and probably unique in this Jurisdiction. A helpful abridged version of these matters is set forth in the course of the Judgment of Charleton J., delivered on 29th February, 2011, as a preliminary Ruling on the issue of the availability to the Plaintiffs of a plea of illegality in contracts, and I am grateful to adopt the account of principal events and dealings that was there set forth.

2. Addressing firstly the respective Discovery applications, I have been appreciably aided by the availability of detailed written and oral submissions, in addition to lengthy Affidavits exchanged between the respective solicitors, with much correspondence between the respective firms involved detailing their mutual dealings. Just as the lengthy Pleadings between the parties have in the main been delivered with commendable expedition since the commencement of proceedings, the Affidavits and correspondence on Discovery disclose significant efforts over time between the respective solicitors to achieve some degree of consensus as to the scope of documentation sought on each application, and to avoid what will in any event be a formidable body of documentation becoming one of insurmountable dimensions. It was accepted, increasingly so over the course of the three days during which the Motions were heard, that much that was comprised in the various categories of documentation sought in each application was both relevant and necessary, and accordingly required to be disclosed. Such areas of discord as remained were reduced to appreciably more limited and manageable dimensions, often relating to the relevant dates of periods in respect of which documentation was required to be discovered. I do not think it is necessary to reiterate the accepted principles governing the ambit of Discovery, notwithstanding the vast and incrementally increased weight of the task apparent over the last two decades or so in major commercial cases. What is patently required is that, noting with approval the reference by Counsel for the Plaintiffs to the inherent need for professional honour on each side in making Discovery, all documentation that is properly relevant and necessary to the party seeking it is in each instance discovered, whilst so far as possible restricting the burden of making such Discovery to limits that even with the technology now available are manageable, an aspiration easier to enunciate than to achieve. I shall accordingly proceed to deal with the remaining aspects of controversy on each application, and will address firstly the First Defendant's Discovery application against the Plaintiffs, which although heard and argued subsequent to the cross-Motion, was considerably more restricted in scope and subsisting degree of differences between the respective legal advisers.

DISCOVERY SOUGHT BY THE FIRST DEFENDANT

3. As indeed transpired to be the case with the Plaintiffs' Discovery Motion against the First Defendant, it was acknowledged between the parties that Discovery in general terms was relevant and necessary, and what was in this instance an appreciably more truncated area of disagreement had by the hearing of the Motion been narrowed to two of the sixteen categories sought, and primarily related to the temporal limits to be imposed. As will be the case in relation to the First Defendant's Motion, I shall confine consideration to these two categories, and the categories in which agreement has been achieved can readily be incorporated in the Order to be made.

4. Firstly, as to Category No. 8, entitled *"Documents referring to, recording or evidencing inter-company loans made between Quinn or related entities"*, the First Defendant seeks such documentation within a time-frame from January, 2007, to January, 2009, in response to which the Plaintiffs, while prepared to make such Discovery, seek to limit the period to one from September, 2007, to January, 2009. Both on Affidavit and in argument on the Motion, the First Defendant contended that relevant documents would have antedated a September, 2007, commencement date, given the level of dispute between the parties as to the nature of funding provided by the First Defendant. I have noted the Plaintiffs' allegation that following full disclosure in September, 2007, of the full extent of the Quinn Contracts for Differences position in Anglo, subsequent lending thereafter was to the knowledge of Anglo used by Quinns to meet margin calls on their positions, a version subsequently controverted by the First Defendant's contention that a preponderance of such lending was deployed for legitimate transactions, including the meeting of inter-company loans within the overall Quinn Group. The First Defendant indeed pointed to portions of the Plaintiffs' Statement of Claim, in particular Paragraph 28, as in any event contending that the required funding in and prior to 2007 was provided by inter-company loans within the Quinn Group.

Given that the First Defendant has no access to internal Quinn documents, it was viewed by it that the knowledge of the Plaintiffs in relation to these matters was crucial, insofar as that was likely to be apparent from such related documentation as was retained by them. The Plaintiffs' response was that it was only on foot of the disclosure at the meeting of 11th September, 2007, that funds were thereafter advanced to satisfy margin calls on contracts for differences, and any funds advanced prior to that did not relate to matters in issue in the proceedings. Applying the principles referred to earlier, I am of the view that the relevant period should run from 1st January, 2007, to 31st January, 2009: the marginal extension of eight months sought by the First Defendant appears to me responsibly curtailed, likely to entail documents of realistically likely relevance, and not inordinately burdensome on the Plaintiffs.

5. Secondly, and as the only other Category in which agreement has not been reached, is Category 13, in which the First Defendant seeks "*documents referring to the financial position of the Quinn Group in 2008, and in particular the potential breaching by the Quinn Group of financial covenants in June, 2008*". While accepting the relevance of this Category in general terms, the Plaintiffs sought to narrow the request by restricting it to *"documents referring to the financial position of the Quinn Group in 2008 referencing the potential breaching by the Quinn Group of its financial covenants in June, 2008, as pleaded in Paragraph 61 of the Statement of Claim and not in respect of any other period"*. In response, the First Defendant contended for *"documents recording or discussing the risk of financial default by the Quinn Group (as defined in the Statement of Claim) in March, 2008, and in particular the potential breaches by Quinn Group Limited of financial covenants in June, 2008".*

6. The genesis of this request was the plea contained in Paragraph 61 of the Statement of Claim, which stated as follows:

> *"By June, 2008, financial pressure was being brought to bear upon NI by its financiers, including the banks and bondholders who had independently loaned to Quinn Group. As a result, it was indicated to senior management (including Dara O'Reilly, Sean Quinn Snr. and Liam McCaffrey) by the banks and bondholders that, in the absence of additional funding, NI would be compelled to make a detailed disclosure of the wider investment holdings of the Quinn family. This would have included the disclosure of the CFD position in Anglo shares. Following further discussions between Pat Whelan and Liam McCaffrey, it was agreed by them that it would be mutually detrimental if this occurred."*

The reference to NI is to the Northern Ireland Quinn Company. In argument, the paragraph was more succinctly expressed on behalf of the First Defendant as an allegation that the Plaintiffs or the Quinn companies were in June, 2008, experiencing particular financial pressures, which motivated some of the impugned actions by the First Defendant. On behalf of the First Defendant, it was argued that the relevant period for this Category should extend back beyond the month of June, 2008, to a broader knowledge of the Quinn financial position, not to encompass the entire period of CFD transactions, but to the whole of 2008. This was disputed on behalf of the Plaintiffs, contending that to go back further than June, 2008, was tantamount to fishing. It appears to me that extending the period to the entire calendar year of 2008 is reasonable, proportionate and unlikely to entail inordinate additional expense and inconvenience to the Plaintiffs.

DISCOVERY SOUGHT BY PLAINTIFFS

7. Regarding the Discovery sought by the Plaintiffs from the First Defendant, what had initially been comparatively wide areas of disagreement between the parties in relation to the various categories of documentation sought had been considerably narrowed by the time of the hearing of the Motions. As had been done with the First Defendant's Discovery Motion against the Plaintiffs, a helpful one page graph had been prepared, indicating in summary fashion the relevant categories of documentation that remained in contention, and the proposals made by each side with a view to reaching consensus, or at least narrowing the ambit of difference. I append as schedules to this Judgment copies of each of these one page documents, which had been in each instance completed on both sides of the paper.

8. The categories of documents sought by the Plaintiffs from the First Defendant were six in number, and as with the First Defendant's Motion I will refrain from setting forth particulars of categories that were either wholly or partly agreed. Category 1 was subdivided into two parts, with Part A being fully agreed in relation to both content and operative dates. As regards Category 1 (B), some differences arose between the parties relating to both the description of the documents sought and the range of dates of documents to be discovered. Having appraised the written and oral submissions, in addition to the lengthy Affidavits, and correspondence exhibited in them, I accept the First Defendant's argument that the phrase "*any repayment proposals*" is neither necessary nor relevant, and further take the view that the operative dates should be from 1st September, 2007, to 31st March, 2009. Accordingly, what is required to be discovered in relation to that sub-Category for the period comprised within those dates are documents relating to the purpose or nature of, or which evidence the motivation for, loan facilities made by the First Defendant to the Plaintiffs.

9. With regard to Category No. 2, the description of the relevant documents was fully agreed as comprising documents evidencing the First Defendant's knowledge of the Quinn stakeholding/CFD positions in its shares, and/or relating to the potential effect of the disposal of the stakeholding/CFD positions on the First Defendant's share price. It was agreed that the commencement date in relation to such documentation should be 1st January, 2007, but a measure of difference, although subsequently narrowing, was apparent between the parties as regards the cut-off date. Having considered the arguments and documentation, I am persuaded by what was contended for on behalf of the Plaintiffs to advance that date to 31st March, 2009.

10. With regard to Category No. 3, while the content of what was sought was in essence agreed as being relevant and necessary, some difficulty resulted from the proposed description of the category on behalf of the Plaintiffs, which indeed appears to me to be expressed in a somewhat prolix fashion. Having considered all that was advanced, I accept the proposal made by the First Defendant that the category should be sub-divided into (A) and (B). For Category 3 (A), some differences arose in relation to the dates applicable, and I am of the view that a period from 1st March, 2008, to 31st December, 2009, meets the justice of the case, having regard to what seems to me a realistic prospect of material documentation arising in 2009. Accordingly, Category 3 (A) will extend to documents generated between those dates referring to or evidencing the procurement by Anglo and the execution by the Plaintiffs of the personal guarantees (including the original executed versions of those guarantees) referred to at Paragraph 76 of the Statement of Claim. As regards Category 3 (B), I agree with the First Defendant that this should be separately designated as documents relating to actions on the part of the First Defendant to seek that the Plaintiffs be provided with retrospective legal advice on those personal guarantees. No date limitation is required in this regard.

11. Turning to Category 4, both the description and relevant dates are fully agreed between the parties, and may be set forth as documents generated from 1st January, 2003, to 31st March, 2009, referring to or evidencing the procurement by the First Defendant, and the execution by the Plaintiffs, of the share pledges referred to at Paragraphs 65 and 66 of the Statement of Claim, including the original executed version of the share pledges.

12. As to Category 5, although it was in general terms agreed that some documentation relating to knowledge on the part of Directors of the First Defendant of financial difficulties facing the bank was relevant and necessary, it proved difficult to reach agreement on

both dates and appropriate description. Having again considered the Affidavits and submissions, I consider that the appropriate wording and dating should extend to all board minutes and relevant documentation circulated to board members, referring to financial difficulties facing the First Defendant, from 1st September, 2007, to 31st December, 2008. In preferring a general reference to relevant documentation circulated to board members, as opposed to a reference solely to board packs, I believe the former designation is more satisfactory and inclusive from the standpoint of what is sought by the Plaintiffs, although it will plainly include such board packs.

13. The final category that arises is No. 6. Although considerable store was set on this in argument on behalf of the Plaintiffs, I have concerns as to its extent, imprecision and appreciably speculative nature. I also attach some weight to the First Defendant's argument that there are difficulties in finding how the items sought relate directly to matters addressed in the course of the extremely extensive pleadings. Having regard also to the burden that full compliance would unjustifiably impose upon the First Defendant, I am persuaded by the arguments on behalf of the First Named Defendant that I should refuse to order Discovery under this category. I am however mindful of the obvious importance to the Plaintiffs of what was described at the hearing as the O'Connor Report, which appears to have been prepared in a number of versions or iterations, and lest there should be any doubt in relation to these falling within or without preceding categories, I order that all such versions or iterations be included amongst the Discovery to be made by the First Defendant to the Plaintiffs.

THE FIRST DEFENDANT'S CLAIM AGAINST THE PLAINTIFFS FOR SECURITY FOR THE COSTS OF DISCOVERY

14. This issue raises two discrete questions: firstly, upon construction of relevant provisions of Statutes, and of the Rules of the Superior Courts, are the Plaintiffs, as natural persons resident within Ireland, excluded from any potential liability on foot of the application? If so, the matter ends there. If not, and if it is the position that this Court has a discretion whether or not to order such security, how should that discretion be exercised on the facts of the present case?

15. Taking first the initial question, before referring to the robust arguments advanced on both sides, it is well to acknowledge one undoubted area of common ground. This is to the effect that it is agreed that under Order 29 of the Rules of the Superior Courts, providing generally for applications for security for costs of an action, it is not possible to obtain an Order for such security against natural persons within the jurisdiction, such as the Plaintiffs. However, Mr. Murray SC on behalf of the First Plaintiff argues that a different situation obtains under Order 31, Rule 12 of the said Rules of the Superior Courts, which specifically empowers the Court in a context of ordering Discovery to further order security for the costs of that Discovery. This, it was argued, was not dependent on the residence or location of the party to be ordered, nor dependent on whether that person was a Plaintiff or Defendant, and was specifically limited to the costs of Discovery as opposed to costs generally. Before addressing any criteria which might later have to be considered in the context of a discretionary exercise, Mr. Murray noted that the Plaintiffs had not contended that they were impecunious or without funds to discharge such sum as might be fixed for security, and that any diminished financial status on the part of the Plaintiffs was not due to any wrongdoing by the First Defendant, but attributable to the Third Party, Sean Quinn (Snr). It was further the position that Section 390 of the Companies Act, 1963, permitted security for costs to be ordered against an Irish limited company, but only when such a company was a Plaintiff in the relevant litigation, and where it established that it would be unable to pay the Defendant's costs. Mr. Murray acknowledged that his application was an unusual one, but this was in the context of a case which itself had many unusual features.

16. In reply on behalf of the Plaintiffs, Mr. Fanning, B.L, submitted that the relief sought against his clients was novel and without precedent. Despite present and prior related legislation going back far into the 19th Century, the First Defendant had been utterly unable to cite any prior precedent of such an Order having previously been made, against a natural Irish resident. He further argued that such a precedent might be invaluable to powerful Defendants seeking to resist claims such as might be brought on behalf of a brain-damaged child of an impoverished family, which included requests for Discovery. Much mischief could thereby be worked in favour of large corporations or insurers. The First Defendant was seeking to propound an unreal distinction, given that it was undoubted that no security for the entire costs of the action under Order 29 could in the circumstances be ordered against his clients. Insofar as the First Defendant sought to place reliance upon Framus Limited -v- CRH plc 2004 2 I.R.20, there the Plaintiff who was ordered to provide security for costs of Discovery in the High Court and Supreme Court was a limited liability company, and there was no reference throughout the lengthy Judgment of Murray J. in the Supreme Court to clarifying any misapprehension or ambiguity in relation to the legal personality of the party ordered to pay costs of security. Counsel on both sides understandably sought to place somewhat self-serving interpretations upon particular passages of the Judgment, but it would appear to remain unresolved whether or not, had Framus Limited been in fact an Irish natural person, a like Order would have been made. A similar view in this regard is expressed in both of the Irish text books dealing with civil procedures in the High and Supreme Courts, *"Civil Procedure in the Superior Courts", by Delaney and McGrath, and "Discovery and Disclosure"*, by Abrahamson, Dwyer and Fitzpatrick.

17. In addressing this first issue, some assistance is to be derived from the very recent Judgment of Clarke J., already mentioned, in Farrell -v- Bank of Ireland (and other connected litigation) delivered on 10th July, 2012. While much of the Judgment deals with the individual facts of the cases involved, it also comprises a valuable and helpful review of security for costs generally. The outcome of the case itself, in which in fact the Plaintiff was directed to provide security for what was estimated as close to the entirety of costs under consideration, in order to proceed with her Appeals against numerous High Court Orders made against her, is scarcely of guidance in the present case. This is for two reasons. Firstly, Ms. Farrell, a solicitor who conducted her own various claims as a lay litigant, was not, as in the instant case, a party seeking relief in a Court of first instance, but an Appellant to the Supreme Court who had lost resoundingly in the High Court, a category in relation to which a significantly different jurisprudence had for many years been applied. In dealing with and expanding upon these earlier cases, Clarke J. instanced by way of an analogy from Criminal Law, the position of an accused person seeking bail before Trial, in regard to which a relatively liberal legal regime applied, as opposed to seeking bail pending Appeal after conviction as a person no longer presumed innocent, in regard to which significantly sterner rules applied. Secondly, Ms. Farrell was also found to have conducted her proceedings in the High Court, and in the initial stages in the Supreme Court, in a fashion that was markedly oppressive and vexatious, involving in at least one instance attempted intimidation, apart from non-compliance with proper Court procedures. Neither of these factors could be found on any appraisal to apply to the Plaintiffs in these proceedings.

18. Although significant portions of the Judgment relate specifically to circumstances in which relevant applications for security are brought before the Supreme Court, other passages helpfully address more general aspects of the jurisdiction to order security for costs, that are applicable to the High Court sitting as a Court of first instance. At page 11, at Paragraphs 4.1 and following, Clarke J. notes two material distinctions between the different circumstances in which security may be sought, firstly, as noted, between an Order sought before a High Court Trial at first instance, and an Order sought in respect of the costs of an Appeal to the Supreme Court, and secondly, between an Order sought against a corporate party with limited liability, on one hand, and an Order sought against a personal party on the other.

19. Clarke J. then notes a connection between the jurisdictions in regard to all of these areas, but also differences between them. He observed that in Chapter 12 of the standard textbook on civil procedure, the book by Delaney and McGrath already referred to, the

general topic of security for costs had separate sections, respectively dealing with *"security for costs against individual Plaintiffs"*, *"security against corporate Plaintiffs"* and *"security for costs of an applicant to the Supreme Court"*. At the start of the Chapter, it is suggested that the concept of ordering security for costs effectively involves balancing the right of a Defendant to recover costs if he successfully defends a claim, against the right of a Plaintiff to have access to the Courts. This latter right was in the view of Clarke J. preferably expressed in the particular context as a right to fair process, or to have litigation fairly conducted, for reasons that he later explains in the Judgment.

20. The Judgment then proceeds to review these competing considerations for some pages, and then sets forth at 4.17 and immediately succeeding paragraphs a number of observations which I believe to be of significant assistance in the present case.

> *"Against that background it seems to me that the jurisprudence in relation to all of the areas where security for costs is considered (as referred to earlier) starts from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. The reasoning behind that view is that, if it were otherwise, all impecunious parties might, in substance, be shut out from bringing cases or pursuing Appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional factor at play before an Order for security for costs can be made.*
>
> *The jurisprudence in respect of corporate parties is relatively well settled. It is clear that the underlying rationale behind the provision of Section 390 of the Companies Act, 1963 is to the effect that the ordering of security for costs against a corporate Plaintiff (who would be unable to pay the Defendant's costs if the Defendant were to succeed) is seen as deriving from the limited liability attaching to the company concerned. It has in some of the cases been described as the price paid for limited liability. As pointed out by Barrington J. in Lismore Homes Limited -v- Bank of Ireland Finance Limited 1999 1IR 501 (at p. 507) 'insolvent limited liability companies are in a different category simply because the liability of their shareholders is limited'.*
>
> *The logic behind that rationale is that parties, such as shareholders or in an appropriate case, creditors, behind a company will get the benefit of the company being successful in litigation but will be spared the adverse cost consequences of the company being unsuccessful, for the premiss on which security for costs is ordered under Section 390 is that those costs will not, in practice, be paid if the company loses. Why should the parties who are going to benefit by a successful action not also be exposed to the costs of failure? That is the underlying rationale for corporate security for costs. There are, of course, a range of other factors that need to be taken into account such as the establishment of an arguable defence, and the existence of special circumstances in accordance with the jurisprudence. It is not necessary to consider those factors in this case.*
>
> *So far as individual Plaintiffs are concerned, the jurisprudence suggests that the High Court will not order security against an individual Plaintiff unless that Plaintiff is out of the jurisdiction (which in this context now includes, in practice, the European Union in respect of EU nationals). See Proetta -v- Niel 1996 1IR 102 and Pitt -v- Bolger 1996 1IR 108. The rationale behind that jurisprudence is that a Plaintiff, though impecunious, must be entitled to bring and pursue a case. The awarding of security for costs against Plaintiffs from outside the relevant area is based on the difficulty of recovering costs where the Plaintiff is not readily amenable to the process of the Irish Courts or other Courts which, under the provisions of Regulation 44/2001, give a high level of recognition to Orders (including cost Orders) of the Irish Courts.*
>
> *It does however, seem to me that there are important differences of principle between the position that pertains before a Court of first instance and that which arises in respect of an Appeal. It is well settled that it is, in the absence of some significant excusing factor, essential that an application for security for costs before a Court of first instance be brought at an early stage. It is rightly considered that inducing a party to expend its own time and resources in bringing litigation close to Trial, only to spring an application for security for costs at a late stage, would in itself be an unfairness which may well disentitle a party, otherwise entitled, to an Order for security. Therefore, at the stage when the Court will have to consider granting security in respect of a first instance Trial, the proceedings will be at an early stage. In such circumstances the Courts in this jurisdiction and in other Common Law jurisdictions, have consistently warned against the danger of attempting to predict the likely outcome of proceedings, given the experience that cases quite frequently look very different when the evidence has been heard and tested at Trial, than they might have appeared at an early stage in the process. It is for that reason that the Court does not assess the relative strength of the parties' case, but simply determines whether the Defendant has shown a prima facie defence."*

21. Lastly, in relation to the Judgment of Clarke J., he notes at 4.22, after reviewing a number of factors, *"it is for these reasons that the Courts have not considered it appropriate to order security against a resident Plaintiff. In any event, it seems to me, for the reasons which I set out in Salthill Properties -v- Royal Bank of Scotland & Ors 2010 IEHC 31, that if there are to be circumstances in which a Court of first instance is to direct security for costs against an individual Plaintiff within the jurisdiction (or the EU), the matter requires a considered Rule change."*

22. While the aforesaid observations of Clarke J. are very substantially in a context of security for costs applications other than as set forth in Order 31, and are not binding in regard to resolving the arguments at issue in the instant case, I nevertheless attach significant weight to his observations as quoted, including his reference that in all areas where security for costs is considered, the jurisprudence should start from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. I also heed fully his remarks in relation to the greater willingness of Courts to make security for cost Orders against corporate parties, as opposed to natural persons, and the rationale for this.

23. In this context, I am asked by the First Defendant to hold that the procedure set forth in Order 31 is a free-standing mechanism, devoid of any of the limitations or inhibitions provided in the much more far-reaching Order 29. No prior instance whatsoever of such an Order being made has been drawn to my attention, going back as far as 1905 or even beyond. Had Order 31 in regard to Discovery, with its Rule relating to security for Discovery costs, not formed part of the Rules of the Superior Courts, the provisions of Order 29 in relation to security for costs generally would presumably have applied to seeking security for Discovery costs. Without real clarity on the matter, and echoing the reluctance of Clarke J. to seek to impose Judge-made law in a situation where either legislation or Rules of Court would be vastly preferable, particularly in the context of a case of such enormous dimensions as the present one, I am not disposed, even without getting into rules of construction, to interpret my entitlements as extending to granting the First Defendant this relief on the basis sought.

24. If I am wrong in that conclusion, the correct legal view is that I should exercise on the matter a free-standing discretion in accordance with Framus.

25. In the Framus case, when heard at first instance in the High Court by Herbert J., the Trial Judge set out a non-exhaustive list of matters to which the Court might have regard in deciding to order security for the costs of Discovery. These were matters which were substantially approved by Murray J. in the Supreme Court when the matter was appealed. As set out at page 89 of Abrahamson, Dwyer and Fitzpatrick on Discovery and Disclosure, already referred to, those factors may be summarised as follows:-

> (1) The apparent strength of the case of the party seeking Discovery, having regard to the pleadings and Affidavits;
>
> (2) any evidence before the Court of the burden, in terms of time and expense, of complying with an Order for Discovery;
>
> (3) the likely detriment to the party seeking Discovery should he be unable to provide security for costs;
>
> (4) any evidence that the inability to provide security for costs is due solely or principally to the actions of which complaint is made in the proceedings;
>
> (5) the likely proportion of the costs of the proceedings which will be attributable to the costs of Discovery;
>
> (6) the strength of the case for Discovery and the stage of the proceedings at which it is sought;
>
> (7) whether the Discovery sought is relevant to any issue of major public importance raised in the proceedings;
>
> (8) whether an Order for security for costs has been made pursuant to Order 29 of the Rules of the Superior Court, or Section 390 of the Companies Act, 1963.

26 I have considered these factors in the context of the present case. Regarding (1), Counsel on both sides tended to berate each other as to the inherent incongruities of substantive matters raised in both Statement of Claim and Defence and Counterclaim. I bear in mind that, while I understand it to be under Appeal, Charleton J. has found in favour of the Plaintiffs as regards one of the most pivotal aspects of their claim remaining entitled to be pursued, and I think it unwise at this juncture to take any determinative view on this matter. As to (2), I have noted the views advanced by Ms. Harty in relation to the cost and difficulty of Discovery sought against the First Defendant, suggesting figures ranging from €600,000 to €1 million. Having regard to further progress since then made by agreement with a view to lessening the burden, and to the limitations on the overall Discovery sought, that I have ruled on, it seems to me that the Plaintiffs should not be penalised in this regard. Regarding (3), it was perhaps the least persuasive part of Mr. Fanning's argument when he resisted Disclosure of the Plaintiff's resources on a basis that he was not required to provide such information, and that were he to do so the Plaintiffs apprehended that information being strategically abused by the First Defendant. It is nonetheless patent that the Plaintiffs would be gravely disadvantaged if the Discovery sought and ordered was not available to them. I also bear in mind in this regard that the First Defendant has sought and obtained extensive Discovery against the Plaintiffs, and does not face any challenge by way of security for the costs of such Discovery. As to (4), very different versions were advanced in argument and in the pleadings as to who should be held liable for the alleged enormous losses of the Plaintiffs, and I do not view it as appropriate to look on this factor as determinative. Regarding (5), the diminished but still very substantial sum that will be entailed in the First Defendant making Discovery can never be regarded as a light matter, but in the context of the gigantic sums at issue in the proceedings it falls in relative terms to be viewed as much more limited than would otherwise be the case. As to (6), it was properly acknowledged in argument by Mr. Murray on behalf of the First Defendant that this factor clearly favours the Plaintiffs. Regarding (7), although a somewhat limited and technical meaning was contended by the First Defendant to apply to "*major public importance*" in this context, it would be difficult to contend otherwise than that the case is of major public importance, given its extraordinary facts, the grave losses occasioned to so many persons through the changed fortunes of both Anglo Bank and the Quinn Group, and, without seeking to impugn either the Plaintiffs or the original principals of the First Defendant, such findings as have already been made in these proceedings by Charleton J. and Dunne J. No (8) appears to have no application or relevance. Even in the context of this somewhat cursory review of what was regarded as non-exhaustive factors, and bearing in mind other aspects noted in this Judgment, including the remarks of Clarke J. in the very recent Supreme Court Judgment, I am of the view that on balance the security sought should not be ordered.

27. With regard to any outstanding matters, and after the parties have had an opportunity to consider this Judgment, I will hear Counsel on Friday, 27th July next. Such matters would seem likely to include time-frames for completion of the Discovery ordered, in addition to a determination as to how many Affidavits will require to be sworn in regard to the six Plaintiffs. Although it was initially contemplated that the matter of a Motion for Directions would be addressed at this juncture, it was proposed by Counsel on both sides that this aspect would preferably be left to Kelly J. as the Presiding Judge in the Commercial Court, a view with which I am fully in agreement.

Plaintiffs' Motion for Discovery against the First Named Defendant

Category	***Plaintiffs- Terms of Category sought***	***First Defendant-Terms of category sought***	***Status/ Difference***
1.	(a) Lending files in respect of loan facilities made by the First facilities made by the First Defendant to the Plaintiffs from 1 Defendant to the Plaintiffs from 1 January 2003 to 31 August 2007 (b) Documents referring to, relating to or evidencing any loans/advances (or motivation for same) made by the First Defendant to the Plaintiffs (including but not limited to the making of the loans referred to at 72 of the Statement of Claim) and/or any repayment proposals from 1 September 2007 to 7 March 2011.	(a) Lending files in respect of loan facilities made by the First facilities made by the First Defendant to the Plaintiffs from 1 Defendant to the Plaintiffs from 1 January 2003 to 31 August 2007 (b) Documents relating to the purpose or nature of, or which evidence the motivation for, loan facilities made by the First Defendant to the Plaintiffs from 1 September 2007 to 31 March 2009. ***[Extended date offered in McCann's letter dated 13 April 2012]***	***(a) Agreed.*** ***(b) Dates range disputed. The First Defendant also maintains that the phrase 'any repayment proposals' is not relevant to the case as pleaded by the Plaintiffs.***

2.	Documents generated between 1 January 2007 and **31 March 2009** evidencing the First Defendant's knowledge of the Quinn stakeholding/CFD positions in its shares and/or relating to the potential effect of the disposal of the stakeholding/CFD positions on the First Defendant's share price.	Documents generated between 1 January 2007 and **31 October 2008** evidencing the First Defendant's knowledge of the Quinn stakeholding/CFD positions in its shares, and/or relating to the potential effect of the disposal of the stakeholding/CFD positions on the First Defendant's share price.	***Terms of category agreed save for cut off point for the discovery.***
3.	Documents generated between 1 January 2008 and 31 January 2010 referring to or evidencing the procurement by the First Defendant and the execution by the Plaintiffs of the personal guarantees (including the original executed versions of these guarantees) referred to at paragraph 76 of the Statement of Claim and/or actions on the part of the First Defendant to seek that the Plaintiffs be provided with advice on those personal guarantees as is particularised in paragraphs 95 to 100 of the Statement of Claim.	(a) Documents generated between 1 July 2008 and 31 October 2008 referring to or evidencing the procurement by Anglo and the execution by the Plaintiffs of the personal guarantees (including the original executed versions of these Guarantees) referred to at paragraph 76 of the Statement of Claim. (b) Documents relating to actions on the part of the First Defendant to seek that the Plaintiffs be provided with retrospective advice on those personal guarantees.	***Not agreed.***
4.	Documents generated from 1 January 2003 to 31 March 2009 referring to or evidencing the procurement by the First Defendant and the execution by the Plaintiffs of the share pledges referred to at paragraphs 65 and 66 of the Statement of Claim, including the original executed version of the share pledges.	Documents generated from 1 January 2003 to 31 March 2009 referring to or evidencing the procurement by the First Defendant and the execution by the Plaintiffs of the share pledges referred to at paragraphs 65 and 66 of the Statement of Claim, including the original executed version of the share pledges.	***Agreed.***
5.	Documents referring to, relating to or evidencing the awareness of the First Defendant's Board of Directors (and its individual executive Directors, Chairpersons and senior account managers) of the financial difficulties facing the First Defendant from 1 September 2007 to 1 April 2009	All board minutes and relevant documents from board packs referring to financial difficulties facing the First Defendant from 1 September 2007 to 31 October 2008	***Not Agreed***
6.	Documents referring to, relating to or evidencing the concerns of the First Defendant's Board of Directors (and its individual Directors and Chairperson) and account managers as to the financial/solvency position of the Quinn group of companies(to include but not limited to: the Quinn Group, the Quinn Investments Sweden Group and/or the QF group of companies)		***Refused by the First Defendant. No alternative proposal made by First Defendant.***

Category	Category sought in Notice of Motion	Status	Plaintiffs' Alternative/s	First Defendant's Position
8.	Documents referring to, recording or evidencing inter company loans made between Quinn or related entities from January 2007 to January 2009.	Disputed	Document referring to, recording or evidencing inter company loans made between Quinn or related entities from ***1 September 2007*** to 31 January 2009	
9.	Documents generated between October 2005 and January 2009 referring to or recording the share price of the first defendant between October 2005 and January 2009.	Agreed	Documents generated between October 2005 and January 2009 referring to or recording the share price of the first defendant between October 2005 and January 2009 ***which are not documents of public record.***	Plaintiffs' alternative wording

13.	Documents referring to the financial position of the Quinn Group in 2008 and in particular the potential breaching by the Quinn Group of financial covenants in June 2008.	Disputed	Documents referring to the financial position of Quinn Group in 2008 referencing the potential breaching by Quinn Group of financial covenants in June 2008 in so far as same relate to the potential breaching by Quinn Group of its financial covenants in June 2008 as pleaded in paragraph 61 of the statement of claim and not in respect of any other period.	Documents recording or discussing the risk of financial default by the Quinn Group (as defined in the statement of claim) in 2008 and in particular the potential breaching by Quinn Group Limited of financial covenants in June 2008
16.	Documents which were or are in the possession of the plaintiffs referring to the financial position of the first defendant during 2007 and 2008.	Agreed	Documents which were or are in the possession of the plaintiffs referring to the financial position of the first defendant during 2007 and 2008 ***and which are not documents of public record.***	Plaintiffs' alternative wording