THE HIGH COURT

[No. 2013/5535 P]

BETWEEN

DAVID COLGAN, MARK COLGAN, DAVIS COLGAN, PATRICK RYAN, PHILIP MONAHAN AND FINIAN MCDONNELL

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND NATIONAL ASSET MANAGEMENT AGENCY

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on Friday 20th day of January, 2017

Introduction

1. This is an application for discovery of reports of inquiries furnished to the first named defendant about alleged overcharging of interest in respect of:-

> (i) facilities which the plaintiffs had with the first named defendant (successor to Anglo Irish Bank) from January, 1999 to November, 2016 when the plaintiffs discharged their indebtedness;
>
> (ii) the derivative contract as pleaded in para. 3 of the amended Statement of Claim delivered on 27th November, 2015 and which in summary relates to a period from October, 2007 to October, 2010.

Agreed Discovery

2. The plaintiffs and each of the defendants exchanged requests for discovery and all categories are the subject of agreements to make voluntary discovery as the Court was told when the plaintiffs' motion came before me on 16th December, 2016. At that time counsel for the plaintiffs (Mr. Ryan) outlined the nature of the plaintiffs' claim. The Court having noted the somewhat historical nature of a large part of the claim suggested that the parties consider preparing something like a scott type schedule in order to identify the disputed figures in detail. Considerable time and cost for the parties and the Court could be saved by adopting something along those lines.

3. Senior counsel for the first named defendant (Mr. Fitzpatrick) reverted on 21st December to indicate that the first named defendant did not wish to proceed with that suggestion while pointing out that the plaintiffs bear the burden of proving the overcharging and loss thereby incurred by the plaintiffs. The motion was then adjourned and came on for hearing which concluded at 4.30pm yesterday evening, 19th January, 2017.

Narrowing of the category

4. During the course of the hearing yesterday I asked counsel for the plaintiffs whether there was any merit in the plaintiffs seeking anything other than the actual reports as opposed to communications about such reports. Suffice to say that counsel for the plaintiffs agreed to confine the application to the actual reports in respect of the said facilities and derivative contract and the hearing of the motion proceeded on that basis.

Adversarial System

5. It is a feature of this application that the first named defendant relies very much on the distinction between the adversarial and inquisitorial systems for the administration of justice. Counsel for the first named defendant emphasised that it had no obligation to assist the plaintiffs to establish their claims. Moreover, he submitted that the plaintiffs could not establish direct relevance of the reports to the plaintiffs' claim, although he acknowledged that there may be an indirect relevance of any report which refers to overcharging of interest to the plaintiffs if there are such reports.

6. It was further submitted that the factors to be taken into account in calculating interest will not be affected by a report published after the event and therefore there is no direct relevance.

7. Senior counsel also mentioned that the plaintiffs will get everything that is necessary (within the meaning of that term for discovery applications) in the discovery already agreed to be made within sixteen weeks from the latest letter from the first named defendant's solicitors dated 12th January, 2017 concerning the making of discovery. Revised category "G" in the letter of 14th September, 2016 from the first named defendant solicitors was particularly referenced and that reads:-

> *"All documentation evidencing or recording the calculation and charging of interest rates applicable under:-*
>
> *(i) The derivative agreement generated from the 6th June, 2007 to the 1st November, 2010 and;*
>
> *(ii) The loan facility generated from the 1st January, 1999 to the 13th of December, 2010;*
>
> *the subject matter of these proceedings"*

The Law

8. The Court of Appeal in *BAM PPP v. NTMA* [2015] IECA 246 reviewed the law and conveniently summarised nine principles which are applicable to discovery in procurement review type proceedings and more particularly a challenge under the European Communities (Public Authorities (Contracts) Review Procedures) Regulations 2010, as was the subject of those review proceedings. Those principles lead the Court of Appeal at paras. 35 and 36 of its judgment to repeat the words of Brett L.J. in *Peruvian Guano* (1882) 11 QBD 55 at 6314 in order to determine whether the documents are relevant and had to be discovered:-

"It is necessary to consider what are the questions in the action: the Court must look not only at the statement of claim and the plaintiff's case but also at the statement of defence and the defendant's case"

The Pleadings in these Proceedings
9. It is clear from the amended Statement of Claim that the way by which interest described in the binding agreements was calculated and applied by the first named defendant is a significant issue for the plaintiffs' claim (see para. 17) and the reliefs claimed specifically at prayer number seven which seeks a declaration on this issue.

10. The Defence to the amended Statement of Claim not only denies that the plaintiffs suffered loss and are not entitled to the reliefs claimed but pleads in the alternative at para. 18 that if the plaintiffs were overcharged interest, the plaintiffs remedy lies against the second named defendant only.

11. It is true indeed that the plaintiffs made no complaint in the amended Statement of Claim about the duty or breach of any obligation to request, prepare or furnish a report on overcharging on the part of the first named defendant.

Issue of Relevance
12. Taking all of the above into account and the fact that a report (if it exists) would not normally be the subject of a discovery order to satisfy a hope that an allegation will crystallise into a substantial one, this Court considers that any report furnished to the first named defendant, which is in liquidation pursuant to statute, on overcharging the plaintiffs for the facilities and the derivative contract, is relevant to the plaintiffs who were customers of the first named defendant. The argument that the plaintiffs are only entitled to raw data of calculation and charging as envisaged by the revised category G under the relevance test is flawed. Just because the first named defendant submits that category G is enough for the plaintiff, does not mean that a report or reports furnished on overcharging is irrelevant. Furthermore, it is indeed a false corollary to say something like "ah well the plaintiffs have not referred to a report in their amended Statement of Claim and are therefore not entitled to discovery of a report".

13. This Court believes that such a report may assist an understanding, preparation, presentation or cross-examination if these proceedings require same. It is the Court's view that discovery of a report on issues which are relevant may lead to a reduction of contention and may assist the plaintiffs to tackle the robust adversarial approach taken by the first named defendant. In short, the Court finds it difficult to understand the difference which is urged on it between direct and indirect relevance in the context of any (and I stress "any") report on interest overcharging furnished to the first named defendant.

Necessity
14. The next issue is one of necessity and as the Court of Appeal in the first of its nine principles stated: once relevance is determined it would follow in most cases that discovery is necessary for the fair disposal of the issues which in this case is whether there was overcharging.

15. It is difficult to understand the benefit for the administration of justice of the first named defendant's tactics in adopting the robust reliance on the adversarial approach. The first named defendant is in special liquidation and has an obligation to identify its liabilities as well as its assets. Nothing has been put forward on behalf of the first named defendant to justify the apparent lack of cooperation to assist an understanding and finalisation of rights, liabilities and obligations when it comes to the charging of significant sums of interest over a number of years to the plaintiffs.

Conclusion
16. In conclusion, on this aspect I am satisfied that the limited discovery of reports (if any) furnished to the first named defendant which is now sought will help the fair disposal of the proceedings. Having said that, the Court is not precluding any claim for privilege which may be asserted in the affidavit of discovery. In this regard, no such suggestion of privilege was flagged. Mr. Fitzpatrick avoided informing the Court or the plaintiffs whether there were actual reports or not. Much time would have been saved if the first named defendant had informed the Court about whether there were reports because if it subsequently transpires that there are no such reports then this application is somewhat redundant. Be that as it may, the affidavit of discovery which is the subject of the court order will ultimately reveal whether there are such reports.

17. The point is well made by counsel for the plaintiffs that it is reasonable to assume that a liquidator would have some report on the actual and contingent liabilities about what appears to be an issue which has been the subject of litigation. The category which will be the subject of the court order will be confined.

18. Finally, in regard to the suggestion that the discovery of the category now sought will be in some way disproportionate to the rights of privacy or confidentiality of the first named defendant, the Court is left wondering about the extent of the privacy and confidentiality rights sought to be protected. I again mention that the first named defendant is in liquidation pursuant to an Act of the Oireachtas. There comes a stage in a discovery application for the respondent to explain the extent of the loss of some right to privacy or commercial confidentiality or excessive workload when relying on the proportionality argument. There is no evidence before this Court about any cost or time involved in discovering whatever report(s) on overcharging exists. In those circumstances, the Court is not in a position to weigh the fairness which it wishes to bring to the determination of these proceedings against the proportionality argument which was mooted. Whatever way one looks at the reliance on the adversarial system by the first named defendant, there is still an imperative for the Court to administer justice, reduce contention and costs where the Court sees the opportunity to do so.

19. For all of those reasons, I order Mr. Wallace for the first named defendant to make discovery within twelve weeks of the reports furnished in the terms which I have set out at the beginning of this judgment, limited to the reports generated during the period from 7th February 2013 (date of appointment of Mr. Wallace as Joint Special Liquidator) to 1st November 2017 so that the first named defendant need not list reports created prior to the commencement of the special liquidation of the first named defendant.

20. I emphasise yet again that nothing in the order made by the Court precludes the first named defendant from claiming privilege in the prescribed manner whether for a report or reports prepared for the dominant purpose of these proceedings or otherwise as it may be so advised.