

THE HIGH COURT
COMMERCIAL

2010 4996 S

BETWEEN

ANGLO IRISH BANK CORPORATION LIMITED
AND
THOMAS BROWNE

PLAINTIFF

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 14th day of April, 2011

Introduction

This judgment deals with the defendant's application for discovery against the plaintiff.

It is hardly necessary to state that discovery will be ordered only in circumstances where the documents sought are shown to be relevant to the issues in the proceedings and are necessary for disposing fairly of the case or for saving costs. (See O. 31, r. 12 of the Rules of the Superior Courts).

That rubric applies universally throughout the civil jurisdiction of this Court but is of particular importance in litigation which is being conducted under judicial supervision and management in the Commercial List.

Uncontrolled discovery can give rise to an enormous expenditure of both time and costs and experience teaches that in many cases a great deal of the material discovered ultimately proves to be useless.

It is necessary to bear in mind that at least two further factors have to be taken into account in deciding whether or not to order discovery.

The first of these is proportionality. That concept, in the context of discovery, has already been the subject of quite a number of judicial dicta. I mention just two in chronological order.

In *Ryanair Plc v. Aer Rianta Cpt* [2003] 4 I.R. 264, Fennelly J. stated:-

"The change made to O. 31, r. 12, in 1999, exemplifies, however, growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy."

Secondly, in *Framus Limited v. CRH Plc* [2004] 2 I.R. 20, Murray J. stated:-

"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."

Thus it follows that in making an order for discovery, the court must bear in mind not merely relevance to the issues in the proceedings and necessity for the fair disposition of the case or cost saving but it must also maintain a sense of proportion between that which is asked for and that which is required.

There is at least one other matter that the court must also consider. This is particularly so in respect of cases in the Commercial List. Discovery ought not to be ordered where the information sought to be gleaned by it is capable of being obtained by an alternative less expensive and less time consuming method. In this regard, I have in mind the use of interrogatories. In the Commercial List, interrogatories may be delivered as of right. No recourse to the court is necessary and they are capable of being administered in every case.

Interrogatories are in many instances superior to discovery. That is so for a trinity of reasons. First, they ask a direct question. Thus the questioner instead of having to sort through what may be hundreds or thousands of documents in an effort to find out whether a particular state of affairs existed or not, simply asks the relevant question. Second, the interrogatories must be answered. Moreover, they are answered under oath. Third, the interrogatories, once answered, may be utilised as evidence in the trial thereby avoiding the necessity to call one or more witnesses.

Interrogatories need no longer be framed in an archaic form by posing questions in the negative. They can ask direct questions. I have seen many cases in this division of the court where a large reduction in discovery and considerable shortening of trial time was achieved by the answering of, by times, in excess of a hundred interrogatories.

Given the easy availability of interrogatories in the Commercial List, it is important that practitioners utilise that facility. When seeking to obtain information from their opponents, the first port of call ought not to be requests for discovery if it is probable that the

information which is being sought is capable of being elicited by an adroit use of interrogatories.

Relevance

In *Hannon v. Commissioners of Public Works* [2001] IEHC 59, McCracken J. set forth four rules which have to be observed in considering an application for discovery. They are as follows:-

- "1. The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the Court to order discovery simply because there is a possibility that documents may be relevant.*
- 2. Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in Affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that Order 31 Rule 12 of Superior Court Rules specifically relates to discovery of documents 'relating to any matter in question therein'.*
- 3. It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other parties documentation is not permitted under the rules.*
- 4. The Court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties."*

As is clear from this quotation, the question of relevance of the documents sought has to be ascertained by an examination of the pleadings in the case. I now turn to them.

The Pleadings

This action commenced by summary summons which sought to recover four separate sums of money. The defendant is a former director of the plaintiff.

It is alleged that the defendant owes the plaintiff the sums in question on foot of two facility letter agreements entered into between the parties. The first is a facility letter agreement of 1st February, 2008 (the Bishopsgate facility) and the second, a facility letter of 7th January, 2009 (the 2009 facility).

The total sum claimed under the Bishopsgate facility is STG£31,628,582.95 (euro equivalent €36,052,186.20). The amounts allegedly due under the 2009 facility are broken up into three. The first is a sum of €11,650,457.74, the second is a sum of STG£1,914,442.86 (euro equivalent €2,182,198.35) and the final sum under this facility is US\$765,747.71 (euro equivalent €544,086.77).

An application for summary judgment was heard by me on 16th December, 2010, and I delivered judgment *ex tempore* on that day.

It is not necessary to revisit *in extenso* what I said on that occasion. In summary, I was satisfied that the defendant had achieved the low threshold of proof which was required to disentitle the plaintiff to summary judgment. I came to that conclusion not because of any denial of the entitlement of the plaintiff to the amounts claimed *per se* but because the defendant had demonstrated an arguable case that the transactions under which he was sued were vitiated by fraud.

The wrong alleged against the plaintiff was a fraudulent misrepresentation by silence. Such fraud, it was argued, not merely gave rise to a counterclaim but also the contractual arrangements under which the obligation to pay could not be the subject of set off or counterclaim. Heavy reliance was placed on dicta in the judgments in *Northern Bank Finance v. Charlton* [1979] I.R. 149 in support of the defendant's case.

Summary judgment was refused and a plenary hearing was directed. On 17th January, 2011, the defendant delivered his defence and counterclaim.

In the defence and counterclaim, the defendant accepts that the loans were made by the plaintiff to the defendant. It is also accepted that the plaintiff demanded repayment of those loans. The defendant pleads that he is entitled to rescission of the loan agreements and that they are invalid and should be set aside by reason of the matters pleaded in the counterclaim. In reality, therefore, it is clear that the defendant's counterclaim will be the substantive issue that the court will have to decide on at trial.

The Counterclaim

The defendant's counterclaim begins by referring to matters which antedate both the Bishopsgate and the 2009 facility. It refers back to an agreement of 28th November, 2007, where the plaintiff allegedly agreed to provide loan facilities to the defendant. Reference was made to a facility letter of 4th December, 2007, and two sums mentioned in it. The first is a sum of STG£2.71m which was advanced to fund a deposit relating to an investment at Victoria in London. The second related to a sum of €9.625m of which €6.025m was provided to fund the exercise by the defendant of a share option entitlement following the termination of his employment with the plaintiff with the balance of €3.6m representing the continuation of an existing "staff loan" previously provided by the plaintiff to the defendant. This staff loan is alleged to represent monies lent to the defendant by the plaintiff between January 2003 and August 2007. No security was provided by the defendant in respect of the staff loan but it is alleged that it was understood that it would be discharged from the sale of shares held by the defendant in the plaintiff. As of the date of that facility letter, the defendant held 879,769 shares in the plaintiff. The security provided for in the facility letter agreement of 4th December, 2007, was constituted by a letter of undertaking from the defendant's solicitors to remit contract deposits from the sub sale of units in the Victoria development coupled with a lien over 1.1m shares in the plaintiff held by Davy Stockbrokers.

The counterclaim alleges that "on foot of the said facilities the plaintiff (sic) proceeded to purchase 1.6m shares in the plaintiff on 28th November, 2007".

The counterclaim goes on to allege that under a further agreement of 11th March, 2008, the plaintiff agreed to provide additional loan facilities of STG£950,000 and US\$750,000, the former being provided to fund the purchase of six apartments in West Yorkshire in England and the latter to fund the initial investment in a real estate fund.

The facilities granted in December 2007 were continued by a further agreement of 11th March, 2008.

A further facility letter of 28th August, 2008, 17th November, 2008 and the 2009 facility are pleaded under which is alleged the plaintiff agreed to provide additional loan facilities to the defendant.

The pleading also contends that in addition to these facilities, pursuant to the Bishopsgate facility, the plaintiff agreed to provide additional loan facilities to the defendant and one John Hughes in the sum of STGE28.5m for the purpose of funding the acquisition of commercial property in Bishopsgate London. The security in respect of this facility included a charge over the commercial property thereby acquired and a further facility was cross secured on, *inter alia*, the defendant's shareholding of 1.1m shares in the plaintiff.

The counterclaim alleges that at the time of agreeing to provide each of these loan facilities, the plaintiff knew that the defendant was reliant upon his shareholding in it and the value thereof both in seeking those facilities and in drawing them down. The defendant was furthermore, it is said, reliant upon the shares to fund the repayment of the monies due.

The counterclaim then pleads an implied term of the facilities or the existence of a duty of care or a fiduciary duty to the effect that the plaintiff would comply with its statutory and regulatory obligations, would not conduct its business in a manner which was improper, unlawful or prejudicial to such business or do so in a way which damaged the integrity of the plaintiff. It is alleged that there was an obligation on the part of the plaintiff to disclose to the defendant any unusual features pertaining to the activities and dealings of the plaintiff which would or could increase or materially exacerbate the risk involved in the defendant undertaking these loans and relying upon his shareholding to fund repayment of them.

The counterclaim then pleads that wrongfully, unlawfully, in breach of the agreements and in breach of its duty, the plaintiff neglected to disclose to the defendant a series of activities and dealings which were of a kind which constituted wrongful and unlawful conduct on the part of the plaintiff and which fundamentally undermined the stability of it and increased and materially exacerbated the risk involved in the defendant executing the facility letters in suit.

There follows in the pleading particulars of the alleged activities and dealings on the part of the plaintiff which jeopardised it and put the defendant at risk. Four such particulars are provided. They are follows:-

"(a) By the beginning of November, 2007, the plaintiff had loaned (sic) very significant sums of money to Mr. Seán Quinn and members of the Quinn family. These loans were used to fund the liabilities of Mr. Quinn and his family arising from contract for difference transactions relating to shares in the plaintiff. The plaintiff thereby supported and funded a situation whereby Mr. Quinn controlled approximately 28% of the overall shareholding in the plaintiff on the basis of borrowings from the plaintiff.

(b) From the beginning of 2008, the plaintiff loaned (sic) very significant sums to its own directors and officials for the purpose of purchasing shares in the plaintiff with the intention of artificially enhancing the share price of the plaintiff. The said loans were made on a non-recourse basis. The defendant is unaware whether the plaintiff consulted the Financial Regulator or the Governor of the Central Bank in respect of its activities in the provision of these non-recourse loans.

(c) During the summer of 2008, the plaintiff engaged in a share support scheme which provided non-recourse loans to ten individuals for the purpose of acquiring a proportion of the shareholding in the plaintiff which was then in the ownership of the Quinn family.

(d) In September, 2008, in a submission made by the plaintiff to the Department of Finance, the plaintiff characterised itself as having 'strong cash flows' and as having 'a professional approach'. It described itself as being 'well capitalised' and as being a 'traditional balance sheet lender'. At and about the same time, the plaintiff arranged for a deposit of €7,300,000,000 to be made to it from another financial institution (Irish Life & Permanent Plc) in time for inclusion in the plaintiff's balance sheet at year end 30th September, 2008. Thereafter the said monies were returned to Irish Life & Permanent Plc. The sole purpose of this transaction was to artificially enhance the plaintiff's deposit funds at the reporting date in its full year figures at a time when very substantial deposits had been withdrawn from the plaintiff."

The counterclaim goes on to allege that whilst it is understood that the plaintiff had consulted the Financial Regulator and the Governor of the Central Bank in respect of certain of the activities specified above, it refused and neglected to disclose to or notify the financial markets of the said loans, or of the specific purposes thereof, or of the extent of the Quinn family shareholdings. It is alleged that the plaintiff failed to abide by its statutory and regulatory disclosure obligations arising therefrom and that these activities were wrongful and unlawful.

The counterclaim alleges that the plaintiff further failed, refused and neglected to inform the defendant of the activities in question. Had it done so, or had the defendant otherwise been aware thereof, he would not have exercised his share option entitlements and would not have borrowed monies from the plaintiff for the purpose of exercising those options.

Because of these alleged activities on the part of the plaintiff it is said that the shares held and acquired by the defendant in it were substantially diminished in value and were ultimately valueless.

As a result of the activities of the plaintiff and by reason of its failure to notify or disclose them, it is alleged that the plaintiff has been guilty of deceit and/or fraudulent misrepresentation. Such deceit and fraudulent misrepresentation was intended to induce and did, in fact, induce the defendant to enter into the agreements in suit. It is alleged that the agreements are void and invalid and have no effect and ought to be set aside or rescinded. There is also a counterclaim for loss and damage suffered as a result of these activities.

The Defence to Counterclaim

In a reply and defence to counterclaim, a number of admissions are made but insofar as the four allegations which I have reproduced *verbatim* from the particulars contained in the counterclaim the following is the position.

At para. 41, it is admitted that by the beginning of November 2007, the plaintiff had lent what is described as very significant sums of money to Mr. Quinn, members of his family and entities under the Quinn family's ownership and control. This paragraph goes on to allege that the defendant was aware from his position as managing director of lending with the plaintiff of the loans advanced to Mr. Quinn, members of his family and entities under that family's ownership and control.

The following paragraph alleges that the plaintiff is a stranger to the use to which sums of money lent to Mr. Quinn, his family and entities under his control which were lent for other stated purposes were put.

The plaintiff denies that by the beginning of November 2007, Mr. Quinn controlled approximately 28% of the overall shareholding in the plaintiff. It further denies that the plaintiff supported and funded a situation whereby Mr. Quinn controlled approximately 28% of the overall shareholding in the plaintiff on the basis of borrowings from the plaintiff. The plaintiff also alleges that if it did support and fund the situation whereby Mr. Quinn controlled approximately 28% of the overall shareholding in it on the basis of borrowings made from it, such gave rise to no cause of action in the defendant as a customer of and borrower from the plaintiff.

The plaintiff admits that from the beginning of 2008, it lent sums to its own directors and officials for the purpose of purchasing shares in the plaintiff. But it denies that the loans made to its own directors and officials from the beginning of 2008 were made with the intention of artificially enhancing the share price of the plaintiff or that they did in fact do so.

The plaintiff also denies that the loans made by it to its own directors and officials from the beginning of 2008 were non-recourse. They allege that they were approved on a full recourse basis and accepted by the borrowers on such basis.

The plaintiff denies that during the summer of 2008, it engaged in a share support scheme which provided non-recourse loans to ten individuals for the purpose of acquiring a proportion of the shareholding in the plaintiff which was then in the ownership of the Quinn family. It goes on to say that if it did so, it denies that such conduct gave rise to any cause of action in the defendant as a customer of and borrower from the plaintiff.

The plaintiff admits that in September 2008, in a submission made by it to the Department of Finance, it characterised itself as having strong cash flows and of having a professional approach. It also admits that it described itself as being well capitalised and as being a traditional balance sheet lender. But it denies that that submission made by it to the Department of Finance gives rise to any cause of action in the defendant as a customer of or borrower from the plaintiff.

The plaintiff does not admit that it arranged for a deposit of €7.3b to be made to it from Irish Life & Permanent Plc in time for inclusion in its balance sheet at year end 30th September, 2008 and that thereafter the monies were returned to Irish Life. Rather, it admits that it arranged for a non-retail deposit of €7.3b to be made from Irish Life Assurance Plc, a non bank affiliate of the Irish Life & Permanent Group which matured on or before 3rd October, 2008 and that the plaintiff also made a short placement of €7.5b with Irish Life & Permanent Plc in September 2008. It is denied that the arrangement of that deposit gives rise to any cause of action in the defendant as customer of and borrower from the plaintiff. The pleading contains a denial that the sole purpose of that transaction was to artificially enhance the plaintiff's deposit funds at the reporting date in its full year figures at a time when very substantial deposits had been withdrawn from it. It furthermore denies that it was obliged to disclose or notify financial markets of the said loans or their purposes or the extent of the Quinn family shareholdings.

The plaintiff denies that it failed to abide by its statutory and regulatory disclosure obligations and, even if it did, it says that such conduct does not give rise to any cause of action in the defendant as customer and borrower from the plaintiff.

There are many other specific denials concerning the value of the shares, the making of fraudulent misrepresentations and deceit. The defence to counterclaim then goes on to allege that the defendant in entering into the borrowings in suit relied upon his own judgment in that regard. It points out that he was from 2005 until 28th November, 2007, managing director of lending in the plaintiff. Under his stewardship in those years, for which he received total remuneration of €4,443,000, the plaintiff's lending to the Irish market more than doubled, including loans to companies associated with Mr. Quinn. The defendant, on his own admission, it is alleged, was fully informed of the position of the plaintiff until the time of his departure from it on 28th November, 2007, for which he received an *ex gratia* payment of €3.75m. Further it is said the plaintiff sold 200,000 shares in May 2008 and 300,000 in September 2008, at prices significantly in excess of the strike price of the said options and chose to retain the balance of his shareholding.

It is in the context of these pleadings that the request for discovery has to be viewed.

The Request for Discovery

The defendant's request for discovery is dated 11th February, 2011 and requests sixteen different categories of documents, a number of which are subdivided into as many as five different subcategories. The response from the plaintiff is dated 18th February, 2011 and agrees to make discovery of nine of those categories albeit in many cases in different terms to those sought. The plaintiff has declined to make discovery of the remaining seven categories.

The application for discovery is grounded upon an affidavit sworn by Aileen Fleming, Solicitor, which does no more than exhibit the correspondence and aver as to the necessity for the discovery sought.

A replying affidavit sworn by Ciaran McAreevey, an Associate Director with the plaintiff sets out its position in some detail.

First, Mr. McAreevey's affidavit says that with the exception of a single category (15) the defendant is seeking all of the categories as framed in its original request. He points out that the response of the bank is set out in the letter of 18th February and reiterates a point made in that letter to the effect that the time, cost and burden of making the discovery sought in relation to the many of the categories would be disproportionate to the degree to which, if any, the particular category in dispute would advance the defendant's case.

The affidavit also points out that the plaintiff has for the purposes of various other investigations and proceedings since late December 2008 engaged legal assistance in archiving and organising its documentation and that very large volumes of data were forensically imaged going back over several years. The total electronic documentation collated to date exceeds ten million documents but only a small portion of that material has been reviewed. Around 850,000 electronic documents responsive to search terms specific to different investigations were uploaded to a specialist search engine. 30% of these documents approximately had been reviewed for relevance to such investigations. In addition, the bank has a large repository of hard copy files both in archive and in day to day use. That is by way of general background and the affidavit then deals with specific categories of documents which are sought.

Category 1

The defendant requests:-

"All documents pertaining to the terms and conditions upon which the plaintiff provided the staff loan to the defendant

and in particular all documents pertaining to the basis upon which said staff loan would be repaid by the defendant."

The plaintiff has offered to make discovery of all documents connected with the account identified by the defendant in his reply to particulars as the account through which the staff loan referred to by him in the proceedings was operated including documents evidencing a loan of approximately €1.5m provided to the defendant in 2002 to assist in the purchase of his family home, additional loan finance in or about April 2005 to purchase property in the United Kingdom and additional funds sanctioned to fund the defendant's input into a property investment in Galway purchased jointly with Mr. John Hughes. The plaintiff goes on to point out that the defendant alleged that the "staff loan" was by way of oral agreement with Mr. Seán Fitzpatrick and was extended orally by Mr. David Drumm and has not suggested that there are any documents in the possession of the plaintiff recording it separate from the account number identified in the reply to particulars. It also points out that no issue has been taken in the proceedings in relation to the terms and conditions or basis for the repayment of the staff loan and that therefore whilst the request might be deemed to be irrelevant since the defendant has identified the transaction, the plaintiff will make discovery.

In my view, this response is satisfactory and meets the reasonable requirements of the defendant. Consequently, I will direct discovery to be made in accordance with what has been offered by the plaintiff in respect of this category.

Category 2

The defendant requests discovery of any loan application documentation pertaining to the facilities provided by the plaintiff to him pursuant to the facility agreement of 4th December, 2007, to include all documentation relating to the consideration and/or approval of that facility whether at credit committee or otherwise.

The plaintiff contends that this is unnecessarily broad and that the use of the term "*or otherwise*" is vague. It points out that the decision to advance the facility to the defendant was taken by the bank through its credit committee and not otherwise. Thus, it contends, that the documents which are relevant to the issues before the court are those which were placed before the credit committee. The plaintiff has offered to provide the credit committee application and decision and the documents considered by that committee but no more.

I am of the view that the discovery which has been offered by the plaintiff meets the needs of the defendant by reference to the criteria that have to be applied to this application. The plaintiff has committed itself in open correspondence to the fact that it was the credit committee of it which made all decisions concerning this facility. Consequently, only the documentation considered by that committee including the application made and its decision are required to be discovered. I will, therefore, direct discovery in accordance with what the plaintiff has offered under this category.

Category 3

The defendant seeks all/any loan application documentation pertaining to the facilities provided by the plaintiff to the defendant pursuant to the facility agreement of 11th March, 2008, to include all documentation relating to the consideration and/or approval of the said facility whether at credit committee or otherwise.

The plaintiff has declined to make discovery of this category. However, on or without prejudice basis, it has agreed to make discovery of the credit committee applications in respect of this and indeed other facilities which are the subject of similar requests. These requests are constituted at category 4 (in respect of the facility of 28th August, 2008), category 5 (in respect of the facility of 17th November, 2008), category 6 (in respect of the facility of 7th January, 2009), category 7 (pertaining to the Bishopsgate facility).

In my view, there should be discovered in respect of these categories precisely the same material as the plaintiff agreed to provide in respect of category 2. Thus there will be made available to the defendant on discovery all documents which were considered by the credit committee including the application and the decision of that committee in respect of each of these categories.

Category 8

The defendant seeks all/any documentation pertaining to or evidencing internal review by the plaintiff of the facilities afforded to the defendant by the plaintiff (to include the Bishopsgate facility) from inception of each facility to the date of demand for repayment.

This category has been refused. The reason for seeking this discovery is an alleged entitlement on the part of the defendant "*to establish the effect which the deterioration and the value of the defendant's shareholding in the plaintiff had upon the plaintiff's consideration/review of the facilities afforded to the defendant*".

In my view, the defendant is not entitled to these documents unless during the course of the existence of the facilities some alteration took place to the terms of such facilities. If so, then he is entitled to have discovery of the documents which were generated and which gave rise to such alteration. In the absence of any such alteration, in my view, the documents are not relevant to any of the issues that fall to be tried in the action.

Category 9

The defendant seeks all/any documentation pertaining to or evidencing internal review or consideration given by the plaintiff to the deterioration in the plaintiff's share price in the period from the beginning of 2007 to 7th January, 2009 and/or the causes or implications thereof.

The plaintiff has indicated that it is prepared to discover in respect of this category the board packs and board minutes reviewed by the board of directors of the plaintiff in the period from the beginning of 2007 to 7th January, 2009, relating to the deterioration in the plaintiff's share price and/or the causes or implications thereof. The reason given for confining the documents in this way is stated by the plaintiff's solicitors to be based on a belief that when the defendant speaks about "*consideration given by the plaintiff to the deterioration in the plaintiff's share price*" he must be referring to the board of directors of the plaintiff through whom it acts. The plaintiff identifies the relevant documents as being the board packs and minutes and contends that the requests for all/any documents is too broad and vague.

In my view, the defendant is certainly entitled to the board packs and minutes dealing with matters touching upon the deterioration in the plaintiff's share price and/or the causes or implications thereof.

Insofar as a wider request is concerned, Mr. McAreavey has sworn that there are hundreds of thousands of potentially relevant electronic documents plus hundreds of lever arch folders which would need to be reviewed to identify documents discoverable within the category as sought. He says that based on the category as framed by the defendant the search terms that would have to be run

would be likely to return a large proportion of irrelevant material, the irrelevance of which could only be identified by a review of the documents returned. Consequently, the plaintiff made the offer which I have outlined.

I accept the evidence of Mr. McAreavey and I am of the view that to order discovery in the terms sought by the defendant would be disproportionate. Nonetheless, I am of the view that the board of the plaintiff only met from time to time and it is probable that at a very senior level in the bank but below the level of the board of directors, consideration was given to the deterioration in its share price. In these circumstances, I am of opinion that in addition to the board packs and minutes, the defendant is entitled to discovery of any minutes of meetings conducted at senior management level in the bank from the beginning of 2007 to 7th January, 2009, where a review of the deterioration in the plaintiff's share price was considered. The discovery need not extend beyond the minutes of such meetings.

In my view, in addition to the board packs and minutes, the defendant is entitled to discovery of any minutes of meetings conducted at senior management level in the bank from the beginning of 2007 to 7th January, 2009, where the deterioration in the plaintiff's share price was considered.

Category 10

Here the defendant seeks:-

"All documentation pertaining to loans provided by the plaintiff to Mr. Seán Quinn or to members of his family, or to entities under the Quinn family's ownership or control, to include (but not limited to):-

(a) All documents establishing the quantum of such loans;

(b) All documents relating to the purpose for which such loans were sought by the said individuals and entities;

(c) All documents evidencing the basis upon which said loans were sanctioned by the plaintiff, to include all documents pertaining to approval of the said loans, whether at credit committee or otherwise;

(d) All documents pertaining to the plaintiff's knowledge of the nature, extent and/or cost of the shareholding held and/or controlled by the said individuals and entities in the plaintiff, whether such shareholding was held directly or pursuant to liabilities under contracts for difference or otherwise;

(e) All documents pertaining to steps taken by the plaintiff to ensure compliance with the stated purpose of loan facilities provided to Seán Quinn, or members of his family, or entities under the Quinn family's control, to include all documents pertaining to the plaintiff's taking of security in respect of such loan facilities."

The plaintiff has indicated a willingness to make discovery of a limited amount of documents under this category subject to its obligations of confidentiality. In that regard, it intends putting relevant parties on notice and seeking their consent where necessary before discovery is made.

In a moment, I will turn to what is offered by the defendant but before doing so I can immediately dispose of the request contained at paras. (a) and (b) above. The information sought under those headings can be obtained by the delivery of simple interrogatories asking the quantum of the loans in question and the purposes for which such loans were sought. That avoids documents having to be discovered and provides sworn information in lieu.

As to the remaining three categories at (c), (d) and (e), the plaintiff is prepared to discover:-

"All documents pertaining to the knowledge of the board of directors of the plaintiff of the nature, extent and/or cost of the shareholding held and/or controlled by the said individuals and entities in the plaintiff, whether such shareholdings were held directly or pursuant to liabilities under contracts for difference or otherwise.

All documents pertaining to the plaintiffs taking of security in respect of such loan facilities."

The plaintiff suggests that an appropriate period for such discovery would be three years prior to 28th November, 2007. That date is chosen because by then the shares in the plaintiff had a negligible value. In my view that is reasonable and appropriate.

As can be seen from the offer made by the plaintiff it is in effect agreeing to the documents which are sought at (d), subject to the three year limitation period.

In my view, the defendant is also entitled to information of the type sought at (e) since I believe it to be both relevant to issues in the case and also to be necessary. Discovery is not necessary to obtain such information. The plaintiff can be required to answer suitably drafted interrogatories as to the steps (if any) taken by it to ensure compliance with the stated purposes of the loan facilities granted.

The net effect of this is that interrogatories may be delivered to elicit that the information sought at (a), (b), (c) and (e) and discovery will be directed in respect of the documents sought at (d) in the form offered by the plaintiff subject to a limitation restricting such discovery from 28th November, 2004 to 28th November, 2007.

Category 11

Under this heading, the defendant seeks "all documents pertaining to the defendant's alleged involvement in the sanctioning and/or approval of loans to Seán Quinn, or to members of his family, or to entities under their ownership or control".

The plaintiff is agreeable to make discovery of this category but only in respect of documents upon which it will rely. That, in my view, is not satisfactory. It seeks to confine the defendant to what might be carefully chosen documents which will be relied upon by the plaintiff but which might exclude documents which would be damaging to its case. The defendant is entitled to the full picture and not an edited version of it. Consequently, there will be an order for discovery as sought at category 11.

Category 12

The defendant seeks:-

"All documents pertaining to loans provided by the plaintiff to its own directors and/or officials for the purpose of purchasing shares in the plaintiff, to include (but not limited to):-

(a) All documents establishing the quantum of loan facilities provided by the plaintiff to its own directors and/or officials for the purpose of purchasing shares in the plaintiff.

(b) All documentation setting out the terms, conditions and/or recourse in respect of such loans provided by the plaintiff to its own directors and/or officials for the purpose of purchasing shares in the plaintiff.

(c) All documentation pertaining to or evidencing the plaintiff's purposes and/or intentions in providing loan facilities to its directors and/or officials for the purpose of purchasing shares in the plaintiff.

(d) All documentation pertaining to or evidencing consideration given by the plaintiff to the consequences/effect (and/or the likely consequences/effect) of its actions in providing loan facilities to its directors and/or officials for the purpose of purchasing shares in the plaintiff.

(e) All documentation pertaining to steps taken by the plaintiff in enforcement of the loans provided to its own directors and/or officials in the period from the beginning of 2008 for the purpose of purchasing shares in the plaintiff."

The reason given for this discovery being sought is that the plaintiff has admitted that it "loaned" (sic) sums to its own directors and officials for the purpose of purchasing shares in it. However, it is said, the plaintiff has not identified the extent, timing or quantum of such loans. These details are said to be necessary to assist the defendant and his advisers to establish the consequences and effect of such loans and the extent of which they undermined the stability of the plaintiff and the extent to which they increased and materially exacerbated the risk involved in the defendant executing the facility agreements. It is furthermore said that the defendant is entitled to establish the extent of steps taken by the plaintiff in enforcement of the said loans in circumstances where the plaintiff has denied that the loans were limited in recourse. The extent to which the plaintiff has sought to enforce repayment of the loans it is said, will assist in establishing the *bona fides* of that plea and in establishing whether the loans, were truly granted without limitation of recourse in the manner alleged by the plaintiff.

The plaintiff takes the view that this discovery is neither necessary nor material to the defendant's case. It points out that the plaintiff has admitted that from January 2008, as alleged by the defendant, the plaintiff provided loans to its directors and/or officials for the purpose of purchasing shares in it. It is the defendant who has characterised such conduct as an artifice for the purpose of disguising the true value of the shares in the plaintiff which the defendant contends were of negligible value as of 28th November, 2007. It is said that disclosure of these loans is not relevant to the defendant's case. In addition, the plaintiff has a duty of confidentiality to its customers and would have to seek consent of the relevant individuals as necessary and appropriate. It is furthermore argued that compliance with this request would be disproportionate to the degree to which, if any, the documents would advance the defendant's case. However, without prejudice to all of that the plaintiff is willing to provide a list of the loans consisting of the dates of them and the quantum of them.

I am of the view that this request should be dealt with as follows. Open correspondence as envisaged by the plaintiff or interrogatories can elicit the quantum of the loan facilities and the identity of the directors and officials to whom they were made. Likewise, the terms and conditions and/or recourse of such loans can be ascertained by means of open correspondence or interrogatories. Thus, paras. (a) and (b) are dealt with. A similar approach applies to what is sought at paragraph (c) and (e). I am of opinion that the defendant is entitled to discovery of what is sought at para. (d) but limited to loans to directors. There appears to have been a lot of such loans, given that I am told that in the period 2006 – 2008 no fewer than 35,000 documents which are potentially relevant to this category were generated. But they are all electronically archived. Such discovery would not be disproportionate.

Category 13

The defendant seeks:-

"All documents pertaining to loans provided by the plaintiff to ten individuals for the purpose of acquiring a proportion of the shareholding in the plaintiff which was then in the ownership/control of the Quinn family, to include (but not limited to):

(a) All documents establishing the quantum of the said loan facilities.

(b) All documentation setting out the terms, conditions and/or recourse in respect of such loans.

(c) All documentation pertaining to or evidencing the plaintiff's purposes and/or intentions in providing such loan.

(d) All documentation pertaining to or evidencing consideration given by the plaintiff to the consequences/effect (and/or the likely consequences/effect) of its actions in providing such loans .

(e) All documentation pertaining to steps taken by the plaintiff in enforcement of the said loans."

The reason given for seeking this discovery is that the plaintiff has denied the transaction in its entirety. The defendant in those circumstances is, it is said, entitled to discovery of this category to establish the occurrence and circumstances of the said loans. Such information is, it is argued, necessary to assist the defendant and his advisers to establish the consequences and effects of such loans and the extent to which they undermined the stability of the plaintiff and the extent to which they increased and materially exacerbated the risk involved in the defendant executing the facilities letters which post-dated the said events.

The plaintiff has declined to make discovery to these documents on the basis that it has admitted that it provided such loans. It contends that the burden scale and cost of making such discovery is disproportionate to the degree which they would advance the defendant's case and the documents, it is said, are not necessary for the fair disposal of the proceedings. In lieu, the plaintiff is prepared to provide a list of the loans consisting of the dates of them and the quantum of them.

In my view, interrogatories can establish the information which is required at (a) and (b) and (c) and (e). The only area that therefore requires discovery is (d) and that, in my view, is limited and not disproportionate to what is required. The documents have

already been archived electronically. Such documents would, in my view, be relevant and necessary.

Category 14

This category seeks:-

"All documents pertaining to or evidencing the plaintiff's intentions and/or purpose in engaging in the transaction referred to at para. 53 of the reply to defence and defence to counterclaim."

Paragraph 53 of that pleading reads as follows:-

"It is not admitted that in September 2008, the plaintiff arranged for a deposit of €7,300,000,000 to be made to it from another financial institution, Irish Life & Permanent Plc, in time for inclusion in the plaintiff's balance sheet at year end 30th September, 2008 and that. thereafter the said monies were returned to Irish Life & Permanent Plc. Rather, it is admitted that in September, 2008, the plaintiff arranged for a non-retail deposit of €7,300,000,000 to be made to it from Irish Life Assurance Plc a non bank affiliate of the Irish Life & Permanent Group, which matured on or before 3rd October, 2008, and that the plaintiff also made a short term placement of €7,500,000,000 with Irish Life & Permanent Plc in September 2008."

In response, the plaintiff says that the transaction took place in September 2008/October 2008. The fact that it occurred is admitted. But it is argued that whether the sole purpose of the transaction was to artificially enhance the plaintiff's deposit funds, as is alleged by the defendant, is not relevant to the disposal of these proceedings since by the time it occurred the share price of the plaintiff was less than the option/price.

It is argued that these documents are not relevant to the issues that will fall to be tried in the action.

I am not convinced that that is necessarily so but I am disinclined to order discovery since it seems to me that the information can be obtained by simply asking the question by way of interrogatories as to what the plaintiff's intentions or purpose was in engaging in the transaction in question. Furthermore discovery as sought would involve review of 25,000 electronic documents, hundreds of lever arch folders, numerous tape/telephone recordings and would be disproportionate.

Category 15

The defendant seeks all board minutes pertaining to or evidencing the defendant's submissions or views in respect of the plaintiff's lending policy in the year 2005. It is agreed that discovery ought to be made of this category.

Category 16

This seeks all documentation detailing the defendant's alleged involvement in the management/operation of the plaintiff bank in the period of 1st September, 2007 to 28th November, 2007. This arises because the plaintiff has alleged that the defendant was engaged in the operation and management of the plaintiff until 28th November, 2007. The defendant contends that he resigned from the board of the plaintiff in September 2007 and retired altogether from the plaintiff's employment in October 2008.

The plaintiff contends that this category is too broad and will involve the review of many documents irrelevant to the contention of the plaintiff that the defendant as managing director of lending was aware of many of the matters of which he now makes complaint in these proceedings.

I am not persuaded by this argument. The documents relate to a period from 1st September, 2007 to 28th November, 2007, slightly less than three months. In my view, the defendant is entitled to discovery of this category in a modified form. The discovery ought not to be confined solely to documents upon which the plaintiff will rely at trial which is what is offered in lieu of that which is sought.

In addition he is entitled to a sample of documents demonstrating his involvement on a daily basis for the period involved. Not all such documents need be discovered but merely a sample showing his daily involvement as a director and employee of the plaintiff during the period in question.

Result

The result of the application for discovery is therefore as follows:-

Category 1: Discovery to be made in accordance with what has been offered by the plaintiff.

Category 2: Discovery to be made in accordance with what has been offered by the plaintiff.

Category 3: Discovery to be made in accordance with what is offered by the plaintiff.

Category 4: Discovery to be made in accordance with what is offered by the plaintiff.

Category 5: Discovery to be made in accordance with what is offered by the plaintiff.

Category 6: Discovery to be made in accordance with what is offered by the plaintiff.

Category 7: Discovery to be made in accordance with what is offered by the plaintiff.

Category 8: Discovery refused unless during the course of the existence of the facilities some alteration took place to their terms. If so, then discovery is to be made of the documents which were generated and which gave rise to such alterations.

Category 9: Discovery to be made of the board packs and minutes together with minutes of meetings conducted at senior management level in the plaintiff from the beginning of 2007 until 7th January, 2009, at which the deterioration in the plaintiff's share price was considered.

Category 10: Interrogatories to be administered in respect of categories (a), (b), (c) and (e) with discovery as offered in respect of category (d) limited to the period from 28th November, 2004 to 28th November, 2007.

Category 11: Discovery as sought by the defendant to be made.

Category 12: Interrogatories to be administered in respect of the information sought at paras. (a), (b), (c) and (e) and discovery to be made in respect of category (d) as sought by the defendant but limited to loans to directors.

Category 13: Interrogatories to be administered in respect of the information sought at (a), (b), (c) and (e). Discovery to be made in respect of category (d) as sought by the defendant.

Category 14: Interrogatories to be administered to ascertain the plaintiff's intention or purpose in engaging in the transaction. Discovery refused.

Category 15: Discovery to be made as agreed.

Category 16: Discovery to be made of the documents which the plaintiff will rely on at trial and in addition of a sample of documents demonstrating the defendant's involvement on a daily basis as a director or employee of the plaintiff for the period in question i.e. 1st September, 2007 to 28th November, 2007.

There will be liberty to apply.