Neutral Citation [2016] IEHC 614

THE HIGH COURT

COMMERICAL

[2011 No. 6362 P]

BETWEEN

JOHN BOURKE AND FRANCIS O'DOHERTY PRACTICING UNDER THE STYLE AND TITLE OF BOURKE AND COMPANY SOLICITORS
PLAINTIFFS

AND

ROYAL AND SUN ALLIANCE PLC AND HUGH J. MILLAR, FINBARR J. CROWLEY, J. W. CARROLL AND CATHERINE KEANE TRADING UNDER THE TITLE AND STYLE OF CROWLEY MILLAR, SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 8th of November, 2016

1. This is an application pursuant to O. 31, r. 1 of the Rules of the Superior Courts seeking leave to deliver interrogatories. These proceedings arise from a decision of the first named defendant to decline to indemnify the plaintiffs in respect of professional negligence proceedings brought against them entitled "The High Court Record No. 2009/6428P *Between/ John Betson and others, Plaintiffs v. Gerard Killally and others Defendants*" (the *Betson* proceedings).

2. The plaintiffs claim a declaration that they are entitled to an indemnity from the defendants or either of them in respect of all claims arising against them in those proceedings "on grounds of contract, duty, waiver and estoppel" and damages for breach of contract and negligence. The pleadings are detailed and range over a series of events and transactions which are highly contentious and complicated.

3. The first named defendants agreed to insure the plaintiffs under a policy of insurance on 10th December, 2008 against any civil liability and claims arising from the provision of professional legal services and advice. The second, third, fourth and fifth named defendants are principals of Crowley Millar Solicitors. They were retained jointly by Bourke & Company and the first named defendant, RSA, to appear and act on their behalf in defence of the professional negligence claim brought against them in the *Betson* proceedings.

4. In the *Betson* proceedings, claims were made by investors against various parties including a Mr. Killally and Bourke & Company for investment related losses arising from personal guarantees and the purchase of and/or subscription for shares in Mount Lucas Enterprises Ltd. The company was to be used as the vehicle to acquire shares in another company Mount Lucas Business Campus Ltd. with intent to acquire an interest in an investment property at Mount Lucas, County Offaly. It was alleged that Mr. Killally was, unknown to the investors, the beneficial owner of Mount Lucas Business Campus Ltd. On the sale to Mount Lucas Enterprises Ltd., it was alleged that Mr. Killally and Mount Lucas Business Campus Ltd. made a secret profit, having acquired the lands for €4.7 million and sold them to the investors' company for €10.4 million for which they were obliged to account to Mount Lucas Enterprises Ltd. and the plaintiffs. It was also claimed that Bourke & Company, who had acted in acquiring the investment property, breached duties to the plaintiffs, the shareholder investors and guarantors owed pursuant to an alleged implied or informal retainer which is disputed by the plaintiffs. It was claimed that they failed in their duty to advise the investors on the transactions underlying the share purchase investments made and the personal guarantees entered into by some of them. It was also alleged that the solicitors had a duty not to conceal or participate in the concealment from the plaintiffs of matters that might have affected their decisions.

5. A further issue arose that Mr. Killally had misrepresented to the investors that there were unconditional contracts for sale in place for the *sale on* of part or parts of the investment property. Bourke & Company were involved in the preparation of the contracts for the *sale on* but claimed that they did not make or condone any misrepresentation and were not party to and did not condone any fraudulent conduct in relation to those contracts. These issues proved highly controversial and the instructions furnished by the plaintiffs to Crowley Millar in respect of these matters are said to have resulted in a successful application to come off record in the *Betson* proceedings on 11th May, 2011. By that time, Crowley Millar had identified a conflict of interest which they maintain they brought to the plaintiffs' notice on 4th February, 2011.

The Pleadings

6. The plaintiffs claim that Crowley Millar owed contractual and fiduciary duties and duties of care and confidence to Bourke & Company in the conduct of the Betson proceedings and, in particular, had a duty to uphold Bourke & Company's interests in the conduct of their defence without regard to the interests of any other party, including RSA. It is claimed that Crowley Millar had a duty to withdraw from the case immediately once their duties to RSA and the plaintiffs conflicted or there was a significant risk that they might conflict. The plaintiffs also claim that Crowley Millar caused or contributed to a decision by RSA to refuse to provide an indemnity and thereby prejudiced Bourke & Company's defence of the *Betson* proceedings and damaged their professional reputation and practice while assisting RSA to avoid liability under the policy.

7. In the particulars set out in the statement of claim it is alleged *inter alia* that:

> (a) A conflict of interest arose at least on or after 26th January, 2011 and perhaps earlier, when Crowley Millar purported to reserve RSA's position in relation to the provision of indemnity even though Crowley Millar continued to act and failed to advise Bourke & Company to retain new solicitors in relation to the *Betson* proceedings or of their right to do so.
>
> (b) Subsequently, the defence of the *Betson* proceedings was conducted by Crowley Millar on the instructions of RSA in the interests of RSA even where those interests conflicted with those of Bourke & Company.
>
> (c) Crowley Millar instructed the disclosure of privileged communications to the *Betson* plaintiffs and the court (in relation to prospective evidence of alleged questionable evidential value) and the calling of witnesses without advising or receiving any instructions from Bourke & Company.

It is clear from the pleadings that a conflict of interest arose between the plaintiff and their solicitors which was identified by Crowley

Millar on 4th February, 2011. The plaintiffs contend that this conflict arose at a much earlier stage and that Crowley Millar, to the prejudice of the plaintiffs, continued to act on a joint retainer when they should not have done so. The draft interrogatories are said to be necessary to obtain information and/or admissions which will assist in identifying the precise date upon which Crowley Millar knew of, or apprehended, the conflict prior to 4th February.

8. In addition, the plaintiffs complain about a statement made to the High Court in the course of the trial of the *Betson* proceedings by counsel acting on the instructions of Mr. Hugh Millar. Counsel informed the court about developments which occurred during the hearing in respect of evidence available from Mr. Jeremy Doyle of Doyle Hannon Solicitors. Mr. Millar held a conversation with Mr. Doyle, in respect of two contracts concerning the *sale on* of part of the Mount Lucas lands relevant to the proceedings. These contracts were the subject of previous instructions by the plaintiffs to Crowley Millar who advised that there were no issues of concern about their alleged dealings with those transactions and that the contracts were not proceeding and had been cancelled. This position is said to have changed at a consultation held on 26th January, 2011.

9. Mr. Doyle was contacted to ascertain whether he could assist the plaintiffs' defence. He initially informed Mr. Millar that the contracts were legitimate but this changed when he was advised that he might be called to give evidence. As is more fully set out later in the judgment, Mr. Doyle allegedly informed Mr. Millar that when the contracts were entered into "there was no intention to fulfil them on their part." Mr. Doyle allegedly told Mr. Millar that he was to be paid €150,000 for signing the contract but that the plaintiffs were innocent of any wrongdoing in that respect. However, it was alleged during the course of cross examination that this €150,000 was paid from the plaintiffs' client account. As the case progressed Crowley Millar and counsel for the defendants revealed proposed evidence to the court based on what they had been told by Mr. Doyle whom they then proposed to call.

10. Mr. Doyle was subpoenaed to attend court and requested to prepare a précis of his proposed evidence on the matter. The plaintiffs complain that this statement was made known to the court without seeking any instructions from or giving advice to Bourke & Company. The plaintiffs contend that the facts outlined to the court were not true and that when Mr. Doyle was called (without any instruction from Bourke & Company) to give evidence, he denied much of the contents of his conversation with Mr. Millar. The particulars also record the correspondence from Mr. Millar containing a summary of his conversation with Mr. Doyle and which was put by Bourke & Company's counsel to Mr. Doyle, challenging his evidence. The plaintiffs contend that they were not aware of this correspondence and had not been advised of its existence or contents and were only furnished with a copy of it after the commencement of the present proceedings. The particulars also recite that Mr. Millar was then called to give evidence in the case by counsel for the *Betson* plaintiffs about his contact with Mr. Doyle and for the purpose of contradicting Mr. Doyle's evidence. It is claimed that Bourke & Company were not advised or consulted on this course or indeed told that it would or might occur. It is alleged therefore that Crowley Millar conducted the defence to the prejudice of the plaintiffs and "in RSA's interests". The plaintiffs also assert that they have substantial grounds to "apprehend" that Crowley Millar failed to discharge other duties "as yet not fully disclosed including failure to discharge duties in relation to discovery of documents".

11. At the conclusion of the evidence in the case, Crowley Millar applied to come off record citing professional obligations and RSA subsequently refused to indemnify the plaintiffs. The plaintiffs subsequently continued the defence of the *Betson* proceedings on their own behalf. The case was ultimately settled on 16th January, 2012 without the participation of the plaintiffs.

12. Further particulars are set out in the statement of claim including a failure to disclose to the plaintiffs, in a timely fashion, the prospect that RSA might refuse to provide indemnity and to advise, consult and take instructions from them in relation to that issue. The plaintiffs also claim that Crowley Millar failed:

> "To disclose a strategy of calling a witness prior to the plaintiffs giving evidence with a view to refusing indemnity."

13. By letter dated 13th May, 2011, RSA declined to indemnify the plaintiffs on the basis of exclusion clause number 7 in the RSA policy stating:

> "Having considered the matter very carefully, RSA has come to the conclusion that it cannot indemnify your client in respect of the claim described above in circumstances where it has become clear that the claim arises from the dishonesty or fraudulent act or omission of Mr. Gerard Killally in combination with others which was condoned by both Mr. Bourke and Mr. O'Doherty."

14. In further particulars, the plaintiffs claim that Crowley Millar reported to and acted upon the directions of RSA for the duration of the *Betson* proceedings. It is alleged that Crowley Millar, in correspondence dated 5th August, 2010, identified a potential fraud issue arising in the context of discovery made by the plaintiffs in the *Betson* proceedings. It is claimed that, where a conflict arose between upholding the interests of the plaintiffs as opposed to those of RSA, Crowley Millar should have informed the defendants clearly of this matter and withdrawn from the case. Crowley Millar failed to advise the plaintiffs that RSA were reserving their position on indemnity as set out in a letter dated 20th December, 2010. It is repeatedly stated that further particulars may be delivered following discovery and interrogatories.

15. A full defence was entered by both defendants. In particular, Crowley Millar denies that they caused and/or contributed to the decision by RSA to refuse to provide indemnity to the plaintiffs or prejudiced or improperly conducted the plaintiffs' defence of the *Betson* proceedings. At para. 20 (a) to (ccc), the solicitor defendants outline, in detail, concerns which arose in relation to three contracts drafted by the plaintiffs, two of which had been issued to Mr. Doyle, solicitor, referred to above. The defendants claim that concerns were expressed about these contracts to the plaintiffs on a number of occasions from late 2009 onwards.

16. A number of these issues arose at a consultation on 26th January, 2011 during the course of the *Betson* plaintiffs' evidence. Arising from matters which emerged from the consultation as set out in para. 20, Crowley Millar claimed that they advised the plaintiffs at that consultation that a number of matters had now been disclosed by them for the first time to their legal team which could have implications for an indemnity from RSA who would be advised of these matters. It is claimed that no objection was taken to this course of action by the plaintiffs. It is claimed that Crowley Millar then sought instructions from RSA following which they wrote to the plaintiffs to advise that their legal team would continue to defend the proceedings but that the professional indemnity insurer was reserving its position on indemnity. Again, it is said that no objection was made by the plaintiffs in respect of these developments. It is claimed that they were advised to seek independent legal advice and did so at the time. It is alleged that the potential conflict that the legal team encountered as of 26th January, 2011 was a result of the failure on the part of the plaintiffs to "correctly, fully and truthfully instruct the legal team on the issue of the Consus contracts prior to 26th January, 2011 giving rise to the possibility that the plaintiffs were aware at all material times of the probability that the Consus contracts were 'dummy contracts'."

17. The defence also highlights at para. (i) to (v) issues which arose on or about 4th February, 2011 during the course of the trial

which raised what might be regarded as serious issues concerning the credibility of the first named plaintiff in the course of the trial concerning his knowledge of the "dummy contracts" and what might be regarded as serious deficiencies in discovery made by the plaintiffs. At a further consultation on 7th February, 2011, it is alleged that deficiencies in respect of the discovery of emails were raised with the plaintiffs who were advised that "their instructions in this regard were contradictory, unsatisfactory and not credible".

18. As a result of concerns arising from further investigations in relation to related "Consus contracts" and the discovery issues set out at para. 20, Crowley Millar stated that on 9th February, 2011 they sought and received advice that they could no longer continue to act for the plaintiffs in the *Betson* proceedings. Senior and junior counsel received similar advice. An application was made by Crowley Millar to come off record which was granted by Peart J. on 18th May, 2011. The plaintiffs thereafter represented themselves for the remainder of the *Betson* proceedings. The full circumstances and particulars of the alleged dealings by Crowley Millar with Mr. Doyle solicitor during the case are set out at para. 20(ss) to (xx).

19. Crowley Millar have identified 4th February, 2011 as the date upon which the actual conflict of interest arose and the joint retainer ceased. It was said that such part of the plaintiffs' file which was in existence prior to that date was handed over to the plaintiffs.

20. The court is informed that partial discovery has been completed in the case but that it is intended that the plaintiffs will seek further extensive discovery.

Legal Principles
21. Order 31, rule 1 of the Rules of the Superior Courts provides that leave may be granted to deliver interrogatories in writing. Interrogatories which do not relate to any matter in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

22. Order 31, rule 2 provides that in determining the application:

> "… the court shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents, relating to any matter in question. Leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs."

The court must be satisfied that the information sought is relevant to the facts in issue in the proceedings and necessary either for disposing fairly of the cause or matter or for saving costs. In *J&LS Goodbody Ltd. v. Clive Shipping Co. Ltd.* (unreported Supreme Court, 9th May, 1967), Walsh J. stated that interrogatories need not be confined to the facts directly in issue but may extend to any facts, the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue. It is not necessary to show that the interrogatories would be conclusive on the questions in issue but they must have some bearing on the question such that they might form a step in establishing liability or a defence. It is not necessary that the person seeking leave to deliver the interrogatory show that it is in respect of something he does not already know. However, interrogatories will not be regarded as necessary when the information sought is within the knowledge of and capable of proof by the interrogating party (*Bula Ltd. v. Tara Mines* [1995] 1 ILRM 401). The purpose of the interrogatories is to obtain information or admissions from the party interrogated. Judicial encouragement to use interrogatories was recently restated by the Court of Appeal in *McCabe v. Irish Life Assurance Plc*. and others [2015] IECA 239. The court is also entitled to consider what other steps are available or offered to address the issues or concerns sought to be addressed by the interrogatories.

Proof of Documents
23. In most civil cases parties agree that all documents discovered in the proceedings are admissible without proof of their contents or execution. If the parties are concerned about the proof of a document or such consent is not forthcoming a party may serve a notice to admit documents pursuant to O.32 r. 2 of the Rules of the Superior Courts. If there is a refusal or neglect to admit the documents, the cost of proving them "shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be" unless the refusal to make the admission is certified as reasonable by the court. In this case, the court has been informed that all documents discovered in the case to date or to be discovered will be admitted in evidence without requirement of formal proof by the defendants. The court was also informed that discovery has not been completed in this case. Some of the documents which are the central focus of the draft interrogatories were obtained by discovery in the course of an arbitration between the plaintiffs and Crowley Millar. If documents are agreed to be admitted they are still subject in the normal way to the rules of evidence governing admissibility: they will not be admissible to prove the truth of their contents unless on the basis of an exception to the hearsay rule.

24. The parties may further agree that documents will be admissible on the *Bula/Fyffes basis (Bula Ltd (In Receivership) v. Tara Mines Ltd* [1997] IEHC 202 and *Fyffes v. DCC* [2005] IEHC 477). Under this procedure, agreed documents are admitted as *prima facie* evidence of the truth of their contents as against the party who created the document. The admission does not apply in respect of documents created by another party to the proceedings or a non party. For the most part, this procedure saves considerable time in the course of the trial as it is often readily apparent which documents are relevant to the parties' respective cases. There may be little or no disagreement as to authenticity, origin, authorship or content. However, a difficulty arises if it is thought that unfair advantage might be taken of this accommodation.

25. In *Moorview Developments Ltd v. First Active PLC* [2009] IEHC 214, Clarke J. addressed this issue (at paras. 3.6 to 3.10):-

> "3.6 It seems to me that the fundamental issue under this heading is to ensure fairness. Where a party makes a concession to the effect that its documents can be admitted on the *Bula/Fyffes* basis, then it seems to me that basic fairness requires that an opposing party wishing to place reliance on any such document or documents needs to make some reference to the document concerned, and the interpretation which it is sought to place on that document, so as to give the party whose document it is an opportunity to know the case against it that is being made in reliance of the document or documents concerned, and to challenge that case if it should wish to do so. It seems to me, therefore, that at the level of principle it would amount to an unfair procedure if a party were to allow the evidence to close without making any reference to a particular document, but then to rely on that document as evidence whether in closing submissions, or in the case, as here, of an application for a non suit, in submissions at the close of the plaintiff's case. To take a contrary view would lead to a real possibility of injustice. A party might well have cross examined witnesses as to a document had that party been aware that reliance was being placed on it. In a case in which a defendant went into evidence (which is obviously not the case here), a defendant might wish to lead its own evidence as to the proper interpretation of the document concerned. These and other considerations seem to me to lead only to the conclusion that it would amount to an unfair procedure to allow documents to be relied on after the evidence had closed, where the document concerned had not been referred to in any way prior to or during the course of evidence.

> 3.7 However, like all practical rules, it seems to me that there should not be an over rigid application of such a principle. There are a variety of reasons for taking that view, some of which I will touch on.
>
> 3.8 Firstly, documents may well form part of a series of connected documents, such as a series of correspondence or documents which make express reference to others. The fact that a document has not been expressly referred to should not necessarily rule it out as being properly regarded as being in evidence where other connected documents had been referred to, and where in all the circumstances it would not be unfair to regard the document concerned as being before the court.
>
> 3.9 Secondly, as the overriding principle is that the procedure be fair, a court should not take an over literal view of whether a document has been specifically referred to by name. If it is clear, either from the submissions of counsel or evidence given by witnesses that reliance is being placed upon a particular document or category or documents which are readily identifiable, even though not specifically mentioned, then the court should lean in favour of allowing such reliance to be placed on the document even though it may not, strictly speaking, have been specifically referred to.
>
> 3.10 Therefore, as a matter of general principle it seems to me that the court should take a broad view as to whether it can properly be said that the opposing party ought to have reasonably understood that the document in question was being relied on. Only where a court is satisfied that an opposing party could not reasonably have apprehended that reliance was being placed upon a particular document for a particular purpose, should the court exclude that document from its considerations. …"

The learned judge concluded that one of the parties, in that case, was entitled to refer to additional documents in a non suit application where it was reasonable to regard those documents as being part of a connected series of documents relied upon for the first time in the application. The court noted that it would be wholly unsatisfactory if a party were entitled "to cherry pick which of its opponents' documents it might chose to introduce into evidence on foot of an admission on the *Bula/Fyffes* basis without it's opponent being able to point to other connected documents, which might be asserted to form part of a connected sequence".

26. It is open therefore to a party whose documents had been relied upon by an opponent on the *Bula/Fyffes* basis to refer to connected documents. It would be a clear abuse of the rule if a party were permitted to cherry pick those of its opponent's documents on which it wished to place reliance and prevent reliance upon other connected documents. This could lead to significant procedural unfairness and be a recipe for injustice. When placing the opponent's documents before the court a party must "in like manner to a party waiving privilege" accept that all other connected documents can properly be referred to without being proved. These principles of fairness are relevant to the present application whereby much of what the plaintiffs seek to achieve by way of proof of documents may be accomplished under admissions made under the *Bula/ Fyffes* process. In addition, the danger of doing injustice by too narrow a focus on one document to the exclusion of all other relevant documents in a case involving many documents and a complicated history is readily apparent. That danger is heightened considerations by a narrow focus in these draft interrogatories on three or four documents out of context around which a series of questions have been framed based in some instances on selective quotations.

27. The defendants in this case are apprehensive that the use of interrogatories in relation to a limited number of documents prior to the completion of discovery containing draft questions which focus upon discrete extracts from the documents in the absence of an opportunity to offer an expansive answer, is unfair in ways similar to those identified by Clarke J. It is very clear, even at this stage, that the context of advices sought and given by Crowley Millar and various attendances at consultations may be the subject of challenges as to accuracy, interpretation and explanation by the witnesses directly concerned. In addition, it is submitted that the objective of securing proof of the documents by way of answers to interrogatories in respect of the various documents will be achieved by the agreement to admit the documents under the *Bula/Fyffes* model. The defendants are satisfied to admit the documents the subject of the interrogatories in evidence and raise no issue about their origin, authenticity or authorship. Furthermore, I am not satisfied that the suggested shortening of the trial with short form answers to the questions posed by which the witness is bound on oath is a realistic or fair way of achieving a fair hearing of this case. The framed questions are incapable of being adequately addressed in that way having regard to the detailed pleadings which have defined the complicated issues and serious looming evidential conflicts in the case.

The Interrogatories
28. The plaintiffs seek to raise a total of forty-three interrogatories under six identifiable headings.

Category 1
29. This embraces the proposed interrogatories (i) to (vi). The issue raised in draft interrogatory (i) is not in controversy at all. Paragraph 13 of the statement of claim states that pursuant to the insurance policy Crowley Millar were jointly retained by Bourke & Company and RSA to appear and act on behalf of Bourke & Company in defence of the professional negligence claim forming part of the *Betson* proceedings. This is admitted at para. 3 of the defence of Crowley Millar Solicitors who add that it is denied that Crowley Millar provided other related and, as yet, undisclosed services to RSA. It is also admitted by the first named defendants at para. 7 of the defence. The answer sought in respect of interrogatory (i) is therefore unnecessary.

30. Draft interrogatory (ii) concerns a letter dated 5th August, 2010 from Tom Casey solicitor acting on behalf of the *Betson* plaintiffs which refers to the possibility that an indemnity could be refused and inquiring from Crowley Millar whether the first named defendants had agreed to indemnify the plaintiffs. The letter was furnished as part of discovery made in arbitration. As with all documents the subject matter of these interrogatories the defendants are willing to admit the letter on the *Bula/Fyffes* principle as applied in *Moorview* quoted above. I am satisfied that, once the letter is admitted in that form, interrogatories are unnecessary for the purpose of proving the letter. The meaning and purpose of the letter, in the context of the correspondence in the case, will be a matter for evidence at a later stage. The interrogatory as drafted should be much more precise if its intention is to identify the letter as one received by Crowley Millar and establish that it is a true copy.

31. Interrogatories (iii) and (iv) concern a letter dated 6th October, 2010 which the plaintiffs also received as part of the discovery in the arbitration. The defendants have also offered to admit this document under *Bula/Fyffes*. The question in (iii) is not framed in a manner best calculated to achieve the proof of the document by way of interrogatories. The plaintiffs might, in separate questions, have asked whether a letter dated 6th October, 2010 was sent by Crowley Millar to RSA, whether that letter was received by RSA and a further question requesting that the defendants accept that the letter exhibited is a true copy of the letter sent and received. The balance of the interrogatory seeks to advance a view as to the import of the letter based on one paragraph of nine pages which I am satisfied is not an appropriate matter for interrogatories.

32. Interrogatory (iv) refers once again to the contents of the letter of 6th October, 2010 and seeks to obtain a sworn yes or no

answer concerning advices contained in the letter. I am not satisfied that this is an appropriate use of interrogatories having regard to the unfolding events as evidenced by correspondence set out in the pleadings and the particulars furnished. Interrogatory (v) inquires whether Crowley Millar failed to inform the plaintiffs of the advice given but, as set out at interrogatories (ii) and (iii), this is too widely drawn and is not capable of a yes or no answer on the basis of the pleadings in the case. The plaintiffs are in a position to give evidence in relation to advice given or not given to them by Crowley Millar and indeed this question could have no application to the letter at interrogatory (ii) which was a letter from Tom Casey solicitor to Crowley Millar.

33. The plaintiffs are seeking information and/or admissions as to whether Crowley Millar failed to inform the plaintiffs in 2010 that RSA "might be in some difficulty in successfully denying indemnity but that tactically it might be the best way forward for the first named defendant". It is open to the plaintiffs if they were not informed of a particular issue to give evidence to that effect. However, I am satisfied that this draft particular seeks confirmation of the plaintiffs' interpretation of the effect of an extract from the letter of the 6th October, 2010 which reads:

> "Indemnity
>
> We need to make a decision now as to whether or not we are going to indemnify the insured. In the circumstances here there is a narrow line between condoning dishonesty and negligence. I think an element of wilfulness is inherent in *condoning* dishonesty and that wilfulness may not be present here. A refusal to indemnify will be challenged and we will be on the back foot in defending that refusal. There is an arbitration provision in the policy.
>
> Tactically it may be wise to do (sic) deny indemnity as one of the main reasons the plaintiffs are pursuing the insured because he is insured. A refusal to indemnify raises another issue and that is the conduct of the defence of that case if we deny indemnity and come off record. The arbitration will not be concluded before the trial and we will be stuck with the result of the trial if we lose the arbitration. …"

There is then a reference to the unavailability of senior counsel to meet and the engagement of another senior counsel is recommended because:

> "I don't think we can wait that long to decide on the indemnity issue …"

This advice is given under the heading at para. 5 which states:

> "If Killally acted dishonesty or fraudulently did the insured condone same or did the insured commit such an act or was the insured guilty of such an omission such as would entitle RSA to refuse indemnity?"

The conclusion reached in the letter by Mr. Millar is that:

> "We would be in some difficulty in successfully denying indemnity but tactically it may be the best way forward for us."

34. This draft interrogatory is also the subject of the *Bula/Fyffes* admission, nothing further is gained from the rather widely drafted interrogatory (vi). It is likely that extensive oral evidence will be given concerning the context and meaning of this letter.

Category 2 - Senior Counsel's opinion

35. The proposed interrogatories at (vii) to (xiii) contain questions related to an opinion obtained by Crowley Millar dated 22nd October, 2010 from senior counsel dealing with RSA's entitlement to refuse indemnity to the plaintiffs. The opinion advises against declining indemnity. It is claimed that Crowley Millar acted in the interests of RSA and not the plaintiffs "by shoring up and substantiating an exclusion clause strategy to the detriment of the plaintiffs, a strategy which either RSA or CM, or one or both of them, conceded and implemented before and during the lengthy *Betson* trial." (Paragraph 6 of Affidavit of Robert Dooney – solicitor – June 2016). The plaintiffs submit that it is highly important to their case to determine the point at which an actual conflict of interest crystallised for Crowley Millar and at which the plaintiffs were entitled to be notified of the conflict of interest. Both sides acknowledge that once such a conflict occurs dual retainer must cease. The plaintiffs submit that the point of the interrogatories is to establish the time at which the actual conflict of interest occurred and "therefore establish when further confidences, information and data was harvested and used against the plaintiffs."

36. The plaintiffs rely on a number of documents in this regard. These documents appear to have been discovered in the arbitration proceedings involving RSA and Mr. Bourke and Mr. Doherty.

37. As already seen on 5th August, 2010, Tom Casey Solicitors on behalf of the *Betson* plaintiffs wrote to Crowley Millar stating their view that a review of the discovery made by Bourke & Company in the proceedings disclosed matters which raised the prospect that solicitors' indemnifiers would refuse to provide an indemnity in respect of any liabilities which they may incur in respect of the plaintiffs in *Betson.* Crowley Millar was asked to confirm that the insurance company had agreed to indemnify Bourke & Company in respect of the claim and would maintain that cover.

38. In an email to RSA dated 6th October, 2010, Crowley Millar raised as a principal issue whether the insured condoned alleged wrongful actions by their clients or were guilty of such an omission as would entitle RSA to refuse indemnity. This is clear from the extract quoted above. RSA were informed on 7th October, 2010 that senior counsel had been retained and had given an opinion on the issue of indemnity as set out in the previous email. Senior counsel was asked to consider whether RSA was entitled to deny indemnity on the basis of Exclusion No. 7 in the Policy of Insurance which was in the following terms:

> "Fraud or Dishonesty
>
> Any claims to the extent that any civil liability or related Defence Costs arise from dishonesty or a fraudulent act or omission committed or condoned by that insured, except that:
>
> (a) this policy nonetheless covers each other insured; and
>
> (b) no such dishonesty, act or omission will be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that company".

Counsel was satisfied that this exclusion complied with Clause 7.5 of the Minimum Terms Annexed to the Solicitors Act 1954 – 2002 (Profession Indemnity) Insurance (Regulations 2007). Senior counsel concluded that there was nothing in the papers which suggested

that, in advance of the hearing in the High Court of the *Betson* proceedings, one could conclude that the insured knew that the plaintiffs were aware of the true nature of the transaction. He stated that it would be difficult to conclude that the insured had condoned the impugned conduct. There was nothing in the papers to suggest that the insured was personally dishonest or guilty of a fraudulent act or omission. On this issue, he stated:

> "…it seems to me that one could not safely reach a conclusion in the present case that the Insured had condoned the dishonesty or fraudulent activity of Mr. K. … It seems to me that one could only reach that conclusion if, in the course of the evidence at the trial, it emerges that the insured did in fact know that the plaintiffs were unaware of the true facts relating to Mr. K.'s activities. Unless that is brought out in evidence at the trial or unless clear evidence to that effect is otherwise uncovered, I do not believe that RSA could safely come to the conclusion that the insured had condoned the fraudulent behaviour of Mr.K… based upon the information currently available, it seems to me that if RSA were to refuse cover on that basis at this point, there would be no evidence available to it to support that contention in any subsequent arbitration which might take place as between the Insured and itself. It therefore appears to me to be wise to wait until the trial and to see how matters progress and in the meantime, to reserve RSA's position in relation to the provision of an indemnity."

39. Senior counsel concluded that it was premature, at that stage, for RSA to conclude that the insured had condoned the dishonesty alleged. He recommended that RSA should "for the moment reserves its position in relation to cover, but continue to defend the case subject to that resolution". He stated:

> "21. For the reasons which I have previously canvassed, I believe that RSA would also need to be careful that there was evidence that the Insured was liable to the plaintiffs since Exclusion No. 7 only appears to apply in circumstances where there is such a civil liability. This is a further reason why I believe it makes sense to wait and see what evidence emerges either between now and the trial or at the trial.
>
> 22. Finally, if it transpires that all of the partners in the Insured were equally aware of the plaintiffs state of ignorance and did nothing to appraise the plaintiffs of the true state of affairs, then it seems to me to be well arguable that there was a condonation of dishonesty such that Exclusion No. 7 could be relied upon. However, for the reasons stated in paragraph 18(c) above, one could not be certain that a court or Arbitrator would necessary uphold this view, though I would be hopeful that a view would be upheld."

40. This opinion has already been furnished to the plaintiffs because the defendants consider that whatever privilege attached to their dealings with RSA did not attach to documents including this opinion obtained prior to 4th February, 2011, the date upon which they accept an actual conflict of interest arose. The defendants have also offered to admit this document on the *Bula/Fyffes* principle. It is accepted that the opinion was sought by Crowley Millar, that it is the opinion of senior counsel and that the opinion and advices received in the document were so given and received. There is no issue between the parties in relation to these facts. However, the plaintiffs wish to rely upon the procurement of the opinion and reliance upon it as evidence of the existence of a conflict on the part of Crowley Millar which should have prompted them to notify the plaintiffs and take the appropriate steps. I am satisfied that this draft interrogatory (vii) is not necessary and furthermore, that the plaintiffs will be in a position to establish, in their own evidence, that they were not notified that the opinion of senior counsel was sought in respect of indemnity. It is also clear that they can give their own evidence about when they received this opinion for the first time. The opinion speaks for itself as to whether it advises RSA to reserve its position in relation to the provision of indemnity but ought to continue to defend the case subject to that reservation. I do not consider that there is any basis upon which to grant leave to deliver the interrogatories at (vii) to (xi).

41. The draft interrogatories at (xii) to (xx) address some related issues concerning senior counsel's opinion.

42. It is clear that the opinion was furnished as part of an email on 22nd October, 2010. The question at (xiii) asks whether Crowley Millar failed to notify the plaintiffs of the seeking and furnishing of the opinion on 5th August, 2010 and 22nd October, 2010. Further emails on the same date to junior counsel for Bourke & Company from Crowley Millar contain the same opinion are the subject of (xiv). A fee note from senior counsel was furnished to RSA by Crowley Millar in respect of senior counsel's opinion which stated:

> "As this was an opinion on indemnity I don't think we can look to the Insured to discharge the VAT element."

This is related to an earlier letter of 2nd November seeking the fees at (xvi).

43. The question at (xvii) enquires whether the first named defendant, RSA, reserved its entitlement to indemnify the plaintiffs following receipt of advices from senior counsel in October 2010. The next question at (xviii) enquires whether Crowley Millar failed to notify the plaintiffs that the first named defendant was reserving its position on this issue in 2010 and (xix) asks whether Crowley Millar failed to inform the plaintiff that the issue of indemnity was under review prior to the commencement of the hearing of the *Betson* action. All of these documents are subject to the *Bula/Fyffes* type admission. The alleged failure to inform the plaintiffs in respect of seeking or obtaining senior counsel's opinion is a matter within the knowledge of the plaintiffs. It is clear that Crowley Millar continued to act on behalf of the plaintiffs and RSA. They did so on instructions. One might infer that RSA acted on the advice of senior counsel in not refusing indemnity in October 2010. Some of the draft interrogatories are directed towards obtaining evidence as to the nature of the instructions given following receipt of that opinion. I do not consider that these interrogatories are necessary or will save costs having regard to the clear conflict that already exists in respect of these complex matters which will require careful and detailed evidence at trial the full understanding of which, in my view, will not be assisted by the answers to these proposed questions.

Category 3 - 26th January 2010

44. The defence delivered by Crowley Millar states that certain issues emerged for the first time on 26th January, 2011 during a consultation with the plaintiffs during the course of the evidence in the *Betson* trial. It is claimed that the plaintiffs were advised at that meeting that these issues could have implications for their indemnity from RSA and would now be disclosed to RSA. The defendants claim that the potential conflict that the legal team had to address arose from the meeting of 26th January and the failure on the part of the plaintiffs to correctly, fully and truthfully instruct their legal team. The plaintiffs in these proceedings claim that this conflict was readily apparent to Crowley Millar at least as far back as October 2010. Thus if they had acted appropriately, they would have disengaged from the retainer and would not have been in a position to obtain the information which lead to their reverting to RSA in January 2011. I am not satisfied that the interrogatories proposed in relation to this sequence of events are necessary for the fair disposal of the issues in the case. They are not conducive to obtaining clarity of information or a clear admission in relation to an issue of fact relevant to the plaintiffs' case. Clearly, the defendants do not accept and deny that there was a conflict of interest such as to require them to notify the plaintiffs of the advices sought, obtained and given to RSA or to disengage from representations from October, 2010.

45. On the basis of the pleadings and the issues which clearly arise in respect of the conduct of the plaintiffs with their own clients from the *Betson* proceedings and with their own legal team in those proceedings, it seems to me to be unfair to pose the questions raised which are in very general terms and attempt to fix the time at which a conflict arose at a point in the early stages of what is a very complicated and well documented course of events. The documents exhibited in this application, in large measure, speak for themselves but may also be the subject of and be more properly understood upon hearing the testimony of those involved at the trial of the action. If the plaintiffs are correct and the date upon which the conflict crystallised is established as earlier than 4th February, 2011, the waiver of privilege in respect of communications to Crowley Millar from the plaintiffs would cease to have effect from the earlier date. RSA could not rely at trial upon communications passing between the plaintiffs and Crowley Millar thereafter, as same would be subject to privilege. That issue will be determined on the hearing of all the evidence in the case from those involved. It is clear from the opinion of senior counsel that his advice was predicated on an examination of the then available materials, the limitations of which he expressly recognised.

46. In draft question (xx), the plaintiffs asks Crowley Millar to confirm that they delivered advices to RSA in October 2010 which detailed the very specific type of evidence that would have to be revealed or uncovered during the course of evidence at the trial before an indemnity could be safely refused. There is nothing to suggest any such course of behaviour by Crowley Millar. No advices are identified to which this interrogatory could be properly addressed. It seeks an admission by Crowley Millar of the very kind of behaviour which they have expressly denied in their defence. It is an overly general and unnecessary question. Discovery has not been completed upon which this question might be framed on a more limited and focused basis than that set out. It is not a proper form of interrogatory.

Category 4 – The Witness Jeremy Doyle

47. The draft interrogatories (xxi) and (xxii) focus on the attendance of Mr. Jeremy Doyle solicitor as a witness in the *Betson* trial. The questions seek to elicit an admission that Crowley Millar introduced Mr. Doyle as a witness on the instructions of RSA and that they did so having written to him on 17th January, 2011 requesting the provision of evidence that would assist RSA in refusing indemnity. The responses to these interrogatories are said to be relevant as they may demonstrate that Crowley Millar were acting against the interest of the plaintiffs in their conduct of the *Betson* defence. An admission is sought that Mr. Doyle was requested to provide evidence that would assist RSA in refusing indemnity. It is claimed that it is relevant and necessary to know whether Crowley Millar engaged in evidence gathering of this kind for the purpose of strengthening any decision to refuse indemnity.

48. On 17th January, 2011, Mr. Millar of Crowley Millar wrote to Mr. Doyle following a conversation earlier that morning which concerned the signing of a contract for the acquisition of a site in Mount Lucas. It set out a précis of what Mr. Doyle was said to have told Mr. Millar as follows:

> "You were never going to complete the purchase of this site and this was in effect a "dummy" contract. You were to be given a €150,000.00 for signing the contract and this would be paid to you a short time after you signed it and the contract effectively abandoned.
>
> I note that you are going to check on your file to see if you have a record of any attendances involving conversations with Joe Carroll or John Bourke solicitors.
>
> This matter commences in the Commercial Court tomorrow and the issue will of course feature largely in this case. It is very important therefore that I have the full facts of the situation available to me. This is of considerable importance to you as well as you will appreciate."

49. In the *Betson* proceedings, three contracts were allegedly drafted by the plaintiffs. Two were issued to Mr. Doyle. Mr. Doyle and his partner were personally acquiring part of the Mount Lucas lands for €3.5 million and Mr. Doyle was dealing with the conveyancing aspects of this matter. It is alleged that the firm also acted for two brothers (the Maye brothers) who were acquiring another part of the same lands for €1 million. Mr. Doyle also dealt with that conveyance. The third contract issued to a Mr. O'Mara solicitor acting for another party related through marriage to Mr. Killally the plaintiffs' principal client in the Mount Lucas transaction. It is claimed that concerns were expressed about the three contracts on a number of occasions from late 2009 onwards by Crowley Millar. The plaintiffs advised that there were no issues of concern arising in respect of these contracts. However, on 26th January, 2011, it is alleged that the legal team had a consultation with the plaintiffs, as a result of which, a number of issues emerged for the first time concerning the three contracts. This consultation occurred during the course of the *Betson* plaintiffs' evidence. The plaintiffs had instructed prior to 26th January, 2011 that the first named plaintiff was not involved in the conveyancing aspects of the matter at all and they were dealt with solely by the second named plaintiff. It was now said that the first named plaintiff had been involved.

50. Crowley Millar contends that it advised the plaintiffs that these issues might have implications for their indemnity and that RSA would be advised of the matters disclosed that day. This was done and it is alleged that Crowley Millar were instructed to write to the plaintiffs to advise that their legal team would continue to defend the proceedings but that the insurer was reserving its position on indemnity. It is said that they were also told on 26th January that they might wish to seek independent legal advice.

51. On Friday, 4th February, 2011, it is alleged that the first named plaintiff was presented in cross examination with an email chain in an attempt to undermine evidence concerning the distribution of a sum of €489,000.00 related to these transactions. This had not been referred to in his evidence and he had allegedly maintained that he had no involvement in the matter of this distribution. An email of the 31st July suggested that he was aware of the distribution which involved payments of €150,000.00 to the Maye brothers and €150,000.00 to Jeremy Doyle and a Graham Hanlon. The €150,000.00 paid to each of Jeremy Doyle and the Maye brothers was said to have come from the plaintiffs' client account as alleged payment for signing "dummy contracts" for the acquisition of part of the Mount Lucas lands on foot of two contracts issued by the plaintiffs.

52. Crowley Millar contend that they had previously been instructed by the plaintiffs that the three contracts for the sale of part of the Mount Lucas lands to Mr. Doyle and others was not a matter for concern. They informed Crowley Millar that they had been instructed that the said contracts were not proceeding and had in fact been cancelled due to alternative plans for the development. Issues arose in the *Betson* proceedings as to the legitimacy of these three contracts and whether or not the plaintiffs had concerns about their legitimacy. In those circumstances, Crowley Millar contacted Mr. Doyle to ascertain if he had any information in the matter that would help prove that the contracts were legitimate and that the plaintiffs had no cause for concern. This would show that the plaintiffs were acting as innocent parties who became unwittingly involved in the Mount Lucas lands. Information received from Mr. Doyle initially supported this strategy. However, when informed that he might have to give evidence in the *Betson* proceedings, Mr. Doyle informed the second named defendant that the contract with him was not legitimate but that he had been paid €150,000.00 to sign it. Mr. Doyle also told the second named defendant that the plaintiffs were not involved in that aspect of the matter. This seemed to establish for Crowley Millar some support for the proposition that the plaintiffs were innocent of any wrongdoings. This also supported the plaintiffs' initial instructions which had continued up to 26th January, 2011 that the contracts were legitimate. When

informed of the conversation between Mr. Doyle and the second named defendants, the plaintiffs, it is said, were relieved to hear that Mr. Doyle had confirmed that they were not involved and they stated that they were not aware of the false nature of the contracts insofar as Mr. Doyle was concerned.

53. The court was advised of the involvement of Mr. Doyle in the matter and the import of the conversations which the second named defendant had with him. The court then directed that Mr. Doyle be called to give evidence immediately. He contradicted the conversation recorded in the letter dated 17th January and Mr. Millar was called to give evidence of that conservation which he had recorded in writing describing how Mr. Doyle had admitted that he had been paid to sign a dummy contract.

54. It is undoubtedly the case that the plaintiffs were aware that Mr. Doyle attended and gave evidence in court. The circumstances in which that occurred are unusual. Mr. Doyle's alleged disclosure to Crowley Millar and surrounding events are said to have triggered appropriate disclosure to the court because of the plaintiffs' legal team's discovery of these new facts. This was a complex scenario and may be further clarified following discovery. I do not consider that the administration of justice in this case would be in any way assisted by asking either of the questions posed in respect of Mr. Doyle's attendance as a witness and the attempt, in particular, in question (xxii) to limit the focus of the letter of 17th January, 2011 to the inference which the plaintiffs seek to draw from that letter namely, that it was sent to "assist the first defendant in refusing indemnity". Apart from the fact that at least three issues are merged in the question, I do not consider that either of these questions are proper matters for interrogatories or would assist the fair trial of this action.

Category 5 - Meeting 26th January, 2011

55. The interrogatories at (xxiii) to (xxxvii) relate to a consultation attended by the plaintiffs, the defendants and counsel on 26th January, 2011. On the same date, senior counsel for the plaintiffs and Mr. Millar held a conference call with RSA and advised a Ms. Scanlon of the facts which had emerged from the consultation. A note of the points discussed in that conference call are set out in a telephone attendance dated 26th January, 2011 which has been disclosed to the plaintiffs. That document is also the subject of a *Bula/Fyffes* admission. Plainly, a meeting took place on 26th January, 2011. Question (xxiv) asked whether the purpose of that meeting was to elicit information that provided a stronger basis for the first named defendant to deny indemnity. It is clear that the various options open to RSA were discussed. Mr. Millar advised that the best option was to continue to defend the matter and to write to Bourke & Company reserving RSA's position with respect to indemnity but that the company would continue to defend the matter unless and until there was proof of fraud. A further letter was written on 27th January, 2011 by Mr. Millar to Ms. Scanlon of RSA. A number of facts which had now become clear were listed in the letter, all of which led Mr. Millar to suggest that the only reasonable conclusion that could be reached was that the insured "never expected these contracts to close". Mr. Millar writes that "John Bourke agrees that this looks likes they were party to a fraudulent transaction. He acknowledged yesterday this is the way it looks but denies that is the case". It confirmed that both plaintiffs had been informed that these matters might give rise to serious implications for their entitlement to indemnity.

56. The summary of facts set out in the letter at paras. 1 to 11 are quoted at the proposed interrogatory (xxix) asking whether the following information had been elicited at the meeting of the 26th January. Draft interrogatory (xxix) and the subsequent interrogatories (xxx) to (xxxvii) concern issues regarding the interpretation of the notes of the meeting of the 26th January and the contents of the letter of the 27th January. It does not appear to me that any of these questions are focused on single issues. Many of them are argumentative; each seeks to draw inferences from the contents of the two documents. I do not consider that it is either necessary or in the interests of justice that these questions be answered in the manner in which they are formulated. I do not consider that it would save time or indeed that it would be fair to the defendants to require answers in respect of these documents isolated and removed from their context and created as they were in the middle of complex and difficult litigation in which new important information was emerging. The narrative of these events is undoubtedly complex and not fairly amenable to these draft interrogatories, particularly in the absence of a full discovery.

Category 6 – 31st January, 2011

57. Draft interrogatories (xxxviii) to (xliii) relate to an email of 31st January, 2011 in relation to a consultation held on the afternoon of the same date. At lunchtime on 31st January, Mr. Millar sent an email to the plaintiffs raising nine questions concerning a number of transactions. These questions followed an earlier conversation between Mr. Millar and Mr. Burke. Later on the same date, at approximately 4.30pm, a consultation was held attended by the plaintiffs, Mr. Millar, senior counsel, and Mr. O'Longaigh and a Ms. Kent. The attendance compiled following this meeting is dated 7th February, 2011. Interrogatory (xxxix) enquires whether Crowley Millar sent the email to the plaintiffs seeking answers to the questions. They clearly did and this is the subject of an admission under the *Bula/Fyffes* principle.

58. The interrogatory (xl) asks whether the answers received from the first named plaintiff to these questions were passed on by Crowley Millar to RSA. It is said that the passing on of any such information to RSA would have been in breach of Crowley Millar's duty to the plaintiff as it could only have arisen from a conflict of interest. There is a suggestion in the question that they were composed arising from a meeting held on 31st January. However, the reference in the email is to a prior "conversation" which occurred earlier on the morning of the 31st of which the plaintiff must be aware.

59. The consultation of 31st January, 2011 is dealt with extensively in the pleadings and in particular at paras. 20(w) to 20(ee) of the defence. The issues raised in the email and attendance note relate to matters addressed by solicitor and counsel at the consultation. These matters are said to have emerged as new and highly important elements of the evidence in the course of the *Betson* trial. The plaintiffs' solicitors and counsel sought and were given further and, it is said, in some respects, changed instructions.

60. The attendance at p. 8 also sets out in detail a conference call held after the consultation between Ms. Conlon of RSA, Mr. Millar, senior counsel, Mr. O'Longaigh and Ms. Kent. Reference is made to the possible implications of these matters for the indemnity to be provided by RSA to the plaintiffs. This document is also subject to a *Bula/Fyffes* admission. The plaintiffs were present during the consultation but not during the conference call. The full attendance is available to the plaintiffs.

61. I do not consider that the draft interrogatories at (xlii) and (xliii) are appropriate. The questions posed seek to procure an acceptance from the defendants that Crowley Millar, when discussing the issues raised with RSA on 31st January discussed the question of indemnity "in terms that 'the closer we get to fraud the better it is for us'". I am satisfied that this attempt to define the call with RSA by that phrase seeks to limit the context of the discussion set out in the attendance in a manner which would be unfair to the defendants and unhelpful to the court's full understanding of the context in which the phrase was used. The attendance runs to nine pages. In my view it is inappropriate to use interrogatories to define such a highly complicated series of developing events and disclosures. Furthermore, the question of whether Crowley Millar advised the plaintiffs concerning this conversation with RSA is a matter which is capable of proof during the course of the trial and is within the knowledge of the plaintiffs. I am not satisfied that any of these interrogatories are necessary for disposing fairly of the cause or issues in these proceedings or will in any way save costs.

Conclusion
62. I am not satisfied to grant leave to deliver any of the interrogatories set out in the notice of motion. Many of the interrogatories are drafted in very general terms. It is clear that the defendants' position is that all documents the subject of the draft interrogatories in evidence are the subject of an admission on the basis of the *Bula/Fyffes* principle. I do not consider that there is any difficulty in proving these documents at the trial. The plaintiffs are privy to much of the information which they claim to seek: insofar as attendances are concerned they attended at the consultations in issue. I do not consider that the selective focus on extracts from these documents is of any assistance to the court in determining the issues which have already been the subject of extensive and detailed pleadings. In addition, discovery has not been completed in the case and is undoubtedly going to be extensive. The course of dealing between the parties and the complex course which the *Betson* proceedings took during the trial, including the changed or inconsistent instructions said to have been given by the plaintiffs, indicate that the answering of these interrogatories, even if in an acceptable form will not assist in narrowing any of the issues which exist between the parties.

63. It is clear that Crowley Millar contend that a conflict of interest arose for the first time on 4th February, 2011 at which stage they notified the plaintiffs of the existence of the conflict and the steps which they then proposed to take. Undoubtedly, at the hearing of the action there will be considerable focus upon information which Crowley Millar had in its possession at various stages of the proceedings, the extent to which instructions from the plaintiffs changed from time to time, how and when various matters of fact came to their attention during the course of the trial or otherwise, and how they addressed that information both with the plaintiffs and with RSA.

64. For the reasons set out above, I do not consider that the use of interrogatories is necessary for disposing fairly with the issues arising in these proceedings or for the saving of costs. The application is therefore refused.