THE HIGH COURT

COMMERCIAL

[2004 No. 1756 S]

BETWEEN:

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINTIFF

-AND-

GARRETT KELLEHER

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 7th day of March, 2018.

1. The background to this motion is that the plaintiff ("NAMA") in the substantive proceedings is seeking to enforce guarantees for €46 million against the defendant ("Mr. Kelleher"), who was involved in the development of the Chicago Spire. Mr. Kelleher claims in his defence to those proceedings that NAMA represented to him that if, *inter alia*, he co-operated with NAMA, which he says he did, the guarantees would not be enforced.

2. The present proceedings concern a motion by Mr. Kelleher regarding compliance with an order of the High Court on the 13th October, 2016, and an order of the Court of Appeal on the 3rd March, 2017, ordering NAMA to provide discovery of certain documents to Mr. Kelleher.

3. By affidavits of discovery dated 8th December, 2017, and 15th December, 2017, NAMA sought to comply with its discovery obligations under those discovery orders made by the High Court and the Court of Appeal.

4. However, in this motion, Mr. Kelleher seeks the following relief:

> "An Order requiring the Plaintiff to make discovery in accordance with the order of this Honourable Court dated 13th October 2016, the order of the Court of Appeal dated 3rd March 2017 and as agreed between the parties or in the alternative an order staying the plaintiff's claim until it does so".

5. This application is curious, since it seeks an order from this Court ordering the plaintiff to comply with orders of this Court and the Court of Appeal. However, the essence of Mr. Kelleher's claim seems to be one of non-compliance by NAMA with its discovery obligations, *albeit* that it is framed as an application for an order for NAMA to comply with a court order.

6. There are a number of heads under which Mr. Kelleher complains about the discovery, namely (1) Co-operation re: the Spire Foreclosure Process; (2) Locating a purchaser for the loan/asset; (3) Lack of Documentation on Meetings, and; (4) Lack of Internal Documentation.

7. In essence Mr. Kelleher does not believe that NAMA has complied with its discovery obligations under each of these headings and he believes that there are other documents available to it which have not been discovered, despite sworn averments from employees of NAMA that all relevant documents have been discovered.

8. Since litigants normally view a case only from their own perspective, Mr. Kelleher is undoubtedly not alone amongst litigants in believing that the other side in his litigation is not being completely open and frank or that his opponent has taken an overly conservative approach to what is relevant when it comes to providing discovery. Indeed, this would coincide with human nature, which would appear to dictate that if there are two possible interpretations of a court order, one liberal and one conservative, it is likely that a litigant will take the interpretation most favourable to his interests.

9. While ultimately Mr. Kelleher might be proved correct in his scepticism of the level of discovery provided by NAMA, there is not an easy answer to his concerns when one has sworn averments to the effect that full discovery has been provided.

10. It is not that he is without any recourse, since if these averments turn out to be incorrect, there are significant implications for NAMA and indeed the reputation of the persons swearing the affidavits.

11. However, the state of affairs confronting this Court at this stage of the litigation is that it has been provided with sworn affidavits by employees of NAMA. Under each of the four categories of discovery, NAMA has provided a sworn averment that all relevant documents have been discovered. When this is the situation, the applicable law is as stated by Kenny J. in *Sterling-Winthrop Group v. Farbenfabriken Bayer A.G.* [1967] IR 97 at 100, namely that an order for further and better discovery:

> "will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit."

The Supreme Court, per Murphy J. in *Phelan v. Goodman* [2000] 2 IR 577 at 583, quoted Kenny J. in *Sterling-Winthrop* when he put the matter thus:

> "The authorities which I have mentioned establish that the Court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong. None of these matters has been established and I must therefore, refuse to make the order sought."

12. In this case, this Court has not been provided with any documents which Mr. Kelleher can show were not discovered by the NAMA in breach of the discovery orders. For this Court to take the very significant step of concluding that a party has given false sworn evidence, this Court needs more compelling evidence than that which has been provided by Mr. Kelleher, which amounts essentially to his belief that NAMA has misunderstood the issues in the action or that NAMA may not have used correct search terms for their

electronic discovery.

13. Typical of the evidence provided by Mr. Kelleher is that there were some meetings held involving NAMA employees for which no minutes or notes have been discovered. While it may seem surprising that NAMA might not have minutes for all of these meetings, one is dealing with a public body that is well versed in litigation and reference was made to the sophisticated electronic searches (including a search of the NTMA Enterprise Vault System, which contains deleted emails) which was carried out as part of the discovery process in the affidavits sworn on behalf of NAMA. More importantly, this Court has sworn evidence that no further documents are available.

14. In these circumstances, this Court cannot see how it can simply disbelieve the sworn averments of two employees of NAMA that they have provided all relevant documents to Mr. Kelleher.

15. It seems to this Court based on the evidence that has been provided to it that, if this Court was to make the order sought by Mr. Kelleher (namely to order NAMA to comply with the High Court and Court of Appeal orders), all that would result is that there would be another affidavit from the relevant employees of NAMA confirming that it had discovered all relevant documents.

16. To quote Murphy J. in *Bula Limited (In Receivership) v Crowley* [1991] 1 IR 220 at p. 584:

"Difficulties obviously arise in directing the discovery of documents or a particular range or class of documents which the deponent denies are in his possession. To order the first defendant to swear a further affidavit of discovery presumably would result in his repeating the statements made and sworn by him on several occasions, namely, that he has not and never had any documents, in addition to those already discovered, in his power or possession relating to the matters in issue in the present proceedings. In those circumstances the court would have to be satisfied on the evidence before it that it was making a meaningful order."

17. This Court does not believe, on the evidence before it, that it would be making a meaningful order if it were to order NAMA once again to comply with a court order, with which NAMA says it has already complied. Accordingly, it refuses the motion brought by the defendant.