THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 84

Appeal No. 2014/73

Appeal No. 2014/1464

Peart J
Irvine J
Mahon J

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION) AND OTHERS

PLAINTIFFS

AND

SEAN QUINN, CIARA QUINN, COLETTE QUINN, SEAN QUINN JUNIOR, BRENDA QUINN, AOIFE QUINN, STEPHEN KELLY, PETER DARRAGH QUINN, NIALL MCPARTLAND, INDIAN TRUST A.B., FORFAR OVERSEAS S.A., LOCKERBIE INVESTMENTS S.A., CLONMORE INVESTMENTS S.A., MARFINE INVESTMENTS LIMITED, BLANDUN ENTERPRISES LIMITED, MECON FZE, CJSC VNESHKONSALT, 000 STROITELNYE TEKHNOLOGII, 000 RLC – DEVELOPMENT, KAREN WOODS, SENAT FZC, SENAT LEGAL CONSULTANCY FZLLC AND MICHAEL WAECHTER

DEFENDANTS

AND

DECLAN TAITE AND SHARON BARRETT

RECEIVERS

Judgment of Mr. Justice Mahon delivered on the 29th April 2015

General

1. Two separate Orders of the High Court have been appealed by a number of the defendants in these proceedings. In this judgment these defendants are referred to as 'the personal defendants'. They are also referred to in other relevant documentation as 'the relevant defendants'.

2. Both relate to Orders made by McGovern J. concerning the process of the inspection of documentation and other material by the receivers of Irish Bank Resolution Corporation Limited (in Special Liquidation) ("IBRC"), namely Orders made on 24th November 2014 and on 9th December 2014.

3. The background to these Appeals is the plaintiffs' claim that the personal defendants have placed assets which ought to have been available for the liquidation of IBRC, beyond reach. These proceedings are part of major and contentious litigation arising out of the interaction between the former Anglo Irish Bank and members of the Quinn family, and companies owned and controlled by them.

4. A particular feature of these proceedings (and indeed other related litigation) is the enormous amount of documentation that has been discovered, or awaits discovery or inspection.

5. The receivers who are the Respondents in these appeals are Mr. Declan Taite and Ms. Sharon Barrett ("the receivers"). Mr. Taite was appointed a receiver by Orders of the High Court in June/July 2012 on the application of IBRC, over the assets of the relevant defendants, with the exception of the twentieth personal defendant/appellant, Karen Woods. Ms. Barrett was appointed as joint receiver with Mr. Taite over the assets of Ms. Karen Woods. In their capacity as court appointed receivers they are separate parties to the plaintiffs, and act independently of them. The receivers were appointed in aid of Mareva injunctive relief granted by order of the High Court on 14th June 2012.

6. The common backdrop to both appeals is an Order of the High Court (Kelly J) dated 9th November 2012. That Order directed the personal defendants to deliver up to the receivers all books, records or documents relating to the assets or the financial or tax affairs of the personal defendants, and included all devices on which such may be stored.

7. The High Court Order of 9th November 2012 provided for a process (the High Court Process) for the review of such documentation and material by the receivers, and which directed the receivers to review all documentation collected from the personal defendants, and then divide the documents into three categories, namely

(i) those documents which appear to be relevant and not privileged, and therefore disclosable to IBRC,

(ii) those documents which appear to be privileged or arguably so; and

(iii) those documents considered to be irrelevant (non-relevant documentation).

8. The Order further provided that where it was impossible to reach agreement in respect of the categorisation of the documents, the personal defendants were at liberty to apply to the High Court for directions.

9. The High Court Order of 9th November 2012 was the subject of an appeal to the Supreme Court. By order of the Supreme Court on 26th February 2014, the High Court Order of 9th November 2012 was varied. The Supreme Court Order provided for a process for dealing with downloaded material and which it referred to as 'the Supreme Court process', in substitution for the original 'High Court process'. This variation of the High Court Order by the Supreme Court is the focus of one of the Appeals to this court.

The Appeal relating to the High Court Order of 24th November 2014 (The First Appeal)

10. The receivers brought a motion on 12th November 2014 seeking to compel the personal defendants to swear an affidavit

containing certain information in respect of those documents over which they had asserted privilege in furtherance of the High Court Order of 9th November 2012, as amended by the Supreme Court Order of 26th February 2014 (the Disclosure Order). More specifically, the information sought was divided into six categories for description and identification purposes, and intended to assist the receivers identify the type and nature of the very large number of documents over which the personal defendants claimed privilege, and thus enable them challenge such claims where appropriate.

11. The first Appeal relates only to that part of the Order of McGovern J. which dealt with the fifth of the six categories of information sought, namely 1.5, and which ordered the disclosure of *"the subject title, heading to communications and names of attachments and documents over which privilege is claimed."*

The submissions of the personal defendants in the first Appeal
12. The personal defendants contend that a requirement that they *provide "the subject title heading to communications and names of attachments and documents over which privilege is claimed"* has the potential to dilute and/or destroy the privilege claimed. It is argued that such a requirement has the potential to reveal the substance of the content of the document, and that there is a real risk that the privilege claimed over such communications/attachments could be fatally undermined. The personal defendants maintain that the learned High Court judge erred in law and in principle in rejecting this argument, when he directed that they provide that information in respect of each document over which they asserted privilege.

13. By way of an alternative means of assisting the receivers in identifying the type and nature of the documentation over which privilege is claimed, the personal defendants state that they prepared:

> *"… to provide a short narrative in respect of each document chosen by the receivers or if deemed necessary over all documents over which the personal defendants have claimed privilege explaining the basis of each claim to privilege."*

14. It is contended on behalf of the personal defendants that a description process such as that outlined in the previous paragraph would adequately deal with the concerns raised by the receivers to the effect that the information already provided by the personal defendants does not, in many instances, sufficiently identify the type and nature of the document over which privilege is asserted.

The submissions of the receivers in the First Appeal
15. The receivers emphasised that they were entitled to know the basis upon which the personal defendants claimed privilege over particular documents. They maintained that the information sought by them (and ordered by the High Court) was necessary information to enable them understand the type and nature of the document over which privilege was being asserted, and that the provision of such information did not dilute or destroy the privilege claim. They maintained that the descriptions of documents which had been provided by the personal defendants in respect of each document over which privilege was claimed did not provide the clarity required.

16. The receivers instanced examples in the personal defendants A3 spreadsheets relating to individual documents, and more particularly the descriptions outlined in the last column for each entry. They pointed to the many instances where the description provided was inadequate and effectively prevented the receivers from being able to adequately identify the class or nature of the document over which privilege was being claimed, such as would enable them make a decision whether or not to challenge such assertion. The receivers pointed to the nature of the litigation and the fact that it had been well established that purposeful steps had been taken by the personal defendants to place assets out of their reach. They argued that the lack of trust created by the actions of the personal defendants/respondents understandably created a degree of scepticism and concern that the personal defendants intended to be as evasive as possible in providing information for the processing of the litigation. It was the case, they pointed out, that the receivers were officers of the Court, and were independent of the plaintiff. Such information as was provided in accordance with the High Court Order and which might assist, even in some remote manner, to identify the content of the document (or the likely content of the document) would not be provided by them to the plaintiffs (IBRC) where a legitimate claim of privilege existed, and there was therefore no risk that IBRC would gain any insight into the nature or content of such privileged documentation or any description provided of such documentation in accordance with the High Court Order.

17. A number of authorities were opened to the Court on behalf of the personal defendants including *Fyffes v. DCC plc and Others* [2005] IESC3, para. 23, *Ahern v. Mahon and Others* [2008] I.R. 704 at 719, *Bula Limited v. Crowley and Others* [1991] I.R. 220 at 222. The following passage from the judgment of Kelly J in *Duncan v. The Governor of Portlaoise Prison* [1997] I I.R. 558 at 576 was referred to, thus

> *"It appears to be the proposition advanced by Mr. McEntee to the effect that the Court ought in this case to direct the production of the documents in respect of which legal professional privilege is claimed and then, in effect, edit them so as to make factual matter in them disclosable to him, would be to dilute in very considerable measure the whole notion and effect of legal professional privilege. It would, in my view, be an unwarranted and dangerous course to embark upon and would amount to a serious interference with what the then Lord Chief Justice of England described as "fundamental condition on which the administration of justice as a whole rests."*
>
> *Quite apart from the objection in principle, Mr. McEntee's formulation has many practical difficulties attendant upon it. If he is correct in his submission, any case in which legal professional privilege is claimed may, on the simple request of the opponent, result in the Court being called upon to go through the entire of the documents with a view to ascertaining, not the validity of the claimed legal professional privilege, but rather to engage in the work of editing the documents with a view to extracting from them factual material to be disclosed to the other side. This exercise would have to be conducted at a time in advance of the trial when no Judge can be fully apprised of the entire factual matrix against which the action is brought. The conduct of such an exercise would, in my view, be much more likely to work against the administration of justice than in its favour."*

18. Reference was also made to the judgments in the case of *The Irish Haemophilia Society Limited and Lindsay and others* (Kelly J, 16th May 2001, JR) and *Derby & Co. Ltd. v. Weldon & Others* (No. 7) [1990] 3 AII E.R.161. In the head note to that case (at p. 162), the judgment of the Court is summarised as follows (at 2):

> *"Where privilege was claimed for professional communications of a confidential character obtained for the purpose of getting legal advice, the claim for privilege was to be treated as itself a sufficient description of the communications, irrespective of the scale of discovery and the complexity of the issues involved, and consequently the party seeking disclosure was not entitled to satisfy himself by means of a fuller description of the communications for which privilege was claimed that it was not claimed for documents outside its proper scope. Moreover, the court would not order the party claiming privilege to disclose all communications with his legal advisers or to provide fuller particulars of those*

communications even where it had been shown in relation to one transaction that the advise was sought in furtherance of a fraudulent design, since to order such disclosure would be contrary to the public policy on which legal privilege was founded. Accordingly, the plaintiffs were not entitled to require the defendants to file further lists identifying in the case of documents for which privilege was claimed the circumstances allegedly giving rise to such a claim."

19. The receivers also referred the court to the remarks of Boyd J in the case of *Flynn v. Northern Banking* [1898] I.L.T.R. 67/68 when he stated:

> *"I think the plaintiff has a right to see from what date and to what date the correspondence contained in this bundle took place, and to see whether the allegation is founded on fact that these queries and answers were made in anticipation of legal proceedings. Some time should be shown first as to when the letters commenced to be written and when they terminated, and there should be some information further than that given to enable the plaintiff to judge whether litigation was likely to ensue."*

20. The Court's attention was also directed to a paragraph in the judgment of Beatson J in the case of *West London Pipe Line and Storage Limited v. Total U.K. Limited* [2008] 2 CLC 258 at 278 as follows:

> *"Thus, affidavits claiming privilege whether sworn by the legal advisors to the party claiming privilege as is often the case, or in this case by a Director of the party, should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect."*

The Appeal relating to the High Court Order of 15th December 2014 (The second Appeal)

21. By Notice of Motion dated 25th November 2014 the receivers sought certain orders relating to the ongoing inspection process, and on 15th December 2014 the High Court (McGovern J) made the following orders:

> *In furtherance of the order of this Honourable Court dated 9 November 2012 as varied by Supreme Court Order dated 26 February 2014 that all "Non Relevant" documents reviewed by the Receiver to date and which are believed to be in fact "Relevant" documents within the meaning of the aforementioned Order be disclosed to the Receivers and Solicitors for the Plaintiff, a list of which documents are identified in the Schedule hereto.*
>
> *By way of variation of the step set out at point 7 of p. 8 of the Supreme Court Order of 26 February 2014 (which varied the High Court's Order of 9 November 2012) that "documents which have been identified as falling outside the ambit of Order 1 and/or Order 2 (i.e. identified as "non relevant") may be inspected forthwith by the Receivers (and up to four personnel from Duff and Phelps on their behalf) and up to ten persons from the Receivers' Solicitors (Arthur Cox) to enable the Receivers satisfy themselves that they do in fact fall outside the ambit of those orders; in the event of any dispute as to whether any document is Non Relevant and therefore falls outside Order 1 and/or 2, the Receivers will bring an application for directions before the High Court on notice to both the Relevant defendants and the plaintiffs."*
>
> *That the relief sought at paragraph 3 of the said Motion do stand adjourned for mention to Monday 26th day of January 2015 at 11 o'clock in the forenoon.*
>
> (The personal defendants/respondents were ordered to pay the costs of the Motion to the receivers.)

22. The High Court Order of 9th November 2012 had been appealed, in part, by the personal defendants, to the Supreme Court. The Supreme Court Order of 26th February 2014 varied the High Court Order of 9th November 2012 to the following extent:-

> *"It is ordered that the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth and Twentieth named defendants (the relevant defendants) to deliver up to the Receivers all books, records or documentation (whether originals or copies, and whether in hard copy or soft copy format) relating to the assets or the financial and/or the tax affairs of the defendant (the "Books and Records") generated subsequent to the 27th day of June 2009 ("Order 1").*
>
> *And it is ordered that the relevant defendants having produced and delivered up to Espion Limited ("Espion") any computers or other electronic devices (including laptops, sim cards, discs, memory boards, smart phones, ipads or similar devices and any other software or hardware of any kind) upon which Books and Records or copies thereof may be stored for the purposes of Espion firstly accessing same so as to download the information therefrom (which occurred on 11th and 12th December 2012) and secondly to carry out the process hereinafter set out in this Order (the Supreme Court Process) it being agreed between the Parties that the information stored on those devices or downloaded therefrom remains the property of the relevant defendants and within their custody and control (Order 2).*
>
> *And the Court doth direct that the Receivers may provide the plaintiffs with any non legally privileged information that they receive either from the relevant defendants or any third party in their capacity as Receivers over the assets of the relevant defendants which they have being appointed over pursuant to Orders dated 29th day of June 2012, 30th day of July 2012 and 31st day of July 2012.*

23. The said Order of the Supreme Court effectively substituted a new inspection process (the 'Supreme Court process') in place of that directed by the High Court, as follows:

> *1. Espion will collate and list each document contained in the material downloaded by it from the devices delivered to it by the relevant defendants and imaged as part of the disclosure process.*
>
> *2. In preparing the said list ("The List") Espion will ascribe each document an identifying number and thereafter identify in respect of each document, where possible.*
>
> *(a) The addressee of the document*
>
> *(b) The sender or author of the document*
>
> *(c) The date of the document*

(d) The type of the document namely letter, email, Word document, Excel document, bank statement, invoice PDF etc and a brief description of the document.

3. Espion will use its best endeavours to complete the List within two weeks of today's date.

4. The List and a copy of the documents on that List will be supplied to the Solicitors for the relevant defendants. The List (save for the brief description of the document) will be supplied to the Receiver.

5. The Solicitors for the relevant defendants will within four weeks from receipt of the List and documents write to the Solicitors for the Receivers identifying by reference to the List the documents firstly, over which no claim to privilege is asserted, secondly the documents over which any claim to legal privilege is asserted and thirdly the documents falling outside the ambit of Order 1 and/or Order 2.

6. Documents on the list over which no claim to privilege is asserted and within the ambit of Order 1 and/or Order 2 will then be identified by the Solicitors for the relevant defendants to Espion who will release those documents but only those documents to the Solicitors for the Receivers forthwith and thereafter to the plaintiffs. In this regard the Solicitors for the relevant defendants will endeavour to identify to Espion these non privileged and relevant documents on a piece meal basis as these documents have been reviewed.

7. Documents which have identified as falling outside the ambit of Order 1 and/or Order 2 may be inspected by the Receivers in conjunction with the personal defendants to enable the Receivers satisfy themselves that they do, in fact, fall outside the ambit of those Orders.

8. In the event of any dispute as to the basis for any privilege objection the receivers will bring an Application for directions before the High Court on Notice to both the relevant defendants and plaintiffs."

24. The form of Order of the Supreme Court was essentially based on an agreed settlement by the parties of the issues arising on the appeal to the Supreme Court. However, the Orders made by the Supreme Court were made in a form deemed appropriate to the Court. In his Judgment Clarke J. stated:

"As to the form of the Order which this Court should make, I agreed with Counsel for the Receivers that it is appropriate that an express direction in those terms be included in the order. In many ways, such a direction is not necessary for the scheduled draft Order already includes, as I have pointed out, reference to a direction in those terms as sought being granted. However, given that all of the other Orders are dealt with twice in the sense of being referred to as being granted by reference to the notice of motion (with or without variation) and then dealt with again by setting out the text of the Order, again with or without such variations, it seemed to me to be preferable, as a matter of form and for the avoidance of any possible confusion, that the direction concerning non privileged documents being made available to IBRC should be treated in the same way. In so doing this Court is not varying the settlement reached between the parties. Rather this Court is putting into a form which this Court considers acceptable the undoubted substance of what was agreed between the parties. While the belated agreement is to form to take some of the controversy away, the form of the Order is, as already pointed out, a matter for the Court."

Discussion

The first Appeal (the review of the documentation in respect of which privilege is asserted

25. One of the great bulwarks of our legal system is the almost absolute right to claim legal professional privilege and to protect from disclosure documentation which correctly falls into that category. The entitlement to prevent disclosure of privileged documentation has been repeatedly stated and reaffirmed in a succession of Court decisions.

26. In *Paragon Finance v. Fresh Fields* [1999] 1WLR 1183 at 1188, Lord Bingham C.J. stated:

"The nature and basis of legal professional privilege has been often and authoritatively expounded…At its root lies the obligation of confidence which a legal adviser owes to his client in relation to any confidential professional communication passing between them. For readily intelligible reasons of public policy the law has, however, accorded to such communications a degree of protection denied to communications, however confidential, between clients and other professional advisers. Save were clients and legal adviser have abused their confidential relationship to facilitate crime or fraud, the protection is absolute unless the client (who privilege it is) waives it, whether expressly or impliedly."

27. In *R v Derby* Magistrates Court *(ex parte* B) [1996] 1A.C.487), Lord Taylor stated the following at p. 507:-

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

28. This passage of Lord Taylor was cited with approval by Kelly J in *Duncan v. The Governor of Portlaoise Prison* [1997] 1.I.R.558 and *Ahern v. Mahon and Others* [2008] I.R.709.

29. The process, from the prospective of the parties seeking the production of documentation in the course of litigation, and where the existence of specific documentation can often be the determining factor in such litigation, can be fraught with risk and, in particular, there is the possibility that a claim to privilege will be made inappropriately. The difficulty arises from the fact that documentation over which privilege is asserted is not usually available for inspection by the party seeking its discovery, and the scope for improperly concealing documentation under a false veil of privilege is therefore significant. In this case, the history of evasiveness and lack of candour on the part of the personal defendants (as so found by the High Court) has undoubtedly given rise to a concern on the part of the receivers, and indeed a suspicion, that documentation which is claimed to be privileged may not in fact be so, and that unless an unusually transparent system of identifying documentation is put in place, and imposed on the personal defendants, the receivers' ability and entitlement to adequately and sufficiently identify documentation, and where appropriate, challenge assertions of privilege, will be frustrated.

30. At the core of this appeal is the extent to which a party seeking privilege in respect of a document should be obliged to reveal information which may, of its nature, serve to identify, to a greater or lesser degree, its content.

31. The A3 spreadsheets provided by the personal defendants identify a great number of documents. In relation to those in respect of which privilege is asserted, a *'description'* is provided in the last column of each spreadsheet. While some of these descriptions identify a document in a manner which is sufficient to identity the class of document referred to, and thereby justify an assertion of privilege in relation thereto, others clearly do not do so. To this extent the Court is satisfied that the receivers criticism of a lack of clarity on the part of the personal defendants in their descriptions of many of the documents over which a claim of privilege is asserted, is reasonable. In his Order of 24th November 2014 the learned High Court Judge directed that six separate categorisations were required of each document over which the personal defendants was asserting privilege, and the fifth of these (which is the categorisation under appeal in this case) is a requirement to provide, in relation to each document, *"the subject title heading to communications and names of attachments and documents over which privilege is claimed".*

32. The personal defendants contend that in many instances such a requirement will result in a disclosure of information which will act to reveal the content of the document, and in so doing, will dilute or destroy the privilege attaching to the document. They are, in particular, concerned with emails and other electronic communications which may not have a subject title heading such as might appear, for example, in more formal correspondence, and that there may be attachments in respect of which a description such as would satisfy the Order of 24th November 2014, would potentially reveal the documents' content. This is not accepted by the receivers who, in any event emphasised that they are not the plaintiffs in the case and that no document or part of a document deemed privileged will be released to the plaintiffs.

33. There are many examples of cases where the courts, both in this jurisdiction and elsewhere, have emphasised the risks associated with any attempt to weaken the entitlement of a party to prevent the disclosure of a privileged document, and resisted efforts to do so.

34. In *Duncan v. The Governor of Portlaoise Prison* [1997] IR 558, at 576, Kelly J. emphasised the importance of preserving the concept of legal professional privilege, and avoiding any requirement on a party asserting same to disclose factual matter in such documentation. (Cf para. 17). remarked as follows:

35. Finlay C.J. stated the following in *Bula Limited (in receivership) and Others v. Laurence Crowley and Others* [1991] 1 I.R. 220 at p. 222.

> *"A consideration of the motion in that case and the appeal from the order of the High Court clearly indicate that what was required by this judgment and what the plaintiff was seeking in that case was an individual listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion by enumeration as would convey to a reader of the affidavit the general nature of the document concerned in each individual case together with the broad heading of privilege being claimed for it. Such a requirement irrespective of what may have been a habitual form of affidavit of discovery in the past seems necessary to comply with the principles laid down by this Court in Smurfit Paribas Bank Limited v. AAB Export Finance Limited.[1990] 1 I.R.469.*

36. In *R (Morgan Grenfell & Co. Ltd.) v. Special Commissioner of Income Tax* [2003] 1 AC563 Para. 7, Lord Hoffman described legal professional privilege:-

> *"A fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the Law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."*

37. There are, however, circumstances in which the almost sacrosanct protection from disclosure of privileged documentation may be waived. In *Murphy v. Kirwan* [1993] 3I.R.501, Finlay C.J. recognised an important exception to legal professional privilege when he states at p. 511:-

> *"…professional privilege cannot and must not be applied so as to be injurious to the interests of justice and to those in the administration of justice where persons have been guilty of conduct of moral turpitude or of dishonest conduct…"*

38. In *Williams v. Quebrada Railway Land and Copper Company Limited* [1895] 2Ch.751, Kekewich J. stated:

> *"Where there is anything of an underhanded nature or approaching to fraud, especially in commercial matters where there should be the veriest good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court."*

39. In similar vein, Goff J. in *Crescent Farm Sports v Sterling Offices* [1972] Ch.553 remarked:

> *"I agree that fraud in this connection is not limited to the tort of deceit, and includes all forms of fraud and dishonesty, such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances."*

40. Finally, there is the statement of Finlay C.J. in the case of *Bula Limited v. Crowley* [1994] 2 I.R.54 when he held that legal professional privilege could be defeated only in cases involving "a clear element of moral turpitude."

41. In this case, the substantive claim against the personal defendants is that they have attempted to place assets beyond the reach of the court appointed receivers. Indeed, the Courts have already found as a fact that some of the personal defendants have engaged in acts of defiance in respect of court orders. However, other than an expression of concern, suspicion and apprehension by the receivers that the personal defendants will engage in activity which will have the effect of concealing documentation in the course of these proceedings under false claims of privilege, no compelling case has been made that such has occurred, at least in any deliberate fashion. Apprehension on behalf of the receivers that the inspection process will be intentionally abused by the personal defendants falls short of proof that such activity has already been deliberately engaged in by them.

42. The receivers are, of course, entitled to bring an application to the High Court expressly seeking a declaration that the entitlement of the personal defendants to assert privilege over particular documentation should be denied to them for stated reasons of abuse or dishonesty relating to the process on their part.

43. Prior to the hearing of this appeal the personal defendants suggested that, as an alternative to the relevant part of the Order of

the High Court under appeal, they would provide a short narrative in respect of each document over which privilege was claimed sufficient to demonstrate to the receivers the legitimacy of such claim. They maintain that they have since provided such a narrative (and which they maintain is adequate for this purpose) in respect of each document under the column headed 'Description' in their A3 spreadsheets. The Court has had the opportunity to consider whether these narratives (under the 'Description' column) advance the asserted requirements of the receivers.

44. The personal defendants are entitled to assert privelege in relation to the documents which they believe are correctly privileged, and their entitlement in this regard has not in my view, at this point in time, been defeated. Neither should it be significantly curtailed because of any proven allegations of fraud, dishonsty or other moral turpitude on their part, in relation to the inspection process.

45. I accept the submissions made on behalf of the personal defendants that the requirement in that part of the Order the High Court which requires them to provide the subject title heading to communications and the names of attachments and documents over which privilege is claimed carries with it a very real risk that the content of such documentation, in whole or in part, will be divulged, thereby significantly diluting or removing the right to privilege where it properly exists.

46. The background to these proceedings and the circumstances in which the receivers were appointed are extremely unusual. The issues in the litigation are, to say the least, complex and the action itself is likely to involve a prolonged hearing with very substantial attendant legal costs. Further, significant difficulties have arisen in relation to the disclosure and inspection process to date particularly having regard to the large volume of documentation which must be scrutinised by the receivers. In these circumstances it is vital that the personal defendants comply with their disclosure obligations in as complete a manner as is possible while consistent with their entitlement to claim privilege over documents which they have been advised properly fall within such category. To make the process purposeful in the context of seriousness of the matters at stake, the receivers must be provided with the most detailed description possible of each document, albeit one which does not disclose any detail as to its privileged contents, so as to enable them form a reasoned judgment as to whether the document has been validly categorised.

47. This brings me to the description/narrative of the priviliged documents contained in the affidavit of Aoife Quinn. It is undoubtedly the case that in relation to the greater number of documents over which privilege is claimed, the personal defendants could not reasonably be expected to furnish any further detail. For example where the narrative claims that a document contains "litigation strategy" or is a "draft affidavit" clearly nothing more could be required of the defendants as those documents are so obviously privledged. However, in many instances the narratives are of little use to the receivers and much greater and more meaningful detail could be provided without disclosing the content of the document.

48. Firstly, in respect of every document, its date should be identified. It is not clear from the spread sheets that the dates referenced to each documents necessarily identifies the date of the document itself as opposed to the date upon which it was either inputted or accessed within the computer programme being used for the disclosure process. Secondly, in respect of correspondence, it is insufficient to, for example, refer to "letter" as the narrative relied upon to demonstrate that the document is privileged. A meaningful narrative requires that at least some generic category of correspondent be identified. For example, "letter from junior counsel to the defendant's solicitor ", or "letter from one of the personal defendants to their solicitor" is at a minimum required.

49. In some instances the description of the document over which privilege is claimed is simply inadequate to identify the class or true nature of the document concerned and the receivers are thereby being inhibited in their ability to make a reasoned assessment as to the validity of the claims to privilege that have been made. I emphasise that the most detailed possible description of each document should be furnished consistant with the non infringement of the privilege asserted.

50. In reaching my conclusions as to how the present appeal should be resolved, I have had particular regard to the difficulties that have arisen thus far in the disclosure process, the fact that the receivers have been appointed by the court to police Mareva injunctions and the fact that the plaintiffs are not entitled to be privy to, or have sight of, documents which appear to be privileged or are arguably so. I have concluded that while the order of the High Court Order places the personal defendants at risk of disclosing information and material that may truly be privileged the balance of justice in the case cannot be served by simply setting aside the Order of McGovern J. I am quite satisfied that his order must be replaced with one that will require the defendants to set out, in respect of each document over which privilege is maintained, a meaningful [emphasis added] narrative containing a sufficient description of the document to allow the receivers make a reasoned judgment as to whether privilege is maintained.

51. The work of assembling documentation for the purpose of complying with an order for discovery is a role which is usually carried out by the party directed to make discovery, albeit with the assistance and direction of their solicitor. However, the question as to whether any such documents are ones to which legal professional or litigation privilege may attach is essentially a legal question and is one invariably answered by the proposed deponent to the affidavit with the benefit of legal advice. This being so, I have assumed that in respect of each document disclosed in the affidavit of discovery that a qualified solicitor, who is of course an officer of the court, has already inspected each document over which privilege has been claimed and has made a professional judgement that that document is correctly so categorised. That being so I am satisfied that, in addition to the order that a more meaningful narrative be provided in respect of each document over which privilege has been claimed, the court should also make an order directing the solicitor responsible for advising on the discovery process, insofar as the privileged documents are concerned, to swear an affidavit stating that they have inspected each of the documents over which privilege has been maintained and that in their professional opinion each such document has been properly so categorised. Hopefully a combination of these orders made in respect of the first appeal will meet the justice of the case having regard to all the prevailing circumstances.

52. Future applications relating to the Inspection process may, of course, be made to the High Court in the normal way, including any application seeking a modification or alternation of the inspection process as directed by this Court in the event of practical or legal difficulties arising therefrom.

The second Appeal (the manner in which documentation in respect of which privilege is asserted is to be reviewed by or on behalf of the receivers)

53. In its Order of 26th February 2014, a comprehensive mechanism for the review of documentation was provided for by the Supreme Court. This mechanism was formulated on the basis of an agreement entered into between the parties. Step 7 of the process directed by the Supreme Court stipulated:

> *"Documents which have been identified as falling outside the ambit of Order 1 and/or Order 2 (i.e. non relevant documents) may be inspected by the Receivers in conjunction with the personal defendants to enable the Receivers satisfy themselves that they do in fact fall outside the ambit of those Orders."*

54. In accordance with this direction, over a period of approximately six months from May 2014, some eighteen meetings took place

between the personal defendants and the receiver, Mr. Taite, in the course of which the documentation identified by the personal defendants as "non relevant" was reviewed. A3 spreadsheets were used by the personal defendants to list the documents. Initially, in May 2014, approximately 280,000 were identified by the personal defendants as "non relevant." This number was subsequently reduced to 126,761.

55. In that six month period the receiver, Mr. Taite, reviewed 5,458 documents (or 4% of the total) in accordance with the process stipulated by the Supreme Court Order. It is maintained by Mr. Taite that 75 of the 126,761 documents reviewed were wrongly classified by the personal defendants as "non relevant", and were, in fact, "relevant." It is suggested by Mr. Taite that these miscatergorisations were not accidental.

56. In any event, the receivers determined in November 2014 that the process (as directed by the Supreme Court) and which had been essentially agreed between the parties, was unworkable, because the review could only be undertaken personally by the receivers. An application was duly made to the High Court for a review of that process, and on 15th December 2014 the learned High Court judge, having accepted the contention of the receivers that the existing review process was unworkable because of the enormous number of documents required to be reviewed, directed an alteration in the process, having expressed the following view:

> *"The idea that having regard to the number of documents which have to be examined to see whether they do come within the ambit of the earlier Orders made should only be examined by the receiver and nobody else, or only by the receiver with the defendants present, is simply no longer workable.*
>
> *I am quite satisfied from the latest affidavit of Mr. Taite that the position, indeed his earlier affidavit grounding this Motion, that the position has become almost impossible for him to advance this case by means of the protocols which were in place up until now. I am satisfied that the Court has a duty and an obligation in the public interest to ensure that in balancing efficiency and fairness to all of the parties that this litigation proceeds not at a snail's pace but in an efficient manner."*

57. The learned High Court Judge directed that henceforth, the review of the claimed "non relevant" documentation may take place by inspection *"…by the receivers (and up to four personnel from Duff and Phelps on their behalf and up to ten persons from the receivers' Solicitors (Arthur Cox) to enable the receiver satisfy themselves that they do in fact fall outside the ambit of those orders…."*

58. The justification for this alteration of the process is that it provides for a system of document inspection which, because of the provision for up to fourteen personnel to review the documents on behalf of the receivers, will result in it being completed much more quickly.

59. The personal defendants' second appeal has two aspects to it. Firstly they contend that the learned High Court Judge did not have jurisdiction to amend or vary the Order of the Supreme Court, and secondly, the learned High Court judge failed to apply the correct test when considering the variation of an Order that was the product of an underlying agreement between the parties, namely, that a Court Order reflecting such an agreement could not be altered in the absence of it being established that one party to the agreement had entered into it under a misapprehension of a relevant fact.

The variation of the Supreme Court Order

60. Ordinarily, there is no jurisdiction vested in the High Court to alter or vary or reverse an Order of the Supreme Court. Article 34.4.3 confers on the Supreme Court a full appellate jurisdiction from all decisions of the High Court.

61. It is necessary to examine more closely the relevant part of the Order of the Supreme Court of 26th February 2014. It provided as follows:-

> *"It is ordered and adjudged that the appeal of the relevant defendants be allowed in so far as the Order of the High Court be varied by the substitution of the following for Orders 1, 2 and 4 and the High Court process…."*

62. The effect of the Supreme Court Order was to vary the Order of the High Court by substituting a particular process in place of the process earlier directed by the High Court. The High Court Order was made as part of its inherent jurisdiction to make interlocutory Orders between parties to litigation in order for its efficient management through the Courts, and in the interests of justice. The regulation of the inspection process is an integral part of that inherent jurisdiction of the High Court, and as is often the case, particularly in complex litigation, it is necessary for the court in its role of managing litigation in the interests of justice, to change, alter, or vary interlocutory Orders as necessary. It is not a role which was ever envisaged for the Supreme Court, other than in its appellate capacity.

63. Order 31 of the Rules of the Superior Courts sets out rules of practice relating to Interrogatories, Discovery and Inspection. Order 31 rule 12(11) as substituted y S. 1 No. 93 of 2009 provides:

> *"(11) "Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that:*
>
> *(i) further discovery is necessary for disposing fairly on the case or for saving costs, or*
>
> *(ii) the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery*

64. While Order 31 rule 12(11) specifically refers to discovery its sentiment can reasonably be extended to the inspection of documents having regard to the close association between discovery and inspection.

65. The nature of a discovery/inspection process initiated by an Order of the High Court may require, and often does require, adjustments and changes in that process to reflect and deal with legal or practical issues or difficulties that arise, as particularly might be expected to arise in lengthy or complex litigation. The High Court retains its inherent jurisdiction to oversee and review that process in the course of litigation, and to alter or vary procedures and processes previously directed. In this case, the Supreme Court simply varied one part of a High Court directed inspection process and in so doing did not exclude the High Court from continuing to operate its inherent jurisdiction to manage and oversee the practical working of that part or any part of the order, albeit in its varied form, into the future, in the interests of justice. This Court is therefore satisfied that the High Court never lost its jurisdiction to generally manage and oversee the inspection process in this case simply because part of that process had been varied by the

Supreme Court. The Supreme Court did not expressly reserve to itself the oversight of the inspection process into the future when it varied the Order of the High Court.

66. This Court is therefore satisfied that in the particular circumstances of this case, the High Court did not lose its inherent jurisdiction to vary or alter the inspection process to reflect practical difficulties that might arise in relation to that process, and which would, if left unaltered significant delay the completion of that process, and ultimately, the conclusion of the litigation. The exercise of that jurisdiction carried with it an even greater imperative in circumstances where the practical difficulties in question were likely to restrict or prolong a process designed and intended to enable Receivers appointed by the court discharge their obligations to the court.

The variation of a Court Order made on the basis of an Agreement between the parties

67. That second leg of the personal defendants' second appeal is concerned with the contention that the Order of the Supreme Court varying the Order of the High Court reflected terms which were agreed by the parties at the time the matter came before the Supreme Court, and as such could only be subsequently altered in circumstances where it was established that one party had entered into the agreement while labouring under a misapprehension as to one or more relevant facts. It was argued that the High Court did not have the jurisdiction to review or alter an agreed inspection process because there had been no misapprehension as to any relevant fact on the part of the Receivers at the time the agreement was entered into. The personal defendants maintained that the extent of the inspection task, including the large number of documents involved, was known to the Receivers at the time they agreed the process reflected in the order of the Supreme Court.

68. In *Purcell v. Trigell Limited* [1970] 3 AII ER 671, Lord Denning MR, stated that an interlocutory Order made by consent may be varied by subsequent Orders in two distinct circumstances:

> *(a) where one of the parties was under a misapprehension or mistake of fact when the order was agreed, or*
>
> *(b) where the Court of its volition decides that the Order should be varied.*

69. He stated at p. 674:

> *"The plaintiff says that no appeal lies from an order made with the consent of the parties, except in circumstances in which a contract may be set aside or varied, such as mistake, misrepresentation and so forth; and that this applies on interlocutory orders as well as to final orders. Mr. Hicks for the plaintiff relied on this regard on Toder v. Sansam [1775] 1Bro.P.C.468. I think that the plaintiff puts his case too high. I think that a party, who gets leave, can appeal from a consent order on wider grounds, at any rate in interlocutory matters. He can appeal for instance on the ground of his own mistake…but there is no ground here so far as I can see for setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. It cannot be set aside. But, even though the order cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent."*

70. The decision in *Irish Commercial Society Limited v. Plunkett* [1987] I.L.R.M. 504(SC); [1986] I.L.R.M. 624(HC) follow that of *Purcell v Trigell Limited*. In the High Court, Costello J., stated:

> *"As pointed out by Lord Denning M.R. in Purcell in Trigell Limited, the Court always has control over interlocutory Orders and it may in its discretion vary or alter them even though originally made by consent…. Whether or not it should exercise it in a given case will largely depend on the circumstances in which the Consent Order was made and the reasons advanced for its discharge."*

71. The Receivers contend that they are overwhelmed by the enormous number of documents that require inspection, and that this volume of documentation or the time required to consider them, was not foreseen by them at the time they agreed the process put in place by the Supreme Court. To this extent it might be said that the Receivers were operating under a misapprehension at the time they agreed the process reflected in the Supreme Court Order. That misapprehension related to not merely the volume of the documentation concerned, but the extent to which the process, as agreed, would enable it be concluded within a reasonable timeframe.

72. Another misapprehension on the part of the Receivers was their belief that the personal defendants would engage in the process as ordered by the Supreme Court in a positive frame of mind in order to conclude that process as quickly as possible. In this regard, this Court considers the following comments made by the learned High Court Judge are germane:

> *"Having reviewed the affidavits and heard submissions from Counsel, I am quite satisfied on the state of the evidence at this stage, that there has been no meaningful attempt by the defendants to engage with the discovery and inspection process in this case in the production of relevant documents. It seems quite clear that the defendants are trying to slow down the process and are doing so in the manner and some form of illegal type of a work to rule or the legal equivalent of a work to rule . There is compelling evidence that the receivers have had to fight inch by inch to obtain access to documents which come within the scope of the Court Orders already made and already extensively referred to in the course of argument. I am quite satisfied from the concessions which have been made by the defendants earlier today, or perhaps in the last few days, with regard to documents, whether it be without prejudice or otherwise, that it is quite clear that they are only going to allow matters to proceed at the slowest pace possible."*

73. These remarks of the learned High Court Judge are a damning indictment of the attitude adopted by the personal defendants to the inspection process, be it that of the High Court or the Supreme Court. It could never be the case that in those circumstances a court's hands should be restricted in the exercise of its inherent jurisdiction to alter or vary a process which had been entered into in good faith, and in a belief that it was workable and would promote the overall efficient management of the litigation in question, where clearly this is not the case.

74. It may be the case, and indeed probably was the case, that the Receivers were unrealistic in their assessment of the time and manpower that would be necessary to undertake the review of a great number of documents at the time they agreed the Inspection process, which was the subject of the Supreme Court variation of the relevant part of the High Court Order, and that consequently they entered into the agreed process under a misapprehension as to the time and manpower that would be required to see it concluded within a reasonable time frame, both being relevant facts relating to their agreement with the personal defendants.

75. Furthermore, it could never be the case that even in the absence of such (or any) misapprehension, a discovery or inspection

process ordered by a Court for the purpose of the good management of the litigation could never be altered or varied by subsequent Court Order merely because the original process had been agreed by the parties. If this was the case, a Court would be effectively prevented from exercising its inherent jurisdiction to oversee the management of litigation because of the fact the parties had entered into an improvident or unworkable discovery or inspection process, and thereby effectively rendered the litigation impotent. That is an entirely different situation to circumstances where an agreement by parties to litigation relates to a substantive issue or matter central to that litigation.

76. The second Appeal is therefore dismissed. The Order of the High Court providing for the inspection of 'non-relevant' documentation by the receivers, and up to four personnel from Duff and Phelps, and up to ten personnel from Arthur Cox Solicitors is affirmed.