**THE HIGH COURT**

**COMMERCIAL**

**[2012 No. 3280 P]**

**[2013 No. 74 COM]**

**BETWEEN**

**IRISH BANK RESOLUTION CORPORATION LIMITED**

**IRISH NATIONWIDE BUILDING SOCIETY**

**PLAINTIFFS**

**AND**

**MICHAEL P. FINGLETON**

**DEFENDANT**

**THE HIGH COURT**

**COMMERCIAL**

**[2012 No. 3279 P]**

**[2013 No. 75 COM]**

**IRISH BANK RESOLUTION CORPORATION LIMITED**

**IRISH NATIONWIDE BUILDING SOCIETY**

**PLAINTIFFS**

**AND**

**JOHN S. PURCELL, DAVID M. H. BROPHY, TERENCE J. COONEY, MICHAEL P. WALSH, CORNELIUS P. POWER**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Costello delivered the 15th day of April, 2015**

**Introduction**

1. Even in the context of the myriad of litigation which has been one of the fallouts of the economic crisis which has befallen the State in recent years these two related cases are extraordinary by any measure. The proceedings arise out of the gross insolvency of the Irish Nationwide Building Society ("the Society") which was a building society registered under the Building Societies Act 1989, as amended. The defendant in the first proceedings ("the Fingleton proceedings") was a long time secretary and director of the Society. He was appointed Secretary of the Society, which was then known as the Irish Industrial Building Society, in 1971 and it is pleaded that he was Chief Executive Officer of the Society from that time until the end of April, 2009. He was appointed a director of the Society in 1971 to 26th January, 2008, and it is pleaded that he was the Managing Director of the Society from 1981 until his resignation as a director on 26th January, 2008.

2. The defendants in the second proceedings ("the Directors proceedings") were all directors of the Society and are sued in their capacity as directors of the Society. The Society merged with the first named plaintiff upon the issuing of a transfer order made pursuant to the Irish Bank Resolution Corporation Act 2013. In each case the plaintiffs seek damages for breach of contract, damages for negligence including gross negligence and damages for breach of duty including breach of fiduciary duty and breach of statutory duty.

**The Fingleton proceedings**

3. The scope of the allegations in the Statement of Claim is extraordinarily wide ranging. Many of the allegations are not time limited. This means that they can range from 1971 up to April, 2009. It is claimed that from, at the latest, the 31st March, 1981, until his resignation in April, 2009 the Board of the Society delegated all of its powers to the defendant for the effective management and control of the Society. It is also alleged that in practice the defendant enjoyed very considerable autonomy and freedom from oversight by the Board in his conduct of the business of the Society such that there was unusual and excessive concentration of the powers of the Society in the hands of the defendant. It is alleged that he failed to take any, or any appropriate, steps to ensure that the necessary oversight was established or maintained or the concentration of the powers of the Society in his hands diluted and/or to ensure that the excessive delegation of powers to him did not continue. It is said that in practice the defendant exercised control and enjoyed very significant responsibility for the lending functions of the Society, including as regards commercial and development lending, such that there was unusual and excessive concentration in his hands of the decision making power of the Society to approve applications or requests for commercial and development lending. It is also alleged that he made lending decisions which were the function of the Board and/or sought retrospective approval for decisions already made by him.

4. It is said that as a result of the delegation and the practice so pleaded the defendant bore a very significant responsibility for the

conduct of the business of the Society. It is said that in practice and as a result of delegation he had the sole authority to approve decisions by the Society to lend amounts in excess of €1 million. It is also said that he authorised the paying out of funds in excess of €1 million to borrowers before the Board had considered the matter.

5. Section 76 of the Building Societies Act 1989, as amended, requires that a building society keep proper accounting records on a continuous and consistent basis and that it establishes and maintains systems of control of its business and records and systems of inspection and reports on these records. It is said that the appropriate systems of control of the conduct of the Society's business and the appropriate systems of inspection and reporting were neither established nor maintained in breach of the requirements of s.76 of the Act. It is alleged that the defendant as the Chief Executive owed a duty to the Society to take all reasonable steps to secure compliance by the Society with the obligations imposed by s.76 of the Act including but not limited to those pleaded in the Statement of Claim.

6. It is also pleaded that the Society was under a statutory obligation to obtain sufficient security for its loans so as to comply in respect of residential lending with the requirements of s.22 of the Act and, in respect of lending for the purposes of property development and/or investment, with the requirements of s.23 of the Act and that the loan be fully secured by a mortgage of freehold or leasehold estate or interest pursuant to s.25 of the Act. The Society was obliged to make arrangements for assessing the adequacy of the security for the loans to be secured by the mortgage of the freehold or leasehold estate or interest.

7. It was also pleaded that the defendant owed further duties, including fiduciary duties, to the Society to act honestly and responsibly and to act in good faith in the interests of the Society. It is pleaded that he owed a duty to exercise reasonable care, skill and diligence in exercising and discharging the powers and functions delegated to him by the Board of the Society, both by resolution and in practice, to protect the assets and interests of the Society, not to expose the Society to unnecessary and/or excessive risks in its lending and its business generally, to ensure that proper and effective controls were in place in the Society, to ensure that all reasonable steps to ascertain the real level of risk associated with the lending engaged in by the Society was assessed and to ensure that the Society obtained adequate security in respect of its loans and did not engage in speculative lending on the basis of obtaining speculative profits or returns in the future.

8. It is pleaded that the defendant as Chief Executive had a significant responsibility for the strategic direction of the Society and, in particular, for the radical change in the Society's loan book from the 1990s when it was predominantly based on residential lending. In the early 2000s the Society increased its activity in commercial lending and in particular in lending for commercial property development. It also lent considerable sums for developments in the United Kingdom and in France. It is pleaded that the defendant failed in his duty to put in place appropriate policies and structures and to monitor and/or ensure compliance with lending policies and corporate governance and risk management structures that were, in all the circumstances, adequate to enable the Society to comply with its duties under law and to manage the greater risks to which the Society was increasingly subject. It is said that the structures should have been commensurate with the scope, size and complexity of the activities being conducted and should have incorporated continuous measuring, monitoring and controlling of risk, accurate and reliable management information systems, timely management reporting and thorough audit and control procedures.

9. It is claimed that in breach of his duties owed to the Society the defendant failed to put in place, implement, monitor and ensure compliance with lending policies and corporate governance and risk management structures that were adequate in all the circumstances and that his failures in this regard were ongoing up to the date of his resignation as Chief Executive (April, 2009) and constituted gross negligence on his part. There are then 52 different particulars of breach of duty set out in pp. 22-32 of the Statement of Claim. Paragraph 39 of the Statement of Claim reads as follows:-

> *"The failures and breaches of duty aforesaid on the part of the Defendant caused or contributed to the massive losses sustained by INBS from 2008 onwards and also losses on particular loans from 2006 onwards. In the alternative, had the Defendant not committed the breaches of duty aforesaid, the losses sustained by INBS during this period would have been avoided or substantially reduced."*

The losses claimed for the years 2008-2010 are in excess of €6 billion thus the claim against the defendant is for up to €6 billion.

10. In paras. 40-86 (pp. 35-59) of the Statement of Claim the plaintiffs particularise a variety of loans and transactions which they say caused or contributed to the losses suffered by the Society. It is expressly pleaded that these loan transactions are by way of example and the plaintiffs reserve the right to adduce particulars of further transactions and associated losses. The losses associated with the loans therein pleaded come to hundreds of millions of euro. The balance of the Statement of Claim is concerned with the alleged failure of the defendant to reimburse the Society in respect of claims for expenses which were not appropriately incurred on behalf of or on account of or in connection with the business of the Society. These come to just under €200,000.00 and then there is a claim of just under €90,000.00 for expenses in connection with the transfer of the defendant's pension arrangements.

**The Directors proceedings**

11. Each of the defendants in these proceedings were directors of the Society. The first named defendant was an executive director of the Society from 30th December, 1994, to 31st March, 2010, and Chief Financial Officer and Secretary of the Society from 25th May, 1993, to 31st March, 2010. The second named defendant was a non-executive director of the Society from 28th February, 2006, to 29th April, 2009. He was a member of the Society's Audit Committee from 2006 to 2008. The third named defendant took no part in the proceedings before this Court. The fourth named defendant was Chairman of the Board of Directors of the Society from 1st May, 2001, to February, 2009, and a non-executive director of the Society from 18th April, 1995, to 17th February, 2009. He was a member of the Society's Audit Committee from 2001 to 2009.

12. The allegations made against the defendants in the Directors proceedings closely mirror those made in the Fingleton proceedings. It is pleaded that the delegation of powers to the Chief Executive meant that the Society was in reality no longer under the control and management of the Board of the Society. It is pleaded that the Board and each of the defendants as members of the Board owed a duty to the Society not to abdicate or surrender their respective functions and duties as such and to ensure that the business of the Society was under the control and management of the Board at all times and not to make or to allow or to continue an excessive delegation of the powers, duties, discretions and/or authorities of the Board relating to the business of the Society to the Chief Executive. It is pleaded that the Board and each of the defendants as members of the Board remained at all times responsible for the acts and omissions of the Chief Executive in the exercise by the Chief Executive of the delegated powers. It is pleaded that from, at the latest, 31st March, 1981, until the resignation of the Chief Executive in April, 2009, the Board delegated all its powers for the effective management and control of the Society to the Chief Executive and they failed properly or at all to oversee the exercise of those powers.

13. Pleas similar to those advanced against the defendant in the Fingleton proceedings are alleged against the defendants in the

Directors proceedings. In relation to the allegation that the defendants breached other duties, including fiduciary duties, which they owed to the Society, in addition to those alleged in the Fingleton proceedings, the plaintiffs make the following additional allegations. It is pleaded that the defendants owed a duty not to place themselves in a position where their respective interests and the interests of the Society might be in or come into conflict; a duty not to make any secret profit or commission; a duty to act in accordance with the rules of the Society; to exercise their powers only for purposes allowed by law and to have regard to the interests of the members of the Society. It is pleaded that as members of the Board (and in the case of the fourth named defendant as Chairman of the Board) that they owed the Society duties of care, skill and diligence as particularised in para. 43 of the Statement of Claim.

14. In the Fingleton proceedings it is pleaded that the Chief Executive had a significant responsibility for the strategic direction of the Society, in the Directors proceedings it is pleaded that the Board, including the defendants had the primary and ultimate responsibility for the strategic direction of the Society and the pleas raised in the Fingleton proceedings are also raised in the Directors proceedings in that regard. In particular it is pleaded that they adopted inappropriate policies in relation to lending for commercial property development. Between pp. 25 and 36 of the Statement of Claim, 61 different particulars of breach of duty are set out. Paragraph 49 of the Statement of Claim is the equivalent to para. 39 of the Statement of Claim in the Fingleton proceedings. The particular loans which were dealt with in paras. 40 to 86 of the Statement of Claim in the Fingleton proceedings are dealt with in paras. 52 to 97 (pp. 39 to 63) of the Statement of Claim in the Directors proceedings. In addition it is pleaded that the defendants failed to identify sufficiently early, or at all, that the Chief Executive was in breach of his own duties to the Society and it is said that had they exercised any, or any adequate, care in this regard the Society would have summarily dismissed the Chief Executive for breach of duty not later than 1st December, 2007, and the Society would not have awarded him a performance bonus for the financial years 2008 and/or 2009 (which bonuses amounted to €1 million and €221,000.00 respectively).

15. The defendants in each of the proceedings have delivered a full defence and in the case of the Fingleton proceedings, a counterclaim. In each case the defence plead that the losses sustained by the Society following the transfer of the loans from the Society to NAMA (or NAMA related companies) are not attributable to any acts or omissions on their part. In particular they say that they should not be fixed with the valuations attributable to the loans in the NAMA process. They rely upon the fact that the audited accounts of the Society which were adopted a few months before the transfer of the first tranche of loans by the Society to NAMA placed significantly higher values on the loans and were applied in the transfers to NAMA. They also place considerable emphasis on the fact that a trade sale of the Society had been in contemplation for some time prior to 2009. It is pleaded that the performance of their duties and obligations to the Society has to be viewed in the context of the intended trade sale and the negotiations surrounding and leading up to that intended sale.

**Application**

16. This is a joint application on behalf of the defendants in each of the proceedings for orders for discovery against the plaintiffs. Each of the defendants made detailed extensive requests for voluntary discovery of the plaintiffs. In order to deal with the extraordinary discovery which will be required in this matter, the plaintiffs have sought to rationalise the discovery exercise insofar as it is possible and to provide one agreed affidavit of discovery in respect of all the requests for discovery in both of the actions. All of the parties are to be commended for the considerable efforts in which they have engaged to that end. The plaintiffs have agreed to make very considerable discovery available to each of the defendants and in turn each of the defendants have made significant concessions in relation to the categories of documentation in respect of which they have sought orders for discovery. As the parties have not been able to reach agreement in respect of all of the categories of discovery sought, these motions for discovery were duly brought. It has been agreed by all of the parties that the plaintiffs will swear one affidavit of discovery for use in both actions. Thus, though the proceedings have not been consolidated, I am delivering one judgment in both actions.

**The law**

17. Before proceeding to deal with the categories of discovery in dispute between the parties it is necessary to consider the law in relation to discovery. Order 31, r. 12 of the Rules of the Superior Courts requires that the party applying for an order for discovery grounds the application upon an affidavit which shall :-

> *"(a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs;*
>
> *(b) furnish the reasons why each category of documents is required to be discovered…"*

Firstly, the documents must be relevant to the matters in issue. The matters in issue are determined by the pleadings. The test of relevance in Irish law has long been set out Brett L.J. in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55 at p. 63 as documents which :-

> *"may – not which must – either directly or indirectly enable the party requiring the affidavit [of discovery] either to advance his own case or to damage the case of his adversary."*

18. Barrett J. in *Astrazeneca AB & Patents Acts* [2014] IEHC 189 emphasised just how embedded within our legal system the "may, not must" test has become, though he acknowledged that this was qualified by issues of proportionality as I will discuss below.

19. In *Framus Ltd. v. CRH plc.* [2004] 2 I.R. 20 at p. 38 Murray J. stated:-

> *"…the primary test is whether the documents are relevant to the issues between the parties. Once that is established* ***it will follow in most cases that their discovery is necessary for the fair disposal of those issues****."(emphasis added)*

20. In *Ryanair p.l.c. v. Aer Rianta c.p.t* [2003] 4 I.R 264 at p. 275 Fennelly J. held that the applicant must prove that the discovery sought is necessary for disposing fairly of the cause or matter. He held that "necessary" was to be construed as meaning "required" and that the applicant did not have to prove that the documents were in any sense absolutely necessary. He referred at p. 277 to the:-

> *"…growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.*
>
> *The court, in exercising the broad discretion conferred on it by O. 31, r. 12(2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required.* ***It should also consider the necessity for discovery having regard to all the***

***relevant circumstances, including the burden, scale and costs of the discovery sought.*** *The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant. These may, no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation. The behaviour of the opposing party is relevant. That party may, for example, have made or may offer to make admissions of facts, and thus persuade a court that discovery on some issues is not necessary. This is, perhaps, axiomatic. Those facts will no longer be in issue. On the other hand, it is difficult to see how a party, such as the defendant in the present case, which contests all the relevant facts on the pleadings and has formally objected to the right of its opponent to resort to affidavit evidence, can plausibly ask the court to deprive its opponent of access to documents which will enable it to prove matters which it disputes.*

*In the present case, I am satisfied that the plaintiff has sufficiently specified the categories of documents in respects of which it seeks discovery, for the purpose of compliance with the rule. It does not follow that the court will not cut down the categories specified. It has also sufficiently verified that discovery of these categories is necessary for the fair disposal of the action and has complied with its obligation to give reasons why each category is required. I do not accept that the defendant has shown that its discovery is not necessary. In particular, I reject the contention that the plaintiff has sufficient alternative means of proving the relevant facts to deprive it of its right to discovery. A notice to admit facts or documents is not a means of proof. It does not, I think, lie in the mouth of a party, which has denied almost all of the pleaded facts and put the opposing party to proof, to evade discovery by claiming that the facts can easily be proved."(emphasis added)*

21. In assessing whether or not a category of document sought to be discovered is necessary within the meaning of the Rules of the Superior Courts, the Court is to have regard to all of the relevant circumstances. Fennelly J. laid a particular emphasis in that case on the conduct of the party in opposing the discovery sought, not least by reason of the fact that its approach to the litigation required the plaintiff in that case to prove a very wide range of facts. In other words, the discovery sought was necessary for the fair disposal of the matters which were in issue. It is not alleged in these proceedings that the plaintiffs have approached the litigation in an improper or obstructive manner. However, it is argued that the scale and scope of the claims advanced against the defendants is such that it does not lie in the mouths of the plaintiffs to argue that the discovery sought by the defendants as a consequence of the breadth of the claims maintained by the plaintiffs is unduly onerous and burdensome.

**Proportionality**

22. The requirement that the discovery sought is necessary for the fair disposal of the matters at issue introduces the concept of proportionality into the assessment as to whether or not a party is entitled to the discovery sought. In the *Framus* case Murray J. held at p. 38 as follows:-

*"36 It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out [in Ryanair], the crucial question is whether discovery is necessary for "disposing fairly of the cause or matter". I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial.* ***That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once it is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues."*** *(emphasis added)*

23. Thus, the primary test remains whether the documents are relevant to the issues between the parties. Once the applicant for discovery establishes that the discovery sought is relevant and necessary in the sense described above, then the party opposing the Order sought must establish to the satisfaction of the Court why it would be disproportionate to order the discovery sought. In essence the argument is why the Court should cut down or limit the discovery to which a party, *prime facie*, is entitled.

24. This question was considered in *Dome Telecom Ltd. v. Eircom Ltd.* [2008] 2 I.R. 726 by the Supreme Court. Geoghegan J. held as follows at p. 738:-

*"The key question that arises under this ground of appeal is whether in all the circumstances the discovery sought is oppressive to an extent that it is unreasonable to order it….[the rules of court] do not expressly provide that it must be, say, proportionate or reasonable or that it must not be oppressive. However, I think that the distinction is helpful. Applying what is meant by "necessary" in Irish law, and particularly as explained by Fennelly J. in Ryanair p.l.c. v. Aer Rianta c.p.t. [2003] 4 I. R. 264, a clear case, in my view, has been made out on behalf of the plaintiff that the discovery sought is "necessary" in that sense. But discovery may be "necessary" and yet so disproportionate as to render it unreasonable for a court to benefit the party seeking such discovery by making the order. For example, one could conceive of cases where the expense of what might otherwise be "necessary" discovery would put the party out of business. That might not necessarily prevent the order being made but a court would have to weigh up that factor quite heavily in considering whether it should make the order. The distinction which I am making seems to me to be particularly important in the light of what was clearly held in Ryanair p.l.c. v. Aer Rianta c.p.t."*

25. The test proposed by Geoghegan J. is whether it is oppressive to the extent that it is unreasonable to order the discovery sought and in answering this question the Court has to have regard to all of the circumstances. In this case, therefore, I must have regard to the breadth of the claim the plaintiffs have chosen to bring in each of the cases as well as the extent of the discovery that will be made by them. In assessing whether or not the requested discovery is oppressive, it has been urged that I should consider the resources available to the plaintiffs and the work involved in bringing the cases to this stage. It is clear that from 2009 the plaintiffs were, to quote counsel, "in litigation mode". The proceedings issued in 2012 and the Statement of Claim was delivered on 17th April, 2013. In each of the proceedings it is clear therefore that a vast amount of work was undertaken by the plaintiffs before the proceedings were initiated and statements of claim drafted. This necessarily will have involved organising, assessing and considering many of the documents now sought to be discovered.

26. The plaintiffs largely have not contested that the discovery sought by the defendants in each of the proceedings is relevant. The main point of argument between the parties related to the framing of the categories of the documents requested by the defendants whether the documents sought were captured by other categories that were agreed between the parties and issues of proportionality. The defendant in the Fingleton proceedings and three of the defendants in the Directors proceedings sought orders for discovery from the Court in respect of a range of categories of documents. They defined the categories sought thematically. They were not defined or delimited by reference to the type of documentation concerned. The plaintiffs opposed the remaining categories

of discovery sought by the defendants, *inter alia,* on the grounds that the universe of documents to be searched was so vast that it would be oppressive to the extent that it would be unreasonable to order thematic discovery. It was argued in respect of some categories that it would be very difficult if not impossible to formulate search terms responsive to requests for discovery of "all documents evidencing…" or "all documents relating to…". The plaintiffs argued that they should make discovery in terms of categories which they defined. These were defined by reference to the type of documents rather than on a thematic basis. It was argued that a discovery in these terms will include many and possibly most of the documents actually sought by the defendants in the thematic requests for discovery. They say that the Court should order discovery in terms of the categories which they offer because of the enormous scale of the exercise involved.

27. The plaintiffs argued that the discovery in these cases is going to be vast. They argue that the dispute to be resolved by this Court is "at the margins". They say that in dealing with an electronic discovery from the vast universe of documents is a very expensive and time consuming procedure. Undoubtedly this is true. They say that searching by reference to document type is far simpler and more accurate and involves fewer hours in reviewing documents than thematic searches. They say in some cases the thematic searches may be almost impossible to conduct. They urge that thematic discovery will be far more expensive, time consuming and difficult. Significantly, despite the lengthy exchange of affidavits, no information is put before the Court as to the likely time or expense that may be incurred if discovery in the terms sought by the defendants is ordered as opposed to discovery in the terms offered by the plaintiffs.

28. The plaintiffs emphasise the observations of Fennelly J. in *Ryanair* to the effect that the proper administration of justice is not confined to the relentless search for perfect truth. They fairly acknowledge they cannot and do not say that the discovery which they offer will afford complete discovery of the documents sought by the defendants in the categories as the defendants have framed them. They fairly concede that what they are offering is a vast discovery but a discovery nonetheless that does not set out to discover all of the relevant documents within the categories which the defendants have identified as relevant to the issues in the cases as they have identified them.

29. Significantly, despite the lengthy exchange of affidavits, no information is put before the Court as to the likely time or expense that may be incurred if discovery in the terms sought by the defendants is ordered as opposed to discovery in the terms offered by the plaintiffs. Therefore, the Court is left with averments, no doubt made in good faith and based upon considerable experience, by the solicitor for the plaintiffs who is conducting the discovery exercise, that the proposed discovery will be extremely expensive and extremely lengthy. The difficulties involved in specific searches are highlighted but the Court is left with no information as to the likely or estimated cost of complying with the discovery sought by the defendants. There is no estimate of the difference between the cost of making discovery as offered by the plaintiffs and that sought by the defendants. This makes it very difficult for the Court to conclude how onerous or unreasonable the discovery sought actually is. Generalities are not sufficient in the context of this case. Furthermore, it is to be borne in mind that this case involves a claim for damages of up to €6 billion canvassing a wide range of allegations over a very wide period of time. In assessing the proportionality arguments of the plaintiffs this is a fact to which the Court should have regard. I disagree with the submission of the plaintiffs that it is not permissible to link the concept of proportionality to the perceived gravity and magnitude of the plaintiffs' claim. Where a party sues for damages of up to €6 billion, it is difficult to deny a defendant documents on discovery which may assist his defence, on the grounds that it is too expensive without establishing or attempting to establish precisely how unreasonably burdensome and onerous the request for discovery is. The possible injustice of unfairly, if unwittingly, withholding documents from a defendant so placed are too grave.

30. The plaintiffs place particular emphasis on their objections to categories of discovery sought by reference to themes as opposed to types of documents. They do so on the basis that the universe of documents is so enormous in discoveries of this type that this approach to discovery should be deprecated, discouraged or ultimately refused. They refer to the Commercial Litigation Association of Ireland's good practice guide and quote from section 5.1 as follows:-

> *'A practice has developed in recent times of parties seeking a "catch all" category of documents such as "all documents on which the plaintiff intends to rely". This is not recommended as good practice and should be discouraged…"*
>
> *Practictioners should where possible, avoid using generic phrases such as "all documents relevant to…" and seek instead to define what is requested, e.g. "invoices" or "correspondence between x and y."'*

This, of course, is a general guide and it is not authority for the proposition that discovery in those terms cannot be ordered by the Court in appropriate cases, nor is that case so advanced. Ultimately, when the Court comes to consider whether or not a particular category of discovery sought should be refused on the grounds that it is disproportionate, the Court will rely upon the affidavit evidence before it to establish that allegation rather than any absolutist approach to any particular formulation of a category of documents sought.

31. Applying these principles, I turn to consider the individual requests for orders for discovery, first in the Directors proceedings and then in the Fingleton proceedings.

**Fourth named defendant's application for discovery**
32. (a) Category 1

**All documents evidencing, discussing or relating to the transfer of each of the loans of the Second Named Plaintiff ("the Society") to the National Asset Management Agency (NAMA). Such documents should include those evidencing, discussing or relating to:**

> **(i) the negotiations between the Society (to include its servants and/or agents) and NAMA (to include its servants and/or agents);**
> **(ii) the fixing of, and basis for, the discount applied to each of the loans transferred;**
> **(iii) the consideration by the Society (to include its servants and/or agents) of the valuations ascribed to the loans to be transferred and of the transfer prices being proposed by NAMA, to include any decisions to accept or appeal any of the transfer prices being determined by NAMA.**

33. One of the central disputes in the proceedings concerns the transfer of the loans from the Society to NAMA. It is pleaded that the discounts applied to tranches 1 and 2 of the loans transferred by the Society to NAMA was far greater than that applied to the loans of any other participating institution which were transferred to NAMA. It is said that the discount reflected the poor quality of the loans and loan assets and this in turn is attributable to the defaults of the defendants as outlined above. Thus, the plaintiffs allege that the defendants are responsible for the losses sustained by the Society arising from the transfer of all loans to NAMA. The fourth named defendant's case is that the loans that were transferred to NAMA took place at a discount which was much greater

than was warranted by the audited accounts and was much greater than was warranted by the loans themselves. There is a huge and, he argues, unexplained discrepancy between the value of the loans in the audited accounts and the value attributed to the loans when they were transferred to NAMA a few months later. Insofar as the plaintiffs seek to rely on the discounted amount paid for the loans by NAMA as a basis both for establishing the liability of the defendants and for quantifying the losses suffered by the Society, the information sought in this category of discovery is absolutely critical. There is an express allegation in the Statement of Claim that in each case the quality of the Society's loans and the underlying security proved to be substantially worse than originally thought. It is argued that this must mean presumably as compared to what was referenced in the accounts when the assets and liabilities were set out. The argument advanced is that this information appears to have either arisen or been acted upon subsequent to the departure of the fourth named defendant as Chairman and Director of the Society.

34. In my opinion it is clear that the documents sought in this category are relevant to the issues in the case. Are they necessary? Central to the defence of the defendants is the fact that when the entirety of the loans transferred to NAMA by the Society is considered the discount applied to all loans is the same as that applied to Anglo Irish Bank Corporation plc. and is 5% greater than that applied to Allied Irish Bank plc. The fourth defendant argues that the general health of the Society's loan book was not so exceptional in comparison to the loan books of the other financial institutions in the State as the plaintiffs contend. In order to establish the defendant's case in this regard it is argued that these documents sought in this category are necessary in order for him to explain that the loans transferred in tranche 1 and tranche 2 did not reflect a true and fair picture of the overall business of the Society. I am satisfied that the fourth named defendant has established that the documents in this category are necessary.

35. The plaintiffs argued that in applying the principle of proportionality this category is too widely cast. They have offered to make discovery in the following terms which they say is "a reasonable response" to the defendant's request for discovery. They offer as follows in composite category 10:-

> *"(a) Correspondence for the period 2009 to 2011 between INBS and NAMA referring to the transfer of each of the loans particularised at paragraphs 41to 86 of the statement of claim in the Fingleton proceedings (paragraphs 52 to 97 of the statement of claim in the Purcell & Others proceedings) and any records of meetings between NAMA and the Society, due diligence reports and valuations prepared by INBS specific to these loans.*
>
> *(b) Documents containing summary information about each of the INBS loans transferred to NAMA, to include, final acquisition schedules, executed due diligence reports, details of the loan amounts, the balance on the individual loan accounts at the valuation date / point of transfer, valuation details, and the discount applied by NAMA.*
>
> *(c) Correspondence for the period 2009 to 2011 between INBS and NAMA pursuant to section 88 of the National Asset Management Act 2009, comprising the Society's interactions with NAMA concerning the valuation of the relevant assets in respect of all of the INBS loans transferred to NAMA."*

36. I do not believe that the correct approach for the Court to adopt is to juxtapose what is requested by one party with what is offered by another party and decide between the two. It is for the moving party to establish whether the categories of documents which he seeks are relevant and necessary. As was stated by Murray J. in *Framus*, it will usually follow that if the documents are relevant and necessary that then discovery of those documents will be ordered. It is for the party opposing the application to establish that it is disproportionate and therefore should be limited or reduced or refused. What is offered is a compromise. While that undoubtedly is the entirely correct approach for parties to adopt in trying to reach agreement on the categories of discovery, it is not the correct approach for the Court. I do not accept that the proposal to offer all of the documents in respect of some of the loans transferred but not in respect of the balance can provide the basis for an order for discovery by the Court. This case is not confined to the eighteen identified loans set out in the pleadings. During the course of the hearing of the Motions the plaintiffs offered to include the due diligent reports in respect of each of the loans transferred in this category of discovery. The due diligent reports are prepared in respect of the loans transferred by a participating institution to NAMA are very detailed and they disclose the flaws and weaknesses in relation to the loans and the underlying security for each loan. They are certified documents. It is argued that the combination of the due diligence reports and the acquisitions schedules will therefore afford the defendants all of the information they require to assess the strengths and weaknesses of the loans transferred by the Society to NAMA.

37. I cannot agree. This issue is so central both to the plaintiffs' case and the defendants' defence that it would be unjust to the fourth named defendant (and the other defendants) to limit the discovery in relation to this area in the manner suggested. The plaintiffs have had two years to consider all of the books, records and documents of the Society to present their case. The fourth named defendant ceased to be a Director of the Society in 2009 and has had no, or virtually no, access to any of the documentation since. Finally, I should state that the limitation offered in sub-category (c) by the plaintiffs is too narrow, given the purposes of s. 88 of the Act of 2009. I direct that there should be an order for discovery in terms of paragraph (a) of the Notice of Motion though substituting the word "consultation" for "negotiations" in the sub-para. (i) as it was conceded in the course of the hearing that there were informal consultations between the Society and NAMA prior to the transfer of loans.

**38. (b) Category 3**

**All documents relating to the exercise by the Chief Executive of the Society of powers and functions which it is alleged amounted to an excessive delegation of powers by the Board of the Society during the period from 18 April 1995 to 17 February 2009 in which the Fourth Named Defendant was a member of the Board of the Society.**

39. One of the central planks of the plaintiffs' case is that the Board delegated powers and functions which it is alleged amounted to an excessive delegation of the powers properly belonging to the Board of the Society. The plaintiffs have offered to make discovery of board records recording or referring to the delegation for the period 18th April, 1995, to 31st March, 2010, and March, 1981 and December, 1994 and all other documents evidencing, discussing or referring to the delegation during that period.

40. The fourth named defendant argues that the category sought arises from the fact that the plaintiffs have alleged (at para. 28 of the Statement of Claim in the Directors proceedings) that the Chief Executive of the Society enjoyed complete (or near complete) autonomy and freedom from oversight by the Board in his conduct of the business of the Society. The plaintiffs have also alleged (para. 29 of the Statement of Claim) that the Chief Executive exercised control over and enjoyed very significant responsibility for, the lending functions of the Society without any, or any sufficient, Board oversight. It is alleged by the plaintiffs that the Board, including the fourth named defendant, failed to take any or any appropriate steps to ensure that the necessary oversight was established or maintained or that the concentration of powers in the hands of the Chief Executive was diluted. In addition the plaintiffs' case is that the Chief Executive exceeded the delegation actually granted and had freedom from oversight from the Board in his conduct of the business of the Society. The fourth named defendant seeks this category of documents in order to capture all documents relevant to the exercise by the Chief Executive of the powers delegated to him and which it is alleged were exceeded and

also why and how they were exceeded as the case he has to meet is not confined to the fact of the delegation but extends to the operation and oversight (or lack of oversight) of the delegation.

41. The plaintiffs objected to making discovery of this category of documents on the basis that it was vague and that it would open up a massive volume of documents. The category as formulated has the potential to capture almost any act of the Chief Executive. It is argued that it is not appropriately tailored to deal with the allegation that in practice the Chief Executive enjoyed complete or near complete autonomy and freedom from oversight by the Board (para. 28) or directed towards the lending decisions of the Chief Executive, some of which were identified in para. 29. In response the fourth named defendant argues that while this may be true it is the plaintiffs who have put in issue the alleged excessive delegation of powers by the Board to the Chief Executive and alleged exercise of those powers. It is pointed out that the documents are within the plaintiffs' possession or power and have been relied upon them in formulating the claim against the fourth named defendant. As a former non-executive director he obviously has no access to the documents in question and so they are clearly necessary for him in maintaining his defence.

42. I agree with counsel for the fourth named defendant that what is suggested by the plaintiffs in their composite category 1 is insufficient to meet his legitimate requests for discovery. But I have also considered the submission of counsel for the plaintiffs to the effect that the discovery of all of the Board meetings including Board packs will illustrate how the Board in fact retrospectively approved lending decisions of the Chief Executive which were in excess of €1 million and will show the response (if any) of the Board Members to these decisions by the Chief Executive. I also rely upon composite category 7 where full discovery is to be given in respect of the loans particularised in the Statement of Claim and which therefore will cover the loans pleaded in para. 29 of the Statement of Claim. Furthermore, I will be making an order for discovery relevant to this issue in respect of the first named defendant's category B as set out in para. 64 below. I accept the submissions of the plaintiff in relation to this category. I refuse it on the basis that it is too vague, the plaintiffs will be making discovery which is relevant to this category and it will be disproportionate to order the plaintiffs to make discovery in terms of the category as drafted in the circumstances.

**43. (c) Category 5**

**All documents (which, for the avoidance of doubt should include any reports prepared or commissioned by or on behalf of the Plaintiffs or either of them) relating to the alleged duty of this defendant as a member of the Board to put in place lending policies and procedures and corporate governance and risk management structures that were in all the circumstances adequate to enable the Society to comply with its duties under law.**

44. The fourth named defendant says that this category of documents is necessary as the plaintiffs have failed to identify the duty which it is alleged the fourth named defendant was under or the basis of that duty and that it is clearly a matter in issue between the parties in the proceedings.

45. The existence and extent of the duty alleged, as with any duty, is a matter of expert evidence and law. The compliance with or, in the alternative, breach of, any such duty, is of course, a different matter. I do not believe that discovery is the appropriate way to establish precisely the scope of the duty allegedly owed by the fourth named defendant to the Society. However, he is entitled to discovery of documents which may go to the breaches of the duty or duties alleged by the plaintiffs.

46. The plaintiffs argue that the extent of a duty is an assertion based on law rather than on fact or based on any particular document. They point to their composite category 9 which they are proposing to discover which provides as follows:-

> *(a) All documents comprising the policies and procedures of INBS for the Relevant Period, specifically policies concerning lending, corporate governance, credit risk, development finance, commercial lending generally and any strategy documents created by or at the behest of the Board, or members of the Board, during the Relevant Period.*
>
> *(b) Documents referring to breaches of lending policy and/or compliance with lending policy and/or monitoring of compliance with lending policies.*

It is argued that it would be impossible to devise a meaningful search for the documents in the category as drafted. It is said that any such reports that exist would have been discussed at either board level or sub-committee level and therefore would fall within composite categories 2 or 3 that the plaintiffs are proposing to discover or would be dealt with in correspondence with the Financial Regulator under composite category 5. It is therefore argued that to order discovery in these terms would be disproportionate.

47. It is clear that discovery of reports relating to the obligations of the Board (and by implication the fourth named defendant as a member of the Board) to put in place lending policies and procedures, corporate governance and risk management structures are relevant to the issues in the case. It is highly likely that all such reports will be covered in the composite categories as argued by the plaintiffs. However, this does not mean that it is disproportionate to order discovery under this category. The discovery in this case is going to be vast. Even within the categories of discovery agreed between the parties there will inevitably be duplication in the different categories of discovery. This is no criticism of anyone concerned: it is inevitable given the nature of the case and its scope. There will be a very considerable burden on the defendants to sift the documents discovered in relation to one aspect of the case to ascertain if they may be relevant to another issue or issues in the case. I have been given no indication as to how difficult a task it would be to search for reports relevant to the matters under discussion in this category. Therefore, I have no basis for concluding that to order discovery of the reports, as opposed to all documents, would be disproportionate in the circumstances. Of particular relevance is the argument that it will be significant if there are no such reports to be discovered this is an important aspect of discovery. I therefore propose to order discovery in terms of para. (c), category 5 of the fourth named defendant's Notice of Motion, deleting the words "…all documents (which, for the avoidance of doubt should include…)".

**48. (d) Category 9**

**All documents evidencing, discussing or otherwise relating to the losses which it is alleged have been suffered by the Society following the transfer of loans from the Society to NAMA, and upon which the Plaintiffs are basing their claim for damages against the Fourth Named Defendant.**

49. The fourth named defendant argues that these documents are required in order to assess the quantum of the loss allegedly suffered by the plaintiffs. The plaintiffs argue that the category is too vague and it would be impossible to identify what documents squarely fall within the category as drafted, that the defendants will be receiving the documents set out in composite category 10 cited above and composite category 7 which relates to all of the specified 18 loans and that this will evidence the losses suffered by the Society following the transfer of the loans to NAMA. It is said that this discovery is therefore not necessary. It should be refused on the grounds that the category is too vague and the documents are not necessary.

50. In reply, the fourth named defendant argues that it is oppressive to expect the fourth named defendant to defend a case of this nature without particulars of the losses claimed and without documentation relevant to those losses. It was accepted by counsel for the fourth named defendant that there was a considerable overlap between categories 1 and 9 (paras. (a) and (d) of the Notice of Motion). I have directed that discovery be made in terms of category 1 (para. (a) of the Notice of Motion). I agree with counsel for the plaintiffs that category 9 as formulated would be a very difficult category of discovery for the plaintiffs to comply with. In view of the fact that the plaintiffs will be making discovery in terms of the discovery they have offered and the discovery I am ordering, I believe it would be disproportionate to order discovery in terms of category 9 as against the plaintiffs in the circumstances. The defendants, including the fourth named defendant, will have the documents setting out the value of the loans transferred to NAMA and the losses associated with the loans. There are other pre-trial procedures available to the fourth named defendant which may be more appropriate means of clarifying this part of the plaintiffs' claim in due course.

**51. (e) Category 11**

**All documents relating to the allegation pleaded by the Plaintiffs that the Fourth Named Defendant failed to act conscientiously in respect of the discharge of his duties as the non-executive member of the Board of the Society.**

52. In his Defence the fourth named defendant pleaded that he acted honestly and conscientiously in discharge of his duties as a non-executive member of the Board of the Society. In the reply the plaintiffs accepted that he acted honestly but denied that he acted conscientiously. They did so because "it is the inference alleged by the plaintiffs from review of all material" which the plaintiffs propose to discover. It is thus clear that the plaintiffs will be providing all the material upon which they intend to rely at trial that is relevant to this category as sought, as the plea is based on an inference to be drawn from the discovered material. They are not offering to make discovery of all documents relating to the said allegation. Specifically, they will not be discovering a specific category of documents relating expressly to the fourth named defendant's plea that at all material times he acted conscientiously.

53. The question I therefore have to consider is whether it is appropriate in all the circumstances to order that a specific category of discovery should be made in this regard as I have ordered in respect of amended para. (c), category 5 above. In my opinion it is not. This is fundamentally different to category 5 which was confined to reports which are an identifiable class of documents. On their own case, the plaintiffs say that this is a matter of inference from all of the material they will be putting before the Court. Therefore, strictly speaking, this category of documentation is not capable of being divorced from the total universe of documents. I do not feel it would be proportionate to direct a specific category such as I did in category 5. It is too vague and it would be extremely onerous and unreasonable to order discovery of this category of documents. I therefore refuse this category.

**54. (f) Category 15**

**(a) All documents evidencing, discussing or relating to the legislative amendments required to facilitate a trade sale of the Society;**

**(b) All communications and/or correspondence between the Society and the Central Bank and/or the Department of the Environment and/or the Department of Finance (including any of either Department's servants or agents) relating to the proposed trade sale of the Society. For the avoidance of doubt, such communications are to include notes of any meetings and/or phone calls.**

55. The fourth named defendant argues that this category of documentation is required as it is a fundamental part of his defence that his retention on the Board was at the request of the Society, the Central Bank and the Financial Regulator pending completion of a trade sale. Therefore, any assessment of, or complaint about, the behaviour of the fourth named defendant must be looked at in the context of this issue. Documents relating to the trade sale and the intention of the Society, the Central Bank and the Financial Regulator in relation to the proposed sale are all relevant to this issue. Obviously these are documents which are uniquely within the power and possession of the plaintiffs and are both relevant and necessary to the defendant to enable him properly to defend the proceedings.

56. The plaintiffs' response is to say that the fact that the sale of the Society was in contemplation is not in dispute and that therefore these documents are not necessary. It is argued on behalf of the fourth named defendant that he needs these documents in order to present his side of the story. He says that his performance will have to be assessed in the light of all relevant matters. These include his performance in relation to the matter in respect of which he was specifically asked to remain on the Board to deal with namely, the trade sale of the Society. The category of documents sought was also relevant to the defence the fourth named defendant may have on the basis of s.115(1) of the Act of 1989, as amended, where the Court is given a discretion to excuse an officer of a Building Society from liability on such terms as the Court may think fit in respect of any alleged negligence, default or breach of duty or breach of trust. It is trite law to state that discovery is available to a party to bolster his own case as well as to damage that of his opponent. Clearly this documentation is relevant to the defence which the fourth named defendant wishes to advance. The issue therefore is whether the category as drawn is appropriate. I believe that the category sought is sufficiently defined save that there is no temporal limit in respect of the documents sought to be discovered. I will make an order in terms of this para. (f), category 15 of the Notice of Motion subject to hearing the parties in relation to the appropriate temporal limits on the category.

**57. (g) Category 23**

**All documents relating to the consideration by the Plaintiffs and each of them as to whether and/or on what basis they, or either of them, should institute and maintain these proceedings, including any correspondence with third parties related to such consideration.**

58. The reasons advanced for this category of discovery are as follows: the fourth named defendant has repeatedly sought details of the duties alleged to have been owed by him to the Society and the basis upon which it is alleged that he has failed to discharge those duties; the fact that the plaintiffs have repeatedly refused to express a standard against which his performance has been measured; and that he needs to understand the basis upon which the plaintiffs chose to bring the claim. It is said that he has expressly pleaded in his defence that he reserves the right to challenge the constitution of the proceedings and the *locus standi* of the plaintiffs and that the plaintiffs' motivation for bringing these proceedings is in issue. It is argued that he needs to understand as a matter of fact and not as a matter of law what the standard of care the plaintiffs in the proceedings actually think or thought they were applying to the defendants and the fourth named defendant in particular. Counsel for the fourth named defendant urged that they wanted to be able to demonstrate that the plaintiffs were actually proceeding on an incorrect standard of care or on a mistaken or misconceived basis.

59. In opposing the category, the plaintiffs argue that the basis upon which the plaintiffs bring the proceedings is set out in great detail in the Statement of Claim. They say the motivation for bringing the proceedings is legally irrelevant. In relation to the duties which the plaintiffs say were owed by the fourth named defendant they say that these have been exhaustively pleaded in the Statement of Claim and in the Replies to the Notice for Particulars. It is said that if there is a problem with how the duties have been particularised this is a matter to take up by way of a motion to compel the provision of particulars not a motion for discovery. Furthermore, they say that the documents sought correspond "to something akin to the very definition of litigation privilege". They say it is hard to imagine how a document relating to the consideration as to whether and what basis proceedings should be instituted and maintained would not be covered by a litigation privilege. It is conceded by counsel on behalf of the fourth named defendant that many, if not most, of the documents falling within the category will be legally privileged but it is speculated that there may be correspondence between the Department of Finance and the Central Bank for example which would not be legally privileged and that the fact that the documents would be subject to legal privilege is not a reason to refuse to order discovery.

60. As a matter of principle that is so. However, the more fundamental objection is the question of relevance. The motivation of the plaintiffs in bringing the proceedings, once they are statable, is not a proper basis for seeking discovery in the proceedings. Even if it is the case that the standards which have been applied to the defendants are different to those which have been applied to non-executive directors of other financial institutions, or that, potentially, the first named plaintiff may have had causes of action against the non-executive directors of the other financial institutions, that is not relevant to an issue in these proceedings. It certainly does not go towards establishing the appropriate standard of care to be applied to a non-executive director such as the defendants in these proceedings. I am not satisfied that the documents sought in this category are relevant and accordingly I refuse this category of discovery.

**61. (h) Category 25**

**All correspondence between the Central Bank and IBRC during the period July 2011 to date in relation to the management and control of the IBRC loans and files.**

62. This was advanced on the basis that it was very similar to the preceding category. It was directed towards trying to ascertain why the former Anglo Irish Bank Corporation Ltd. was treated differently to the Society. For the reasons I have rejected para. (g), category 23 I reject this category also.

**Motion of the first named defendant**
63. Category A is the plaintiffs' agreed composite categories and has been agreed between the parties.

**64. B. All instructions signed by Michael Fingleton under the powers delegated to vary interest rates for the period 1st January 2004 – 21st December 2005.**

65. The delegation of the powers of the Board of the Society to the Chief Executive included a power to set, vary and alter interest rates. In a letter of 6th June, 2014, the plaintiffs' solicitors accept that the instructions to vary the interest rates will evidence the operation of the delegation in practice. The first named defendant seeks this category of discovery on the basis that it is imperative that he has access to documentation which establishes the true operation of the delegation in practice. The documentation is sought on the basis that it will provide evidence of the lawful and proper operation of the delegation impugned by the plaintiffs. The plaintiffs' response was that the discovery sought was not necessary to resolving the issue of whether the delegation itself or its operation and practice was improper and/or illegal. Ms. Hooper on behalf of the plaintiffs averred:-

> *"This question can be objectively assessed by reference to the terms of the delegation itself along with evidence and appropriate examples of the delegation in practice. In fact, the far reaching nature of several of the other composite categories will themselves provide a substantial array of material evidencing the operation of the delegation in practice."*

66. It is not for the plaintiffs to decide on the appropriate examples of the operation of the delegation in practice. The defendants, including the first named defendant, may wish to advance their own contrary examples. To this end, the first named defendant has confined his request to a limited class of documents in a limited time period. He is not seeking all documents which could evidence either directly or indirectly the operation of the delegation in practice. Therefore it does not appear to me that this category is unduly wide or vague or disproportionate. In reply it was argued that there was no issue in the case about how the Chief Executive exercised his power to vary interest rates and therefore he said that this category of discovery was not relevant. I disagree, I accept the submissions of the named first named defendant that the discovery sought is relevant and necessary. I believe that this is an appropriate limited category for discovery and I order that discovery be made in terms of para. B of the Notice of Motion.

**67. C. All internal INBS reports and memoranda (to include any handwritten notes) relating to the reports which are the subject of categories 6 (a) – (h) in the Plaintiffs' composite category 6.**

This category was amended during the course of the hearing of these motions and agreement in respect of this amended category was reached between the first named defendant and the plaintiffs.

**68. D.**

> **(i) Documents evidencing any valuation of each of the loans transferred to NAMA at any time before the transfer;**
> **(ii) Documents evidencing any offer made for any loan in 2008, 2009 and/or 2010 which loan was subsequently transferred to NAMA**
> **(iii) Documents evidencing any valuations ascribed to the loans transferred to NAMA after the said transfers;**
> **(iv) Documents evidencing the sums paid to NAMA for the subsequent sale of any former INBS loan, sold or partially sold by NAMA;**
> **(v) Documents evidencing the most recent valuation in respect of each of the loans transferred to NAMA.**

69. In reply on behalf of the first named defendant it was accepted that if the Court directed discovery in terms of category 1 of the fourth named defendant's Notice of Motion then discovery in terms of category D(i) and (ii) of the first named defendant's application would not be required. In view of the fact that I have made an order for discovery in terms of category 1 of the fourth named defendant's request for discovery, it is not necessary to rule on sub-categories (i) and (ii) of the first named defendant's category D.

70. The documents sought by the first named defendant in sub-categories (iii) to (v) all relate to documents which will be in the possession, procurement or power of NAMA and not in the possession, procurement or power of either of the plaintiffs. On this basis,

this application for discovery against the plaintiffs must be refused. This is expressly without prejudice to any non party application for discovery which the first named defendant may wish to pursue against NAMA or any NAMA group entity.

**71. E. All documents furnished by the First named Defendant to Darragh Daly or any other person concerning the work of the Credit Risk Department/Credit Review Function/risk management structures of the Society and;**

**All documents pertaining to loan information prepared by INBS from the Credit Review database in 2008 for meetings with credit agencies and Banks.**

72. Agreement was reached between the parties in relation to the first part of this request for discovery during the hearing of the Motion and so no order is required in respect of the first part. In relation to the second limb the first named defendant argues that this category of documentation is critical to his defence. He maintains that it will evidence the contemporaneous position and approach of the Society. He says the documents are likely to include written notes which were prepared in advance of meetings with the rating agencies. He argues that the documents are clearly relevant to issues in dispute between the parties and are necessary to establish the approach taken by the Society to a wide range of issues raised by the plaintiffs in the proceedings.

73. The plaintiffs object on the basis that they say the documents are not objectively necessary as composite category 12 of the discovery the plaintiffs are proposing to make should provide sufficient discovery for the first named defendant in relation to this area. Composite category 12 reads as follows:-

> *"(a) The routine reports prepared by the Credit Risk Department from its inception to 31 March 2010.*
>
> *(b) Documents referring to or evidencing the establishment, function and role of the Credit Risk department and the Credit Review function at INBS along with any material referring to credit reviews performed on loans particularised in the statement of claim.*
>
> *(c) Documents referring to the establishment and functioning (but not the day to day operations) of risk management structures in the Society and documents referencing or providing any commentary on the absence of a Risk Committee in INBS during the Relevant Period.*
>
> *(d) Documents referring to or evidencing the establishment and functioning of INBS's ICAAP Committee."*

74. I am of the opinion that the documents sought by the first named defendant are relevant. It is clear that the categories set out in composite category 12 quoted above will not necessarily encompass these documents. The documents are not otherwise available to the first named defendant. It follows that they are both relevant and necessary. No particular case has been advanced that discovery of this category in addition to those offered in composite category 12 would be disproportionate or unduly onerous. The only point advanced is that the plaintiffs envisage *"significant difficulties in identifying potentially relevant documents"*. In my opinion this is not sufficient to disentitle the first named defendant to a category of discovery documents in respect of which he has made out a case that it is both relevant and necessary. Accordingly I order that discovery in terms of the second part of para. E of the Notice of Motion be made by the plaintiffs.

**75. F. All documents comprising, containing or discussing advices and/or assistance given by lawyers to the Second named Plaintiff between 1 January 2000 and 31 March 2010 in connection with:**

> **(a) Corporate governance;**
> **(b) the annual general meeting of the Society;**
> **(c) The prospective sale of the Society;**
> **(d) The preparation of standard or specimen banking documentation, including letters of loan offer and mortgage documentation;**
> **(e) Internal or external investigations into the management of the society by the Defendant [the Chief Executive] and/or other members of the Board of Directors**
> **(f) Any payments, including alleged bonus payments, made to the Defendant [Chief Executive] and any expenses paid to the Defendant [the Chief Executive];**
> **(g) The society's obligations under sections 23, 25 and 76 of the 1989 Act;**
> **(h) All applicable ratios including without limitation, the Capital Adequacy Ratio, the Liquidity Ratio, the Share to Deposit Ratio, the Loan to Deposit Ratio and;**
> **(i) The Society's lending policies.**

76. The plaintiffs propose making discovery of these documents (including the solvency ratio) in their composite category 17 for the period 1st January, 2000, to 31st August, 2009. The only dispute in this regard between the first named defendant and the plaintiffs is that he seeks to extend the period out to the 31st March, 2010, being the date when he resigned from the Board of the Society. The plaintiffs argue that from the end of August, 2009 the Society was on a "litigation footing" and that this date is the "litigation cut-off point". The first named defendant strenuously objects to this date. He argues that he remained on the Board as an executive director until his resignation on 31st March, 2010. Where required, he assisted with and dealt with any legal issues arising during that period. In particular, he assisted with enquiries made of him by Ernst & Young. He says that there was no suggestion whatsoever that the purpose, let alone the dominant purpose, of the Ernst & Young investigation was to instigate legal proceedings against, *inter alia*, the first named defendant.

77. In reply, Ms. Hooper avers that the documents cannot be relevant as there can be no question of the first named defendant placing reliance on these documents for the purposes of advancing his defence in respect of the matters the subject of the proceedings. She also asserts:-

> *"With the exception of legal assistance falling within category 17, the plaintiffs are entitled to assert privilege over the preponderance of documents falling within category 17. While we acknowledge that privilege is not, prima facie, a reason not to discover documents, in the particular circumstances of this case it would be disproportionate, to require the plaintiffs to discover privileged "look-back" type advices and documents, many of which were created in contemplation of these proceedings, and were the first named defendant would not have been in a position to rely on the content of these documents at times material to these proceedings. Accordingly, to require discovery of these documents would be futile and disproportionate."*

78. I do not agree. There is no suggestion that discovery of the documents would pose an unreasonable burden upon the plaintiffs.

Therefore questions of proportionality do not arise. As Ms. Hooper herself acknowledges, legal privilege is not a reason in and of itself not to discover documents. The first named defendant has indicated that he proposes to challenge any claim of litigation privilege in respect of the Ernst & Young Report at the very least and possible others. It is difficult to see why he should not be permitted to do so if a document had been produced with his assistance and co-operation. It seems that there must be at least an argument in the circumstances that the Ernst & Young Report was not prepared for the dominant reason for suing, *inter alia*, the first named defendant. It is argued that the category sought is not relevant. This cannot be so. If the documents are relevant prior to 31st August, 2009, there is no explanation as to why they could not be relevant up to 31st March, 2010. Even if some or indeed all of the documents are "look-back" type documents they were still prepared when the first named defendant was Secretary to the Society and an executive director of the Society. As he is sued in respect of the entire duration of his tenure (and indeed beyond) he is entitled to these documents to aid his defence. The fact that the Society "was on litigation footing" is not relevant. He was an executive director at the time and was involved in preparing the documents. I am of the opinion that the first named defendant has established that discovery of this category of documents is relevant and necessary and I order discovery of same up to the 31st March, 2010.

**Motion of the third named defendant**
79. The third named defendant issued a notice of motion seeking four categories of discovery. Three of these were resolved by agreement the day before the Motions were heard. The fourth was agreed on the fourth day of the hearing of the Motions. No order for discovery is required therefore in respect of the third named defendant's application for discovery.

**Defendant's Motion for Discovery in the Fingleton proceedings**
**80. Category 2: Board Records ('Relevant Period')**

**Discovery of all documents responsive to Category 2 in Appendix 1 of the Plaintiffs' Solicitors' Letter of 13 June 2014 for the period 1 January 2000 (1 January 1992 in the case of Board minutes only) to 1 July 2011.**

81. The dispute between the plaintiffs and the defendant in relation to this category relates to the period in respect of which discovery is to be made. The plaintiffs are prepared to make discovery of these records up to the 31st March, 2010 (being the date when the last of the defendants resigned from the Board of the Society) and the defendant seeks discovery of this category of documentation up to 1st July, 2011 (the date the second named plaintiff was transferred to the first named plaintiff). The defendant seeks these documents because he has pleaded contributory negligence and a failure to mitigate loss against the successor Board. He puts in issue the responsibility of the successor management of the Society for the extent of discounting on the losses consequent upon the transfers to NAMA which took place subsequent to the 31st March, 2010. The date of 1st July, 2011, was selected as being the date when the Society was "effectively subsumed" into the first named plaintiff.

82. In opposing the application it is argued that the documents are irrelevant to the manner in which the defendant carried out his functions and duties as a director of the Society and that it amounts to little more than a fishing expedition. Undoubtedly the documents are not relevant to the defendant's performance of his functions and duties. That is not to say that they are not highly relevant to the issues raised by his Counterclaim and his argument that the Society failed to mitigate its loss. Therefore this is not an answer to the request to extend the period in respect of which board records should be discovered. The plaintiffs were prepared to make discovery of board minutes only between 31st March, 2010, and 1st July, 2011, so the issue to be decided is whether the additional documentation other than board minutes ought to be ordered to be discovered in respect of this period. In my opinion in the context of the arguments which the defendant wishes to advance- that there was a failure to mitigate loss and that there is a counterclaim- the board minutes alone would be insufficient to meet his discovery requirements. No reasons have been advanced as to why board minutes would be sufficient. I am therefore prepared to order the discovery sought by the defendant in respect of category 2.

**83. Category 6(g), 6(i) and 6(j): External Advisors**

> **6(g) Any reports for the Relevant Period in respect of Category 6 of Appendix 1 of the Plaintiffs' Solicitors' Letter of 13 June 2014 commissioned by or on behalf of the Second Named Plaintiff by any external advisors concerning:**
>
> > **(i) the performance of the Board of INBS and/or any policies implemented by the Board of INBS during the Relevant Period,**
> >
> > **(ii) commercial lending by the Second Named Plaintiff, but not including reports limited to one particular loan, or**
> >
> > **(iii) the future prospects for the commercial property market in Ireland, the UK or France or the residential property market in Ireland.**
>
> **6(i) All documents referring to or evidencing actions and/or discussions on foot of Management Letters issued by KPMG and/or the concerns arising out of any such Management Letter form (sic) 1 January 2004 to 31 March 2010.**
> **6(j) All reports, including draft reports, prepared by Ernst and Young or any other expert in connection with an Ernst and Young report for or on behalf of the First and/or Second Named Plaintiffs during the period commencing on 30 April 2009 up to the date of institution of the within proceedings.**

84. The plaintiffs agreed to an amendment to composite category 6(f) so that it reads:-

> *"Documents relating to the Relevant Period being reports of Moody's / Fitch and letters of engagement, letters of instruction, correspondence and/or internal INBS reports which are related to the reports of Moody's / Fitch, which documents include handwritten notes of the First Named Defendant for the relevant period."*

On that basis the defendant was not seeking discovery in terms of category 6(g)(i).

85. In categories (ii) and (iii) the defendant seeks discovery of reports commissioned by or on behalf of the Society relating to commercial lending or to the future prospects for the residential property market in Ireland or the commercial property market in Ireland, the United Kingdom or France. It is argued that these documents are relevant and necessary to the defendant's defence because negligent commercial lending is at the core of the damages claim made against him in the Statement of Claim. It is argued that the discovered reports will enable the defendant to demonstrate that the commercial lending with which he was involved was in

accordance with the views of external advisors, including those who had expertise in assessing the prospects of the relevant property markets and was therefore not negligent. In reply the plaintiffs say that the reports referred to in 6(g)(ii) and (iii) of the defendant's request should already be discovered in categories (a) to (h) in their agreed composite category 6. This does not appear to be the case. These categories relate to reports prepared by KPMG, the auditors of the Society, Deloitte, Goldman Sachs, PwC, Moody's and Fitch Group. Category 6(g) are reports of third party advisors considering the performance of the Board of the Society. It seems to me that none of these reports would be concerned with either commercial lending or the future prospects of the commercial property market in Ireland, the United Kingdom or France or the residential property market in Ireland.

86. The next objection is that it would be a very difficult category to search for and that, in the alternative, the discovery sought is not really necessary in the sense that the prospects for the market can be dealt with by way of expert evidence. However, this does not deal with the question as to the advice received by the defendant at the relevant time or, in the alternative, the lack of any such advice. It was accepted that the documents were relevant but it was urged that unless the defendant identified the person or persons who provided the reports that it would be unduly onerous for the plaintiffs to produce them. I do not accept that it would be so onerous that it would be unreasonable to order discovery of this category of relevant documents. I order that the plaintiffs make discovery in terms of category 6(g)(ii) and (iii).

87. In category 6(i) the defendant seeks discovery of all documents referring to or evidencing actions and/or discussions on foot of the management letters issued by KPMG and/or the concerns arising out of any such management letters between 1st January, 2004, and 31st March, 2010. In reply the plaintiffs said that a separate category of discovery is not necessary. The responses to the management letters are to be discovered as part of composite category 6(a). It was also pointed out that the management letters would be discussed at board level and at the audit committee level of the Society and the board minutes including board packs and the sub-committee records (which would encompass the audit committee) are to be discovered. On that basis it was argued that the responses to the management letters will be captured by what the plaintiffs are already offering by way of discovery in composite categories 2 and 3. In addition, in composite category 4, internal audit reports are to be discovered for the period 1st January, 2000, to 31st March, 2010.

88. It was also urged that it would be extremely difficult to devise meaningful searches for the category of documents as described which includes documents evidencing actions taken on foot of management letters issued by KPMG. This could include an almost unlimited class of documents. It was urged that the category is not appropriately framed and would capture much more than was genuinely necessary for the fair disposal of the action. I accept this submission. It would be disproportionate to order discovery as formulated, particularly in light of the discovery that will be made.

89. Category 6(j) relates to the Ernst & Young Report and draft versions of the Ernst & Young Report commencing 30th April, 2009, up to the date of the proceedings. The first named defendant in the Directors proceedings sought discovery of reports at para. F of his Notice of Motion, I have decided to grant that application for discovery up to the 31st March, 2010. I believe this should satisfy the defendant's request for discovery under this heading. For the avoidance of doubt, I confirm that the Order should include any drafts of the reports falling within the scope of that category and in particular drafts of the Ernst & Young Report. In relation to the argument that the Ernst & Young Report was subject to legal privilege, it was urged that this may have been lost as the defendant has already been furnished with a copy of a draft. In any event it is not a matter which requires to be determined at this stage in the proceedings and it is not a reason to refuse the relief sought. No particular reason was advanced as to why the document was required up to the date of the institution of the proceedings other than the fact that all versions of the Report could be of assistance to the defendant's defence. The reason I extend this period from August, 2009 to 31st March, 2010, in respect of the request of the first named defendant in the Directors proceedings was because he was an executive director of the Society up to that date and assisted in preparing at least part of the Report. This rationale does not apply to the defendant here. Therefore, he has not made out a case for the extension of the period beyond the date of his resignation from the Board of the Society. As a composite discovery is to be made he will have the benefit of the discovery ordered in favour of the first named defendant in the related proceedings.

**90. Category 7: Loans particularised in the Statement of Claim (Definition of 'loan file')**

**For the purposes of Category 7in Appendix 1 of the Plaintiffs' solicitors' letter of 13 June 2014, the term "loan file" means in relation to each relevant loan, all documents created by INBS or any officer or employee of INBS or any third party contracted by, or acting as agent for, INBS or the relevant borrower or any third party contracted by the borrower or any guarantor, together with all financial information relating to the performance of such loans including, without limitation, all loan applications, loan offer letters, security documents, security reports, valuations, file notes, internal memoranda, internal reports, external reports, legal advice and opinions, statements of net worth, all documents evidencing or relating to the approval process, all document (sic) relevant to the drawdown of the facilities and completion checklists.**

**References to the 'borrower' in the foregoing definition, where the borrower was a Special Purposes Vehicle, also include the person(s) to whom the loan offer was sent and/or who accepted the loan offer.**

**Category 7(h) and 7(i): Loans Particularised in the Statement of Claim**

> **(h) All documents, in respect of the loans set out in the sub-paragraphs to paragraph 22 of the Statement of Claim, evidencing or recording reasons for the paying out of funds before Board and/or Credit Committee approval, including referring to business urgency or any special circumstances.**
> **(i) All documents relating to or evidencing efforts by the Second Named Plaintiff, its servants or agents, to reduce its exposure on the loans referred to at paragraphs 41 to 86 of the Statement of Claim, including internal communications within the Second Named Plaintiff in this respect.**

The definition of borrower has been accepted by the plaintiffs and incorporated in the composite category 7. The loan file the plaintiffs are prepared to discover in respect of each loan set out in composite category 7 includes the material held on the loan file as maintained by the Society along with any legal and/or security file associated with the relevant loans. The defendant seeks the extended definition of loan file set out above. However, it should be noted that the plaintiffs will be discovering the following matters which may not have been placed on the loan file but which may have been included among internal correspondence/files of lending managers. Thus, at composite category 7(f) and (g) the plaintiffs intend to discover:-

> *"(f) All documents responsive to an electronic search in the custodian mailbox and network file shares of the manager (where identifiable from the loan file) who either submitted the loan applications referred to at paragraphs 22(a) to (r) and 41 to 86 of the statement of claim in the Fingleton proceedings (paragraphs 29(a) to (r) and 52 to 97 of the statement of claim in the Purcell & Others proceedings) to the Credit Committee or was the manager of the loan from time to time.*

*(g) To the extent not incorporated within subcategories (a) to (f) above, all documents evidencing or discussing the relationship between the Society and each borrower in the context of the loans and transactions pleaded at paragraph 45(n) and paragraphs 41-86 of the statement of claim in the Fingleton proceedings (paragraph 56(n) and paragraphs 52 to 97 of the statement of claim in the Purcell & Others proceedings)."*

It is argued that further extension of the definition beyond what has been offered by the plaintiffs will place a disproportionate burden on the plaintiffs entailing the conduct of further costly searches across potentially all documents and emails ever created containing the names/number of the loans/borrowers particularised in the Statement of Claim. Further, it is objected that a request for "financial information" in respect of a particular loan or borrower is too broad and amorphous and could potentially capture every incidence of a borrower's name appearing on an administrative spreadsheet for example.

91. In reply, it was argued that this was not unduly burdensome as the extended category of loans was confined simply to the loans selected by the plaintiffs and specified in para. 22 (a) to (r) of the Statement of Claim. In submissions, that was amended to paras. 41-86 of the Statement of Claim in the Fingleton proceedings and paras. 52-97 of the Statement of Claim in the Directors proceedings. The plaintiffs argue that in addition to providing the loan file they will be searching the mail boxes and network file shares of the relevant loan managers; they will be searching for the borrower name or the name of the person to whom the loan was sent and the relevant account number. In the circumstances they urge that it is inconceivable that in carrying out those searches they will not throw up the documents sought to be discovered by the definition offered by the defendant. Given that these are the files which the plaintiffs have selected to focus on in the Statement of Claim it seems likely that they have or will assemble all available evidence in relation to those files and those loans and accordingly, I do not believe that the extended definition of loan files sought by the defendant is required. I refuse to amend the definition of loan file.

92. In the light of the discovery which the plaintiffs are making in this category, I do not accept that it is necessary to devise a separate category in respect of sub-category 7(h). It seems to me that the person who would record the reason for the paying out of funds before Board or Credit Committee approval would either be the relevant loan manager or would need to inform the relevant loan manager so that the loan could be advanced. It clearly would be very difficult if not impossible to devise an appropriate search term for such a stand alone sub-category. It seems therefore that requiring the plaintiffs to meet discovery in such a stand alone sub-category would in the circumstances be disproportionate in terms of the expense involved. Presumably it would involve individual review of all of the documents already being discovered in order to ascertain which ones would fall into this sub-category (in addition possibly to manually reviewing potentially thousands of other documents).

93. There is a similar difficulty with regard to sub-category 7(i). This seeks all documents relating to or evidencing the efforts by the Society its servants or agents to reduce its exposure on the loans referred to at paras. 41-86 of the Statement of Claim. The reason this is sought is in support of the defendant's plea that the plaintiffs failed to mitigate their loss. The plaintiffs in reply contend that the documents relating to the Society's attempts to reduce its exposure on any of the loans particularised in the Statement of Claim will be adequately captured by composite category 7 and by composite categories 2, 3 and 12 (board records) as defined (sub-committee records and risk management). They strongly make the point that it would be difficult to devise meaningful search terms to isolate documents responsive to this request as a stand alone sub-category. I have considerable sympathy with this latter point. In and of itself, it would not be sufficient reason to refuse the discovery sought. However, when taken in conjunction with the discovery which is being advanced in respect of composite categories 2, 3, 7 and 12 the defendant should have a very considerable amount of information to enable him to make out his claim that the Society failed to mitigate its loss in relation to these particular pleaded loans. In this regard I am bearing in mind the scope of discovery I have ordered to be made relating to the transfer of loans from the Society to NAMA.

**94. Category 9(c), 9(d), 9(e) and 9(f): Plaintiffs' allegations in respect of policies**

> **(c) All documents evidencing the Plaintiffs' claims in the Statement of Claim in respect of breaches of the lending policies referred to at paragraph 38(c).**
> **(d) All documents evidencing the Defendant's awareness of and approval of any such breach of policy.**
> **(e) To the extent not pertaining both to paragraph 22 of the Statement of Claim and pages 35 to 59 of the Statement of Claim, all documents evidencing the claim at paragraph 19 of the Statement of Claim that "the Defendant made lending decisions which were the function of the Board and/or sought retrospective approval for decisions already made by him".**
> **(f) Documents evidencing the monitoring by the Second Named Plaintiff of compliance with the lending policies referred to in paragraph 38(c) of the Statement of Claim, in respect of any of the loans referred to in the Statement of Claim.**

95. The defendant argues that these categories are necessary because of the very serious nature of the allegations made against him and the fact that the plaintiffs have expressly reserved their right to rely on documents which may not have been captured by the discovery either volunteered or ordered in the case. It is argued that it is necessary in the circumstances to seek "all documents evidencing" the various pleas in relation to the Society's lending policies and breaches or approvals of breaches of the lending policies of the Society.

96. In reply, in composite category 9, the plaintiffs point out that they have agreed to make discovery in the following terms:-

> *"(a) All documents comprising the policies and procedures of INBS for the Relevant Period, specifically policies concerning lending, corporate governance, credit risk, development finance, commercial lending generally and any strategy documents created by or at the behest of the Board, or members of the Board during the relevant period.*
>
> *(b) Documents referring to breaches of lending policy and/or compliance with lending policy and/or monitoring of compliance with lending policies."*

97. They also point out that under composite category 4 internal audit reports will be discovered which refer to breaches of lending policy, management letters, which also refer to breaches of lending policy, will be discovered under composite category 6(a) and breaches of lending policy will be evident from the loan files which are to be discovered under composite category 7. In the circumstances they argue firstly, that to order discovery of all documents that evidenced the plea in respect of breaches of lending policies would place an undue burden on the plaintiffs in terms of scoping and searching. Secondly, they say that discovery as sought is not necessary on the basis that the defendant will have "adequate" discovery to meet his "legitimate" discovery needs by reason of the discovery that will be made.

98. In my judgment, in this case, the discovery that will be made will provide the defendant with very extensive documentation in

relation to these issues. It is accepted that not every single document relevant to the category as drafted may be discovered in this way. However, in my judgment, this is one of those instances where the formulation of the category is such that it is in fact neither necessary nor proportionate in the circumstances. It could produce a vast amount of documents showing breaches of the lending policy but which might not in any way advance the defendant's defence and it is clear that searching for these particular categories as drafted is particularly onerous in the circumstances of this case. This is not to say that I am of the view that it is not appropriate to make discovery of the "all documents evidencing" category of documents. I am refusing these categories of documents on the basis that they are seeking an exceptionally wide ranging discovery. In making this ruling I have in mind the fact that in due course witness statements will be exchanged in advance of the trial of these proceedings and books of core documents will be prepared. Any documents upon which the plaintiffs intend to rely at the trial will of course be appended to witness statements and included in books of core documents. Insofar as there are any documents which have not been discovered, these will come to the attention of the defendant. In the normal course to say that witness statements will be provided with documents appended is not an answer to a request for discovery. I accept this. However, in the circumstances of this case it is relevant to the exercise of my discretion given the extraordinary scope and expense involved in the discovery that is to be made. I decline to order discovery in terms of category 9(c), (d), (e) and (f) of the Notice of Motion.

**99. Category 10(d) to (k): NAMA**

> **(d) All minutes of internal meetings within the Second Named Plaintiff, and documents prepared in connection with such meetings, concerning the preparation of that Plaintiff for its meetings or interactions with NAMA and/or referring to or evidencing the proposed strategy to be adopted by the Second Named Plaintiff in the course of such meetings or interactions.**
> **(e) All documents reflecting general instructions given by the Second Named Plaintiff to valuers appointed by the Second Named Plaintiff for the purpose of valuing loans which were to be transferred to NAMA.**
> **(f) Documents containing summary information of the loans transferred to NAMA from INBS, including, in particular, the amount the loan was valued at on transfer, the amount by which it was discounted and the reasons for such discounts.**
> **(g) All documents providing details of any loans of the Second Named Plaintiff transferred to NAMA with nil value, including documents evidencing the reasons for such transfer at nil value.**
> **(h) Any documents, including correspondence, referring to or evidencing any decision of NAMA not to require a full valuation of any loan transferred to NAMA or any group of loans transferred to NAMA from INBS.**
> **(i) All documents evidencing any policy applied by NAMA specific to INBS loans and/or evidencing any factors specific to INBS loans taken into account by NAMA when valuing such loans**
> **(j) All documents evidencing any challenge made by an INBS member of staff to a proposed NAMA valuation.**
> **(k) All correspondence (including emails), and any notes/minutes of meetings between NAMA and any board member of the Second Named Plaintiff, to include any documents prepared for any such meeting.**

**The Relevant Period for this Category 10 is 1 January 2009 to 31 December 2011. The definition of "NAMA" in respect of this Category includes the National Asset Management Agency and its servants or agents acting in the course of their employment as well as any NAMA Group entity, such as, but not limited to, National Asset Loan Management Limited.**

**All documents responsive to sub-categories (a), (b) and (c) of Category 10 in Appendix 1 of the Plaintiffs' solicitors' letter of 13 June 2014 are to be scheduled to the Affidavit of Discovery sworn on behalf of the Plaintiffs regardless of whether or not NAMA has provided its consent to any such document being discovered.**

100. I have directed that discovery should be made in terms of category 1 of the fourth named defendant's Notice of Motion in the Directors proceedings. It was accepted by counsel for the defendant in the Fingleton proceedings that the fourth named defendant's category (1) (ii) corresponded to his client's category 10(e),(f) and (g) and that the fourth named defendant's category (1)(iii) corresponded to his client's category 10 (j). It therefore is not necessary to consider those sub-categories further.

101. In relation to category 10(d) these documents are covered by category 1 of the fourth named defendant's Notice of Motion which is all documents evidencing, discussing or relating to the transfer of each of the loans of the Society to NAMA. In my opinion this should include the minutes of internal meetings and documents prepared in respect of such meetings and any proposed strategy to be adopted by the Society as is sought by the defendant in this category. It is therefore not necessary to make an order in terms of category 10(d) as the documents which would fall into this category will be dealt with in the category in respect of which I am making an order for discovery. This leaves sub-categories (h), (i) and (k). There is an issue as to whether the relevant period for these sub-categories should be from 1st January, 2009, to 31st December, 2011.

102. In relation to sub-category (h), these are documents relating to a decision of NAMA not to require a full evaluation of any loan transferred to NAMA or any group of loans transferred to NAMA from the Society. In opposing this sub-category, the plaintiffs urge that insofar as any decision was taken by NAMA not to require a full evaluation of any particular loan this was not within the control of the Society. Further, the Society's reaction to any such decision will be disclosed in the documents to be discovered pursuant to composite category 10 (c). They should also be discovered in terms of the fourth named defendant's category 1(i) in the Directors proceedings. I do not believe that it is necessary or proportionate to order additional discovery in terms of this particular sub-category in light of the discovery that will be made in this case.

103. In relation to sub-category (i) this relates to documents held by the Society (and the first named plaintiff) evidencing any policy applied by NAMA to INBS loans. Primarily these documents will be NAMA documents or a NAMA related company's documents. In answer to this request for discovery it was urged that it will be apparent from sub-category (a) which encompasses the correspondence between the Society and NAMA referring to the specific loans referred to in the Statement of Claim. I do not accept that this is an adequate answer. However, in view of the fact that I am directing discovery of all documents evidencing, discussing or relating to the transfer of each of the loans by the Society to NAMA to include consultations between the Society and NAMA, I believe that this additional sub-category is neither necessary nor proportionate and I do not propose making an additional order in its terms.

104. The final sub-category is (k). In view of the fact that I have directed that discovery should be made in terns of category 1 of the fourth named defendant's Notice of Motion, it is unclear to me why it would be necessary to direct discovery in respect of this sub-category also. I could find no particular argument addressed to this particular sub-category which establishes the necessity for these documents. I do not propose to make any order in respect of this sub-category.

**105. Category 12(e): Risk Management**

**(e) All documents evidencing the Plaintiffs' allegations in the Statement of Claim that there were deficiencies in risk management in the Second Named Plaintiff, and that the Defendant caused and/or contributed to the same.**

106. Unquestionably serious allegations are advanced against the defendant in respect of risk management and the alleged lack of risk management structures in the Society. The defendant seeks discovery of documents over and above those offered by the plaintiffs on a voluntary basis in respect of this category as set out above. The defendant argues that the plaintiffs have refused to provide the defendant with the comfort that the only documents which will be adduced against him are those responsive to the plaintiffs' voluntary discovery. It is also pointed out that the category offered will not assist the defendant in testing the plaintiffs' case that to the extent that there were deficiencies in risk management, the defendant was responsible for such deficiencies. The plaintiffs objected to discovery of a stand alone category responding to this request on the basis that the plea in relation to deficiencies in risk management would be adequately and proportionately captured by composite categories 12, 2, 3, 4, 5, 6 and 7 and that therefore discovery in respect of this category was not necessary. It was submitted that the category as drafted was "[a]ll documents evidencing" which made it very difficult to contend with and potentially involved a huge number of documents. Counsel described the number of documents as being "practically unlimited in any practical sense".

107. I am of the opinion that the category as drafted is not in terms in which the Court could properly order discovery in this case. No satisfactory reframing of the category has been suggested. In reply, counsel for the defendant suggested that the category could be limited to those upon which the plaintiffs will rely at trial. While this may at first blush appear to be an attractive solution, it poses very great practical difficulties. At the point of time in which discovery is to be made the plaintiffs cannot be certain which documents they will rely upon at trial until they prepare advices on proofs and witness statements. Undoubtedly, the documents will have to be appended to the relevant witness statements and included in books of core documents. While I acknowledge that witness statements and books of core documents are in no way a substitution for discovery, it is important to note that the category of documentation sought is specifically directed towards documents evidencing the plaintiffs' allegations. Therefore, strictly speaking, this category is directed towards informing the defendant in advance of trial of the material upon which the plaintiffs will rely and avoid trial by ambush. I am conscious of the fact that a very considerable body of documents will be discovered in relation to this category and in respect of the other categories referred to by the plaintiffs. On the exercise of my discretion, I decline to order discovery of this category as the documents will be available to the defendant in advance of trial even if they are not all captured in discovery.

**108. Category 15(b): Debit Agreed Advances**

**(b) All documents from and/or furnished to the Defendant referring or relating to any Debit Agreed Advance upon which the Plaintiffs will rely at the trial of the action.**

109. It is pleaded that the Society made frequent use of a highly unusual practice of Debit Agreed Advances ("DAAs") whereby additional funds were released to borrowers without either credit committee approval or receipt of updated facility letters. The plaintiffs offer the DAAs associated with the loans particularised in the Statement of Claim. The defendant seeks discovery of all documents from and/or furnished to the defendant referring to or related to any DAAs upon which the plaintiffs will rely at the trial of the action. It is said that this category is necessary so that the defendant can rebut any allegations made against him in respect of the alleged inappropriate or unusual making of DAAs. In reply, the plaintiffs say that there are DAA forms on a very large proportion of the Society's loan files and therefore discovery as sought by the defendant, over and above that offered by the plaintiffs, "would be an onerous and fruitless exercise". The plaintiffs do not limit their claim in relation to the alleged inappropriate use of DAAs to the loans particularised in the Statement of Claim. Therefore, it follows that composite category 15 as offered by the plaintiffs cannot capture all documents relevant to this issue. It was submitted that the category as drafted could involve potentially a very large exercise; it was urged that discovery was not necessary for the fair disposal of the action, as to go further than was being offered was burdensome without being of any particular utility. In my judgment the defendant is entitled to discovery of more documentation in relation to the DAAs than is offered by the plaintiffs in composite category 15. In this case I do not feel that it would be fair to the defendant to oblige him to await the delivery of witness statements and books of core documents. The allegation is too central to the wrongs alleged against the defendant and there is no real suggestion that the documents will be captured by other categories of discovery. However, in an effort to ease the difficulties identified by the plaintiffs in argument in relation to making discovery of the additional category sought by the defendant I order that discovery be made in the following terms:-

*"15(b) All documents from and/or addressed or copied to the defendant referring any Debit Agreed Advance upon which the plaintiffs will rely at the trial of the action."*

I am leaving in the qualification in ease of the plaintiffs if they wish to avail of it when they make discovery in accordance with the categories that have been agreed or ordered.

**110. Categories 17(j), (k) and (l): Legal Advice/Assistance**

**In addition to the sub-categories set out in Category 17 of Appendix 1 of the Plaintiffs' solicitors' letter of 13 June 2014, all documents comprising, containing or discussing advices and/or assistance given by lawyers to the Second Named Plaintiff during the Relevant Period in respect of the said Category 17 in connection with:**

**(j) any of the loans referred to at pages 35 to 59 of the Statement of Claim, or the properties securing such loans, to the extent that such is not discovered in response to Category 7;**
**(k) the Society's risk strategy;**
**(l) the Society's interactions with NAMA and/or any NAMA Group entity.**

**The Relevant Period for the above subcategories, and also for subcategory (f) of Category 17 in Appendix 1 of the Plaintiffs' solicitors' letter of 13 June 2014 shall conclude on 1 July 2011. The Relevant Period in respect of sub-category (e) in the same Appendix shall conclude on the date of institution of the within proceedings.**

111. In relation to category 17 (j) it was accepted if the extended definition of "loan file" sought in respect of composite category 7 was adopted then this category would not be required. I have not specified the definition of loan file as sought by the defendant in relation to composite category 7. However it is important to note that the plaintiffs amended sub-category (f) so that discovery will now be made of all documents responsive to an electronic search in the custodian mail box and network file shares of the manager (where identifiable from the loan file) who either submitted the loan applications referred to in the Statement of Claim or was the manager of the loan from time to time. It was argued on behalf of the plaintiffs that this amendment would now ensure that legal advices and assistance associated with the loans particularised in the Statement of Claim would be captured. As the category is qualified "to the extent that such is not discovered in response to category 7" the question is whether this category is now

necessary as required by the Rules of the Superior Courts. In light of the amendment to category 7(f) in my opinion it is not. Legal advices or assistance in relation to the loans would have to be addressed or copied to the loan manager responsible for the file at the time the advices for assistance was given. I am therefore satisfied that it is not necessary to make an order for discovery in terms of this sub-category.

112. Category 17(k) relates to legal advices in respect of the Society's risk strategy. It is accepted that this is relevant and necessary as is argued by the defendant. The plaintiffs say that this discovery will be made by discovery in terms of composite category 12 (c) which provides as follows:-

> *"Documents referring to the establishment and functioning (but not the day to day operations) of risk management structures in the Society and documents referencing or providing any commentary on the absence of a Risk Committee in INBS during the Relevant Period."*

It was argued by counsel for the plaintiffs that if it refers to either the establishment or the functioning of the risk management structures in the Society it is captured by composite category 12. I accept that it is appropriate not to proliferate the categories of discovery and therefore I refuse the discovery sought in category 17(k) by the defendant but I amend composite category 12 (c) by adding the words *"to include any advices and/or assistance given by lawyers to the second named plaintiff between 1st January, 2000, and end August, 2009 in relation to same."*

113. The defendant seeks discovery of any legal advices and assistance the Society received in relation to its interactions with NAMA and/or any NAMA group entity. He argues that this category of discovery is relevant and necessary in order to assist in making out his pleas that the extent of the losses consequent upon transferral to NAMA were not of his making but were attributable to other factors including the successor management teams. He says that the advice which the team received in respect of its interactions with NAMA is relevant to advancing that plea and casting light upon what occurred in the Society's interactions with NAMA. He says that necessarily this category must extend beyond August, 2009 as the National Asset Management Agency Act 2009 only commenced on 21st December, 2009. He says the period should extend to 1st July, 2011, being the date the Society was subsumed into the first named plaintiff.

114. The plaintiffs argue that any legal advice sought or prepared for the Society in respect of the NAMA process was after the conclusion of his tenure in the Society and is therefore irrelevant. I cannot accept that this is correct. There is clearly a very substantial issue around the transfer of the loans to NAMA and the responsibility for values attributed by NAMA to the loans of the first named plaintiff. It is also argued that the defendant will receive adequate discovery under composite category 10 and that the category of documentation sought will very likely attract legal advice privilege. It is accepted that this is not a justification for refusing to make an order for discovery but it militates against it as there will be very little, if any, litigious advantage to be gained by including the additional sub-category.

115. In my opinion the category sought is relevant and it is necessary in the sense that the defendant clearly has no other access to these documents. It is not argued that it would be unduly burdensome to make discovery of these documents. If it is the case that the documents are privileged that does not mean that there is nothing to be gained by ordering the plaintiffs to make discovery of the documents. They must be scheduled. It is open to the defendant, if he sees fit, to challenge the claim of privilege. Clearly, the discovery period could not end on 31st August, 2009, and would have to go to 1st July, 2011, as was sought by the defendant in respect of this category. I therefore make an order for discovery in terms of composite category 17(l) for the period up to 1st July, 2011.

116. It was argued that composite category 17(e), internal or external investigations into the management of the Society by the defendant and/or other members of the Board of Directors, should extend to the date of the institution of the proceedings rather than to 31st August, 2009. I am not satisfied that the defendant has made out a case for the extension of this category of documentation beyond the period when he served as a director and Secretary of the Society. I do not propose to amend the relevant period in respect of composite category 17.

117. Finally, it was argued that in respect of sub-category (f), which related to bonus payments and expenses payments made to the defendant, this should extend to the 1st July, 2011, as these issues continue to arise after his resignation as a director and Secretary of the Society. The plaintiffs argue that as the defendant left the Society in April, 2009 any legal advice received after that date could not have been relied upon by him and that therefore these documents are irrelevant. On that basis they ought not to be discovered. In reply it was urged that even if the documents were subject to legal professional privilege the very fact that legal advice existed might potentially help in terms of rebutting allegations of negligence. However, that cannot apply to documents created after his departure from the Society. I do not accept that it is necessary to extend the relevant period in respect of sub-category (f).

**118. Category 21(b): the Defendant's expenses**

> **(b) To the extent not captured by Category 21 of Appendix 1 of the Plaintiffs' solicitors' letter of 13 June 2014, documents evidencing all enquiries which either plaintiff (including its servants or agents, and for the avoidance of doubt including Ernst and Young) made to external natural or legal persons in relation to the Defendant's expenses referred to at pages 61 to 80 of the Statement of Claim.**

119. Agreement was reached in respect of this category during the course of the hearing of the Motions.

**120. Category 22(c): Counterclaim categories**

**All documents upon which the Plaintiffs will rely at trial evidencing their (in the alternative) denial at paragraph 67 of the Reply and Defence to Counterclaim that the removal of the Defendant from the Directors' and Officers' insurance policy was not unlawful.**

121. The plaintiffs have agreed to make discovery of all documents referring to the removal or the proposed removal of the defendant by the insurer from the policy and all documents referring to the indemnification of the defendant by the Society. The defendant argues that this is not sufficient to enable him to advance his Counterclaim. The defendant argues that a document or information might well support the legality of removing an insured from a policy but would not itself be a document referring to his or her removal from the policy. These documents would not be captured by 22(a). It is for that reason that they seek sub-category (c). The difficulty though, with sub-category (c), as drafted, is that it is phrased as an "all documents" category upon which the plaintiffs will rely at trial. In my judgment the discovery that will be made will be relevant to the defendant's Counterclaim. The third sub-category

is formulated in such a way that attempting to comply with it, were the plaintiffs ordered to make discovery in those terms, would be unduly onerous and disproportionate. It is difficult to recast this category of discovery as it is not alleged that the plaintiffs removed the defendant from the relevant policy but rather that they induced the insurance company to remove him from the policy by changing the definition of director to read "Director means every director except Michael Fingleton". Accordingly, I refuse this category.

**122. Category 23(c): Pension Advice**

**(c) All documents:**

> **(i) evidencing the 'Particulars of expenses in connection with the Defendant's pension arrangements';**
> **(ii) Evidencing or relating to the directing or sanctioning of the incurring of the above expenditure, including any involvement of the Defendant with these matters.**

123. In answer to this request the plaintiffs say they take no issue with the provision of the documents and that they will make discovery of them in composite category 21. This offers discovery of "[d]ocuments referring to or evidencing the expenses referred to at pages 61 to 80 of the Statement of claim…" They say that this includes expenses in connection with the defendant's pension arrangements. Given this averment, if no documents relating to the expenses in connection with the defendant's pension arrangements are discovered by the plaintiffs then clearly this is a matter in which the defendant may challenge any discovery made by the plaintiffs for failing to discover these documents. On the basis that discovery has to be operated on a basis of trust in the professionals involved, I accept the averment of Ms. Hooper in this matter and decline to make any discovery of a specific category as sought by the defendant.

**124. Category 24: Sale of the Society**

**All documents, between 1 January 2006 and 30 April 2009, referring to or evidencing discussions and/or interactions with Irish or foreign banks regarding the sale or purchase of the Second Named Plaintiff, including those relating to actual or proposed merger discussions between the Second Named Plaintiff and Educational Building Society.**

125. The defendant seeks this category of documents as they will assist him in demonstrating that the Society was in good shape and was well run and that the collapse of the property market and/or losses of the Society were not reasonably foreseeable. He says that interest on the part of other banks in purchasing or merging with the Society would assist him in demonstrating that his stewardship of the Society was not regarded at the time as giving rise to any difficulties. In reply, the plaintiffs argue that as the trade sale is not in dispute and the defendant's duties remained the same whether or not a trade sale of the Society was anticipated these documents are not relevant or necessary. It is argued that the documents to be discovered in composite categories 2 (board records) and 6 (external audit/ non-legal external advisors and rating agencies) and composite category 11 (other business records of the Society) will provide many documents relating to and illustrative of the health of the Society. It is therefore argued that the category of documentation sought is neither relevant nor necessary. The composite categories relied upon by the plaintiffs in response to this request for discovery clearly do not in express terms cover discussions or interactions with Irish or foreign banks regarding the sale or purchase of the Society or merger discussions between the Society and the Educational Building Society. Undoubtedly documentation in relation to these issues will be included in board records but there is no reason to believe that all of the documents relevant to this category will be included in board records. Nor is this case advanced by the plaintiffs. I accept that these documents are relevant and necessary for the defence which the defendant wishes to advance in these proceedings. He wants to be able to show that other banks were interested in either buying the Society or merging with the Society with him *in situ*. He is entitled to this category of discovery unless it is disproportionate. It was argued that it was disproportionate because an indicative electronic search on a database containing 13 INBS custodians for the key words "sale" and "INBS" returned 18,257 "hits". However, counsel on behalf of the defendant argued that these search terms were far too broad and that it would be possible to construct a much more discreet and more narrow search term such as names of the actual institutions who had expressed an interest in purchasing or merging with the Society. I accept that this is correct and I do not believe that it would be unduly onerous to order the plaintiffs to make discovery of this category of documents. I order discovery in terms of category 24 of the defendant's Notice of Motion.

**126. Category 25: Defendant's pleas as to refinancing by borrowers**

**All documents evidencing efforts to reduce exposure to the Society's commercial loan book up from 1 October 2007 to 30 April 2009, including details of all refinancing by borrowers as pleaded at paragraph 59 of the Defence and Counterclaim, and the institutions with which they refinanced.**

127. The defendant pleads that he was not negligent but prudently sought to reduce the exposure of the Society, including by building up liquidity, before the credit crunch and the global economic downturn and the consequent collapse of the property market in late 2008 and thereafter. In order to substantiate this defence he says that he needs more than formal board decisions to cease lending. The plaintiffs argue that this additional category of discovery is not necessary. It is urged that any steps taken to reduce exposures would be evidenced by documents to be discovered under composite category 2 (board records), composite category 3 (sub-committee records), composite category 6 (external audit/non legal external advisors and rating agencies), composite category 7 (loans particularised in the statement of claim), composite category 9 (policies) and composite category 11 (other business records of the Society). It is said that an ample picture of the processes and procedures within the Society during the relevant period is provided by these categories. It is said that the discovery sought will only serve to place an additional burden on the plaintiffs with regard to scoping, searching and categorising documents if this category of discovery is added to the existing categories. It is to be recalled that at composite category 2 the plaintiffs will be making discovery in terms of sub-category (c) of:-

> *"All documents referring to or evidencing the decision to cease or substantially reduce new commercial lending in the final quarter of 2007, including any reports and correspondence in this regard with third parties outside the Society."*

128. This undoubtedly covers part of what is sought by the defendant in category 25 but it is limited to the decision to cease or substantially reduce new commercial lending in the final quarter of 2007. What is sought is wider and expressly concerns efforts other than reducing new commercial lending. If steps were taken in addition to the reduction of new commercial lending to reduce the Society's exposure to the commercial property market, the fact that this occurred, and when this occurred and who was responsible for same is clearly very relevant to the defence of the defendant and the defendants in the Directors proceedings. The documents sought are relevant and necessary in my view.

129. It is expressly pleaded at para. 59 of the Defence and Counterclaim that the defendant arranged that a number of the Society's

long standing borrowers be contacted and be encouraged to re-finance their loans with other institutions. The plaintiffs complained that the defendant did not identify any of these borrowers and that discovery in these terms would be disproportionately onerous. It would require the plaintiffs to search every single loan file for the purpose of identifying whether any of these long standing borrowers were contacted and encouraged to re-finance their loans as was pleaded by the defendant. In reply to this objection, counsel for the defendant pointed to the fact that the defendant retired from Society five years ago and he could not at this remove recollect the names of any of the borrowers. While I believe discovery of this category ought to be made, it is important that some effort be made to reduce the difficulty posed by the category as presently drafted to the plaintiffs. I propose setting a limit to the size of the loans in respect of which this category of discovery will be ordered and I will hear submissions from the parties in that regard.

**130. Category 26: Interviews and Investigations**

**The Relevant Period for this category is 1 January 2000 to the dated of institution of the within proceedings.**

> **(a) All documents (including, for the avoidance of doubt, any in audio or electronic form):-**
> **(i) Recoding or evidencing the "approximately 25 interviews with current and former employees of INBS" conducted by the Second Named Plaintiff and/or its advisors, as recited at paragraph 33 of the Affidavit of Mr Sean Barton of 5 June 2013 seeking admission of the within proceedings into the Commercial List; and/or**
>
> **(ii) Recording or evidencing other statements of interviews with employees or former employees of the Second Named Plaintiff relating to any of the matters raised in the Statement of Claim.**
>
> **(b) All reports, correspondence and minutes of meetings referring to investigations carried out in accordance with the protocols agreed by the Second Named Plaintiff, the Central Bank, McCann Fitzgerald and Ernst and Young, to include, without limitation, correspondence and meetings in this regard with the Department of Finance.**
> **(c) All reports, including reports on corporate governance, carried out by either Plaintiff for the purposes of reviewing the internal structures and systems of the Second Named Plaintiff between 1 January 2000 and the date of institution of the within proceedings.**

In summary the reasons this category of discovery is sought is set out at para. 64 of Niall Clerkin's affidavit grounding the application which provides:-

> *"64. To the extent that any particular matters were the subject of investigation, by either the Second Named Plaintiff and/or by Ernst and Young, but were not chosen to be advanced by the Plaintiffs in their Statement of Claim, this may also assist the Defendant's Defence and confer a litigious advantage upon him, and discovery of the category above is also relevant and necessary for this reason."*

131. Mr. Clerkin argues that in order that there be equality of arms the defendant should be entitled to discovery of the material which the plaintiffs considered before framing and instituting the proceedings. This, in my opinion, is to misapply the test of relevance. The test of relevance relates to the issues in the case. It has not been shown that these documents are relevant to any issues in the case. They were relevant to the plaintiffs' analysis of the affairs of the Society which is by no means the same thing. On this basis I refuse sub-categories (a) and (b) as sought by the defendant.

132. Sub-category (c) is different. There the defendant seeks reports on corporate governance carried out for the purposes of reviewing the internal structures and systems of the Society between 1st January, 2000, and the date of the institution of the proceedings. The plaintiffs argue that this is very similar to composite category 4 (b) which provides:-

> *"All internal reports, including reports on corporate governance, prepared for the purposes of reviewing the internal structures and systems of the second named plaintiff."*

133. These are to be discovered for the period 1st January, 2000, to 31st March, 2010. In my opinion composite category 4 (b) completely covers what would be required by sub-category 26(c) save for the question of the upper limit of the relevant period. No particular case has been made out as to why discovery should be extended beyond the 31st March, 2010, and I accept the submissions that it is highly probable that any such documents discovered after that date will be covered by litigation privilege. In the circumstances, it would be disproportionate to order discovery in terms of a separate category in these terms.

**134. Category 27: Interaction between the Second Named Plaintiff and the Department of Finance**

> **(a) All correspondence and notes of meetings between the Second Named Plaintiff (or, after 1 July 2011, the First Named Plaintiff) and the Department of Finance between 1 January 2008 and the date of institution of these proceedings concerning:-**
> **(i) investigations into the management of the Second Named Plaintiff;**
>
> **(ii) the Defendant, including 'bonus' payments alleged to have been made to the Defendant;**
>
> **(b) All reports required by or commissioned by the Department of Finance into the Second Named Plaintiff between 1 January 2008 and the date of institution of these proceedings.**

135. In relation to category 27(a)(ii) in my judgment this is properly covered by composite category 8 which provides as follows:-

> *"(a) All documents recording, evidencing or discussing the payments made by INBS to Michael Fingleton in 2008/2009 that described at paragraph 98 of the statement of claim in the Purcell & Others proceedings, including any advice in respect of such payments and any correspondence between INBS and CIROC for the Relevant Period and the minutes of a meeting between INBS and CIROC held on 9th January 2009 and any submissions on behalf of the Society to CIROC.*
>
> *(b) Any correspondence with the Department of Finance referring to payments made by INBS/ Michael Fingleton in 2008/20009 as described at paragraph 98 of the statement of claim in the Purcell & Others proceedings."*

The reasons advanced by the defendant for seeking this category 27(a)(ii) of discovery is that the interactions in respect of the bonuses are relevant and necessary to allow him to evidence, corroborate and advance his plea that the sums recouped from him was not a bonus and that the Society so informed the Department of Finance. That being so, it seems to me that composite category 8 covers what is sought and category 27(a)(ii) amounts to an unnecessary duplication of the categories of discovery.

136. However, having carefully considered the composite categories and the orders which I propose to make, it seems to me that category 27(a)(i) and (b) are not covered by any of the existing categories of discovery. The question therefore is whether they are relevant to any issue in the proceedings. The reason the defendant advances for this category of documents is to enable him to utilise in his defence any favourable aspects of such reports or investigations. It may be of assistance to the defendant in his defence to point to correspondence from the Department of Finance relating to investigations into the management of the Society during his tenure as Secretary and Director. Likewise if there were reports commissioned by the Department of Finance in relation to the Society they may be relevant to his defence in relation to his role as perceived by the Department of Finance at that time. However, I do not believe that it is relevant to discover documents which came into existence after his resignation as they cannot have had any bearing upon his actions while he had a role to play in the Society. For this reason, I direct that discovery be made in accordance with category 27(a)(i) and (b) up to 31st August, 2009, when the defendant resigned from the Society.

137. The final category, composite category 25 was agreed on day 4 of the hearing as:-

> *"All correspondence between the second named plaintiff and the Department of Finance between 1st January 2005 and 30th April 2009 in respect of the proposed trade sale of INBS."*

**Conclusion**
138. I will hear the parties in relation to category 25 of the defendant's Notice of Motion in the Fingleton proceedings as set out at paras. 119-122 above and in relation to the time to be allowed for the making of discovery.

**Order 19, rule 28**
28. The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just.