THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 94

Ryan P.
Irvine J.
Hogan J.

2015 No. 525

BETWEEN /

QUINN INSURANCE LIMITED (UNDER ADMINISTRATION)

PLAINTIFF/

APPELLANT

- AND –

PRICEWATERHOUSECOOPERS (A FIRM)

DEFENDANT/

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 21st day of March 2017

Part I

1. In April 2010 the High Court appointed administrators to Quinn Insurance Ltd. ("QIL") pursuant to the provisions of s. 2 of the Insurance (No.2) Act 1983. In its time QIL was principally a motor and household insurance company, but it has since transpired that the extent of its insolvency is enormous: it has ceased to write any new business and at the hearing of the present appeal the Court was informed that the deficit between assets and liabilities is in the order of €1.6 billion. Certainly, to date the High Court has approved the drawing by QIL of sums of more than €1.2 billion from the Insurance Compensation Fund to meet the deficit between its assets and liabilities.

2. Since their appointment the administrators have sold the core business of QIL (including its insurance book) so that virtually the only remaining asset which QIL retains is the present action against its former auditors, Pricewaterhouse Cooper ("PwC"). For the years up 31st December 2005, 2006, 2007 and 2008 ("the material period"), PwC was the auditor of the plaintiff and reported on the plaintiff's financial statements and separately on the plaintiff's regulatory returns.

3. In 2012 the administrators of QIL commenced an action in the name of the company whereby it sued PwC for negligence, breach of contract and breach of duty in or about its auditing of the plaintiff's books and records in the material period and separately in relation to its regulatory returns. The essence of the claim is that PwC ought to have known that the relevant financial statements and regulatory returns did not give the reported true and fair view of the state of the plaintiff's affairs for each year of the material period. All are agreed that this action will be an enormous and complex case. If the matter should come to trial it might be expected that the hearing would last for more than twelve months with a claim for damages in the order of €800m. Some measure of the difficulties inherent in this mammoth litigation may be gleaned from the fact that the various notices for particulars raised to date and the replies to these particulars already cumulatively extend to more than 800 pages.

4. At the heart of the plaintiff's claim against the defendant is the allegation that the former's financial statements materially understated its liability for insurance claims or, to employ the widely-used industry term, the "technical provisions". Despite the extensive pleading and counter-pleading on the part of the litigants, the litigation is nonetheless in its (relatively) early stages, since the pleadings have yet fully to close. In particular, discovery is yet awaited. This is likely to be a daunting process which might yet generate tens of millions of documents.

5. The issue which now comes before us relates to PwC's motion in the High Court seeking an order pursuant to Ord. 19, r. 7 compelling the plaintiff to provide further particulars in relation to certain aspects of the claim relating to the allegation that the technical provisions were materially understated. In the High Court Costello J. made an order directing replies to a majority of the particulars sought *(Quinn Insurance Ltd. (in administration) v. Pricewaterhouse Coopers* [2015] IEHC 303), while refusing to direct the furnishing of other particulars. QIL has now appealed to this Court against that decision and there is also a cross-appeal by PwC in respect of her failure to direct certain particulars.

6. In the High Court the disputed particulars extended to some 23 pages. As it happens, only a minority of the particulars which were in dispute before the High Court remain outstanding in the wake of that judgment. This Court's task has been accordingly made easier by the fact we can now focus on the more limited number of particulars – some 47 specific requests in all - which remain in dispute between the parties in respect of both the appeal and the cross-appeal.

7. While even the experienced legal practitioner might be taken aback that 47 individual requests still require to be adjudicated upon by an appellate court in respect of proceedings that are already four years old, this in its own way gives a further sense of the vast dimensions of this litigation. In fairness, however, counsel for PwC, Mr. Gleeson S.C., was unapologetic in respect of what he acknowledged was the fastidious nature of his client's attitude to this feature of the pleading process. He insisted that against the backdrop of this hugely complex litigation a generous approach to the scope of particulars was required in order to corral the extent of the pleadings. The essence of the submission was that detailed particulars were required in respect of a vastly complex claim, as otherwise PwC would lack the capacity fairly to defend the claim and to know the essence of the case which it was now required to defend.

8. Counsel for QIL, Mr. Gallagher S.C., was equally robust in his submission to the effect that while this claim was admittedly complex, it had already been fully particularised following a detailed statement of claim and extensive replies to particulars. He submitted that PwC well understood the nature of the claim against it.

9. Before considering the details of the disputed particulars themselves, it may first be convenient to summarise the general legal principles which govern applications of this kind.

The applicable legal principles regarding particulars

10. The applicable principles regarding the delivery of particulars are not really in dispute and may be lightly summarised here. It is, of course, the application of these principles – not least in a case of formidable complexity such as the present one – which presents all the difficulties.

11. The starting point of the legal analysis is the well known dictum of FitzGerald J. in *Mahon v. Celbridge Spinning Co. Ltd.* [1967] I.R. 1, 3:-

> "The whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues, and to ensure that the trial may proceed to judgment without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline the case he will have to meet at the trial…."

12. This theme was taken up by Henchy J. in *Cooney v. Browne* [1985] I.R. 185, 191 a decision which remains, in many way, the leading Irish authority on the scope of particulars:-

> "Where the particulars are sought for the purpose of the hearing, they should not be ordered unless they are necessary or desirable for the purpose of a fair hearing. "The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise": *Spedding v. Fitzpatrick* (1888) 38 Ch. D. 410, at p. 413. Thus, where the pleading in question is so general or so imprecise that the other side cannot know what case he will have to meet at the trial, he should be entitled to such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at the trial."

13. This approach was well summarised by Dunne J. in *Quinn Insurance Ltd. v. Tribune Newspapers plc* [2009] IEHC 229 where she observed:-

> "There is no doubt whatsoever that a party is entitled to know the nature of the case being made against them. However, *the role of particulars is not to require a party to furnish detailed particulars of specific aspects of the case.* It is sufficient that the issues between the parties should be adequately defined and that the parties should know in broad outline what is going to be said at the trial of the action." (emphasis supplied)

14. The defendant also argued that the particulars sought were necessary in order to bring greater precision to the issues between the parties so that the discovery ultimately sought in this enormous and complex case might be reduced. Some of these difficulties were adverted to Clarke J. in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19:-

> "It has been suggested in some quarters that the fact that, in the Commercial Court, parties are required, well prior to trial, to exchange statements setting out a précis of the evidence which any witness, whether of fact or expert, is due to give, coupled with the requirement to exchange written submissions on the legal issues which are likely to arise at the hearing, significantly reduces the need for a very high level of particularity at the pleading stage. There is, undoubtedly, some truth in that proposition. One point of pleadings (and a very important aspect of same in cases where there is not likely to be a pre-trial exchange of witness statements and submissions) is to define with some precision the questions which are likely to arise at the trial so that the parties can not be prejudiced by being taken by surprise. Clearly in circumstances where witness statements and written submissions have to be exchanged, the extent to which a party could reasonably be taken by surprise at trial is significantly reduced. However, there is another important function which pleadings play, particularly in cases where significant discovery is likely to follow."

15. While Clarke J. accepted that the Commercial Court requirements regarding the exchange of witness statements tended to mitigate against any possible surprise, he also adverted to the fact that a loosely or laxly pleaded case carried its own dangers regarding the scope and breadth of discovery in the proceedings:

> "…overly broad discovery carries with it the risk that in virtually every case, the costs of the proceedings will be increased for no gain in terms of the likely justice in the vast majority of cases, so that whatever party has to bear the burden of paying for that discovery (normally the loosing party), will bear a larger burden than might otherwise have been the case. The injustice, to at least one party in virtually every case, that would arise in those circumstances is obvious…..To enable a party to move to discovery without having adequately pleaded its case is to run the risk of a significant injustice by virtue of that party being allowed to trawl through the other side's often confidential information without real justification. On the other hand, to require a party to plead at a level of detail (in advance of discovery or the like) which it could not reasonably obtain other than by discovery or other procedural steps can lead to an obvious injustice. A balance again needs to be struck."

16. A further factor is that identified by Baker J. in her own judgment in *Playboy Enterprises International Inc. v. Entertainment Media Network Works Ltd.* [2015] IEHC 10, namely, that, generally speaking, the more complex the proceedings and the pleadings, the greater will be the need in the interests of the efficient use of court time and resources to ensure that the case is fully pleaded. This in turn suggests that the role of particulars in complex litigation is more expansive than in the case of more routine cases.

17. These were the general principles identified by Costello J. in her judgment and, as I have already indicated, they are not really in dispute. It is the application of these principles to the disputed particulars which has given rise to the present application to the High Court and the subsequent appeal to this Court.

18. Before proceeding further, it may be helpful if I indicate the format of the remainder of the judgment. I propose first to examine the disputed particulars by reference to subject areas by setting out the general background to the proceedings, then summarising the High Court judgment. I will then proceed to examine whether the relevant aspect of the High Court judgment should be upheld,

taking first the particulars which are the subject of QIL's appeal and then proceeding to consider PwC's cross-appeal in respect of those particulars refused by the High Court.

Part II: The Background to the Proceedings

Technical Provisions

19. As an insurance company, the plaintiff had an obligation to make provision for the future cost of claims in its annual accounts. It was, of course, impossible to be precise in relation to the size of these claims, but the gist of the allegation against PwC is that in respect of the material period, the technical provisions were very seriously understated. The plaintiff contends that the defendant was negligent in respect of these provisioning estimates and it seeks to hold it responsible for the enormous losses it has suffered as a result of serious under-provisioning for claims.

20. During its time as auditor of QIL, PwC was engaged by the plaintiff to audit the financial statements prepared by QIL and to audit the statutory forms of QIL's annual returns to the Financial Regulator. These financial statements naturally included the appropriate estimates in respect of the technical provisions. While there is really little in dispute between the parties concerning the nature of the technical provisions, the nature of the provisioning obligation was helpfully explained by Mr. Tony Weldon of PwC in his affidavit of 3rd March 2015:-

> "Very simply, an estimate of claims reserves is included in the financial statements and regulatory returns of any insurance company. This estimation of the required claims reserves is an estimate only and can obviously include allowance for thousands of claims, all with various unknown and known variables and all at different stages of progression. Estimating the technical provisions is an inherently uncertain exercise, which is heavily dependent on the exercise of professional judgment. The question that arises is whether an estimation falls within a reasonable range and auditing guidance generally emphasises that it is only if the estimate falls outside a reasonable range that a misstatement can be regarded as having arisen. The exercise of estimating appropriate claims reserves is particularly complex for what are described as "long-tail" insurance claims, which formed a significant proportion of the plaintiff's outstanding claims. These are insurance claims which do not proceed to final settlement until a length of time beyond the policy year and indeed, potentially years after the expiration of the policy in question…
>
> Information regarding the claims incurred with long-tail insurance emerges over time and accordingly there is a high degree of estimation. The nature of the legal process involved in settling claims also means that there can be large changes in the outcome of estimates, such as where the attribution of liability to one side or the other changes. When changes in the external environment are factored in as well, the consequence is that there is a high degree of uncertainty…
>
> There are a number of methodologies that can be used by actuaries to estimate claim reserves, such as extrapolation from past claims data for a company, with respect to both paid claims and incurred claims which have not yet been paid. It is also possible to apply a loss-ratio method based on premiums and to combine a number of different methodologies….
>
> In each year of the material period, the plaintiff engaged Milliman Advisers Limited ("Milliman"), a highly reputable actuarial firm, to provide an estimate of its Technical Provisions.
>
> In general, the most material and complex judgment affecting the annual regulatory returns for a non-life insurer is the adequacy of its booked technical provisions. In order to obtain additional confidence in the adequacy of the booked technical provisions, a key requirement imposed on authorised non-life insurers is that the adequacy of the booked technical provisions is supported by a Statement of Actuarial Opinion ("SAO") signed by an appropriately qualified actuary."

21. At para. 31 of that affidavit Mr. Weldon went on to explain:

> "Accordingly, the ultimate estimates are dependent on the following:
>
> (1) The appropriateness of the key data inputs;
>
> (2) The selection of appropriate assumptions and actuarial methods to apply to such input data; and
>
> (3) The appropriateness of the conclusions drawn by the actuary from the application of each method and/or the combining of the results of different methods."

22. The directors of QIL were, accordingly, under an annual obligation to prepare an estimate of the technical provisions. Somewhat unusually, however, the plaintiff did not employ in-house actuaries, but it instead relied upon the expertise of Milliman Advisers Ltd. ("Milliman"). (Milliman is a US-based international actuarial and consulting firm.) It was Milliman who assisted QIL in the preparation of the technical provisions. To this end Milliman relied upon the data furnished by QIL but exercised its own independent professional judgment in assessing the data and selecting the appropriate methodologies to apply in these circumstances.

23. It is accepted that PwC was obliged to audit this figure as part of the overall audit of the business of the plaintiff. For this purpose PwC availed of the actuarial expertise supplied by a specialist branch of its own organisation. PwC AIMS. The role of PwC was, however, to audit the financial records of QIL, not to audit the work of Milliman. This actuarial exercise naturally required the exercise of a considerable degree of professional judgment in calculating the technical provisions. The final overall estimate of technical provisions will accordingly depend to some extent upon what Costello J. aptly described as "the actuarial methodologies used, a variety of data sources and inputs, the assumption applied and the professional judgment of the actuary." In her judgment Costello J. also acknowledged that:

> "It is also common case that there may legitimately be a range of results based on the same data, depending on the methodologies used and the individual judgment and professional expertise employed by the actuary conducting the estimate. It is only if the figure estimated for the technical provisions materially underestimates and therefore is considerably outside the accepted range that it could be considered to be wrong."

24. As the claims materialised following the appointment of the administrators, they were concerned there had been significant under-provisioning in respect of the claims in the previous years. The administrators accordingly instructed the well known professional

services firm, Mazars, to re-estimate the technical provisions for the years 2005 to 2008. In their re-estimation exercise Mazars concluded that the original estimates were materially under-estimated in a manner so far outside of a range of reasonable estimates that they could not have been conducted properly in accordance with the appropriate and relevant professional standards.

25. Two critical aspects of the Mazars exercise should be noted at this juncture. First, Mazars had not been supplied with the audit working papers of PwC, so that it was unable to determine the extent to which any of the relevant factors which might impact on the likely level of technical provisions (such as – to take only the most obvious example - estimates of likely claims costs) had in fact been taken into account by PwC during the periods in question.

26. Second, Mazars performed this re-estimation exercise in the round and, specifically, did not seek to attribute a particular value to a particular loss. Accordingly, rather than make an estimate on an item by item basis, Mazars arrived at a global figure which it maintains represents PwC's under-estimates of the level of technical provisions for which QIL should properly have made provision.

27. A key part of QIL's case is that if PwC had drawn attention to this level of under-provisioning, then this would have had the effect of obliging the company to increase these reserves significantly. One consequence of this, for example, would have been that QIL would not have been in a position to make substantial gifts (in the order of €175m.) to related companies in the Quinn Group of companies. It would also have been obliged to address its business model, thus obliging the company to adjust its prices or, alternatively, to exit from certain unprofitable lines of business, particularly insurance written in various UK markets. The administrators maintain that actions such as this would have helped it to avoid the catastrophic underwriting losses which it ultimately incurred.

Re-opened claims

28. Another issue forming part of the backdrop to the present proceedings is the contention that there were a large number of re-opened claims. QIL maintains that had this factor been identified it would have been a tangible signal that the underlying claims model which it had employed was not working effectively. As Costello J. put it in her judgment:

> "The sheer number of reopened files raised significant issues about the reliability of the approach to claims and claims reserves. Further, the number was far greater than the industry norm which should have alerted the defendant to the frailty of the data. It would affect the professional judgment employed in assessing the estimates. It is said that the scale of the reopened claims during the material period required an appropriate adjustment which would have required a material increase to the level of claims reserves required and it is said the defendant negligently failed to identify this issue."

29. The plaintiff's case on this point is that the sheer volume of re-opened cases should itself have sent a warning sign to PwC – which was not heeded - that all was not well with QIL's general modus operandi.

Part III: The judgment of the High Court

The judgment of the High Court

30. It is next necessary to consider the judgment of Costello J. The first set of disputed particulars related to the calculation of the technical provisions. The judge then explained the range of the particulars sought in relation to the technical provisions:

> "The particulars sought in relation to the calculation of the Technical Provisions fall broadly into two categories. In simple terms, the defendant needs to know why, according to the plaintiff, the estimates as calculated by the plaintiff and Milliman for the relevant years in the material period where wrong and materially underestimated the technical provisions. Secondly, it seeks to know the details of the Mazars re-estimation of the technical provisions so that it can understand how Mazars approached the exercise, understand the data used, the methodology employed and the assumptions and professional judgments which the plaintiff will say at trial were the appropriate ones in all the circumstances. The plaintiff has objected to providing the particulars on the basis that the defendant understands and knows the case it has to meet and that the particulars sought amount to an inappropriate interrogation of evidence including expert evidence which will be adduced at the trial of the action. Its counsel submits that the statement of claim and the particulars delivered set out very fully the plaintiff's case against the defendant."

31. Costello J. acknowledged that QIL had already set out in great detail the particular of alleged negligence and breach of contract on the part of PwC. She nonetheless considered that it was not clear:

> "…from either the pleadings or the particulars furnished to date precisely what the plaintiff says was wrong with the technical provisions as calculated by the plaintiff and Milliman in the material period. It is common case that the plaintiff will first have to establish that these estimates were materially underestimated. In order for the defendant fairly to meet this case, I am of the opinion that it needs particulars of why the plaintiff alleges the technical provisions were in fact materially underestimated. On the other hand, I do not believe that the defendant is entitled to particulars of how Mazars conducted the re-estimate of the technical provisions in preparation for this case. The plaintiff's case is not advanced upon a direct comparison between the Mazars exercise and the exercise previously carried out by the plaintiff and Milliman. It follows that the requested particulars do not in fact arise out of the plaintiff's claim and therefore do not relate to the issues in the case. Clearly they relate to the evidence which the plaintiff will lead at trial. However, it is well established and the authorities are clear that a party is not entitled to its opponent's evidence by way of particulars of the claim or defence.
>
> Furthermore, the plaintiff says that it has not in fact conducted the exercise of comparing the differences between the Mazars calculation with the Milliman calculation in the manner contended for by the defendant. It says it simply does not have the information in the format requested by the defendant in its notice for particulars. In order to answer the questions actually posed by the defendant in relation to these matters, it would have to carry out a further analysis and calculations which it has not done and which do not form part of its case against the defendant. This is a further reason for refusing these requests for discovery.
>
> Thirdly, the parties are agreed that there is a range of possible estimates that might legitimately be made in calculating the technical provisions. Therefore, while the Mazars re-estimation is relevant to the plaintiff's allegation that the original estimation of the reserves was wrong it is not the plaintiff's case that the Mazars re-estimate of the technical provisions is the only correct estimate of the provisions. It will be perfectly possible for another actuary to re-estimate the reserves for the material period, taking account of the errors alleged by the plaintiff to have arisen, and bona fide to arrive at different values and ultimately at a different estimate for the technical provisions. Provided appropriate account is taken

> the relevant factors and there is appropriate professional expertise and judgment employed in preparing the estimates, it could legitimately be argued that this further re-estimation is as valid as that conducted by Mazars. It follows that the exercise carried out by Mazars is truly a matter of evidence which ultimately will be subject of expert reports and cross-examination rather than particulars of the plaintiff's claim against the defendant."

32. Costello J. accordingly directed QIL to reply to a specific range of particulars relating:

> "….to the re-estimation of the technical provisions by Mazars rather than identifying the alleged errors in the estimates actually carried out during the material period, or they seek to identify the differences between the original estimation and the re-estimation. The question of comparing the calculation with the exercise carried out by Mazars does not arise out of the plaintiff's claim and therefore is not in the circumstances an appropriate matter for particulars. Insofar as they seek to identify standards or contemporaneous information and data that Mazars relied upon when re-estimating the provisions, when identifying the errors alleged to have occurred in the original exercise, particulars of available data or information which was not considered or to which insufficient weight was paid will be identified as will the actuarial standards insofar as they were not or not appropriately applied."

33. It is against this background that I now propose to move to a consideration of the individual particulars (or, in some instances, groups of particulars) which remain in dispute between the parties and are the subject of either an appeal or cross-appeal, as they may be.

Part IV: QIL's appeal

The particulars sought in relation to the alleged under-provisioning of the technical provisions: Paragraph 11(3) II, V, VIII and XI

34. By a second notice for further and better particulars delivered on 18th December 2014 PwC sought details of the alleged under-provision in respect of the technical provisions for the calendar years 2005, 2006, 2007 and 2008. As each of the particulars sought for these years were in identical terms, I propose to treat the particulars (paragraph 11(3) II)) sought in respect of calendar year 2005 as representative for this purpose:

> "In respect of the alleged understatement of each accident year within each class within each geographic region at 31 December 2005, please specify the reasons and the financial effect of each reason for the alleged understatement identified by the plaintiff in its re-estimation of the plaintiff's technical provisions."
>
> Reply
>
> "The plaintiff's case has been adequately pleaded. This is an inappropriate interrogation as to matters properly for evidence, including expert evidence, at the trial of the action."

35. As Costello J. found – and it is not really disputed – QIL have already provided extensive particulars of losses which it claims to have suffered. Thus, in a reply to particulars delivered on 24 June 2014, QIL has provided elaborate details and comparisons of the original Milliman/QIL estimates and the subsequent Mazars re-estimations for each of the years in which PwC acted as auditors, commencing with 2005. These estimates range from private motor and commercial motor estimates for this State through to estimates for property damage in Great Britain. The particulars then supply a detailed estimate and re-estimate under 14 separate headings of insurance business written by QIL during this period, along with total estimate comparisons. Based on this exercise QIL estimate that the deficit in provisioning was (with rounding) €167m. in 2005, €331m. in 2006, €579m. in 2007 and €671m. in 2008.

36. The defendant maintains that this detail – impressive though it is – is insufficient. It contends that it is entitled to know via this request for particulars both (i) the reasons for and (ii) the financial effect of each reason for the alleged under-statement identified by QIL. In essence, therefore, this request is that the plaintiff supply the defendant with reasons as to why it contends that the defendant was negligent.

37. PwC has, of course, also sought further particulars regarding the savings which QIL maintained would or, at least, might have been achieved had it been aware of the extent of the underwriting losses. In her judgment Costello J. addressed the question of PwC's entitlement to further particulars by saying:

> "In my opinion the defendant does not have sufficient information to understand the issues in relation to causation as set out in the replies to particulars of the 22nd October 2014, in relation to this aspect of the case. It is entitled to know how the plaintiff says it would have adjusted its pricing model, how it would have increased its rates on loss making lines, what were those loss making lines, what precisely would have been the effect of exiting the GB/NI in either 2006, 2007 or 2008."

38. In my judgment, however, viewing the matter both from the standpoint both of practice and existing authority it would be hard to see how requests of this kind could be accommodated within the ordinary parameters of a notice for particulars. The pleader in a standard personal injuries action is not required, for example, to explain why the driver of the motor vehicle which caused the crash was driving too fast or why he failed to keep a proper look-out immediately prior to the accident. The gist of such a claim, after all, is that the defendant was in fact negligent by driving too quickly and by failing to keep a proper look-out. While it is true that, as I have already noted, Baker J. observed in *Playboy Enterprises* that the scope and range of admissible particulars in complex commercial litigation is naturally more extensive and broad-ranging than in straightforward personal injury actions, the general principle to which I have adverted nonetheless holds true.

39. One is driven to the same conclusion if the matter is viewed following a consideration of the authorities. The particulars already supplied in relation to the claim enable PwC to know, adopting Fitzgerald J.'s classic formulation in Mahon v. Celbridge Spinning Co. Ltd. [1967] 1.R. 1, 3, the broad outline of the case it will have to meet at trial. It knows with precision the extent to which under-provision was allegedly made in respect of the technical reserves for each relevant year and how it is said to have been negligent in this respect.

40. Counsel for PwC, Mr. Gleeson S.C., pressed the Court for these particulars on the grounds that, given the multiplicity of possible variables relating to the alleged under-provision, his clients were entitled to know - at least in general terms – the major causal factors which the plaintiff contends were responsible for the alleged under-provision. Given the complexity of the claim, he submitted, the plaintiff was entitled to know what factors or issues the defendant says it ought to have noticed in the course of the audit but

that it somehow missed.

41. The most straightforward answer to this submission is to recall that the purpose of pleadings is to define the issues between the parties and that the purpose of particulars is in turn to clarify more precisely the parameters of the pleadings. Here QIL have defined the extent and scope of the claim in respect of the alleged under-provision in, it must be said, elaborate detail for each of the relevant years.

42. To go further is effectively to require the other party either to identify items of evidence which it proposes to lead or to provide something in the nature of a factual narrative in support of the claim. Our system of civil procedure certainly provides instances (such as judicial review proceedings and, more latterly, in defamation claims) where a plaintiff is required to provide a grounding narrative by way of affidavit in support of the claim at the outset of the proceedings. Rightly or wrongly, there is no such requirement in the case of private law actions commenced by way of plenary summons (such as the present case) and the authorities have consistently rejected the contention that a defendant is entitled to such information by way of particulars: see, for example, the comments of Henchy J. in Cooney and my own judgment as a judge of the High Court in *Armstrong v. Moffatt* [2013] IEHC 148, [2013] 1 I.R. 417.

Conclusions regarding particulars in relation to the alleged underprovisioning of the technical provisions
43. It is for these reasons that I respectfully disagree with the conclusions of Costello J. in this respect. I would accordingly allow QIL's appeal against orders directing to answer the following particulars arising out of paragraph 17 of the statement of claim contained in paragraph 11(3) of the notice for particulars delivered on 15th November 2013, namely, 11(3) II, V, VIII and XI, these being particulars in relation to the reasons for the alleged under-provisioning in the years from 2005 to 2008 in respect of the technical provisions.

Particulars 11(3) XIII F and G: Details regarding contemporaneous information and data
44. A related request is No. 11(3)XIII F whereby PwC sought details of the precise "contemporaneous information and data" which it is alleged was available at the time

> "….and in accordance with which the original estimation carried out by the plaintiff and/or Milliman of the plaintiff's ultimate net costs as of 31st December in that year for the purpose of preparing the plaintiff's financial statements and regulatory returns, ought to have been, but was not, carried out."

45. Particular No. 11(3)XIII G is expressed in very similar terms.

46. In my view, Costello J. was correct to direct QIL to provide such particulars. Knowing the range of information and data to which it is said PwC ought to have had regard at the time of the audit is so integral to the claim of professional negligence that this is information to which, as a matter of basic fairness of procedures, it should be entitled. While the distinction articulated by Henchy J. in Cooney between the range of evidence on the one hand (to which information the opposing party is entitled by way of particulars) and distinct items of evidence (to which it is not), is not always the easiest to apply in practice, I consider that this specific information is important to enable PwC fairly to meet the case against it.

47. This conclusion should not, however, be misunderstood. It will be sufficient for this purpose if QIL provides by way of reply a broad outline the range of such information and data. It may be supposed that a succinct statement of the material to which QIL says PwC ought to have had regard in conducting its audits should suffice for this purpose.

Conclusions
48. I would uphold the decision of the High Court in respect of particulars 11(3)XIII F and G.

Details of alleged avoidable underwriting losses
49. By particulars No. 21(12)II A, B and C PwC have effectively sought details in respect of the underwriting losses for each of the financial years from 2007 to 2010 which it is alleged "could or would have been avoided" but for the alleged failures of PwC. To that end QIL were further requested to supply:-

> "II. Arising from each of the examples set out in Reply 21(12) of the 22 October 2014 Replies under B and C, in respect of the underwriting losses in each of the financial years ended 31 December 2007 to 2010 inclusive, which it is alleged could or would have been avoided but for the alleged failures of the Defendant, please provide, preferably in tabular format and with monetary amounts:-
>
> > A. A breakdown of each of the constituent elements making up the net underwriting loss in each year into categories including premiums earned, claims incurred, claims handling expenses, commission expense, operating expense, foreign exchange gains or losses and any investment return included in the net loss.
> >
> > This is a matter for evidence, including expert evidence, and is not a proper matter for particulars. Without prejudice to the foregoing this breakdown will be provided in due course as is averred to above in the narrative to these replies under the heading "Underwriting Losses."
> >
> > B. A breakdown of each of the constituent elements making up the net underwriting loss in II A above separately into each class of business within each geographic region.
> >
> > > Please refer to the reply to Rejoinder II A above.
> >
> > C. A breakdown of the figure of asserted savings as between costs savings, avoidable substantial underwriting losses, gifts and loans.
> >
> > > Please refer to the reply to Rejoinder II A above."

50. In any consideration of this question it is first necessary to observe that the Mazars did not seek to attribute a value to each of the relevant factors which it had identified in the course of its re-estimation exercise. In other words, while, for example, Mazars had identified gifts and loans which QIL had made to Quinn-related companies during this period which it said would not have been made had it been aware of the extent to which it had under-provisioned in respect of its contingent claims liabilities, no specific value had been attributed to each of these items.

51. The rationale for this approach was explained thus by Mr. Andrew Goldsworthy, who is the audit and assurance service line leader

for Mazars UK (at para. 22 of his affidavit of 31st March 2015):

> "At each of the relevant year ends, the best estimate of the technical provisions calculated by Mazars is greater than the technical provisions included in the plaintiff's financial statements. In determining our best estimate, it is important to stress that our projections do not attribute a value to each relevant factor, In accordance with extant actuarial practice (which is still the case), these factors are addressed in the round in determining the technical provisions necessary, rather than on an item by item basis. The relevant factors considered together informed the actuarial assumptions and judgments made in calculating the best estimate…"

52. In any event, these further particulars effectively seek a detailed breakdown of the claim into what amounts to a line item analysis of key aspects of its constituent parts. In my view, this goes well beyond seeking to ascertain the parameters of the claim, but rather seeks in substance what would amount to a précis of the evidence (even if, admittedly, in figures and in tabular form) of the evidence to be given against. Any such reply to these requests for particulars would, in reality, be a form of narrative of the details of the claim, even if expressed principally in figures as distinct from words. For the all reasons expressed by me in a judgment delivered as a judge of the High Court in *Armstrong v. Moffatt*, I consider that such requests venture beyond the proper scope of a notice for particulars and must be disallowed.

Conclusions
53. I would allow QIL's appeal as against the order of the High Court which directed it to answer particulars Nos. 21(12)II A, B and C.

Details as costs savings: Particulars 21(12) VII A, B and D
54. By particulars 21(12)VII A, B and D arising from the notice for particulars delivered on 18th December 2014 PwC has also sought details as to the costs savings which QIL contends it would have achieved had it been alerted to the extent of the under-provisioning. By particular 21(12)VII A PwC seek to inquire how it is asserted that the plaintiff would have adjusted its pricing model by reference to each underwriting or accident year "in respect of each class of business within each geographical region." This request for particulars is, however, against a background against a claim by QIL that had it received forewarning from its auditors that it had materially under-provisioned it would have taken a range of remedial steps, including adjusting its prices and discontinuing certain loss-making businesses.

55. In my view, the particulars sought as to how QIL would have adjusted its pricing models in the various classes of business and within each geographical region go beyond the range of evidence to which it is entitled and amount to interrogatories directed at the specific details of an expert report which might be tendered at trial. I would therefore allow QIL's appeal against the High Court order that it answer these particulars.

56. PwC also sought particulars (21(12)VII B) of each class of the loss-making business "within each geographic region by accident year" to which reference is made. I think that PwC are entitled to know in general terms the identity of loss-making business for each relevant underwriting year so that it can ascertain from the pleadings the nature of the claim and the range of evidence that will be led in support of this claim. I see no reason why this particular could not be replied to in summary form by reference to the general classes of loss-making business in each underwriting year.

57. In passing, I would also note that particular 21(12) I B contains a similar, overlapping request for the details of each class of loss-making business "within each geographic region by accident year to which reference is made." In essence, the further detail sought is the geographic region in which any loss-making business is said to operate. I do not see that this additional detail is critical so far as this claim is concerned. Once QIL provides details of the general classes of loss-making business in each underwriting year (as it has just been required to provide), this will be sufficient for PwC to knew in broad terms the case it has to meet. I would accordingly allow QIL's appeal in respect of the order to furnish an answer to this request for particulars.

58. The final request under this heading was a request (21(12)VII D) that QIL specify by reference to each class of alleged loss-making business "how it is asserted [that] underwriting losses of approximately €490m. would have been avoided." It is important to stress that QIL have already pleaded (in admittedly more general terms than PwC would wish) that had it been aware of the alleged under-provisioning it would have taken steps such as ceasing to make gifts to related Quinn companies, discontinuing loss-making business and increasing prices. In these circumstances, for PwC to go further in order to seek the details by reference to each class of business is effectively seeking to interrogate QIL as to details of the evidence it proposes to lead at trial. In these respects PwC knows the substance of the case it will have to meet at trial and doubts in this regarded may be assuaged by the fact that, as I have just indicated, QIL will have to answer particulars directed at identifying the loss-making business.

Conclusions as particulars 21(12)VII A, B and D
59. I would therefore affirm the decision of the High Court in respect of the particulars sought at 21(12) VII B, but otherwise allow the appeal in respect of particulars 21(12)VII A and D and IXA, B and D.

Further particulars in relation to cost-saving measures: particulars 21(12) X A, C, D, E, XI A, C, D, E and F
60. It remains under this heading to consider yet further particulars seeking details regarding the alleged cost saving measures which QIL would have taken. Many of these requests overlap with earlier requests and in some instances are phrased almost identically to earlier requests. Some of the requests are effectively determined by specific rulings which are contained in earlier parts of this judgment, while other requests require more detailed treatment.

Details of substantial cost savings: Particulars 21(12) X A and F, XI A, XI F and XVB, XVI A and XVIIA.
61. The request at 21(2)X A seeks to elicit details of the "substantial cost savings" which it is asserted "would have been generated as a result of the plaintiff exiting the Great Britain and Northern Irish business." Given that the contention that there would have been substantial cost savings had QIL been alerted to the extent of the under-provisioning is central to its claim, I consider that PWC are entitled to know in broad outline the details of the savings which it is said the exiting of these markets would have generated. I would therefore affirm the decision of the High Court in this respect of this particular.

62. This decision also governs the very similar requests in 21(12) X F, 21(12) X A, XF, XV B, XVI A and XVII A.

Increased rates on loss-making business: Particulars 21(12) X D and XI C
63. The contained in Particular 21(12) X D requests QIL to specify:-

> "…by reference to each underwriting year or accident year (as appropriate) in respect of each class of business within each geographical region, how it is asserted the plaintiff would have increased the rates on 'loss-making lines of business, thus avoiding substantial underwriting losses on business written by it."

64. This is another example of a request which goes beyond the range of evidence test articulated by Henchy J. in *Cooney*. As I have indicated elsewhere in this judgment, PwC is entitled, of course, to know in broad terms the general nature of cost-saving measures which QIL contends it would have adopted had it been aware of the under-provisioning deficits. It is also entitled to learn via particulars that one of the proposed measures would have been the adjustment of the pricing model by QIL.

65. The extent to which QIL would have adjusted its prices is, however, an entirely different matter. This request reaches deep into the evidence which QIL will presumably tender at the trial and, as I have already indicated in respect of some of the other requests advanced by PwC, represents an inadmissible request via particulars for what amounts in substance a narrative or a detailed expert witness statement. PwC will, of course, be entitled to see at a later stage the witness statements of the witnesses to be tendered by QIL in accordance with Ord. 63A r. 22. But it is not entitled to see them by way of particulars.

66. This might be thought by some to represent a defect in our system of civil procedure. This outcome is nonetheless supported by both principle and authority: the pleadings define the issues between the parties and particulars serve to clarify the scope and extent of those issues. After all, Ord. 19, r. 3 requires a pleading to contain – and contain only – "a statement in summary form of the material facts on which the party pleading relies….but not the evidence by which they are to be so proved…." The evidence to be given in support of the litigants' pleas accordingly remains that to be given viva voce at trial and, in the case of the Commercial Court, supplemented by extensive witness statements exchanged between the parties in advance of trial.

67. If, however, the scope of particulars could be expanded so as to go beyond the general range of evidence test articulated in *Cooney v. Browne*, it would conflate the pleadings/evidence distinction which is at heart of Ord. 19 and would ultimately lead over time to a state of affairs where pleadings did not simply define issues and the pleader was required to supply evidence to support the plea.

68. It is true, of course, that the Oireachtas has from time to time enacted legislation to require precisely this: see, *e.g.*, s. 8 of the Defamation Act 2009 for a contemporary example of where the litigant is required to file a verifying affidavit in support of the pleas. These legislative changes are nonetheless issue specific and have not introduced any general change in the system of civil procedure introduced by the Common Law Procedure (Amendment) Ireland Act 1853 and supplemented from time to time by the Rules of the Superior Courts.

Conclusions
69. The fact remains, however, that applying the existing issues/evidence distinction which is fundamental to our current system of pleading, this request is inadmissible. I would accordingly allow the appeal in respect of this specific request. This conclusion also governs the rather similar request contained in 21(12) X E and XI D and E.

Part V: PwC's Cross-Appeal

70. I now propose to consider PwC's cross-appeal in respect of those particulars to which Costello J. refused to direct QIL to reply.

Calculations of Margin over Best Estimate: Particulars 11(3) III, VI, IX and XII
71. Particulars 11(3) III, VI, IX and XII are all in identical terms, save that they related to different years. Particular 11(3) III is in the following terms:

> "Under the heading 'Results as of 31 December 2005' of the 24 June 2014 Replies, please set out each of the steps taken in the calculation of the figure of 21,061 for 'Margin over Best Estimates' for the results as of 31 December 2005."

72. As I have already explained elsewhere in this judgment, this request for particulars is in effect an attempt to interrogate QIL in relation to details of its proposed evidence. As such, it plainly goes well beyond any the scope of any particular which seeks to identify the parameters of the pleadings, I consider that this request for further particulars was properly disallowed by Costello J. and I would affirm her decision in that regard.

73. This conclusion also governs the requests at paragraph 11(3) VI, IX and XII.

The re-estimation process: particulars 11(3) XIII A, B, C, D and E
74. Under this heading PwC sought particulars in respect of a variety of aspects of the re-estimation process.

75. With particular XIII A PwC sought details of each of the steps taken in the "re-estimation of the best estimate of the plaintiff's ultimate net claims cost as at 31 December in that year." As this is a question which relates directly to method whereby particular figures by QIL's expert advisers, it does not relate to the range of evidence, but rather to aspects of specific items of evidence which QIL will tender at trial. Applying, therefore, the test in *Cooney v. Browne*, it is clear this request is not a valid request for particular. This conclusion governs a not dissimilar request under XIII B.

76. Particular XIII C seeks details of the financial effects of the different steps taken in the course of the re-estimation process. For all the reasons set out elsewhere in this judgment in relation to particulars requesting details of the effects of certain price and rate changes, it follows, therefore, that such a request reaches well beyond the range of evidence and must be disallowed.

Conclusions
77. It follows, therefore, that I would affirm the decision of the High Court in respect of particulars 11(3)XIII A, B and C.

Particulars 11(3) XIII D and E: specification of the then extant actuarial standards and contemporaneous and data
78. By particulars XIII D and E PwC have sought details of the then extant actuarial standards and contemporaneous information and data in connection with which the re-estimation exercise was carried out. Similar requests (expressed in somewhat different language) were contained in particulars 11(3)XIII F and G and I have elsewhere in this judgment upheld the decision of the High Court to direct such particulars.

79. For my part, I see no real difference between the requests at D and E as compared with F and G. All four requests relate to the range of information and data to which it is said PwC ought to have had regard at the time of the audit. As these requests are integral to the claim of professional negligence I consider that this is information to which, as a matter of basic fairness of procedures, it should be entitled.

80. As I indicated with regard to the particulars at 11(3) F and G, it will suffice if a broad outline as to the relevant range of such

information and data is supplied by QIL. It may be supposed that a succinct statement of the material to which QIL says Mazars had regard in conducting its re-estimation exercises should suffice for this purpose.

81. I would accordingly allow PwC's cross-appeal in respect of particulars 11(3) F and G.

Details of loss-making business: Particulars 21(12) V A, B, C and D
82. By particulars 21(12) V A, B C and D, PwC sought to elicit further information in relation to alleged loss-making business written by QIL.

83. In particular 21(12)V A PwC sought details of the loss-making business to which QIL referred in their replies to particulars of 14 March 2014. By analogy with the conclusions already reached elsewhere in this judgment in respect of the particulars seeking details of the loss-making business in 11(3)VII B and D. Given that the contention that there would have been substantial cost savings had QIL been alerted to the extent of the under-provisioning is central to its claim, I consider that PWC is entitled to know in broad outline the details of the savings which it is said the exiting of these markets would have generated. I would therefore allow PwC's cross-appeal from the decision of the High Court in this respect of this particular. This conclusion also governs the related requests at C ("loss making lines") and D (steps to effectuate necessary cost savings).

84. Particular 21(12)V B sought details by reference to each individual year:

> "…in respect of each class of business within each geographical region, how it is contended [that] the plaintiff's pricing model would have been adjusted to decrease the amount of loss-making businesses to reflect the causes of under-reserving."

85. I consider that this request relates to details of specific items of evidence and, accordingly, fails the *Cooney v. Browne* test. In practice, this request is similar in practice to the request at particular 21(12) X D and I would also refuse to direct an answer this particular for much the same reasons.

Conclusions
86. I would accordingly dismiss PwC's cross-appeal in respect of particular 21(12) X A, B, C and D.

Re-Opened Claims: Particulars 97(1) I, II and III and particular 135(1)
87. The final general issue was in relation to re-opened claims. In replies to particulars dated 12 February 2015 QIL had already provided PwC with the number of re-opened claims during the material period by way of further particularising a plea originally contained in paragraph 65.5 of the statement of claim. Assuming that these figures are correct, they show that the number of re-opened claimed jumped from 1,282 in 2005 to 31,350 in 2008. The relevance of this to plaintiff's case is that it was the extraordinary increase in the number of reopened claim files which ought in itself to have given cause for concern and that it was not relying on the reason why the files were being reopened.

88. PwC sought, however, the following further and better particulars at particulars 97(1) in respect of the re-opened claims:

> "(I) For each financial year, in tabular format if possible, please provide a breakdown of the number and value (in terms of claims cost) of reopened files in each accident year up to 2008, and further categorised by principal reason that caused the files to be reopened.
>
> (II) For each financial year, in tabular format if possible, please provide details of the value of the claims cost deterioration relating to reopened claims files in each accident year up to 2008 arising in financial years 2009 and later.
>
> (III) Please particularise the extent to which the plaintiff alleges that:
>
> A. files reopened in 2006, 2007 and 2008 and had been closed in 2005 or prior years and were reopened because of information that was available at the time of the defendant's audit of the plaintiff's 2005 financial statements.
>
> B. files reopened in 2007 and 2008 had been closed in 2006 or prior years and were reopened because of information that was available at the time of the defendant's audit of the plaintiff's 2006 financial statements.
>
> C. files reopened in 2008 had been closed in 2007 or prior years and were reopened because of information that was available at the time of the defendant's audit of the plaintiff's 2007 financial statements."

89. PwC also sought particulars at particular 135 I of the number of the plaintiff's re-opened files "by reference to each class of business within each geographical region."

90. In her judgment Costello J. rejected PwC's argument that it was entitled to these particulars, saying:

> "…..the defendant is entitled to particulars of the case advanced by the plaintiff. It is not entitled to seek information by way of particulars of matters which it requires for its defence if it does not relate to the case it has to answer. These particulars do not relate to the plaintiff's case in relation to reopened claims. The plaintiff's case is not based upon either the value of the reopened claims or the reason that the files have been reopened. It has not checked each of the approximately 60,000 reopened files to ascertain the reason the individual files were reopened or the value of the files or the breakdown of the files by reference to each class of business within each geographical region. The defendant is seeking information by way of a notice for particulars of matters which the plaintiff simply does not have because it has not carried out the relevant analysis as it forms no part of its case. Rejoinder 97(1)I is not a proper matter for particulars as it does not arise out of the plaintiff's claim. Furthermore, in order to provide the particulars sought the plaintiff would have to carry out an extremely onerous exercise which is not part of its case. This clearly would be inappropriate and unfair to the plaintiff. The value of the claims cost deterioration relating to reopened claimed files in each action year up to 2008 is not directly part of the plaintiff's claim and therefore the particular II is not a proper matter for particulars. Rejoinder 97(1) III A-C are related to the reasons for the reopening of the closed files and therefore are not a matter for particulars. I accept that the plaintiff's was correct in refusing Rejoinder 97(1) IV as that likewise was not a matter for particulars and was based on a premise not advanced by the plaintiff. I therefore refuse these particulars.
>
> The final request is Rejoinder 135 I A where the defendant seeks a breakdown of the number of plaintiff's reopened files

by reference to each financial year and by reference to each class of business within each geographical region. The defendant has not clarified why this breakdown is required and it does not arise out of the case pleaded by the plaintiff. I refuse this also."

91. In my view, Costello J. was entirely correct in refusing to order the delivery of these particulars for all the reasons which she gave. I would add that, measured against the parameters of the present claim, these details classically amount to an endeavour to seek details of particular items of evidence, as distinct from the general range of evidence demarcating the boundaries of the claim as envisaged by Henchy J. in Cooney.

Conclusions on the re-opened claims issue
92. I would accordingly dismiss PwC's cross-appeal against the failure of the High Court to order particulars in relation to the re-opened claims issue.

Part VI

Overall conclusions
93. In summary, therefore, I would conclude as follows:-

94. First, so far as QIL's appeal is concerned, I would dismiss the appeal in respect of particulars 11(3) XIII F and G, 21(12) VII B, X A and F, XI A and F, XV B, XVI A and XVII A, but I would allow the appeal in respect of particulars 11(3) II, V, VIII and XI, 21(12) VII A and D, IX B and D, X D and E, XI C, D and E.

95. Second, so far as PwC's cross-appeal is concerned, I would dismiss the cross-appeal in relation to particulars 11(3) III, VI, IX, XII, VIII A, B and C, 21(12) V A, B, C and D and 97(1) I, II, III and particular 135(1) , but I would allow the cross-appeal in respect of particulars 11(3) XII F and G, 11(3)V A, C and D.