THE HIGH COURT

[2010 No. 5004 S]

BETWEEN

ACC LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

FRANCIS DOOLEY

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 30th day of March, 2017.

1. The plaintiff brought proceedings by summary summons seeking judgment in the sum of almost €18 million in respect of loan facilities afforded to the defendant in his personal capacity, and to a development company of which he was a director and whose loans he is claimed to have guaranteed.

2. The proceedings were agreed to be remitted to plenary hearing and a statement of claim was delivered on 7th November, 2011. The defendant then served a defence and counterclaim on 18th June, 2012 in which he counterclaimed for damages on the general grounds that the plaintiff (the ACC Bank, hereinafter "the Bank") and the defendant were engaged in a joint venture in regard to the development project for which the monies were borrowed. The defendant also counterclaims for damages for negligence, breach of contract and breach of duty arising from the appointment by the Bank of a receiver over the development, and the ongoing involvement of that receiver and an independent quantity surveyor appointed by the Bank to monitor the completion of the development, and further draw down of funds. The plea is also made that an architect, an engineering firm, and other construction professionals engaged in the course of the completion of the project were appointed on behalf of, and acted as agents for, the Bank and in respect of whose alleged negligence the defendant raises a counterclaim.

3. This judgment is given in an application for discovery brought by the defendant against the plaintiff in respect of forty-six categories of documents as set out in a letter of 16th April, 2014.

4. It is fair to say that the motion has had a somewhat unusual history. The Bank through its solicitors made an open offer that discovery would be furnished in respect of certain categories of documents, and when the application for discovery came on before Kearns P. on 20th November, 2014 he directed the plaintiff to make formal discovery of all the documents thereby offered to be discovered, and adjourned further consideration of the application for discovery to 19th February, 2015.

5. The motion then was adjourned from time to time and ultimately came on for hearing before me in Cork on 20th March, 2017. At that hearing counsel for the defendant sought discovery of all categories of documents including those in respect of which an order had already been made by Kearns P. and where three affidavits of discovery have been sworn by or on behalf of the plaintiff in purported compliance with that order.

6. The categories of discovery can be broken down into a number of larger categories and the defendant seeks discovery of documents as follows:

> (a) All documents of the Bank relating to the agreement made to advance money to the defendant personally and to the development company;
>
> (b) All documents relating to the appointment of Martin Ferris as receiver on 6th March, 2009, and all documents relating to the engagement by the receiver with the professionals in regard to the completion of the development, which at the date of the appointment of the receiver was in a state not suitable for onward sale;
>
> (c) All documents in the form of the correspondence between the Bank and the construction experts or professionals regarding the safety and planning compliance of the development;
>
> (d) All documents relating to the completion of the development, including relevant documents of the construction professionals and experts appointed by the Bank to oversee or supervise the completion of the project;
>
> (e) All documents regarding the sale by the receiver of the residential units in the development, all of which have been sold.

The withdrawal of the request

7. By letter of 6th November, 2015 Messrs. John P. O'Donohoe solicitors on behalf of the defendant formally withdrew his request that discovery be made in respect of twenty-seven identified categories, such withdrawal being made on a "without prejudice basis" with regard to the completeness or adequacy of the discovery already made in those categories.

8. The defendant has now sought to pursue the request for discovery in regard to these twenty-seven categories, and the first question I must consider is whether he should be permitted to do so. Having considered the application for discovery, and the contents of the letter, I am of the view that the concession by which the solicitors for the defendant withdrew the request for discovery of the twenty-seven categories is one from which he ought not to be permitted to resile, primarily because the letter by which the request was withdrawn regarding these categories amounts to a considered decision that no necessity then existed for discovery of those documents.

9. Certain matters need to be noted with regard to this letter. Messrs. John P. O'Donohoe continue to act for the defendant, and while he has had a number of solicitors in the course of this litigation, he has continued to instruct that firm. The letter is ten pages long and can fairly be regarded as a focused and considered response to the motion which stood adjourned to the non jury list on

Monday 9th November, 2015, three days after the letter. The letter was written a year after Kearns P. had made the order for discovery of the agreed categories, and after two affidavits of discovery, one sworn on 4th February, 2015 and the other on 10th July, 2015, had been furnished, and the purpose of the letter was to identify what documents Mr. O'Donohoe regarded as still then outstanding. Finally, the letter was clearly sent on instructions and the writer identified that his client had instructed him to agree to withdraw the request in respect of those identified categories.

10. In a very short letter on 30th June, 2016 the solicitors for the defendant informed the solicitors for the plaintiff that the defendant "has made a decision regarding your client's voluntary discovery following recent events". The "recent events" are not identified. The letter goes on to say as follows:

> "The defendant wishes to remove any doubt that nothing has been agreed until everything is agreed and it is now necessary to have all forty-six categories of discovery adjudicated on by the honourable court at the next hearing on 22nd July, 2016."

11. The formal letter of 6th November, 2015 by which the request for discovery was withdrawn was not made conditional upon the making of any other agreement between the parties, and no other conditional agreement has been identified.

12. The concession by which the defendant withdrew his request for discovery in regard to the twenty-seven categories must influence my decision in regard to the present request that discovery be made in regard to those categories, as the considered position advanced by the solicitor for the defendant on 6th November, 2015 was that the categories of documents in respect of which the concession was made could safely be regarded as no longer relevant, or that the solicitor was satisfied, having reviewed the documents furnished, that discovery of those categories was no longer necessary.

13. I make no conclusion based on any argument that an estoppel might have arisen as a result of the letter of 6th November, 2015, as it is not necessary for me to do so. Nothing has been shown to have occurred since the sending of that letter which would suggest that the considered response by the solicitor for the defendant regarding discovery cannot be taken into account in determining whether discovery of these categories is to be ordered on the grounds of relevance or necessity. While the defendant himself has sworn an affidavit in the matter on 14th November, 2016 he has nowhere explained why he instructed his solicitors to withdraw the concession with regard to this twenty-seven categories of documents. Furthermore, the principal of the firm, Mr. John P. O'Donohoe, himself has sworn an affidavit on 17th November, 2016 and he does not explain the reason for the change of mind.

14. Taking all of those factors into account, and in the light of the propositions I will deal with later regarding the principles to be applied in considering an application for discovery, I consider that no basis has been shown on which the defendant is to be entitled to resile from the withdrawal of his request in regard to the twenty-seven categories.

15. Accordingly, I propose dealing with the application for discovery on the basis that what is left to be determined is the application by the defendant for discovery of nineteen categories of documents to which I now turn.

The categories of discovery sought: general observations

15. The motion is a motion for discovery, but certain of the arguments advanced by counsel for the defendant are more relevant to an application for further and better discovery. I am prepared to excuse this approach as the motion stood adjourned following the making of an order by Kearns P. on 20th November 2014.

16. An argument made by the defendant in regard to many of the categories sought is that the three affidavits of discovery furnished by the Bank do not on their face indicate a belief by the deponents that the documents discovered comprise the totality of documents in the possession, power or procurement of the plaintiff in the relevant category. The defendant has expressed certain disquiet with regard to the language used in the replying affidavit of Ms. Cora Freeney sworn on 10th July, 2015 where she says that the documents discovered are "sufficient". The argument is made that it is not a matter for the deponent of an affidavit of discovery to make an assessment of whether the discovery made is sufficient, and the sufficiency of discovery is always a matter in respect to which the court must make a determination. That proposition can scarcely be controversial, save for one factor which I considered as being highly relevant in the present case.

17. Three affidavits of discovery have already been made, as a result of which the plaintiff has, in total, discovered in excess of 1,100 documents and 3,000 or thereabouts documents in electronic form. These affidavits are sworn in the standard form of discovery, and no informality is to be found in the manner by which the discovery was made, and whilst the order of discovery was made on consent following the offer by the plaintiff that it would make voluntary discovery, discovery was made on foot of an order of the High Court.

18. Counsel for the defendant argues that because of the defendant's own concern and because the exploration of, and interrogation by, his solicitor of the documentation discovered has resulted in the furnishing of two supplemental affidavits of discovery, he has lost confidence in the process and in the completeness of the affidavit evidence now furnished. He points also to the fact that the affidavit in reply to this motion sworn by Ms. Freeney does not confirm that all documents in the power, possession or procurement of the Bank relating to the matter have been discovered, and she has confined herself to asserting that the discovery furnished is "sufficient". It is argued that Ms. Freeney has carefully chosen the words used, and that I should take the view that, absent an averment by her or another person on behalf of the Bank that the discovery made is now complete and full, I should require a further affidavit in the form of a verifying affidavit from the Bank to set the mind of the defendant at ease.

19. The same firm of solicitors has acted for the plaintiff throughout this litigation, albeit that the plaintiff has now ceased to trade in the State as a bank, and the winding down of its bank business is being conducted on its behalf by an agent. I am not satisfied that the circumstances could justify the making of an order by the court that the deponents of the three affidavits of discovery should swear a further affidavit in the form of omnibus verifying affidavit confirming that no other documents exist, and this is for a number of reasons.

20. The process of the making of discovery on oath is a solemn one and it is to be assumed unless the contrary is shown that the person swearing the affidavit does so in the knowledge of the requirements of the oath. Second, there is no provision in the Rules for the making of an affidavit by which the contents of another affidavit are verified. Indeed the proposition that such is permitted or required by any of the Rules would seem to me to run contrary to the nature of affidavit evidence. The way in which an affidavit is tested is for the service of the notice to cross-examine a deponent on affidavit, and it is not unknown for a party to serve a notice on a party to cross-examine on foot of an affidavit of discovery, albeit the cross-examination of a deponent of an affidavit of discovery is unusual.

21. Finally, insofar as it is suggested that the affidavits of discovery are incomplete, the defendant is entitled under the Rules of Court to bring an application for further and better discovery, and for such purpose to identity the nature of the documents alleged to be missing from the discovery already made, and the basis on which it is asserted that such documents exist and are available for production by way of discovery by the relevant party.

22. For all of these reasons I conclude that the defendant's argument arising from his disquiet regarding the completeness of the discovery made is misplaced, and may be adequately dealt with by one of the means identified by me in this judgment.

Consideration of request in nineteen categories

23. I turn now to consider the request for discovery of the nineteen remaining categories, not the subject matter of the letter of 6th November, 2015. The argument made on behalf of the defendant is best addressed by considering the nature and purpose of an order for discovery, and whether on the facts of the present case the discovery made in respect of these categories is necessary and relevant to the matters at issue in the proceedings.

24. In *Irish Bank Resolution Corporation Ltd. & Anor. v. Fingleton & Ors*. [2015] IEHC 296 Costello J. helpfully outlined the tests to be applied by a court in considering whether to order discovery. As she stated, the documents must be relevant to matters in issue as identified in the pleadings. She noted the judgment of Murray J. in Framus Ltd. & Ors. v. CRH plc & Ors. [2004] IESC 25, [2004] 2 I.R. 20 at p. 38 where he 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."*

25. That relevance is to be construed in a broad way, what Barrett J. described in *Astrazeneca AB & Patents Acts* [2014] IEHC 189 as the "may, not must" test, means that the test of relevance may readily be satisfied provided it can be shown that the documentation will assist a party in advancing his own case or damaging the case of his adversary.

26. The document sought must also be necessary for the disposal of those issues and whether a document is necessary is in the words of Costello J., to "have regard to all of the relevant circumstances".

27. In *Framus Ltd. v. CRH plc* Murray J. identified another element of the test, namely that the order must be proportionate to the fair disposal of the proceedings, and ought not to be of a nature and extent as to be disproportionate and oppressive. Costello J. stressed the limits of the test of proportionality, and that a court ought not readily deny a party discovery merely on the grounds that it is likely to be vast, or 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 faced are too grave".

28. With these principles in mind I turn now to examine the individual categories.

Category 1: Documents relating to initial negotiations and application

29. Discovery has already been made in respect of this category in the form of credit assessments and reports and minutes of meetings between the Bank and Mr. Dooley on his own behalf and on behalf of the company. The defendant argues that the documentation furnished does not include documents from early 2005. Whether discovery of this category ought to be granted must depend on the pleadings, and the counterclaim contains as specific plea that the defendant first approached the plaintiff bank "in late 2005, early 2006" with a view to obtaining funding for the development, and to a refinancing of Bank of Ireland loans already advanced in respect thereof.

30. On the pleadings therefore the defendant is not entitled to seek documentation relating to early or middle 2005, as such is not relevant to the matter as pleaded.

31. The affidavit of Edmund Allen in support of the application sworn on 26th June, 2014 avers that discussions took place between the defendant and agents of the Bank "in 2005" pertaining to the proposed funding. Mr. Allen does not identify when in 2005 this happened, but the pleadings make a claim arising from a contract or other obligation that arose between the parties following on the initial contact in "late 2005" at the earliest. In a letter of 24th March, 2015 Messrs John P. O'Donohoe solicitors identified the first contact as having been made in June 2005 with the Dundalk Branch of the Bank. I find it difficult to reconcile the discrepancies, but the case law requires that relevance be tested against the claim as formulated in the pleadings, and the vague assertion that the Bank's Dundalk office dealt with the matter "between circa June, 2005 and December, 2005" is not borne out by the pleadings, nor is it possible to ascertain with any degree of certainty when the meetings occurred.

32. Furthermore, the primary plea in the counterclaim is not that the initial advance of the loan was improperly made, but that because the loan was advanced subject to a condition that drawdown of the monies was dependent upon a certificate by an independent quantity surveyor (called in the pleadings "the Bank Monitor"), that the Bank is at fault for failing to ensure "the progress and quality of the works" and compliance with statutory obligations. As a consequence, factors relating to the Bank's original decision to advance the loan seems to me to be adequately dealt with by the discovery already made, which includes credit reports and assessments, minutes of meetings and facility letters date from May, 2006 to October, 2010.

33. I refuse to make an order in this category.

Category 7: Documents regarding the appointment of a receiver

34. The plaintiff has furnished discovery in the form of credit committee meetings and those detailing the appointment of the receiver, including a report from Messrs. Watts International. The defence and counterclaim pleads that the Bank obstructed the defendant in completing the development, and it is accepted by the defendant that the Bank did have a contractual entitlement to appoint a receiver. No plea is made that the appointment of the receiver was unlawful or made without authority.

35. I consider that the discovery made to date is sufficient to deal with this category in those circumstances.

Category 8: Commercial credit general terms and conditions

36. These have been discovered. The defendant argues that in addition to the general terms and conditions for credit loans operative in January, 2005 and December, 2006, further general conditions must exist. As the agreement to grant the loan and the drawdown of the monies was made in the currency of one or both of these general conditions, I consider that the defendant has not made out a stateable basis which the discovery of other general terms and conditions might be warranted.

Category 9: Documents relating to the defendant's application for funding

37. This is a class of "catch all" application for discovery and the defendant makes the argument that having regard to the facts that three affidavits of discovery have now been sworn on behalf of the Bank that there are "unknown unknowns", that further documents must exist which he cannot identify, and that having regard to the piecemeal way in which discovery was made, it is reasonable to extrapolate that other documents might come to light.

38. In the absence of some factors that might identify the class of documents the applicant says have not been furnished, it is oppressive to grant discovery, and impossible to formulate an order with any coherence or clarity. My reasoning is explained above.

Category 11: Documents pertaining to the drawdown of funds in April, 2007

39. Statements of account for each loan facility has been furnished and the statement of the receiver's accounts. The defendant says that the discovery is inadequate because the statements of account are impossible to interpret or understand without the underlying documents. A number of difficulties are evident in this argument. Insofar as the statements of accounts relate to accounts either of the defendant himself or of the development company, the invoices or cheque books stubs may be within the possession or procurement of those parties. Insofar as the application relates to the receiver's account, I consider that the defendant is seeking discovery of this category of documents in order to further the action that he has commenced against the receiver for negligence and breach of duty, in proceedings bearing Record No. 2015 6310 P. in which I am advised that a statement of claim has been delivered but no further pleadings or orders delivered or made.

40. Four hundred and twelve invoices or similar type documents have been discovered and the defendant has not explained the extent to which this discovery is incomplete, or incapable of being usefully analysed. From counsel's submission it seems that a forensic accountant has not yet been engaged by the defendant.

41. The fact that, as counsel puts it, the figures "don't make sense" without an explanation or the underlying documents, highlights one of the problems in discovery in commercial litigation, that there is no obligation under the Rules of Court that a party furnishing discovery would explain entries in, for example, a book of account or a statement of account. The purpose of discovery is not to require the party against whom an order is made to furnish documents by way of explanation, or indeed to generate documents for the purposes of linking documents furnished in the process.

42. The defendant cannot require the plaintiff to provide a narrative to link the payment by the receiver with invoices, and that is a matter which falls more properly to be dealt with in the proceedings against the receiver, but also is a matter that does not bear on the purpose of discovery.

Category 23: Payments pertaining to the "proceeds of the receivership"

43. Again, what is sought are documents relating to the conduct of the receivership by Mr. Ferris. The statements of account have been furnished and as indicated above under Category 11 four hundred and twelve invoices. The statements of account do contain reference to cheque numbers, and the defendant accepts that the receiver not the Bank would have the cheque stubs or cheque books from which the cheques were drawn.

44. Again the defendant argues that the discovery furnished is "pretty meaningless", and requires an explanation or linking documents to assist in the clarification of the documents furnished. In the last affidavit in the chain of affidavits, John P. O'Donohoe's affidavit of 17th November, 2016, he explains the difficulty that his client has by way of an illustration regarding certain entries in books of accounts, loan accounts, current account and the accounts of the receiver and says as follows:

> "I say that without both the ledger for those bank accounts together with invoices and basis for interest charges indicated it is not possible for me to advise the defendant on the appropriateness or otherwise of the liability therein or otherwise."

45. He goes on at para. 7 of the affidavit to say that "reconciliation is not provided between the amount claimed in the plenary summons and those bank statements". A number of observations must be made. Any explanation by way of reconciliation or clarification of the figures claimed by the plaintiff in the statement of claim is a matter for particulars not for discovery. The defendant himself well knew his business enterprise, and the nature of the development works on going on his site. The purpose of discovery is not, as explained above, to require a party making discovery to generate documents by way of explanation for the documents discovered. The defendant solicitor says that "remaining" documentation is outstanding but cannot identify what the documents might be, save by reference to "unknown unknowns".

46. The request for discovery, insofar as it seeks such, is a classic fishing expedition. I refuse this category

Category 25: Documents relating to funding

47. This is an omnibus category and discovery has already been made of credit reports and assessments between 31st May, 2006 and 18th October, 2010, minutes of meetings and a valuation report. The defendant argues that because his interrogation of the documentation already furnished has thrown up further documentation and two additional affidavits of discovery were furnished after the first affidavit, that there "must be" more documents.

48. My comments above regarding the sufficiency of the affidavits of discovery, and the function of the exercise engaged in the swearing of an affidavit of discovery are apposite.

49. Discovery of this category is refused as the defendant has not shown any classes of documents which are covered by the category and which were not disclosed.

Category 26: Planning and other statutory requirements

50. A number of documents have been discovered, including certificates of compliance with building regulations, correspondence with the firm of architects between June, 2006 and March, 2009 regarding works under construction, planning status reports and reports on the fire detection and alarm systems.

51. The defendant has narrowed this category and now seeks discovery of any documents had between the Bank, the receiver, its or his servants or agents, with Wexford County Council, its servants or agents since March, 2009.

52. This is neither an unreasonable nor an oppressive category, save that it is anticipated that the Bank may not have in its possession all or part of the documents relating to the meetings between the receiver and the County Council, or those relating to meetings between other construction professionals and the Council. I will make an order as follows:

> Discovery to be made of any documents relating to meetings between the Bank and Wexford County Council since 5th March, 2009.

53. Any documents pertaining to meetings between the County Council and other professionals are documents which relate to other proceedings commenced by Mr. Dooley, including his proceedings bearing Record No. 2011 5235P against the project management team Clancy Project Management Ltd., proceedings bearing Record No. 2011 6564P. against Patterson Bannon Architects and the quantity surveyors engaged, proceedings bearing Record No. 2013 6552P. against Construction Properties Services Ltd., the project managers, and the proceedings against Mr. Ferris bearing Record No. 2015 6310P.

54. It is not the purpose of discovery to enable this defendant to obtain documents he may wish to use to pursue or further his claim against those other persons. Without wanting to decide the issue of agency, I consider that prima facie at least the claim against the receiver is one which has to be treated as a standalone claim, and at the current state of the present proceedings no argument is made that Mr. Ferris is to be treated in any way different from the way in which the law generally treats a receiver, as agent of the borrower, and as an independent person with a role which is not exercised at the direction of a mortgagee appointing him or her.

55. Save as indicated I refuse discovery of this category.

Category 27: Documents relating to the appointment of CPS Ltd. as "Bank Monitor"

56. An email from the Bank to CPS Ltd. dated 20th April, 2007 has been discovered. In her replying affidavit Cora Freeney confirms that no "formal letter" appointing CPS was sent by the Bank, but that the role CPS was to undertake is that outlined in this email. The defendant is unable to identify what other class of document might exist within this category, save a reference to "all internal reports thereof". The affidavits of discovery are sworn on the basis that discovery is made of all relevant documents within this category, and for the reasons outlined above, the defendant and this Court must accept the accuracy and veracity of the affidavits.

Category 29: Documents relating to payments to CPS Ltd.

57. Six categories of documents including invoices, cheques and a schedule of payments have been furnished. The defendant asks that the plaintiff would depose on oath to having discovered all invoices in relation to the development.

58. For the reasons outlined above this request is misconceived and I refuse to make an order under this category.

Category 30: Documents relating to ongoing dealings between the plaintiff and Patterson Bannon Architects

59. Three categories of documents have been furnished including correspondence between the firm of architects and the Bank from 20th June, 2006 to 5th March, 2009, the Watts report and a planning status report.

60. Ms. Freeney in her affidavit avers that no report was ever prepared by Patterson Bannon for the Bank and she explains the documents already discovered and the role of Patterson Bannon.

61. Again for the reasons outlined above, I do not consider that the defendant is entitled to documentation to support the case commenced by him against the firm of architects in 2011. The request for further documents in regard to the role played by the firm of architects is in my view a fishing expedition, or relevant to those other proceedings and not to the present proceedings.

62. Again, the defendant requires that the Bank would depose on oath to the fact that the documents discovered are all discoverable documents in relation to this category, and for the reasons outlined above I do not believe this is an appropriate approach to the matter of discovery.

63. One sub-category is suggested as being outstanding, namely minutes of meetings between the firm of architects and the Bank regarding works and the planning status of those works. If such documents exist they are discoverable and I order in that narrow category, namely:

That discovery be made of any minutes of meetings between Patterson Bannon and Associate Architects and the Bank regarding the works on the site the subject matter of the development.

Category 32: Documents pertaining to the drawdown on certificate 16

64. The defendant pleads at para. 17 of the defence and counterclaim that he requested of the Bank that no further certificate be issued for drawdown until remedial works had been carried out. This is denied in the reply to defence and defence to counterclaim. A large number of letters have been discovered under this category, eighteen in all, and the defendant requires what it calls "the plaintiff's own correspondence", by which I assume is meant that, while there are discovered letters from CPS to the Bank from 30th May, 2007 to 8th October, 2008 there are no replying letters. I consider that the defendant is correct and that the Bank should be required to discover any correspondence it has had in reply to those letters, and any internal memoranda of the Bank.

65. I therefore make an order in those terms.

Category 36: Documents relating to the insurance aspects of the project

66. Discovery has been made of four classes of documents which the plaintiff says sufficiently deals with this category. The defendant argues that memoranda and notes or other forms of documents may exist would be within this category.

67. I refuse to grant an order for the reasons outlined above.

Category 37: Documents relating to the claims by the defendant against the construction professionals identified at para. 25 of the counter-claim

68. As indicated above and at category 30 I consider this category of discovery not to be relevant to the matters at issue in this case, and a classic fishing expedition.

Category 38: Documents pertaining to Watts International

69. Watts was the engineering company engaged by the Bank for the purposes of certifying the works before drawdown. Reports from Watts from February, 2009 to August, 2009, the project notes on planning status and a list itself and defects have been furnished in existing discovery.

70. Again the engineering company is sued, and discovery is refused for the reasons outlined

Category 39: Documents in the final specifications schedules etc. regarding the remedial works

71. A number of documents have been discovered under this head. The defendant says because the cost and extent of the remedial works is an issue in the proceedings this category of document is relevant. It is argued that an order should be made relating to the schedule of the quantity surveyor or scope of works, and bill of quantities, and tender documents pertaining to any work completed in the development since 5th March, 2009. The plaintiffs says that all such documents have already been furnished, and 500 relevant documents are identified. In the absence of some argument or evidence that the documents disclosed identify the possible existence of other documents, I am not prepared to order any further discovery in this category.

General

72. While I am prepared to accept that because of the way in which the matter progressed the motion can properly be dealt with as a motion for further and better discovery to some extent, I am not satisfied that the defendant has made out a case for the furnishing of the documents in question. The primary difficulty seems to me to be the argument of the defendant, which I consider to be not sustained on the facts, that the affidavit evidence is deliberately elusive and the affidavits of discovery already sworn are deliberately obscure. I am not satisfied that this is the case or that the evidence shows that the Bank is deliberately withholding relevant and necessary documentation.

73. For the reasons outlined above, I consider that this proposition is not supported by the evidence or argument.

74. Save as is otherwise identified in this judgment I refuse to make an order for discovery beyond that already made by Kearns P.