Approved
No redactions required

THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2021] IECA 182

Record No 2020/101

Whelan J

Collins J

Binchy J

BETWEEN

ORLA MCNULTY

Plaintiff/Appellant

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

t/a BANK OF IRELAND GROUP

Defendant/Respondent

Judgment of Mr Justice Maurice Collins delivered on 29 June 2021

PRELIMINARY

1. The Plaintiff, Ms McNulty, appeals from two orders of the High Court (Gearty J) made on 21 February 2020. There was some difficulty with the perfection of the orders but that is not relevant to the issues arising on the appeals.

2. Those orders were made at the conclusion of a hearing of two motions brought by Ms McNulty. The hearing extended over two days in the High Court in Cork and the Judge gave her decision at the conclusion of the hearing.

3. The first motion before the High Court was a motion issued on 26 February 2019 seeking "*an order compelling the Defendant to provide discovery as agreed by consent on 6th March 2017… pursuant to Order 31, Rule 20 and Rule 21 of the Rules of the Superior Courts, or in the alternative an Order striking out the Defendant's Amended Defence or relevant part therefore for failing to reply to Notice for Further and Better Discovery*". I shall refer to this motion as "*the First Motion*". The Notice for Further and Better Discovery referred to in this motion is document dated 10 December 2018 which it will be necessary to refer further.

4. The second motion was one issued on 31 May 2019. It seeks an order pursuant to Order 31 directing that Ms Francesca McDonagh, Group Chief Executive of Bank of Ireland (*"the Bank*") swear an Affidavit of Discovery providing discovery pursuant to the Order made by the High Court on 6 March 2017 ("*the Discovery Order*"). I shall refer to this motion *as "the Second Motion*".

5. Each of these motions was contested by the Bank. Neither succeeded before the High Court. As regards the First Motion, the Judge was of the view that, in the absence of cross-examination, the Court could not go behind the evidence of the Bank to the effect that full discovery had been made by it and that no further documents within the agreed categories of discovery were in its power or possession beyond those already discovered. The Judge indicated to Ms McNulty that it would be open to her to cross-examine the Bank's witnesses at the hearing of these proceedings about the discovery it had made and the adequacy of it, including cross-examination of the Bank officers who had sworn the affidavits of discovery which had been delivered by the Bank. It is clear from the Judge's remarks that, in taking that view, she was following the approach adopted by the High Court (Ryan J) in *Campion v Wat* [2013] IEHC 45.

6. Although she refused the relief sought by Ms McNulty, the Judge awarded her costs, in circumstances where it had become apparent after the First Motion had issued that the discovery initially made by the Bank had been significantly incomplete, resulting in the swearing of a substantial supplemental affidavit of discovery by the Bank on 9 May 2019 and a second supplemental affidavit of discovery on 1 October 2019. Both of these affidavits were sworn by David Coleman, Head of Industrial Relations in the Bank.

7. As regards the Second Motion, the Judge considered that it would be inappropriate to direct that a further affidavit of discovery be sworn simply on the basis that the suggested deponent was more senior and she did not think that there was sufficient evidence on which she could properly discard the affidavits sworn by Mr Coleman.

8. Ms McNulty challenges these rulings on appeal. She complains about the manner in which the hearing in the High Court proceeded and criticises the Judge's handling of the hearing in a number of respects and renews her application for the reliefs set out in the First and Second Motions. In addition to those reliefs, her notice of appeal also sought an order compelling Mr Colin Kingston, who swore the Bank's first affidavit of discovery on 25 October 2017, to attend for cross-examination at the hearing of her appeal. She also sought an order compelling Ms Teresa Kelly, a solicitor in the Bank's legal department to attend for cross-examination or, in the alternative, an order directing that a sworn deposition be taken from Ms Kelly to provide "*specific answers on reply to the unanswered questions as raised in my correspondence to her dated 1st February 2019*." However, these orders were not pursued at the hearing.

9. Before addressing the arguments made by Ms McNulty in support of her appeal, and the arguments made by the Bank in response, something further needs to be said about the underlying proceedings, as well as its procedural history, particularly in respect of discovery.

THE PROCEEDINGS

10. The proceedings were commenced by the issue of a Personal Injury Summons on 23 June 2010. The Summons claimed damages (including aggravated, exemplary and punitive damages) against the Bank for personal injuries, breach of contract, bullying, intimidation, ageism, breach/attempted breach of contractual relations, breach of

legitimate expectations and breach of constitutional and personal rights. The complaints made by Ms McNulty are difficult to summarise but the essential complaint – as appears from the Indorsement of Claim – is that the Bank wrongfully terminated her employment at its Dublin Airport Bureau in or around April 2008. The Indorsement pleads that the Plaintiff had been given assurances that the Dublin Airport Bureau would remain open, and that she would continue to be employed there, until December 2010. The Indorsement refers to attempts on the part of the Bank to transfer her employment which are characterised as wrongful and inappropriate. The Indorsement of Claim also pleads that the Plaintiff was harassed and subjected to bullying while in the Bank's employment and that complaints that she had made regarding her treatment at work were not properly investigated and adjudicated upon. Reference is made to security threats made against the Plaintiff arising from her employment which, it is said, were not properly dealt with. The Indorsement claims that, immediately on the closure of the Dublin Airport Bureau in July 2008 (that closure being the reason given for the transfer of the Plaintiff), a subsidiary of the Bank began to operate from the same premises. The Plaintiff claimed that, as a result of the wrongful conduct of the Bank, she had suffered shock and distress and became depressed.

11. The Bank delivered its Defence on 8 July 2011**.** The Defence traverses the Plaintiff's claim. It references the Plaintiff's proposed transfer to Blanchardstown and says that the Plaintiff did not object to that proposed transfer and was offered, and accepted, €7,500 in consideration of the transfer. However (so the Defence says) a few days before the transfer was to take effect the Plaintiff had absented herself on sick leave and had not returned to work since then. The Defence includes pleas of contributory

negligence.

12. The next significant development in the proceedings – at least as far as these appeals are concerned – was the delivery of Replies to Particulars on the Plaintiff's behalf (the Plaintiff was at that stage represented by solicitor and counsel) on 6 August 2013**,** in response to a Notice for Particulars from the Bank delivered on 23 November 2011. In paragraph 10 of those Replies, which address a request for particulars of the Plaintiff's allegations of harassment, bullying and ageism, reference is made to a change in atmosphere in the workplace following a meeting in April 2008 and it is stated that the Plaintiff *"believes that she was being blamed and scapegoated for disclosing the duplicate accounting system to newly-appointed Manager Sheelagh McGirl."* Significant additional detail about the operation of this alleged "*duplicate accounting system",* and the Bank employees alleged involved in it, was provided in paragraph 15 of the same Replies. It is said in that paragraph that all transactions in excess of €2,000 were excluded (from the turnover returned to the DAA) and, having stated that Ms McNulty had informed Ms McGirl about the system, paragraph 15 states that the Plaintiff "*had confirmed that all trading was fully accounted for and how the necessary adjustments were made and that all transactions are fully verifiable for all three shifts and detailed records exist".*

13. In December 2014 the Plaintiff applied for leave to amend her Personal Injuries Summons. At that stage the Plaintiff continued to be represented by solicitor and counsel, though she had changed solicitors in January 2014. The Plaintiff swore an affidavit grounding the amendment application on 17 December 2014 and in that

affidavit she made express reference to the issue of duplicate accounting (at paragraph 6). Ms McNulty stated that she had given full instructions to her previous solicitors but that when she had seen the Personal Injuries Summons she had realised that some issues had not been pleaded and, after changing her solicitors, she was advised that the Summons did not adequately reflect her claim and that it required amendment. Obviously, the Court is not in a position to adjudicate on these averments.

14. That affidavit exhibited a draft Amended Personal Injuries Summons which pleads in express terms that the Plaintiff had been *"forced to operate a duplicate accounting system designed by the Defendant, its servants or agents to financially understate reported turnover figures to its landlord, the DAA (formerly Aer Rianta) which were then used in the computation of a monthly rental charge payable under the terms of the lease."* (para 10). The Summons also pleads that the Plaintiff had been forced to engage in "*the irregular and/or inappropriate recording of daily turnover and the concealment of material facts*., *which jeopardised her standing and position of trust"* and alleges that she had been scapegoated after she had disclosed the duplicate accounting system to the newly appointed manager on 10 April 2008. The affidavit also exhibited correspondence between the solicitors for the parties from which it appears that the draft Amended Personal Injuries Summons was first sent to the Bank on 19 August 2014.

15. Leave to amend was granted in January 2015 and an Amended Summons issued on 28 January 2015.

16. Thus, as and from *August 2013* when the Bank received the Plaintiff's Replies to Particulars – or, at the very latest, from *August 2014***,** when the draft Amended Personal Injuries Summons was sent to it – it was or ought to have been evident to the Bank that the Plaintiff was seeking to make the case that she had been forced by the Bank to operate a duplicate accounting system at the Dublin Airport Bureau for the purpose of understating its turnover and reducing the Bank's payments to the DAA and that she was claiming that her disclosure of that duplicate accounting system to the incoming manager in April 2008 was directly connected to (what she characterised as) the wrongful termination of her employment by the Bank.

17. The Bank delivered an Amended Defence on 18 May 2015. It takes issue with the new pleas and denies the Plaintiff's claim. Some considerable time later – in April 2017 – the Bank sought further and better particulars arising from the Amended Summons and in her Replies of 13 October 2017 the Plaintiff gave very detailed and specific particulars of the duplicate accounting system she alleges was in operation in Dublin Airport: paragraph 3 of those Replies.

DISCOVERY

18. The Plaintiff's solicitors delivered a request for voluntary discovery on 22 December 2015. It sought 8 categories of discovery, including a category (category 2) comprising *"all records of the Accounting Systems to include books of record and electronic data and information used for the maintenance and storage of accounting data in respect of daily turnover.."*

19. In its response, the Bank objected to the discovery sought in several respects. With regard to category 2, it disputed the relevance of the *"secondary accounting system"* and separately complained that the documentation sought was potentially vast and would impose "*an entirely disproportionate administrative burden"* on the Bank (letter of 19 February 2016).

20. A motion for discovery duly issued which came before the High Court (Noonan J) on 6 March 2017 when, by consent, the Discovery Order was made. The Order provided for the discovery of 8 categories of documents. Category 2 as agreed differed significantly from the category as sought, a point emphasised by the Bank. As agreed, category 2 included the following sub-categories:

> *"(iii) Trading Accounts Foreign Notes Sales in respect of Shifts A, B and C for July 2007*
>
> *(iv) Foreign Note Sales Reserve Account for July 2007; and*
>
> *(v) Daily tally rolls generated from the Forde Electronics Calculators for July 2007."*

The temporal scope of these categories is very limited. The significance of July 2007, and the reason why the discovery was limited to that month, are not evident but that is in any event what was agreed and ordered. Of the other agreed categories, for present

purposes it appears necessary only to refer to Category 4, which related to the Plaintiff's *"contract of employment and personnel file*", including the Plaintiff's desk diary for 2007 and up to August 2008, Category 5 which related to two meetings said to have been attended by the Plaintiff in 2007/2008 connected to alleged security threats and Category 7 which related to the reason for the €7,500 payment made to the Plaintiff in 2008. The Discovery Order provided that the Bank should make the agreed discovery within 12 weeks of the perfection of the Order and that the affidavit should be sworn by Colin Kingston.

21. In October 2017, the Plaintiff issued a motion seeking an order pursuant to Order 31, Rule 21 for failure to comply with the Discovery Order. That motion was returnable to 17 November 2017. Prior to the return date, the Bank delivered an affidavit of discovery sworn by Mr Kingston on 25 October 2017.

22. The affidavit listed a limited number of documents by reference to category 2 and otherwise referred to the Second Schedule. No documents in sub-categories (iii), (iv) or (v) were listed in the First Schedule, Part 1 and the Second Schedule stated that due to the (unspecified) retention period having elapsed, the documents in these categories no longer existed. As regards category 4, a number of documents were listed in the First Schedule, Part 1 and the Second Schedule refers to the Plaintiff's desk diary, explaining that a search for it had been made but that "*it no longer exists".*

23. On 7 December 2017, the Plaintiff's motion was struck out, with costs to her.

24. On 17 December 2018, the Plaintiff (who was by then representing herself) served a Notice to Admit Documents on the Bank. 95 documents are listed in the schedule to that Notice. Most (if not indeed all) of those documents were documents emanating from the Bank which had not, however, been discovered by it.

25. On 26 February 2019, the Plaintiff issued the First Motion, grounded on a detailed affidavit sworn by her. The motion was returnable to 1 April 2019. For the reasons set out in that affidavit and the exhibits to it, the Plaintiff challenged the adequacy of the discovery that had been made by the Bank, with particular reference to categories 2 (iii) and (iv), 4, 5 and 7. The complaints made by the Plaintiff about the Bank's discovery had been identified by her in correspondence exchanged before the motion was issued. In the course of that correspondence, the Bank had identified the electronic retention period as 7 years. The Bank indicated that certificates of destruction were not available.

26. On 9 May 2019**,** a "*Supplemental and Replying Affidavit of Discovery*" was delivered by the Bank. The affidavit was sworn by Mr Coleman, rather than Mr Kingston because, it appears, Mr Kingston was no longer an employee of the Bank. Mr Coleman explained that, in response to the Plaintiff's correspondence, the Bank had undertaken a review of its documents. That review had identified a number of documents that ought to have been discovered but which had not been. Mr Coleman explained that the documents had been contained, in no particular order, in "*plastic sleeves*" not all of which had been reviewed in the course of the Bank making discovery initially. Mr Coleman did not elaborate on the circumstances in which the Bank had failed to carry out an adequate review initially. He confirmed that the documents in category 2(iii) and (iv) no longer

existed as the retention period had expired. It appears from Mr Coleman's affidavit (see paragraph 11) that no "*litigation hold*" had been in place and that was confirmed to have been the position by Mr Lyons BL (Counsel for the Bank) at the hearing of the appeal. The First Schedule, First Part of the Affidavit discovered additional documents under categories 1, 4, 6 and 7 and listed additional documents in the Second Schedule with reference to categories 4, 7 and 8. Mr Coleman apologised to the Plaintiff and to the Court for the errors made by the Bank.

27. The Second Motion issued on 31 May 2019. In the affidavit grounding that application, Ms McNulty took issue with the contents of Mr Coleman's affidavit and accused the Bank of seeking to conceal documents and of frustrating and obstructing her claim. As regards category 2(iii), (iv) and (v), Ms McNulty accused the Bank of refusing to provide the documents in those categories and stated that it was not credible for the Bank to assert that the documents no longer existed. In terms of the order sought in the Second Motion, Ms McNulty suggested that, as manager of a department whose actions were being challenged by the Plaintiff, Mr Coleman was compromised. In her view, Ms McDonagh had the management clout to ensure that all discoverable documents were discovered and her role would guarantee that the discovery process was conducted with integrity.

28. Mr Coleman swore a second supplemental affidavit of discovery for the Bank on 1 October 2019. In it he explains that as a result of "*further extensive searches*" which he had carried out within the Bank, he had become aware of additional data which formed part of the data that had been used to create the Trading Accounts Foreign Notes Sales

and Foreign Notes Sales Reserve Accounts referred in category 2(iii) and (iv) of the Discovery Order. That information had been derived from a backup IT system operated by the Bank known as "*the Stor System".* He cautioned that the data in the Stor system was not the same as, and did not contain all of the information as, the data that had been contained in the Trading Accounts Foreign Notes Sales and Foreign Notes Sales Reserve Accounts and was not an analogue for either. While the data did not correspond directly with any of the categories of discovery, Mr Coleman considered it desirable that it should be discovered and he duly discovered various screenshots of the Stor system, *"duly redacted*". He explained that, at the time of swearing his first supplemental affidavit of discovery, he had not been aware of the existence of the Stor system. He went on to take issue with the suggestion that the Bank had sought to obstruct the Plaintiff and stated that no useful purpose would be served by compelling the CEO of the Bank to swear an affidavit. He was the most appropriate person and he had been afforded *"all necessary authority and power*" to ensure that the Bank had made comprehensive discovery.

29. Ms McNulty had the final word in terms of the affidavits. In her affidavit of 3 February 2020, she continued to maintain that the Bank was refusing to provide the category 2 discovery. In paragraph 7 of that affidavit, she complained that no adequate details of the searches undertaken by the Bank were forthcoming and she noted that no witness statements had been supplied or explanations provided for the destruction of documents *"other than virtual non answers".* There was, she observed, a total absence of detail, precise dates and names to explain when, by who and why the documents had been destroyed. She stated her belief that the scale of "*concealment*" on the part of the Bank

necessitated a senior authority figure to resolve the outstanding issues.

30. That was the state of play when the motions came on for hearing in Cork before Gearty J and she made the orders the subject of this appeal.

31. Subsequently, on 21 May 2021 – well after the High Court hearing and decision – Mr Coleman swore what was described as a "*Composite Affidavit as to Documents*". In the body of that affidavit, information is provided as to the inquiries and review carried out for the purpose of making the affidavit. The First Schedule, First Part of the affidavit consolidates all of the material previously discovered by the Bank. The Second Schedule provides much more detailed information about the documents within the agreed categories of discovery that are no longer in the Bank's possession, including the accounts within category 2(iii) and (iv) and the daily tally rolls within category 2(iv). As regards (iii) and (iv), it appears from the affidavit that hard copies of the relevant documents were retained for one year. Thus, Mr Coleman explains, the hard copy of the Foreign Note Sales Report was shredded "*in or around July 2008.*" The Bank was required to keep electronic transaction data for 6 years but, in practice, did so for 7 years. The manner in which the data was deleted meant that the maximum period that the data was available in "*business readable format to employees within the Defendant"* was 7 years and 6 months (90 months), when it was "*automatically deleted."* It remained potentially recoverable by IT experts for a further period of between 1 month and 11 months. Thus, according to Mr Coleman, the electronic records of the Trading Accounts Foreign Note Sales for July 2007 were deleted in *January 2015* and the underlying data was overwritten (and became irretrievable) at some point

between *January 2015 and December 2015* (para 3.6 of the Second Schedule). The position regarding the Foreign Note Sales Reserve Account is the same (para 4.7 of the Second Schedule).

32. The Second Schedule also provides significant further explanation as to the circumstances in which the Bank no longer had in its possession the documents within Category 4 which had been attached to the Notice to Admit Documents that had been served on the Bank in December 2018.

33. Counsel for the Bank, Mr Lyons, explained that the delivery of the Composite Affidavit was prompted by the decision of this Court in *Hireservices Ltd v An Post* [2020] IECA 120. It was, he said, in ease of the Plaintiff as it consolidated in one document the discovery that had been spread over 3 affidavits previously. Furthermore, as Mr Kingston was no longer in the employment of the Bank it was of benefit to the Plaintiff that the entirety of the Bank's discovery had now been made by Mr Coleman, who could if necessary be examined at trial regarding any issues relating to it (the implication being that Mr Kingston might not be available). As regards the additional detail in the Second Schedule, Mr Lyons submitted that this too was in ease of the Plaintiff given that it addressed concerns that she had raised before the High Court and in her submissions to this Court as to the adequacy of the explanations previously provided by the Bank.

34. The Plaintiff objected to the Composite Affidavit being considered by the Court on appeal. She suggested that it had been sworn by the Bank to address concerns expressed

by this Court when ruling (on 23 October 2020) on the Plaintiff's application for an extension of time in which to bring this appeal. In the course of that ruling Haughton J (with whom Whelan and Noonan JJ agreed) had expressed the view that *"an argument, a strong argument, can be made that there must be a full explanation as to the circumstances in which documentation or electronic records were retained or stored and ultimately were destroyed."* The Plaintiff submitted that, as the affidavit had not been before the High Court, and as her appeal from the decision of the High Court was not a *de novo* hearing, it was inappropriate that the Court should have regard to it. She also indicated that, in the event that the Court considered that it should admit the Composite Affidavit, she would require an adjournment in order to prepare a replying affidavit. Ms McNulty did not identify any aspects of the Composite Affidavit which she considered to be factually inaccurate and /or which she was in a position to controvert.

35. The Court took the view that the Composite Affidavit, which had been included in the books of appeal provided to the Court and which the members of the Court had read in advance of the hearing, was clearly relevant to the appeal and that, consequently, the Court ought to have regard to it. A litigant who has made discovery is not just *entitled*, but *obliged*, to address deficiencies in such discovery that subsequently become apparent and in the Court's view there was no basis for excluding the Composite Affidavit, though obviously the Court would have regard to the fact that it had not been before Gearty J in the High Court. When that view was communicated to the Plaintiff and she was asked whether she wished to press an application for an adjournment, she indicated that her primary concern was to have the appeal resolved and that, in the

circumstances, she wanted to proceed. The Court made it clear to the Plaintiff that she would be free to make any submission she considered appropriate regarding the contents of the Composite Affidavit.

DECISION

The Complaints made by Ms McNulty regarding the hearing in the High Court

36. Ms McNulty makes a number of complaints about the manner in which the motions were dealt with in the High Court. Having reviewed the full DAR transcripts of the hearing (which, as mentioned, extended over two hearing days), I do not consider that these complaints have any basis.

37. The principal complaint made by Ms McNulty is that the Judge failed to afford her equality and/or fair procedures on the basis that she was not a qualified legal professional. According to the Plaintiff, the Judge obstructed her presentation of the motions by wrongly suggesting that counsel for the Bank might be asked to give a neutral overview of the proceedings and of the motions and then subsequently inviting him to do so.

38. It is apparent from the transcript that, at the outset of the hearing, the Judge (who, it should be noted, had not had any opportunity to read the motion papers and had no prior familiarity with the proceedings) indicated to Ms McNulty that it was sometimes her practice to ask counsel to give a neutral overview before asking a litigant in person to

set out their case. In response, Ms McNulty indicated that she would prefer to do that herself. She then began her submissions. It is evident from the transcript that the Judge wished to understand "*the broader parameters of what the case is about*" by way of context for the motions before the Court. That was, of course, perfectly appropriate. However – and this is not meant to be critical of her – the Plaintiff was intent on addressing the detail of her complaints regarding the Bank's discovery, thus, as the Judge put it, putting her *"into the thick of it."* In those circumstances, and after some further time had elapsed, the Judge again suggested that Mr Lyons be asked to give an overview of the proceedings, while also making it very clear that she was happy to proceed as was. At that point, Ms McNulty indicated a willingness to agree if it would assist the Court and the Judge indicated that it would assist her. The Judge was very careful to explain that her view that it would be of assistance to hear an overview from Mr Lyons should not be seen as an insult to Ms McNulty and also made it clear that Ms McNulty would have an opportunity to respond to anything said by him with which she disagreed. Mr Lyons was then invited to address the Court, not for the purpose of making submissions on the motions but to give the overview of the proceedings that the Judge had sought. Mr Lyons then proceeded to give what he aptly referred to as "*a bird eye view of the issues"* and did so clearly and fairly. The Judge then reminded Ms McNulty that she was free to contradict anything said by Mr Lyons, which in due course she did. Ms McNulty then resumed her submissions which continued for the remainder of that hearing day and extended into the following morning.

39. Courts have an obligation to treat all litigants – whether legally represented or not – fairly. But they also have an obligation to deal with the business before them with

appropriate efficiency and dispatch. That is both in the interest of individual litigants and in the wider public interest in the effective administration of justice. There was no unfairness whatever in the manner in which the Judge proceeded here. The Judge made a suggestion as to how the motions might best proceed, explained clearly and sympathetically the reasons for making that suggestion but also made it clear that she was not going to impose her suggested approach on the Plaintiff. Ultimately, the Plaintiff agreed to that approach and the hearing proceeded.

40. A party who is entitled to be heard first – whether a plaintiff in an action, an applicant in a motion or an appellant in an appeal – does not lose that entitlement because they are a lay litigant. But that does not preclude a court from looking to counsel for the other party (assuming that party is represented by counsel) for assistance in understanding the nature of the proceedings before the court and/or identifying the issues for determination. Even where all parties are legally represented, court hearings do not always follow a rigid sequence. Judges must have some latitude to decide how best to ensure that they have an appropriate understanding of the issues they are required to adjudicate on. Counsel owe particular duties to the court to give appropriate assistance when asked. Mr Lyons did just that. It is, of course, important to avoid any reasonable perception that a represented party is being preferred or being heard out of turn. In my view, the Judge's careful interactions with the Plaintiff left no room for any such perception here.

41. The Plaintiff also complains about comments made by the Judge regarding the difficulty of establishing deliberate wrongdoing. Ms McNulty suggests that such

comments demonstrated some adverse predisposition on the part of the Judge. That is clearly not so. It is a truism that deliberate wrongdoing is more difficult to establish than a simple breach of contract or negligence. The substantive allegations made by the Plaintiff against the Bank, including the allegations relating to the operation of the alleged duplicate accounting system in the Dublin Airport Bureau, were not, of course, before the High Court. However, Ms McNulty was alleging that the Bank was deliberately concealing documents within the scope of the Discovery Order. In that context, the Judge was perfectly entitled to make the point that the threshold for establishing such conduct was an exacting one (and one which could not be satisfied in the absence of cross-examination of the Bank's deponents).

42. It is clear from the DAR transcripts that, so far from treating Ms McNulty unfairly because she was a lay litigant, the Judge was at all stages careful to ensure that she had every opportunity to present her case and I would therefore reject Ms McNulty's complaints relating to the High Court hearing.

The Substantive Appeal – The First Motion

(1) An order compelling the Defendant to provide discovery as agreed … pursuant to Order 31, Rule 20

43. The first aspect of the relief sought in the First Motion is an order pursuant to Order 31, Rule 20. Rule 20(3) provides that the court may make an order *"requiring any other party to state by affidavit whether any one or more specific documents, to be specified*

in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof."

44. Although Ms McNulty invokes Order 31, Rule 20, it appears to me that her application is not, in substance, an application pursuant to that Rule and is instead, in substance, an application for further and better discovery.

45. The threshold test for the making of an order for further and better discovery is well--established and was helpfully set out by Murray J in *Hireservices Ltd v An Post*:

> *"13. The legal test in this regard is clear. Further and better discovery will only be directed where it has been shown that there are documents which the party that has made discovery was required to discover, but has not discovered, and/or that the person making the affidavit of discovery has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong. (Sterling Winthrop Group Limited v. Farben Fabriken Bayer AG [1967] IR 97 at pp.100, 103 and 105; O'Leary v. Volkswagen Group Ireland Ltd. [2015] IESC 35 at para. 56).*
>
> *14. An order of this kind will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession that ought to have been, but were not, disclosed in the first affidavit of discovery (Sterling Winthorp Limited v. Farben Fabriken Bayer AG at p. 100). It is a*

matter for the party seeking the order to establish that there has been a default so as to raise 'a reasonable suspicion that the party who had already made an affidavit had other documents relating to the matters in question in his possession' (Lyell v. Kennedy (No. 3) (1884) 27 Ch.D. 1, 20). …"

46. The material before the Court does not show either "*that there are documents which [the Bank] was required to discover, but has not discovered"* or that the Bank "*has misunderstood the issues in the action and/or that his view as to whether documents are outside his discovery obligation was wrong."* In paragraph 18 of the Composite Affidavit, Mr Coleman states that he has had full access to all documents, records and information systems in the power, possession and/or procurement of the Bank and says also that he is in a position to make comprehensive discovery on its behalf *"having been afforded all necessary authority and power to ensure that this is done*." At paragraph 25, Mr Coleman swears in very specific terms that, according to the best of his knowledge, information and belief, the Bank has not now, and never had in its possession, power or procurement, any documents or any electronically stored information relevant to the proceedings and falling within the ambit of the Discovery Order, other than and except the documents and information set forth in the First and Second Schedules. There is no evidence before the Court that contradicts these averments or which gives rise to any reasonable suspicion that there are, in fact, additional discoverable documents in the possession of the Bank which it has failed to discover. The assertions made by Ms McNulty are not sufficient for this purpose. No suggestion was made by Ms McNulty that the Bank, or Mr Coleman in particular, has misunderstood the issues in the action or otherwise formed an erroneous view of the

scope of discovery to be made.

47. In reality, the focus of Ms McNulty's complaints was on the fact that very many of the documents that were in the possession of the Bank, and which undoubtedly come within the scope of the Discovery Order, are no longer in its possession and cannot be produced by it. Those documents include – but are not limited to – the documents coming within category 2(iii), (iv) & (v) of the Discovery Order. There is no doubt but that such documents existed and were in the possession of the Bank. Equally, there is no doubt but that those documents were relevant – and potentially significant – for the purposes of the Plaintiff's claim. However, the documents have now been *discovered*, albeit in the Second Schedule rather than the First Schedule and it would not be appropriate to make an order for further and better discovery of those documents unless the evidence provided a sufficient basis for considering that the Bank in fact retains in its possession or power copies – whether hard-copy or electronic – of any of those documents. Having regard to the detailed and unambiguous averments in the Composite Affidavit, in particular in the Second Schedule, the available evidence is all the other way.

48. In the circumstances, I do not consider that it is appropriate to make an order for further and better discovery here.

49. I would add, however, that, had the Composite Affidavit not been sworn by the Bank, I would have directed the swearing of such an affidavit by it. In my view, the previous affidavits, individually and collectively, clearly failed to comply with the requirements of Order 31 and, in particular, did not adequately address the steps undertaken by the

Bank to comply with the Discovery Order and the circumstances in which the Second Schedule documents were lost or destroyed and when that occurred. These issues have now been adequately addressed in the Composite Affidavit.

50. However, the Composite Affidavit serves to highlight a further issue of concern. It is apparent from the Second Schedule that certain documents within the agreed categories were shredded/deleted after – and in some cases well after – the commencement of these proceedings. By way of example, I refer to the Category 4 documents referenced at paragraphs 13.1 and 14.1 of the Second Schedule. The Plaintiff had copies of these documents in any event so their loss does not cause any prejudice to her. There may, of course, be other documents within category 4 that have been lost which the Plaintiff did not retain copies of. The documents within Category 2(iii) and (iv) were also destroyed many years after the commencement of the proceedings. The destruction of those documents had been referred to in the supplemental affidavit of discovery sworn previously by Mr Coleman but considerable additional detail is provided in the Composite Affidavit. According to Mr Coleman, the electronic copies of those documents were irretrievably overwritten and deleted sometime during *2015*. That is in circumstances where the proceedings were commenced in *June 2010***,** where allegations concerning the alleged operation of a duplicate accounting system had been made in *August 2013* (in terms which drew attention to the existence of *"detailed records"* of all transactions**),** a draft Amended Summons incorporating those allegations had been sent to the Bank in *August 2014* and an Amended Summons formally delivered in *January 2015.*

51. These documents are therefore not available to the Plaintiff in the prosecution of her claim. There is some data available from the Stor system but, as Mr Coleman fairly acknowledges, that data clearly does not mirror the data contained in the lost documents and the nature and significance of the Stor data is rather uncertain. This Court does not know whether those documents would have provided support for the claims she is advancing but, on any view, it appears to me to be a matter of real concern that relevant documents are now unavailable. The Bank and its solicitors (at the relevant period, the Bank's own legal department) must surely have anticipated that, in proceedings of this kind, discovery would be sought from it and must also have been aware of the Bank's retention policies. Yet, it appears that the Bank failed to take adequate steps to preserve relevant documents from destruction pending the conclusion of this litigation or, at least, until discovery was completed. I will return to this issue below.

52. Returning to the form of order sought by the Plaintiff, even if this aspect of the First Motion is properly to be regarded as an application for an order pursuant to Order 31, Rule 20(3), rather than an application for further and better discovery, no such order is appropriate at this stage, having regard to the terms of the Composite Affidavit. Subject to one possible qualification, that affidavit effectively addresses – even if belatedly – all of the matters that an order under Rule 20(3) might be directed to and in the circumstances no purpose would be served by making an order pursuant to Order 31, Rule 20(3) at this stage. For the reasons I have indicated, however, the position would have been different in the absence of the Composite Affidavit.

53. That possible qualification arises from the fact that the Composite Affidavit does not

explain the apparent failure of the Bank to take any steps to preserve potentially relevant documents, leading to the destruction of such documents subsequent to the commencement of the proceedings. It is not entirely clear whether the Court's power under Order 31, Rule 20(3) would extend to ordering the Bank to address that issue on affidavit but clearly the Court has an inherent power to require such an explanation: *Hireservices v An Post*, at para 41. For the reasons set out below, I consider that it is appropriate to exercise that power in the circumstances here.

(2) An order compelling the Defendant to provide discovery as agreed … pursuant to Order 31, Rule 21 or in the alternative an order striking out the Defendant's Defence

54. Order 31, Rule 21 provides that if any party fails to comply with (*inter alia*) an order for discovery he shall be liable to attachment. Ms McNulty has not sought the Bank's attachment. However, Rule 21 goes on to provide (*inter alia*) that such party shall also, if a defendant, be liable to have his defence struck out and to be placed in the same position as if he had not defended. Ms McNulty seeks an order in those terms.

55. There is a substantial volume of jurisprudence on the exercise of this jurisdiction, starting with the decision of the Supreme Court in *Mercantile Credit Co of Ireland v Heelan* [1998] 1 IR 81. The Plaintiff relied particularly on the decision of the High Court (Baker J) in *Go2Capeverde Limited v Paradise Beach Aldemento Turistico* [2014] IEHC 531. *Go2Capeverde* is a rare instance of a party's pleading being struck out pursuant to Order 31, Rule 21 (each of the parties in default had their defences to the counterclaim of the defendant struck out). Notably – and unusually – the deponents

who swore the impugned affidavits of discovery were cross-examined over a number of days. Here, of course, neither Mr Kingston nor Mr Coleman were cross-examined nor was there an application made for such cross-examination in the High Court (as already mentioned, Ms McNulty's Notice of Appeal did seek an order for the cross-examination of Mr Kingston before this Court but that was not pursued).

56. In her judgment in *Go2Capeverde* Baker J noted that counsel for all parties had accepted that a culpable failure by a party to comply with its discovery obligations was a pre-condition to the exercise of the court's power under Rule 21 (para 15). Later in her judgment, she referred to the decision of Clarke J in *Dunnes Stores (Ilac Centre) Ltd v Irish Life Assurance plc* [2008] IEHC 114, [2010] 4 IR 1, noting that Clarke J had in that case found that relevant documents had been *"deliberately suppressed"*. She went on to refer to another decision of the High Court (Ryan J) in *Green Pastures (Donegal) v Aurivo Co-Operative Society Limited* [2014] IEHC 209 where the court had identified *"malicious determination to evade the obligation to make discovery*" as a hurdle that an applicant faces in an application to dismiss. That, in Baker J's view, helpfully identified two essential elements of the test; the failure had to be malicious – meaning that it must be "*deliberate and not merely negligent*" – *and* arise from a determination to evade an obligation to make discovery (para 26).

57. Even where such a culpable failure is demonstrated, an order pursuant to Rule 21 will not follow as a matter of course. The object of the Rule 21 jurisdiction is to ensure that parties to litigation comply with orders for discovery rather than to punish defaulters. Therefore, if the default can be remedied, and a fair trial can be had, an order striking

out a claim or defence will not be appropriate: *Go2Capeverde* at paragraphs 16, 17 and 27. However, even where a default is identified and addressed (by the making of further and better discovery), there may still be adverse consequences for the defaulting party, above and beyond consequences in costs. Thus, in appropriate circumstances, deliberate suppression of documents may give rise to an inference being drawn adverse to the defaulting party at trial: *Dunnes Stores (Ilac Centre) Ltd v Irish Life Assurance plc.*

58. In *Go2Capeverde,* Baker J found on the evidence that a significant volume of documentation had deliberately not been discovered and that it was unlikely that discovery would be satisfactorily completed by the relevant parties even if given a further opportunity to do so. The documents concerned were of relevance to the defendant's counterclaim and in the circumstances Baker J considered that the appropriate order to make was to strike out the defences to that counterclaim.

59. The proposition that the jurisdiction under Order 31, Rule 21 is exercisable only where the failure to make discovery is "*deliberate and not merely negligent*" has significant support in the jurisprudence and in the textbooks. Thus, for instance, *Delany and McGrath on Civil Procedure* (4th ed; 2018) states it seems that "*nothing short of deliberate conduct on the part of the defaulter will suffice to persuade a court that this rather drastic step should be taken*" (at 10-221). However, as the authors of Abrahamson et al, *Discovery and Disclosure* (3rd ed; 2019) observe, "*the extent of the requirement for culpability*" has not been applied uniformly (at para 11-11). Indeed, in *Mercantile Credit Co of Ireland v Heelan* itself, Hamilton CJ (O' Flaherty and Denham

JJ agreeing) stated that an order under Order 31, Rule 21 should *"only be made where there is wilful default **or** negligence on the part of the defendant"* (my emphasis). In the immediately preceding passage of his judgment, the former Chief Justice had stated that the jurisdiction "*should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness"* (at page 85). The exact import of this passage is perhaps open to debate but it is certainly appears to provide a basis for an argument that negligence may, in principle, be sufficient in this context. That certainly was the approach taken by the High Court (Gilligan J) in *Hansfield Developments v Irish Asphalt Ltd* [2010] IEHC 32. In the view of Gilligan J in *"referring to "wilful default or negligence" the judgment* [in *Heelan*] *therefore clearly contemplates two alternative bases on which an order to strike out a defendant's defence may be granted"* though also emphasising that a negligent failure to make discovery would not, without more, suffice to justify the exercise of the Order 31, Rule 1 jurisdiction.

60. In addition, the judgment of Keane CJ (Murphy and Murray JJ concurring) in *Johnston v Church of Scientology* (7 November 2001), which the Plaintiff relied on, appears to provide support for the view that, in certain circumstances at least, the jurisdiction may be exercisable even in the absence of deliberate wrongdoing. Giving an *ex tempore* judgment – and for that reason it may be appropriate to treat it with a degree of caution – the former Chief Justice stated:

> *"The court has a jurisdiction and there is no issue about this, to strike out*

proceedings or to strike out a defence filed by a defendant where it is satisfied that the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result and of course that may also arise where it appears from the affidavit that some particular documents or some category of documents have been in fact destroyed by the party concerned, whether innocently or whether deliberately in order to interfere with the further conduct of the case." (my emphasis)

61. As this passage recognises, the destruction of relevant documents may impact on the fairness of a trial and that is so whether such destruction is done deliberately by a litigant to avoid the discovery/production of such documents or whether it results from the negligence of a litigant in failing to take appropriate steps to preserve documents. Seen in that light, a rigid and absolute distinction between the deliberate and the negligent in all circumstances may appear difficult to justify.

62. Ms McNulty asserts that the Bank's failures in relation to discovery have deprived her of a fair trial of her claim against it. There was, she contends, a duty on the Bank to preserve relevant documents in its possession, relying by analogy on the decision of the Supreme Court in *DPP v Braddish* [2001] 3 IR 127. She also relies on the following observations of Megarry J in *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693, at 694:

" .. it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ

issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it."

63. In my view, the decision in *Braddish*, and the earlier decision of the High Court in *Murphy v Director of Public Prosecutions* [1989] ILRM 71 which it approves and applies, cannot be divorced from their context, namely the prosecution of a person for an alleged criminal offence and the duties of the prosecuting authorities in that context. *Rockwell Machine Tool Co Ltd* is, in contrast, a decision concerning discovery in civil proceedings. The passage above is set out in Abrahamson et al, *Discovery and Disclosure* (at para 19-15) but does not appear to have been judicially cited here. Mr Lyons informed the Court that there was no Irish authority on whether or in what circumstances a party might be required to put in place (and a party's solicitors might be obliged to advise) a so-called *"litigation hold"* (also referred to as a "*legal hold*"). That may be so but, at the level of principle, it seems difficult to argue with what was said in *Rockwell Machine Tool Co Ltd* (no doubt there is significant room for debate as to the scope of the duty involved and the consequences of its breach) and Mr Lyons did not in fact suggest that it was wrong.

64. The availability of discovery is an essential element of civil litigation in this jurisdiction and its importance was recently re-affirmed by the Supreme Court in *Tobin v Minister for Defence* [2019] IESC 57. Discovery "*improves the chances of the court being able*

to get at the truth in cases where facts are contested" and, in that way, *"makes a significant contribution to the administration of justice*" (per Clarke CJ, at para 7.5). As the Chief Justice went on to acknowledge, there are very real issues about the burden and cost of discovery but these issues do not arise for consideration here.

65. The value of discovery and its potential to assist a court in getting at the truth in contested cases, such as the claim of the Plaintiff here, is obviously undermined if potentially relevant documents are allowed to be destroyed while litigation is contemplated and, *a fortiori*, while litigation is actually pending. Many common-law jurisdictions have recognised a duty to preserve documents in such circumstances. Thus, in *Earles v Barclays Bank plc* [2009] EWHC 2500 (Mercantile) Judge Simon Brown QC while noting that there was no general duty to preserve documents prior to the commencement of proceedings (though deliberate spoliation in anticipation of litigation might have adverse consequences), after the commencement of proceedings "*the situation is radically different*" (at para 29). The Judge was very critical of Barclay's failure to preserve documents and electronically stored information (ESI) in that case, expressing himself in terms that might be thought to have resonance here. "*One expects"*, he observed, " *a major high street Bank in this day and age of electronic records and communication with an in house litigation department to have an efficient and effective information management system in place to provide identification, preservation, collection, processing, review analysis and production of its ESI in the disclosure process in litigation..".* Even so, the judge declined to draw any inferences from such failure on the basis that it was done deliberately.

66. In England and Wales Practice Direction 31B – *Disclosure of Electronic Documents* now provides that "*as soon as litigation is contemplated"* the legal representatives of the parties "*must notify their clients of the need to preserve disclosable documents".*

67. A duty to preserve evidence has also been recognised in the United States: see *Zubulake v USB Warburg LLC* 220 FRD 212 (2003) (US District Court, S.D. NY), which has given rise to the widespread practice of "*litigation holds*".

68. The importance of taking appropriate steps to preserve documents/data is particularly acute in relation to ESI and "*e-discovery*". In this jurisdiction, that is reflected in the very clear advice given in the *Good Practice Discovery Guide* (V2, November 2015) published by the Commercial Litigation Association of Ireland. This Guide has been referred to with approval in a number of High Court decisions. Chapter 2 of the Guide sets out a number of over-arching principles, one of which is that *"[p]arties should take all steps necessary to preserve sources of data, as soon as they become aware of a matter which is likely to require discovery."* The issue of preservation is then addressed in more detail in Chapter 8 and, at section 8.1, under the heading "*Legal hold process*", the Guide states:

> *"One of the first steps in the discovery process is to inform relevant parties of their duty to preserve data which may be of relevance to the matter and to suspend routine/automatic data destruction processes. This is vital to helping ensure that relevant data is not lost or destroyed, whether deliberately or accidentally. This is best achieved by putting in place a 'legal hold', i.e.*

informing all of the relevant personnel, in writing, of their obligation to preserve all data that may be relevant to the actual or threatened proceedings. All actions taken to preserve data, and actions not taken, should be fully documented, along with the reasons why."[1]

The Guide makes it clear that this should not be a once-and-for-all process:

"Given the likely duration of litigation it is advisable to issue periodic reminders of the legal hold and/or to modify the hold if it becomes apparent that the scope of the proceedings and/or all relevant information has expanded or indeed narrowed, (though any narrowing should be done with extreme caution). People will join or leave an organisation during the lifetime of the proceedings and you should ensure parties understand the need to advise new arrivals of the presence of the legal hold, as well as ensuring they have contact details for leavers to ensure enquiries can be made of them should the need arise." (my emphasis)

69. In my view, litigants are obliged to take *reasonable* steps to preserve relevant documentation (including ESI) so as to ensure its availability on discovery and their legal advisors – whether internal or external – have a duty to advise their clients of this obligation. As suggested by the *Good Practice Discovery Guide*, the issue of what document and information ought to be preserved may need to be reviewed in the course of litigation, as for instance where amendments to pleadings are sought to be made. It

[1] Similar text was contained in version 1 of this Guide, published in March 2014 (at section 3.2).

is not sufficient to address issues of preservation only at the point discovery is requested or when discovery is ordered. There may be – and frequently will be – a significant gap between the commencement of proceedings and the finalisation of the parameters of discovery, whether by agreement or by court order. Here, discovery was first requested more than 5 years after the commencement of the proceedings and, by the time it was agreed, almost 7 years had elapsed since commencement. That is not satisfactory on any view and, one hopes, represents the exception rather than the rule. But even where litigation is prosecuted with all due expedition by all of the parties to it, months and years may elapse before the scope of the discovery is definitively resolved.

70. I emphasise that a party is required only to take *reasonable* steps to preserve relevant documents. What is reasonable will depend on all of the circumstances. Relevant considerations will include the nature and scope of the proceedings, the extent of the universe of potentially relevant documents and the number of potential custodians. The experience and resources of the parties, and whether they are legally represented or not, will also be relevant. Whether and to what extent these issues have been addressed in prior correspondence may also be relevant. It is open to a party or their legal advisors to write at an early stage in litigation (or even before its commencement) identifying categories of documents likely to be the subject of a discovery request in due course and expressly putting the other party on notice of the need to take steps to preserve such documents. That is frequently done in practice, though it does not appear to have been done here.

71. The question of when such a duty first arises does not really arise here and was not the

subject of any real discussion. *Rockwell Machine Tool Co Ltd* frames the duty of the solicitor as one arising when the writ issues. Similarly, *Earles v Barclays Bank plc* suggests that no general duty to preserve arises until proceedings are commenced. In contrast, Practice Direction 31B refers to contemplated proceedings. The *Good Practice Discovery Guide* refers to threatened proceedings. *Zubulake* also refers to threatened litigation. The better view would appear to be that that there will be some circumstances at least in which a duty to preserve arises before the formal commencement of proceedings but where the cut-off is to be drawn is likely to involve a case-by-case assessment.

72. Where relevant documents are lost by reason of a litigant's failure to take reasonable steps to preserve them, that litigant must expect, at a minimum, to be the subject of criticism.

73. Here, it appears, no litigation hold was put in place, resulting in the continued operation of "*routine/automatic data destruction processes*" and the destruction of relevant documents. It is surprising that such should occur within a large and well-resourced organisation such as the Bank, with its own internal legal department which was, it appears reasonable to assume, familiar with the Bank's data management processes and its document retention policies and practices.

74. In his submissions Mr Lyons emphasised that categories 2(iii) and (iv) were first identified only on 6 March 2017. Category 2 as requested was, he noted, in very different terms and in any event that request was not made until December 2015. He

also stressed that the Personal Injury Summons issued in 2010 did not make any allegation regarding the operation of a duplicate accounting system at the Dublin Airport Bureau and that the Summons was only amended to include claims about the alleged duplicate accounting system in January 2015. That is all true. But, for the reasons I have indicated, the Bank ought to have addressed the issue of preservation in advance of any request for discovery being made. It ought readily to have been able to identify documents relating to the operation of the Dublin Airport Bureau during the period of the Plaintiff's employment, and in particular in the period leading up to and immediately after her alleged "*termination*" in April 2008, as potentially relevant documents that ought to be preserved. Given that the Plaintiff had worked only at the Dublin Airport Bureau, the universe of documents was relatively limited. This is not a case where there was a vast volume of potentially relevant documents, dispersed amongst multiple custodians. Given the nature of the allegations made in the Summons, the relevance of the Plaintiff's personnel file (Category 4 of the agreed discovery) should surely have been apparent to anyone addressing their mind to the issue and, even if the potential relevance of category 2(iii) and (iv) would not have been apparent from the Summons, it ought to have been apparent from the particulars served in August 2013 and the draft Amended Summons sent to the Bank in August 2014. At that stage, the electronic records within categories 2(iii) and (iv) were still available and could have been preserved.

75. That said, there is in my view no question of making an order striking out the Bank's defence, at least at this stage of the proceedings. There is no evidence on which this Court could properly conclude that the Bank's failures in respect of discovery were the

result of "*wilful default"* or, as it was put by Ryan J in *Green Pastures (Donegal) v Aurivo Co-Operative Society Limited*, a "*malicious determination to evade the obligation to make discovery*". As I have said, the weight of authority indicates that some deliberate attempt to avoid the obligation to make discovery must be established before such an order could be made. Whether, and if so in what circumstances, culpable conduct short of deliberate avoidance may suffice in this context are issues which could only be determined following much more detailed argument than the Court has had on this appeal. Even if, in principle, negligence may suffice, the evidence before the Court would not allow for any reliable or informed conclusion to be reached on this point at this stage.

76. Furthermore, the Court is not, in my view, in a position at this point to assess the impact of the absence of the destroyed documents (including but not limited to the documents within Category 2(iii) and (iv)) on the fairness of the trial of these proceedings or determine whether that impact is likely to be so significant as might warrant the extreme remedy of striking out the Bank's defence or whether some more limited remedy might be sufficient to vindicate the rights of the Plaintiff. The documents in Category 2(iii) and (iv) relate to a specific aspect of the Plaintiff's claim only and it would appear to be entirely disproportionate to strike out the entirety of the Bank's Defence on the basis of the loss of those documents. In any event, the trial judge will have the evidence of the Plaintiff and, presumably, of the officers of the Bank alleged to have been involved in and/or to have been aware of the alleged wrongdoing and may well be in a position to confidently determine all of the issues in the proceedings, including the issues regarding the alleged operation of the duplicate accounting system, notwithstanding the

absence of the destroyed documents.

77. For these reasons, I would uphold the decision of the Judge to refuse to make an order striking out the Bank's defence. That does not, I stress, preclude Ms McNulty from pursuing the issue of discovery at the trial of these proceedings or renewing her application to have the Bank's defence struck out *if* such an application appears appropriate in light of the evidence that may be given at trial, including by way of cross-examination of Mr Coleman and of any other witness or witnesses from the Bank who may be called (or tendered) on this issue. In making that observation, I am not to be understood as inviting Ms McNulty to make such an application.

78. However, there is another form of order that is, in my view, appropriate to make at this stage of the proceedings. The Composite Affidavit addresses adequately the circumstances in which documents were destroyed and the dates of their destruction. It also addresses adequately the steps taken by the Bank, and by Mr Coleman specifically, to comply with the Discovery Order after it was made. It does not, however, provide any information on the steps (if any) taken by the Bank to preserve potentially relevant documents from destruction following the commencement of the proceedings or explain whether any steps, short of a formal litigation hold, were taken to alert potential custodians of the prospect that discovery would in due course have to be made in these proceedings. If it is the case that no such steps were taken, the Composite Affidavit fails to explain why that was the case as so and whether, in that context, there were any policies or protocols within the Bank, and in particular within the legal department of the Bank, relating to the need to preserve documents/data in such circumstances. As I

have noted already, there is a passing reference in the supplemental affidavit of discovery sworn by Mr Coleman to the effect that no litigation hold was put in place within the Bank. That is all that is said on this issue, despite the fact that, as of now, a total of four affidavits of discovery have been sworn on the Bank's behalf. The additional matters just mentioned should be addressed at this stage and I would direct the Bank to swear an affidavit for that purpose. It is, in my view, appropriate that this information should be made available as part of the discovery process and in advance of the hearing of these proceedings. Such affidavit should be sworn by someone in the legal department of the Bank rather than by Mr Coleman. If Ms Kelly is available, the affidavit should be sworn by her; if she is not available, the affidavit should be sworn by some other solicitor in the Bank's legal department. The deponent should, in due course, be made available for cross-examination at trial. Obviously, the Bank is not required to disclose privileged information in such affidavit. A period of 4 weeks should be sufficient for this purpose. Should that timescale cause a problem, however, or if any other difficulty arises in relation to this affidavit, the Bank will have liberty to apply.

79. I would make one final observation on the substance of the discovery issue. It relates to the data from the Stor System. Ms McNulty has been dismissive of the value of that data. Even so, it appears to me that such data should be retained by the Bank and, on request, made available for inspection by or on behalf of Ms McNulty, subject to any reasonable conditions that the Bank consider appropriate.

The Second Motion

80. I would uphold the order made by the High Court on the Second Motion. Mr Coleman is a senior manager in the Bank. He has had no involvement with the events giving rise to these proceedings. He has sworn that he has had full access to all documents, records and information systems in the power, possession and/or procurement of the Bank and says also that he is in a position to make comprehensive discovery on its behalf *"having been afforded all necessary authority and power to ensure that this is done*." The Court has no basis for going behind those averments or for concluding that any useful purpose would be served by directing the CEO of the Bank to replicate the exercise that has already been carried out by Mr Coleman.

Costs

81. Ms McNulty was awarded the costs of the First Motion in the High Court and that order was not appealed by the Bank. As regards the costs of the appeal, my provisional view is that Ms McNulty is once more entitled to her costs, in circumstances where the Bank were clearly in breach of its discovery obligations until the delivery of the Composite Affidavit in May 2021 and where the Bank has been directed to deliver a further affidavit on appeal.

82. As regards the costs of the Second Motion, I would be inclined to make no order for costs. The Second Motion was also affected by the delivery of the Composite Affidavit. Furthermore, the costs of the overall appeal were not materially added to by the

Plaintiff's appeal in respect of the Second Motion.

83. If either party wishes to contend for a different costs order(s), they will have liberty to apply to the Court of Appeal Office within 21 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the party that requested the hearing may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Whelan and Binchy JJ have authorised me to record their agreement with it.