THE HIGH COURT

THE COMMERCIAL COURT

[2011 No. 4336 P.]

BETWEEN

CIARA QUINN, COLLETTE QUINN, BRENDA QUINN, AOIFE QUINN,

SEAN QUINN JUNIOR AND PATRICIA QUINN

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED

(IN SPECIAL LIQUIDATION) AND KIERAN WALLACE

DEFENDANTS

AND

SEAN QUINN, DARA O'REILLY AND LIAM MCCAFFREY

THIRD PARTIES

JUDGMENT of Mr. Justice Robert Haughton delivered on 20th day of February, 2019

1. This ruling follows on, and should be read with, the Judgment and Order that I made on 31st July, 2018, in respect of the first named defendant's ("IBRC") challenge to privilege asserted by the plaintiffs in respect of certain discovered documentation. These fall within essentially two categories of non-party discovery ordered by McGovern J against Mason Hayes & Curran ("MHC"), the plaintiffs' former solicitors, on 14th May, 2015:

> "(a) Documents relating to any lending (including the provision of any security referable to that lending) by Anglo Irish Bank to Ciara Quinn, Collette Quinn, Sean Quinn Junior, Aoife Quinn, Brenda Quinn or Patricia Quinn or any of them, or companies of which they were individually or collectively beneficial owners, which were created or provided to MHC between 1st April 2010 and 1st March 2011 and which have not been already discovered in these proceedings by the plaintiffs or any other non—parties;
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> (b) Documents generated between 2008 to 2010 relating to the Quinn CFD position built up in shares of Anglo Irish Bank Corporation Ltd (the Quinn CFD position), the closeout of the Quinn's CFD position and the proposed reorganisation of the Quinn family interests, including but not limited to documents referring to the insider dealing provisions of the Market Abuse (Directive 2003/6/EC) Regulations in connection with the aforesaid;
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> (c) Any notes or memoranda associated with the documents described in 1 (a) and 1 (b) above."

2. In the order dated 31st July, 2018, I directed as follows:-

> "1. By reference to the Disclosed Privileged Documents (arising from the Plaintiffs' discovery) being documents disclosed by the Plaintiffs, contained on the CD enclosed with the letter from CP Crowley Solicitors to McCann FitzGerald Solicitors dated the 9th day of July 2014, the First Named Defendant shall compile a list of documents ('List 1'), extracted from the Mason Hayes & Curran ('MHC') Category A and Category B privileged discovery schedules (attached to the Further Supplemental Affidavits of Discovery sworn by Justin McKenna on the 4th day of October 2016 and Niamh Callaghan on the 6th day of October 2016), of documents that are potentially part of a 'transaction' evident from the Disclosed Privileged Documents (being, for example, a string of emails or other documents, or related documents, by reference to date, parties, subject/file so far as these can be ascertained from the MHC descriptions). The objective of this exercise is to identify MHC privileged documents which, if not disclosed, would result in the disclosed privileged documents giving such a partial, incomplete and misleading picture (by virtue of the disclosed privileged documents) as would be unfair to the First Named Defendant.
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> 2. List 1 shall be delivered by the First Named Defendant to the Plaintiffs' Solicitors within two weeks of the date of this Order.
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> 3. The Plaintiffs shall deliver their response to List 1 within four weeks of receipt: —
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> (a) producing copy MHC privileged documents over which they decide to waive privilege, and
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> (b) in respect of all other MHC documents over which they continue to assert privilege, setting out in detail in a list ('List 2') a full description of the subject matter of the document, short of disclosing the substance of privileged legal advice, but sufficient to identify whether its contents may or may not be related or linked or similar to any transaction the subject of the Disclosed Privileged Documents, and stating why the Plaintiffs continue to assert privilege.
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> For the avoidance of doubt, to the extent that the Plaintiffs fail to respond to any documents in List 1, or default in complying with the above direction, they shall be deemed to have waived privilege and shall produce such documents forthwith.
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> (c) upon receipt of List 2, the First Named Defendant shall have three weeks within which to challenge/debate the privilege claimed (whether because the document does not attract privilege at all, or because privilege has been

lost by virtue of its relationship to a "transaction" reference in the Disclosed Privileged Documents).

4. This Motion shall be adjourned for mention only to Monday 12th November 2018.

5. In the event, and to the extent that the First Named Defendant wishes to further dispute privilege maintained by the Plaintiffs over List 2 documents, the First Named Defendant shall furnish a further grounding before the 26th day of October 2018 and any replying Affidavit to that grounding Affidavit of the First Named Defendant shall be filed by the Plaintiffs on or before the 9th day of November 2018."

3. In accordance with my Order List 1 was duly delivered by IBRC, and the plaintiffs delivered their response, in the form of List 2. IBRC further disputed the privilege being maintained in List 2, and further correspondence ensued, resulting in the matter being listed before this Court on 19th December, 2018. On that date, the court considered written legal submissions of IBRC dated 5th December, 2018, and of the plaintiffs dated 14th December, 2018 and heard further legal argument. The main concerns of IBRC were:-

(i) that the plaintiffs' List 2 proceeded on the basis of an "over-broad interpretation" of the concept of a '*transaction*' by reference to my judgment of 31st July, 2018;

(ii) the plaintiffs' requirement that IBRC identify a specific litigation disadvantage or unfairness referable to a disclosed document in order for privilege to be lost;

(iii) inadequate description of some of the documents in List 2; and

(iv) the absence of information in List 2 in respect of 107 documents described by the plaintiffs as "illegible".

4. In an *ex tempore* ruling on 19th December, 2018, I indicated that I wanted "…to reflect on the submissions that had been made in relation to what constitutes 'a transaction' and the approach that the court should take to the use of that term in my judgment of [31st July, 2018]". However, I also took the view that List 2 failed to give a "full description of the subject matter of the documents…" in accordance with 3(b) of my order of 31st July, 2018, and accordingly, I limited a period until 21st January, 2019, for the plaintiffs to supply fuller descriptions, and indicated that I would not deliver any further ruling on the dispute until that had been done. I also indicated that:-

"If need be, the court will delve into this documentation and form its own view but that is to be a last resort."

In stating this, I was mindful of the fact that this long running case was listed for hearing (before another judge) on 5th March, 2019.

5. The issue with illegible documents was also resolved, and List 2 with further document description was duly delivered by the plaintiffs' solicitors on 21st January, 2019. Arising from that IBRC had continuing concerns, and the matter was again listed substantively before this Court on 6th February, 2019. IBRC's concerns related to:-

(i) 116 documents which it was asserted were still not adequately identified;

(ii) an overly narrow interpretation by the plaintiffs of "transaction" in the context of related or connected non-disclosed documents; and

(iii) the plaintiffs' requirement that IBRC demonstrate specific litigation disadvantage or unfairness.

6. In ease of the court, IBRC were now limiting their dispute as to privilege to 313 documents out of an original 1,066 arising under Category A discovery, and 73 documents out of a total 1,684 documents in Category B, and the 116 'inadequately described documents'.

7. Having heard limited further argument from counsel for both parties (limited by the court in light of the full submissions made on 19th December, 2018), and having regard to the imminent trial, I determined that to assist me in deciding the residual privilege issues, I should inspect the documents in dispute. These were identified by IBRC in columns added to List 2 in an updated spreadsheet. Following this, the plaintiffs' solicitors delivered a memory stick containing the 116 documents said to be "Inadequately Described", the 313 "Category A" documents, and the 73 "Category B" documents in dispute, for my inspection, along with the most up to date spreadsheet. In addition, I was supplied by McCann Fitzgerald, IBRC's solicitors, with a folder ("the Folder") which included:-

(a) The most up to date spreadsheet – which I shall refer to as "List 3" - extract listing the Category A and Category B documents from the MHC privileged schedules over which IBRC is still seeking disclosure. This includes in separate columns McCann Fitzgerald's comments in respect of List 1, the plaintiffs' response from List 2, McCann Fitzgerald's further comments of 26th October, 2018, and finally McCann Fitzgerald's comment of 30th January, 2019 – which identifies documents which they say are still "Inadequately Described".

(b) Behind Tabs 4-10, "The Disclosed Privileged Documents to which it appears [to IBRC] the disputed documents are connected or related to". The reference to "Disclosed Privileged Documents" is a reference to (admittedly) privileged documents discovered by MHC in a non-party discovery and over which the plaintiffs through their then solicitors (CP Crowley) waived privilege in a letter dated 30th May, 2014.

8. Relatively few documents appear in Tabs 4-10, and they can be grouped as follows:

1) The focus of the documents in Tabs 4, 5 and 7 is a MHC telephone attendance on their client representatives at 10.00am on 14th May, 2010.

2) Tab 6 is an email thread of 28/29 August, 2010 in reference to a meeting to be held the following Tuesday.

3) The focus of Tabs 8, 9 and 10 is MHC's involvement with their Quinn Group clients in January 2009 in responding to letters dated 19th December, 2008 served by the Office of the Director of Corporate Enforcement on 21 individuals/corporate entities concerned with Quinn Insurance and related parties, and included are versions 5, 6 and 7 of a draft letter of response by MHC to the DCE.

'Transaction'
9. It is not disputed that the privilege that applies to communications between a client and their lawyer may be waived, or that partial waiver may by inference or implication give rise to further waiver of privileged documents. The relevant principles are set out and discussed in my judgment of 31st July, 2018 at paras. 41-52. At para. 51 I quoted with approval from the decision of Mann J. in *Fulham Leisure Holdings Ltd v. Nicholson Graham and Jones* [2006] EWHC 158 (Ch) where at para. 11 he stated:-

> "11. Based on the authorities which I am about to refer to, it seems to me that the relevant process should be as follows:
>
> i) One should first identify the "transaction" in respect of which the disclosure has been made.
>
> ii) That transaction may be identifiable simply from the nature of the disclosure made – for example, advice given by counsel on a single occasion.
>
> iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed."

10. At paras. 57-62 inclusive of my judgment I then considered two examples of disclosed privilege documents which counsel for IBRC relied upon to show how unfairness could occur if further disclosure of related or connected MHC privileged documents did not occur. I then stated:-

> "63. These examples demonstrate, and I so find as a matter of probability, that MHC have disclosed, as privileged documents, documents which are closely connected to undisclosed privileged documents. This probability emerges from what is known from the disclosed documents in terms of date and subject matter, sender and recipient, and the information that can be gleaned from the Category A and B lists of privileged documents – even though the subject matter column provides limited information.
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> 64. I am satisfied that it would be unfair if the plaintiffs were entitled to maintain privilege over MHC privileged documents which are connected or related to the same 'transaction' the subject matter of disclosed privileged documents, or where they are part of a stream of documents, part only of which has been disclosed.
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> 65. There is a real risk that the plaintiffs will achieve unfair litigious advantage by partial disclosure of relevant documents which may give an incomplete understanding of the relevant communications/transactions involving MHC."

11. In argument before me on 19th December, 2018 and 6th February, 2019, Mr. Barry O'Donnell S.C., counsel for IBRC, while accepting that this court's judgment did not provide a prescriptive definition of "transaction", relied on the paragraphs in the judgment quoted above to oppose the plaintiff's application to apply a more restrictive definition, and to oppose the suggestion that there was any onus on IBRC to identify in each instance where unfairness or litigation disadvantage would arise if privilege was maintained over a particular document.

12. In his submissions on behalf of the plaintiffs on 19th December, 2018, Mr. Ciarán Lewis S.C. argued for a narrow interpretation of what should constitute the "transaction" based primarily on principles stated by Hobhouse J. in *General Accident Fire and Life Assurance Corporation Ltd v. Tanter* [1984] 1 All ER 35, [1984] 1 WLR, which form the basis for the decision of Mann J. in the *Fulham* case, and which were wholeheartedly endorsed by Balcombe L.J. in the Court of Appeal in *Tanap Investments (UK) Ltd v. Tozer & Ors* (unreported, 11th October 1991).

13. In *Tanter*, Hobhouse J. was concerned with an action between underwriters and brokers. A memorandum passing between one of the brokers and their solicitors had not been disclosed in discovery because it was privileged. Counsel for the brokers sought to pursue cross examination, making use of the memorandum, whereupon counsel for the underwriter made a wide ranging request for disclosure and inspection of otherwise privileged documents. In the course of his judgment Hobhouse J. quoted with approval from Cotton L.J. in *Lyell v. Kennedy* 27 Ch. D1, at p. 24 :-

> "There was this contention raised, which I have not forgotten: that the Defendant had waived his privilege, and therefore could not claim it at all. That, in my opinion, was entirely fallacious. He had done this, he had said, 'Whether I am entitled to protect them or not I will produce certain of the documents for which I had previously claimed privilege – I will waive that, and I will produce them,' but that did not prevent him relying on such protection with regard to others which he did not like to produce. It is not like the case of a man who gives part of a conversation and then claims protection for the remainder, and we think there is no ground for the contention that there has been here a waiver of privilege."

14. Then at p. 47 – 48 of his judgment Hobhouse J. sets out eight principles as follows:-

> "The principles on which I am relying in arriving at this conclusion have been covered by the full arguments of counsel. It is right that I should summarise them. The first is that under the English adversarial procedure a party can choose what evidence he does or does not adduce at the trial.
>
> Second, under the rules of legal professional privilege certain categories of communication are protected from pretrial discovery and from being the subject matter of investigation at the trial. This is essential to the adversarial procedure followed in this country. The reasons underlying it and its importance have been discussed in many cases, including by Lord Simon in *Waugh v British Rlys Board* [1979] 2 All ER 1169 at 1177, [1980] AC 521 r at 536—537.
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> Third, a party is at liberty to decide whether or not to waive privilege and, if so, the extent to which he does so. This is expressly stated in *Lyell v. Kennedy*, 27 Ch D 1, in the passage to which I referred. This applies to interrogatories and it applies to the discovery of documents. The issue in the present matter is the degree to which it applies in the proceedings in court.
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> Fourth, the waiver of a part of the document or conversation is a waiver of the whole of that document or conversation as was stated in *Lyell v. Kennedy* and as was the subject of decision in the *Burnell* case and the *Great Atlantic* case.
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> Fifth, with regard to waiver before a trial, there can be no question that these principles are correct and that, for example, the waiver in the present case of the confidentiality and privilege in the document dated 6 October 1981 does

not of itself waive privilege in anything else.

Sixth, by adducing evidence at a trial one does get involved in potential further waiver. The underlying principle is one of fairness in the conduct of the trial and does not go further than that. The fact that this principle does not arise unless you adduce the evidence at the trial is clearly stated in the judgment of Mustill J. and it was clearly raised by the facts in *Dolland* and it was likewise raised by the facts in the *Great Atlantic* and *Burnell* cases.

Further, if the evidence is adduced then the extent of the waiver relates to the transaction to which that evidence goes. The extent of the transaction has to be examined and where it is what somebody said on a particular occasion, then that is the transaction. It is not the subject matter of those conversations. It does not extend to all matters relating to the subject matter of those conversations.

In support of that latter point I would observe that if counsel for the underwriters' submissions were to be accepted in full at face value they would be tantamount to a disruption of legal professional privilege. Any waiver of privilege at all would be liable to have the most wide-ranging consequences and indeed give rise to a *reductio ad absurdam*. If one follows the approach of looking at the transaction concerned rather than at the subject matter of the communications, that problem does not arise.

Seventh, the necessity that the evidence shall have been adduced also involves that it must be adduced by the party who is waiving the privilege or who is alleged to be waiving privilege. Once a document has had its privilege waived then of course it is open to be used by any party. Counsel for the underwriters or counsel for the plaintiffs could have used the document in the present case at any time after 6 May 1983. They likewise can use it, if it was used by Mr Baxter to refresh his memory when Mr Baxter comes to give evidence. But it cannot be suggested that any use by an opposite party amounts to a waiver by the original party of anything. Likewise, the mere production of the document in discovery, or in some pre-trial procedure, cannot in the ordinary course be treated as a waiver of anything beyond the document itself.

Eighth, with regard to the consequences, once evidence is adduced it gives rise to a right to cross examine freely and fairly with regard to the transaction in respect of which the document is adduced or the evidence is called. This principle applies to the introduction of both documentary and oral evidence. Fairness requires that the opposite party shall be entitled to investigate by cross examination the transaction and therefore be entitled to ask for and see documents that are relevant to that transaction. But the requirements of fairness do not go beyond that; no conclusion is to be drawn from the use by Mustill J., or indeed by the Court of Appeal, of language such as 'the whole of the material' or 'the whole of the material and not merely a fragment' to extend the principle beyond the actual transaction so as to include the matters which are merely referred to in the relevant communication. That is the essence of the decision of Mustill J. and any other conclusion would be a departure from his decision."

15. Hobhouse L.J. held that the application was misconceived and premature as Mr. Baxter, who had created the memorandum in question recording a conversation on 6th October 1981, had yet to give evidence. He further held that if and when Mr. Baxter was called and gave evidence with regard to 6th October, 1981 then:-

> "He will be liable to be cross-examined with the totality of the transaction of 6th October, 1981. I hold that the waiver of privilege does not go further than that."

16. Earlier in his judgment (at p. 42) Hobhouse J. referred to submissions made by counsel for the underwriters, which submissions he clearly rejected:-

> "Counsel for the underwriters also was not deterred by the fact that he submits that use of part of a document makes the whole of the document disclosable, and therefore this very submission might give rise to an almost infinite regress through the privileged documents held by a party. One document makes another document disclosable; that other document will make further documents disclosable, and so on. This is merely one of the difficulties about his submission. He suggested with complete fairness, but not wholly logically, that one of the ways in which that sort of problem might be avoided is by covering up parts of documents which related to different subject matter or by leaving it to the good faith of the relevant solicitors to select those documents, or those parts of the documents, which did relate to the topic on which privilege had been waived."

17. Mr. Lewis relied on this passage to suggest that the effect of Mr. O'Donnell's submission, if accepted, would lead to a 'ripple effect' in the disclosure of numerous otherwise privileged documents. He relied in particular on the fourth, fifth and sixth principles enunciated by Hobhouse J. He further submitted that critical to the court's determination of what is the "transaction" is the use to which a party seeks to put the privileged document, and this use or purpose may not be ascertainable before the trial. He relied on the following passages from the judgment of Mann J. in the *Fulham* case:-

> "18. What those citations show is that it is necessary to bear in mind two concepts. First of all, there is the actual transaction or act in respect of which disclosure is made. In order to identify the transaction, one has to look first at what it is in essence that the waiving party is seeking to disclose. It may be apparent from that alone that what is to be disclosed is obviously a single and complete "transaction" – for example, the advice given by a lawyer on a given occasion. In respect of disclosure before a trial that may be all that the non-disclosing party has to go on, because a wider context may not yet be apparent (or at least not until the exchange of witness statements). This may explain the contrast that Hobhouse J drew between disclosure before a trial and deployment at trial. However, in order to ascertain whether that is in fact correct, one is in my view entitled to look to see the purpose for which the material is disclosed, or the point in the action to which it is said to go. That explains at least some of the references to the "issue" or "issues" in the judgments of Auld LJ and Mustill J. Mr. Croxford submitted that the purpose of the disclosure played no part in a determination of how far the waiver went. I do not agree with that; in some cases, it may provide a realistic, objectively determinable definition of the "transaction" in question. Once the transaction has been identified, then those cases show that the whole of the material relevant to that transaction must be disclosed. In my view it is not open to a waiving party to say that the transaction is simply what that party has chosen to disclose (again contrary to the substance of a submission made by Mr. Croxford). The court will determine objectively what the real transaction is so that the scope of the waiver can be determined. If only part of the material involved in that transaction has been disclosed, then further disclosure will be ordered and it can no longer be resisted on the basis of privilege.
>
> 19. Once the transaction has been identified and proper disclosure made of that, then the additional principles of fairness

> may come into play if it is apparent from the disclosure that has been made that it is in fact part of some bigger picture (not necessarily part of some bigger "transaction") and fairness, and the need not to mislead, requires further disclosure. The application of this principle will be very fact sensitive, and will therefore vary very much from case to case, as Auld LJ observed in the first paragraph of his judgment cited above. It is in this sense too that the disclosure may be partial. It is part of some greater whole, not necessarily part of some larger individual transaction. I confess, with all due respect, to having had some difficulty in understanding precisely what he meant in the last sentence of the citation, but I think that my analysis is consistent with his judgment."

18. Mr. Lewis emphasized that the only deployment made to date of the disclosed privileged documents is the waiver of privilege by CP Crowley in their letter of 30th May, 2014. There is therefore limited context at this stage from which the court could objectively identify the real transaction and so determine the scope of a waiver and address the second question of whether unfairness or litigious disadvantage would result from non-disclosure. He further submitted that the court does not rule out at any stage revisiting the question of further waiver by reason of deployment, but this can only be determined when use is being made of the relevant document and there is a context for a decision on further waiver.

19. In response to the suggestion from the court that a chain of emails is in the nature of a conversation, and that waiver in respect of privilege over one email message necessarily or by implication means that privilege is waived over all of the emails in that chain, Mr. Lewis submitted that email exchanges are more akin to an exchange of written correspondence, where each communication appears on a separate piece of paper. Similarly, emails can be produced on a separate piece of paper, and simply because there is a response that may be printed alongside the earlier email does not mean that privilege may not be maintained over the response. He added that the nature of the form in which the document is stored is not fundamental to the issue, and that the *Hobhouse Principles* would apply equally to a string of emails just as to a course of written correspondence.

20. In his submissions Mr. Lewis was forced to address the observations made in my judgment of 31st July, 2018 in respect of documents over which privilege was maintained but which appeared to be closely connected to disclosed privilege documents. For instance, the disclosed telephone attendance of 14th May, 2010 refers to a Questionnaire clearly designed by MHC to obtain instructions, and presumably completed Questionnaires were in due course furnished to MHC. Mr. Lewis submitted that while the court had made observations about what a transaction might be, it had not been addressed directly on this point, and my observations should be treated as *obiter*. He argued that "…what the Court contemplated would form part of the transaction was *obiter* and hadn't been finally determined because the Court hasn't defined what a transaction is."

21. Mr. O'Donnell responded that if Mr. Lewis is correct, and if the question of further waiver can only be determined at trial, it "… completely and utterly hollows out the judgment and directions given by this court of any meaning and effect". He argued that the court had properly relied upon dicta from Fennelly J. in *Fyffes Plc v. DCC Plc* [2005] 1 I.R. 59 in the Supreme Court in relation to implied waiver through partial disclosure, and the earlier decision of McKechnie J. in *Hansfield Developments & Ors v. Irish Asphalt Ltd & Ors* [2009] IEHC 420 where McKechnie J. ruled that:-

> *"..privilege can be lost on the basis of unfairness and that is in relation to partial disclosure of legal advices .... To allow an individual item to be plucked out of context would risk injustice through its real weight or meaning being misunderstood."*

Mr. O'Donnell sought to distinguish the case law relied upon by Mr. Lewis on the basis that those cases involved a deployment of privilege documentation in a trial situation, and an interrogation of the purposes of the waiver. Counsel also urged the court to recall that the plaintiffs had instructed their lawyers to disclose all of the material that they had in their possession from MHC, and that they swore that that was all the documentation that existed. That documentation traversed a wide range of issues, and he argued that there was "palpable unfairness" in the approach being taken by the plaintiffs, and that this is unfair on IBRC who were faced with preparing for a trial likely to take several months. Counsel relied on para. 84 of my judgment of 31st July, 2018 where I stated that it would be "unfair of the plaintiffs who are entitled to maintain privilege over MHC privilege documents which are connected or related to the same "transaction" the subject matter of disclosed documents, or where they are part of a stream of documents, part only of which has been disclosed". He also relied on this to persuade the court that waiver over an email should be treated as a waiver over a chain of emails or related documents by reference to date, parties, and subject/file, insofar as they could be ascertained from the document descriptions in List 1 and "List 3". Counsel suggested that a string of emails is more akin to a conversation rather than a course of written correspondence.

Decision

22. The starting position is the relative sanctity of legal professional privilege both in this jurisdiction and in the UK. This is referred to by Fennelly J. *Fyffes* who adopted the *dictum* of Ebsworth L.J. in *Kershaw v. Whelan* [1998] 1 W.L.R. 358, at p. 370:-

> "Waiver is not lightly to be inferred: although privilege is an aspect of law of evidence and not of constitutional rights it is firmly established in our law for sound reasons of public policy."

My judgment of 31st July, 2018 also refers, at para. 45, to the status attributed to legal privilege under the European Convention on Human Rights, under which it is accorded protection under the right to privacy under Article 8 of the Convention, and to the Strasbourg organs which have recognized that interference with confidentiality of the legal professional relationship may infringe the right to a fair trial under Article 6.

23. From this it is clear that the question of what constitutes "the transaction" for the purpose of implied waiver must be approached with great care, and the court should be slow to undermine the long recognized and important right of legal professional privilege which fundamentally affords lawyers the freedom to take instructions and advise clients in the expectation that their communications will not be compulsorily revealed to opposing parties.

24. In my view this means, regardless of the principles to be applied to identifying 'the transaction', that once the disputed documents have been adequately identified and a basis for privilege averred to on affidavit (usually, but not necessarily, an Affidavit of Discovery), the onus should be on the party alleging implied waiver of further documents to satisfy the court that the waiver should be extended, or at least to persuade the court that it should itself inspect the disputed documents in order to make a sound determination. This onus extends both to identifying the transaction in respect of which there has been waiver, and which it is suggested should extend to the disputed document, but also of indicating how it may be unfair and/or create litigious disadvantage, if further waiver were not to be implied. If the position were otherwise there would be an intolerable onus on the party/their lawyers asserting privilege.

25. I am satisfied that, while the judgment of Mann J. in the *Fulham* case did feature in submissions that led to my Judgment on 31st

July, 2018 and was considered by me, this was primarily with a view to establishing the further process for ascertaining implied waiver of other documents set out in my Order of 31st July, 2018. I did not in my judgment of that date address specifically what might constitute a "transaction". While I did make observations as to what might be connected or related documents covered by implied waiver, those observations were indicative and not determinative, and were *obiter dicta*. It is therefore necessary to address in principle what may constitute a 'transaction' in this context.

26. The principles enunciated by Hobhouse J. in *Tanter* in 1984 ("the Hobhouse Principles") have been followed and applied in the UK since then, and were expressly approved by the Court of Appeal in *Tanap*. I find them persuasive, and in essence conclude that the court should adopt a narrow definition of what constitutes a 'transaction' in the context of implied waiver of privilege over further documents.

27. It is worthwhile to summarise the first six principles:-

> 1. A party can choose what evidence he does or does not adduce at the trial.
>
> 2. Legal professional privilege protects certain communications from pre-trial discovery and from being the subject matter of investigation at the trial.
>
> 3. A party is at liberty to decide whether or not to waive privilege, and if so to what extent.
>
> 4. The waiver of part of a document or conversation is a waiver of the whole of that document or conversation. [I accept this as a general proposition but it may be subject to exceptions. For example, there may be commercial sensitivity which would justify redaction of part of a document or conversation]
>
> 5. With regard to a waiver before trial, there can be no question that these principles are correct.
>
> 6. By adducing evidence at trial one does get involved in potential further waiver. The underlying principle is one of fairness in the trial and does not go further than that. As Hobhouse J added - "Further, if the evidence is adduced then the extent of the waiver relates to the transaction to which that evidence goes. The extent of the transaction has to be examined and where it is what somebody said on a particular occasion, then that is the transaction. *It is not the subject matter of those conversations. It does not extend to all matters relating to the subject matter of those conversations."* [Emphasis added].

28. While the sixth principle relates to potential further waiver at trial, in my view the comment of Hobhouse J. emphasised above applies equally to waiver before a trial. There is no logical reason why this should not be so. On this view waiver in respect of a memo of a conversation is a waiver in respect of that memo and that conversation. It is not generally to be regarded as a waiver in respect of the subject matter of the memo or conversation such that other documents related to the same *subject matter* and arising before or after the conversation must be disclosed. A waiver cannot in this sense lead to a "ripple effect", whether forward or backward in time, whereby reference to subject matter in a particular conversation, document or email is to be treated by implication as waiver of all other privileged documents or records relating to the same subject matter. As Hobhouse J. observed such wide ranging consequences could "give rise to a *reductio ad absurdam*", and it would fundamentally undermine the right to legal professional privilege. Having said this, a memo of a second conversation immediately before or after another conversation may be so intimately connected in time and subject matter as to warrant implied waiver of privilege over such memo.

29. I am also persuaded by the observations of Mann J. at paras. 18 and 19 of his judgment in *Fulham*, quoted earlier, as to the need to consider the purpose of waiver in a particular instance in assessing what should fairly and reasonably come within the scope of the transaction. This is likely to be easier to take into account at trial where the issue of further waiver is likely to arise in the context of a single document or a small number of documents, and the scope of the transaction may be relatively limited. Nonetheless in my view the court should, even in a pre-trial arena, take into account so far as it can, the purpose and circumstance of the primary waiver when deciding what may fairly constitute a transaction, and in considering what further privileged documents should be disclosed. The fact that pre-trial the court has less to go on does not rule out ordering further disclosure of privileged documents, but it is a further reason for the court to take a cautious approach.

30. We are in the present case dealing with disclosure before trial, and while pleadings are closed and there has been extensive discovery by the parties, and non-party discovery by MHC, there is limited visibility over the purpose for the waiver of privilege to date. But this is an unusual case. It will be recalled that the plaintiffs' then solicitors in waiving privilege in their letter of 30th May, 2014 said "Our clients are not conceding their previous position – simply adopting a practical approach.", and thereby waived privilege that the plaintiffs could otherwise have maintained over a very extensive body of MHC documents. I have held that this waiver amounted to deployment, as these documents are now part of the case, and it is open to the plaintiffs, as well as IBRC, to use these documents at trial. I do accept that it is not usually until a privileged document is actually used at trial that the trial judge is in a strong position to identify the purpose of waiver, and hence objectively identify the "transaction" and address whether, in the interests of fairness and avoiding litigious disadvantage, further privileged material should be disclosed. That is the "bigger picture" that Mann J. refers to in para. 18. But there are further aspects of this case that enable the court to form a cautious judgment as to what should be defined as a transaction, and what further documents should be disclosed.

31. One such aspect of this case is that in addition to the initial descriptions of documents from List 1, IBRC now has the benefit of the much fuller description of documents in List 3 and has therefore been in a position to suggest what may constitute the 'transaction', and to suggest where implied waiver may be fair and just. A second aspect is that the court, by agreement, has the opportunity to inspect the disputed 'privileged' documents so is well situated to identify the 'transaction' and where litigious disadvantage or unfairness might arise absent further disclosure.

32. I also bear in mind that the trial is scheduled to take several months and it is incumbent on the court, so far as it can at this point, to identify further disclosure that should be ordered so that both parties can prepare accordingly and the prospect of early objections/interventions which would disrupt the trial at opening or in the course of evidence of the first few witnesses is minimized.

33. With regard to a chain of email I do not consider that a single general approach can be enunciated; each chain and each email within a chain needs to be approached it light of its own facts/circumstances. I do consider that the emails within the chain are more closely comparable to a course of written correspondence, rather than a conversation between individuals. One email is sent, and it is responded to by another email, and there is a reply to that and so forth. While these most commonly form a string of emails such that each new email is transmitted in a format that includes the earlier emails, this is not necessarily so; one email may be sent, and the response may be a stand-alone email. It may therefore be more logical to apply the *Hobhouse Principles* to each email in a chain, in

the same way that they would apply to correspondence. In particular cases, however, the comparison to a conversation may be more apt, especially where the time lapse between emails is minimal, and in such cases it may be that a court would be more readily persuaded that a waiver of a part of the email exchange should be treated as a waiver of the entire or other parts, in order to avoid injustice, unfairness or a misleading impression. In considering the email chains, and individual emails, I have therefore decided to apply the *Hobhouse Principles*, but not to take a prescriptive approach.

Results of inspection
34. Having applied the *Hobhouse Principles* in my inspection of all of the documents/disputed documents on the memory stick I am satisfied that the plaintiffs are entitled to assert and maintain legal professional privilege over all of these documents save to the extent indicated hereafter. In respect of several of the disputed documents it became clear that these should not attract privilege at all, and I will also direct their disclosure.

'Inadequately Described Documents'
35. I have reviewed the 116 'Inadequately Described Documents' listed in Categories A and B, and taken into account the comments of IBRC's solicitors in List 3, insofar as they were able to comment based on the description given. Each document or linked documents have been reviewed primarily in the context of the 'transactions' represented by the disclosed discovered documents in the Folder provided by McCann Fitzgerald. I propose to address a sample document before dealing with the generality of documents in this group.

36. For the most part I was satisfied that the better description given by the Plaintiffs under the column headed "List 2 – Plaintiffs' Response" was a fair description of content. A typical example is document 0626 (0.7.45.53792) authored by MHC solicitor Niamh Callaghan and sent to Anne McCarthy on 9th July 2010. The subject was inadequately described in List 1 as "FW: Quinn Companies", but later more fully described thus –

> "Internal email circulating (without comment) and earlier email between MHC and Paul Morgan (Quinn Group) re Quinn companies and children's shareholding. This is unrelated to a May 2010 call or the Quinn Children's knowledge. Content is in relation to file maintenance. Privilege Maintained. No unfairness or litigation advantage – Privilege Maintained. Plaintiffs not copied on email."

In the column headed "List 3 – McCann Fitzgerald Comment (26/10/18)" state –

> "We stand by and reiterate our comment in 'List 1'. The date of the document and the Plaintiffs' response to 'List 1' confirms that this email relates to and/or is connected to the issues that are the subject matter of a Disclosed Privileged Document, in the 14 May 2010 Attendance Note (the "Attendance Note") (identified in the judgement of Mr Justice Haughton dated 31 July 2018), an identical copy of which was the only document disclosed under Category A, as part of the Plaintiffs' response to 'List 1". This is clearly a reference to fact find arising from the Attendance Note. The fact that the plaintiffs are not specifically copied on the correspondence has no bearing on the assessment and is in no way a valid reason for the Plaintiff's to refuse disclosure of this document, which is clearly connected with the issues discussed in the Attendance Note and/or the fact find that is envisaged therein. It is clear that the plaintiffs entrusted other persons to liaise with MHC, as is evidenced by the Attendance Note itself."

I note that similarly worded comment is adopted by McCann Fitzgerald in respect of many of the documents created before, after or in or about 14th May, 2010.

In the final column of the spreadsheet McCann Fitzgerald add their 'Comment 30 January 2019' – "Inadequate description". Nothing now turns on this Comment as I have inspected the document in question, and the same applies to all documents within this group.

37. I am satisfied that this document is now correctly described. I am satisfied that it is unrelated to the call on 14th May, 2010 and cannot be regarded as part of the same 'transaction'. I am satisfied that the Plaintiffs are entitled to maintain their claim to privilege at the present time.

38. The 116 documents consist largely of emails or email chains in which MHC request or receive from their clients, or their servants or agents, instructions, information and documentation for the purpose of giving legal advice, or in which MHC give legal advice. Many of the emails/chains are internal communications between solicitors in MHC referring to client issues, passing on information, documents, or drafts, and preparing to giving legal advice to the client(s), or simply relate to file maintenance. Most of the MHC emails were not addressed to or copied to the plaintiffs, but this in itself does not exclude privilege. Many emails/documents concern or are communications with Quinn companies, although still falling within Category A or B discovery.

39. Some of the emails merely contain attachments – which may be listed in the next document identified with a sub-number - or have a single sentence that is only understood or put in context when considered alongside another email of the same date or a date shortly before or afterwards. In such instances I was able to confirm that the context was preparing drafts or otherwise connected with the preparation or giving of legal advice.

40. It is true to say that, like the attendance of 14th May, 2010, some of the emails relate to taking instructions from the plaintiffs, and also to setting up the telephone attendance on that date. However, these do not relate to the same 'transaction', as I have narrowly construed it for the purpose of considering implied waiver. It is also true that many emails after that telephone attendance are a response to MHC's request for questionnaires with client instructions/information, and MHC's request for documentation or follow-up information. However, I find that the telephone call on that date is a separate and distinct 'transaction' and the later emails/communications are different 'transactions', albeit that some of them are related in the sense that they resulted from the telephone call.

41. I therefore determine that the Plaintiffs are entitled to maintain privilege over all of these documents at this time, with the sole exception of document 82 in Category B, addressed below. This does not mean that privilege may not be waived at trial, expressly or by implication, if any privileged document is further deployed in such a way that the trial judge considers that waiver arises.

42. There are a few emails with attachments which are *executed* documents e.g. guarantees, company resolutions, deeds or Powers of Attorney. Those executed documents would appear to be captured by the 19 categories of discovery ordered by Moriarty J. on 26th July, 2012 to be made by the plaintiffs, or possibly by Category A or B as ordered by McGovern J. to be discovered by MHC. The court assumes, as it must, that such documents have been discovered in Part 1 of Schedule 1 of the affidavits of discovery made pursuant to one or both of these orders. *Relevant executed documents* cannot be the subject of legal professional privilege. However, I find that, save in respect of document 82 in Category B, the emails in which such attachments appear do attract legal

professional privilege and the entire email or chain of emails is covered by privilege.

43. In one instance the email sets out scanned-in copies of 4 executed documents in the body of the email. This is document no.82 (Cat. B), an email of 2nd May, 2008. On its face this email originated with an email of 30th April, 2008 sent by Mark McNamara, Financial Planning Manager of the Quinn Group (RoI) to Dara O'Reilly in Quinn Group Headquarters, with 4 attachments and the following short message:

> "Dara,
>
> 2nd of Nine.-IG Index,
>
> Mark McNamara" ,
>
> This email, with what appears to be the 4 attachments scanned in, is then forwarded by Colin Morgan of Quinn Insurance to MHC solicitor Daragh O'Shea, on 2nd May, 2008. The initial description in the Spreadsheet is "IG Index Docs", and the plaintiffs' fuller description in List 2 is as follows:
>
> > "Email attaching:
> >
> > (i) certified board resolution,
> >
> > (ii) fax message,
> >
> > (iii) deed of novation and
> >
> > (iv) personal guarantee and indemnity.
> >
> > Privilege Maintained
> >
> > No unfairness or litigation advantage arises – privilege maintained.
> >
> > Plaintiffs not copied on email."
>
> McCann Fitzgerald's comment on this is –
>
> > "While the plaintiffs' response is insufficient, it appears that this relates to inter alia the provision of security to IG Index, one of the CFD providers, and there is reference to a "personal guarantee and indemnity". The question of personal guarantees given by the Plaintiffs in respect of the CFD positions and their related knowledge of those transactions is clearly a central issue."

44. In fact there is no message added by Colin Morgan – it simply forwards Mark McNamara's email with the attachments and four documents scanned in. There is nothing in the email to demonstrate why it should attract privilege. The mere fact that it is sent to MHC is not sufficient. It does not contain or seek any legal advice. It is from the Quinn Group, not from the plaintiffs, to MHC. The documents scanned in all date to March/April 2006, so are not in themselves encompassed by the discovery ordered by McGovern J, but the email itself being dated 2008 clearly comes within the scope of Category B. The documents are also captured by the discovery order of Moriarty J (in categories (v), (vi), (xii), (xiv), (xviii), and/or (xix)) and therefore should have been discovered already.

The email is not a document in respect of which the issue of waiver arises, but it is a document which on its face does not attract privilege at all, and I therefore direct its disclosure.

Category A documents

45. Save as set out below I determine that the plaintiffs are entitled to maintain privilege over the Category A documents. The general comments made above at paragraphs 37-39 in respect of Inadequately Described documents apply equally to the Category A documents.

46. Document 2 (0.7.45 56943-00001) dated 10th September, 2008 is correctly described by the plaintiffs as "Email from Fiona McCaul at Quinn Group to Aoife Quinn, Brenda Quinn, Ciara Quinn and Collette Quinn requesting them to sign documents relating to undertaking and request a certifying transfer shares." McCann Fitzgerald in their second comment assert that privilege is waived because of the relationship back/connection of this document to the subject matter of the 14th May, 2010 attendance note. I do not agree that privilege is waived, because this is a separate transaction. However McCann Fitzgerald in their first comment (14/8/18) state "it is again not clear how legal advice is asserted over this document, given that it is an email from a non—lawyer to three of the plaintiffs". I agree with that comment (save that the email is in fact addressed to 4 of the plaintiffs). Furthermore even if Ms McCaul was sending this email and the attachments on behalf of MHC, it is concerned not with legal advice, but with the provision of legal services. It does not attract legal advice privilege and should be disclosed.

47. Document 139 (0.7.4 5.41552 – 000001) dated 29th April, 2010 is described as a "draft letter (unsigned) regarding the accounts of Quinn Finance Holding from Dara O'Reilly to the ODCE.". Litigation privilege is claimed. McCann Fitzgerald's first comment is "this appears to relate to response to the ODCE (Peter Durnin is an officer in that organisation)". In the second comment there is an assertion of waiver of privilege because the document "is connected with the company Disclosed Privileged Document 'ODCE draft for discussion purposes' which was a draft in response to letters from the ODCE dated 19/12/2008." I do not agree that there is waiver of privilege.

However the document as furnished with the memory stick does appear to bear the electronic signature of Dara O'Reilly, Finance Director of Quinn Finance Holding, and on its face does not appear to be a draft letter, and if this is the letter that was sent to Mr. Durnin it does not attract litigation privilege.

The matter is further complicated by inspection of documents 142 (0.7.4 5.25592) and 143 (0.7.4 5.25592 – 000001). The first of these is a short email dated 30th April, 2010 from Fiona McCaul of Quinn Group to Peter F Durnin of the ODCE attaching a letter, with

the original "to follow in the post". The second document is the attachment, and is a letter dated 28th April, 2010 from Liam McCaffrey, Chief Executive of Quinn Finance Holding, bearing his signature, to Peter Durnin. This letter is in very similar terms to document 139. This strongly suggests that document 139 is indeed a draft that was not sent, and that the document actually posted to Peter Durnin by Quinn Finance Holding is document 142. Assuming this is so, I cannot see how documents 142 or 143 attract legal advice privilege or litigation privilege (as claimed), and I will direct their disclosure. Assuming document 139 is in fact to be treated, as claimed in the Plaintiffs' response, as a draft, then it attracts privilege which has not been waived and it need not be disclosed.

48. Turning to the disclosed attendance of the telephone call at 10am on 14th May, 2010 between Niamh Callaghan and Michael Grace of MHC, and Dara O'Reilly and Marie Carroll, based on the principles enunciated earlier I treat the 'transaction' for the purposes of considering implied waiver of other documents as limited to the confines of the conversation itself. However, it is pertinent to note the second paragraph of the attendance which reads: –

> "Niamh Callaghan (NC) directed Dara's and Marie's attention to a list of questions previously provided to Dara. Reference this list is reproduced as a schedule hereto (the "Questionnaire")."

This raises issues in respect of two documents over which the plaintiffs seek to maintain privilege.

49. The first is Document 323 (0.7.45.9528), an email from Niamh Callaghan of MHC to Dara O'Reilly at 19.09 on 14th May, 2010, the same day as the telephone call the subject of the disclosed attendance.

In the email, over which privilege is claimed, Ms Callaghan opens by stating –

> "As I mentioned on our call this morning, one of our 5 clients specifically asked the 5 questions noted below. Some of these will be answered on the questions we already raised, however if you could separately answer each of these, I would be grateful…."

From this it is clear that the five questions referred to in this email came up in the course of the conversation that morning. Having reviewed the email I have come to the conclusion that the five questions which it relays were part of the conversation, and revealing the attendance alone gives an incomplete and potentially misleading picture which would risk being unfair to IBRC. I therefore hold that privilege has been impliedly waived and I direct disclosure of Document 323 (0.7.45.9528).

50. The second is the Questionnaire mentioned in the attendance. It is clear from a reading of the attendance that questions raised in the Questionnaire were mentioned on numerous occasions during the conversation on 14th May, 2010, to the point where it could be said that the Questionnaire effectively formed the agenda for the conversation, the main purpose of which was for MHC to obtain instructions, information and documentation from their clients. Moreover the attendance refers to the Questionnaire in a schedule, although that schedule does not appear with the disclosed document.

51. I am satisfied that the Questionnaire is so intimately connected with the content of the conversation that it would be unfair, and IBRC would be at risk of litigious disadvantage, and there would be a risk that IBRC would be misled, if the scheduled Questionnaire (which presumably left blanks for responses) was not disclosed. I therefore hold that privilege has been impliedly waived and I direct disclosure of the Questionnaire.

52. It seems to me that a copy of this Questionnaire appears as document 491 (0.7.4 5.60490 – 00001) as an attachment to an email dated 1st June, 2010. Accordingly, and assuming that I have correctly identified the Questionnaire, I direct disclosure of Document 491.

53. I note in passing document 676 which is a section 68 letter sent by MHC on 14th May, 2010. This is not referenced in the telephone attendance, and I regard it as a distinct 'transaction' in respect of which the plaintiffs are entitled to maintain privilege.

54. In many instances McCann Fitzgerald in their Comments of 26th October, 2018 seek to rely on the 14th May, 2010 attendance to support waiver of privilege over documents in which MHC seek instructions or give advices, or receive from their clients information or documents for the purpose of enabling them to give advice. The unfairness of extending the implied waiver beyond the immediate 'transaction' emerges quite starkly from some of the documents, for example numbers 96, 928, 929, 935 and 936 which contain witness statements provided by the five Quinn children in September 2010. This is taken to absurd lengths where disclosure is sought of emails/files described as relating to MHC "workflow, work pipeline and fees", such as document 1008 created on 23 September 2010.

Category B Documents

55. Save to the extent indicated below, the plaintiffs are entitled to maintain privilege over the Category B Documents.

56. Documents 534, 538, 541, 542, 551, 552 and 616 are a series of emails dated 26th June, 2008 and (in the case of 616) 27th June, 2008, all of which concern the execution of board minutes, confirmations and a certificate required by Anglo Irish Bank Corporation plc. in respect of Bazzely transactions. Although legal advice privilege is claimed, these emails do not consist of legal advice; in my view they evidence the provision of legal services and no more than that. They do not attract privilege and should be disclosed.

57. I note that the plaintiffs are now making voluntary disclosure of many documents created on 27th or 28th January, 2009 in respect of which privilege had earlier been asserted – see documents 940 – 961. These relate to the response and preparation of the letter to be sent to the ODCE. Amongst the disclosed privileged documents at tab 3 in the Folder is a detailed email dated 27th January, 2009 from Justin McKenna of MHC to Paul Gardiner S.C., seeking his advices in relation to the appropriate response to the ODCE. It does not follow that there is implied waiver of privilege in respect of counsel's advice/opinion. The email seeking advices is one 'transaction' over which the plaintiffs can choose to waive privilege, and counsel's advices are a separate and distinct transaction in respect of which the plaintiffs are entitled to choose to maintain privilege.

58. Document 1155 dated 13th February, 2009 is described as "Letter from MHC to ODCE in response to ODCE letters addressed to numerous members of staff and director of the wider Quinn Group dated 19th December, 2008." It is not described as a draft and it is therefore not apparent on the face of the document why privilege is claimed. However it is unsigned, and may be a draft. The court has not been supplied with document numbers 1149 – 1154 inclusive, and it may well be that document 1155 is an attachment to an email, and still the subject of legal advice. If that is so the plaintiffs can maintain privilege, but if it is the final document that was sent to the ODCE then it does not attract privilege and should be disclosed.

59. Document 1156 is a copy of the letter dated 19th December, 2008 from the ODCE to Liam McCaffrey. I do not see how litigation privilege can be claimed in respect of this document, and it should be disclosed.

Summary of documents ordered to be disclosed
"Inadequately Described Documents":

Cat.A

None.

Cat.B

Doc.82 (0.7.45.74812).

"Category A":

Doc.2 (0.7.45 56943-00001).

Doc.139 (0.7.45.41552-000001) - unless it is an unsent draft.

Doc. 142 (0.7.4 5.25592).

Doc.143 (0.7.4 5.25592 – 000001).

Doc. 323 (0.7.45.9528).

Doc. 491 (0.7.4 5.60490 – 00001) (Questionnaire scheduled to telephone attendance of 14th May, 2010).

Category B:

Doc. 534 (0.7.45.13341).

Doc. 538 (0.7.45.25947).

Doc. 541 (0.7.45.26050).

Doc. 542 (0.7.45.27028).

Doc. 551 (0.7.45.75445).

Doc. 552 (0.7.45.75453).

Doc. 616 (0.7.45.9589).

Doc. 1155 (0.7.45.43214-000001) – unless it is an unsent draft.

Doc. 1156 (0.7.45.43214-000002).

Subject to hearing from counsel I propose to order disclosure by close of business on Friday, 22nd February 2019.