Neutral Citation: [2014] IEHC 209

THE HIGH COURT

[2013 No. 7737 P.]

BETWEEN

GREEN PASTURES (DONEGAL)

PLAINTIFF

AND

AURIVO CO-OPERATIVE SOCIETY LIMITED AND DAVID RAMSEY

DEFENDANTS

JUDGMENT of Mr Justice Ryan delivered on the 4th April, 2014

This is an application by the plaintiff to strike out the defence of the first defendant for failure to make discovery or, in the alternative, for an order for further and better discovery to comply with orders of this Court.

1. Background

Green Pastures and Aurivo are milk producers in Co. Donegal. The plaintiff is an unlimited company in a relatively modest way of business with a small number of farmer suppliers under contract. The first defendant, Aurivo, is a major milk producer in the State and operates in Co. Donegal and surrounding areas; it is a farmers' Co-op which has a large number of farmer milk suppliers associated with it by contract. The second defendant, Mr Ramsey, is a farmer and milk supplier.

The plaintiff's case is that the first defendant unlawfully induced Mr Ramsey, one of their milk producer farmers, to change over to Aurivo by offering him extra milk quota. They allege that this was a policy adopted by the first defendant to take clients from rival milk suppliers. The plaintiff seeks injunctions and claims damages for inducing breach of contract and other wrongs in tort and contract law. In the course of the proceedings, it obtained an order for discovery of documents and the dispute now before the Court is whether the first defendant has complied with it in respect of one category of the Order for Discovery. Category 4 is the matter of controversy. It says:-

> "All documents, howsoever described, referring to, disclosing or evidencing the methods used and/or systems employed by the first defendant when determining the allocation of any excess milk quota to milk suppliers, including, but not limited to documents referring to any additional quota which may be allocated to the second defendant."

The discovery process began with a letter of the 5th September, 2013 in which the plaintiff sought voluntary discovery in respect of six categories of documents. Aurivo agreed to make discovery of four of the six categories. On the 21st October, 2013, Birmingham J. in this Court directed discovery of the two disputed categories, one of which was Category 4. In purported compliance, the first defendant swore affidavits of discovery on the 30th October, 2013, and on the 15th January, 2014, and copies of the documents were furnished. The plaintiff considered that the discovery was deficient and following correspondence, issued another motion seeking an order striking out the defence or alternatively directing full and proper discovery. That matter came before me on the 24th January, 2014. Following a half day's hearing, I gave an *ex tempore* judgment in which I directed further and better discovery. Aurivo had interpreted the order of Birmingham J. as referring to the allocation of a specific category of quota. It seemed to me that Category 4 comprised documents relating to any excess or extra quota that the first defendant was able to distribute or allocate to a supplier/farmer. The first defendant made further discovery on the 29th January, 2014, in light of my ruling. This motion concerns the further discovery that was made and Green Pastures complains that this discovery is also inadequate and non-compliant with my order and that of Birmingham J.

Aurivo claims to have complied fully with the orders. It has discovered a small number of documents and furnished the plaintiff with copies. The plaintiff seeks a much more extensive list of documents and the defendant does not deny that such documents exist but it says that they are not within Category 4.

Green Pastures claims that the first defendant has acted in blatant, deliberate disrespect of the order by adopting a meaning that is so narrow as to deprive the category of any practical effect. The plaintiff accordingly seeks to have Aurivo's defence struck out or an order for further and better discovery to give effect to the plaintiff's understanding of the meaning of Category 4.

The issues that arise on this motion are first, the meaning of Category 4 of the order and specifically whether the first defendant has complied with it; secondly, if the defendant has failed to comply, whether it did so deliberately with intent to evade its discovery obligation; thirdly, if so, what relief or remedy or sanction is appropriate?

Before referring to the debate in the affidavits, it is necessary to refer to the rules applying to milk quotas. The references in the affidavits to Annexes 1 and 2 are to the 'Handbook for Milk Purchasers and Direct Sellers', outlining the milk quota regime in Ireland, which was published by the Milk Policy Division of the Department of Agriculture, Food and the Marine in May, 2010. Annex 1 is headed "Maintenance and Retention of Milk Intake Records and Reconciliation of Milk Intake" and part 1 is entitled "Records to be Retained by Purchasers" and comprises twelve classes of information.

These records are extremely detailed, including information recording each producer's name and address, the quantity of milk each producer delivered on each delivery, details of supplies by each producer on a periodic basis, including the individual records and accumulative figures, the average fat content of the deliveries by each producer and extensive records required under the European Communities (Milk Quota) Regulations 2008. The final class is a compendium of the milk purchaser's business records.

Annex 2 is headed "Administration of Milk Quota Records" and comprises nine categories of quota records.

2. The Affidavits

The issues were debated in detail in a series of affidavits in which the plaintiff's allegations of deficiency of discovery by the first

defendant were set out and justified and the defendant's responses were answered by Mr. Molloy and Mr. Brady in a total of five affidavits. In reply on behalf of Aurivo came three affidavits by Mr. Walsh and one by Ms. Shanley, the solicitor for the company. It is unnecessary to set out or discuss all of the affidavits in detail and the following represents a summary of the main arguments.

2.1 Mr. John D. Molloy
Mr. Molloy is the Site Operations Director of the plaintiff and he swore three affidavits. He details the specific areas of deficiency as being failure to list documents in Annex 1 and Annex 2 of the Milk Quota Regulations. He provides examples of areas in respect of which no documents have been discovered: dual quota holder registers, dormant supplier registers, and/or registers of those producers recommencing deliveries following a cessation or suspension of supply for a period of six months or more.

Mr. Molloy acknowledges that the milk quota trading scheme is operated by the Department, but he quotes a Department document as saying that it is "run on a co-op area basis". He avers that information relating to the purchaser and buyer is sent to the respective co-operatives for adjustments to be made to relevant milk quotas by reference to the individual milk suppliers' milk accounts. In other words, the first defendant Co-op has documents relating to milk quota trades that have been made through the Department in the scheme operated by the Department.

Mr. Molloy emphasises the importance of the documents and the prejudice to the plaintiff if the extra discovery that he seeks is not made. He says in his first affidavit that the discovery ordered by the court in relation to Category 4:-

> "is required to enable the plaintiff to test the first defendant's contention that its operations are fully compliant with the Milk Quota Regulations and to show, by reference to primary records produced and maintained by the first defendant, how (and to what extent) the first defendant in fact manages, controls and/or administers excess quota, unused quota and dual supply
>
> arrangements in and around Co. Donegal, notwithstanding the very high level of regulation to which the market for the production and supply of milk is subject."

Mr. Molloy also avers at para. 12, that:-

> "Whilst the plaintiff can see, for example, that the first defendant has administered the transfer of very substantial volumes of quota in specified years, it cannot determine how, or on what basis, or in what circumstances, such transfers took place. Nor can it identifing (sic) all of the parties to which such transfer. This is of particular concern in circumstances where, on the basis of the limited number of aggregated summaries discovered by the first defendant, the administration by the first defendant of transfers involving large volumes of quota (which I say and believe must have been undertaken under dual supply arrangements) is not matched by a corresponding increase in the number of suppliers to the first defendant. I say that without seeing the primary documents relating to such transfers (none of which has been provided), such anomalies cannot be understood or interrogated and the plaintiff will be unable to determine whether transfers have occurred (as the first defendant says) in compliance with the requirements of the Milk Quota Regulations or whether, as the plaintiff says, such transfers have been administered in a manner inconsistent with the regulations and in order to induce the breach of contract complained of in the within proceedings."

There are two significant points about Mr. Molloy's first affidavit. He claims that Annex 1 and Annex 2 of the Milk Quota Regulations, which require detailed documentary records to be maintained by the first defendant and other similar milk producers, are comprised within Category 4 of the discovery order. Secondly, he claims to be entitled to see the documents in order to appraise the compliance by the first defendant with the Milk Quota Regulations. The first point is a matter of interpretation of Category 4 of the discovery order. The second point is a more general one relating to relevance and cannot succeed if Category 4 does not include the documents that Mr Molloy is looking for.

2.2 Mr. Anthony Walsh
In his replying affidavit for the first defendant, Mr. Anthony Walsh, Farm Services Manager of the Co-op, gives a detailed description of the milk quota system and how it operates. He deposes that Aurivo made discovery in accordance with the order of Birmingham J. on the basis of the industry understanding of "excess milk", the term used in the order. Following the hearing before me on the 24th January, 2014, when I directed that excess milk should be understood to have a broader meaning, Mr. Walsh made further discovery which he says complied fully with the order that I made.

Mr. Walsh explains that there are three modes whereby a farmer may acquire additional milk quota over and above what he gets from the Department of Agriculture, Food and the Marine. First, the quota trading scheme enables a farmer to sell the whole or part of his quota to another farmer in the same purchaser pool. It is operated by the Department and the co-op has no function in determining the allocation of the traded quota. The co-op does have a purely administrative role in producing and sending out forms, confirming that purchasing farmers are its suppliers and that sellers own the land to which quotas are attached. The co-op obviously has to keep its own records up to date following changes in quota ownership to ensure that correct information is filed as to the quotas held by particular farmers. Mr. Walsh says that the second defendant has not in fact applied to participate in the trading scheme through Aurivo. The Department of Agriculture, Food and the Marine makes the decision to assign quota under the trading scheme from one farmer to another and not the Co-op. The latter has no function in determining the allocation. There are accordingly no relevant documents under Category 4 of the discovery orders in the possession, power or procurement of the first defendant.

Secondly, there is a temporary leasing scheme which Aurivo administers in accordance with detailed rules issued by the Department. The co-op does not have discretion to give a quota to a requesting farmer, otherwise than in strict conformity with the scheme. The information that the co-op records includes whether farmers seeking quota are dual suppliers, i.e., sending milk to two milk producers. Mr. Walsh says that Aurivo made full discovery of all relevant documents relating to this scheme. The second defendant, Mr Ramsey has not applied to participate in the temporary leasing scheme through Aurivo. In respect of the quota year 2009/2010, in which there are no documents discovered, Aurivo did not run a temporary leasing scheme.

The third mode of transferring milk quota is under the flexi-milk scheme. There are no records in the first defendant's possession under this heading because Aurivo has made no allocations since 2004. The Co-op has not been over quota since that year and therefore the flexi-milk scheme does not arise for consideration. Mr. Walsh says that it would not be possible in any event to give extra quota under the scheme, but the question does not arise.

Mr. Walsh also swears that a farmer may transfer some of his milk quota from one purchaser to another, but such a transaction by a dual supplier is done by the farmer and not by the purchaser. There is no question of Aurivo determining the allocation of excess quota in such a case.

Mr. Walsh then addresses the alleged deficiencies listed by Mr. Molloy and rejects them in turn. He says at para. 43(iii) that:-

> "Mr. Molloy avers that the items at Annex 1 and 2 of the Handbook for Milk Purchasers and Direct Sellers ought to have been discovered. I do not see how the greater majority of these items have anything to do with *'the methods used and/or systems employed by the First Defendant when determining the allocation of any excess quota to milk suppliers'* under any of the milk quota trading scheme, the temporary leasing scheme or the flex-milk scheme, as I have outlined above. Further, I note that Mr. Molloy does not list the temporary leasing spread sheets which were discovered by Aurivo in light of the ruling of Mr. Justice Ryan that Category 4 was not limited to allocations of flexi milk under Regulation 22. For the avoidance of doubt, discovery has been made of all documents all within Category 4, including all relevant documents listed in Annex 1 and 2."

2.3 Mr. Michael Brady
This deponent is the managing director of Brady Agricultural Consultants Limited and the outgoing national President of the Agricultural Consultants Association. He has been retained by the plaintiff as an expert witness and swore an affidavit dated 10th February, 2014.

Mr. Brady does not actually challenge the evidence sworn by Mr. Walsh as to how the milk quota purchase scheme operates but that is not obvious. At para. 20 of his first affidavit he sets out the steps in the process of sale of quota by one farmer to another. He does not say that the Co-op has a function in determining the allocation of milk quota, but says that "it must have documents to evidence the role it plays in ensuring that the trades are given effect". Mr. Brady expresses himself confusingly, but he does not deny the specific points made by Mr. Walsh that (a) the Department allocates and determines the allocation of quota from one farmer to another under the purchase scheme and (b) the Co-op's function is administrative only.

In regard to the temporary leasing scheme, again Mr. Brady does not disagree with Mr. Walsh on how the scheme works. In relation to this scheme, Mr. Brady concludes at para. 21, that the spreadsheets and tables as discovered by the first defendant do not constitute compliance with the court orders "in the absence of the primary documents". But that is not correct, in my opinion. The applications for quotas or offers by farmers are not documents concerning the methods etc. used when determining the allocation of quota.

In regard to flexi-milk, Mr. Brady does not challenge the averment by Mr. Walsh that this does not arise.

Mr. Brady then seeks to justify the demand for the documents contained in Annex 1 and 2 of the Regulations. In regard to "supplier milk intake and milk quota data items (A) to (D)", Mr. Brady says that:-

> "Discovery of primary documents and reconciliation with the end of year summary as declared to the Department of Agriculture, Food and the Marine verifies all data being the output of the methods used and the systems employed".

Mr. Brady attempts to justify and connect the other items in Annex 1 and the records under Annex 2 with the discovery order, swearing that these categories of documents:-

> "Evidence the systems used and methods employed in so doing and that discovery of primary documents clears any misunderstanding between the plaintiff and defendants. The documents will serve to evidence the systems used and methods employed in so doing."

2.4 Mr. John D. Molloy's second affidavit
In this affidavit Mr. Molloy returns to the dispute and says that "documents evidencing the transfer and allotments of quota between suppliers are all captured by Category 4 as evidencing the mechanisms and systems that the first defendant used to redistribute or make available quota belonging to suppliers for the first defendant's commercial gain". Later in his affidavit, Mr. Molloy says the following:-

> "I say that the first defendant simply cannot hide from the fact that irrespective of whether one employs the term allocation, allotment or distribution, the inescapable conclusion is that the first defendant was capable of moving quota from one purchaser to another, and was capable of controlling and managing its milk quota pool to secure a nil return of unused quota or flexi milk. The foregoing facilitated the first defendant's inducement of the second defendant to breach the terms of its contract with the plaintiff."

2.5 Second affidavit of Mr. Anthony Walsh
In this affidavit, Mr. Walsh claims that Mr. Brady has misunderstood the meaning of Category 4. He says that Annex 1 and Annex 2 were not sought by Counsel in the application before me on the 24th January, 2014, neither were they referred to in the hearing before Birmingham J., nor were they sought in the voluntary discovery letter and Category 4 contains no reference to either Annex. The plaintiff is now seeking every document in respect of the processing and giving effect to milk quota transactions, which would allow the plaintiff to audit Aurivo's entire business "without the plaintiff having identified a single specific incident of wrongdoing" by this defendant.

Mr. Walsh disagrees with a statement by Mr. Brady that the Department and the milk purchaser allocate the successful trades, which is an averment he made in respect of the milk quota trading scheme. This is one of the statements made by Mr. Brady that I described as confusing. From what appears later in Mr. Brady's affidavit, it seems to me that what he meant was that the Department did indeed decide which farmer was to get which quota or part quota from farmers offering their quotas in whole or in part, following which the Co-op in question recorded the information and then acted on it and obviously there was a communication of the information from the Department to the Co-op. By eliding these two functions, the Department's function of deciding which farmer was to get which quota or part quota and the Co-op's role in recording and registering the information for its purposes, Mr. Brady gave a misleading impression that the two parties were jointly involved in deciding on the allocation of the quota. However, it seemed from what he said later in the affidavit and specifically where Mr. Brady listed out the various steps that he said were typical of a quota trading transaction that the was accepting the statement made by Mr. Walsh as to the respective functions of Department and Co-op. If he was in disagreement with Mr. Walsh, he would no doubt have expressly said so.

Mr. Walsh acknowledges that Aurivo has internal documents recording the allocations made by the Department under the trading scheme. He says at para. 27 of this affidavit:-

> "I say that Aurivo has internal documents which record the allocations made by the Department following the operation of the milk quota trading scheme. Aurivo has at no point disputed the existence of such documents. I say however that just because they exist does not mean that the plaintiff is entitled to them on discovery. In circumstances where the plaintiff has not pleaded anything in relation to the milk quota trading scheme and in circumstances where I say and believe that Aurivo has an exclusively administrative role in its operation and does not make any allocations, I say that the plaintiff is not entitled to any material relating to the scheme."

In relation to the temporary leasing scheme, Mr. Walsh insists that the Co-op has not any discretion as to the determinations they make and must carry out the calculations strictly in accordance with the Department's rules. Again, Mr. Brady used a confusing expression. Mr. Walsh says that Aurivo has made discovery of all relevant documents under this head in compliance with the order that I made.

Mr. Walsh says that the completed forms from farmers leasing quota or acquiring it under this scheme are commercially valuable but do not reveal anything about the method or system employed by the first defendant in the determination of allocations to farmers. Thus, it is not within Category 4.

He says that documents in Annex 1 are not required to be discovered.

Mr. Walsh says that Aurivo has made discovery of all documents evidencing or describing the method or systems employed by Aurivo when allocating quota to dual suppliers.

Mr. Walsh rejects the argument put forward by Mr. Brady as to the alleged deficiencies in the discovery made.

As to the affidavit of Mr. Molloy, again Mr. Walsh takes issue with the criticisms made of the discovery by Aurivo and he says that Mr. Molloy's averment about Aurivo's capacity to move quota from one purchaser to another in relation to flexi-milk is made without any evidence and he says that if Aurivo was able to that, one would have expected Mr. Brady to describe how it might be done.

2.6 Second affidavit of Mr. Michael Brady
Mr. Brady refers to the claim that the first defendant has misused its operation of excess milk quota, which seems to me to be a reference to the flexi-milk system. Aurivo would say that excess milk refers exclusively to the flexi-milk system but the plaintiff contends that it includes but it is not confined to it.

Mr. Brady embarks on an examination of the milk records of two suppliers to Aurivo, the Lockharts and the Callans, with a view to demonstrating that the milk statements that the Co-op supplied to those farmers are anomalous and difficult to make sense of and he cites particular reasons why in each case that should be so.

2.7 Third affidavit of Mr. John D. Molloy
The third affidavit of Mr. Molloy is no more than a repetition of previous arguments and more debate about the alleged irregularities of the record keeping by Aurivo. It also goes into some other matters that it is unnecessary for me to debate.

2.8 Third affidavit of Mr. Anthony Walsh
Mr. Walsh joins issue with Mr. Brady once more and then addresses the records of the Lockharts and the Callans and furnishes explanations in each case to show that there is, as he contends, nothing anomalous or inexplicable therein. Neither do these records contain evidence of unauthorised use of available milk quota, according to Mr Walsh's testimony. Obviously, those records were furnished to Mr. Brady for his analysis but there is no affidavit evidence from the farmers involved.

These exchanges in regard to the Callans and the Lockharts simply demonstrate in my view that there is deep suspicion between the parties and allegation and counter allegation. I do not see, however, the potency of any connection between the alleged irregularities in the case of those farmers and the understanding or interpretation of the records required to be discovered by virtue of Category 4 of the discovery order. It could be said that Mr Brady has demonstrated some apparent irregularities in the record keeping of Aurivo in regard to the Callans and the Lockharts. Obviously, Mr Walsh disputes that and has provided a detailed explanation of the matters raised by Mr Brady. But even assuming that the plaintiff were able to establish some irregularity in regard to farmers A and B, does that justify a reading of a category of discovery that would not otherwise entitle the party seeking discovery to get access to the documents? I do not think so.

2.9 Ms. Caren Shanley
In this affidavit the solicitor in the firm acting for the first defendant provides a comprehensive exposition of her client's approach to the discovery, including the view that it took on the range of the documents encompassed by Birmingham J.'s order and the issue of excess quota and unused quota that came before me. Ms. Shanley gives the history of the discovery process and describes the submissions at the hearings in court. The fundamental points that this deponent makes are that the plaintiff is misunderstanding Category 4 of the order and that the Annex 1 and 2 records are wholly outside it and that the first defendant has indeed complied fully with the Court's directions. The factual issues are dealt with in Mr. Walsh's affidavits and so I concentrate on them rather than on the instructions that he and the company gave to their solicitors. Ms. Shanley is emphatic on matters within her knowledge, namely, that Aurivo never sought to evade its obligations in discovery and relied on legal advice to ensure that it was in full compliance.

3. Submissions of the plaintiff
The plaintiff's case is that Aurivo makes milk quotas available to farmers in circumstances where it is not entitled to do so, as a way of enticing them to breach their contracts with the plaintiff and to supply them instead. Aurivo has avoided making discovery by relying on a strict interpretation of the orders of the Court on two separate occasions. Pursuant to O. 31, r. 21 Rules of the Superior Courts, ("RSC"), the first defendant's claim should be struck out:-

> "If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly."

As this Court said in *Campion v. Wat* [2013] IEHC 45:-

> "The jurisdiction to strike out a claim or a defence for failure to make discovery exists for the purpose of enforcing and

ensuring compliance with the court's orders."

The plaintiff submits that any subsequent trial will be unfair because of the defendant's lack of compliance with the two discovery orders. Neither of the orders confined the categories of documents for which discovery was sought by reference to the wording of the Regulations. Category 4 applies because the documents are evidence of transfers of quotas, which formed part of the system used by the first defendant to re-distribute quota belonging to suppliers for their own financial gain - the documents being sought will show the methods used by the defendant and endorse the plaintiff's claim. The fact that the defendant has failed to discover the relevant documents from Annex 1 and Annex 2 of The Handbook for Milk Purchasers and Direct Sellers, 2010 is evidence of their wilful default and non-compliance with this Court's order.

The plaintiff argues that certain conditions must be satisfied for a farmer to sell his quota, including:-

(1) Evidence of compliance with the eligibility criteria must be recorded by the purchaser;

(2) Evidence of compliance with quota deliveries;

(3) The farmer meets the definition of 'Producer in the Milk Purchaser's Area' or 'Multiple Quota Holders';

(4) The farmer must have had their obligations under the EU hygiene regulations confirmed;

(5) The application form must be drawn up correctly by both the purchaser and filled out correctly by the producer;

(6) The butter fat level is established based on the cumulative fat representative level of all the producers who surrendered all or part of their quota under the temporary leasing scheme;

(7) Category 1 farmers leasing quota under the temporary leasing scheme must be treated as Category 2 for the allocation of unused quota and they will only qualify under the temporary leasing scheme once all other producers have been satisfied;

(8) If there is insufficient demand for quota under the temporary leasing scheme, the unallocated quota should be submitted to the Department of Agriculture, who then distribute it via a national pool to areas with insufficient supply; and

(9) The plaintiff alleges that the defendant was operating 'dual supply' with a number of purchasers but did not discover the register of dual supply holders, which it is obliged by the Department to keep.

In respect of all of the above, the documents discovered by the defendant do not show that any assessment was carried out in relation to meeting these eligibility requirements. The defendant must have these records because it could not operate the distribution of the quota lawfully without doing so. Contrary to the defendant's complaint that to produce the documents would be akin to subjecting it to an audit, this is exaggerated as the plaintiff has no interest in the quality of the records kept, it is merely interested in ascertaining whether the defendant has lawfully, or unlawfully, distributed (or refused to distribute) additional quota, which is central to it's argument. The claim has been pleaded and particularised and the plaintiff needs the documents to support its case.

The plaintiff submits that the test is modest – it does not have to establish that it will win the case; the only question is 'has the issue to which the documents related been raised and denied?' The test in *Compagnie Financiere u Pacifique v. Peruvian Guano* (1882) 11 Q.B.D. 55, which Fennelly J. held to be the "universally accepted test" of the primary requirement for discovery in *Ryanair v. Aer Rianta* [2003] 4 I.R. 264 entitles a party to the discovery of any documents;

"Which it is reasonable to suppose contain information which may – not must – whether directly or indirectly enable the party requiring discovery to advance his own case or damage that of his opponent."

The plaintiff says that the relevance of the documents sought is beyond dispute. The Court has twice approved an order for discovery and it is inappropriate and an abuse of process for the defendant to attempt to re-litigate the necessity and relevance of the documentation to be disclosed.

In *Mercantile Credit Company of Ireland & Anor. v. Heelan & Ors.* [1998] 1 I.R. 81, in considering an application to strike out a defence for failure to make discovery as per O. 31, r. 21 RSC, Hamilton C.J. held at p. 85:-

"The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and 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.

It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect.

The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."

The plaintiff also cites *Johnston v. Church of Scientology* (Unreported, Supreme Court, 7th November, 2001) where the Supreme Court reiterated that the courts have jurisdiction to strike out a claim or a defence when they are satisifed that the extent of non-compliance with the order is such that it is not possible to have a fair trial. The plaintiffs submit that *Johnston* supports their contention that the defendant's non-compliance with discovery obligations will prevent them from having a fair trial. As Keane C.J. held:-

"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."

Keane C.J. then cited the decision of Barrington J. in *Murphy v. J. Donohue Limited* [1996] 1 I.R. 123, where he said at p. 142:-

> "'[U]ndoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and such cases will be extreme cases'".

In *W v. W* (Unreported, Supreme Court, 25th November, 1999) Barron J. stated:-

> "….It is a totally different thing to delay deliberately in furnishing discovery or in concealing deliberately documents which are known to be relevant. It is this latter behaviour for which there should be an adequate sanction."

In *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 265, Clarke J. summarised the overall approach to discovery at para 3.3:-

> "1. In order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.
>
> 2. If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.
>
> 3. The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials . . .
>
> 4. [T]he court can seek to fashion an appropriate order . . . to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence asserted."

Clarke J. reiterated these principles in the subsequent case of *Thema International Fund plc v. HSBC* [2011] IEHC 496, at para 3.4 where he said:-

> ". . . [P]roportionality can also play a role in relation to the disclosure of confidential information, at least in circumstances where documents are sought to be disclosed which are highly confidential (and, in particular, where the confidence of third parties is involved) and where the relevance of the documents concerned to the case may be at best marginal. ….[A]s Kelly J. pointed out in *Cooper Flynn v. RTE* [2000] 3 I.R. 344, the requirement that justice be administered fairly will trump any obligation of confidence in ordinary circumstances so that confidentiality will not, ordinarily, provide a basis for the non-disclosure of materials which are of real relevance to the proceedings."

Relying on the quoted authorities, the plaintiff's claim is that without the defendants' documentation relating to the Milk Quota Regulations, they will be prejudiced in prosecuting their claim. They believe that they will not be able to plead their case as stated and allege that the Court's ability to adjudicate will be impaired without access to the Category 4 documentation.

4. Submissions of the first defendant

The first defendant submits that while the plaintiff makes no allegation of specific wrongdoing by them, in this action the plaintiff is effectively suggesting that every record relating to the operation of every aspect of their milk quota scheme be discovered.

Following the ruling of this Court, the defendant made additional discovery in the affidavit of Anthony Walsh, dated 30th January, 2014. All relevant documents on the method and system used to determine the allocation of excess milk quota to suppliers were discovered and there are no other documents falling within the scope of the order.

Mr. Molloy in his affidavit at para. 7(iii), (iv) and (vi), refers to three categories of documents which he claims he needs to support his claim. The defendant has made submissions in respect of each category.

They say that counsel for the plaintiff confirmed in a question to the court that discovery was not being sought in respect of the documents listed in Annex 1 (A to L) or Annex 2. The annexes had only been opened to show that the documents existed and were maintained. Despite this, Mr. Molloy in his affidavit at para. 7(iii) states that "the items listed in Annex 1 to the Milk Quota Regulations (subcategories (A) to (L) have not been provided." The defendant says that the only item actually omitted from (A) to (L) of Annex 1 is item (E) and the pursuit of these documents contradicts what counsel for the plaintiff told the court on the 24th January, 2014. Therefore any assertion that because documents in the annexes were not discovered the defendants are in breach of the court order and their defence should be struck out or cross-examination ordered, is moot.

The defendants contend that the plaintiff is actually seeking all documents relating to every single transaction concerning the Milk Quota Regulations. These documents are not relevant to the current proceedings and do not fall within Category 4 of the order of Birmingham J. and none of them are even referred to in Category 4. At the motion hearing on 21st October, 2013, no reference was made that items (A) to (J) were intended to be captured by Category 4. No reference was made to the annexes until a letter to the first defendant's solicitor on the 19th December, 2013. On the 24th January, 2014, it was made clear to the court that discovery was not being sought in respect of Annex 1 and 2.

The first defendant says that while Mr. Molloy acknowledges that "the Department computes certain figures to afford milk suppliers the opportunity to sell and buy quota by matching willing purchasers and willing buyers", he still seeks records of the first defendant as adjusted by reason of the determinations made by the Department. Adjusted records do not describe or evidence "methods used and / or systems employed by the first defendant when determining the allocation of any excess milk quota to milk suppliers" and do not therefore fall within Category 4.

The first defendant also submits that Mr. Brady has misinterpreted the operation of the Milk Quota Trading Scheme. His categorisation of some of the steps in what he calls the eight 'typical top level steps' in the scheme illustrates that the milk purchaser has no role in the allocation or determination of allocation of any milk quota. Mr. Molloy alleges there has been no discovery of Aurivo's declaration for the quota year 2009/2010 in respect of the temporary leasing scheme but submits that Aurivo was not involved in a temporary leasing scheme in 2009/2010.

On the legal issues, in *Sterling-Winthrop Group Limited v. Farbenfabriken Bayer Aktiengesellschaft* [1967] I.R. 97, it was held that an

order for further and better discovery will not be made solely on an affidavit which alleges that the other party has documents relevant to the action which have not been disclosed in the affidavits of discovery. Mere suspicion is not enough.

In *Framus Limited v. CRH plc* [2004] 2 I.R. 20 the Supreme Court approved the judgment of McCracken J. in *Hannon v. Commissioners for Public Works* (Unreported, High Court, 4th April, 2001) where he stated at p. 35:-

> "(1) The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.
>
> (2) Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that O. 31, r. 12 of the Rules of the Superior Courts 1986 specifically relates to discovery of documents 'relating to any matter in question therein'.
>
> (3) It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other party's documentation is not permitted under the Rules.
>
> (4) The court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties."

The defendant submits that the above principles suggest that the application for further and better discovery should be dismissed. The plaintiff has misunderstood the extent and boundary of the discovery, which is restricted to methods and systems used when determining allocation of quota and there is no convinving evidence that the order of the Court has been breached.

On the application to have the defence struck out, the first defendant submits that if any default on their part had been identified, striking out the defence would not be appropriate in light of *Campion v. Wat* [2013] IEHC 45. A more appropriate method to query assertions made by the plaintiff on affidavit would be by way of cross-examination. While O. 31, r. 21 RSC gives the court authority to strike out a defence if a party fails to comply with an order for discovery, the jurisdiction is exercised in the most extreme cases. This point was affirmed by the Supreme Court in *Murphy v. J. Donohue Limited* [1996] 1 I.R. 123 where Barrington J. held at p. 142:-

> "Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court."

This approach is outlined more recently in *Dunnes Stores v. Irish Life Assurance* [2010] 4 I.R. 1, where Clarke J. held at p. 8:-

> "I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned."

The first defendant submits that its approach to the discovery process has always been to act in good faith and all reasonable measures were taken to comply with the order. The categories sought by the plaintiff referred to 'excess quota' and the first defendant has interpreted this as 'unused quota' within the meaning of Regulation 22. They submit that this interpretation was incorrect but state that it was an understandable error and one taken on foot of legal advice.

The defendant has not sought to conceal the existence of documents from the plaintiff; it has in its possession the records created and maintained pursuant to Annex 1 and 2. The issue is the extent to which any of those documents come within the scope of Category 4. It is submitted that Mr. Molloy's beliefs or suspicions can only be dealt with at the trial of the action.

5. Discussion

This case involves a bitter dispute between the plaintiff and the first defendant. There are many allegations of irregularity and improper practice. Some of the debate in the affidavits is more concerned with allegations of improper behaviour and is not really concerned with discovery. These questions will be fought out at the hearing of the action and are not for me to address but it may be worth explaining to the parties that my decision on this application has nothing to do with the merits of the case.

The dispute before the court is about the meaning of Category 4 of the order of discovery: what documents does it require to be discovered? The plaintiff is seeking a wide range of documents based on its interpretation of the meaning of the words. Thus, because the category refers to allocation of milk quotas, the plaintiff takes this to mean that the co-op must disclose all documents that relate in any way to allocation of milk quotas, whether those documents come from the Department or anywhere else. Furthermore, the plaintiff cites the Milk Quota Regulations, which contain at Annex 1 and Annex 2 a long list of the details that every co-op is required to keep in conformity with the Regulations, and the plaintiff claims that it is entitled to see all of those documents.

The relevant part of the order of discovery is as follows:-

> "All documents, howsoever described, referring to, disclosing or evidencing the methods used and/or systems employed by the first defendant when determining the allocation of any excess quota to milk suppliers, including but not limited to documents referring to any additional quota which may be allocated to the second defendant."

This may be reduced to the following essential elements, that is to say, documents relating to the methods used and/or systems employed by Aurivo when determining the allocation of any excess milk quota to milk suppliers, including but not limited to documents referring to any additional quota which may be allocated to Mr. Ramsey, the second defendant.

This category seeks documents relating to how the defendant decides on the allocation of excess milk quota to milk suppliers. The implication is that Aurivo determines the allocation of excess milk quota to milk suppliers. The plaintiff wants Aurivo to discover all relevant documents as to the method Aurivo uses to do that, including how it did so in the case of the second defendant. It is obvious that the category of discovery is focusing on the methods and systems Aurivo uses "when determining the allocation".

It is clear in my view that this does not mean the documents that are required to be kept as records by Aurivo under the milk quota

regulations as specified in Annex 1 and Annex 2. It is in conflict with the meaning of the words used to try to read the category as meaning every record relating to milk quotas. The suggestion that all records held by the Co-op relating to milk quotas, including the quantities of milk supplied by farmers and the records sent to the Co-op by the Department of allocations made by the latter, come into this category is irrational and wholly contrary to the meaning of the words used in Category 4. Those records have nothing to do with deciding how that allocation of excess milk quota is made.

The plaintiff is seeking in this motion to examine all Aurivo's records in regard to milk supply and milk quota. It is not entitled to do that. It is certainly not entitled to do it by reference to Category 4. That has a specific class of documents that concern the determination by Aurivo of the allocation of excess milk quota to milk suppliers. Not just the determination, but specifically the methods used and/or systems employed when carrying out that exercise. It is not the result of the exercise, neither is it the documentary application forms that give rise to the exercise. It is the methods used etc. when determining the allocation. Documents that are relevant to the methods and systems are discoverable; others are not discoverable.

The plaintiff has engaged in an all out attack on the first defendant in respect of its compliance with discovery. But the attack is misdirected. It is based on a misunderstanding of the terms of the category of discovery.

The plaintiff says in Mr. Molloy's affidavits and also in Mr. Brady's affidavits that what it wants to do essentially is to monitor the performance of the Co-op/first defendant in complying with the Milk Quota Regulations. The plaintiff wants to inspect the first defendant's records in order to satisfy itself that the Co-op has complied with the Regulations and to discover if there are instances where it has failed to do so. It says that this may assist its case or will do so. Clearly that is possible. There may be some irregularities revealed in a trawl through all the first defendant's records and establishing those failures or breaches of regulation may well assist in a general way the case made by the plaintiff. It is possible also that some specific material may be revealed which is of assistance.

The problem for the plaintiff is that that is not what discovery is about. Discovery is not a process of trawling through the opponents records and documents to see whether and how it has complied with its legal obligations in general or to other parties or even towards the plaintiff. It is much more specifically focused and that is why the categories are specified. A party's documents are its own property and it is not obliged to reveal them to another litigant even in proceedings between them, unless the specific document or category of documents is actually relevant to the issues in the case and that has to be demonstrated on the pleadings. It seems to me that the mistake the plaintiff is making here is to believe that because it makes a specific allegation that the Co-op engaged in wrongdoing in a particular manner, it is entitled to go through all the defendant's milk quota records with a fine toothcomb to see what may turn up. Simply because allocation is a word used in the category of discovery, it is frankly absurd to suggest, as Mr. Brady does, that that means that it is discoverable. I may say that I think it is wholly inappropriate for Mr. Brady to purport to declare that the Co-op has failed to make discovery. That is a conclusion that is entirely for the Court and while during the hearing I was indulgent in regard to the averments made by Mr. Brady, the more I think about it the less tolerant I think I ought to have been. But I suppose having taken a lenient view in the course of the proceedings, it is scarcely appropriate for me now to adopt a sterner approach.

The dispute here as I have said is about the meaning of Category 4. It is not a dispute about whether documents exist. The Co-op acknowledges that documents exist under Annex 1 and Annex 2 because it is obliged to keep those records. But it says that those records have nothing to do with the case and they are not required under Category 4. I accept that submission.

There is another point. Mr. Anthony Walsh has sworn an affidavit denying in the most specific detail the allegations made by the plaintiff that Aurivo has not complied fully with its discovery obligations. Despite indignant disagreement expressed in the plaintiff's affidavits, those rebuttals stand as the position that is adopted by Aurivo. I should mention in this connection that Ms. Shanley, the solicitor for Aurivo, has furnished an affidavit rebutting the claims of inadequate discovery. In circumstances where there is claim and counterclaim in affidavits about discovery with substantial issue joined and backed up by detailed argument, it would not be appropriate or legitimate or even possible for a court to deprive one party of its entitlement to defend the case without making some express factual findings. And that could not be done by comparing and contrasting the affidavits that have been sworn in this case.

In fact, however, I am satisfied to a greater degree than simply identifying factual disputes as between plaintiff and first defendant. It seems to me that the matter goes further than that. In my view, the plaintiff's notion of what is comprised in the discovery obligation in respect of Category 4 is misconceived. In those circumstances, there is no question but that the motion must fail.

I wish to say also that if I had come to the conclusion that the plaintiff was correct in its analysis and understanding of the discovery obligation, I would have ordered further and better discovery and would not have struck out the Aurivo defence. This is a situation entirely different from a case where there is some malicious determination to evade the obligation to make discovery. The plaintiff makes that suggestion about the Aurivo discovery, namely, that it has been provided on the narrowest base possible by way of deliberate and *mala fide* determination to misconstrue the order so as to provide as little material as possible but I do not accept that proposition and I do not think that the nature of the dispute gives any basis for arriving at that conclusion.