THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 157

Record Number: 2017 No. 139

Irvine J.
Peart J.
Baker J.

BETWEEN:

WATERFORD CREDIT UNION LIMITED

PLAINTIFF/RESPONDENT

- AND -

J & E DAVY

DEFENDANT/APPELLANT

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 5TH DAY OF JUNE 2019

1. This is an appeal by J & E Davy ("Davy") from an order for discovery in respect of three categories of documents made against it by the High Court (Keane J.) on the 3rd February 2017. I will refer to the respondent as "Waterford".

2. By their letter dated 25th October 2012 to Davy's solicitors, Waterford's solicitors sought ten categories of documents by way of voluntary discovery. In response Davy agreed to provide eight categories, but declined the remaining two. Subsequently by further letter dated 9th September 2014 following receipt of an amended defence, Waterford sought an additional three categories of documents. No agreement was reached in relation to those additional categories. Waterford issued a notice of motion on the 13th April 2012 seeking an order for discovery of five categories of documents. In the course of submissions to the trial judge, Waterford abandoned its application in respect of two of these five categories, leaving just three categories remaining for determination.

3. Davy contends firstly that the trial judge erred in his application of the well-known discovery principles of relevance and necessity, and secondly, and most unusually, an issue arises as to whether the trial judge took appropriate account of the fact, which was acknowledged during the hearing, that Waterford's solicitors had breached its implied undertaking as to confidentiality in relation to discovery of documents by Davy made *in other proceedings* in which the same firm had previously acted. Davy has submitted that the trial judge's approach to this serious and acknowledged breach of undertaking, and the delay by the firm in acknowledging same over a two year period despite inquiry by Davy's solicitors as to the source of the firm's knowledge of a certain bond (the Jyske bond), was erroneous, and that this of itself was sufficient to warrant a refusal of the respondent's application for discovery, even if, absent such breach as occurred, the Court might consider that the order should be made.

4. Before addressing these issues, I will set out briefly the factual background to these proceedings.

5. Waterford is a credit union. Davy is a firm of stockbrokers and investment advisers with whom Waterford entered into a contract in January 2005 by which it retained Davy as its investment adviser, and also agreed to provide funds to Davy for investment into such investments as Davy advised as suitable and appropriate for a credit union. Over €5 million was so provided by Waterford which was invested in certain bonds which, it is alleged, Waterford was advised by Davy and were led to believe were bonds which guaranteed the capital sum invested, and also complied with the Trustee (Authorised Investments) Order 1998 ("the 1998 Order"). Waterford discovered subsequently that the bonds in which Davy invested its funds did not comply with the 1998 Order, did not guarantee the capital sum invested, and provided no definite maturity date.

6. Waterford's case is that it would not have invested in these bonds had Davy not advised it to do so, and if it had known of the matters just referred to. It is alleged that Davy is guilty of misrepresentation, breach of warranty, breach of contract, breach of fiduciary duty, breach of statutory duty and negligent mis-statement, and Waterford seeks an indemnity and/or compensation in respect of the sums invested together with interest. In an amended statement of claim Waterford also claim that Davy failed to disclose that it was acting a principal in the sale of bonds into which it advised Waterford to invest its funds, and was making a secret profit which it failed to disclose.

7. Davy's defence and amended defence contain a general traverse of the allegations and claims made by Waterford, specifically in relation to the claim that it did not disclose to Waterford that it acted as a principal and that it had earned a secret profit Davy pleads at para. 26(d) of its amended defence:

> (d) without prejudice to the foregoing, in meetings between the plaintiff and the defendant in or around August 2006 and March 2008, the defendant confirmed to the plaintiff that it had acted as a principal in the sale of bonds and had earned a sum in that regard. In the premises, the defendant will contend that the plaintiff's claim in relation to an alleged "secret profit" (which claim is denied) is statute barred having regard to the provisions of the Statute of Limitations and/or that the plaintiff has acquiesced in and/or waived the said claim and/or is estopped from raising the said claim and/or is guilty of laches and/or inordinate delay in respect of the said claim."

The three disputed categories of discovery:

8. The three categories of documents ordered to be discovered by Davy are set out in the order under appeal as follows:

"(i) the separate reports furnished by the Irish Stock Exchange to the defendant in June 2007 and February 2008 with regard to the investigation carried out by the Irish Stock Exchange into the defendant's conduct of its business with regard to the sale by the defendant of investment bonds to Credit Unions including the plaintiff;

(ii) all notes, memorandum (sic), documentation (whether in written or electronic form) comprising all documents relating to the defendant's alleged disclosure to the plaintiff that the defendant was acting as principal on the sale of the bonds subject matter of the proceedings in which the plaintiff invested; and

(iii) all notes, memorandum (sic), documentation (whether in written or electronic form) relating to meetings (to include all minutes and notes taken at or subsequent to the meetings) between the plaintiff and the defendant in August 2006 and March 2008 and which are expressly referred to in paragraph 26 (d) of the defendant's amended defence at which it is alleged by the defendant that the defendant disclosed to the plaintiff that it had acted as principal in the sale of the bonds the subject matter of the proceedings and had earned a sum in that regard."

Category (i) above -- The I.S.E reports:

9. In its letter seeking voluntary discovery, Waterford explained the reason for seeking discovery of this category as follows:

"The plaintiff in the statement of claim in pleading its case against the defendant has pleaded in paragraph 11 of the statement of claim that the defendant failed to highlight to the plaintiff the essential features and risks of the investment bonds in which the plaintiff was asked to advise (sic) and/or in failing to explain and evaluate the investment bonds in a comprehensive manner and in a manner compliant with the defendant's statutory duties and obligations under the Stock Exchange Act, 1995. The defendant has denied this pleading in paragraph 22 of its defence. The plaintiff in its reply has joined issue with this denial including the denial pleaded in paragraph 23 of the defence. Consequently, voluntary discovery of the above category of documents is relevant to the matters in issue in the proceedings. In particular, the plaintiff in its reply has expressly pleaded that the Stock Exchange prepared two reports in June 2007 and February 2008 in which the defendant was found in breach of its duties as pleaded in the plaintiff's statement of claim. Consequently, voluntary discovery of the above category of documents is relevant and necessary and will assist the plaintiff in establishing its claim against the defendant. Voluntary discovery of this category of documents will also assist in saving costs."

10. In response by letter dated 29th November 2012, Davy's solicitor stated:

"Our client refuses to make discovery of this category. The Stock Exchange Reports referred to do not deal with and are not relevant to the subject matter of the claims made in these proceedings. The plaintiff is manifestly engaged in a fishing expedition. It is not enough to reference a plea in the reply. The plaintiff has to demonstrate some basis for asserting that these reports are relevant to the issues that arise in these proceedings and has failed to do so."

11. In his judgment the trial judge referred to the correspondence that had passed between the solicitors, and to the fact that in its affidavit opposing the discovery of this category, Davy had exhibited a copy of a public statement issued by the Irish Stock Exchange on the 8th April 2009 in relation to Davy. The trial judge set out the following part of that press statement which he considered to be material:

"The Exchange, as part of its oversight and supervision of stockbrokers, became aware in late 2006 of issues of concern regarding possible breaches by [Davy] of Irish Stock Exchange conduct of business rules. These related to its sale of a number of perpetual Constant Maturity Swap (CMS) bonds to some of its credit union clients.

Following a detailed regulatory review, the Exchange issued its findings in a report to Davy, which was also provided to the Financial Regulator, in June 2007. Before various agreed measures had been implemented further relevant information became available to the Exchange. The Exchange's final findings and the necessary actions to be taken by Davy were set out in a second report in February 2008. The report was also provided to the Financial Regulator.

In January 2008, Davy commenced a process which culminated in a proposal to credit unions, in May 2008, of a comprehensive arrangement which addressed performance issues with the bonds. This proposal was accepted by the vast majority of credit unions at a cost to Davy of over €35m. This negotiated settlement between Davy and its clients was welcomed by the Exchange as it dealt with the core issue of loss of value of the bonds.

The Exchange investigations concluded that there had been breaches of the Rules of the Exchange by the firm in particular in relation to:

- The completeness of disclosure of certain information to credit unions concerning the bonds and the provision of written evidence to demonstrate that it had taken due care to ensure that the relevant credit unions understood the characteristics of the bonds; and

- Taking all reasonable steps to ensure the bonds were full compliance with the Trustee (Authorised Investment) Order 1998.

The Exchange also acknowledged important mitigating factors such as:

- The changed investment demands of credit unions which were seeking higher yield investments,

- Fundamentally altered conditions and bond markets, and

- The extensive interaction between Davy and its credit union clients.

The Exchange is satisfied that Davy has taken appropriate remedial action to ensure that internal controls and conduct of

> business procedures have been rectified to mitigate against any recurrence of the breaches discovered. This and the arrangements agreed with credit unions bring closure to this matter and it addressed the actions required of Davy by the Exchange in its reports." [Underlining at first bullet point provided]

12. Davy asserted in the High Court, and on appeal to this Court, that the ISE investigation was carried out only in respect of "a sample" of credit unions and that Waterford was not part of that sample, and in that regard pointed to the reference in the statement above to "the relevant credit unions" at the first bullet point above, as underlined. It is submitted therefore that the reports are not relevant to Waterford's claim as it was not part of the sample of credit unions referred to. The replying affidavit by Davy's solicitor sworn on the 7th May 2015 also stated (para. 22) that "the defendant had engaged with the ISE at the time of the investigation as part of a private and confidential process [and] that having regard to that process, the ISE Reports and the papers relating thereto were also confidential and private."

13. Davy submitted that Waterford had not established that these ISE reports are relevant to the issues in these proceedings, given that the investigations from which the reports derive their existence did not involve any investigation into the investments related to Waterford. Mr Peter Barry, the general manager of Waterford on the other hand in his second affidavit, while accepting that the ISE investigation was in relation to a sample that did not include Waterford specifically, nevertheless referred to that part of the ISE press statement which stated that the review related to "issues of concern regarding possible breaches by [Davy] .. of Irish Stock Exchange conduct of business rules" … which … "related to its sale of a number of perpetual Constant Maturity Swap (CMS) bonds to some of its credit union clients …", and that it had been concluded by the ISE that Davy had breached the rules of the exchange in its dealings with the sampled credit unions in a manner which, in Mr Barry's view, corresponds exactly to the way in which it breached its duty to Waterford. Mr Barry considered that "it can hardly be argued that the mere fact that the plaintiff was not one of the credit unions selected for the sample considered in the regulatory review means that the findings set out in the ISE reports are not relevant".

14. The trial judge found these reports to be relevant, and rejected Davy's argument that being just a sample of which Waterford did not form a part meant that it dealt with issues separate and distinct from the issues being raised in these proceedings by Waterford. The trial judge referred to a particular part of the public statement already mentioned, and stated that this "is also strongly indicative of systemic issues, rather than of a disparate collection of distinct and unique problems in the defendant's dealings with each of a number of specific credit unions". In these circumstances the trial judge was satisfied that it is reasonable to suppose that the two ISE reports in question "contain information which may, either directly or indirectly, enable the plaintiff to advance its own case or damage the case of the defendant".

15. As for the necessity of discovery, Davy had submitted that Waterford had done no more than merely assert that discovery was necessary for the fair disposal of the proceedings, but without advancing any particular reasons in that regard.

16. As for Davy's argument that the public interest in maintaining the confidentiality of the regulatory or disciplinary process which led to the ISE reports outweighed any interest that Waterford had in the documents being made available by way of discovery, the trial judge considered that question at some length and, having done so, stated at para. 54 of his judgment:

> "54. For the reasons I gave in considering the question of relevance, I am satisfied that the contents of the two regulatory review reports at issue are very likely to be material to issues likely to arise in the proceedings, and that the degree of confidentiality attaching to the relevant materials is not so significant as to outweigh the interest of the common good in their disclosure for the purpose of ascertaining the truth and rendering justice."

17. Before arriving at that conclusion, the trial judge looked at the level of confidentiality that might attach to Davy's involvement in the supervisory and disciplinary process of the Stock Exchange, and he referred to the ISE public statement dated 8th April 2009, and to the fact that appended to it was an explanatory note which by reference to the ISE Rules stated that the ISE "may make a public statement at the conclusion of disciplinary proceedings in relation to a member firm of the [ISE]". He referred also to the fact that copies of the review reports in question had been furnished by the ISE to the Financial Regulator. In these circumstances the trial judge concluded at para. 49 of his judgment:

> "49. It follows from these rules that any member firm of the ISE, such as the defendant, that engages openly in the regulatory process, as each member firm is obliged to do, does so in the knowledge that any information it provides in that context may be made public as the ISE sees fit."

18. The trial judge distinguished the confidentiality in the documents sought in the present case from other cases where the documents contain commercially sensitive information relating to a competitor, and he was also satisfied that the reports were not "part of settlement discussions between the defendant and the ISE of a kind that, in the ordinary course, attract privilege against disclosure". The trial judge also rejected Davy's reliance upon the protection of confidential communications and privacy rights under Article 8 of the European Convention on Human Rights.

19. On this appeal Davy has submitted that the trial judge erred in his consideration of the category (i) documents – the two ISE reports – by failing to reach any conclusion on the question whether, even though he found the reports to be relevant, they were also "necessary", and that he appears to have proceeded directly to the question of confidentiality raised by Davy. It is submitted that the issue of whether confidentiality outweighs the interest in disclosure of the documents, arises only once both relevance and necessity have been established, and not simply relevance as in this case. It is submitted that in the present case the trial judge has conflated relevance and necessity, and therefore erroneously moved straight into the question of confidentiality, having found relevance established.

20. While it is correct to identify from the judgment of the trial judge, as the appellant does, that having concluded that the two ISE reports were relevant to some of the issues raised and traversed in the pleadings, he did not explicitly make a finding as to necessity, and went from relevance straight to the question of whether discovery should be refused on the basis that confidentiality outweighed the public interest in disclosure, it is not in my view an infirmity that of itself should lead to this appeal being allowed, and discovery refused.

21. I accept of course that not in every case where a document is found to be relevant will it also be considered to be necessary that it be discovered. The two elements must be satisfied both in accordance with O. 31, r. 12 RSC and the settled case law on this question. It is worth noting the words of Fennelly J. in his judgment in *Ryanair plc v. Aer Rianta* [2003] I.R.264 at p.276:

> "In the great majority of cases, discovery disputes have revolved around the issue of relevance. There are fewer cases concerning necessity. There are good reasons for this. If there are relevant documents in the possession of one party, it

will normally be unfair if they are not available to the opposing party. Finlay C.J. in his judgment in *Smurfit Paribas Bank Ltd v. A.A.B. Export Finance Ltd* [1990] 1 I.R. 469 emphasised, at p. 477, "the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice". The overriding interest in the proper conduct of the administration of justice will be the guiding consideration, when evaluating necessity for discovery.

The issue of "necessity" for discovery has, consequently, usually been debated in cases where some other interest is involved, particularly the confidentiality of documents, especially where they involve the interests of third parties. To that extent, the arguments advanced on behalf of the defendant on this appeal, effectively that the plaintiff does not need the documents, because they have alternative means of establishing the relevant facts, has rarely arisen.

In order to establish that discovery of particular categories of documents is "necessary for disposing fairly of the cause or matter", the applicant does not have to prove they are, in any sense absolutely necessary. Kelly J. considered the matter in his judgement in *Cooper Flynn v. Radio Telefis Eireann* [2000] 3 I.R. 344. He derived the useful notion of "litigious advantage" from certain English cases. He adopted the following statement of Bingham M.R. in *Taylor v. Anderton* (C.A.) [1995] 1 W.L.R. 447 at p. 462:-

> 'The crucial consideration is in my judgment, the meaning of the expression 'disposing fairly of the cause or matter'. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment the test."

It may not be wise to substitute a new term of art "litigious advantage" for the words of the rule. Nonetheless, the discussion gives guidance as to the context in which the matter has to be considered. Within that context, the court has to reach a conclusion as to the likely effect of the grant or refusal of the discovery on the fair disposal of the litigation."

22. In my view there is no doubt whatever that the two ISE reports are relevant to the issues raised in these proceedings, and I agree with the trial judge's conclusion in that regard. The fact that the press statement indicates that the reports were prepared on the basis of investigations carried out by reference to a sample of credit unions only does not detract from the relevance of the reports to the claims made by Waterford. It is reasonable to conclude that the sample was a representative sample – in other words representative of credit unions generally with whom Davy had dealings in relation to the type of bonds at issue in the case of Waterford. In so far as Waterford has pleaded criticisms, allegations and deficiencies relating to the advice given to it, or not given as the case may be, the investigation by the ISE into similar issues arising in relation to the sample of such credit unions chosen for investigation must be relevant to the issues in dispute in these proceedings. It is reasonable to suppose that relevant findings against Davy in relation to the sample credit unions which are contained in the report would either assist Waterford in asserting and proving its claims, and meeting the denials of its allegations by Davy, in conducting cross-examinations of Davy witnesses, and/or may adversely affect Davy's ability to defend the allegations made by Waterford.

23. In that same sense the two reports can easily be considered to be necessary. I appreciate that the trial judge did not carry out any discrete analysis in relation to necessity, as opposed to relevance, but in the present case the two concepts are established for the same reasons. It was unnecessary to carry out any separate analysis, though perhaps the reason for eliding the two concepts ought to have been clearly explained.

24. As to whether the desirability in the public interest of disclosing the reports is outweighed by the confidential basis on which Davy engaged with the investigation, and their claim to confidentiality as a result, any such confidentiality is not that of some third party but Davy itself. The trial judge gave consideration to this question as is clear from his judgment. I agree with his conclusion that the confidential basis on which it engaged with that process is not a sufficient interest to outweigh the interest of Waterford being able to deploy the reports at trial in order either to advance their own case, or to damage the case put up by Davy in defence of the claims made against it. In this way, the Court takes account of (in the language of Fennelly J. in *Ryanair*) "the likely effect of the grant or refusal of the discovery on the fair disposal of the litigation", and the words of Bingham M.R in *Taylor v. Anderton* that "the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection", and is consistent with Fennelly's statement in *Ryanair* that "the overriding interest in the proper conduct of the administration of justice will be the guiding consideration, when evaluating necessity for discovery".

25. In these circumstances, I am satisfied that these two reports are both relevant and necessary for the purposes of satisfying the provisions of O.31, r.12 RSC and in accordance with the legal principles applicable.

Category (ii) above: (ii) all notes, memorandum (sic), documentation (whether in written or electronic form) comprising all documents relating to the defendant's alleged disclosure to the plaintiff that the defendant was acting as principal on the sale of the bonds subject matter of the proceedings in which the plaintiff invested.

Category (iii) above – (iii) all notes, memorandum (sic), documentation (whether in written or electronic form) relating to meetings (to include all minutes and notes taken at or subsequent to the meetings) between the plaintiff and the defendant in August 2006 and March 2008 and which are expressly referred to in paragraph 26 (d) of the defendant's amended defence at which it is alleged by the defendant that the defendant disclosed to the plaintiff that it had acted as principal in the sale of the bonds the subject matter of the proceedings and had earned a sum in that regard.

26. Categories (ii) and (iii) above may be conveniently dealt with together.

27. Davy makes the same complaint in respect of these categories in relation to the trial judge's conflation of the concepts of relevance and necessity. However, for the same reasons as I have explained in relation to category (i) I am satisfied that these categories are both relevant and necessary in the light of the issues raised on the pleadings, despite Davy's reliance on the fact that it has admitted that it acted as principal in relation to the sale of the bonds in question. Waterford advances the case, inter alia, that in addition to acting as such principal Davy earned a secret and undisclosed profit. I am satisfied that even though this issue was not raised until the amended statement of claim was delivered, these categories of documents are nonetheless relevant and necessary to assist Waterford to advance its case and/or damage the defence being advanced by Davy. I agree with the trial judge's conclusions

in this regard.

28. As for Davy's complaint that the discovery ordered is excessively wide by reference to the words "relating to" disclosure and to meetings in the categories ordered, and should be confined to documents "recording" such disclosure and meetings, I am satisfied that the trial judge was entitled to exercise his discretion in the manner in which discovery should be ordered. There is no evidence that any such discovery would be unduly onerous and/or lacking in proportionality. I would not vary the discovery order on that ground.

The breach of implied undertaking:
29. The remaining question is whether the conduct of the solicitors acting for Waterford in breaching its implied undertaking in relation to discovery made in a previous and different case in which they were acting for a different credit union altogether is so egregious, being a breach of the implied undertaking **to the court**, that the court should refuse to make an order for discovery in favour of Waterford in respect of some or all of the categories of documents to which they would otherwise be entitled on the basis of the ordinary discovery principles. While it is acknowledged by Waterford, albeit very late in the day, that what occurred is a serious breach of the undertaking to the court which is implied when a party obtains an order for discovery of documents, it was submitted to the trial judge that it was "entirely inadvertent". The trial judge concluded on this matter as follows at paras. 61- 63 of his judgment:

> "61. On the basis of counsel's instructions that the use of the information concerned by the plaintiff's solicitor in *inter partes* correspondence prior to the issue of the plaintiff's motion was entirely inadvertent, the plaintiff next submits that, from the solicitor's perspective, such a mistake was easy to make, since it is as difficult to 'unknow' things as it is to put toothpaste back in the tube, and is not always easy to recall the source of what one believes one knows. On a human level it is difficult not to have some sympathy for that position. But it is difficult to maintain that sympathy when the court is obliged to consider the plaintiff's solicitors' steadfast refusal for more than two and a half years to admit that error and, indeed, the plaintiff's castigation of the defendant's solicitors both in correspondence and on affidavit during that period for raising a concern about the matter. It is easier to pass over the mistake, if mistake it be, than to overlook the failure to acknowledge it for more than two and a half years until the hearing of the application.
>
> 62. Whatever about the plaintiff's solicitor, it is clear that the plaintiff in this case did not provide the undertaking at issue and, hence, did not breach it. In those circumstances, counsel for the plaintiff submits that the correct approach is to consider whether the court would be minded to order discovery of this category of documents, disregarding for that purpose (as the court has done) the information improperly deployed in breach of that undertaking (i.e. the purported confirmation that the ISE regulatory review reports specifically address the defendant's role in the sale of the Jyske bond). I accept that submission and I have already determined that, by reference to the information contained in the ISE public statement of 8th April 2009, the contents of the two regulatory review reports at issue are very likely to be material to issues likely to arise in the proceedings and are, therefore, discoverable for the reasons I have already outlined.
>
> 63. On that basis and that basis alone, I conclude that discovery of this category of documents should be ordered, notwithstanding the admitted breach by the plaintiff's solicitors in these proceedings of the undertaking that they gave to this court in other proceedings. However, it may be necessary to revisit the issue in due course in connection with the appropriate ancillary orders on this application."

30. It is necessary to set out certain of the correspondence between the parties' solicitors which followed upon Waterford's solicitor's letter dated 25th October 2012 seeking voluntary discovery of the two ISE reports. At para. 9 above I have set out the reason given for seeking discovery of the reports, and at para. 10 I have set out the response by Davy's solicitors refusing this category on the basis that it was a 'fishing exercise' and that "the plaintiff has to demonstrate some basis for asserting that these reports are relevant to the issues that arise in these proceedings and has failed to do so. To address that refusal Waterford's solicitors responded as follows by letter dated 7th March 2013:

> "We do not accept that the defendant is entitled to refuse to make voluntary discovery of the documents identified in category 8 of our letter of 25th October 2012. One of the substantial issues in the proceedings relates to the representations, assurances and advice given by the defendant to the plaintiff, which is a credit union, with regard to the investment made by the plaintiff in the investment bonds pleaded in the statement of claim. It is the plaintiff's case that the plaintiff invested in these bonds, further to the representations, assurances and advice given by the defendant.
>
> You will be aware of the statement by the Irish Stock Exchange ("ISE") of Wednesday 8th April 2009, a copy of which we enclose. The statement refers to the ISE becoming aware of "… issues of concern regarding possible breaches by [Davy] of Irish Stock Exchange conduct of business rules. These related to its sale of a number of perpetual Constant Maturity Swap (CMS) bonds to some of its credit union clients". The statement goes on to refer to the two reports made to the Financial Regulator in June 2007 and February 2008.
>
> The statement goes on to say as follows:
>
> 'The Exchange investigations concluded that there had been breaches of the Rules of the Exchange by the firm, in particular in relation to:
>
> • The completeness of disclosure of certain information to credit unions concerning the bonds and the provision of written evidence to demonstrate that it had taken due care to ensure that the relevant credit unions understood all the characteristics of the bonds; and
>
> • Taking all reasonable steps to ensure the bonds were in full compliance with the Trustee (Authorised Investment) Order 1998".
>
> **We are aware that the investigations by the ISE concerned, inter alia, Davy's role in relation to the JYSKE perpetual bond, which is one of the bonds at issue in the present proceedings, and the manner of Davy's remuneration in relation thereto it may well relate to other bonds acquired by our client on the advice of Davy.**
>
> **Given these factors, and the findings of the ISE in its statement as quoted above,** which correspond to the allegations made by our client in the present proceedings, **the reports are clearly relevant and can in no way be**

characterised as a 'fishing expedition'…". [Emphasis provided]

31. In its further letter dated 29th April 2013, Davy's solicitors reiterated its refusal of this category of documents, but went on to refer to the reference to the JYSKE bond in the said letter dated 7th March 2013 from Waterford's solicitors. In that regard they stated:

> "We are very surprised to note your comment that you are aware that the investigations by the ISE concerned, *inter alia*, Davy's role in relation to the Jyske bond and the manner of Davy's remuneration in relation thereto. The statement makes no reference to the Jyske bond or to any issues concerning Davy's remuneration in relation thereto. We are at a loss, therefore, to understand how you claim to be "aware" of these matters, or indeed any such matters, given the confidential nature of the process referred to above. In the circumstances, please now identify the source of the information on which your alleged "awareness" is based."

32. It would appear that between the date of that letter and the 19th December 2013 Waterford decided that its statement of claim should be amended. Its solicitors wrote to Davy's solicitors seeking their consent to the delivery of an amended statement of claim, a draft of which was enclosed. In addition, the penultimate paragraph of that letter confirmed Waterford's intention to apply to court for an order directing discovery of the disputed categories of discovery. This letter made no reference to the concern expressed by Davy's solicitors in relation to the awareness of the Jyske bond referred to the said letter dated 29th April 2013.

33. By letter dated 22nd of January 2014, Davy's solicitors stated *inter alia*:

> "We find it remarkable that you would write to us in these terms. The last correspondence between us in relation to discovery rested with your letter dated 29 April 2013. As you will be aware, in that letter we clearly set out the basis for our client's refusal to make discovery of categories 8 and 10. Not only have you failed to reply to that letter, you have not even acknowledged it. Our client's position, therefore, is as set out in earlier correspondence, to which you have not responded."

34. Waterford's solicitors wrote again by letter dated 17th of April 2014 noting that discovery was still being refused in respect of these categories, but made no reference to the issue raised as to the source of their awareness concerning the Jyske bond. It is unsurprising therefore that in a letter dated 7th May 2014 Davy's solicitors stated that discovery of these categories had been refused because they were "neither relevant nor necessary for the fair disposal of these proceedings", and that it once again referred to their previous request that the solicitors would confirm how they came to be aware that the particular reports concern Davy's role in relation to the Jyske bond "and, over one year later, you have still not responded to that letter". That letter did not yield any response to this issue either, and resulted in a further letter from Davy's solicitors dated 7th July 2014 in which a number of matters concerning discovery were referred to, including the following at the second paragraph thereof:

> "Our client is particularly concerned that your knowledge of discovery made by our client in the defence by it of High Court proceedings issued by your client Eservices and Communications Credit Union may have lead [sic] to your client's amendment of pleadings and the request for discovery of the ISE correspondence in this case. This is clearly a very serious issue and once more we call upon you to explain how you became "aware" that the ISE correspondence concerns Davy's role in relation to the Jyske bond."

35. While Waterford's solicitors noted the contents of that second paragraph in their reply dated 18th July 2014, they went on to say in relation to the issue raised in relation to their awareness of the Jyske bond that "we fail to see the relevance of the matters canvassed in the second paragraph of your letter". By further letter dated 6th August 2014 they were called upon once again provide the explanations previously sought. However, none was provided in any later correspondence despite further requests.

36. As I have stated already it was not until the hearing of the discovery motion itself before the trial judge in November 2015 that counsel for Waterford acknowledged for the first time that the knowledge concerning the Jyske bond had indeed emanated from discovery made by Davy in proceedings brought against it by a different credit union, for which Waterford's solicitor also acted. The breach of the implied undertaking in relation to documents discovered in that other action was described by the trial judge as "entirely inadvertent", and I have already set out the relevant extract from the trial judge's judgment relating to that question.

37. It has been necessary to set out the relevant correspondence which passed between the parties in relation to this serious matter. It is my view too benign a view was taken by the trial judge of the breach of undertaking. Its seriousness is not properly and adequately reflected by the way in which it was addressed and disposed of by the trial judge. Allowing the discovery on the basis that the court would have been minded to order it if the information improperly deployed is disregarded, but that "it may be necessary to revisit the issue in due course in connection with the appropriate ancillary orders on this application" fails to reflect adequately the seriousness of what occurred. The trial judge appears to have considered that the matter could be addressed in the context of costs, presumably the costs of the discovery motion.

38. The breach of any undertaking, implied or otherwise, given ***to the Court*** and particularly as in this instance by an officer of the court, is a very serious matter, whether inadvertent or otherwise. In this regard it is noteworthy that no explanation, or indeed apology, was offered to the court on affidavit, by the solicitor or any other person responsible. Where an undertaking is offered to the Court by a party to proceedings, the Court will often consider whether the necessary trust can be placed in the person offering the undertaking for the Court can be confident that it will be complied with. Where that trust is not apparent or is in doubt the Court may refuse to accept it. But where it is an undertaking given by an officer of the court, such as a solicitor, that necessary trust is presumed. A solicitor's undertaking is, as I have had reason to say previously, "the hard currency of the solicitors' profession", upon which complete trust is placed in so many different situations, and without which much that is done in reliance upon that trust, either within court proceedings or in legal transactions generally, could not be so conveniently done. It is fundamental to the administration of justice and to the conduct of the business of the profession generally. A breach of an undertaking to the Court, even an implied undertaking such as exists in relation to discovery may be considered to be a contempt of court.

39. The implied undertaking to the Court in relation to documents provided by the other side by way of discovery is that the documents disclosed will not be used for any collateral, ulterior or improper purpose (see for example *Alterskye v. Scott* [1948] 1 All ER 469 at 470). The question may arise in a particular case whether what was done was in pursuance of "a collateral or ulterior purpose". But that question does not arise in the present proceedings as it has been acknowledged that what occurred was a breach of undertaking, and was wrong, albeit that it is contended that it was not conscious or deliberate. There is no doubt that the use to which information gathered from discovery in the previous case was put in the present proceedings is an improper purpose. As is evident from the correspondence already referred to, the awareness of the JYSKE bond was deployed in Waterford's solicitor's letter dated 7th March 2013 in an effort to counter Davy's solicitors' allegation in its letter dated 29th November 2012 that seeking the ISE

reports by way of discovery amounted to a "fishing expedition".

40. The question arises as to how an acknowledged breach of undertaking ought to be dealt with by the court. In *Alterskye v. Scott [supra]* Jenkins J. stated at p. 471:

> "If [a party] can substantiate improper use in any particular case, he has his remedy. He can bring that instance of alleged improper use before the court either on proceedings for contempt, if he considers that it amounts to contempt of court, or on proceedings to restrain the conduct complained of."

41. In that case what was at issue was whether the plaintiff who had made improper use of discovered documents should be refused an order for further and better discovery on account of that conduct. Further and better discovery was ordered notwithstanding the breach of undertaking. But every case is fact specific. In *Alterskye* the improper conduct was that documents provided by the defendant to the plaintiff under a discovery order had been provided to the Ministry of Food and to the police indicating that the defendant had breached certain food regulations, which resulted in the defendant being visited by representatives from that Ministry and by the police. That breach did not gain a litigious advantage for the plaintiff in the litigation itself.

42. A different set of circumstances arose in *Home Office v. Harman* [1983] A.C. (H.L.(E)) 280. In that case the Home Office had made certain discovery under court order. By letter to the plaintiff's solicitor it had made clear that it did not wish the documents to be used for the general purposes of an organisation of which the solicitor acting in the proceedings was also the legal officer. However, as noted in the headnote to the reported case:

> "A few days after the hearing, the solicitor allowed a journalist whom she knew to be a feature writer, and who had been present during part of the hearing, to have access to the documents that had been read out, including the confidential documents, for the purpose of writing a newspaper article. The article was highly critical of Home Office ministers and civil servants. The Home Office applied under R.S.C. Ord. 52, r.9 for an order against the solicitor for relief for contempt of court, alleging that she was in breach of the undertaking, implied by law and affirmed in her letter of October 17, not to use documents obtained on discovery for purposes other than those of the action in which they were disclosed. Park J. held that the solicitor was in contempt of court, but accepted that she had acted in good faith and imposed no penalty."

43. That decision was upheld both in the Court of Appeal, and on further appeal to the House of Lords. In his speech, Lord Diplock stated at p. 307:

> "As was held in *Scott v. Scott* any contempt of court of this kind would be civil. The court would not have jurisdiction to deal with it except on motion by the other party to the action and if the person showing the document to the reporter had no reason to suppose that the party whose document it was would object to his doing so, the court and the proper exercise of its discretion could dismiss the motion with costs.
>
> In the instant case, however, access to the bundles of copies of documents belonging to the Home Office which were in her possession in her capacity as solicitor to Williams only because they had been produced upon discovery, was not given by Miss Harman to a press reporter of either of these kinds, but to a journalist who, as she knew, wanted to use them as material for a feature article upon a matter, no doubt of public interest, which happened incidentally to be involved in the action in which the documents had been produced upon discovery. I agree with Park J. and the Court of Appeal that this was a contempt of court and I would dismiss the appeal with costs."

44. It is well recognised also in this jurisdiction that a party who obtains documents by way of discovery may not use them other than for the purpose of the action in which they were disclosed, and that to do so constitutes a contempt of court – (see Finlay C.J. in **Ambiorix Ltd v. Minister for the Environment** [1992] 1 I.R. 277 at p. 286). The implied undertaking was referred to by Murphy J. also in *Greencore Group plc. v. Murphy* [1995] 3 I.R. 520. He usefully described its purpose at p.528 as follows:

> "The order requiring the production of the documents is an invasion of the right of the person against whom the order is made to keep his documents to himself and it is for that reason that the **court will ensure that documents are not used for any purposes other than the purpose of the particular legal proceedings in which they were produced** by making the order for production subject to that implied undertaking." [Emphasis provided]

45. It is clear that in order to protect its own process from abuse, and ensure the proper administration of justice, and fairness of procedures between the parties to the litigation, the court will take such steps as may be open to it *to ensure* that discovered documents are not used other than in connection with the proceedings in which they were discovered. In some cases, the Court may impose a sanction on the contemnor appropriate to the particular circumstances of the breach, such as a fine or a committal order. Depending on the particular circumstances such a sanction may be the only ones possible.

46. In the present case, however, there are two aspects worthy of the Court's attention and consideration. Firstly, the fact is that an implied undertaking to the court relating to discovery made by Davy in other proceedings has been breached. But secondly, the breach has occurred in circumstances where the court can in addition to or as an alternative to any sanction as such against the person responsible for the contempt of court which the breach constitutes, ensure that Davy, the party whose interests in the present litigation stand to be adversely affected by the breach of undertaking, do not suffer a litigious disadvantage by having information deployed against it by a party (Waterford) which has no entitlement to access to such information.

47. The trial judge at para. 62 of his judgment placed reliance upon the fact that "it is clear that the plaintiff in this case did not provide the undertaking at issue and, hence, did not breach it", and he agreed with counsel for Waterford that "the correct approach is to consider whether the court would be minded to order discovery of this category of documents, disregarding for that purpose (as the court has done) the information improperly deployed in breach of that undertaking …".

48. I cannot agree with that approach to the breach of undertaking. It provides no protection to the offended party, Davy, to permit the information to be deployed simply because it was not Waterford itself who gave the undertaking and did not itself breach it, but rather its agent. If it is wrong that Davy should suffer a litigious disadvantage as a result of the breach, and if the Court's duty is (using the words of Murphy J. in *Greencore Group plc. v. Murphy*) to "ensure that documents are not used for any purposes other than the purpose of the particular legal proceedings in which they were produced", then once the undertaking has been breached in the circumstances of the present case, it matters not to Davy whether it was Waterford or its agent that breached the undertaking. The court can, and in my view should, ensure that the information so gained is not put to a use which advances the interests of the offending party (albeit through the actions of its agent) at the expense of the interests of, or prejudice to, the offended party in the litigation.

49. Equally it does not seem to me to be the correct approach, and to meet the justice of the situation, to say that if the Court disregards the wrongfully deployed information and is still satisfied that the documents are relevant and necessary and should be discovered, the order for discovery should still be made. The possibility that the Court in due course might proceed to mark its displeasure at the undertaking given to the court in other litigation by perhaps making no order in favour of Waterford in respect of its discovery motion, or even an order for costs against it, fails to recognise the seriousness of what occurred, and fails to ensure that documents or information obtained by way of discovery in one set of proceedings is not used for an improper, collateral or ulterior purpose, such as to gain a litigious advantage in another set of proceedings. It would seem to condone the breach (subject to a possible costs order) of undertaking provided that it has no adverse consequence for another party.

50. I fully recognise that an appellate court ought not lightly interfere with an order made in the court below which is in the nature of a discretionary order. In the present case clearly the trial judge had a wide discretion as to how the court would treat and mark the breach of the undertaking in the other case in which the same solicitors were instructed. But where, as here in my view, where the manner in which that discretion has been exercised fails to protect the integrity of the proper administration of justice, an important matter, it is open to the appellate court to exercise its own discretion in way that it considers to be more appropriate.

51. As I have stated, it is open to the court on the facts and in the circumstances of the present case not only to recognise that a breach of undertaking given in other proceedings has occurred (which is admitted), but to prevent the party against whose interests the breach has been committed from suffering a litigious disadvantage as a consequence thereof. The court's powers under its inherent jurisdiction are as ample as may be required for its intervention to be effective and appropriate, and to maintain absolute fairness in the administration of justice.

52. In my view, therefore, despite the trial judge's conclusion, reached without regard to the wrongfully deployed information, that the two ISE reports are relevant and necessary, the Court should as a matter of discretion refuse to order discovery of those reports firstly in order to ensure that Davy does not suffer a litigious disadvantage as a result of the breach, as explained above, and secondly to mark in a meaningful way the serious breach of undertaking that occurred. It is not appropriate to dispose of this serious matter by possibly "revisit[ing] the issue in due course in connection with the appropriate ancillary orders on this application" as stated by the trial judge at para. 63 of the judgment.

53. For these reasons I would allow the appeal, and vary the order of the High Court by refusing an order for discovery of the two ISE reports referred to.