Neutral Citation [2017] IEHC 8

THE HIGH COURT

[2011 No. 555P]

BETWEEN

WATERFORD CREDIT UNION LIMITED

PLAINTIFF

AND

J & E DAVY

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 13th January 2017

Introduction

1. These are cross-motions for orders, pursuant to Order 31, r. 12 of the Rules of the Superior Courts ('RSC'), as amended, directing each of the parties in the above-entitled action to make discovery of certain categories of documents.

Background

2. As its name suggests, Waterford Credit Union Limited ('the plaintiff') operates the business of a credit union in Waterford. J & E Davy ('the defendant') is a private unlimited company that carries on a stock broking and investment advisory business and which, at the material time, held itself out as having an established expertise to advise credit unions concerning appropriate investments for their funds.

3. Through the defendant, the plaintiff invested the aggregate sum of €5,393,831 in bonds issued by four separate banks, comprising: in January 2005, €1,502,250 in a Nordea Bank AB bond; in March 2005, €1 million in a Jyske Bank bond; in October 2005, €1,910,125 in a Barclays Bank Step-Up Perpetual bond; and in August 2006, €981,456 in an AIB Step-Up Perpetual bond.

4. Having issued proceedings on the 20th January 2011, the plaintiff delivered an amended statement of claim on the 17th April 2014. In broad outline, the plaintiff makes the following claims.

5. The defendant, which warranted that it had the expertise to provide investment advice to credit unions, approached the plaintiff in 2003. In January 2005, the plaintiff entered a contract with the defendant to retain the defendant's professional and expert services as its investment advisor and to provide the defendant with funds to invest on its behalf. In reliance upon the defendant's expertise, recommendations and advices, the plaintiff invested in the four bonds concerned. It was a condition of that contract that the defendant would ensure that the plaintiff's funds were invested in instruments that were authorised under the Trustee (Authorised) Investment Order 1998; guaranteed the capital sum invested; and provided a definite maturity date.

6. The bonds concerned were not authorised investments; did not guarantee the capital sum invested; and did not provide a definite maturity date. Further, the defendant failed to comply with its statutory obligations under the Stock Exchange Act 1995 to furnish the plaintiff with all information necessary to enable the plaintiff to know the characteristics of, and risk associated with, the instruments in question. Still further, the defendant failed to disclose to the plaintiff that it was acting as principal in the sale of bonds concerned, which it has advised the plaintiff to invest in, and was thus making an undisclosed, or secret, profit on those transactions.

7. Hence, the defendant is liable to the plaintiff for misrepresentation, breach of warranty, breach of contract, breach of fiduciary duty, breach of statutory duty and negligent misstatement, and the plaintiff is entitled to an indemnity or damages from the defendant in the sum invested, €5,393,831.

8. In the amended defence that it delivered on the 4th June 2014, the defendant joins issue with almost every aspect of these claims.

9. In particular, it denies that it represented or warranted to the plaintiff that it had an established expertise in providing advice to credit unions on authorised investments, or that it approached the plaintiff on that basis in 2003, although it admits that it held itself out generally as having such expertise. It denies that it entered a contract with the plaintiff to provide such advice in 2005, although it admits that it provided information and advice to the plaintiff concerning specific investment products.

10. The defendant denies that it was engaged as an investment advisor by the plaintiff, either on an exclusive basis or at all. It pleads that, in relation to investment products, the plaintiff relied on information and advice provided by several product producers and investment advisors and, specifically, on the investment advice provided by a firm named Dolmen Stockbrokers that the plaintiff appointed for that purpose in late 2005 or early 2006. Further, the defendant pleads that the plaintiff relied on the considerable expertise of its own board members and investment committee.

11. The defendant pleads that it dealt with the plaintiff in accordance with its own terms of business and, in relation to the purchase of the bonds concerned, in accordance with the terms set out in the term sheets that it furnished to the plaintiff prior to each of those transactions.

12. The defendant denies that it represented to the plaintiff that the bonds concerned fell within the terms of the relevant provisions of the Trustee (Authorised Investments) Order 1998; or guaranteed the capital sum invested; or provided a definite maturity date.

13. The defendant denies that it advised the plaintiff to invest in the bonds concerned or, if it did, that it failed to comply with any obligation or duty imposed on it in that regard under the Stock Exchange Act 1995. It denies that any of the provisions of that Act are actionable by the plaintiff to ground any such claim.

14. The defendant denies that it failed to disclose to the plaintiff that it was acting as principal in the sale of the bonds concerned or that it was earning a profit from those sales. In the alternative, the defendant pleads that, in two meetings between the parties, in or around August 2006 and in or around March 2008, it confirmed to the plaintiff that it had acted as principal in the sale of the bonds concerned and had earned a profit in that regard, such that the plaintiff's claim of a secret profit, as set out in its amended statement of claim, is statute barred.

15. The defendant pleads that, if the plaintiff's allegations are correct, any loss or damage incurred was caused or contributed to by the plaintiff's own negligence and that the plaintiff has failed to mitigate its loss.

16. In an amended reply, delivered on the 15th July 2014, the plaintiff pleads, amongst other things, the following. The defendant was the plaintiff's sole investment advisor concerning the purchase by the plaintiff of the bonds concerned, and the defendant is estopped by its conduct from denying that it acted as the plaintiff's advisor in that regard. The plaintiff's board and investment committee members did not advise the plaintiff regarding the purchase of the bonds at issue. The plaintiff did not rely on the expertise of those persons in that regard. Those persons have no such expertise.

17. Further, the plaintiff did not receive the defendant's standard terms of business and did not contract with the defendant on that basis. The defendant is estopped from denying that it failed to furnish its standard terms of business to the plaintiff having regard to the results of an investigation into its conduct by the Irish Stock Exchange, which prepared two reports in June 2007 and February 2008.

18. In addition, the defendant did not disclose to the plaintiff at any time that it was acting as principal in the sale of the bonds concerned, or that it was earning a profit on those sales. Earning a secret profit as undisclosed principal constitutes a breach of the fiduciary duty that the defendant owed to the plaintiff.

19. Finally, the plaintiff's claim in that regard is not statute barred, nor is the plaintiff guilty of laches or acquiescence that would disentitle it to the declaratory relief that it is seeking. The loss and damage sustained by the plaintiff was not due to any negligence on its part nor did the plaintiff fail to mitigate its loss.

The test for discovery

20. The test for discovery has two limbs. The first is whether the category of documents sought is relevant to a matter in question in the proceedings; O. 31, r. 12 (1) of the RSC, as amended. The matters in question in the proceedings are defined by the pleadings and not otherwise; *BAM PPP PGGM Infrastructure Cooperatie UA v National Treasury Management Agency & Anor.* [2015] IECA 246. The test of relevance is not limited to documents admissible in evidence on any issue, but extends to documents that it is reasonable to suppose, without merely speculating, contain information which may (not must), either directly or indirectly, enable the party requiring discovery to advance his own case or damage the case of his adversary; *Ryanair v Aer Rianta* [2003] 4 I.R. 264 and *Framus v CRH* [2004] 2 I.R. 20, endorsing the formulation of Brett L.J. in Compagnie Financiere du Pacifique v Peruvian Guano Co. (1882) 11 Q.B.D. 55.

21. The second limb of the test is whether the applicant for discovery can satisfy the court that the discovery sought is necessary either for disposing fairly of the cause or matter or saving costs, or both; O. 31, r. 12 (4) of the RSC, as amended. If a party is entitled to a document on grounds of relevance to assist him in his case, on the ordinary discovery principles the discovery of that document will usually be necessary also. Save in exceptional circumstances a formal verification of this on affidavit will be sufficient to meet the test on a prima facie basis, but an opposing party may put forward reasons why that is not so; per Geoghegan J. in Taylor v Clonmel Healthcare Ltd. [2004] 1 I.R. 169 at 182. One such reason is the assertion of a conflicting confidentiality interest; *per* Fennelly J. in *Ryanair plc v Aer Rianta cpt* [2003] 4 I.R. 264 at 276. Another is where a too wide-ranging order would itself comprise an obstacle to the fair disposal of the proceedings, given that there must be proportionality between the extent or volume of the documents to be discovered and the degree to which such documents are likely to advance the applicant's case or damage that of his adversary; *per* Murray C.J. in *Framus Ltd v CRH plc* [2004] 2 I.R. 20 at 38. In every case where such a conflicting interest arises, a balance must be struck.

The plaintiff's application

i. procedural history

22. The plaintiff's solicitors first wrote to the defendant's solicitors on the 25th October 2012, seeking voluntary discovery of 10 enumerated categories of documents. Agreement was subsequently reached in respect of all but two of those; categories 8 and 10 as described in that letter. After receiving the defendant's amended Defence on the 14th June 2014, the plaintiff's solicitors wrote again on the 9th September 2014, requesting voluntary discovery of a further three categories of documents. No agreement could be reached in respect of that request. Accordingly, a notice of motion issued on the 13th April 2015, seeking an order directing the defendant to make discovery of five categories of documents, comprising the two categories from the plaintiff's original request that remain in dispute, together with the three further categories that it sought after the delivery of the amended defence. For convenience, the plaintiff has renumbered those categories (i) to (v) for the purpose of the present application.

ii. Category (i)

23. Category (i) comprises:

> 'The separate reports furnished by the Irish Stock Exchange to the defendant in June 2007 and February 2008 and all communications passing between the defendant and the Irish Stock Exchange with regard to the investigation carried out by the Irish Stock Exchange into the defendant's conduct of its business particularly with regard to the sale by the defendant of investment bonds to credit unions including the plaintiff.'

24. The reason given for requiring discovery of this category of documentation is as follows. The plaintiff pleads at paragraph 11 of its statement of claim that the defendant failed to highlight to it the essential features and risks of each of the investment bonds in which it was asked to invest and/or in failing to explain or 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 claim in paragraph 22 of its defence. The plaintiff in its reply has joined issue with that denial and has 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.

iii. Category (i) - arguments

25. On the 29th November 2012, the defendant's solicitors wrote to notify the plaintiff's solicitors of the defendant's refusal to make discovery of this category of documents. The following reasons was given for that refusal:

> '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.'

26. To assist in understanding the correspondence that ensued, it is useful to note at this point that, in opposing the application for discovery of this category of documents, the defendant has exhibited on affidavit a copy of a public statement made by the Irish Stock Exchange ('ISE') on Wednesday, the 8th April 2009, in relation to the defendant. In material part, it reads as follows:

> 'The Exchange, as part of its oversight and supervision of stockbrokers, became aware in late 2006 of issues of concern regarding possible breaches by J & E Davy (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 in 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 in 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.'

27. Returning to the correspondence between the parties' solicitors, the plaintiff's solicitors wrote again on the 7th March 2013, joining issue with the defendant's refusal to make discovery of this category of documents. In relevant part, that letter refers again to the pleadings; goes on to refer to the paragraph in the Stock Exchange statement detailing its conclusion concerning breaches of the Rules of the Exchange by the defendant; and then states:

> 'We are aware that the investigations by the ISE concerned, inter alia, [the defendant's] role in relation to the JYSKE bond, which is one of the bonds at issue in the present proceedings, and the manner of [the defendant's] remuneration in relation thereto. It may well relate to other bonds acquired by our client on the advice of [the defendant].
>
> Given these factors, and the findings of the ISE in its statement as quoted above, which corresponds 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." Our client acquired its bond between January 2005 and August 2006, and it is reasonable to infer that this comprises at least part of the period during which the activities which gave rise to concern on the part of ISE occurred. The documents sought are necessary to establish the approach of the defendant in relation to the matters in respect of which the ISE established that there had been breaches of the Rules of the Exchange in as far as they related to bonds sold to credit union clients and the plaintiff in particular.
>
> It is the plaintiff's position that voluntary discovery of the reports by the defendant will assist the plaintiff in establishing that the bonds in which the plaintiff was advised to invest by the defendant were completely inappropriate and unsuitable and that the defendant as an investment advisor knew of this fact and should not have advised the plaintiff to invest in those bonds. The plaintiff therefore renews it request for the defendant to make voluntary discover of this category of documents.'

28. The defendant's solicitors replied on the 29th April 2013, repeating the grounds for the defendant's refusal to make discovery of this category of documents, before going on to advance the following two contentions on the defendant's behalf.

29. First, the ISE investigation was carried out on a 'sample' of credit unions. This is the significance of the use of the term 'the relevant credit unions' in the section of the ISE statement dealing with the conclusions of its investigation. The plaintiff was not part of that sample. The conclusions of the ISE were specific to that sample.

30. Second, the ISE reports at issue (and the correspondence between the defendant and the ISE concerning the relevant investigation) were prepared in the context of open engagement between those parties and were strictly confidential.

31. As a separate matter, the defendant's solicitors requested the plaintiff's solicitors to identify the source of the information for

their statement that they were aware that the defendant's role in sales of the Jyske bond formed part of the subject matter of the ISE investigation, pointing out that the ISE statement makes no express reference to the Jyske bond. That request was repeated in a letter dated the 7th May 2014.

32. In a further letter dated the 7th July 2014, the defendant's solicitors expressed a concern that the source of that information was documentation that had been discovered to another credit union, also represented by the plaintiff's solicitors, in entirely separate proceedings. The use of documentation discovered in any proceedings, or of information contained in such documentation, for any purpose unconnected with the proper conduct of those proceedings is a breach of the implied undertaking which any party seeking discovery gives to use such documentation or information solely for that purpose and is a contempt of court; *per* Finlay C.J in *Ambiorix Ltd v Minister for the Environment (No. 1)* [1992] 1 I.R. 277 at 286.

33. On the 18th July 2014, the plaintiff's solicitors wrote in reply asserting that, because the defendant ultimately consented to the amendment of the plaintiff's statement of claim by the insertion of an express plea that the defendant made a secret profit on the plaintiff's acquisition of the bonds concerned and was, thus, in breach of its fiduciary duty to the plaintiff, they could not see the relevance of the defendant's expressed concern about the source of the plaintiff's information regarding the Jyske bond. The defendant's solicitors responded in a letter dated the 6th August 2014, in substance observing that neither the amendment of the plaintiff's claim nor the defendant's consent to that amendment provided any explanation of how the plaintiff became aware that the ISE investigation involved the defendant's role in the sale of the Jyske bond, before repeating their request for an explanation. The plaintiff's solicitors replied to that request by letter dated the 30th October 2014, stating that, in light of the defendant's consent to the amendment of the plaintiff's statement of claim, 'it is now entirely irrelevant as to how the plaintiff became aware of the correspondence issued by the Irish Stock Exchange to the defendant.'

34. No such explanation was ever provided either in subsequent correspondence or in the exchange of affidavits between the parties until, in the course of submissions at the hearing of the application on the 24th November 2015, Counsel for the plaintiff acknowledged that the plaintiff's solicitors had – on his instructions, inadvertently - made use of information that had come into their possession through discovery in proceedings brought by another credit union against the defendant. It appears to be common case that, among the documents discovered in those other proceedings, was correspondence referring to the two ISE reports now at issue in a manner that suggested or established that the investigation concerned covered sales of the Jyske bond. Counsel stated that he was instructed to apologise to the court on behalf of the plaintiff's solicitors for their inadvertent breach of undertaking. The defendant had, at that stage, been waiting over two and a half years for that explanation from the plaintiff's solicitors.

35. In the affidavit that he swore on the 13th April 2015 to ground the plaintiff's application, Peter Barry, the general manager of the plaintiff, formally averred that discovery of each of the categories of documentation sought is necessary for disposing of the proceedings fairly and for saving costs.

36. In affidavits sworn on the 7th May and 24th June 2015 in opposition to the plaintiff's application, Lisa Carty, a partner in the firm of solicitors representing the defendant, in substance repeats the defendant's objections to the discovery of this category of documents already set out in correspondence. In summary, those objections are:

> (a) that the ISE reports as issue arose from an investigation into a sample of credit unions, which - contrary to the implication of the words that the plaintiff used to define this category - did not include the plaintiff. Ms Carty suggests that the investigation into each credit union that formed part of that sample 'relates to a unique set of facts and circumstances...separate and distinct from [those of] the plaintiff';
>
> (b) that the said reports were the product of a process of open engagement between the ISE and the defendant that was intended to be, and was, private and confidential with the exception of the short public statement by the ISE at the culmination of the process already quoted; and
>
> (c) that it is a serious matter if the source of the information that underpins the plaintiff's assertion that the ISE investigation covered the defendant's role in the sale of the Jyske bond is the discovery process in other proceedings subject to the usual implied undertaking to use any such information for the purposes of those proceedings only.

37. In an affidavit sworn on the 8th June 2015 in support of the present application, Peter Barry, the general manager of the plaintiff, acknowledges that the plaintiff was not one of the credit unions covered by the ISE investigation. Mr Barry goes on to aver that the Jyske and Nordea Bank AB bonds were perpetual Constant Maturity Swap ('CMS') bonds. While Mr Barry is critical of the defendant's expression of concern about the source of the plaintiff's information that the ISE investigation extended to sales of the Jyske bond (which, he avers rhetorically, is one that 'rings hollow'), he does not address that concern.

38. As the plaintiff's solicitors have now belatedly admitted that the source of this information was their breach of the implied undertaking that they gave in separate proceedings brought by another credit union client of theirs against the defendant, a further concern arises about the failure of those solicitors to address the point in correspondence before, or evidence during, the present application.

39. Although Counsel for the plaintiff was instructed to inform the Court that the plaintiff's solicitors breached their undertaking 'inadvertently', there is no evidence whatsoever before the Court on the point. In that context, I cannot overlook, as I might otherwise have done, the fact that the affidavit that grounds the plaintiff's discovery application was sworn not by its solicitor, but by its manager. The anomalous consequence of that unusual occurrence is that it was left up to the plaintiff's manager to depose to matters of which he can have had little if any direct knowledge (specifically, the pleadings, motion papers and relevant correspondence between the parties' solicitors) and to exhibit and, indeed, comment upon, that correspondence.

40. That such affidavits are normally sworn by the parties' solicitors is confirmed by the exchange of affidavits on the defendant's cross-motion for discovery. There, as one might expect, the replying affidavit on behalf of the plaintiff was sworn by Elizabeth Burke, a partner in the firm of solicitors representing the plaintiff.

iv. Category (i) – decision

41. I reject the defendant's argument that the ISE reports are not relevant to any matter in question in the proceedings. There is a dispute on the pleadings concerning whether the defendant failed to properly highlight to the plaintiff the essential features and risks of each of the investment bonds in which it was invited to invest and whether the defendant failed to explain or evaluate those bonds properly or in compliance with its statutory duties and obligations under the Stock Exchange Act 1995. Of course, there is also an issue of law about whether any breach of its obligations under that Act by the defendant is actionable at the suit of the plaintiff but

that is a matter for argument and resolution at trial.

42. From the terms of the public statement made by the ISE on the 8th April 2009, it seems reasonable to conclude that the ISE investigation report deals with the following matters:

> (a) The sale of perpetual CMS bonds to some credit unions by the defendant at some time prior to late 2006;
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> (b) The breach by the defendant of the ISE's conduct of business rules when selling those bonds by:
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> • not providing complete disclosure of certain information to credit unions concerning the bonds;
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> • not providing written evidence to demonstrate that it had taken due care to ensure that the relevant credit unions understood the characteristics of the bonds; and
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> • not taking all reasonable steps to ensure the bonds were in full compliance with the Trustee (Authorised Investment) Order 1998.

43. I do not accept the defendant's contention that, since the ISE regulatory review of the sale by the defendant of perpetual CMS bonds to credit unions involved a sample of credit unions that did not include the plaintiff, it is reasonable to infer that the investigation into each credit union that formed part of that sample must relate to 'a unique set of facts and circumstances...separate and distinct from [those of] the plaintiff.' The Oxford Dictionary of English (revised 2nd ed., 2005) defines a 'sample' as 'a small part or quantity intended to show what the whole is like.' There is nothing in the ISE public statement to suggest that it considers the failings on the part of the defendant in its dealings with the 'relevant credit unions', which the defendant's solicitor describes as a 'sample set of credit unions', involve a unique set of facts and circumstances materially different from the defendant's dealings with credit unions generally, or with the plaintiff in particular. The reference in that public statement to 'a process which culminated in a proposal to credit unions…of a comprehensive arrangement which addressed performance issues with the bonds' 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.

44. I am thus satisfied that it is reasonable to suppose, without merely speculating, that the ISE regulatory review reports of June 2007 and February 2008 contain information which may, either directly or indirectly, enable the plaintiff to advance its own case or damage the case of the defendant.

45. The defendant next submits that, even if the test of relevance is met (as I have concluded it is), the plaintiff cannot satisfy the court that the discovery sought is necessary for disposing fairly of the action because the production of the documents concerned in the interests of justice and, thus, for the common good is outweighed here by the conflicting public interest in maintaining the confidentiality of the regulatory or disciplinary process in the course of which those documents were generated or by the defendant's private law interest in the confidentiality of those documents.

46. What was the level of confidentiality associated with the member firm supervisory and disciplinary process of the Irish Stock Exchange at the material time? Appended to the ISE public statement of the 8th April 2009 in relation to the defendant is an explanatory note concerning Rule 9.44 of the ISE *Member Firm Rules*, which states that, under that rule, 'the [ISE] may make a public statement at the conclusion of disciplinary proceedings in relation to a member firm of the [ISE].' According to that note, Rule 9.44 states:

> '[A]t the conclusion of any disciplinary proceedings pursuant to these rules, the [ISE] may make public, the name of the member firm involved, details of the subject matters of the proceedings and/or a summary of the decision of the Disciplinary Committee or, if applicable, the Appeals Committee, and without limitation of the foregoing may furnish such details in relation to the disciplinary proceedings of the Competent Authority as it sees fit.'

47. The ISE public statement of the 8th April 2009 in relation to the defendant recites that the ISE furnished copies of the regulatory review reports at issue to the Financial Regulator.

48. The defendant has acknowledged in its submissions to the court that, as one might expect, under the Rules of the ISE as those rules stood at the material time, information received by the ISE concerning the affairs of a member firm could be disclosed by the latter without liability when such disclosure was required by law.

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.

50. This is not a case in which discovery is sought of documents involving the confidence of a third party, unlike *Independent Newspapers (Ireland) Ltd v Murphy* [2006] 3 I.R. 566. Nor is it a case in which a competitor seeks discovery of documents containing commercially sensitive information, unlike *Flogas Ireland Ltd v Langan Fuels Ltd* [2012] IEHC 259 or *Telefonica 02 Ireland Ltd v Commissioner for Communications Regulation* [2011] IEHC 265. There is no suggestion that the regulatory review reports at issue here were communications that were part of settlement discussions between the defendant and the ISE of the kind that, in the ordinary course, attract privilege against disclosure. To that extent, it seems to me that the defendant's reliance upon the decision of the English High Court in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 1557 as authority for the proposition that 'there is a clear public imperative in preserving confidentiality of documentation furnished to regulators or investigators' stretches the ratio of that case too far.

51. The defendant expressly invokes Article 8 of the European Convention on Human Rights as it applies to the protection of confidential communications and relies on the extension of Article 8 privacy rights to companies by the European court of Human Rights in cases such as *Niemitz v Germany* (1993) 16 E.H.R.R. 97 and, more significantly, *Colas Est SA v France* [2004] 39 EHRR. But it does not seem to me that this advances the defendant's position, since Article 8.2 of the Convention permits interference with the exercise of the relevant privacy rights where that interference is in accordance with law and necessary in a democratic society for, amongst other reasons, the protection of the rights and freedoms of others. In short, there is no absolute or unqualified confidentiality right under the Convention whether for human persons or, a *fortiori,* for companies.

52. It is clear that there is a balancing exercise to be performed. On the one hand, I must consider what, in his judgment in *Smurfit*

Paribas Bank Ltd v A.A.B. Export Finance Ltd [1990] 1 I.R. 469 at 477, Finlay C.J. emphasised is '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.' On the other hand, I must consider the confidentiality interest in the regulatory review reports concerned asserted on behalf of the defendant.

53. As Clarke J. put the matter in *Telefonica 02 Ireland Ltd*, at §3.3:

> '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.'

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.

55. The final issue I must consider on this aspect of the application is the admitted breach by the defendant's solicitors of the implied undertaking that they gave in quite separate proceedings against the defendant not to use the information they obtained through discovery in those proceedings for any other purpose.

56. There is no doubt, as the defendant submits, that to go outside the prohibition constituted by such an undertaking is to commit a contempt of court; so much is clear from the judgment of Finlay C.J. *in Ambiorix Ltd v Minister for the Environment (No. 1)* [1992] 1 I.R. 277 at 286.

57. The defendant submits that, in the particular circumstances of this case, quite apart from any question of contempt, the court should exercise its inherent jurisdiction to regulate its own procedures and to prevent an abuse of process, by refusing the plaintiff's application for discovery on the ground of the established breach of their undertaking by the plaintiff's solicitors.

58. In reply, the plaintiff makes a number of points. First, the court has a discretion to lift or modify the implied undertaking given in respect of materials produced on discovery; per O'Sullivan J. in *Smyth v Tunney* [2004] 1 ILRM 464, following Kelly J. in *Roussel v Farchepro Ltd & Ors* [1999] 3 I.R. 567 at 571-2, in turn approving the decision of the House of Lords (*per* Lord Oliver) in *Crest Homes plc v Marks* [1987] A.C. 829 at 854. Second, the court may permit the use of documents or information obtained through discovery in other proceedings, even in the absence of an application to release the party concerned from the implied undertaking given in those other proceedings, where it is manifestly clear that the relevant release sought would have been granted if applied for; *per* Clarke J. in *Porterridge Trading Ltd v First Active plc* [2007] IEHC 313.

59. In *Porterridge*, it was manifestly clear to the Court that if a release had been sought it would have been granted because the two sets of proceedings concerned, although different cases, were closely linked, and there was no reason in substance why all of the issues could not have been raised in the same proceedings. As Clarke J. pointed out (at §3.7), 'it has never been suggested that a party who discovers that he may have an additional or different cause of action arising out of the same general circumstances, is precluded by the undertaking in respect of discovered documents from relying on those documents to assert the additional claim in the same proceedings.'

60. It is by no means clear to me, having been told little or nothing by the plaintiff in this case concerning the other proceedings in which discovery was obtained, whether those proceedings and these proceedings are closely linked. Hence, it is by no means clear to me that, if a release had been sought in those other proceedings, it would have been granted.

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 hard 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 the 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 the Court in other proceedings. However, it may be necessary to revisit the issue of that breach of undertaking in due course in connection with the appropriate ancillary orders on this application.

64. I will therefore order discovery of this category of documents subject to the following limitation. In the course of argument and in response to the plaintiff's alternative submission that this category of discovery is overbroad, Counsel for the plaintiff offered the concession that the words 'and all communications passing between the defendant and the Irish Stock Exchange' should be deleted from the description of this category. That seems to me to be appropriate, and I will order accordingly.

v. category (ii)

65. In the course of submissions, the plaintiff abandoned its claim for an order directing discovery of this category of documents and it is, thus, unnecessary to consider it further.

vi. categories (iii), (iv) and (v)

66. Category (iii) is:

> 'All notes, memoranda, 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 the subject matter of the proceedings in which the plaintiff invested on the advice of the defendant.'

67. At the hearing of the application, the plaintiff abandoned its claim for an order directing the discovery of the documents described in category (iv) of its notice of motion.

68. Category (v) is:

> 'All notes, memoranda, documentation (whether in written or electronic form) relating to the 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 at paragraph 26(d) of the defendant's amended defence at which it is alleged by the defendant that it 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.'

69. The reason furnished for these two requests may be summarised in the following way. At paragraph 26 of the defendant's amended defence it has pleaded, amongst other things, that in meetings between the parties in August 2006 and March 2008, it confirmed to the plaintiff that it had acted as principal in the sale of the bonds concerned and had earned a sum in that regard. In its amended reply, the plaintiff expressly denies that the defendant disclosed to the plaintiff, at any time before or after the plaintiff's acquisition of the bonds in question, that the defendant had acted as principal in the sale of the bonds and had earned a sum in that regard.

vii. categories (iii) and (v) - decision

70. The defendant argues that discovery of these categories of documents is entirely unnecessary because of the defendant's express admission that it did act as principal in relation to the sale of the bonds concerned. I am not persuaded by that submission, which seems to me to be beside the point. The issue is not whether the defendant acted as principal in the sale of the bonds concerned; it has admitted it did. Rather, the issue is whether the defendant at any material time disclosed to the plaintiff that it was acting as principal and earning a sum in that regard. As I understand the pleadings, that proposition remains very much in issue.

71. The remaining dispute between the parties in connection with these categories of discovery is whether the words 'relating to' in each of them should be replaced with the word 'recording' as an appropriate limitation on the scope of the necessary discovery. The defendant offered discovery to the plaintiff in those terms by letter dated the 28th November 2014, prior to the issue of the present motion. The plaintiff rejected that proposal by letter dated the 12th March 2015, insisting that the discovery to which it is entitled should not be artificially limited to the ex post facto recording of disclosures or meetings but ought properly to extend to any document evidencing any such event prospectively, contemporaneously or in hindsight. I find merit in that position. While I accept, as Barrett J. found in *IBB Internet Services Ltd v Motorola Ltd* [2015] IEHC 54, that there are circumstances in which the use of the words 'relating to' may be overbroad in its effect and, hence, oppressive or disproportionate in the obligation it seeks to impose, there can be no general rule to that effect. Each case must be considered on its own facts. In this instance, there is no evidence before the court that would suggest, much less establish, any such disproportionate or oppressive effect.

vii. categories (iii) and (v) - decision

72. Accordingly, I propose to order discovery in terms of categories (iii) and (iv) as set out in the plaintiff's notice of motion, save that, for clarity, I will direct that the words 'on the advice of the defendant' be deleted from the order to be made in respect of category (iii).

The defendant's application

i. procedural history

73. The defendant's solicitors wrote to the plaintiff's solicitors on the 10th April 2013, seeking voluntary discovery of nine enumerated categories of documents. The parties have been unable to agree in relation to four of those. Although, as originally numbered, those categories were 2.3, 7 and 8, for clarity and simplicity I have renumbered them (i), (ii) and (iii), respectively, below.

ii. category (i)

74. Category (i) is:

> 'All documents containing or evidencing the terms and conditions of the alleged contract between the plaintiff and the defendant including but not limited to all documents evidencing the negotiations, if any, between the parties in the lead up to the alleged contract to include any documents concerning the role or responsibility which either party would have in the contract.'

75. In the defendant's original letter seeking voluntary discovery of the 10th April 2013, this category was formulated in the following way:

> 'All documents containing or evidencing the terms and conditions of the alleged contract between the plaintiff and the defendant including but not limited to:
>
> 1. all documents evidencing the alleged retention by the plaintiff of the defendant as its investment advisor in or about January 2005;
>
> 2. all documents evidencing the purchase of any investment product by the plaintiff, through the defendant, between the period January 2005 and August 2006;
>
> 3. all documents evidencing the negotiations, if any, between the parties in the lead up to the alleged contract to include any documents concerning the role or responsibility which either party would have in the alleged contract.'

76. The reason given for the original request is this. The plaintiff pleads that it entered a contract with the defendant in or about

January 2005 to retain the defendant as its investment advisor and agreed to provide funds to the defendant for investment. The defendant denies this. The plaintiff pleads that the contract between the parties included a number of identified terms. The plaintiff denies any contract on those terms and pleads that the services it provided to the plaintiff were subject to its standard terms of business and to the terms of the relevant term sheet for each specific transaction.

77. In the affidavit sworn by Ms Carty on the 1st May 2015 to ground the defendant's application, those reasons are supplemented by the invocation of the plaintiff's plea that, in 2003, the defendant approached it and specifically represented and warranted to it that the defendant had established expertise in advising credit union in relation to appropriate and suitable investments.

iii. category (i) - arguments

78. The plaintiff points out that, in a letter written by its solicitors on the 30th October 2014, it has already agreed to make discovery of all documents containing or evidencing the terms and conditions of the alleged contract between the parties, including those documents described in sub-categories 1 and 2 of the defendant's original request. Hence, the dispute between the parties in respect of this category is in effect limited to whether documents evidencing any negotiations there may have been between the parties in the lead up to the alleged contract should be ordered to be discovered as relevant and necessary for disposing fairly of the action. The plaintiff contends that such discovery is not necessary.

iv. category (i) - decision

79. Not without some hesitation, I venture to disagree. The plaintiff has expressly pleaded that the defendant first made representations and warranties to it when the defendant approached it in 2003 – a plea which is denied. It has not been made clear whether the contract that the plaintiff contends the parties entered into in January 2005 was written or oral. If written, it might be argued that the parol evidence rule will apply, rendering evidence extraneous to the terms of that written contract inadmissible, but that rule is not without significant qualifications and exceptions.

80. Accordingly, I will order discovery of this category of documents.

v. category (ii)

81. Category (ii) is:

> 'All documents relating to the process by which Dolmen was appointed as investment advisor to the plaintiff in late 2005/early 2006 to include the terms and conditions of such appointment and the documents evidencing the plaintiff's decision not to appoint the defendant or other applicants [for that position or role].'

82. The reason furnished for that request is the following. At paragraph 5 of the statement of claim, the plaintiff pleads that it entered a contract with the defendant in or about January 2005 to retain the defendant as its investment advisor and that it agreed to provide the defendant with funds to invest on its behalf. That claim is denied. Furthermore, at paragraph 5 of the defence, the defendant pleads that, in relation to investment products, the plaintiff relied on the advice of Dolmen Stockbrokers, which it appointed as its investment advisor in late 2005 or early 2006.

vi. category (ii) - arguments

83. The plaintiff objects to making discovery of this category of documents on the basis that it is irrelevant to the questions in issue in the proceedings. The plaintiff argues that this is so because three of the four bond transactions at issue occurred prior to late 2005 or early 2006, which, the defendant alleges, is when the plaintiff appointed Dolmen as its investment advisor. Further, the plaintiff relies on the defendant's plea, at paragraph 5 of its defence, that it did provide information and advice to the plaintiff in relation to specific investment products, to suggest that there is no real denial that the defendant advised the plaintiff on the acquisition of the fourth bond – the AIB Step Up Perpetual Bond – in August 2006, after the appointment of Dolmen, such that Dolmen's status as the plaintiff's investment adviser at that time is immaterial.

84. The defendant points out in response that there is a controversy, or matter in question, between the parties not merely concerning whether the defendant was engaged to provide investment advice generally or contracted with the plaintiff in relation to specific investment products only, but also in relation to what alternative investment advice was availed of, or available to, the plaintiff at the material time both internally and externally. The defendant submits that that not merely is the resolution of the latter controversy capable of informing the resolution of the former, but it is also potentially capable of advancing the defendant's case, or undermining the plaintiff's, in relation to the defendant's additional contentions that the plaintiff has been guilty of contributory negligence or of failure to mitigate its loss, or both.

vii. category (ii) - decision

85. I accept the defendant's submission on this point and, accordingly, I will order discovery of this category of documents, as described.

viii. category (iii)

86. Category (iii) is:

> 'All documents containing, evidencing or relating to communications between Dolmen and/or any other investment advisor and the investment committee of the plaintiff in respect of investments made by it upon the suggestion of the defendant between January 2003 and August 2006, to include minutes of investment committee meetings and board meetings, and all documents containing, evidencing, or otherwise relating to communication within the plaintiff in respect of investments made by the plaintiff on the suggestion of the defendant between January 2003 and August 2006, to include minutes of investment committee meetings and board meetings.'

87. The reason given for this request is the following one. The defendant pleads that plaintiff relied on the information and advice provided by a number of product producers and investment advisors and, in particular, on the advice of Dolmen Stockbrokers, which it appointed as its investment advisor in late 2005 or early 2006. The defendant further pleads that the plaintiff relied on the considerable expertise of its own board members and investment committee. In addition, in alleging contributory negligence, the defendant pleads that the plaintiff and, in particular, its board and investment committee, failed to give proper consideration to its

investment in the bonds concerned and failed to obtain appropriate or adequate advice in that regard. Each of these matters is in controversy between the parties.

ix. category (iii) - arguments

88. In response to the defendant's request for discovery of this category of documents, the plaintiff has offered, in its solicitor's letter of the 30th October 2014, to discover only those documents containing, evidencing or otherwise relating to communications within the plaintiff in respect of its investment in the bonds concerned.

x. category (iii) - decision

89. For the reasons set out in relation to the preceding category, I will order discovery of this category of documents in the terms sought by the defendant, as set out above.

Conclusion
90. In summary, I will make orders in the following terms.

91. I will order the defendant to make discovery of the following categories of documents:

> 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 particularly with regard to the sale by the defendant of investment bonds to credit unions including the plaintiff.
>
> ii. All notes, memoranda, 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 the subject matter of the proceedings in which the plaintiff invested.
>
> iii. All notes, memoranda, documentation (whether in written or electronic form) relating to the 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 at paragraph 26(d) of the defendant's amended defence at which it is alleged by the defendant that it 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.

92. I will order the plaintiff to make discovery of the following categories of documents:

> i. All documents containing or evidencing the terms and conditions of the alleged contract between the plaintiff and the defendant including but not limited to:
>
> > 1. all documents evidencing the alleged retention by the plaintiff of the defendant as its investment advisor in or about January 2005;
> >
> > 2. all documents evidencing the purchase of any investment product by the plaintiff, through the defendant, between the period January 2005 and August 2006;
> >
> > 3. all documents evidencing the negotiations, if any, between the parties in the lead up to the alleged contract to include any documents concerning the role or responsibility which either party would have in the alleged contract.
>
> ii. All documents relating to the process by which Dolmen was appointed as investment advisor to the plaintiff in late 2005/early 2006 to include the terms and conditions of such appointment and the documents evidencing the plaintiff's decision not to appoint the defendant or other applicants to that position or role.
>
> iii. All documents containing, evidencing or relating to communications between Dolmen and/or any other investment advisor and the investment committee of the plaintiff in respect of investments made by it upon the suggestion of the defendant between January 2003 and August 2006, to include minutes of investment committee meetings and board meetings, and all documents containing, evidencing, or otherwise relating to communication within the plaintiff in respect of investments made by the plaintiff on the suggestion of the defendant between January 2003 and August 2006, to include minutes of investment committee meetings and board meetings.

93. I will hear the parties in relation to the identity of their respective proposed deponents, the period to be allowed for making the discovery directed, and any other ancillary matters that may arise.