Neutral Citation: [2014] IEHC 137

THE HIGH COURT

[2013 No. 9924 P.]

BETWEEN

PATRICK MCKILLEN

PLAINTIFF

AND

1. IRISH BANK RESOLUTION CORPORATION (IN SPECIAL LIQUIDATION),

2. KIERAN WALLACE,

3. EAMON RICHARDSON,

4. B OVERSEAS LIMITED,

5. MISLAND (CYPRUS) INVESTMENTS LIMITED,

6. DAVIDBARCLAY,

7. FREDERICK BARCLAY,

8. MAYBOURNE FINANCE LIMITED, AND

9. ELLERMAN INVESTMENTS LIMITED

DEFENDANTS

JUDGMENT delivered by Mr. Justice Michael White on the 12th day of Februarv, 2014

1. The plaintiff and fourth to ninth defendants are seeking orders of discovery pursuant to the rules of the Superior Courts.

2. The plaintiff by motion of 29th January, 2014, seeks substantial orders of discovery across a number of categories against the fourth to ninth named defendants. The fourth to ninth defendants by motion of 29th January, 2014, seek a more restricted form of discovery against the plaintiff. The applications were heard by this Court on 5th, 6th and 7th February, and judgment was reserved.

3. The plaintiff is a businessman, who is a shareholder in a company, Coroin Limited (the Company), which was incorporated in England on 2nd April, 2004, and is a holding company for the ownership and management of the Maybourne Hotel group of companies which holds through trading subsidiary companies, Claridges Hotel, the Connacht Hotel and the Berkeley Hotel, in London. The plaintiff has been an investor and shareholder in the Company from the date of its incorporation with other investors.

4. The plaintiff drew down a loan facility from Anglo Irish Bank Corporation subsequently renamed as the Irish Bank Resolution Corporation. Part of the loan was secured on the plaintiffs shares in the Company. The amount secured on foot of the total loan facility is in the order of €300m.

5. Pursuant to s. 4 of the Irish Bank Resolution Corporation Act 2013, and the Irish Bank Resolution Corporation Act 2013 (Special Liquidations) Order 2013 (S.I. 36 of 2013) the second and third defendants were appointed as special liquidators for the purposes of winding up the affairs of the first defendant and to sell its assets. The second and third defendants have at all times stated they wish to sell the plaintiffs loans without restriction.

6. The operation of the Company was governed by a shareholders' agreement of 14th May, 2004, to which the plaintiff and the fifth defendant were a party. A subsequent dispute developed between these parties and other parties who had acquired indirect interests in the company. This led to substantial litigation in the English High Court and Court of Appeal. In the course of that litigation there was substantial discovery by way of court order.

7. Through the proceedings in the Republic of Ireland the plaintiff seeks a declaration that the sixth and seventh defendants are not entitled to acquire the plaintiffs loans either personally or indirectly through other entities and also seeks a declaration that the fourth, fifth, eighth and ninth defendants, being entities under the control of the sixth and seventh defendants are not entitled to acquire directly or indirectly the loan facility of the plaintiff.

8. The plaintiff seeks a declaration that the first, second and third defendants are not entitled to sell the loans to the fourth to ninth defendants or any other entity controlled by them either directly or indirectly.

9. The plaintiff relies on the provisions of the shareholders' agreement of 14th May, 2004, already referred to.

10. The plaintiff seeks damages for breach of contract, inducement to breach contract, conspiracy, and an intentional interference with the plaintiff’s economic interest.

11. In addition to the existing shareholders' agreement, the plaintiff seeks to imply a term of same that the parties to the agreement would not act in a manner that would render another shareholder in default or create conditions that would prevent a party to the agreement from performing his obligations under the shareholders' agreement.

12. The plaintiff contends that the decision of the second and third defendants to sell the first defendant's loans without restriction is a breach of public law duties as the liquidation has been commenced by statute.

13. The plaintiff alleges breaches of his constitutional rights and European Convention rights. The plaintiff issued proceedings by plenary summons on 17th September, 2013, and served a statement of claim on 23rd December, 2013. The fourth to ninth defendants entered a full defence on 13th January, 2014. There has been case management of the proceedings with a restricted time line to ensure that the substantive hearing commences on 4th March next.

14. As part of the defence of the fourth to ninth defendants, they have entered an objection to the present proceedings in circumstances where the issues sought to be raised against the defendants were raised in two sets of proceedings brought by the plaintiff in England and Wales. The fourth to ninth defendants contend that the issues raised in these proceedings are *res judicata* and that the issue of estoppel arises. The defence further contends that any matters not raised in the English proceedings and now raised in these proceedings, should have been litigated there and thus, the plaintiff is estopped from litigating new matters in the present proceedings. All parties agree this issue has to be determined by the trial judge. The fourth to ninth defendants argue that the discovery provided in the English proceedings, is sufficient for the conduct of the litigation here. The plaintiff disputes that.

15. By letter dated 20th January, 2014, the plaintiffs solicitors wrote to the fourth to ninth named defendants' solicitors seeking voluntary discovery pursuant to O. 31, r. 12(4) of the Rules of the Superior Courts 1986. In the letter, the plaintiff sought fifteen categories of discovery designated (a) to (o) and set out the reasons for seeking the discovery.

16. By letter of reply of 27th January, 2014, the solicitors for the fourth to ninth defendants proposed that all relevant disclosure made in the plenary action and petition in England be treated as discovery in the present proceedings. In respect of parties to the English proceedings that were not party to the Irish proceedings, it was stated that the ninth defendant and the trustees of Sir David and Sir Frederick Barclay's family settlement have consented to this proposal.

17. The categories sought were refused except categories (k) and (l) which were agreed subject to a suitable time period.

18. By letter dated 20th January, 2014, from the fourth to ninth defendants' solicitors to the plaintiffs solicitors, voluntary discovery was sought in accordance with O. 31, r. 12 of the Rules of the Superior Courts in two separate categories.

19. By reply of 24th January, 2014, the solicitors for the plaintiff refused to give voluntary discovery in respect of these categories.

20. By motion of 29th January, 2014, the plaintiff sought the following discovery:

> "An Order pursuant to the Rules of the Superior Courts 1986 (as amended) and in particular Order 31, rule 12 thereof, and/or pursuant to the Court's inherent jurisdiction, directing the fourth to ninth defendants to make discovery on oath of the documents which are or have been in their possession, power or procurement under the following categories:-
>
> (a) All documents relating to the establishment, constitution and powers of the Sir David and Sir Frederick Barclay Family Settlements together with any communications between any person or entity on behalf of the Barclay Defendants or any of them and the Trustees of the said Family Settlements (or any person acting on behalf of the Trustees) which (whether directly or indirectly) relate to the acquisition or the intended acquisition of the plaintiff's shares in Coroin Limited.
>
> (b) Any documents relating to any instructions (whether given directly or indirectly) by or on behalf of the sixth or seventh named defendants to the Trustees of the said Settlements (or any person acting on behalf of the Trustees) in relation to any matter pertaining to the plaintiff or the plaintiffs shares in Coroin Limited.
>
> (c) All documents relating to any interest (past or present) (whether direct or indirect) of the sixth and seventh named defendants in:-
>
> (i) Coroin Limited and/or any company which is a shareholder thereof;
>
> (ii) B Overseas Limited and/or any company which is a shareholder thereof;
>
> (iii) Misland (Cyprus) Investments Limited and/or any company which is a shareholder thereof;
>
> (iv) Mayboume Finance Limited;
>
> (v) Ellerman Investments Limited.
>
> (vi) Ellerman Corporation Limited.
>
> (d) All documents relating to the ownership (whether legal or beneficial) (direct or indirect) of the sixth and seventh named defendants in the shares m:-
>
> (i) B Overseas Limited;
>
> (ii) Misland (Cyprus) Investments Limited;
>
> (iii) Mayboume Finance Limited, and
>
> (iv) Ellerman Investments Limited,
>
> (v) Ellerman Corporation Limited.
>
> (e) All documents relating to the manner in which the Trustees of the said Settlements exercise any power over the shares in any of the companies mentioned in category D above or over the running of any of the said companies including any documents relating to any instructions or suggestions made to the Trustees by or on behalf of the sixth or seventh named defendants (whether directly or indirectly) in relation to how the said shares should be dealt with or as to how the said companies should be operated, run, or managed.

(f) All documents relating to the control which the sixth and/or seventh named defendants exert or maintain (whether directly or indirectly) regarding the affairs of:-

(i) B Overseas Limited;

(ii) Misland (Cyprus) Investments Limited;

(iii) Mayboume Finance Limited, and

(iv) Ellerman Investments Limited.

(v) Ellerman Corporation Limited.

(g) All documents relating to and/or evidencing communication, correspondence and/or interaction as between the Barclay Defendants, their servant or agents or any person or entity acting on their behalf (whether directly or indirectly) and the National Assets Management Agency (NAMA) and/or its employees in relation to the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information and/or documentation in relation to the plaintiff and/or his loans.

(h) All documents relating to and/or evidencing communication, correspondence and/or interaction as between the Barclay Defendants, their servant or agents or any person or entity acting on their behalf (whether directly or indirectly) and the Department of Finance and/or its employees in relation to the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information and/or documentation in relation to the plaintiff and/or his loans.

(i) All documents relating to and/or evidencing communication, correspondence and/or interaction as between the Barclay Defendants, their servant or agents or any person or entity acting on their behalf (whether directly or indirectly) and the first, second and/or third named defendants and/or their respective employees in relation to the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information and/or documentation in relation to the plaintiff and/or his loans.

(j) All documents relating to and/or evidencing instructions given by or taken from the Barclay Defendants (or any person or entity acting on their behalf) to communicate, correspond and/or interact with NAMA, the Department of Finance and/or the first, second and/or third named defendants regarding the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information in relation to the plaintiff and/or his loans.

(k) All documents received by the Barclay Defendants, their servants or agents from NAMA and/or its employees and/or Frank Knight and/or Ms Elaine Tooke (whether directly or indirectly) relating to the plaintiff and all documents relating to and/or evidencing the Barclay Defendants, their servant or agents (or any person or entity acting on their behalf) receiving information (directly or indirectly) in relation to the plaintiff from NAMA and/or its employees and/or from Frank Knight and/or Ms Elaine Tooke.

(l) All documents relating to and/or evidencing the Barclay Defendants' engagement (whether directly or indirectly) of Knight Frank and/or Ms Elaine Tooke including all documents relating to any communication and/or interaction (whether directly or indirectly) between the Barclay Defendants their servants or agents (or any person or entity acting on their behalf) and Knight Frank and/or Ms Elaine Tooke in relation to the plaintiff and/or regarding information or documentation relating to the plaintiff.

(m) All documents relating to the allegation made in paragraph 20 of the Defence that it is currently contemplated that the Barclays Interests will seek to acquire the Loan Facilities together with all documents relating to the intention of Ellerman Corporation Limited to acquire the loans and the Charge.

(n) All documents relating to any bid made by or on behalf of the Barclay Defendants (or by any person or entity acting on their behalf or on behalf of any one or more of them) to acquire the plaintiffs loans.

(o) All documents relating to and/or evidencing the purpose and/or intent for which the Barclay Defendants communicated and/or interacted (directly or indirectly, through third parties or otherwise) with NAMA, the Department of Finance, and/or the first, second and/or third named defendants, their servants or agents."

By motion of 29th January, 2014, the fourth to ninth defendants sought the following discovery:

"An order pursuant to Order 31 Rule 12 of the Rules of the Superior Courts requiring the Plaintiff to make discovery on Oath of the documents which are or have been in his possession power or procurement in respect of the following categories of documents.

Category 1.

All documents evidencing:

a) The up-to date position in respect of each facility falling within the Loan Facility(as that term is defined in the Statement of Claim) to include documents evidencing or referring to the question of the present compliance or default by the Plaintiff with the terms of such facilities.

b) Actual or contemplated attempts or efforts made by or on behalf of the Plaintiff to purchase and/or refinance and/or discharge the Loan Facility (or any part thereof) and or to raise finance so to do.

Category 2.

All documents

Evidencing the confidential information and/or documentation alleged in paragraph 26(o)(iv) if the Statement of Claim to have been disclosed by any employee of NAMA and Relating to the alleged engagement between Ms Elaine Tooke and Mr Enda Farrell."

Brief History of the English Proceedings

21. Two sets of proceedings were issued in England. A petition under s. 994 of the Companies Act 2006 and a claim for damages in tort for conspiracy to injure by unlawful means and inducing breaches of contract. The fourth and fifth defendants were parties to both proceedings. The sixth, seventh, and eighth defendants were defendants in the tort action. In addition, in the English proceedings, the trustees of the family settlement of the sixth and seventh named defendants were named as defendants in the tort claim, but the action was not pursued against them. Throughout the proceedings the fourth, fifth and eighth defendants were described as "The Barclay interests".

22. The English proceedings revolve around Coroin Limited. In his introduction to the substantive judgment the learned trial judge stated "at the heart of this case lies a battle for control of three of London's leading hotels- Claridge's, The Connaught and The Berkeley."

23. One of the other investors was Peter Green and his family who invested in the Company through the fifth defendant.

24. In January 2011, the share capital of the fifth defendant was acquired by the fourth defendant.

25. The shares of other original investors in the Company, Derek Quinlan and Kyran McLaughlin, were acquired by the Barclay interests.

26. In September 2011, the eight defendant acquired the senior debt of the Company of approximately £660m and associated security.

27. At all times the intention of the Barclay interests had been to obtain control of the Company. The plaintiff has alleged that they used unlawful or unfairly prejudicial means, including breaches of provisions of the articles of association of the company and the shareholders' agreement, and breaches of duty by directors appointed by them. The Barclay interests now wish to acquire the loan facilities of the plaintiff.

28. The National Asset Management Agency (NAMA) was joined as notice party to the proceedings, as it had acquired the entire beneficial interest of the original bank facilities provided to the company in June 2010, and by loan agreement of 27th September, 2011, transferred the facilities to the eight defendant, to which the plaintiff took objection.

29. The plaintiff in these proceedings objects to the involvement of NAMA for various reasons. NAMA originally made an attempt to acquire the plaintiff’s loan facilities with the first defendant, such acquisition was deemed invalid by order of the Supreme Court.

30. There is no dispute that there were ongoing contacts between the Barclay interests and NAMA with a view to them acquiring the plaintiffs loan facilities if and when they were acquired by NAMA, and this pattern of activity forms part of the plaintiffs claim particularly in the public law claim.

31. For the purposes of the discovery application before this Court, it is important to draw a distinction between the separate role of NAMA in the English proceedings relating to matters which may indirectly, but do not directly, concern the present proceedings. In the course of the English proceedings, there were two preliminary issues decided which were both the subject of appeals to the Court of Appeal.

32. The first preliminary issue was decided by the trial judge, Mr. Justice Richards, on 21st December, 2011, when he concluded that the sale of the share capital of the fifth defendant in January 2011, was not made contrary to clause 6.17 of the shareholders' agreement and did not trigger the other shareholders' pre-emption rights. He came to the same conclusion in respect of similar clauses in the articles of association of the Company. This decision was appealed to the Court of Appeal and by decision of 24th February, 2012, the trial judge's ruling on the preliminary issue was upheld.

33. In a separate preliminary issue decided by Mr. Justice Richards on 2"d February, 2012, the trial judge decided that the transfer of the facilities by loan sale agreement of2ih September, 2011, from NAMA to the eighth defendant was in breach of the original facility agreement. The appeal was brought by NAMA and the eighth defendant in these proceedings. The Court of Appeal reversed the decision of the trial judge.

34. The petition and the tort action were heard together and were the subject of a very substantial judgment of 10th August, 2012.

35. The learned trail judge set out the history of the proceedings and the involvement of the various parties in his judgment from paras. 1 -50. At para. 53 of his judgment, he referred to the disclosure in the English proceedings which I will return to. He stated as follows:-

> "There has been disclosure of a very large volume of documents. Complex corporate transactions involving many parties over a period in excess of a year generate a great deal of paper. The chronological bundle for the trial comprises 54 files, with a total number of pages approaching 20,000. Text messages played a vivid, and sometimes significant, part in the story. Many of the principal players, including Sir David Barclay, frequently send and receive text messages. Disclosure of text messages has been far from complete, with some extensive gaps on the respondent's side and some gaps on Mr. McKillen's side. Explanations have been given in the evidence and in correspondence. Although Mr. McKillen's closing submissions invite me to draw adverse inferences from the loss of these text messages, it does so only in the most general terms. I do not know precisely what inferences I am invited to draw, but in any event I am not persuaded that I should reject the explanations given."

The English Discovery

36. In response to the affidavits of Hugh J. Millar Solicitor, of Crowley Millar Solicitors sworn on 31st January and 4th February in these proceedings, the solicitor acting for the fourth to eighth defendants in the English proceedings, Hannah Fields Lowes of Weil, Gotshal and Manges Solicitors in London swore an affidavit in response on 4th February, 2014. Counsel for the plaintiff has informed

the court that the plaintiff has not had an opportunity to swear an affidavit in response, however, the court only intends to rely on the said affidavit and exhibits to reflect the factual matters of discovery in the English proceedings.

37. On 22nd November, 2011, Mr. Justice Richards, the trial judge made an order granting standard disclosure to be completed by 13th January, 2012.

38. An extensive electronic search was conducted by the defendants in the English proceedings which generated nearly 40,000 electronic documents for review. In total, more than 3,000 documents were disclosed by the defendants by way of standard disclosure. Disclosure was also provided in the English proceedings by the trustees of the Sir David and Sir Frederick Barclay family settlements, directors of the family settlement, Derek Quinlan, Coron Limited, NAMA and obviously the plaintiff himself. At a later date, Barclay's Bank Plc was also ordered to give third party disclosure.

Relevant Law on Discovery Applicable to these Proceedings
39. Order 31, rule 12 of the Rules of the Superior Courts (No.2) (Discovery) 1999, amended the original order of O. 31, r. 12. The amended rules state:-

> "(1) Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question therein.
>
> Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:
>
> (a) verify that the discovery of documents sought is necessary for disposing fairly of the cause or matter or for saving costs; (b) furnish the reasons why each category of documents is required to be discovered.
>
> (2) On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non compliance with the provisions of subrule 4(1), or make such order on terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes or documents as may be thought fit.
>
> (3) An order shall not be made under this rule if and so far as the Court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.
>
> (4) (1) An order under subrule 1 directing any party or under rule 29 directing any other person to make discovery shall not be made unless:
>
> (a) the applicant for same shall have previously applied by letter in writing requesting that discovery be made voluntarily, specifying the precise categories of documents in respect of which discovery is sought and furnishing the reasons why each category of documents is required to be discovered; and
>
> (b) a reasonable period of time for such discovery has been allowed; and
>
> (c) the party or person requested has failed, refused or neglected to make such discovery or has ignored such request.

Provided that in any case where by reason of the urgency of the matter or consent of the parties, the nature of the case or any other circumstances which to the Court seem appropriate, the Court may make such order as appears proper, without the necessity for such prior application in writing.

> (2) Any such discovery sought and agreed between parties or between parties and any other person shall, subject to subrule 4 below, be made in like manner and form and have such effect as if directed by order of the Court.
>
> (3) In any case in which discovery has been sought and agreed and has not been made within the time agreed, the party who has sought same may make application pursuant to rule 21 provided that when seeking discovery the party requested was informed that:
>
> (a) such voluntary discovery was being sought pursuant to Order 31 rule 12 subrule 4;
>
> (b) agreement to make discovery would require it to be made in like manner and form and would have such effect as if directed by order;
>
> (c) failure to make discovery may result in an application pursuant to rule 21;
>
> and the Court may, if satisfied that it is proper so to do, make such order under rule 12, 19 and 21 as is appropriate or such other order as appears just in the circumstances.
>
> (4) An application for discovery whether under rule 12(1) or (4) shall be made not later than twenty eight days after the action has been set down or in matters which are not set down, twenty eight days after it has been listed for trial provided that the Court or the party requested may order or agree, as the case may be, to extend the time for the application for discovery in any case which it appears just and reasonable so to do.
>
> (5) The costs of an application to Court for discovery in any case in which prior written application has not been made or in which application has not been made within the time provided, shall be in the discretion of the Court."

40. Both parties have relied on extracts from the judgment of the Supreme Court in *Ryanair Pic v. Aer Rianta* c.p J [2003] 4 I.R. 264.

Fennelly J. in his judgment in respect of the amended rules stated at p. 275:-

> "It is impossible to resist the conclusion, however, that the amendment to the rule has shifted the primary burden of proof. The applicant must, under the present rule, discharge the *prima facie* burden of proving that the discovery sought "is necessary for disposing fairly of the cause or matter". This is not a mere formalistic requirement: the affidavit must, in addition, "furnish the reasons why each category of documents is required". In context, there is no meaningful distinction between the words, "necessary" and "required." The latter term is implicitly referable to the objective of the fair disposal of the cause or matter. The nature of this burden is considered further below.
>
> Apart from this alteration of the *prima facie* burden of proof, it is clear that the amended rule made no serious or fundamental change in the law regarding discovery of documents. The definition by Brett L.J. in *Compagnie Financiére du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B.D. 55 at p. 63, remains the universally accepted test of what is the primary requirement for discovery, namely the relevance of the documents sought".

41. Fennelly J. went on to state at p. 276:-

> "In the great majority of cases, discovery disputes have revolved around the issue of relevancy. 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 the 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."

42. Referring to the growing concern about the dangers of unnecessary, costly and protracted litigation and the burdens on parties of excessive resort to automatic discovery, Fennelly J. stated at p. 277:-

> "The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.
>
> The court, in exercising the broad discretion conferred upon it by O. 31, r. 12(2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant. These may, no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation. The behaviour of the opposing party is relevant. That party may, for example, have made or may offer to make admissions of facts, and thus persuade a court that discovery on some issues is not necessary. This is, perhaps, axiomatic. Those facts will no longer be in issue. On the other hand, it is difficult to see how a party, such as the defendant in the present case, which contests all the relevant facts on the pleadings and has formally objected to the right of its opponent to resort to affidavit evidence, can plausibly ask the court to deprive its opponent of access to documents which will enable it to prove matters which it disputes."

43. The comments by Clarke J. in *Thema International Fund Plc v. HSBC Institutional Trust Services Ireland & Ors* [2011] IEHC 496, are relevant to the issue of discovery in modern commercial litigation which derives significantly from the production and retention of electronic data.

44. At para. 2.5 he stated:-

> "Against that general background, it seems to me to be important for the court to at least attempt to set out some general principles by reference to which the obligations of parties to make discovery in complex cases need to be addressed. Those general principles relate to the operation of the law as it currently is. Clearly, some consideration may have to be given to ways in which it might be possible to tame the monster that discovery can now become whether by means of changes in rules or practices so as to refine the scope of discovery and/or the modalities by which parties may be required to comply with their obligations. However, those issues are not for me to determine. Nonetheless, within the parameters of existing procedural law, it seems to me that a number of matters can usefully be observed."

45. He went on to state at para. 2.12:-

> "It needs to be recalled that there is, in reality, a balancing exercise involved here. The whole reason for a search, of the type with which I am concerned, is that the most time consuming and costly part of the process is the physical review of the remaining documents (that is those remaining after the selection process) by trained lawyers on a document by document basis. Clearly, the selection process will not have achieved its end if it does not significantly reduce the number of documents that need to be subjected to that costly direct review. If too many documents remain for review which turn out not to need to be discovered (so called false positives), then the cost and time of discovery will unnecessarily be lengthened. The whole point of narrowing the universe by means of key word searches is to reduce the number of documents that require direct personal review. If the key words are too wide, then the selection process will not do that job. If the key words are too narrow (or, perhaps, deliberately or inappropriately skewed), then same is likely to enhance the risk of false negatives. Some reasonable balance has to be achieved between those two ends. Provided that a party acts bona fide, and that the approach to the use of search tools is along the lines which I have described, it does not seem to me that a party should face criticism or adverse consequences if it should transpire that, despite those best efforts, some documents slipped through the net. In addition, I should note, in that context, that if truly key documents were to slip through the net that might, of itself, lead to real questions as to whether anyone could reasonably have believed that the methodology was right in the first place."

46. He then stated at paras. 3.4 and 3.5:-

"3.4 Since the decision of the Supreme Court in *Framus Ltd v CRH Plc* [2004] 2 I.R. 20, it has been clear that the court must pay attention to the principle of proportionality in deciding on the breadth of discovery to be ordered. It is also clear from *Telefonica 02 Ireland Ltd v Commission for Communications Regulation* [2011] IEHC 265 (and the cases cited therein) that proportionality can also play a role in relation to the disclosure of confidential information, at least in circumstances where documents are sought to be disclosed which are highly confidential (and, in particular, where the confidence of third parties is involved) and where the relevance of the documents concerned to the case may be at best marginal. It remains, of course, the case that, as Kelly J. pointed out in *Cooper Flynn v RTE* [2000] 3 I.R. 344, the requirement that justice be administered fairly will trump any obligation of confidence in ordinary circumstances so that confidentiality will not, ordinarily, provide a basis for the non- disclosure of materials which are of real relevance to the proceedings.

3.5 It also seems to me that proportionality is a relevant consideration when the court has to determine the way in which a party is to comply with its discovery obligations. There is, potentially, an interaction between the speed at which a discovery obligation has to be met, on the one hand, and the costs of complying with discovery obligations, on the other hand. While there may be some absolute limits to the speed at which aspects of the identification and analysis of materials which might potentially be included in a discovery affidavit can be achieved, nonetheless it is likely that the application of additional resources (whether they be human or technological) can speed up the process although sometimes at a not inconsiderable cost. In the ordinary way, it seems to me that a court, in considering the length of time which a party should be given to comply with a discovery obligation, should have regard to what might be considered an acceptable length of time having regard for the need for the case to come to trial with reasonable expedition, but also to the costs that might have to be incurred by greater expedition and to then strike an appropriate or proportionate balance."

47. Clarke J. went on to state at para. 3.7:-

"Where, therefore, a party unreasonably fails to progress matters in that way, in advance of order or agreement, a court is likely to be less sympathetic to a plea on the part of the party concerned that it would be difficult, unfair, unreasonable or unduly expensive or resource consuming, to require the party to comply with its obligations post agreement or order in a very short period of time. If, for example, a party who might reasonably have been expected to have completed stages one and two prior to the making of an order by the court could have complied with discovery in (say) eight weeks had it taken those steps in a timely fashion, then a court is likely to be reluctant to afford a significantly longer period for compliance to such a party simply because the relevant party had failed to comply with its obligation to take appropriate preparatory steps. It remains, of course, the case that the court cannot order a party to do the impossible. It is also true that it is only in extreme cases that the court could dismiss a claim or defence for discovery failures. However, within the range of what may be possible, a party may find the court unsympathetic to pleas of expense or difficulty if the party has not acted reasonably in preparing itself to be able to comply with discovery in an expeditious way."

The Distinction between English and Irish Discovery

48. I have already set out the relevant provisions of the Rules of the Superior Courts in the Republic of Ireland.

49. Rule 31(6) of the Civil Procedure Rules (CPR) in England specifies that a standard of disclosure requires a party to disclose only:-

(a) the documents on which he relies; and

(b) the documents which:

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

50. I have been referred to the full chapter of the Civil Procedure Rules in England on disclosure and inspection of documents (part 31 of the Rules).

51. Counsel for the plaintiff has also opened an English Court of Appeal decision, *Nichia Corporate v. Argos Limited* [2007] EWCA Civ 741, where in a judgment of Jacob L.J. a distinction was drawn between the new rules and the previous rules. Jacob L.J. stated at paras. 45 and 46 of his judgment:

"45. I start with the latter-the introduction of "standard disclosure". Prior to the CPR the test under the rules was that any document "relating to any matter in question" was discoverable. The courts took a very wide view of what was covered by this. The test was laid down a long time ago when no-one had the quantities of paper they have now. In the very well-known *Peruvian Guano* case, (1882) 11 Q.B.D. 55 6 Brett L.J. said:

"We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action;

It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may*- not which *must* -either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead

him to a train of inquiry, which may have either of these two consequences."

> 46. It is manifest that this is a much wider test than that for "standard disclosure." I have a feeling that the legal profession has been slow to appreciate this. What is now required is that, following only a "reasonable search" (CPR 31.7(1)), the disclosing party should, before making disclosure, consider each document to see whether it adversely affects his own or another party's case or supports another party's case. It is wrong just to disclose a mass of background documents which do not really take the case one way or another. And there is a real vice in doing so: it compels the mass reading by the lawyers on the other side, and is followed usually by the importation of the documents into the whole case thereafter-hence trial bundles most of which are never looked at."

52. This Court does accept that the requirements 0. 31, r. 12 of the Irish Superior Court Rules are materially different from the Civil Procedure Rules in England.

Conclusion

53. The reliefs that the plaintiff seeks in the present proceedings are different from those in the English proceedings. The focus of these proceedings is on the attempt by the Barclay interests to acquire the loan facilities of the plaintiff with IBRC which are now the subject of a proposed sale by the second and third named defendants. However, the plaintiff does seek to introduce in the Irish proceedings, matters which were the focus of extensive evidence and argument in the English proceedings. The plaintiff seeks to have interpreted the definition of shareholder in the relevant shareholders' agreement.

54. He seeks further to have an implied term made part of the shareholders' agreement. He also intends to rely on allegations of breaches of good faith contrary to para. 8 of the shareholders' agreement.

55. The exact relationship between the Irish proceedings and the English proceedings will in due course be determined by the trial judge. He will have an obligation to consider the objections set out in the fourth to ninth defendants' defence.

56. In respect of the claim against the Barclay interests, of wrongdoing in their efforts to acquire the plaintiffs loan facilities from IBRC and NAMA prior to the appointment of the special liquidators on 7th February, 2013, there is an overlap between the Irish and English proceedings. There has been some discovery of the communications between the Barclay interests and the Department of Finance, NAMA and IBRC. However, the court accepts this was not the primary focus of the English proceedings nor was it by any means the central issue in those proceedings.

57. Material was deleted by the plaintiff and the Barclay interests, in the course of the relevant period, that was the subject of considerable attention in the English proceedings, including interim applications in the course of the hearing and was referred to by the trial judge in the substantive judgment. As far as discovery in these proceedings is concerned, this Court does not expect further efforts by the Barclay interests to retrieve deleted text messages. Both the plaintiff and the Barclay interests deleted texts, and there should be no further issue about same in the Irish proceedings. The court would expect that deleted e-mails or texts stored could be recovered.

58. It is relevant and necessary for the plaintiff to have discovery of the efforts by the Barclay interests to acquire his loan facilities from IBRC from the date of initiation of that process by them up to the appointment of the special liquidator on 7th February, 2013. That discovery is both relevant and necessary for the plaintiff to assist him in making the case before the Irish Courts.

59. Insofar as the plaintiff seeks to ask the Irish Courts to interpret the shareholders' agreement in the context of Irish Law or to refer to issues of control within the Barclay entities or directions by the sixth and seventh defendants to the trust in respect of the wider dispute between them and the plaintiff apart from the distinct issue of the acquisition of the IBRC facilities, this Court is satisfied that the discovery in the English proceedings is sufficient.

60. The fourth to ninth defendants are concerned that any order for discovery will be oppressive and may jeopardise the early commencement of these proceedings which are scheduled to commence on 4th March, 2014.

61. The court accepts that is an appropriate matter to consider.

62. However, the order for discovery which the court intends to make in the Irish proceedings is aimed specifically at the fourth to ninth defendants' efforts to acquire the loan facilities of the plaintiff. It is appropriate for the court to draw the inference based on the information already disclosed in respect of these efforts, that this exercise would have been under the control of senior executives from the fourth to ninth defendants and it should not be an unduly difficult task to trace any relevant documentation and communication between the entities and between the sixth and seventh named defendants and the entities relating to the determination of the Barclay interests to acquire these loan facilities. There is no need to make further inquiries or discover other matters which involved NAMA, namely the acquisition by the Barclay interests of Derek Quinlan's loans and subsequently his shares and also the acquisition of the loan facilities of the company. The court accepts that there may be difficulties in calibrating the electronic searches required to exclude these documents.

63. The court is concerned to safeguard the bid process so if issues arise in respect of relevant documents the court will retain the discretion to examine those documents and if necessary refuse to include them as part of discovery.

64. It is essential for all concerned that the trial date fixed is held.

65. As far as the fourth to ninth defendants' motion for discovery is concerned, the information sought at Category 1, para. (a) is relevant and necessary because of the term sought to be implied in the shareholders' agreement, and the allegation that the intention of the fourth to ninth defendants is to engineer the default of the plaintiff. An order for discovery should be made in respect of that category.

66. The court does not regard para. (b) as relevant or necessary except for the issue of the status of the plaintiff as a bidder for his own loans. It has now been confirmed by the court that he is a bidder and that should be set out in the affidavit of discovery.

67. The documents in Category 2 in the motion are relevant and necessary, but the court notes that the plaintiff has indicated that he has no documents. That should be set out in the affidavit of discovery.

68. To give effect to the court's order, the categories of documents sought by the plaintiff have been substantially recast by the

court and the suggested wording of the order is set out in the schedule hereto.

69. The court notes that there is no requirement for discovery in respect of the plaintiffs damages claim and that there is agreement in respect of categories (k) and (1) of the plaintiffs motion.

70. The court considers the appropriate period of time over which the discovery should range is from 1st January, 2011 to 7th February, 2013.

71. There will be, of necessity, a narrow time for the plaintiff to examine the documentation.

SCHEDULE.

An Order pursuant to the Rules of the Superior Courts 1986 (as amended) and in particular Order 31, rule 12 thereof, and/or pursuant to the Court's inherent jurisdiction, directing the fourth to ninth named defendants to make discovery on oath of the documents which are or have been in their possession, power or procurement under the following categories:-

(a) Any communications between any person or entity on behalf of the Barclay Defendants or any of them and the Trustees of the said Family Settlements (or any person acting on behalf of the Trustees) which (whether directly or indirectly) relate to the acquisition or the intended acquisition of the plaintiff's loan facility with IRBC.

(b) Any documents relating to any instructions (whether given directly or indirectly) by or on behalf of the sixth or seventh named defendants to the Trustees of the said Settlements (or any person acting on behalf of the Trustees) in relation to any matter pertaining to the acquisition of the Plaintiff's loans in IRBC.

(c) All documents relating to and/or evidencing communication, correspondence and/or interaction as between the Barclay Defendants, their servant or agents or any person or entity acting on their behalf (whether directly or indirectly) and the National Assets Management Agency (NAMA) and/or its employees in relation to the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information and/or documentation in relation to his loans.

(d) All documents relating to and/or evidencing communication, correspondence and/or interaction as between the Barclay Defendants, their servant or agents or any person or entity acting on their behalf (whether directly or indirectly) and the Department of Finance and/or its employees in relation to the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information and/or documentation in relation to his loans.

(e) All documents relating to and/or evidencing communication, correspondence and/or interaction as between the Barclay Defendants, their servant or agents or any person or entity acting on their behalf (whether directly or indirectly) and the first, second and/or third named defendants and/or their respective employees in relation to the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information and/or documentation in relation to his loans.

(f) All documents relating to and/or evidencing instructions given by or taken from the Barclay Defendants (or any person or entity acting on their behalf) to communicate, correspond and/or interact with NAMA, the Department of Finance and/or the first, second and/or third named defendants regarding the plaintiff's loans with IBRC and/or in relation to the accessing and/or acquiring of information in relation to his loans.

(g) All documents received by the Barclay Defendants, their servants or agents from NAMA and/or its employees and/or Frank Knight and/or Ms Elaine Tooke (whether directly or indirectly) relating to the plaintiff and all documents relating to and/or evidencing the Barclay Defendants, their servant or agents (or any person or entity acting on their behalf) receiving information (directly or indirectly) in relation to the plaintiff from NAMA and/or its employees and/or from Frank Knight and/or Ms Elaine Tooke.

(h) All documents relating to and/or evidencing the Barclay Defendants' engagement (whether directly or indirectly) of Knight Frank and/or Ms Elaine Tooke including all documents relating to any communication and/or interaction (whether directly or indirectly) between the Barclay Defendants their servants or agents (or any person or entity acting on their behalf) and Knight Frank and/or Ms Elaine Tooke in relation to the plaintiff and/or regarding information or documentation relating to the plaintiff.

(i) All documents relating to the allegation made in paragraph 20 of the Defence that it is currently contemplated that the Barclays Interests will seek to acquire the Loan Facilities together with all documents relating to the intention of Ellerman Corporation Limited to acquire the loans and the Charge.

(j) The court reserves the right to exclude any documents which would compromise the integrity of the bid process for the Plaintiffs loans.

(k) The relevant period of discovery is from 1/01/2011 to 7/2/2013.