

THE HIGH COURT

COMMERCIAL

2010 2049 S

BETWEEN

ANGLO IRISH BANK CORPORATION LIMITED

PLAINTIFF

AND

JOHN FLANAGAN, GERARD (OTHERWISE GERRY) LILLIS

AND TED JOYCE

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 8th day of March, 2011

1. This judgment is given on the application of the first named defendant that the plaintiff make discovery of documents. The application lists fifty-three categories of documents under seven headings. There are similar applications for discovery by the second and third named defendants. It was agreed between the parties that the application of the first named defendant be heard and determined. It is hoped that this decision will permit the parties to agree orders in respect of the applications of the second and third named defendants which is consistent with this judgment.

2. In the summary summons, the plaintiff claims in aggregate €9,890,619.65 plus interest as a debt due from the first named defendant, pursuant to four separate facilities and/or guarantees:

(i) Loans pursuant to a facility letter of 11th August, 2008, to the first named defendant (the "Flanagan Facility").

(ii) Loans pursuant to a second facility letter of 11th August, 2008, to the first and second defendants (the "Flanagan and Lillis Facility").

(iii) A guarantee allegedly executed by the first and second named defendants on 22nd December, 2005, of a loan facility to Atlantis Developments Limited (the "Atlantis Guarantee"). The outstanding loan to Atlantis Developments Limited is alleged to be the subject of a further facility letter dated 11th August, 2008.

(iv) Pursuant to a guarantee dated 27th June, 2005, from the first and third named defendant of the liabilities of Liscannor Properties Limited to the plaintiff. The outstanding liabilities of Liscannor Properties Limited allegedly guaranteed are pursuant to a letter of 8th August, 2008.

3. The proceedings were admitted to the Commercial List on 10th May, 2010. On an application for summary judgment, the claims against all three defendants were remitted to plenary hearing by order of 23rd July, 2010. Each defendant has served a defence and counterclaim. The plaintiff has delivered a reply and defence to counterclaim. Particulars have been raised and replied to.

4. The first named defendant denies any liability to the plaintiff for the sum claimed. The defences made are multiple. Certain are specific to an individual facility and others are common to several of the facilities.

5. The plaintiff made loans to the first named defendant and companies of which he is alleged to be guarantor on different dates commencing in 2003. The majority of the loans relate to the proposed development by the first named defendant and others of what is referred to as 'the Park & Ride' project at Liscannor, County Clare, and the development on an adjacent site of a hotel to be known as the Cliffs of Moher Hotel. The latter was proposed to be financed by investors with the benefit of a tax scheme. There were also smaller loans made by the plaintiff to the first named defendant, one, for the purpose of investment in the Jaguar Fund and another for a booking deposit on lands at Quin, County Clare.

6. The defence and counterclaim of the first named defendant raises a significant number of defences some of which appear to relate to all of the monies, the subject matter of the claim against him, and others which relate to specific facilities. The court at this stage does not have the full facts before it nor, indeed, certain of the documents to which reference is made. The reply and defence to counterclaim puts almost every plea in the defence in issue. The defences which relate to many of the facilities include:

(1) The allegation that the plaintiff is not entitled to enforce the alleged contracts, the subject matter of the proceedings (*i.e.* the facility letters of the 11th August, 2008), on the grounds that the same were "illegal and made as a result of a wilful and deliberate breach of the bank's statutory duties [and] were thereby tainted with illegality." (Defence par. 2).

(2) In relation to all facilities given to the first named defendant or to the companies in which he had an interest and whether to him alone or jointly with the second named defendant, it is pleaded that "it was expressly agreed between the parties that the plaintiff would have recourse only to the asset on which the said loans and facilities were secured and would have no other recourse. In the alternative, the aforesaid term was implied into the agreement between the parties". (Defence par. 3).

(3) The plaintiff would not seek any performance of the facilities until "the Park & Ride was operational". This plea is repeated in relation to many of the facilities and it is further pleaded that many of the facilities were linked to "the Park & Ride Project".

(4) The plaintiff was or became a partner in the Liscannor Project with the first named defendant and others. (Defence 56-2, 58 and Counterclaim 8).

There are additional specific defences and claims in the counterclaim to which I will make reference insofar as necessary in considering and determining the application for discovery.

Application for Discovery

7. Voluntary discovery was sought by letter dated 29th November, 2010, from the solicitors for the first named defendant. The discovery sought was divided into seven main categories, some issue related and some facility related and further subdivided. Of the total 53 subcategories, the solicitor for the plaintiff in their reply of 13th December, 2010, effectively agreed to give only eleven of the categories sought and some subject to modifications which are not acceptable to the first named defendant. Complaint was made by counsel for the plaintiff, correctly, that the notice of motion seeks an order for discovery of all fifty-three categories originally sought including those to which there had been agreement.

8. A general complaint was also made on behalf of the plaintiff in relation to potential overlap between different categories of documents. Whilst there would appear to be overlap, it is not something which this Court can fully address in this judgment. It follows, in part, from the multiplicity of facilities included in the proceedings and also from the nature of the defence and counterclaim and manner in which the documents sought on discovery have been categorised. The plaintiff is only obliged to discover and produce for inspection documents once pursuant to any order for discovery. In the discovery allowed, I have attempted to reduce some of the obvious overlap.

Applicable Legal Principles

9. There is no significant dispute between the parties as to the applicable legal principles though counsel for the respective parties placed different emphasis on their applicability to the facts of this application.

10. In accordance with the well established principles, the first named defendant must satisfy this Court for the purposes of O. 31, r. 12 that the documents in respect of which he seeks discovery are documents within the possession, power or procurement of the plaintiff and are:

- (i) relevant to the issues in the proceedings, and
- (ii) necessary for disposing fairly of the matter or for saving costs.

11. It was agreed that the starting point of the test for relevance is the principle set out by Brett L.J. in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* [1882] 11 Q.B.D. 55, 63 where he stated:

"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 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 those two consequences."

This remains the appropriate test of relevance since the introduction of the amended discovery rules in O. 31, r.12. In *Ryanair Plc v. Aer Rianta CPT* [2003] 4 I.R. 264, 275, Fennelly J. stated that the *dictum* of Brett L.J. in *Compagnie Financiere* "has long been accepted as laying down the appropriate test of relevancy".

12. It was also agreed that relevance must be determined by reference to the issues raised in the pleadings and not alleged facts put forward in affidavits. See *Hannon v. Commissioners of Public Works* (High Court, McCracken J., 4th April, 2001).

13. Counsel for the first named defendant submitted that the court in determining whether or not documents are relevant to an issue in dispute on the pleadings should not engage in any qualitative assessment as to whether the issue in question is one which the claimant will need to prove in order to succeed in the action. She relied upon *Discovery and Disclosure*, Abrahamson, Dwyer & Fitzpatrick, Thompson Round Hall 2007, at paras. 6-16, where it is stated:

"It is important to note that the authorities which endorse the application of the relevance requirement in this matter do not go so far as to permit the court to assess qualitatively whether the issue in question is one which the applicant will need to prove in order to succeed in the action. All that is permitted is an analysis of whether the documents in question are relevant to the case as pleaded. It is sufficient if the issue to which the documents are said to relate has been raised by one party and denied by another. The fact that the court may feel that the resolution of the issue will not ultimately sway the court of trial is irrelevant."

14. It appears to be correct, that the court must, on an application for discovery, consider and determine the issue of relevance by reference to the issues in dispute on the pleadings and which will have to be determined by the court at the full hearing. Exceptionally, there may be issues in dispute on the pleadings but which intervening circumstances indicate will not be an issue at the trial. That is not the position in these proceedings.

15. My attention was also drawn to the decisions of the Supreme Court including that in *P.J. Carroll & Company Ltd & Ors v. the Minister for Health and Children & Ors* [2006] 3 I.R. 431, which makes clear that the tests of relevance and necessity are two separate and distinct tests. It has been stated by the Supreme Court that a document, if relevant, is, more often than not, also necessary. However, the concepts are separate and there are cases in which documents which pass the test of relevance may not be considered necessary.

Application of principles to Discovery sought

16. The documents sought by the first defendant at para. 1 under the heading of "Regulatory Obligations" are:

(a) Financial Regulatory Reports and/or Statements in relation to the accounts, the subject matter of these proceedings from the date of August facility letters: -

(i) Facility Letter 2008/237L dated the 11th August 2008

(ii) Facility Letter 2008/238L dated the 11th August 2008

(iii) Facility Letter 2008/239L dated the 11th August 2008

(iv) Facility Letter 2008/242L dated the 11th August 2008

(v) Facility Letter 2008/243L dated the 8th August 2008

(b) Any correspondence and/or communications between the Plaintiff and the Financial Regulator, Central Bank, Financial Ombudsman or European Financial Institutions in respect of these accounts to include electronic data and recordings;

(c) Memos and minutes including electronic data and recordings of meetings at which these accounts were discussed with regard to their treatment pursuant to the Basel Regulations;

(d) Any correspondence and/or communications with the Financial Regulator, Central Bank, Financial Ombudsman or European Financial Institutions/Regulatory Bodies and any memos and minutes of any meetings or relevant recordings which concerned or touched upon the issue of impaired accounts generally within the Bank but limited to instances where there was a strategy or practice within the Plaintiff Bank of issuing new facility letters where accounts were in arrears, otherwise rolling up facilities when the motivation or part motivation for doing so was lined to the Basel Capital Adequacy Requirements and the obligations under European Directive 2006/48/EC and European Communities (Capital Adequacy of Credit Institutions) Regulations, 2006 (S.I. No. 661 of 2006) and the Defendants agree that any necessary material should be redacted so as to protect the privacy of account holders.

17. I have decided that the documents sought at paras. 1(a), (b) (with the exclusion of the reference to the Financial Ombudsman or European Financial Institutions) and (c) should be discovered. They are relevant to the allegation of illegality made in para. 2 of the Defence and put in issue in para. 2 of the reply. Whilst counsel for the plaintiff sought to challenge the *locus standi* of the defendant to raise an issue of illegality on the grounds alleged, this does not appear to be a matter to which I should have regard on this application for discovery. The illegality is pleaded and particulars have been delivered in the replies to particulars of 29th October, 2010, including an allegation that the facility letters of August, 2008 were generated by the plaintiff for the purpose of presenting to the Financial Regulator a false picture of loans which were in arrears and impaired, and for the purposes of obscuring such facts for the purposes of the regulatory regime. However, the first defendant has not established any basis for probable communications with the Financial Ombudsman or European Financial Institutions and, therefore, I am excluding any reference to those offices at para. 1(b). Subject to that exclusion, I am satisfied that the documents sought at paras. 1(a), (b) and (c) pass the test of relevance and that their discovery is necessary for the fair disposal of these proceedings as the alleged illegality particularised include the purpose of the loans.

18. I have reached the contrary decision in relation to the documents sought at para. 1(d). The documents sought are not specific to the defendants' facilities. I am not satisfied that this very general category of documents meets the *Peruvian Guano* test of relevance in relation to the issue of alleged illegality of the agreements made in August 2008, and it appears to me to be more in the nature of a fishing exercise. The only illegality issue in the proceedings relates to the facility letters to the defendants and their companies of August, 2008.

2. Security

19. The first named defendant seeks, in all, thirteen separate categories of documents under this heading in paragraphs 2(a) to (m) inclusive. I do not propose setting them out in full; it is not necessary to do so. The primary reason given for this discovery is its relevance to the first named defendant's plea at para. 3 of the defence to the effect that it was agreed between the parties that the plaintiff would only have recourse to the assets on which the loans and facilities were secured and would have no other recourse. Particulars of the alleged agreement have been sought and given at para. 2 of the replies to particulars. The agreement is alleged to have been made originally in about 2003, and made again at the time of the signing of each individual facility letter. Individuals in the plaintiff who are alleged to have made the agreement are named and the agreement is alleged to have been made orally. Reliance is also placed on the security section of the facility letters. The alleged agreement is denied by the plaintiff. However, I am satisfied in accordance with the principles set out above that internal documentation of the plaintiff and documentation passing between the plaintiff and the first named defendant which as a matter of probability include reference to either the security to be provided for the facilities and/or the personal liability of the first named defendant for payment of the interest or to the question as to whether or not the plaintiff would have recourse to the first named defendant for repayment of the capital and/or interest on the loans are relevant to the issue in dispute as to whether there existed an agreement or agreements that the loan was non recourse or whether such a term was implied in the agreements between the parties. I am also satisfied that it is necessary for the fair disposal of the proceedings that such documents are now discovered to the first named defendant. The first named defendant, in replies to particulars, has identified individuals within the plaintiff's organisation who are alleged to have made the agreements with him. As a matter of probability there will be oral evidence adduced on behalf of the plaintiff. The first named defendant is entitled to see and consider the relevant contemporaneous documentation prior to being required to cross examine the plaintiff's witnesses.

20. Notwithstanding the above, the categories sought, in part, go beyond what, in my view, is relevant to the issue. I propose allowing the following categories *in lieu* of the categories of documents sought at para. 2(a) to 2(h) and 2(j) to 2(m) inclusive. The requests were drafted to relate to all the defendants and as this issue is common to all three defences, I have likewise referred to all defendants:

(a) All loan applications together with any supporting documentation submitted by or on behalf of the defendants or any of them between 1st January, 2003, and 31st August, 2008.

(b) All credit committee applications and/or supporting memos, reports and recordings put forward to the credit committee

or prepared for the credit committee in respect of applications from or loans to the defendants or any of them between 1st January, 2003, to 31st August, 2008.

(c) All decisions of the credit committee on such applications.

(d) Any other documentation created by the plaintiff in connection with such applications from the defendants to include any memos, minutes or recordings of any meetings held by the plaintiff, its servants or agents, where the security to be provided by the defendants or the defendants ability to repay or the question as to whether or not there was to be personal recourse to the defendants was considered, discussed or referred to.

(e) All documents created or received by the plaintiff in connection with the defendants' ability to repay the loans between 1st January, 2003, to 31st August, 2008.

(f) All facility letters issued by the plaintiff to any of the defendants in the years 2003 to 2008 inclusive.

21. The category of documents sought at para. 2(i) relates to a different issue in the proceedings. The first named defendant seeks copies of all guarantees and related documentation. As already indicated, the plaintiff has a claim against the first named defendant in reliance upon two guarantees. The plaintiff on the summons refers to a third guarantee upon which it is not seeking to rely. The first named defendant specifically denies signing one of the two guarantees and it is denied that the second guarantee relates to the relevant facility. Those factual issues are all in dispute. Having regard to such disputes, it appears to me that the copies of the guarantees allegedly executed and certain related documentation is both relevant to the issues in dispute in the proceedings and necessary for the fair disposal of them. Accordingly, I would allow the documents sought at para. 2(i) amended to read:

(i) All guarantees allegedly executed by the first named defendant in favour of the plaintiff and any memoranda, report or other document which refers to the requirement for a guarantee from the first named defendant, the existence of such a guarantee or the execution and delivery of such a guarantee or any query or uncertainty relating to any such guarantee.

3. & 4. Agreement and Retraction from Agreement

22. The first named defendant seeks, under the above headings, in total, twenty-four categories of documents 3(a) to (m) and 4(a) to (k). At the hearing, the requests at 4(e), (f) and (g) were withdrawn. The documents sought at 4(h) to (k) relate to communications with the National Asset Management Agency (NAMA) and I will deal with those separately. I propose dealing with the remaining categories 3(a) to (m) and 4(a) to (d) in this part of the judgment as they relate to connected issues.

23. The plaintiff in the letter from its solicitors of the 13th December, 2010, has agreed to make discovery of the documents sought, subject to certain modifications in paras. 3(c), (d), (f), (g), (l) and (m).

24. The documents sought are alleged to be relevant to several issues in dispute in the proceedings. The first is that the plaintiff agreed not to seek interest or capital repayments in relation to many of the facilities until the Park and Ride project was operational. The second is that the plaintiff became a partner in the Liscannor project. The replies to particulars indicate that the first agreement is alleged to have been reached in January 2009, following negotiations which commenced in October 2008. The replies to particulars also contend that the plaintiff became a partner with the defendants on 22nd January, 2009. Thirdly, it is alleged that the plaintiff is in breach of contract in seeking to have the defendants sign new facility letters in September 2009, and in issuing the letters of demand in March/April 2010. Such breaches of contract are denied. On the pleadings, there are significant factual disputes as to the participation of the plaintiff and dealings between the plaintiff and the defendants between January 2009 and the letters of demand in March and April 2010. The plaintiff's contemporaneous documentation recording its consideration of the loans to the defendants or of which they were guarantors in this period and any record of communications between them are relevant to the issues in dispute and I am satisfied it is necessary that they be discovered for the fair disposal of the proceedings.

25. Accordingly, having regard to the agreement, in part, of the plaintiff to make certain discovery and my view of what is both relevant and necessary, I propose allowing discovery of the following amongst the categories sought at 3(a) to (m) and 4(a) to (d) inclusive, and following the number used in the letter, seeking voluntary discovery:

3(c) All audited accounts (hard copy or electronic) held by the plaintiff in relation to the defendants, Atlantis Developments Limited and Liscannor Properties Limited.

(d) All financial projections (hard copy or electronic) in respect of the Park and Ride project prepared by or on behalf of the plaintiff, its servants or agents.

(e) All professional reports received by the plaintiff in relation to the Park and Ride project.

(f) & (g) Any memorandum made or recording made of any telephone call between the defendants or any of them and any representative of the plaintiff between 1st October, 2008 and 22nd January, 2009, to include, in particular, conversations between the first named defendant and Tom Walsh on 22nd January, 2009.

(h) Any letters of request for interest payments on any of the facilities made by the plaintiff, its servants or agents of any of the defendants between 22nd January, 2009 and 14th January, 2010.

(i) Any letters of request for capital payments made by the plaintiff, its servants or agents of the defendants or any of them between 22nd January, 2009, and 14th January, 2010.

(j),(k),(l) All documents, recordings, or memoranda concerning any review undertaken by the plaintiff of any of the facilities the subject matter of these proceedings between 30th October, 2008 and 15th January, 2010.

(m) All applications including electronic data and recordings which were put before the credit committee or prepared with a view to being put before the credit committee for the approval of development finance for the Park and Ride project between 22nd January, 2009 and 17th June, 2009.

4(a) All applications, including electronic data and recordings put before the credit committee or prepared with a view to being put before the credit committee for approval of development finance for the Park and Ride project between 18th

June, 2009, and 5th March, 2010;

(b) All reports and documents which issues from the credit committee following reviews of the applications referred to in the preceding paragraph.

I am not satisfied that the first named defendant has made out the relevance of the remaining documents sought at 3 and those at 4(c) and (d) in relation to valuations to the issues in dispute on the pleadings.

NAMA

26. The first defendant seeks at para. 4(h) to (k) inclusive:-

(h) All business plans including all electronic data and recording of the eligible assets prepared for the transfer to the National Asset Management Agency (NAMA);

(i) All valuation reports including electronic data and recordings of the eligible assets prepared for the transfer to NAMA;

(j) All memoranda, letters and correspondence to include all electronic data and recordings between the plaintiff and NAMA in respect of these loans;

(k) The NAMA questionnaires to include all electronic data and recordings to the plaintiff bank duly replied to by the plaintiff bank in respect of these loans.

27. In summary, the first named defendant contends that there may be information in some of all of the above documents which would tend to support that defendant's contention that the agreement in relation to these loans was that there would not be recourse to the defendants, personally, and also that the plaintiff was involved in the project as a partner.

28. The documents sought are not contemporaneous documents; they postdate the alleged agreements in January 2009, and the alleged involvement of the plaintiff as a partner from that date. I have concluded that even if such documents should be considered as coming within the principles set out by Brett L.J. in *Peruvian Guano Company*, they are of such marginal relevance that their discovery is not necessary for the fair disposal of the issues in dispute in these proceedings. Accordingly, I am refusing the application for such categories of documents.

5. Cliffs of Moher - Tax Driven Scheme/Doolin Facility/Guarantee Facility/VAT Bridging Facility

29. The first named defendant seeks, at paragraphs 5(a) to (k) inclusive, eleven categories of documents relating to a number of different facilities in dispute in the proceedings. The first five categories relate to what is referred to as the Tax Driven Scheme for the Cliffs of Moher Hotel. The primary contention of the first named defendant in relation to this facility is that the plaintiff expressly agreed to finance the development of the Cliffs of Moher Hotel as a tax driven hotel scheme, and, as part of such agreement, that the plaintiff agreed that it would issue a "complete non-recourse" facility letter for the investors in the scheme. It is contended that in breach of such agreement, the plaintiff refused to afford investors complete non-recourse finance, and that, *inter alia*, as a result of such breach of contract, a VAT liability arose for the first named defendant and others. All of the above contentions are disputed by the plaintiff.

30. The plaintiff has agreed to discover the documents sought at paragraphs 5(c), (d) and (e), but contends that those sought at 5(a) and (b) are too wide and their relevance is not established. I am not satisfied that the relevance of the planning permission is established and therefore disallow (b). It does appear to me that the first named defendant is entitled to discovery of some of the documents sought at 5(a) and therefore I will allow this category revised to read:

(a) All documents, notes, memoranda or other recordings concerning or arising out of or in connection with the refinancing of the Ulster Bank debt that is referred to as Facility B and Facility C in facility letter 2008/238L to include all electronic data and recordings.

31. In category 5(f), the first named defendant seeks documents relating to "the Doolin site facility". The first named defendant, at paragraphs 35 and 36 of the defences, pleads a specific defence to the effect that there was agreement that the plaintiff would not seek performance of such facilities until the Park and Ride project was operational. The plaintiff, in its defence at paragraph 23, whilst it admits that the facilities which are the subject of the proceedings were interlinked, it denies any agreement that it would not seek performance of the Doolin site facility until the Park and Ride project was operational. The documents sought relating to the Doolin site facility, are, I have concluded, both relevant and necessary and I will allow 5(f).

32. The documents sought at 5(g) and (h) relate to what is referred to as the Guarantee Facility. This related to a performance bond. The plaintiff agreed to make discovery of paragraph (h) but not (g). Having regard to the defences pleaded at paragraphs 37 to 39, and the matters put in issue in paragraphs 24 to 26 of the reply, I have concluded that the documents sought at both (g) and (h) are both relevant and necessary.

33. The last three categories 5(i) to (k) relate to what is known as the VAT Facility. The first named defendant contends that the VAT liability arose by reason of the alleged breach of contract of the plaintiff in not providing complete non-recourse facilities for investors in the proposed Cliffs of Moher Tax Driven Scheme. It is contended that the documents sought are irrelevant to those issues as well as the first named defendant's liability for the VAT Facility. The plaintiff objects on the grounds that the documents are both irrelevant and impermissibly wide. It appears to me that the documents sought at paragraph 5(i) are excessively wide and in lieu of the categories of documents sought at (i), (j) and (k), I will allow discovery of the following:

(i) any request made by the defendants for the VAT Facility or its drawdown;

(j) any letter of undertaking sought, obtained or relied upon by the plaintiff as security for the VAT Facility, and

(k) any other document, note or memoranda relating to the defendants' application for the VAT Facility and/or the plaintiff's assessment of such application or the defendants' then need for the VAT Facility.

6. Quin Facility

34. The first named defendant seeks one category of documents, albeit, as the plaintiff contends, impermissibly wide, relating to the Quin Facility. The Quin Facility was an advance of approximately €400,000 for the deposit on lands at Quin, County Clare. The terms of the Facility are in dispute, as appears from paragraphs 75 and 76 of the Defence and paragraphs 44 and 45 of the Reply. In addition, the first named defendant pleads, at paragraph 14 of the counterclaim, that the plaintiff agreed to fund the balance of the purchase price of €3.6 million and did not do so. This is also in dispute. Certain of the plaintiff's documents relating to the application for and the granting of the Quin Facility are both relevant and necessary for the fair disposal of the proceedings. Having regard to the plaintiff's legitimate objections to the width of the categories sought, I propose allowing discovery of the following:

6(a) Any application received from or on behalf of the first named defendant for the Quin Facility and all documents, notes and memoranda (including in electronic format) relating to the plaintiff's assessment of such application and its decision to grant the Facility and as to the terms upon which it should be granted, and any consideration of a connection between the Quin and Jaguar Facilities.

7. Jaguar Facility

35. This Facility was for the purpose of investment in the "Jaguar Fund". The first named defendant contends that this was a fund operated by former executives of the plaintiff. The terms of the Facility are in issue on the pleadings, pursuant to paragraphs 73 and 74 of the Defence and paragraphs 42 and 43 of the Reply. In addition, the first named defendant has counterclaimed for damages for alleged breach of contract, misrepresentation, breach of warranty, breach of duty and negligence in connection with the monies advanced for investment in the Jaguar Fund. The plaintiff has agreed to provide discovery, in part, of the documents sought. It justifiably alleges that the category of documents is impermissibly wide. Some documents are both relevant and necessary and, accordingly, I propose allowing discovery of the following:

7(a) All brochures, specifications and other promotional material and all internal and/or external professional reports on the performance of the Jaguar Fund and correspondence and records of communications (oral and written) with the first named defendant and any documents, notes or memoranda (including in electronic format) relating to the first named defendant's proposed investment in the Jaguar Fund and any facility to be granted for that purpose or in connection therewith, all such documents up to the date the first named defendant invested in the Jaguar Fund.

Conclusion

36. There will be an order that the plaintiff make discovery of the documents in the categories allowed in this judgment. They are set out in the following Schedule. I will hear the parties as to the time to be fixed for the discovery and obtain the deponent's name from the plaintiff.

SCHEDULE

Category 1: Regulatory Obligations

1(a) Financial Regulatory Reports and/or Statements in relation to the accounts, the subject matter of these proceedings from the date of the August facility letters:

Facility Letter 2008/237L dated the 11th August 2008

Facility Letter 2008/238L dated the 11th August 2008

Facility Letter 2008/239L dated the 11th August 2008

Facility Letter 2008/242L dated the 11th August 2008

Facility Letter 2008/243L dated the 8th August 2008

1(b) Any correspondence and/or communications between the Plaintiff and the Financial Regulator and the Central Bank in respect of these accounts to include electronic data and recordings.

1(c) Memos and minutes including electronic data and recordings of meetings at which these accounts were discussed with regard to their treatment pursuant to the Basel Regulations.

Category 2: Security

2(a) All loan applications together with any supporting documentation submitted by or on behalf of the defendants or any of them between 1st January, 2003, and 31st August 2008.

2(b) All credit committee applications and/or supporting memos, reports and recordings put forward to the credit committee or prepared for the credit committee in respect of applications from or loans to the defendants or any of them between 1st January, 2003 and 31st August, 2008.

2(c) All decisions of the credit committee on such applications.

2(d)Any other documentation created by the plaintiff in connection with such applications from the defendants to include any memos, minutes or recordings of any meetings held by the plaintiff, its servants or agents, where the security to be provided by the defendants or the defendants ability to repay or the question as to whether or not there was to be personal recourse to the defendants was considered, discussed or referred to.

2(e)All documents created or received by the plaintiff in connection with the defendants' ability to repay the loans between January 1st, 2003 and 31st August, 2008.

2(f)All facility letters issued by the plaintiff to any of the defendants in the years 2003 to 2008 inclusive.

2(i)All guarantees allegedly executed by the first named defendant in favour of the plaintiff and any memoranda, report or other document which refers to the requirement for a guarantee from the first named defendant, the existence of such a guarantee or the execution and delivery of such a guarantee or any query or uncertainty relating to any such guarantee.

Category 3: Agreement

3(c)All audited accounts (hard copy or electronic) held by the plaintiff in relation to the defendants, Atlantis Developments Limited and Liscannor Properties Limited.

3(d)All financial projections (hard copy or electronic) in respect of the Park and Ride project prepared by or on behalf of the plaintiff, its servants or agents.

3(e)All professional reports received by the plaintiff in relation to the Park and Ride project.

3(f) and (g)Any memorandum made or recording made of any telephone call between the defendants or any of them and any representative of plaintiff between 1st October, 2008 and 22nd January 2009, to include in particular conversations between the first named defendant and Tom Walsh on 22nd January, 2009.

3(h)Any letters of request for interest payments on any of the facilities made by the plaintiff its servants or agents of any of the defendants between 22nd January, 2009 and 14th January, 2010.

3(i)Any letters of request for capital payments made by the plaintiff, its servants or agents of the defendants of any of them between 22nd January, 2009, and 14th January, 2010.

3(j), (k), (l)All documents, recordings, or memoranda concerning any review undertaken by the plaintiff of any of the facilities the subject matter of theses proceedings between 30th October, 2008 and 15th January, 2010.

3(m)All applications including electronic data and recordings which were put before the credit committee or prepared with a view to being put before the credit committee for the approval of development finance for the Park and Ride project between 22nd January, 2009 and 17th June, 2009.

Category 4: Retraction from Agreement

4(a)All applications, including electronic data and recordings put before the credit committee or prepared with a view to being put before the credit committee for approval of development finance for the Park and Ride project between 18th June, 2009, and 5th March, 2010.

4(b)All reports and documents which issues from the credit committee following reviews of the applications referred to in preceding paragraph.

Category 5: Cliffs of Moher – Tax Driven Scheme/Doolin Facility/Guarantee

Facility/VAT Bridging Facility

5(a)All documents, notes, memoranda or other recordings concerning or arising out of or in connection with the refinancing of the Ulster Bank debt that is referred to as Facility B and Facility C in facility letter 2008/238L to include all electronic data and recordings.

5(c)All reports, documents and memoranda in relation to the tax driven scheme in the power, possession or procurement of the Plaintiff Bank to include all electronic data and recordings.

5(d)Without prejudice to the generality of the foregoing, all professional reports prepared for or with the intention of putting before the credit committee or actually before the credit committee in respect of the Cliffs of Moher Co-Ownership Partnership.

5(e)The facility letter that issued to the Cliffs of Moher Co-Ownership Partnership.

5(f)All documents, notes and memoranda whether in computerised, disk, email or electronic format including all recordings arising out of, under or in connection with or touching upon the Doolin site facility.

5(g)All documents, notes and memoranda whether in computerised, disk, email or electronic format including all recordings arising out of, under or in connection with or touching upon the Guarantee facility.

5(h)Without prejudice to the generality of the foregoing, to include all documentation touching upon or concerning the issue of delay and/or prevarication on the part of the Plaintiff itself in having the bond released and touching upon the issue of cooperation or lack thereof between the Plaintiff and Clare County Council.

5(i)Any request made by the defendants for the VAT Facility or its drawdown.

5(j)Any letter of undertaking sought, obtained or relied upon by the plaintiff as security for the VAT Facility.

5(k)Any other document, note or memoranda relating to the defendants' application for the VAT Facility and/or the plaintiff's assessment of such application or the defendants' then need for the VAT Facility.

Category 6: Quin Facility

6(a)Any application received from or on behalf of the first named defendant for the Quin Facility and all documents, notes and memoranda (including in electronic format) relating to the plaintiff's assessment of such application and its decision to grant the Facility and as to the terms upon which it should be granted, and any consideration of a connection between the Quin and Jaguar Facilities.

Category 7: Jaguar Facility

7(a)All brochures, specifications and other promotional material and all internal and/or external professional reports on the performance of the Jaguar Fund and correspondence and records of communications (oral and written) with the first named defendant and any documents, notes or memoranda (including in electronic format) relating to the first named defendant's proposed investment in the Jaguar Fund and any facility to be granted for that purpose or in connection therewith, all such documents up to the date the first named defendant invested in the Jaguar Fund.