THE HIGH COURT

COMMERCIAL

[2019] IEHC 639
[2016 No. 5037 P.]

BETWEEN

VICTORIA HALL MANAGEMENT LIMITED, PALM TREE LIMITED, GREY WILLOW LIMITED, ALBERT PROJECT MANAGEMENT LIMITED, O'FLYNN CAPITAL PARTNERS and O'FLYNN CONSTRUCTION (CORK)

PLAINTIFFS

AND

PATRICK COX, ROCKFORD ADVISORS LIMITED, LIAM FOLEY, FOLEY PROJECT MANAGEMENT LIMITED, EOGHAN KEARNEY, CARROWMORE PROPERTY LIMITED, CARROWMORE PROPERTY GARDINER LIMITED and CARROWMORE PROPETY GLOUCESTER LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice David Barniville delivered on the 11th day of September, 2019

Introduction

1. This is my judgment on a number of motions in relation to discovery issued as between the plaintiffs and the defendants in this long running and fiercely contested case. Although the proceedings were commenced in June, 2016 and entered in the commercial list shortly thereafter, and although discovery orders were initially made in February, 2017, the parties are still in dispute in relation to various aspects of the discovery made by each other. Those motions came on for hearing before me on 19th July, 2019. The case itself is listed for hearing on 14th January, 2020.

2. There are three motions concerning discovery which are dealt with in this judgment. The first two have been brought by the plaintiffs as against the defendants. The third has been brought by the defendants.

3. In the first motion the plaintiffs seek an order directing the defendants to make further and better discovery of certain documents. That motion was issued on 20th February, 2019 and was initially returnable for 25th February, 2019. It was adjourned from time to time to enable affidavits to be exchanged and was ultimately compromised by means of a settlement agreement made on 11th April, 2019 on foot of which the court (Haughton J.) made certain agreed directions. The plaintiffs contend that the defendants have failed to comply with those directions and have re-entered the motion.

4. The second motion was issued by the plaintiffs on 25th June, 2019 and was initially made returnable for 1st July, 2019. That motion seeks additional discovery arising from the joinder of the seventh and eighth defendants (Carrowmore Property Gardiner Limited and Carrowmore Property Gloucester Limited) on foot of an order made by the High Court (McDonald J.) on 6th February, 2019 which also permitted the plaintiffs to amend their statement of claim to include certain additional matters. On the day after that motion was issued by the plaintiffs, the defendants' solicitors, Crowley Millar, agreed that the defendants would make the further discovery sought by the plaintiffs in the second motion and would furnish an affidavit of discovery to be sworn by Patrick Cox, the first defendant, by 9th August, 2019. An outstanding issue does arise in relation to the second motion in that the plaintiffs also seek an order directing the seventh and eighth defendants to explain on affidavit the methodology adopted by them in making the discovery which they have now agreed to make in circumstances where Mr. Cox, the first defendant, swore an affidavit on 30th May, 2019 confirming that the seventh and eighth defendants had no documentation to discover on foot of the plaintiffs' request save for the documents which had already been discovered by the other defendants in the proceedings.

5. The third motion is a motion brought by the defendants in which the defendants seek an order for further and better discovery against the plaintiffs in respect of two categories of documents which the defendants contend ought to have been discovered by the plaintiffs on foot of an order made by the court (McGovern J.) on 11th July, 2017. The circumstances in which that order was made and in which the defendants now seek further and better discovery from the plaintiffs are somewhat complicated and will require to be addressed in some detail when I come to considering the third motion in the course of this judgment.

6. Before considering each of the motions, in the order in which I have just indicated, it is appropriate that I first sketch out the substantive case being advanced by the plaintiffs and the basis on which it is being defended by the defendants. I will then briefly outline the relevant legal principles applicable to applications for further and better discovery which arise, in particular, in relation to the first and third motions. In addition to those legal principles (on which there was little, if any, difference between the parties), certain other legal issues arise in respect of the various motions which I will consider separately when dealing with the motions themselves. Having set out those general legal principles applicable to applications for further and better discovery, I will then consider each of the motions in turn. Having done so, I will set out in my conclusions the orders I propose to make in relation to each of the motions.

The proceedings

7. The plaintiffs, property development companies variously registered in Ireland, England, Wales and Jersey, claim that three former employees of the plaintiffs or other entities within the O'Flynn Group of companies, namely, the first, third and fifth defendants, Patrick Cox, Liam Foley and Eoghan Kearney (the "personal defendants") have acted in breach of their respective contracts of employment and in breach of other duties in various respects. In very brief summary, it is alleged that Mr. Cox actively competed with the plaintiffs and concealed and diverted significant investment opportunities for his own benefit or for the benefit of the other defendants and appropriated or failed to return and used a substantial amount of confidential documentation relating to the business of the O'Flynn Group. It is further alleged that Mr. Foley and Mr. Kearney appropriated or failed to return and may have used such confidential documentation themselves for the benefit of companies of which they are directors and ultimate beneficial owners, namely, the sixth, seventh and eighth defendants, Carrowmore Property Limited, Carrowmore Property Gardiner Limited and Carrowmore Property Gloucester Limited.

8. It is alleged that Mr. Cox acted in breach of contract and in breach of duty by failing to disclose certain commercial opportunities to the plaintiffs and diverted those opportunities for the benefit of the defendants and appropriated and retained certain confidential information. One such alleged commercial opportunity was a student accommodation project at Gardiner Street in Dublin (the "Gardiner Street Project"). The plaintiffs make various claims against Mr. Cox in relation to that project. The plaintiffs claim that Mr. Foley and Mr. Kearney, whom it alleged are former employees of the O'Flynn Group, acted in breach of contract and in breach of duty by appropriating and retaining certain confidential documentation, the property of the plaintiffs, although at the time of the original statement of claim, it was stated that the plaintiffs

were unaware as to the use to which the documentation was put by those defendants. The plaintiffs also allege that the defendants conspired to injure the plaintiffs as a result of which it is alleged the plaintiffs suffered loss and damage. In addition to declarations and damages, the plaintiffs also seek an account of profits allegedly made by the defendants on foot of the commercial opportunities allegedly concealed from the plaintiffs and diverted to the defendants.

9. The defendants delivered a very full and comprehensive defence in October, 2016. That defence raised a series of preliminary objections and a detailed denial of the plaintiffs' claims. Of significant relevance to the third motion the subject of this judgement, the defendants advanced as one of their preliminary objections, at para. 4(ii) of the defence, the following:-

> *"In the premises and/or insofar as any of the claims herein related to any acts, omissions and/or decisions which were prohibited by NAMA and/or any relevant legislative provisions and/or which were not disclosed to NAMA in accordance with statutory obligations in that regard and/or in respect of which the consent of NAMA was not obtained and/or such acts, omissions and/or decisions were not in accordance with the restrictions imposed by NAMA and/or the provisions of any relevant legislative provisions:-*
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> *(a) The plaintiffs are not entitled to the reliefs claimed or to any relief; and/or*
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> *(b) The plaintiffs are estopped from claiming such reliefs; and/or*
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> *(c) It would be contrary to public policy to grant the reliefs claimed or any reliefs to the plaintiffs or any of them against the defendants or any of them; and/or*
>
> *(d) In the exercise of its discretion, the court should refuse to grant the reliefs claimed or any relief;"*

10. At para. 4(iii), it was pleaded that the defendants reserved the right to provide further particulars in support of that objection following discovery including discovery concerning the establishment of the plaintiff companies and the *"totality of the information disclosed to NAMA by the O'Flynn Group and/or the directors of the O'Flynn Group…"*.

11. In supplemental replies to particulars dated 21st December, 2016, the defendants' then solicitors, McCann Fitzgerald, gave further particulars in relation to the matters pleaded at para. 4(ii) of the defence. They asserted that Victoria Hall Limited (an O'Flynn Group entity) disposed of two valuable sites in Birmingham and Coventry by agreement with NAMA in 2012. It was alleged that the O'Flynn Group informed NAMA (*inter alia*) that the first plaintiff (Victoria Hall

Management Limited) or Victoria Hall Management (UK) Limited (both of whom were alleged to be non-O'Flynn Group entities) may be involved in a management capacity with the sites following their sale. It was asserted that Victoria Hall Limited sold the sites for approximately £1 million and that in advance of that sale Victoria Hall Management (UK) Limited and Grey Willow Limited (the third plaintiff) attributed a value to the sites of more than £5 million. It was asserted that subsequent to the sale, the sites were sold to a joint venture involving the third plaintiff, in a transaction arranged by Michael O'Flynn and John Nesbitt. The defendants contended that the joint venture acquired the sites for over £5 million which it was asserted facilitated the third plaintiff realising capital from its joint venture partner and gaining a 10% carried equity interest in, and the right to benefit from, a further profit share from the joint venture. It was contended that the third plaintiff earned more than £10 million from the subsequent sale of the developed sites in or about September – November, 2013. The defendants asserted that Mr. Cox, the first defendant, assisted in structuring the joint venture in question and that he sought and obtained reassurance from Mr. Nesbitt at the time that the third plaintiff was not part of the O'Flynn Group or related to or associated with the O'Flynn Group. The defendants contended that Mr. Nesbitt informed Mr. Cox in or about that time that the entities developing the Birmingham and Coventry student accommodation projects (which Mr. Cox understood to mean the first, third and fourth plaintiffs) were not part of or associated with the O'Flynn Group and that he was requested not to disclose any information relating to the business of those entities to the group finance director of the O'Flynn Group. It was further asserted that Mr. Nesbitt informed Mr. Foley, the third defendant, in or about that time that the Birmingham and Coventry student accommodation projects and the entities developing those projects were not associated with the O'Flynn Group and also requested him not to discuss or disclose any information related to those projects to the group finance director of that group. The supplemental replies to particulars then went on to refer to various matters pleaded by the plaintiffs in the pleadings concerning the ownership and control of a number of the plaintiff companies by Mr. Nesbitt and Michael O'Flynn and to the plea that each of the plaintiffs is a company associated with the O'Flynn Group.

12. As noted earlier, the defendants' defence denies all of the allegations of breach of contract and other wrongful conduct made against them in the statement of claim. The defence contains detailed pleas in relation to the plaintiffs' documentation and denies any wrongful behaviour in relation to those documents (see, for example, paras. 18, 19 and 20 of the defence). At para. 37 of the defence, the defendants make reference to a letter from Mr. Nesbitt

dated 14th July, 2014 which it is contended, acknowledged and approved the entitlement of Mr. Cox in his own right or through the second defendant, Rockford Advisors Limited, or any other associated companies to engage in real estate or real estate activities in Dublin including the acquisition, development and sale of land and the acquisition, redevelopment and sale of residential or commercial investment properties and further that should any single project related investment exceed expenditure of more than €500,000.00 by Mr. Cox or the other entities referred to, Mr. Cox would inform Tiger Developments (the division of the O'Flynn Group with whom Mr. Cox had his contract of employment) and seek approval which was not to be unreasonably withheld. The defendants place reliance upon that letter and contend that the opportunities pursued by Mr. Cox were in accordance with the terms of that letter.

13. The plaintiffs sought to join two additional defendants, the seventh and eighth defendants and to amend their claim in a number of respects. The High Court (McDonald J.) made an order on 6th February, 2019, allowing the amendments and joining the two additional defendants. The joinder of the seventh and eighth defendants was sought by the plaintiffs on the basis that it was contended that the proceeds of some or all of the commercial opportunities allegedly concealed by and diverted to the defendants and, in particular, the proceeds of the Gardiner Street Project have been or will be diverted to the seventh defendant. In the case of the eighth defendant, it is contended that the proceeds of Phase 2 of the Gardiner Street Project have been or will be paid to that defendant. Phase 2 of the Gardiner Street Project is particularly relevant to the first motion addressed in this judgment. Among the most significant amendments made to the statement of claim on foot of the order made on 6th February, 2019 were the following: First, the plaintiffs were permitted to refer to an assignment dated 15th May, 2017 under which Tiger Developments (now known as Carbon Developments Limited) assigned to the plaintiffs all of its rights and benefits in the contract of employment with Mr. Cox (para. 23A of the amended statement of claim). Second, the amended statement of claim contained detailed pleas in relation to the letter of 14th July, 2014 (the "July, 2014 letter") (paras. 25A to 25I of the amended statement of claim). Essentially, it is pleaded by the plaintiffs that the letter was sought by Mr. Cox for the purpose of permitting him to build a house without breaching his contract of employment and that Mr. Nesbitt agreed to provide a letter for that purpose. The plaintiffs contend that Mr. Cox misrepresented the purpose of the letter and failed to disclose that he was seeking to acquire a development site and developing it for student accommodation in Dublin. It is alleged, therefore, that the July 2014 letter was procured by misrepresentation on the part of Mr. Cox. In the alternative, the plaintiffs claim that the Gardiner Street Project

breached the terms of the letter in that the project related investment exceeded or will exceed €500,000.00.

14. In their amended defence delivered on 21st March, 2019, the defendants dispute the validity of the purported assignment of Mr. Cox's contract of employment to the plaintiffs on various grounds (paras. 33A and 33B of the amended defence). As regards the July 2014 letter, the defendants deny the allegations made by the plaintiffs in relation to that letter. The defendants plead that the letter did not relate to the building of a private dwelling house by Mr. Cox but rather related to commercial investment and development opportunities and that the opportunities pursued were in accordance with the terms of the letter.

15. The parties have been engaged in the discovery process since late 2016/early 2017 with the initial orders for discovery in the proceedings being made in February, 2017. The discovery process has been particularly contentious and has given rise to endless correspondence and numerous applications to court culminating in the three motions which have now to be dealt with it in this judgment. The case is listed for hearing on 14th January, 2020, more than three and a half years after it was first entered in the commercial list and almost three years after discovery was first ordered in the case. It is imperative that the discovery issues are brought to a conclusion as soon as possible so that the parties can proceed to trial on the scheduled trial date without further delay.

General legal principles on further and better discovery

16. There was no real difference between the parties as to the legal principles applicable to applications for further and better discovery. Those principles were confirmed by the Supreme Court in *O'Leary v. Volkswagen Group Ireland Limited* [2015] IESC 35 ("*O'Leary*").

17. In her judgment for the Supreme Court in *O'Leary*, Laffoy J. approved of the following summary of the circumstances in which it is appropriate to make an order for further and better discovery set out by Kenny J. in *Sterling Winthrop Group Limited v. Farbenfabriken Bayer AG* [1967] IR 97. Kenny J. summarised those circumstances as follows:-

> *"Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit. The Court will, however, order a further affidavit of documents when it is satisfied (a) from the pleadings, (b) from the affidavit of discovery already filed, (c) from the documents referred to in the affidavit of discovery, or (d) from an admission by the party who has made the affidavit of discovery that the party against whom the order is sought has other documents in his*

possession relating to the issues in the action which have not been disclosed by the first affidavit. The Court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it" (per Kenny J. at 100)

Kenny J. further summarised the position as follows:-

"The authorities which I have mentioned establish that the Court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong…" (per Kenny J. at 105)

18. That summary was approved by the Supreme Court in *Phelan v. Goodman* [2000] 2 IR 577 ("*Phelan*") (as well as by that court in *O'Leary*). In *Phelan*, Murphy J. in the Supreme Court considered two situations which frequently arise on applications for further and better discovery. The first is where the deponent of the affidavit of discovery avers that the party ordered to make discovery has documents but that they do not require to be discovered as they are irrelevant. The second is where the deponent avers that the party required to make discovery has no documents. Both those situations arise in the present case (and particularly in the first and second motions).

19. As regards the first situation, Murphy J. quoted with approval the following passage from the judgment of Finlay C.J. in *Bula Limited (In Receivership) v. Crowley* [1991] 1 IR 220 (*"Bula")* where he stated:-

"I accept that a court should be satisfied, as a matter of probability, that an error has occurred in an omission from an affidavit of discovery of documents on the basis of irrelevancy before making any order for further discovery and that it should not, in particular, permit the opposing party to indulge in an exploratory or fishing operation." (per Finlay C.J. at 223)

The Supreme Court in *Bula* rejected the proposition that an averment by the deponent of an affidavit of discovery that documents were irrelevant was effectively conclusive. Rather, the Supreme Court held that on the question of relevance, the court must be satisfied on the

balance of probabilities that an error (to the effect that the documents were irrelevant) had occurred.

20. Turning to the second situation (where the deponent avers that there are no documents), Murphy J. stated in *Phelan*:-

> *"Difficulties obviously arise in directing the discovery of documents or a particular range or class of document which the deponent denies are in his possession. To order the first defendant to swear a further affidavit of discovery presumably would result in his repeating the statements made and sworn by him on several occasions, namely, that he has not and never had any documents in addition to those already discovered in his power or possession relating to the matters in issue in the present proceedings. In those circumstances the court would have to be satisfied on the evidence before it that it was making a meaningful order."* (per Murphy J. at 584)

21. As noted by Laffoy J. in *O'Leary*, the test for the court is:-

> *"…whether the evidence presented to the High Court was insufficient to satisfy the court that relevant documents are or have been in the possession of the defendant which should have, but have not, been discovered in its original affidavit of discovery or its supplemental affidavit of discovery."* (per Laffoy J. at para. 56, p. 26)

22. Abrahamson, Dwyer and Fitzpatrick in *"Discovery and Disclosure"* (3rd Edition) helpfully summarised the relevant authorities concerning further and better discovery and set out the following principles on the basis of those authorities:-

> *"12 – 09 Generally, the court will only look behind an affidavit of discovery only in limited circumstances. This may occur when the court has a reasonable suspicion that relevant documents exist which may have been omitted from the affidavit of discovery. The usual test of relevance and necessity applies in deciding whether such documents are to be discovered. In determining whether such documents exist, the court may have regard only to the following sources to determine the existence of additional documentation:-*
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> *(a) the affidavit of discovery itself;*
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> *(b) the documents referred to in that affidavit;*
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> *(c) the pleadings; and*
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> *(d) an admission by the party making discovery.*

12-10 The court may also order further and better discovery where it is satisfied that the party making discovery has wrongly determined that documents in his or her possession are not relevant, for example because he or she has misunderstood the issues in the case." (Abrahamson, Dwyer and Fitzpatrick: *"Discovery and Disclosure"* (3rd Edition) at paras. 12-09 – 12-10)

23. I will apply these principles in determining the three motions before me. As noted earlier, certain other discrete legal issues arise in relation to a number of the motions before me. I will consider them separately by reference to the relevant motion.

(A) First Motion: Plaintiffs' Re-entered Motion for further and better discovery dated 20th February, 2019

Introduction

24. The first motion is the plaintiffs' re-entered motion for further and better discovery which was issued on 20th February, 2019 and made returnable for 25th February, 2019. The motion was compromised by the parties on 11th April, 2019 on certain terms. The plaintiffs contend that those terms have not been complied with and have re-entered the motion in accordance with the agreed directions made by the court (Haughton J.) on 11th April, 2019. The defendants contend that they have complied with the terms on which the motion was settled and dispute the plaintiffs' entitlement to any further relief on foot of that motion.

25. It is necessary first to say something about the background to this motion before turning to the two issues which remain in dispute between the parties.

Discovery Order 20th February, 2017

26. Orders for discovery were made as between the plaintiffs and the defendants by the High Court (McGovern J.) on 20th February, 2017. The first motion is concerned with the order for discovery made against the defendants. The order directed the defendants to make discovery of several categories of documents. There was substantial agreement between the parties on the terms of the discovery to be made by the defendants. The court resolved the issues in dispute and made an order directing the defendants to make certain discovery. It appears that there is no perfected copy of the order made on that date and the parties have agreed to work from an agreed draft of the order which it is accepted was made.

27. The first motion concerns a number of the categories of documents which were ordered to be discovered by the defendants. They can be divided into two groups. The first concerns the

discovery ordered in respect of Categories 1 and 2. Under Category 1, the defendants were required to make discovery of:-

> *"All documentation/materials taken by, or at the request or direction of, the defendants (or any of them) from the plaintiffs (or any of them) or from any company within the O'Flynn Group of companies, including for the avoidance of doubt any materials sent by email or copied to a USB key, disk or other portable device or any other form of extraction by electronic means of such material."*

Under Category 2, the defendants were required to make discovery of:-

> *"All documents which record and/or refer to and/or evidence the use by the defendants or any of them of materials taken by, or at the request or direction, of the defendants (or any of them) from the plaintiffs (or any of them) or from any company within the O'Flynn Group of companies, including for the avoidance of doubt all documents created out of or using such material."*

It can be seen, therefore, that Category 1 covered documents or materials allegedly taken by the defendants from the plaintiffs or from other companies within the O'Flynn Group and that Category 2 was directed to documents recording, referring to or evidencing the alleged use by the defendants of those documents or materials.

28. The second group of documents the subject of the first motion are the documents directed to be discovered under Categories 4 and 6. The defendants were required to make discovery under Category 4 of the following documents:-

> *"(1) All documents created during the period from 1st January, 2014 to 31st July, 2015 which record and/or refer to and/or evidence commercial opportunities pursued by the first, second and/or sixth defendants while the first defendant was working for Tiger Developments or providing consultancy services to the plaintiffs or any of them, including, without limitation, the development of student accommodation and the following projects in particular:*
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> *(i) The Gardiner Street Projects; and/or*
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> *(ii) The Smithfield Projects; and/or*
>
> *(sic)*
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> *(2) All documents created during the period from 1st August, 2015 to 8th June, 2016 which record and/or refer to and/or evidence:*

(a) *Commercial opportunities pursued by the first, second and/or sixth defendants while the first defendant was working was working for Tiger Developments or providing consultancy services to the plaintiffs or any of them, including, without limitation, the development of student accommodation and the following projects in particular:*

(i) *The Gardiner Street Projects; and/or*

(ii) *The Smithfield Projects; and/or*

(b) *The use by the first, second and/or sixth defendants or any of them of materials taken by, or at the request or direction of the defendants (or any of them) from the plaintiffs (or any of them) or from any company within the O'Flynn Group of companies, including for the avoidance of doubt all documents created out of or using such materials."*

Under Category 6, the defendants were required to make discovery of:-

> *"All documents referring to or relating to or evidencing the interests of the defendants or any of them in relation to the Gardiner Street Project (as defined at para. 25 of the statement of claim) including a full account of all profits, fees or income made or to be made or derived from the said project."*

It can be seen, therefore, that the documents sought in Category 4 were time limited and concerned the commercial opportunities allegedly pursued by a number of the defendants and, in particular, the Gardiner Street Project and a project in Smithfield (which it is pleaded was not actually pursued by the relevant defendants) as well as documents relating to other commercial opportunities during a further time limited period and the use of materials allegedly taken by the plaintiffs or from companies within the O'Flynn Group of companies. Category 6 was directed to the interests of the defendants or any of them in the Gardiner Street Project and the profits, fees or income made or to be made from that project.

Defendants' Discovery

29. The defendants were directed to make discovery by 25th May, 2017. For various reasons that was not done. Mr. Cox swore an affidavit of discovery on behalf of the first to sixth

defendants (this was prior to the joinder of the seventh and eighth defendants) on 27th October, 2017. At paras. 5 to 16 of his affidavit, Mr. Cox explained the methodology adopted by the relevant defendants in making discovery with the benefit of advice from the defendants' then solicitors, McCann Fitzgerald, and support from Reveal, an eDiscovery expert. An issue has been raised by the plaintiffs in relation to the methodology adopted by the defendants in making that discovery. A supplemental affidavit of discovery was sworn by Mr. Cox on behalf of the then defendants on 11th December, 2018 as a result of certain deficiencies in the discovery originally made, as explained at para. 21 of the supplemental affidavit.

Complaints Regarding Defendants' Discovery

30. The plaintiffs' solicitors, BHK Solicitors, raised issues in relation to the defendants' discovery in a detailed letter dated 23rd January, 2019. The plaintiff contended that there were deficiencies in the defendants' discovery with particular reference to the two groups of categories of documents referred to earlier, Categories 1 and 2, and Categories 4 and 6.

31. With regard to Categories 4 and 6, the plaintiffs sought discovery of further documents within those categories and an extension of the categories themselves. This further discovery was sought on the basis that, having considered the discovery made by the defendants, it was contended that the plaintiffs had ascertained that Mr. Cox had engaged in and worked on a second phase of the Gardiner Street Project (ie "Phase 2") while he was employed or engaged by the plaintiffs and that Phase 2 of the Gardiner Street Project was a natural follow on project in respect of which the developer of the first phase (or Phase 1) of the Gardiner Street Project had a natural advantage. The parties had, during the course of 2018, exchanged correspondence in relation to Phase 2 in the course of which it was acknowledged by the defendants that documents relating to Phase 2 were considered relevant by the defendants for the purposes of Category 4. In addition to seeking an extension of Category 4 in terms of the time period covered by that category and express reference to Phase 2 of the Gardiner Street Project, the plaintiffs also sought to extend Category 4 by making express reference to documents concerning any use of residential development appraisal templates owned by the plaintiffs which it is alleged were taken by Mr. Cox and emailed to Mr. Kearney on 21st October, 2015 relating to Bolton Hall, Rathfarnham and Beech Park, Cabinteely (the "residential appraisal templates") or any adaptation of those templates or any other appraisal or other templates allegedly taken or obtained from the plaintiffs or any of them whether used in original or adapted form. It was asserted that the discovery made by the defendants included an email

from Mr. Cox to Mr. Foley and Mr. Kearney dated October, 2015 which attached a residential template and a financial model for a residential template in respect of Bolton Hall and Beech Park which had been developed by and for the plaintiffs in respect of their own residential developments. The plaintiffs found it difficult to accept that there were no documents relating to or evidencing the use by the defendants of the residential appraisal templates.

32. Deficiencies in the defendants' discovery were also alleged by the plaintiffs in respect of the other relevant group of categories of documents, namely documents covered by Categories 1 and 2. The alleged deficiencies concerned the failure by the plaintiffs to make discovery of certain notes of emails made by Mr. Cox and sent to himself which it was alleged were covered by Categories 1 and 2 and ought to have been discovered. The plaintiffs were concerned that there may have been other notes relating to other emails made by Mr. Cox which had not been discovered. The plaintiffs also alleged that further and better discovery was required arising from an alleged inappropriate and incorrect interpretation by the defendants of Category 1. The plaintiffs' concerns arose as a result of the failure by the defendants to make discovery under Category 1 of an email sent by Mr. Cox from his O'Flynn Capital Partners email address to the private email address of his wife (the "Project Achill email"). There was correspondence between the parties during the course of 2018 and a dispute arose as to whether that document was covered by Category 1. The plaintiffs maintained that it was and that the approach taken by the defendants in relation to that email suggested that the defendants' review of documents for the purpose of Category 1 was conducted on the basis of a misinterpretation of Category 1 and that there could be other documents falling within Category 1 but which were reviewed (and excluded) on the basis of such alleged incorrect interpretation. The plaintiffs also referred to three further documents which were discovered by the defendants in respect of which a further explanation as to the source of the documents was required.

First Motion Issued

33. Having raised these issues in the letter of 23rd January, 2019, the plaintiffs issued a motion on 20th February, 2019 (the first motion) seeking further and better discovery of documents on the basis of an expanded or extended version of Categories 4 and 6 and in respect of Categories 1 and 2. That motion was grounded on an affidavit sworn by Patricia O'Brien of the BHK Solicitors, the plaintiffs' solicitors, on 19th February, 2019. The motion was returnable for 25th February, 2019. A replying affidavit was sworn by Mr. Cox on 4th March, 2019. With respect to the further discovery sought in respect of extended Categories 4 and 6,

Mr. Cox's position was that the defendants had already made discovery of documents in relation to Phase 2 of the Gardiner Street Project but that the defendants accepted that the plaintiffs were entitled to further information in relation to *"the profits, fees, income or financial benefits already obtained or yet to be obtained"* in relation to Phase 2. However, the defendants believed that this should be done by affording access to the relevant material to expert forensic accountants engaged by the plaintiffs with engagement with the defendants' experts and that this process was preferable to making discovery for various reasons. As regards the outstanding issue in relation to residential developments under Categories 4 and 6, the defendants' position was that the reason why no documents were discovered in relation to the use of the template and model referred to by the plaintiffs was that no use was made of those documents. As regards the further discovery sought in relation to Categories 1 and 2, the defendants' position was as follows. With regard to the issue in relation to notes, the defendants did not agree that notes written by Mr. Cox fell within the categories of documents required to be discovered and the defendants were advised to that effect by their then solicitors. However, to avoid *"unnecessary controversy"*, Mr. Cox carried out a search for any other notes made by him. He located other notes and exhibited them at Exhibit "PC2" to his affidavit. As regards the alleged inappropriate and incorrect interpretation of Category 1, Mr. Cox stated that the defendants' position was that all documents falling within Categories 1 and 2 had been discovered. Mr. Cox did not agree that the email sent by him to his spouse fell within those categories. As regards the other three documents referred to by the plaintiffs, Mr. Cox stated that he *"must have accessed these on the hard drive"* and sent them by email to Mr. Kearney. Mr. Cox stated that Mr. Kearney informed him that he retained the documents on his computer but never used them.

34. There then followed a lengthy replying affidavit sworn by Mr. Nesbitt on behalf of the plaintiffs on 18th March, 2019 in which issue was taken with the position adopted by the defendants in Mr. Cox's affidavit. For reasons explained in his affidavit, the plaintiffs did not accept the suggested approach in relation to the further documents concerning Phase 2 of the Gardiner Street Project. However, as an alternative to full discovery, the plaintiffs suggested an alternative approach. As regards Categories 1 and 2, the plaintiffs were critical of the failure by the defendants to discover the notes exhibited to Mr. Cox's affidavit (only one of which had been previously discovered) and the absence of a proper explanation by Mr. Cox for the failure to discover the notes. The plaintiffs were critical of the searches apparently carried out by the defendants when making their discovery and contended that the defendants had not complied

with the "Good Practice Discovery Guide" prepared by the Commercial Litigation Association of Ireland (CLAI). The plaintiffs required the defendants to swear a supplemental affidavit of discovery making discovery of the notes referred to by Mr. Cox and any other relevant notes or materials not discovered and also required the defendants in a supplemental affidavit of discovery to explain the steps taken by them to ensure that full and proper discovery of all relevant electronic documentation had been made. As regards the alleged inappropriate and incorrect interpretation of Categories 1 and 2 (concerning the alleged use by the defendants of documents), the plaintiffs maintained that there were a significant number of examples of documents discovered by the defendants which fell within Category 1 and/or Category 2 but which were not discovered by the defendants under those categories which suggested that an incorrect interpretation of those categories had been taken by the defendants. Reference was again made to the Project Achill email and to various other documents including the three documents referred to by Mr. Cox in his replying affidavit which he said must have been accessed by him on the hard drive and sent by email to Mr. Kearney but not used by Mr. Kearney. Various other alleged deficiencies were noted by Mr. Nesbitt.

Settlement Agreement

35. The first motion was ultimately compromised by the parties on 11th April, 2019. The terms of that compromise were set out in a settlement agreement (the "settlement agreement") on foot of which certain agreed directions were made by the court (Haughton J.) on that date (the "agreed directions").

36. Under the settlement agreement, it was noted that the parties had agreed to compromise the plaintiffs' motion for further and better discovery on certain terms and on the basis that the court would make the agreed directions. At para. 1 of the settlement agreement, it was agreed as follows:-

> *"Each of the personal defendants to swear separate affidavits, supplemental to the affidavits of discovery sworn by Mr. Cox on behalf of the defendants confirming that appropriate searches and/or review has been done of all documents within the power, possession or procurement of the defendants or any of them for any documents falling within the following category:*

(a) All documents sourced from the plaintiffs which were accessed, emailed to any party (including any of the defendants) to include the emails to which those documents were attached or copied to any device.

One of the defendants to explain in these affidavits the methodology adopted in the review for documents. The affidavits to be provided to the plaintiffs by 3rd May, 2019."

37. It was agreed at para. 2 of the settlement agreement that a direction would be made in the following terms:-

"…To the extent that any further documents not previously discovered by the defendants are identified from the exercise referred to para. 1, and which fall within that category or the categories of discovery already listed in the discovery order of McGovern J. dated 27th (sic) February, 2017, a supplemental affidavit of discovery will be sworn discovering the said additional documents."

38. Paragraph 3 provided that a direction would be made that Mr. Kearney would swear an affidavit on behalf of the defendants by 3rd May, 2019 containing:-

"Full details of and vouching (by way of exhibited documents) all profits, fees, income and financial benefits relating to the development at Phase Two Gardiner Street which have been received or which may at any time be received by the defendants or any of them or any entity controlled by the defendants or any of them or any member of the families of the three personal defendants."

39. It was agreed at para. 4 that the defendants would allow an expert, appointed by the plaintiffs, access to such other documents as the expert required in relation to Phase 2 of the Gardiner Street project *"for the purpose of verifying the profits, fees, income and financial benefits of the development at Phase Two Gardiner Street"*. At para. 5, it was agreed that the plaintiffs' right to seek *"such further and better discovery in relation to Phase Two Gardiner Street as necessary"* remained fully reserved including the right to bring any further motion before the court. At para. 6, the defendants agreed to furnish to the plaintiffs in native format the notes exhibited at "PC2" to Mr. Cox's affidavit of 4th March, 2019 by 3rd May, 2019. It was agreed that the plaintiff would have liberty to apply to re-enter the motion in the event that it was necessary to do so and costs were to be costs in the cause (paras. 7 and 8). Agreed directions were made in those terms.

Purported Compliance with Settlement Agreement

40. The defendants endeavoured to comply with the terms of the settlement agreement and the agreed directions by swearing a number of affidavits. The plaintiffs maintain that those affidavits do not comply with the terms of the settlement agreement or the agreed directions and have therefore re-entered the first motion. It is necessary to examine what the defendants did in order to comply with the settlement agreement and the agreed directions in order to determine whether it is appropriate to grant any relief to the plaintiffs under the first motion.

41. In purported compliance with para. 1 of the settlement agreement, affidavits in identical terms were sworn by each of the personal defendants. In each of those affidavits the personal defendants referred to the previous affidavits of discovery sworn by Mr. Cox on behalf of the defendants. Each of them then stated (at para. 5 of their respective affidavits):-

> *"I confirm that all appropriate searches and/or review has been done of all the documents within the power, possession or procurement of the defendants or any of them for any documents falling within the following category.*
>
> > *'All documents sourced from the plaintiffs which were accessed, emailed to any party (including any of the defendants) to include the emails to which those documents were attached or copied to any device.'*
>
> *The methodology adopted is set forth in Patrick Cox's affidavit of the 27th of October, 2017 and in particular I refer to paragraphs 5-16 inclusive thereof. Furthermore, since the settlement agreement the personal defendants have considered the documentation which has been discovered by and on behalf of the defendants in these proceedings and I am satisfied that any documents falling within the above category have already been discovered in these proceedings."*

42. In purported compliance with para. 3 of the settlement agreement, Mr. Kearney swore a separate affidavit on 2nd May, 2019. At para. 3 of that affidavit, Mr. Kearney stated that the property the subject of phase two of the Gardiner Street Project (the "property") was acquired from Dublin City Council for a total figure of €762,720.00 (including VAT) which was payable in four tranches which included two payments to be made on practical completion which has not yet occurred. Mr. Kearney exhibited a copy of an extract from the contract for sale between the Council (as vendor) and the sixth defendant, Carrowmore Property Limited (as purchaser) dated 23rd February, 2017. All that was exhibited, however, was a front cover page. At para. 4 of his affidavit, Mr. Kearney stated that the defendants have incurred certain expenses with respect to the property. He then set out a list of four invoices. As noted at para. 5 of his affidavit, the total

of the invoices was €38,984.55 (including VAT). Mr. Kearney exhibited a copy of the invoices at Exhibit "EK3" to his affidavit. At para. 6 of his affidavit, Mr. Kearney stated that by a contract dated 23rd November, 2018 between the sixth defendant, Carrowmore Property Limited, and the eight defendant, Carrowmore Property Gloucester Limited (as vendors) and TSAF 2 IDA GP Limited (as purchaser) and the Student Accommodation Fund ICAV, the vendors agreed to dispose of their entire interest in the property for the sum of €3,274,000.00 (including VAT). An extract of that contract was exhibited at Exhibit "EK4" to Mr. Kearney's affidavit. Again all that was exhibited was the front cover page.

43. At para. 7 of his affidavit, Mr. Kearney stated that the pre-tax profit on the disposal of the property amounted to €2,180,886.50 which was subject to a corporation tax charge estimated at €545,221.62 leaving a post-tax profit in or about €1,625,664.87. Mr. Kearney stated that if the personal defendants wished to access those funds they would incur further tax charge at the rate of 33%, which would reduce the sum to €1,089,194.00.

44. Mr. Kearney then averred at para. 8 of his affidavit as follows: -

> *"The defendants have earned no other fees, income or financial benefits whatsoever and will not do so. Similarly, no entity controlled by the defendants or any of them or any member of the families of any of the three personal defendants will earn any other profit, fees, income or financial benefits relating to the property."*

45. The plaintiffs' solicitors raised issues in relation to the manner in which the defendants had sought to comply with the terms of the settlement agreement and the agreed directions. Three further affidavits were then sworn on behalf of the defendants on 12th June, 2019. Supplemental affidavits were sworn by Mr. Kearney and by Mr. Cox and an affidavit was sworn by Hugh J. Millar, a partner in Crowley Miller, the solicitors now acting for the defendants.

46. In his supplemental affidavit, Mr. Cox referred to para. 1 of the settlement agreement and stated that the description of documents contained in that paragraph was agreed having regard to the fact that there was a dispute between the parties as to whether the sending of an email by Mr. Cox to his spouse while he was employed by Tiger Developments amounted to the "use" of a document. The plaintiffs asserted that it did while the defendants did not accept that that was the case. Mr. Cox explained that the reason the email was not discovered in his original affidavit of discovery was that it was sent by him to his spouse from an old work email address to which he did not have access when he made discovery. He had completely forgotten about it. When it was drawn to his attention by the plaintiffs, Mr. Cox stated that the defendants *"caused checks to be carried out on the email accounts of their spouses"* and that any relevant

emails and documents were discovered to the plaintiffs. Mr. Cox explained that in order to resolve the dispute concerning the term "use", the parties agreed that the defendants would furnish affidavits confirming that the defendants had discovered all documents sourced from the plaintiffs which were sent to any party. He explained that he and the other personal defendants had reviewed the existing discovery and had regard to their recollection of the events. He stated that based on that exercise they swore the affidavits (on 3rd May, 2019) confirming that any documents sourced from the plaintiffs sent by them to any party had already been discovered. In response to the suggestion by the plaintiffs that it was not clear whether any additional exercise had been carried out, Mr. Cox stated that the personal defendants reviewed the methodology used in the original discovery exercise to ensure that it captured any documents falling within the category of documents set out in para. 1 of the settlement agreement and that *"no documents were excluded on the basis of any distinction being made that the documents were sent but not used"* (para. 6). Mr. Cox also dealt in his supplemental affidavit with the outstanding issues in relation to Phase 2 of the Gardiner Street Project. He referred to redacted versions of the agreements exhibited by Mr. Kearney to his supplemental affidavit. Mr. Cox stated that the redacted portions of the documents referred to the *"precise structure of the deal"* which he asserted is *"commercially sensitive"* and not relevant to matters at issue in the proceedings. He then confirmed that the payments referred to in the unredacted portions of the documents are the only payments that will be received by the defendants or any of them or any connected or related entities in connection with Phase 2. Mr. Cox further stated that there are no *"profit share agreements"* or *"promote agreements"* or *"development management agreements"* as speculated by the plaintiff's solicitors in their letter of 31st May, 2019. Mr. Cox then stated (at para. 7):-

> *"Such other agreements as there are in relation to the transaction do not include any provisions providing for any payments to the defendants or for the conferring of any financial benefits at all on the defendants or anyone connected with them."*

At para. 8 of his affidavit, Mr. Cox contended that Mr. Kearney had dealt comprehensively with the outstanding issue in relation to Phase 2 of the Gardiner Street Project and had provided (as required under the settlement agreement) full details of all profits relating to the development of Phase 2. He contended that the plaintiffs were seeking to rewrite the settlement agreement so as to require the defendants to provide *"full details"* relating to the development of Phase 2 and that had not been agreed between the parties.

47. In his supplemental affidavit, Mr. Kearney exhibited more extensive extracts from the two contracts for sale in respect of Phase 2 of the Gardiner Street Project. Redacted versions of those extracts were exhibited at Exhibit "EK2". Mr. Kearney explained (at para. 4) that the redacted portions of the documents refer to the *"precise structure of the deal"* which he asserted was *"commercially sensitive"* and not relevant to issues in the proceedings. He confirmed that the payments referred to the unredacted portions of the documents and in his affidavit of 2nd May, 2019 are the only payments that will be received by the defendants or any of them or any connected or related entities in connection with Phase 2. He also confirmed that there are no *"profit share agreements"*, *"promote agreements"* or *"development management agreement"* as speculated by the plaintiff's solicitors. He then stated (as Mr. Cox did in his supplemental affidavit): -

> *"Such other agreements as there are in relation to the transaction do not include any provisions providing for any payments to the defendants or for the conferring of any financial benefits at all on the defendants or anyone connected with them".*

48. In his affidavit, Mr. Millar noted that he had considered the unredacted versions of the two contracts for sale exhibited by Mr. Kearney. He repeated the assertion made by Mr. Kearney and Mr. Cox that the redacted portions referred to the *"precise structure of the deal"* which he asserted was *"commercially sensitive"* and not relevant. He also confirmed (at para. 4) that the payments referred to in the unredacted portions of the documents are the only payments to the defendants or any persons or entities connected with them referred to in the contracts and that that there are no *"profit share agreements"*, *"promote agreements" or "development management agreements"* as speculated by the plaintiffs. Mr. Millar confirmed that he had considered *"other agreements relating to the development and financing"* of Phase 2 and that *"none of these refer to any payments to or financial benefits accruing to the defendants or any persons or entities connected with them"* (para. 4). He asserted that Mr. Kearney's affidavit of 2nd May, 2019 fully complied with the terms of the settlement agreement.

Re-entry of First Motion

49. The plaintiffs were dissatisfied with the purported compliance by the defendants with the terms of the settlement agreement and the agreed directions and sought to re-enter the first motion. The basis upon which the plaintiffs contended that the defendants had not complied with the settlement agreement and the agreed directions and, consequently, the basis on which it was contended that the plaintiffs were entitled to re-enter the first motion and to

seek the reliefs sought in that motion was set out in detail in an affidavit sworn by Mr. Nesbitt on 20th June, 2019. Mr. Nesbitt's affidavit sets out the two general areas of complaint made by the plaintiffs in relation to the defendants' compliance with the settlement agreement. The first set of complaints concerns the defendants' purported compliance with the provisions of para. 1 of the settlement agreement (which paragraph was intended to cover and address the dispute between the parties in relation to the approach taken by the defendants to categories 1 and 2 of the discovery originally ordered). The second set of complaints set out in Mr. Nesbitt's affidavit concerns the manner in which the defendants sought to comply with the provisions of para. 3 of the settlement agreement in relation to the documents detailing and vouching the profits, fees, income and financial benefits relating to the development of Phase 2. Very briefly stated, the plaintiffs' positon in relation to those two sets of complaints was as follows.

50. In relation to the defendants' purported compliance with para. 1 of the settlement agreement, Mr. Nesbitt reiterated the concerns previously addressed in his affidavit of 18th March, 2019 and in Ms. O'Brien's affidavit of 19th February, 2019 concerning the failure to discover as being relevant to Category 2, documents evidencing the use of the plaintiffs' documents including documents accessed by the personal defendants and emailed to other parties (including any of the defendants) and documents copied to any device to which the defendants had access. While noting the methodology adopted by the defendants and their solicitors at the time the original discovery was made (as explained in the original affidavit of discovery sworn by Mr. Cox on 27th October, 2017), the plaintiffs pointed out that that methodology resulted in documents relevant to Category 2 not being discovered as such. Mr. Nesbitt asserted that the settlement agreement required more than a mere repetition of the description of the methodology previously explained by Mr. Cox and that the plaintiffs had anticipated that the defendants would, in one of the supplemental affidavits required to be sworn under para. 1 of the settlement agreement, explain how each of the documents relevant to Category 2, but not discovered as such by the defendants, was excluded by virtue of the original methodology applied and would explain the steps taken to review the original discovery and to carry out further searches so that documents described in para. 1 of the settlement agreement and not discovered in the original discovery as relevant to Category 2, or not discovered at all, would be discovered. The plaintiffs maintained that the supplemental affidavits sworn by the personal defendants for the purposes of para. 1 of the settlement agreement did not provide any adequate explanation as to the methodology applied to ensure that the discovery referred to at para. 1 of the settlement agreement had been made. Mr. Nesbitt noted

that the supplemental affidavits did not explain why documents relevant to Category 2 were not discovered in the original discovery. He gave examples of documents falling within Category 2 but not discovered by the defendants under that category at paras. 10(a) to (e) of his affidavit. Mr. Nesbitt contended that the defendants' failure to identify those documents as relevant to Category 2 suggested that the methodology adopted by the defendants in making the original discovery was flawed and that while the documents were discovered by the defendants under other categories, the plaintiffs' concern was that, arising from an incorrect methodology applied in relation to Category 2, there may well be other documents relevant to Category 2 but not relevant to other categories which were not discovered. The plaintiffs expected the defendants to address that concern in the affidavits required to sworn by the personal defendants under para. 1 of the settlement agreement but that was not done. In the absence of a satisfactory explanation by the defendants addressing these concerns, the plaintiffs sought further and better discovery of documents falling under Category 2 applying a correct interpretation of "use" as set out in para. 1 of the settlement agreement as well as an order directing the defendants to set out in their supplemental affidavits of discovery a full and detailed explanation of the methodology applied to ensure that all relevant documents are discovered.

51. The second set of complaints made in Mr. Nesbitt's affidavit concerned the manner in which the defendants purported to comply with para. 3 of the settlement agreement in respect of documents concerning the profits and other benefits relating to Phase 2 of the Gardiner Street Project. The plaintiffs were critical of the affidavits sworn by Mr. Kearney, Mr. Cox and Mr. Millar on this issue and complained, in particular, about the limited extracts of the contracts exhibited to Mr. Kearney's affidavits. The plaintiffs were also critical of the extent of the redaction of the documents and the basis for the redactions made. Mr. Nesbitt asserted that, in the absence of an understanding as to the precise structure of the deal, it would not be possible for the plaintiffs or their experts to properly review and examine the defendants' books and records (as provided for at para. 4 of the settlement agreement) to verify the profit figures disclosed by the defendants. Mr. Nesbitt was also critical of the manner in which the defendants purported to provide details of the profits, fees, income and financial benefits and asserted that the defendants had failed to provide full details and had failed properly to vouch those benefits. The plaintiffs required discovery of all of the overarching legal agreements governing the acquisition, development and disposal of the property. As regards Mr. Millar's affidavit, Mr. Nesbitt observed that Mr. Millar was not the solicitor who acted for the defendants in relation to the purchase, sale or development of the property comprised in Phase 2 and did not explain

what enquiries or confirmations he sought or received from the solicitors who did act in that transaction nor did Mr. Millar set out in any detail the "other agreements" which he considered for the purpose of swearing his affidavit. While noting that Mr. Millar referred to such other agreements, Mr. Nesbitt stated that Mr. Millar did not say whether the defendants are parties to the other agreements or to whom the payments due under those agreements are to be made and did not say whether the documents reviewed are all of the other agreements relating to development of the particular site. Mr. Nesbitt observed that it was a mystery as to why the defendants would forego the profit associated with the development management of Phase 2 in circumstances where the relevant defendants made a profit of approximately €6 million from the management of the development of Phase 1 and disposed of Phase 2 to the same purchaser as the purchaser of Phase 1. Under those circumstances, the plaintiffs sought full unredacted copies of the contract for the purchase of the site and the sale of the site and the documents relating to the development of the site as well as the legal documents governing the structure of the purchase, development and sale of Phase 2 to enable the plaintiffs to understand the structure of Phase 2, the profits made, the entities by whom the profits were made and in order that the plaintiffs may brief their expert as envisaged under the settlement agreement.

52. On that basis, the plaintiffs sought an order for further and better discovery of documents falling under Categories 4 and 6 in respect of Phase 2 of the Gardiner Street Project and an order directing the defendants to carry out a further review of documents falling under Categories 1 and 2.

Defendants' Response to Re-entered First Motion

53. Mr. Kearney swore a supplemental affidavit on 11th July, 2019 in response to Mr. Nesbitt's affidavit. Mr. Kearney contended on behalf of the defendants that the explanation provided, in particular, by Mr. Cox as to the methodology adopted (as described at para. 6 of Mr. Cox's affidavit of 12th June, 2019) was adequate. Mr. Kearney further stated that the personal defendants were heavily involved in the original discovery process and collectively reviewed well in excess of ten thousand documents. He further stated that during the course of the original discovery process, the personal defendants discussed with their former solicitors the issue as to whether the sending of certain documents could be said to amount to "use" within the meaning of the relevant category of documents (Category 2). He stated that the approach adopted in preparing the original affidavits of discovery was that any emails enclosing documents were discovered even if the sending of those documents did not amount to the "use"

of the documents and that, therefore, each of the personal defendants was in a position to confirm that all documents falling within para. 1 of the settlement agreement had already been discovered. Mr. Kearney further stated that he confirmed with McCann Fitzgerald that the explanation given by him was correct.

54. Neither Mr. Kearney nor any of the other personal defendants engaged with or responded to the detailed criticisms made in Mr. Nesbitt's affidavit of 20th June, 2019 in relation to para. 1 of the terms of settlement. Nor was there any response by Mr. Kearney or by any of the other personal defendants to the complaints made by Mr. Nesbitt concerning the purported compliance by the defendants with para. 3 of the settlement agreement in relation to the Phase 2 documents.

Outstanding Issues regarding First Motion

55. There are two outstanding issues between the parties in relation to the first motion. The first issue is whether the defendants ought to be required to make further and better discovery in relation to Phase 2 of the Gardiner Street Project. The second issue is whether the defendants ought to be required to make further and better discovery of documents relating to the "use" by the defendants of the plaintiffs' documents (as provided for in Categories 1 and 2 of the original discovery which the defendants were ordered to make as clarified in para. 1 of the settlement agreement). I deal with each of these issues in turn applying, as I am required to do, the general principles applicable to applications for further and better discovery set out earlier in this judgment.

(1) Further and better discovery in relation to Phase 2 Gardiner Street Project

56. In short, the plaintiffs contend that they are entitled to further and better discovery of the documents falling under Categories 4 and 6 in respect of Phase 2 of the Gardiner Street Project. The plaintiffs claim that the defendants have not complied with the terms at para. 3 of the settlement agreement both in terms of the extracts of the documents referred to and exhibited by Mr. Kearney in his affidavits of 2nd May, 2019 and 12th June, 2019 and in terms of the redactions made to the documents. The plaintiffs contend that a significant part of their claim in the proceedings involves their case that the defendants diverted commercial opportunities which ought to have been brought to the attention of the plaintiffs and profited from those and that the main complaint in that regard concerned the Gardiner Street Project. The defendants maintain that they have fully complied with the provisions of para. 3 of the settlement agreement which was designed to avoid the need for extensive discovery and that

there is no basis for going behind the averments made by the personal defendants for the purposes of para. 3 of the settlement agreement. As a fall-back position, it was indicated on behalf of the defendants that they would not object to the court looking at the unredacted documents to satisfy itself that they were properly redacted. As a further alternative, it was suggested that the plaintiffs' lawyers could look at the documents subject to appropriate undertakings as to confidentiality in light of the commercially sensitive nature of the documents.

57. I have reviewed the extensive affidavits sworn for the purposes of this motion and the written and oral submissions advanced by the parties in relation to it. Having done so, I am satisfied, notwithstanding my strong desire to bring the discovery issues between the parties to a conclusion, that it is necessary to make certain further orders of discovery concerning the defendants' documents falling under Categories 4 and 6 in relation to Phase 2 of the Gardiner Street Project. However, I am not going to make a general and wide-ranging order for further and better discovery but will attempt to refine the order to be made to the minimum necessary to ensure that justice is done between the parties. I have reached that conclusion for the following reasons.

58. I am satisfied that the documents which I am disposed to direct the defendants to discover by way of further and better discovery concerning Phase 2 of the Gardiner Street Project are clearly relevant in the sense that that term is used in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 Q.B.D. 55 ("*Peruvian Guano*") as recently discussed and applied the Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57 ("*Tobin*"). The alleged profit, fees, income and financial benefits which have been obtained or which may be obtained by the defendants or persons or entities connected with them arising from Phase 2 of the Gardiner Street Project are clearly relevant to the claims made in the proceedings and would fall within Category 4 of the discovery originally ordered were it not for the temporal limitation and would also fall within Category 6. However, in circumstances where the parties reached an agreement at para. 3 of the settlement agreement as to how this issue would be dealt with, I am loathe to make a wide ranging order for discovery of documents falling under Categories 4 and 6 in respect of Phase 2 of the Gardiner Street Project. Nonetheless, I am not satisfied that the defendants have complied fully with the obligations contained in para. 3 of the settlement agreement.

59. The defendants initially provided wholly incomplete extracts from the two contracts of sale in respect of Phase Two. When this was pointed out to the defendants, more complete extracts of those two contracts were provided but there were extensive redactions to those

contracts. The redactions were made on the stated basis that the redacted portions refer to the "*precise structure of the deal*" and that this is commercially sensitive and not relevant. However, it is impossible to tell from that very general description whether it was appropriate to redact the documents in the manner actually done by the defendants. I do not accept, therefore, that there was an adequate explanation for the redactions made. It is clear from the supplemental affidavits sworn by Mr. Kearney and by Mr. Cox on 12th June, 2019 and from the affidavit sworn by Mr. Millar on the same date that there are other agreements in existence in relation to the transaction (which I take to mean the purchase and sale of the property comprised in Phase 2) and relating to the development and financing of Phase 2. While each of the deponents state that those other agreements do not include provisions relating to any payments to the defendants or for the conferring of any financial benefits on the defendants or anyone connected with them, it seems to me that the history between the parties in relation to discovery and, in particular, the deficiencies identified by the plaintiffs with the defendants' discovery (such as in relation to the notes made by Mr. Cox) have an understandable and reasonable level of distrust and suspicion as regards the averments made by the personal defendants in relation to those other agreements in relation to Phase 2.

60. As regards the averment made by Mr. Millar, it is not contested by the defendants that Mr. Millar was not the solicitor acting for the relevant parties to any of the transactions concerning Phase 2 of the Gardiner Street Project but is the solicitor acting for the defendants in these proceedings. Without in any way casting doubt over the veracity of the averment made by Mr. Millar, or the genuineness of his belief, in my view, it is reasonable for the plaintiffs to be afforded the opportunity of satisfying themselves that there is nothing in those other agreements which are relevant to the question of profits, fees, income or financial benefits relating to Phase 2 which may have been received or may be received by the defendants or any of them or anyone connected with them. Further, it is to be noted that Mr. Millar does not actually identify the particular agreements which he considered prior to making the averments which he made at para. 4 of his affidavit.

61. While it is undoubtedly the case that the court will only look behind an affidavit such as those sworn by Mr. Kearney, Mr. Cox and Mr. Millar in limited circumstances, I am satisfied that the circumstances of this case are such that it is necessary in the interests of justice that the plaintiffs be permitted to obtain access to the other agreements referred to, subject to properly explained and justified redactions, if appropriate.

62. I am also satisfied that it is necessary in the interests of justice that the plaintiffs are provided with a more detailed explanation on oath by one of the personal defendants on behalf of all of the defendants for all of the redactions made in the two contracts for sale exhibited by Mr. Kearney in redacted form at Exhibit "EK2" to his affidavit of 12th June, 2019. I am not satisfied that a sufficiently detailed and persuasive explanation for the redactions made has been provided to date by the defendants on whom the onus of establishing the appropriateness of the redactions rests. The judgment of Haughton J. in *Courtney v OCM Emru Debtco DAC* [2019] IEHC 160 ("*Courtney*") discusses very comprehensively the relevant principles and case-law on the redactions of documents. I adopt and approve the principles set out in that judgment.

63. I have considered whether it would be appropriate in lieu of directing further discovery in respect of this issue, I should at this stage adopt one of the alternatives suggested on behalf of the defendants, namely, that I would review the two contracts for sale and determine whether the redactions were properly made or whether access to the unredacted contracts would be afforded to the plaintiffs' lawyers only. I do not believe that either alternative would be appropriate or workable at this stage without a proper explanation for the redactions made. Furthermore, it is generally undesirable, unless absolutely necessary, to restrict access to one party's documents to the lawyers for the other party without having the opportunity or facility to take instructions from the client. Further it would place the court in an invidious position if it were required to review the appropriateness of the redactions without a detailed explanation as to what those redactions relate to.

64. In my view, it is appropriate to direct the defendants to provide a detailed explanation on oath of the redactions to the contracts for sale. If necessary, I will then consider the further explanation and, if I am not satisfied with it, I will direct the provision of the unredacted contracts. I will also consider whether certain express undertakings should be given by the plaintiffs not to use the documents or the information in them other than for the purposes of the action (as was recently required by the High Court (Haughton J.) in *Courtney* and by the High Court (Quinn J.) in *Promontoria (Aran) Limited v. Sheehy* [2019] IEHC 613 (at para. 64).

65. I will, therefore, direct the defendants to:-

(1) Provide a detailed explanation on oath of all of the redactions made to the contracts for sale dated 23rd February, 2017 and 23rd November, 2018 (redacted versions of which were exhibited at Exhibit "EK2" to the supplemental affidavit of Eoghan Kearney sworn on 12th June

2019) by affidavit to be sworn by one of the personal defendants on behalf of all of the defendants within 21 days of the date of the delivery of this judgment or within such other period as may be agreed between the parties or ordered by the Court (subject to further discussion with counsel).

(2) Make further and better discovery of all agreements in relation to the purchase, sale, development and financing of Phase 2 of the Gardiner Street Project within the possession, power or procurement of the defendants or any of them referred to in the affidavits sworn by Patrick Cox, Eoghan Kearney and Hugh J. Millar on 12th June 2019. Such discovery to be made within the same period at (1) above.

66. I will discuss with counsel the precise terms of the order to be made and any undertakings which may require to be given by the plaintiffs having regard to the approach taken by Haughton J. in *Courtney* and by Quinn J. in *Sheehy.*

(2) Further and better discovery re para. 1 of settlement agreement/Categories 1 and 2 of original discovery

67. In brief, the plaintiffs contend that the defendants did not comply with paras. 1 and 2 of the settlement agreement. Paragraph 1 required that each of the personal defendants swear separate affidavits confirming that appropriate searches and/or reviews had been done in relation to documents sourced from the plaintiffs which were accessed, emailed to any party (including any of the defendants) to include the emails to which the documents were attached or copied to any device and that one of the personal defendants was to explain on affidavit the methodology adopted in the review of those documents.

68. Paragraph 2 of the settlement agreement provided that in the event that further documents emerged following the exercise referred to in para. 1, a supplemental affidavit of discovery would be sworn discovering those documents.

69. The plaintiffs claim that the affidavits sworn by the personal defendants were deficient for the reasons discussed above. They say that the affidavits sworn by the personal defendants on 2nd May, 2019 and the supplemental affidavit sworn by Mr. Kearney on 11th July, 2019 in response to Mr. Nesbitt's affidavit of 20th June, 2019 are all deficient and do not explain what methodology was adopted in carrying out the review which the defendants agreed to carry out

at para. 1 of the settlement agreement. The plaintiffs further contend that none of those affidavits provides any explanation of the issues identified by the plaintiffs (in the various affidavits sworn by Mr. Nesbitt and Ms. O'Brien) concerning the apparent misunderstanding by the defendants of the requirement to discover documents concerning the "use" of the plaintiffs' documents (Category 2 of the original discovery) and how that misunderstanding has been addressed. The plaintiffs contend that there has been no explanation of how the anomalies identified by them have been addressed. They draw attention to the CLAI's "Good Practice Discovery Guide" which recommended that the affidavit of discovery contain an explanation of the methodology adopted. They also rely on the approach suggested by Abrahamson, Dywer and Fitzpatrick that the affidavit of discovery should outline:

> *"(i) the document custodians whose documents were searched;*
>
> *(ii) the data sources search;*
>
> *(iii) the process that was followed to retrieve and uphold potentially relevant documents;*
>
> *(iv) whether duplicates of documents have been omitted; and*
>
> *(v) the review process that was undertaken following retrieval of the document universe to identify the discovered documents."* ((3rd Edition) (2019) para – 20 - 51, pp. 288 – 289).

70. The plaintiffs contend that an order for further and better discovery of documents in Category 2 should be made applying a correct interpretation of "use" as set out at para. 1 of the settlement agreement and that a direction should be made that any supplemental affidavit of discovery should provide a full explanation of the methodology adopted.

71. The defendants contend that the affidavits sworn by the personal defendants on 2nd May, 2015 together with the supplemental affidavits sworn by Mr. Cox on 12th June, 2019 and by Mr. Kearney on 11th July, 2019 comply with para. 1 of the settlement agreement and provide explanations as to the methodology adopted in the review of documents.

72. Having considered all the affidavits and the written and oral submissions of the parties, I am not satisfied that it would be appropriate to make a wide ranging order for

further and better discovery in respect of documents falling under Category 2 applying a correct interpretation of "use" as set out at para. 1 of the settlement agreement. I do not believe that an order in those terms is necessary in the interests of justice. I am also conscious of the fact that it is not possible to achieve *"perfect"* justice in the context of discovery (as noted recently by the Supreme Court in *Tobin* and previously by Fennelly J. in the Supreme Court in *Ryanair Plc. v. Aer Rianta Cpt* [2003] 4 I.R. 264). However, I accept the criticism made by the plaintiffs that none of the affidavits sworn by the defendants in purported compliance with para. 1 of the settlement agreement provides an explanation as to how, applying the methodology outlined by Mr. Cox in the original affidavit of discovery sworn on 27th October, 2017, documents falling under Category 2 were not discovered by the defendants under or by reference to that category. I accept the plaintiffs' submission that something more was required by the defendants under that paragraph of the settlement agreement than merely repeating and adopting what was said in relation to the methodology adopted by Mr. Cox in his original affidavit of discovery. I am satisfied that something more was required of the personal defendants than the *pro forma* confirmation contained at para. 5 of the affidavit sworn by each of the personal defendants on 2nd May, 2019 and something more is required than merely referring to the methodology originally adopted by the defendants in making their discovery as described in the affidavit of discovery sworn by Mr. Cox on 27th October, 2017. In my view, para. 1 of the settlement agreement required the defendants to explain how it was that the documents referred to by the plaintiffs which fell under Category 2 but were not discovered under that category by the defendants (or not discovered at all) was excluded in accordance with the original methodology and also to explain in considerably more detail than was done in the affidavits sworn by the personal defendants on 2nd May, 2019 the steps taken to review the original discovery and to address the problem of documents falling under Category 2 but not discovered by reference to that category in the original

discovery or not discovered at all. How else could the plaintiffs have been satisfied that the appropriate review had been followed and the proper methodology applied? While Mr. Cox does state in his affidavit of 12th June 2019 that the personal defendants reviewed the existing discovery following the settlement agreement and also with regard to their recollection of events and based on that exercise swore their affidavits on 2nd May, 2019, and that they reviewed the methodology used in the original discovery exercise to ensure that it captured documents falling within Category 2 as formulated in para. 1 of the settlement agreement, it is not clear from that affidavit (or from Mr. Kearney's supplemental affidavit of 11th July, 2019) how the defendants could have satisfied themselves on this further review that the deficiencies identified by the plaintiffs in some detail did not persist and did not continue to give rise to a situation where documents falling under Category 2 but not under other categories were not being discovered by the defendants. It seems to me that that was something the defendants were obliged to do by virtue of para. 1 of the settlement agreement.

73. I have given consideration as to whether I should simply make an order for further and better discovery of documents falling under Category 2 and give a specific direction that the guidance provided by the CLAI in the "Good Practice Discovery Guide" should be followed but I have decided that I should not make an order in such extensive terms. While the Guide has been referred to with approval and complimented in several decisions of the High Court including *Ryanair v. Impact* [2017] IEHC 425, *Gallagher v. RTE* [2017] IEHC 237 and *Ryanair Limited v. Channel 4 Television Corporation* (No. 2) [2017] IEHC 743 and is undoubtedly an invaluable guide for the approach to discovery of the electronically stored information and one which the courts fully support, it is not a binding legal instrument. It makes perfect sense that the Guide should be followed but I do not believe that I can compel parties to do so. It seems to me, however, that what the plaintiffs are entitled to is a proper explanation as to the methodology used when the discovery was

originally made in October, 2017 and the methodology used on the further review required to be carried out by the personal defendants under para. 1 of the settlement agreement so that the plaintiffs can receive a reasonable degree of reassurance that all documents falling under Category 2 have been discovered. That explanation should be provided on affidavit to be sworn by one of the personal defendants on behalf of all of the defendants within 21 days from the date of this judgment or within such other period as may be agreed or ordered by the court subject to discussion with counsel. There should be an explanation as to how the methodology originally applied resulted in documents falling under Category 2 being missed, an explanation of the further review of that methodology carried out by the defendants under para. 1 of the settlement agreement, and an explanation as to how the defendants can be satisfied that all documents falling under Category 2 but not under any other categories have now been discovered. The precise terms of the order can be further discussed but will be along the lines which I have outlined.

74. Finally, in the event that the defendants have not made discovery of the notes exhibited at Exhibit "PC2" to Mr. Cox's affidavit of 4th March, 2019 in native form as required by para. 6 of the settlement agreement (see the correspondence exhibited Exhibit "JN4" to Mr. Nesbitt's affidavit of 20th June, 2019), this should also be done. This was required by para. 6 of the settlement agreement to be done by 3rd May 2019. However, the correspondence exhibited at Exhibit "JN4" to Mr. Nesbitt's affidavit indicates that it was not done by that date and indeed the plaintiffs were still corresponding with the defendants' solicitors on 31st May, 2019 requesting compliance with para. 6 of the settlement agreement by close of business on 7th June, 2019. It is not clear from the papers whether this was in fact done. If it was not, then obviously it should be done forthwith.

(B) The second motion: plaintiffs' motion for discovery against defendants re additional defendants and amended pleas

75. The second motion the subject of this judgment is a motion issued by the plaintiffs on 25th June, 2019. That motion sought certain discovery against the seventh and eighth named defendants who were joined by order of McDonald J. on 6th February, 2019 and also discovery of two categories of documents against all of the defendants arising from certain of the

amendments made to the statement of claim on foot of that order of McDonald J. In addition, the motion sought an order directing the seventh and eighth defendants to explain on affidavit the methodology adopted by them in making their discovery.

76. The seventh and eighth defendants having been joined to the proceedings and an amended statement of claim and amended defence having been delivered, the parties then agreed directions in relation to further discovery which might be required. Those agreed directions were made by Haughton J. on 11th April, 2019. On foot of those directions, the plaintiffs sought discovery from the seventh and eighth defendants and further discovery from all of the defendants in relation to the amended claims by letter dated 7th May, 2019.

77. There was then an exchange of correspondence between the parties' respective solicitors. It is unnecessary to consider that correspondence in any detail at this stage in light of subsequent developments. However, in a letter dated 20th June 2019, the defendants' solicitors provided to the plaintiffs' solicitors an affidavit sworn by Mr. Cox on 30th May, 2019. That affidavit was sworn by Mr. Cox on behalf of the seventh and eighth defendants. He referred to the plaintiffs' request for voluntary discovery from those defendants and to the affidavits of discovery sworn up to that date in the proceedings on behalf of the defendants. Mr. Cox then stated at para. 4 of the affidavit:

> *"The companies have no documentation in their power possession or procurement falling within the categories of document set out in [the] plaintiffs' said letter seeking voluntary discovery of the 7th May, 2019 save the documents which have already been discovered in the affidavits of discovery sworn in these proceedings here to for on behalf of the defendants."*

78. The defendants' solicitors maintained in that correspondence that further discovery ought not to be made by the defendants on foot of the request made on 7th May, 2019 as it was suggested that the documents requested were already captured by other categories of documents contained in the original order for discovery made on 20th February, 2017. That position was not accepted by the plaintiffs and the motion was then issued on 25th June, 2019 grounded on an affidavit sworn by Ms. O'Brien of BHK Solicitors on that date.

79. However, on the following day, 26th June, 2019, the plaintiffs' solicitors wrote to the defendants' solicitors noting that the plaintiffs intended issuing a further motion (in fact the motion had been issued the previous day) and reiterating the defendants' contention that the additional discovery sought was unnecessary in light of the affidavit sworn by Mr. Cox on behalf of the seventh and eighth defendants on 30th May, 2019 and in light of the defendants'

contention that the other discovery requested was encompassed by the discovery already made on foot of the original order for discovery. However, the letter concluded in the following terms:

> "*In order to avoid further waste of court time by endless wrangling about discovery, the defendants will agree to make voluntary discovery of categories 1, 2 and 4* [in the plaintiffs' solicitors' letter on 7th May, 2019 and in the schedule to the notice of motion issued on 25th June, 2019] *and will swear an affidavit of discovery dealing with those categories. The defendants will furnish the affidavit by 9th August, 2019. The deponent will be Mr. Cox."*

80. The plaintiffs' solicitors replied on 28th June, 2019 noting the position and observing that the plaintiffs had been prepared not to insist on full discovery in respect of those categories if the defendants had been prepared to make reasonable enquiries and to provide an explanation in relation to the methodology adopted. While the plaintiffs had no issue with the defendants' agreement to make full discovery in relation to the three categories of documents, it was indicated that the plaintiffs did not wish the position to be delayed further because of a dispute in relation to the methodology adopted. The letter then went on to make certain further observations in relation to the methodology to be adopted. The plaintiffs' solicitors contended that in order properly to address the question of methodology, it would be necessary for the defendants either to make enquiries of the defendants' former solicitors, McCann Fitzgerald, as to the methodology adopted when making the original discovery or for a completely new search of the defendants' universe of documents to be conducted and a fresh review of the documents now which are potentially relevant to be carried out. Clarification was sought as to the methodology proposed to be adopted in making the further discovery. It was indicated that if the plaintiffs could be confident as to the reliability of the methodology proposed to be adopted by the defendants, it might be possible to strike out the second motion on terms.

81. In the event there was no replying affidavit on behalf of the defendants in response to the second motion and it was agreed that the defendants would proceed to make the further discovery by 9th August, 2019. It was accepted by the parties that my ruling in relation to the methodology question on the first motion would have a bearing on how the defendants made their additional discovery on 9th August, 2019. However, it was not possible for me to give that ruling before the end of term on 31st July, 2019. This motion and the other motions were listed for mention before me on 31st July, 2019. On that occasion, I indicated that it would be safe for the defendants to proceed on that basis that there should be an explanation of the methodology adopted in the discovery to be made by them 9th August, 2019. In the absence of any further

information prior to preparing this judgment, I am assuming that the further agreed discovery was made by the defendants by the agreed date.

82. In my view, the same conclusions I reached in relation to the first motion on the requirement by the defendants to provide an explanation as to the methodology adopted taking account of the deficiencies or problems identified by the plaintiffs in relation to the defendants' prior discovery applies equally to the further discovery which was to be made by the defendants by 9th August, 2019 and which was the subject of the second motion. When I am updated as to the position in relation to that discovery, I will discuss with counsel what orders (if any) should be made in respect to the second motion in light of my conclusion that there should be (or should have been) an explanation as to the methodology adopted which should address the deficiencies or problems identified in the defendants' prior discovery and discussed earlier in this judgment in relation to the first motion.

(C) The third motion: Defendants' motion for further and better discovery from the plaintiffs

Introduction

83. The third motion is the defendants' motion for further and better discovery from the plaintiffs in respect of documents which it is contended ought to have been discovered by the plaintiffs on foot of the order of the High Court (McGovern J.) made on 11th July, 2017. The motion, which was issued on 26th June, 2019, made reference to two categories of documents. The first category referred to documents relevant to an agreement or arrangement under which it is alleged that a Tony Gallagher or entities connected to him were interposed or to be interposed between the O'Flynn Group and certain of the plaintiffs in relation to the acquisition and disposal of sites at Coventry and Birmingham, including all or any payments made to Mr. Gallagher or connected entity or any repayment or request for repayment of those payments by Mr. Gallagher or any connected entity. The second category referred to documents relevant to debt applications and any associated communications made to Royal Bank of Scotland (RBS) and Co-op Bank in relation to the development of the sites at Coventry and Birmingham. During the hearing of the motion, it was indicated on behalf of the defendants that a lengthier list of the documents that were

actually being sought by the defendants in this motion had been prepared. A copy of the list had not been provided to the plaintiffs or to the court. It was agreed that I should first deal with issues of principle arising in relation to the motion and, if I were minded to direct the plaintiffs to make further and better discovery on foot of the order of McGovern J. of 11th July, 2017, that I would allow the parties some further time to consider the list prepared by the defendants. I accepted that that was a pragmatic way of dealing with the motion.

84. Before turning to the evidence put forward by the defendants in support of their contention that the plaintiffs ought to have discovered the further documents referred to in the motion in relation to the Coventry and Birmingham sites, it is necessary to refer briefly to the somewhat complicated history which has preceded this motion.

Discovery Order 20th February, 2017

85. Following correspondence, the defendants brought their initial motion for discovery against the plaintiffs on 18th January, 2017. That motion came before McGovern J. on 20th February, 2017. The defendants sought discovery of 20 categories of documents. The parties were in agreement in relation to certain of the categories which the plaintiffs were prepared to discover. There was a dispute between the parties in relation to the other categories. McGovern J. resolved that dispute on 20th February, 2017 and made an order for discovery on that date. The schedule to the order of 20th February, 2017 indicated the categories which were agreed between the parties and those which were not agreed and which had to be adjudicated upon by the court.

86. The motion now brought by the defendants concerns Category 8(f). The plaintiffs initially agreed to make discovery of the following documents under Category 8(f):-

> *"All documents which refer to and/or record and/or evidence:-*

(i) *Any assets or sites in Birmingham or Coventry acquired by the plaintiffs or any of them directly or indirectly from the O'Flynn Group; and/or*

(ii) *Any assets or sites in Birmingham or Coventry disposed of by the O'Flynn Group out of which any of the plaintiffs made a financial gain."*

In addition to agreeing to make discovery under Category 8(f), the plaintiffs also agreed to make discovery of certain other documents concerning the plaintiffs' interactions with NAMA in relation to the Coventry and Birmingham sites under Category 8(a) to (e) and under Category 9.

Discovery Recast by Order 11th July, 2017

87. Having initially agreed to make discovery in respect of the documents in Category 8(f) and having agreed to an order in the terms just mentioned on 20th February, 2017, the plaintiffs then became concerned as to the extent and ambit of Category 8(f) and brought a motion seeking to "clarify" the terms of Category 8(f) and, if necessary, to vary the terms of the discovery ordered under that category. That motion was heard and determined by McGovern J. on 11th July, 2017. Having heard submissions and having considered (inter alia) an affidavit sworn by Ms. Karen Harty of McCann Fitzgerald, the defendants' former solicitors, and in particular, para. 34 of that affidavit which set out the documents which the defendants were contending were covered by Category 8, McGovern J. gave a ruling and ordered that his previous order of 20th February, 2017 be "recast". McGovern J. ordered that the discovery to be made by the plaintiffs in respect of Category 8(f) would be in the following terms (in lieu of terms originally ordered):-

"1. All documents which evidence:-

(a) *The consent and any terms thereof issued by NAMA in relation to the sale by Victoria Hall Limited of the property at Alma Road, Coventry and the property at Selly Oak, Birmingham.*

(b) *The contract and any terms thereof relating to the sale of the lands at Alma Road, Coventry and Selly Oak, Birmingham by Victoria Hall Limited to JJ Gallagher Limited.*

(c) *Any contract between (i) Victoria Hall Limited and/or any company in the O'Flynn Group and (ii) any of the plaintiff companies or any directors of the plaintiff companies in relation to the transfer or sale by Victoria Hall Limited of the properties at Alma Road, Coventry and Selly Oak, Birmingham.*

(d) *The contract(s) or agreement(s) under which the plaintiff companies or any of them acquired an interest in the lands at Alma Road, Coventry and/or Milton Grove, Selly Oak, Birmingham.*

2. *Correspondence between the O'Flynn Group and/or any of the plaintiffs and NAMA in respect of the Birmingham and Coventry sites sold by Victoria Hall Limited, including correspondence in respect of the site to the north of Dale Road on which Victoria Hall Limited applied for planning permission on 22nd September, 2011, disclosures to NAMA relating to the above and requests for consents including form A's and consents given by NAMA;*

3. *Documents relating to planning applications made by Victoria Hall Limited and/or Victoria Hall Management Limited in Coventry on 22nd June, 2011 and Birmingham on 22nd September, 2011, including disclosures made to NAMA in respect of the applications and the subsequent grants of planning*

permission and the request and consents of NAMA relating to expenditures on said planning applications."

88. Paragraph 1 of Category 8(f) represented what the plaintiffs contended were the appropriate documents to be discovered under Category 8(f). Paragraphs 2 and 3 came from para. 34 of Ms. Harty's affidavit (paras. 34(a) and 34(b) of that affidavit). The plaintiffs accepted before McGovern J. that it was appropriate for them to make discovery of those two further categories of documents under Category 8(f). As appears from the transcript of the hearing and of the ruling made by McGovern J. on 11th July, 2017, the court accepted that those were the documents which should be discovered under Category 8(f) as "recast" by the court that day on the basis that such discovery was fair, reasonable and proportionate in light of the issues in the case.

89. I note that one of the categories of documents referred to in para. 34 of Ms. Harty's affidavit (at para. 34(f)) were:-

"Communications between the O'Flynn Group and/or the plaintiffs and the purchaser (JJ Gallagher) or any associated or related companies prior to or post the sale by Victoria Hall Limited of the sites in Coventry and Birmingham;"

McGovern J. did not order discovery of that category of documents under Category 8(f).

Defendants' Motion for Further and Better Discovery

90. The defendants now contend that plaintiffs should be required to make further and better discovery of the documents listed in the notice of motion issued in respect of the third motion (concerning the Coventry and Birmingham sites). In the first place, they contend that those documents ought to have been discovered under the terms of the order made by McGovern J. on 11th July, 2017. Consequently, they seek further and better discovery of those documents on foot of that order. The defendants rely on a submission advanced by the plaintiffs' counsel to McGovern J. in relation to the discovery being offered by the plaintiffs under Category 8(f) in support of their contention that the order

made covered the documents sought by the defendants in the third motion. Alternatively, my understanding of the defendants' position is that even if the documents now sought were not covered by the terms of the order of 11th July, 2017, the plaintiffs ought nonetheless to be directed to make discovery of those documents (which they contend are relevant and necessary for the purpose of discovery) in the interests of justice.

91. The plaintiffs oppose the defendants' motion on a number of grounds. First, they object to the circumstances in which the defendants have brought the motion and object to some of the material relied on by the defendants in support of the motion. In particular, the plaintiffs object to the admissibility of a witness statement signed by Tony Barry on the basis that it amounts to impermissible hearsay evidence. Second, the plaintiffs contend that the documents sought by the defendants in this motion do not fall within the terms of Category 8(f) as ordered by McGovern J. on 11th July, 2017. The plaintiffs contend that the documents now sought by the defendants on this motion were amongst the categories of documents which the defendants sought before McGovern J. but that he refused to direct the plaintiffs to make discovery of such documents. The plaintiffs observe that the defendants did not appeal the order of McGovern J. and are, in effect, seeking to go behind the order in their motion before the court. Finally, the plaintiffs contend that the discovery sought is not necessary for the fair disposal of the proceedings or in the interests of justice having regard to the material which the defendants already have by way of discovery and the evidence and other material they were in a position to put before the court for the purposes of their motion.

(1) Procedural objection: Admissibility of witness statement

92. The plaintiffs have taken issue with the admissibility in evidence on this motion of a witness statement signed by Tony Barry, who worked for the O'Flynn Group between 2004 and 2014. Although it was directed by the court (Haughton J.) at the call over of the motion in the week preceding the hearing that Mr. Barry's witness statement should not be

included in the papers furnished to me, inadvertently the defendants' solicitors included a copy of that witness statement. The defendants apologised through their counsel for this inadvertence and that apology was accepted. I did not read the witness statement in advance of the hearing. However, I have done so for the purpose of giving judgment on the defendants' motion.

93. Before considering the plaintiffs' objection to the admissibility of Mr. Barry's witness statement, I should identify the material put before the court for the purpose of the defendants' motion. The motion was grounded on an affidavit sworn by Mr. Cox on 26th June, 2019. In that affidavit, Mr. Cox relied on what was said by the plaintiffs' counsel at the hearing before McGovern J. on 11th July, 2017. Mr. Cox asserted that it had been represented to the court that the recast categories together with admissions made by the plaintiffs would give the *"full picture of what was and was not disclosed to NAMA"*. He asserted that discovery made by the plaintiffs did not give that *"full picture"* and that the plaintiffs had not made discovery of any documents relating to an alleged agreement under which Mr. Gallagher was *"interposed as a middleman"* between the O'Flynn Group and certain of the plaintiffs in order allegedly to *"disguise the true market value of the site from NAMA"*. Mr. Cox then referred to Mr. Barry's witness statement and to matters of which it is alleged he was personally aware in terms of dealings between Mr. Gallagher and representatives of the plaintiffs.

94. Mr. Millar swore an affidavit on the same date in which he exhibited a witness statement signed by Mr. Barry. Mr. Millar introduced the witness statement by stating (at para. 3 of his affidavit):-

> *"In the course of the preparation for the trial of the action, I sought and received a witness statement from Mr. Tony Barry…"*

Mr. Millar did not say anything else about the witness statement. In particular, he did not indicate when the witness statement was taken (I note it was signed on 11th June, 2019).

Nor did Mr. Millar indicate that there was any particular difficulty in Mr. Barry swearing an affidavit for the purposes of the defendants' motion in the terms of his witness statement.

95. A replying affidavit was sworn on behalf of the plaintiffs by Mr. Nesbitt on 9th July, 2019. Mr. Nesbitt's affidavit set out in detail the grounds on which the plaintiffs were objecting to the defendants' motion which I have summarised earlier. Mr. Nesbitt disputed certain of the allegations contained in Mr. Cox's affidavit and contested the defendants' entitlement to any relief on foot of their motion. A couple of days before the hearing of the motion, the defendants furnished to the plaintiffs three further affidavits in support of their motion. I understand that no mention was made of the intention to put these affidavits in at the call over the previous week.

96. The first of the three additional affidavits was an affidavit sworn by Simon Fox on 16th July, 2019. Mr. Fox is a former employee of Tiger Developments Limited (which was part of the O'Flynn Group) and worked with Mr. Cox. He is a development manager of Carrowmore Property UK Limited. His affidavit contains certain allegations against the plaintiffs and refers to alleged dealings between representatives of the plaintiffs and Mr. Gallagher in relation to the purchase and onwards sale of the two sites in Coventry and Birmingham. The second additional affidavit was an affidavit sworn by Mr. Millar on 16th July, 2019. The purpose of Mr. Millar's affidavit was to exhibit a report by Sean Murray FCA which bears the date 16th July, 2019. Mr. Murray is an accountant and a partner in Conlan Crotty Murray (although the plaintiffs point to material suggesting that that firm was the subject of a merger and has been known by a different name since 23rd May, 2019). In any event, Mr. Murray's report analyses the documents discovered by the plaintiffs in relation to the Coventry and Birmingham sites and sets out certain conclusions made by Mr. Murray adverse to the plaintiffs from the discovered documents in relation to the sale of the Coventry and Birmingham sites and the information and material disclosed

to NAMA. The third additional affidavit provided was a second affidavit sworn by Mr. Cox on 16th July, 2019 which responded to Mr. Nesbitt's replying affidavit and made certain further allegations against the plaintiffs in relation to the Coventry and Birmingham sites. Finally, Mr. Nesbitt swore a replying affidavit on behalf of the plaintiffs on 18th July, 2019 which commented on the affidavits provided by the defendants and Mr. Murray's report and denied allegations contained in those affidavits and in that report.

97. It is in that context that I must first consider the objection made by the plaintiffs to the admissibility of Mr. Barry's witness statement. Both parties accept that a witness statement is not evidence (unless and until the witness gets into the box and confirms its contents or it is otherwise agreed as evidence between the parties). In my view, were it not for the fact that the defendants did, albeit very belatedly, put in further affidavits in support of their motion in the days immediately prior to the hearing, I would most likely have ruled that Mr. Barry's witness statement was inadmissible as amounting to impermissible hearsay. I agree with the approach taken by Murphy J. in *F & C Reit Property Asset Management plc v. Friends First Managed Pension Funds Limited* [2017] IEHC 383 ("*F & C Reit*") and by Noonan J. in *Joint Stock Company Togliattiazot v. Eurotoaz Limited* [2019] IEHC 342 ("*Eurotoaz*") as to the circumstances in which hearsay may be admissible on an interlocutory application. In particular, I agree with the conclusion expressed by Noonan J. in *Eurotoaz* that, notwithstanding that hearsay evidence may be admitted on an interlocutory application in light of O. 40, r. 4 RSC, it *"should not be admitted as of course but only where it is unavoidable for genuine reasons of urgency or difficulty in procuring direct evidence."* (per Noonan J. at para. 16, p. 8).

98. Proceeding on the assumption that an application for further and better discovery is an interlocutory application (but making no definitive finding on that point), and accepting that there may be circumstances in which hearsay evidence may be admitted, I agree that this should only arise where it is *"unavoidable for genuine reasons of urgency or difficulty*

in procuring direct evidence", as noted by Noonan J. There was no explanation from the defendants as to why an affidavit could not have been obtained from Mr. Barry in the terms of the witness statement which he signed on 11th June, 2019. The defendants issued their motion just over two weeks later. There is no indication in any of the affidavits sworn on behalf of the defendants of any difficulty in procuring direct evidence in the form of an affidavit from Mr. Barry. Nor is there any assertion of urgency by the defendants or suggestion that it might have been difficult to obtain an affidavit from Mr. Barry for the purposes of the motion. Whatever about obtaining such an affidavit prior to the issuing of the motion (and there is no indication that there was any difficulty in doing so), there is certainly no suggestion that, in the four weeks or so between the date the motion was issued and the date of the hearing on 19th July, 2019, an affidavit could not have been obtained from Mr. Barry.

99. While the defendants submitted that just as the court can look at documents discovered in order to point to the likelihood that other documents exist which have not been discovered, and since documents discovered are not evidence unless proved in the proper way or admitted, so to should it be possible to rely on a witness statement provided for under O. 63A RSC in commercial proceedings in support of an application such as this. However, I do not accept that submission. An application for further and better discovery based on the assertion that documents discovered disclose the likelihood of further documents which have not been discovered must be brought in a procedurally correct manner and, on the assumption that such an application is an interlocutory one, any affidavit sworn in connection with the application must comply with the provisions of O. 40, r. 4 as interpreted and applied by Murphy J. in *F & C Reit* and by Noonan J. in *Eurotoaz*. If such an affidavit refers to and exhibits documents discovered in order to demonstrate that there are other documents which have not been discovered, there can be no objection to that. That is quite different to what has happened here where the defendants

have sought to rely on Mr. Barry's witness statement as if it were evidence in order to make certain allegations against the plaintiffs and as if it were an affidavit. In my view, that is not appropriate.

100. If the plaintiffs had adduced nothing further in support of their application than Mr. Barry's witness statement (as exhibited by Mr. Millar), I would more than likely have refused the defendants' application as being grounded on inadmissible hearsay evidence. However, as I have explained, the defendants have relied on other affidavit evidence in support of their application. Therefore, I do not find it necessary to make any formal order declaring Mr. Barry's witness statement inadmissible (notwithstanding the views I have expressed in relation to it). I will proceed to consider the defendants' motion on the basis that there is admissible evidence before the court to ground the motion, in the form of the other affidavits to which I have referred.

(2) Whether documents sought are within terms of Order of 11th July, 2017

101. As noted earlier, the defendants contend that the further discovery sought in this application is covered by the terms of Category 8(f) as "recast" by McGovern J. in the order of 11th July, 2017. The relief sought by the defendants on the motion is an order for further and better discovery on the basis that the documents sought were required to be discovered by the plaintiffs on foot of the order of 11th July, 2017. In support of their application, the defendants rely on what was said by the plaintiffs' counsel during the course of the hearing before McGovern J. on 11th July, 2017. The plaintiffs' response to this is threefold. First, the plaintiffs contend that as a matter of principle, the order made by McGovern J. on 11th July, 2017 cannot be interpreted or conditioned by what counsel said during the course of the hearing preceding the making of the order. Second, they say that even if counsel's submissions could be used as an aid to the interpretation of an order, the submission actually made by the plaintiffs' counsel is consistent with the order made by McGovern J. Third, the plaintiffs make the point that wider discovery was sought by the

defendants (as set out in para. 34 of Ms. Harty's affidavit) and was refused by McGovern J. The plaintiffs contend that if the defendants were unhappy with the order made, then the appropriate course was to appeal the order and that it is not appropriate to seek to go behind that order by means of the motion now brought by the defendants.

102. In my view, the plaintiffs are correct in submitting that as a matter of principle, an order made by a court should be interpreted on its terms and not by reference to a submission made by counsel in the course of the hearing that preceded the making of the order. In other words, it is not appropriate to change or alter the terms of an order by reference to submissions made by counsel unless the terms of the order themselves can reasonably bear the meaning contended for. However, in my view, this debate is academic on the facts of this case. The defendants rely, in particular, on what the plaintiffs' counsel stated at page 46 of the transcript of the hearing before McGovern J. on 11th July, 2017. Having outlined what the plaintiffs were arguing were the appropriate documents for the purpose of Category 8(f), the plaintiffs' counsel then stated:-

> *"So now you get a total picture of our interaction with NAMA in relation to Birmingham and Coventry. You can see what was disclosed. You can see what wasn't disclosed. You can see what was consented to and what wasn't. That's everything sufficient for the plaintiff…"*

103. The order made by McGovern J. on 11th July, 2017 recast Category 8(f) in the manner set out earlier in this judgment. Category 8(f) as recast in the order of 11th July, 2017 (comprising the documents described at paras. 1, 2 and 3) required the plaintiffs to make discovery of documents evidencing what was disclosed by the relevant plaintiffs to NAMA in relation to the Birmingham and Coventry sites (see, for example, para.2 of Category 8(f)). Category 8(f) as recast by that order did not direct the defendants to make discovery of what was <u>not</u> disclosed to NAMA. However, once it can be ascertained what was disclosed to NAMA, what was not disclosed can then be discerned. That is entirely

consistent with what the plaintiffs' counsel said in his submission to McGovern J. on 11th July, 2017. Neither Category 8(f), as recast by the order of 11th July, 2017, nor the submission by the plaintiffs' counsel at the hearing can be interpreted as requiring the plaintiffs to make discovery of what was not disclosed to NAMA in relation to the Birmingham and Coventry sites or as indicating the plaintiffs' agreement to do so.

104. In my view, therefore, the documents which the defendants now seek by way of further and better discovery in order to substantiate the defendants' allegations concerning the alleged interposition of Mr. Gallagher as a middle man in the disposal of the two sites, which it is alleged was not disclosed to NAMA, are not covered by the terms of Category 8(f) as recast by McGovern J. in the order of 11th July, 2017.

105. I am fortified in my conclusion on that issue by the fact that one of the categories of documents which was being sought by the defendants at para. 34 of Ms. Harty's affidavit was the category referred to at para. 34(f) concerning communications between the O'Flynn Group and/or the plaintiffs and Mr. Gallagher's company prior to or post the sale of the sites. The defendants' contention that those documents were covered by the order was expressly drawn to the attention of McGovern J. by the plaintiffs' counsel (see p. 10 of the transcript). Although the transcript does not fully reproduce the terms of para. 34(f) of Ms. Harty's affidavit, it is clear that counsel was reading from para. 34 of Ms. Harty's affidavit. In his ruling on the application (at pp. 50 to 54), McGovern J. was fully conscious of the categories sought in Ms. Harty's affidavit and was satisfied, on the grounds of proportionality and necessity, to recast the order in the terms outlined by him (at pp. 53 and 54 of the transcript). Those terms did not include the documents sought at para. 34(f) of Ms. Harty's affidavit in relation to Mr. Gallagher's company. I am satisfied, therefore, that the additional discovery now sought by the defendants does not fall within the terms of the order made by McGovern J. on 11th July, 2017. Not only that, the additional discovery being sought would have been encompassed by the discovery in sub-

para. (a) of the defendants' motion which was sought and not granted by McGovern J. when he recast the order on 11th July, 2017. The discovery sought in sub-para. (b), concerning RBS and the CoOp Bank, was not expressly sought before McGovern J. but may well have been encompassed by the very wide issues originally agreed which were then cut down or recast by McGovern J. They were not ordered to be discovered by McGovern J. The appropriate remedy for the defendants if they were unhappy with the order made was to appeal the order. They did not do so. The appropriate course was not to seek further and better discovery. I will, therefore, refuse to direct the plaintiffs to make further and better discovery of the documents referred to in the notice of motion (or any expanded list of those documents which may now be put forward by the defendants) on foot of the Order of 11th July 2017.

(3) Whether nonetheless an order for discovery should be made of the documents sought

106. Although I have concluded that the documents sought in the motion do not fall within Category 8(f) of the order made by McGovern J. on 11th July, 2017, I must nonetheless consider whether I should make an order that the plaintiffs make discovery of those documents not by way of further and better discovery but by way of additional or supplementary discovery. This was a fall-back position adopted by the defendants on the application in the event that they were unsuccessful in establishing that the documents fell within the category ordered by McGovern J. The defendants contend that the documents sought are relevant and that it is necessary that they obtain them by way of discovery for the fair disposal of the proceedings. They rely on the recent judgment of the Supreme Court in *Tobin* in support of their argument that the ultimate objective of discovery is to ensure that there is a fair trial.

107. The plaintiffs oppose the making of any additional order for discovery over and above the order already made. They accept that if this were a fresh application for

discovery, without the complex procedural history in respect of this application, the additional documents sought would probably be relevant in the *Peruvian Guano* sense. However, the plaintiffs contend that it is not necessary that the defendants obtain discovery of these additional documents for the fair disposal of the proceedings. The plaintiffs advance that objection on a number of grounds. First, they argue that having sought discovery of documents in similar terms and having failed to obtain such discovery from McGovern J., it would be inappropriate to make the order sought on this further application. Second, they contend that the defendants do not need the documents sought in circumstances where Mr. Murray has been in a position to prepare his report and to draw the conclusions which he has sought to draw without at any stage suggesting that he was hampered in doing so by the absence of the discovery now sought by the defendants. Third, the plaintiffs refer also to other affidavits put forward by the defendants in support of their application and to the submissions made by the defendants' counsel as to the case which they seek to make against the plaintiffs in relation to the alleged nondisclosure to NAMA of significant facts concerning the disposal and onwards sale of the Coventry and Birmingham sites and the subsequent development and operation of those sites.

108. I am satisfied that in the very particular circumstances of this case, I should not direct the plaintiffs to make the additional discovery sought by the defendants. It is, to my mind, very significant that discovery similar to that now sought by the defendants (in sub-para (a) of their motion) was in fact raised and sought in the course of the application before McGovern J. (as set out at para. 34 of Ms. Harty's affidavit). McGovern J. refused to order that discovery as explained in his ruling. He was satisfied that it was not necessary or proportionate to recast the order in the wider terms proposed by the defendants and was satisfied that the appropriate order to make was that suggested by the plaintiffs. While McGovern J. did not have before him the additional evidence put forward by the defendants in support of the motion now before the court, I am not persuaded that it is

necessary for the defendants to obtain the additional discovery sought in order to advance the case which they wish to advance as set out in the various additional affidavits relied upon by them in support of their motion. Nor am I satisfied that the defendants have put forward any stateable basis for obtaining discovery in respect of the documents in sub-para. (b) concerning RBS and CoOp Bank. So far as I can ascertain from the papers, the only mentions of RBS or CoOp Bank are a brief reference at para. 6.2 of Mr. Barry's witness statement and an explanation, at para. 32 of Mr. Nesbitt's affidavit, averring that they were the two banks that offered loan facilities to the two companies that ultimately purchased the sites from Mr. Gallagher's companies. Nothing is said about them in either of Mr. Cox's affidavits or Mr. Murray's report.

109. On the contrary, I am satisfied that the plaintiffs have demonstrated that it is not necessary for the fair disposal of the proceedings that the defendants obtain the additional discovery. Mr. Murray was in a position to draw the conclusions which he drew on the basis of the discovery documents provided to him and did not suggest that he was hampered in drawing those conclusions by the absence of any documents. The defendants have also been in the position to obtain an affidavit from Mr. Fox as well as being in a position to rely on the affidavits sworn by Mr. Cox in relation to his personal knowledge. In addition, of course, the defendants have obtained a witness statement from Mr. Barry. If this were an entirely fresh application without the procedural history to which I have referred, and if I were satisfied that an injustice would be done to the defendants if they did not obtain the discovery sought on this application, I would have directed the plaintiffs to make the additional discovery sought. However, I cannot ignore the procedural history and the need to ensure that there is at some point finality in the discovery process. Proceedings would become intolerably delayed and disrupted if it were possible, notwithstanding a previous refusal of discovery, to return to seek discovery in similar terms at a later stage in the process. That said, if I were satisfied that an injustice would be done to the defendants

if they did not obtain this additional discovery, even with that procedural history, I would have directed the plaintiffs to make the additional discovery. However, I am not satisfied that any injustice would be done to the defendants for the reasons I have mentioned.

110. In those circumstances, I have concluded that I should refuse the defendants' application.

Summary of orders to be made on the three motions

(1) The first motion: Plaintiffs' motion for further and better discovery

(a) Further and better discovery in relation to Phase 2 Gardiner Street Project.

111. I will direct the defendants to:-

(1) Provide a detailed explanation on oath of all the redactions made to the contracts for sale dated 23rd February, 2017 and 23rd November, 2018 (redacted versions of which were exhibited at Exhibit "EK2" to the supplemental affidavit of Eoghan Kearney sworn on 12th June, 2019) by affidavit to be sworn by one of the personal defendants on behalf of all of the defendants within 21 days of the date of the delivery of this judgment or within such other period as may be agreed between the parties or ordered by the court (time period subject to further discussion with counsel).

(2) Make further and better discovery of all agreements in relation to the purchase, sale, development and finance of Phase 2 of the Gardiner Street Project within the possession, power or procurement of the defendants or any of them as referred to in the affidavits sworn by Patrick Cox, Eoghan Kearney and Hugh J. Millar on 12th June, 2019. Such

discovery to be made within the same period as at (1) above (time period subject to further discussion with counsel).

(b)Further and better discovery re para. 1 of settlement agreement/Categories 1 and 2 of original discovery

112. I will direct the defendants to furnish a further explanation as to the methodology used when the defendants' discovery was originally made in October, 2017 and as to the methodology used on the further review required to be carried out by the personal defendants under para. 1 of the settlement agreement. That explanation should address how the methodology originally applied resulted in documents falling under Category 2 being missed, should explain how the further review of that methodology was carried out by the defendants under para. 1 of the settlement agreement and should further explain how the defendants can be satisfied that all documents falling under Category 2 have now been discovered.

113. The terms of the orders to be made in respect of the first motion can be further discussed with counsel including the question as to whether express undertakings should be given by the plaintiffs in relation to the use of any documents to be provided on foot of the orders made as considered by Haughton J. in *Courtney* and by Quinn J. in *Sheehy*.

(2) Second motion: Plaintiffs' motion for discovery on amended pleas

114. I will discuss with counsel what orders (if any) need to be made in respect of the second motion in circumstances where the defendants agreed to make further discovery by 9th August, 2019. As explained in the judgment, I am satisfied that the same conclusions I reached in relation to the first motion on the requirement by the defendants to provide an explanation as to the methodology adopted applies equally to the further discovery which was required to be made by the defendants by 9th August, 2019.

(3) Third motion: Defendants' motion for further and better discovery

115. For the reasons set out earlier in the judgment , I refuse the defendants' application for further and better discovery of the documents sought in this motion.

116. I will hear counsel in relation to the precise terms of the orders to be made and in relation to any other issues arising from the judgment on these three motions.