[2020] IEHC 161

THE HIGH COURT

[2015 No. 4737 P]

BETWEEN

ANDREW GRIFFITH

PLAINTIFF

AND

PARMA INVESTMENTS BV, PARMA DEVELOPMENTS, PARMA DEVELOPMENTS (JERSEY) LIMITED AND REMLEY

DEFENDANTS

AND BETWEEN:

PARMA INVESTMENTS BV, PARMA DEVELOPMENTS, PARMA DEVELOPMENTS (JERSEY) LIMITED AND PARMA MANAGEMENT SERVICES

COUNTER CLAIM PLAINTIFFS

V.

ANDREW GRIFFITH

COUNTER CLAIM DEFENDANT

JUDGMENT of Ms. Justice Murphy delivered on the 6th day of April 2020

Introduction

1. Before the court are two motions for discovery, one brought by the plaintiff/counterclaim defendant and the other brought by the defendants/ counterclaimants. These applications are the latest in a series of highly contentious and argumentative applications brought by both sides, since the inception of these proceedings. The motions were heard over six court days, being the 21st and 22nd November 2017, the 20th and 21st December 2017, and the 9th and 10th of April 2018. Written submissions were filed in May and June 2018 and a further hearing was conducted in July 2018. The applications, for the reasons set out hereunder, have many of the hallmarks of discovery being used "*as a tactic in the war between the parties*", a situation deprecated by McCracken J., in *Hannon v Commissioners of Public Works & Ors* [2001] IEHC 59, and one which the court "*should be astute to ensure*" did not occur.

2. The plaintiff in his application, which he opened for a day and a half, failed to disclose to the court the fact that he had had in his possession for a period of approximately two years, in excess of 100,000 documents, relevant to the issue of discovery and in particular, to the question of the necessity for discovery. The defendants/counterclaimants, on the other hand, in many respects, used their application for discovery more to 'turn the screw' on the plaintiff rather than to elicit documents which are relevant and necessary for the prosecution of their counterclaim. Throughout these applications, both in oral and written submissions, the defendants/counterclaimants have characterised the plaintiff as a thief and a blackmailer who has stolen their documents and who is attempting to use those documents to leverage a settlement of his claim. This characterisation is entirely inappropriate in circumstances where the entitlement or otherwise of the plaintiff to have possession of the documents is the very subject of their counterclaim and an issue to be determined on the hearing of that counterclaim.

3. The purpose and function of discovery is to preserve and vindicate a party's constitutional right of access to justice. Where documents which might assist a party in proving his own

case, or in damaging the case of his opponent, lie in the power of that opponent, then a court, in the interest of justice, may direct discovery of those documents. The purpose of the power to order discovery pursuant to O. 31, r.12, of the Rules of the Superior Courts, as amended, is, like the power to order inspection under O. 50, r.4, to ensure equality of arms in the conduct of litigation, so that one party will not be disadvantaged by being denied access to evidence in the control of his opponent. The discovery process also serves to ensure that a court when determining a dispute, has before it all relevant evidence to allow it to come to a just determination. It also plays a role in keeping the parties to litigation honest. As stated by Clarke C.J. in the recent Supreme Court decision in *Tobin v The Minister for Defence & Ors* [2019] IESC 57 at para. 7.3:-

> *"…for it cannot be ruled out that some parties might succumb to the temptation to present a less than full picture of events to the court, were it not for the fact that they know that any attempt to do so may be significantly impaired if there is a documentary record which shows their account either to be inaccurate or materially incomplete. I consider the latter point to be of particular importance, for it provides a potential counterweight to the oft quoted argument that the vast majority of documents which are discovered do not find their way into the evidence presented to the court."*

4. In *Tobin*, Clarke CJ., emphasised the importance of the role of discovery in serving the interests of justice. He confirmed that the test for the making of an order for discovery remains that the court must be satisfied that the documents are both relevant and necessary for the fair disposal of the case or to save costs. He set out the approach which courts should adopt when considering the issue of "necessity". Clarke CJ. also acknowledged the possibility that the discovery process could be misused in a way which did not serve the overall interests of justice. At para 7.9 of his judgment he stated:-

> *"Most procedures which make sense can also be used tactically by one or other party (or indeed both) to gain a litigious advantage rather than to achieve the specific end to which the procedure is properly directed. Any regime for the interpretation and application of procedural measures needs to keep that fact in mind and needs to operate under principles which at least minimise the risk of procedures being used solely or mainly for tactical reasons rather than for the purpose of ensuring the fairness and completeness of the ultimate trial."*

5. To understand the court's decision on these discovery motions, it is necessary to outline the background to the respective claims of the parties and to the various court applications made prior to these discovery applications.

Background

6. In the early noughties the plaintiff was a very successful property development manager employed, at a handsome salary, by a large construction company. In addition, he had a number of business interests on his own account, situate mainly in the north east of the country. He was, apparently, friendly with Laurence Goodman Junior who he maintains 'headhunted' him to join the Goodman organisation. He states that he was unwilling to

exchange his well salaried job for another salaried position and he indicated that he would only be willing to join the organisation were he to be given equity in the projects which were to be developed.

7. On the 4th December 2006, following extensive negotiations, in which both parties were legally represented by solicitors from A&L Goodbody, the plaintiff entered two agreements with the defendants. One was an Executive Employment Agreement made between a company called Parma Management Services Limited and Andrew Griffith. Though not specified in the Executive Employment Agreement, the court considers it likely that Parma Management Services is a wholly owned subsidiary of Parma Investments BV. The second agreement made on the 4th December 2006, was a Share Option Agreement, made between Parma Investments BV, Parma Developments Limited and Andrew Griffith.

8. In these proceedings, the plaintiff is claiming an entitlement to a 7.5% equity share in the company which purchased the former Bank of Ireland headquarters at Baggot Street, pursuant to the Share Option Agreement. The defendants deny his entitlement to such a share, maintaining that the property was acquired by Parma Investments BV and not Parma Developments. In addition the first three defendants together with Parma Management Services have counterclaimed for relief, including damages, for the plaintiff's alleged breach of the Executive Employment Agreement.

Share Option Agreement

9. The agreement is between Parma Investments BV and Parma Developments Ltd of the one part and Andrew Griffith, the plaintiff of the other part. Parma Developments Limited is a wholly owned subsidiary of Parma Investments BV. Throughout the agreement, Parma Investments BV is referred to as Parma and Parma Developments Limited is referred to as the Company. Part 1 of the agreement grants Andrew Griffith option shares in companies owning 20 existing development sites, listed in a schedule attached to the agreement. The individual company owning each site is not identified in the schedule, but Parma Developments warrants at clause 4.1.2. that members of the company group, hold the scheduled sites. The 'Group' is defined as follows in the definition section:-

> " *the Group means the Company, the companies listed in column B of the table in clause 4.1.1. and the New Group Companies established in accordance with clause 6.1, and member of the Group means any member thereof."* (emphasis added)

Notwithstanding this definition, the companies owning the existing sites are not in fact identified in the agreement.

In clause 3, Parma Investments BV grants the plaintiff a 'Put Option' whereby he is given the right to require Parma Investments BV to purchase his share options subject to the terms and conditions set out in that clause.

Clause 4 is headed '*Calculation of Purchase Price on Exercise of Put Option*.' Clause 4.1 sets out the 20 existing sites in respect of which share options were granted to the plaintiff. As already stated the respective companies holding the title to those sites are

not identified, but the value of each site is agreed and set out in the schedule, as is the number and class of shares allotted. Clause 4.3 provides for the exercise of the plaintiff's Put Option where an existing site is sold, whether developed or not. Clause 4.4 provides for the exercise of the Put Option and the valuation of the option shares in circumstances where a site is developed and retained for letting or licence, by Parma Developments or a Group company. Clause 4.7 contains a covenant by Parma Investments to procure that the audited accounts of each member of the Group will be prepared in accordance with the law and will give a true and fair view of the state of affairs of each member of the Group as at the relevant balance sheet date.

Clause 5 of the agreement which did not feature in this application, deals with arrangements for the disposal of the option shares in the event that the plaintiff parted company with Parma Developments. Different arrangements were agreed depending on the circumstances of the plaintiff's departure.

10. While Part 1 of the Share Option Agreement deals with existing sites, Part 2 deals with the plaintiff's rights to subscribe for shares in new property development sites which might be acquired, during the course of the agreement. This part is at the core of the dispute between the plaintiff and the defendants. Clause 6. 1. headed, '*Incorporation of New Group Companies*', provides:-

> *"The parties agree that, in each case, a special purpose newly incorporated subsidiary of the Company (New Group Company) will be established for the purposes of acquiring the interest in each new property development site which the Group proposes to acquire (New Site)"* (emphasis added)

In the definition section, New Group Company is defined as follows:-

> *"New Group Company has the meaning ascribed to such term in clause 6.1. and New Group Companies means some or all of them as the context so admits"* (emphasis added)

Clause 6.2 which is headed 'Subscription for New Shares' provides:-

> *"The parties agree that Mr. Griffith shall subscribe for 7.5% (seven and one half per cent) of the issued share capital of each New Group Company, on the following terms:*
>
> *6.2.1. Mr Griffith will subscribe for 7.5% (seven and one half per cent) of the equity share capital being raised by that New Group Company to acquire the relevant New Site on the same terms as provided by the Company which shall subscribe for the balance of the equity share capital.*
>
> *6.2.2. The Company may, at its discretion, offer Mr. Griffith a shareholding in excess of 7.5% (seven and one half per cent) in any New Group Company, but he is not obliged to accept that offer.*

6.2.3. The parties agree that Mr. Griffith should not be prejudiced by virtue of capital being tied up in the option Shares and, in particular, if Mr Griffith does not have the requisite cash to subscribe for 7.5% of the equity in any New Group Company, any shortfall in funding will be provided by way of loan by Parma (Parma Investments BV) *to Mr Griffith at market rates, thereby enabling Mr Griffith to preserve his 7.5% equity interest at all times. Recourse to Parma for funding shall be a last resort under this paragraph and Mr. Griffith's primary obligation will be to fund his equity from his own resources.*

6.2.4. The Company (Parma Developments) *agrees that, if requested by Mr. Griffith, it will use all reasonable endeavours to procure that Mr. Griffith will be granted the same finance terms as the Company by any lender in respect of the proposed investment in any New Group Company."*

The balance of Clause 6, dealing with rights attaching to new shares; the issuing of further shares; and restrictions on the transfer of shares do not appear to have any relevance to these applications. Similarly, Clause 7 of the agreement providing for Exit Provisions for New Shares appears to have no relevance to the issues raised on these applications.

11. Part 3 of the Share Option Agreement is headed '*Miscellaneous'*. It contains clauses providing *inter alia* for matters such as jurisdiction and dispute resolution. The only clause material to the court's decision on this application is Clause 10, headed '*Access to Information'*. Clause 10 provides:-

"10.1. Copies of Accounts

The Company agrees to provide to Mr. Griffith copies of the annual audited accounts together with any management accounts prepared in respect of the Company and each member of the Group in a timely manner as and when such accounts become available.

10.2. Access to Financial Records

As a director of the company and its subsidiaries, Mr Griffith will be given full access to all the financial information on the company and its subsidiaries. This information will be treated in the strictest confidence by Mr. Griffith and will only be made available to his accountant or any expert appointed by him in the event of a dispute requiring resolution under paragraph 9 (dispute resolution clause)."

Executive Employment Agreement

12. On the same date, the 4th December 2006, the plaintiff Mr. Griffith entered into an executive employment agreement with a company called Parma Management Services Limited, whereby he agreed to act as an executive employee and company director as set out in the agreement. It was a fixed term agreement for six years, capable of being renewed on the expiry of the fixed term. It is the alleged breach of this agreement that

has given rise to the counterclaim. The relevant clauses for the purposes of this application are found at:

3.1 headed, '*Executive's Obligations'*, which provides:-

"the executive shall devote the whole of his business time and attention to his duties and the business of the company and during the period of this agreement he shall not work for himself or for any other person or company".

4.2. headed, '*Salary and Employment Benefits'*, which provides:

"The Company shall make a contribution of 50,000 gross per annum…..to the pension scheme nominated by the Executive and agrees to become a member of any such scheme if that may be required and to comply with the requirements of such scheme. The Executive shall repay to the Company the amount of pension contributions made by it under this clause4.2 from time to time as applicable upon the completion of the purchase by the Company of Option Shares as provided in the Agreement between the parties."

5.5. headed, *'Duration and Termination'*, which provides:

Upon the giving of notice under this Agreement, the Executive must immediately return to the Company in accordance with its instructions all equipment, correspondence, records, specifications, software, disks, models, notes, reports and other documents and any copies thereof and any other property belonging to the Company or any Group Company which are in possession or under control of the Executive. The Executive agrees to confirm in writing to the Company that it(sic) has complied with all obligations under this clause……."

9.1. headed, '*Confidential Information'*, which provides:

The Executive, shall not in the duration of this Agreement (except in the proper performance of his duties) nor at any time (without limit) after its termination directly or indirectly

(a) Use for his own purposes or those of any other person, company, business entity or other organisation whatsoever; or

(b) Disclose to any person, company, business entity or other organisation whatsoever;

any trade secrets or confidential information relating or belonging to the Company or any Group Company relating to the past, the current or the future including but not limited to any such information relating to customers, customers requirements, site vendors, pricing structures, marketing and sales information, business plans or dealings, Executives or officers, financial information and plans, projects, planning applications, banking or financing schemes, designs , software, any documents

marked 'Confidential' (or with a similar expression) or any information which the Executive has been told is confidential or which the Executive might reasonably expect the Company would regard as confidential, or any information which has been given to the Company or Group Company in confidence by commercial contacts, suppliers and other persons.

9.2 contains a caveat in respect of the non-disclosure obligation. It provides:

"The obligations contained in this clause shall not apply to any disclosures required by law or in the public domain, and shall cease to apply to any information or knowledge which may subsequently come into the public domain after the termination of this Agreement other than by way of authorised disclosure."

Clause 10 is headed 'Conflicts of Interest'. 10.1 provides that:

During his employment the executive shall not without the consent in writing of the company at any time either solely or jointly with or as manager or agent for, any other person directly or indirectly, carry on or be engaged or be concerned or interested in any business trade or calling other than in the course of his duties hereunder other than as provided for in this agreement.

Clause 11 provides for the management of the Executive's existing business interests as at the commencement date of the employment agreement. 11.2. provides that the plaintiff could continue his involvement with his existing business interests. 11.2.1 provides that within the period of three years, the executive will have either disposed of all declared business interests or converted such business interests to investments, requiring no active involvement of any nature on the part of the executive. At 11.2.2., it is provided that during the period of two years from the commencement date, the executive's time commitment to such business interests shall not exceed 10% of the executive's total working hours.

Clause 11.3 of the executive employment agreement provided that the executive should furnish an updated Appendix 1 to the company in writing on or as soon as is practicable after each anniversary of the commencement date, setting out details of: -

(i) Business interests; and

(ii) Financial exposure as at such date.

Clause 11.4 provided that during the term of the agreement the executive should not engage in any new business interests of any nature whatsoever other than the holding of securities which are publicly traded. The plaintiff's business interests at the date of the agreement are set out in two appendices to the Executive Employment Agreement. The counterclaimants claim that the plaintiff is in breach of clauses 3, 4, 5, 9 & 11 of the Executive Employment Agreement

Supplemental Share option Agreement

13. Two years later, in 2008, a Supplemental Share Option agreement was agreed for the express purpose of amending and supplementing the agreement dated the 4th December 2006 made between Parma Developments BV, Parma Developments Limited and Andrew Griffith. There is disagreement between the parties as to whether this supplemental agreement was executed, but the fact of the agreement does not appear to be in dispute. The parties to the supplemental agreement are:-

    (i) Parma Investments BV;

    (ii) Parma Developments;

    (iii) Andrew Griffith;

    (iv) Parma Developments (Jersey) Limited.

14. The recitals state that Parma Investments BV is the 100% holding company of the company (Parma Developments) and that Parma Developments and a number of its subsidiary companies, are engaged in the development of various property sites. It recites the original option agreement of the 4th December 2006 between Parma, the company and Mr. Griffith, whereby it was agreed that Mr. Griffith would subscribe for, and the company would allot and issue certain shares in the capital of the company (Parma Developments Limited), in accordance with the terms set out at Part 1 of the option agreement, and that Parma would grant to Mr. Griffith a Put Option in respect of such shares, which Put Option was triggered by a number of events including the completion of the development of the group's property sites.

15. The next recital records that it is now proposed that Parma transfer the entire issued share capital of the company (Parma Developments Limited) to Jersey Co., and that the company be re – registered as unlimited for the purposes of availing of the exemption in respect of the filing of accounts in Ireland.

16. Accordingly, the parties agreed; to amend the option agreement to join Jersey Co. as a party to the option agreement; to provide for the option shares to be created in and issued by Jersey Co. as opposed to the company (Parma Developments) and to provide for a number of other consequential changes to the option agreement. The recitals also record that the parties have also agreed to amend the option agreement to provide for a number of other tidy up changes thereto.

17. Finally, it is recited that it is now also proposed that those existing sites, (being property development sites, currently owned by the company (Parma Developments Limited) or a related company), referred to in the Option Agreement, which are located in the UK and Northern Ireland, be no longer governed by the option agreement and be removed from its ambit. At first glance, that would appear to encompass 10 of the 20 sites contained in the original agreement. In the original option agreement (and in particular Clause 4.1 and the table set out at Clause 4.1.1. thereof) Parma Investments BV warranted that

each of the original 20 sites was owned by a separate company within the company's group, but the individual companies holding those sites were not identified.

18. In the Supplemental Agreement, the position is expressed somewhat differently. The Supplemental agreement suggests that ownership of the relevant sites had never been transferred to either Parma Developments, or to any group companies. Recital E of the supplemental agreement states:

> *"…in addition the Option Agreement (and in particular, clause 4.1 and the table set out at clause 4.1.1. thereof) contemplates that each of the Existing Sites is owned by a separate company within the Company's group. As at the date hereof the transfer of the right title and interest in each of the Existing Sites to such separate companies has not yet been completed for logistical reasons. Accordingly, Parma has agreed to use reasonable endeavours to procure such transfers and to ensure that Mr. Griffith's entitlements are not affected in the interim period prior to the completion of such transfers."*

A new schedule of sites is appended to the supplemental option agreement. It lists 13 sites and in column B names the companies to which Parma Investments BV proposed to transfer ownership. It is not clear to the court on the evidence before it, whether such transfers occurred. This is of significance in the context of the plaintiff's assertion that assets were moved at will between various entities all of which were controlled by the same people. Clause 4 of the supplemental agreement contains the amendments required in relation to the existing sites. Parma acknowledged in the context of the supplemental agreement that notwithstanding the provisions of Clause 4 in the original option agreement, the right title and interest in each of the existing sites had not been transferred to separate group companies and Parma undertook to use its reasonable endeavours to remedy that defect.

19. Clause 2 of the amended agreement sets out the necessary amendment changing "the company" in the original agreement to "Parma Developments (Jersey) Limited". Clause 3 provides for miscellaneous amendments. Clause 4 deals with amendments required in relation to the existing sites.

20. At or about the time of the supplemental agreement a further agreement appears to have been entered into, between a company of which Mr. Griffith was director, Emaifroib Ltd, and Parma Investments BV. The agreement has not been put in evidence on these applications, but it appears to have been an agreement that the plaintiff's company Emaifroib Ltd. would supply consultancy services to Parma Investments BV. *Prima facie*, such an agreement appears inconsistent with that clause in the Executive Employment Agreement which requires the plaintiff to devote the whole of his business time and attention to the business of Parma Developments. That is a clause on which the defendants/counterclaimants, including Parma Investments BV place significant weight in seeking discovery of the plaintiff's outside interests. Perhaps the plaintiff was granted a waiver in respect of that particular contract. The court does not know and hasn't had evidence on the issue from any party.

21. Mr. Griffith worked for Parma Management Services for almost eight years, from late 2006, until June 2014. On his evidence, corporate governance appears to have been lackadaisical. Mr Griffith worked mainly with and under the direction of Laurence Goodman Junior. Though Mr. Griffith was to be a director of Parma Management Services and Parma Developments pursuant to his employment and Share Option Agreements, board meetings of that group and Parma Developments Limited (later Parma Developments (Jersey Co) Limited) appear to have been sporadic. Nor on the evidence, does Mr. Griffith appear to have been supplied with copies of accounts and access to financial records, as provided for in Clause 10.1 and Clause 10.2 of the option agreement of the 4th December 2006. As will become clear, this does not mean that Mr. Griffiths was entirely bereft of information, because on his evidence in an earlier application to the court, it appears that he had extensive access to the central network of the entire Goodman organisation. While Mr. Griffith maintains that he complained about the absence of proper structures in the course of his employment, it does not appear that he made any formal complaint until the emergence of the dispute giving rise to his claim. Nor on the evidence, did he raise any issue on the failure to provide him with accounts and financial information prior to this dispute.

Genesis of the disputes

22. The court has no evidence as to the operation of the share option agreement between 2006 and 2012. Given the economic collapse in 2008, it seems likely that the level of development was low. In December 2012, the former Bank of Ireland headquarters at Baggot Street was purchased by a company called Remley. The purchase of the former Bank of Ireland headquarters was reported in the Irish Times on the 8th December 2012 and included the following: -

> *"In a statement last night, a spokesman for the Goodman family said "The property division of Parma Group through its wholly owned subsidiary Remley Limited, has purchased the former Bank of Ireland headquarters building in Baggot Street". The Parma Group is the holding group for the non–agri business of the Goodman family, the spokesman said".*

23. According to his affidavit, the plaintiff texted Larry Goodman to congratulate him on the purchase on the same date, the 8th December. He avers that he shared his "good news" with his family over the Christmas period. In the new year, he received a number of phone calls and representations from parties wishing to offer services to the project. He passed these matters on to Laurence Goodman Jr. but heard nothing further. According to his affidavit, he had a meeting with Larry Goodman Sr. on the 10th May 2013.

24. The plaintiff had the impression that Larry Goodman Sr. was unaware of all the activity that he had been performing for the company. At the conclusion of the meeting, the plaintiff avers that he said to Larry Goodman Sr. that he would like to tidy up his contractual arrangements including his share options. When Larry Goodman responded that he had no share options that were activated, the plaintiff mentioned the Bank of Ireland headquarters. He avers that from the reaction of Larry Goodman Sr. he quickly realised that there was going to be trouble and he avers that he was devastated. He

wrote to Larry Goodman on the 7th June 2013 and asserted that the Bank of Ireland headquarters purchase appeared to fall within the terms of the option agreement and he sought confirmation of that fact and information in respect of the purchase. In a response dated the 20th June 2013, Larry Goodman Sr. wrote on behalf of Parma Developments in the following terms:-

> *" . . . I refer to your query about the Bank of Ireland headquarters. The Bank of Ireland building was bought by Remley Limited, a company which is not and has never been a part of the Parma Development "Group". Therefore, it would not be covered by the documents you have mentioned (and although we agreed that the 2006 documents would be replaced the 2008 documents were never executed by either side). The Bank of Ireland property was – like our Setanta and Harcourt properties, bought to form part of the family's private investments..."*

25. It was at that point that the plaintiff engaged solicitors. On the 27th June 2013, they wrote on his behalf asserting that the Bank of Ireland headquarters was bought within the "Parma Group structure". Messrs. A&L Goodbody sent a holding letter on the 3rd July and responded substantively by letter dated the 24th July 2013 the relevant part of which is as follows:-

> *". . . Even leaving aside the expiry of the agreement as long ago as last December, we note that the arrangements between our clients were exclusively concerned with properties acquired by Parma Development Group as development sites. Based on the agreements entered into between our respective clients, it was simply not the case that the arrangements could encompass assets acquired as investment properties. There are no provisions dealing with investment properties in the agreements entered into between our respective clients. The agreements only reference and make provision for development sites. Further, your client has not had any role in the acquisition of investment properties such as the Bank of Ireland acquisition. Your client was never consulted about any matters whatsoever in connection with this investment and your client has admitted that he had no role of any description in the acquisition of Bank of Ireland. As your client is or should be aware, the Bank of Ireland headquarters is not a development site. The property was – like the Setanta and Harcourt properties – acquired as an investment property, to form part of the family's private investments. Your client has no entitlement in respect of such investment properties, irrespective of the vehicle used to acquire them.*
>
> *It is correct that Remley was originally set up as a shelf company and initially created as a subsidiary of Parma Developments BV. However, Remley never operated or traded while it was part of Parma Developments BV nor was it used by Parma Development Group for any commercial purpose. It was never intended that Parma Development BV should have or acquire any direct or indirect interest in the Bank of Ireland headquarters.*

The Bank of Ireland headquarters was acquired on behalf of the family. A vehicle was required to effect the transaction and Remley (which was no more than a convenient and available shelf company) was employed for that purpose..."

26. Further correspondence on the issue ensued between the parties' solicitors.

27. In the midst of this correspondence concerning the share option agreement, Laurence Goodman Jr. separately wrote to the plaintiff on the 26th August 2013, raising issues with his employment contract and expressing his belief that the plaintiff was not "*devoting my whole time and attention to [my] duties and the business of Parma (as required by the agreement)*".

28. The plaintiff avers that he was surprised at this turn of events in circumstances where he and Laurence Goodman Jr. had been directors of an entirely separate company (Omniscourt Limited) since May 2007 and had regularly discussed the business of that company during business hours, often at the instigation of Laurence Goodman Jr.

29. In September 2013, the plaintiff's solicitors wrote to A&L Goodbody and inter alia requested:-

" . . . copies of the annual audited accounts together with any management accounts for "the company" and each member of the group" and "full access to all financial information on the company and its subsidiaries" in accordance with Clause 10 of the agreement dated the 4th December 2006 between Parma Investments BV, Parma Developments Limited and our client".

The full accounts do not appear to have been supplied then, or indeed to date .

30. On the 29th April 2014, Laurence Goodman Jr. wrote to the plaintiff suggesting that having regard to Parma Developments' plans, the plaintiff's role as project manager and developer might in fact be redundant. In May 2014, the plaintiff was offered alternative employment at a fraction of his then salary to project manage a development and refurbishment of an ABP factory in Perth. Scotland .

31. The plaintiff tendered his resignation by letter dated 5th June 2014. The letter of resignation was addressed to Laurence Goodman Jr. at the Parma Office at Milestown, Castlebellingham, Co. Louth. Having set out what he perceived as his reasonable attempts to resolve the issues which had arisen, the plaintiff goes on in that letter to state: -

"I have not received any of the accounts information set out in my share option agreement now or during my time of employment and it is the case that I have been kept entirely in the dark regarding the structuring of the various group companies. I again have requested as a director of Parma with contractual entitlement across the group companies on many occasions for board meetings to be convened to address this and other governance matters of concern, these requests have being (sic) ignored and not facilitated. I have been kept entirely in

the dark about the arrangements relating to the various group companies particularly the "Non-filing" and "Offshore" Structures and the taxation arrangements that these structures facilitate, as a director of a group company with legal entitlement related to the other companies and the structure they are a part off (sic), such information should have being (sic) provided to me on an annual basis and this is a major breach of covenant by you and makes my position as a director untenable. I have asked my legal advisors to seek absolute assurance and indemnity from you based on evidence that I have not being (sic) part of any structure designed primarily or in part for the avoidance of paying lawful taxation. The information and corporate governance structure required to perform my duties as a director have not being (sic) made available to me by the company and I am resigning my position as a director of Parma Developments with immediate effect.

I was informed by you on many occasions over the past year in particular that the decisions surrounding my correspondence were being made by "The Board" (the Board being referred to as a Group Board based outside of the Jurisdiction) of the company and that the matter was out of your hands. In recent correspondence from you it is now clear that all decisions were made by you and Larry Goodman alone, I am at a loss as to why I was misinformed by you so frequently".

32. He then refers to the strategy allegedly employed to create a redundancy situation. He adverts to the fact that A&L Goodbody solicitors had advised both parties in relation to the option agreement and expresses surprise that they, at that point, remained as solicitors for Parma in the circumstances. He refers to his successful history in performing projects for the company. He refers to the fact that he had had to work without any regular direction and to decide at all times, in the absence of management or board meetings, the best of use of his time in order to achieve the best outcome for the company:-

> *"I have kept you fully informed of all my activities as instructed by the chairman of the company and have raised the matter of communicating my activities to the chairman of the company on countless occasions with both you and the company secretary".*

33. He notes that at his meeting with Larry Goodman Sr. in the previous year, that Larry Goodman appeared to be unaware of the majority of the work that the plaintiff had been performing for the company. He asserts that he has had to balance his permanent employment with his consultancy commitment to the business without guidance from the shareholders or the hierarchy of the company. He then made arrangements to agree the practical details around his departure. On the same date, accounting information limited, to the year 2013, was furnished by A&L Goodbody on behalf of the defendants. On his departure, the plaintiff had in his possession, certain equipment which contained a significant volume of documentation relating to Parma and other Goodman companies.

The Proceedings

34. A year later, on the 10th June 2015, a concurrent plenary summons was issued in which the plaintiff claimed specific performance of the option agreement and the supplemental option agreement whereby the plaintiff claimed an entitlement to subscribe for 7.5% of each new property development site acquired by the group and which agreement incorporated the acquisition through the fourth defendant Remley, by the first, second and third defendants, or any of them, of the property otherwise and formerly known as the Bank of Ireland headquarters situated on Baggot Street, Dublin 2, or in the alternative, damages in addition to or in lieu of specific performance. An appearance was entered on behalf of all of the defendants on the 2nd July 2015.

35. Separately, Parma Management Services, having threatened to do so for some months, issued, but did not serve, a plenary summons claiming a breach of the Executive Employment Agreement by the plaintiff. It sought injunctive relief enjoining the plaintiff to:-

    (a) identify on oath any and all company property which is, or was, in his possession or control under or in connection with the executive employment agreement;

    (b) An order directing the plaintiff to identify on oath any and all company property which is, or was in his possession or control under or in connection with the option agreement, the alleged supplemental agreement and/or in his capacity as a director of Emaifroib Limited;

    (c) An order directing the delivery up by this plaintiff of all items of company property in the plaintiff's possession or control;

    (d) an order directing the plaintiff to swear an oath as to the status and whereabouts of any company property formerly held by him but not returned to the counterclaim plaintiffs and no longer in his possession or control;

    (e) Damages for breach of contract;

    (f) Damages for breach of duty including breach of fiduciary duty;

    (g) Damages for breach of confidence; and

    (h) Damages for the torts of intentional and/or negligent infliction of economic damage upon the counterclaim plaintiffs.

Application for Entry to the Commercial List

36. On the 8th July 2015, the defendants filed a notice of motion seeking entry of the plaintiff's claim under the share option agreement into the commercial list. The plaintiff resisted the application *inter alia* on the grounds that Parma's proceedings against him related to an employment contract, signed on the same date as the option agreement, and that the two sets of proceedings were linked to one another. He set out a chronology showing how his assertion of a right to a 7.5% share of the company that purchased the Bank of Ireland property pursuant to the share option agreement was countered with

demands requiring repayment of pension and return of property pursuant to the employment agreement. As employment agreements are specifically excluded from the remit of the Commercial Court, and because of the delay in applying for admission, the proceedings were not admitted to the Commercial Court.

Application for Case Management to the High Court

37. On the 27th July 2015, the defendants made application to the High Court for case management of the proceedings. This included an application to consolidate the plaintiff's claim under the share option agreement and the defendant's claim pursuant to the executive employment agreement. A statement of claim had already been delivered on behalf of the plaintiff on the 24th July 2015. A defence and counterclaim were delivered on the 7th October 2015. The case was admitted to case management and a schedule of directions was attached to the order of the court.

Plaintiff's Application to Strike Out certain pleas in the Counterclaim

38. On the 12th February 2016, the plaintiff/counterclaim defendant filed a motion seeking to strike out elements of the counterclaim on the basis that the counterclaim was more extensive than the original plenary summons issued by the counterclaimants, and further, on the grounds that no factual basis for elements of the counterclaim, being the claim for breach of confidence and or the intentional/negligent infliction of economic damage, had been pleaded. This motion was resisted by the defendants.

Defendants/Counterclaimants Application for Injunctive Relief

39. On the 11th March the defendants issued their own motion returnable for the 16th March 2016. On that date, the defendants/counterclaimants sought an order compelling the counterclaim defendant to deliver up to the counterclaimants all company property and any other proprietary information or documentation owned by the counterclaimants, held or retained by the counterclaim defendant; further and/or in the alternative, they sought an order prohibiting the counter claim defendant from releasing the company property to any third party and/or disclosing or disseminating any proprietary information or documentation owned by the counterclaimants to any third party.

40. The defendants relied on clauses 5.5 and 9.1 of the executive employment agreement made between the plaintiff and Parma Management Services Limited. The respective clauses which are set out in full at pages 8, 9, 10 & 11 and relate to the return of company property at the conclusion of the agreement and the duty of confidentiality.

41. The grounding affidavit of Laurence Goodman sets out the correspondence that followed from Mr. Griffith's resignation, from both A&L Goodbody and Matheson's solicitors, requesting the return of all company property, including confidential information and documents.

42. Mr. Griffith's initial response in the correspondence, was that he had preserved a copy of his files and records as he was entitled to do. That assertion was made on the 23rd June 2015, approximately one year after he had left his employment. On the 18th February 2016, his solicitors stated in correspondence:-

"As has been previously advised, our client has retained and continues to retain property which came into his possession arising out of his employment with your client. This includes and is principally comprised of copies and duplicates of his hard copy files together with electronic information and three electronic devices".

43. The letter admits that: -

"While our client was initially motivated to preserve a copy of his own direct work and files, upon subsequent review of the information retained, he discovered that there was other material available to him on the network drive than he had realised at the time".

44. The letter then goes on to say: -

"Following a review of the files retained, it appears to also contain certain information on the company structures, financial affairs, and tax arrangements that our client raised concerns with previously. We believe that the nature of this information may give rise to a public interest exception to our client's confidentiality obligations".

The counterclaimants have chosen to characterise this comment as a veiled threat.

45. On 24th February 2016 the counterclaimants' solicitors invited the plaintiff to give an unequivocal and unqualified undertaking to the High Court that there would be no disclosure or dissemination of the documents retained by him or the contents thereof and further invited a proposal as to how the return of the electronic devices might be facilitated.

46. In a letter dated the 2nd March 2016, the plaintiff's solicitors asserted that it was only after he had left his employment that he appreciated the nature and extent of the information that he had retained. This letter also refers to his "*concerns regarding the tax arrangements adopted by Parma Developments*" and states:-

"That the structures and arrangements implemented by Parma Developments which appear to be evidenced by the information in his possession give or may give rise to a serious risk of public harm and/or the public through the auspices of the offices of the Revenue Commissioners should know the information despite the confidential nature of the relationship through which it is obtained" (emphasis added)

47. The counterclaimants contend that the only rationale for the plaintiff's retention of the information is to seek to improperly deploy it as a leverage in the proceedings with a view to reaching a settlement of a claim which the counterclaimants consider groundless. The foregoing correspondence is exhibited in the grounding affidavit of Laurence Goodman Junior sworn on the 11th March 2016.

48. In his replying affidavit, the plaintiff avers that the counterclaimants were at all times aware that he had an iPhone and tablet which were company property and he avers that

he was never asked to confirm precisely what information or documentation he had in his possession.

49. He also asserts that as far back as the 5th June 2014 the date of his resignation, and by letter dated the 23rd June 2015, he offered to provide copies of all documents held electronically relating to the counterclaim plaintiff's business and that it was only on the 24th February 2016 that Matheson confirmed for the first time that the counterclaimants wished to obtain the offered schedule, listing the documentation retained by him. He complains that in the circumstances, the counterclaimants are creating a false sense of urgency.

50. He outlines the proposal which his solicitors had made to resolve the issue, particularly, concerning his personal information which is on some of the devices. He concludes in his replying affidavit that the counterclaimants are seeking to remove property from his possession that he has held for almost two years without incident. During that time, he says that he has repeatedly provided assurance as to his confidentiality obligations, has made offers to transfer property, or otherwise disclose what is in his possession, and at all times has attempted to reasonably engage with the other side in an effort to meet their concerns while communicating the basis for his own.

51. In the course of the injunction application Mr. Griffith, was directed by the court, to furnish a comprehensive list of all company documentation retained by him, to the counterclaimants, by the 4th April 2016. The injunction application appears to have proceeded in parallel with Mr Griffith's application to have certain of the pleas in the counterclaim struck out.

52. In the course of his affidavit exhibiting the schedule of documents directed by the court and in reply to the injunction application, the plaintiff avers to rather loose data arrangements within the Parma Group during his employment. He asserts his belief:-

> *"that after the former Bank of Ireland headquarters was purchased, Parma set about pursuing a course of redefining the nature of his relationship with the group principally to prejudice his entitlements under the option and supplemental agreement".*

53. He avers that it was in the context of Parma deploying a recognised strategy within the group to terminate his employment, that he acted to retain documentation. At para. 68 of his replying affidavit in the injunction application he states: -

"When I realised that the same tactics were being used on me, and in circumstances where Parma were refusing to honour its contractual commitments to me while at the same time they were making unlawful demands of me, I sought to retain copies of the files folders and documentation that I had used during my professional relationship with Parma and which I felt I ought to be concerned with. I took this step at the time as I knew that it would be essential for me to prosecute any claim that I was required to

formally bring or to resist any claim that was brought against me and that it would not be sufficient to rely on the mechanism of discovery." (emphasis added)

54. He goes on in the following paragraph to acknowledge that he has a considerable amount of information in his possession, much of it irrelevant and/or mundane in nature. However, he then states: -

> *"Some of the documentation does however contain information which is likely to be critical to the advancement of my claim and/or is liable to damage the counterclaim brought by Parma. Moreover, I have confirmed that I am aware of my confidentiality obligations".*

55. The schedule of documents produced in the injunction application runs to 105 pages and lists 3,182 files.

56. The counterclaimants injunction application was resolved by a consent order made the 1st June 2016. Under the terms of the order the plaintiff agreed to deliver immediately to consultants nominated by the counterclaimants, Espion Group, all company property as defined in the employment agreement dated the 4th December 2006. It was agreed that the IT consultant would create a forensic image of all data held on the company property and would retain it until the conclusion of the proceedings or for such other period as might be agreed.

57. It was envisaged that the consultant would prepare a comprehensive schedule of all data held on the company property delivered by the plaintiff, and that the schedule would be provided to both parties. A process was agreed for identifying any personal data of the plaintiff which might be on the schedule and it was agreed that such data would be removed and not provided to the counterclaimants.

58. It appears that there were issues in relation to compliance with the order of the 1st June 2016, which led to a further hotly contested motion on the issue of whether or not the plaintiff/ counterclaim defendant had complied with the terms of the consent order made on the 1st June 2016. The counterclaimants expressed concern inter alia that the documents appeared to have been uploaded to the company laptop from two USB keys. When the USB keys were ultimately furnished and examined, according to the counterclaimants, they had been wiped and that the original contents were irretrievable. Further affidavits and allegations were exchanged. When the motion came before Mr. Justice Gilligan, who had been case managing the claim and counterclaim, on the 24th January 2017, it was ordered that the motion stand adjourned to the trial of the action. At that point Espion had produced a schedule of the documents retained by the plaintiff. The primary purpose of the schedule was to allow the plaintiff to identify what was his personal documentation, so that that documentation would be excluded from the documentation to be returned to the counterclaimants. The court has been told that the schedule contains more than 100,000 documents. One might have anticipated that the schedule would feature in a significant way in any discovery application, however neither party has chosen to exhibit the schedule in the course of these applications.

Discovery

59. Having adjourned the dispute about the retention of documents to the hearing of the action, the High Court, on the 22nd February 2017, gave liberty to the parties to bring motions for discovery, returnable to the court on the 26th April 2017. Between January 2017 and March 2017, the pleadings in relation to the counterclaim were closed and various notices for particulars and replies were exchanged in relation to those pleadings.

60. On the 5th April 2017, the plaintiff issued a request for voluntary discovery in respect of 17 categories of documents. As already stated, one might have anticipated that having regard to the fact that both sides were now in possession of the Espion schedule of documents, which listed the documents of which the plaintiff had had possession, since at the latest June 2014, that the plaintiff's request and application for discovery would be a focused one, in which he identified the relevant documents which he knew to exist, and setting out the grounds upon which he contended that there were other relevant documents of which discovery was necessary for the fair disposal of the action. As already stated, neither side has exhibited the Espion schedule.

61. In responding to the plaintiff's request for voluntary discovery on the 3rd May 2017, the defendants did not specifically raise the fact that the plaintiff had had access to more than 100,000 of its documents for a period of at least two years, however, they did dispute the plaintiff's request, on the grounds of the overly broad nature of the requests and in some instances they challenged the relevance of the requests.

62. At the hearing of the application however, the defendants placed great weight on the fact that the plaintiff had had access to more than 100,000 of its documents for several years and despite this, had failed to identify any specific documents that would help to advance his case or damage the defendant's case, and on that basis the defendants contended that the plaintiff had not demonstrated that discovery was necessary.

63. The defendants/ counterclaimants sent their request for voluntary discovery on the 20th April 2017, which contained fifteen categories of documents of which they sought discovery. The plaintiff replied on the 11th May 2017, consenting to discovery of some categories, refusing others, proposing amendments to some, and contending that other documents sought, were already contained in the documents he had returned to the defendants/counterclaimants, pursuant to the consent order of the 1st June 2016. In respect of the last contention, the defendants/counterclaimants responded that the fact that he had returned documents to the defendants/counterclaimants did not absolve him of the obligation to make discovery of relevant documents.

64. Voluntary discovery not having been agreed, the matter came before the court for hearing on the 31st May 2017. It would appear that the matter was not reached, perhaps because of the anticipated length of the hearing. and both motions for discovery came before this Court on the 21st November 2017. This Court had not been involved in the case management of these claims and at the outset, was entirely unaware of the previous combative interactions between the parties.

The plaintiff's application

65. At the date of hearing, ten of the original seventeen categories of discovery sought by the plaintiff were still in issue. They are as follows: -

Category 2

"All documentation evidencing the decision to acquire and/or the acquisition of the Bank of Ireland headquarters in or around 14 December 2012 including (but not limited to): -

(i) Advertisements or other notifications that property was or was likely to be available for sale;

(ii) Form of tender/conditions of tender/conditions of sale or similar;

(iii) Any and all tender documentation or purchase offers submitted:

(iv) Pre – contract inquiries and/or requisitions raised and answered or similar;

(v) Instructions to and advices received from professionals acting on the transaction including (but not limited to): A&L Goodbody, Bruce Shaw, HT Marr O'Reilly, such planning consultants as may have been appointed and their servants or agents.

(vi) All documentation evidencing (intention of the acquirer to include any corporate governance documentation effecting the decision to acquire the property;

(vii) Correspondence or other communications with the vendors or their representatives including (but not limited to): Kieran Wallace; KPMG; Jones Lang La Salle; Mason Hayes & Curran; Bank of Scotland plc; and their servants or agents;

(viii) Documentation evidencing the consideration paid for the property to include its origin;

(ix) Any other related correspondence".

Category 3

"All documentation evidencing the incorporation, ownership and control of Remley to include (but not limited to);

(i) Corporate governance documentation evidencing the decision and the rationale for the incorporation of Remley;

(ii) The constitutional documentation including the certificate of incorporation;

(iii) The beneficial ownership of Remley identifying the natural person or persons ultimately controlling it directly or indirectly, either by way of shares held or voting rights enjoyed or otherwise:

(iv) The transfer from Parma Investments BV to Remley finance of the shareholding or part thereof in Remley to include documentation evidencing the decision to transfer the shareholding:

(v) *Instructions to and advices received from professionals acting in respect of the incorporation of and/or corporate governance matters concerning Remley, including (but not limited to) A&L Goodbody, KPMG and their servants or agents;*

(vi) *The parties to whom Remley is indebted to including any parties who hold security over any of its assets or undertakings;*

Category 4

"All documentation evidencing the refurbishment works carried out to the property to include (but not limited to):

(i) *Planning permission;*

(ii) *Scope of works;*

(iii) *Development/refurbishment contracts;*

(iv) *Commencement notices, fire safety certificates/regularisation certificates, disability access certificates and/or any opinions on compliance with planning permission and/or building regulations;*

(v) *Any other related correspondence".*

Category 5

"All documentation evidencing the identities of the natural or legal persons who owned the sites listed at numbers 1 – 20 of Column A of the table referenced at clause 4.1 of the option agreement"

Category 6

"All documentation evidencing the identities of the officers (to include the office held) or other persons to whom powers were delegated in respect of the identification or acquisition of new property development sites for or on behalf of the 'company' the 'group', and the entities listed at numbers 1 – 13 of Column B of the table referenced at clause 4.1 of the supplemental agreement"

Category 7

"All documentation evidencing the identities of any subsidiaries, holding companies or group companies of or related to Remley from the date of incorporation until the date the proceedings commenced".

Category 8

"All documentation in the nature of Travaux prèparatoires in respect of the negotiation, execution and/or entry into the option agreement, the supplemental agreement or similar and the executive employment agreement to include but not limited to any instructions to and/or advices received from professional advisers".

Category 10

"All documentation evidencing the properties comprising the 'portfolio of investment properties' held outside the group but subject to the same beneficial ownership (i.e. by the Goodman Family Trust)".

Category 11

"All documentation evidencing the identities of the corporate or other officers who exercise control over the Goodman Family Trust and their respective terms of engagement to include (but not limited to) the deed of trust or similar".

Category 13

"All documentation evidencing the identities of the 'group companies' as defined at clause 1 of the executive employment agreement during the currency of the plaintiff's employment or directorship relationship".

66. For more than a day the plaintiff's counsel opened his application for discovery by reference to the pleadings and the various replies to particulars raised. In opening his application, counsel for the plaintiff never once referred to the fact that his client had had access to in excess of 100,000 of the defendants/counterclaimants documents for a period of at least two years. This fact only emerged in the course of the defendants' response to the plaintiff's application. Upon enquiry by the court as to why the plaintiff had not identified specific documents in respect of which he required discovery, the plaintiff's counsel contended that, the in excess of 100,000 documents, the plaintiff had had in his possession, were not relevant to the issue of discovery and that the affidavits filed in the previous injunction application for the return of those documents should be ignored.

67. In written submissions subsequently filed in support of the discovery application, the plaintiff again sought to argue in effect, that the affidavits filed in the earlier applications should be hermetically sealed and ignored by the court. The plaintiff relies on O.40 r.19 and O. 52, r. 16 of the Rules of the Superior Courts in support of his position.

O.40.r.19 states:

> *"Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used, unless by leave of the Court."*

The court does not consider that that rule has any relevance to these applications. This is not a situation in which a special time is limited by law for the filing of affidavits.

O. 52, r. 16: -

> *"Upon the hearing of any application in any proceeding not assigned as aforesaid, an affidavit shall not be used without the special leave of the Court, unless the same shall be produced at the hearing or shall have been filed, or, if the application shall be on notice, unless the affidavit shall have been filed and a copy thereof delivered to the opposite party or parties before the hearing of the application. Upon the hearing of any application in any proceeding which has been so assigned,*

an affidavit shall not be used without the special leave of the Court unless the same shall be produced at the hearing or shall have been filed, or, if the application shall be on notice, unless the affidavit shall have been filed and notice of intention to use the same shall have been given to the opposite party or parties before the hearing of the application. Every affidavit shall be considered as filed only on the day of such copy being delivered or notice given".

Prompted by the use of the word 'aforesaid' in O. 52, r. 16, the court considered the content of O. 52. r 15. It provides: -

"Any affidavits to be used <u>in support</u> of any motion on notice in any proceeding not assigned to a judge under Order 5, rule 4, shall be mentioned in the notice of motion and copies thereof shall be served therewith. In any proceeding which has been so assigned, it shall not be necessary, except in the cases mentioned in rule 4, to deliver or serve a copy of any affidavit on which the motion is grounded". (emphasis added)

68. In the court's view, r. 15 and r. 16 must be read together and the rules are clearly designed to ensure that the *moving party* in any application will disclose any affidavits to be used *in support* of their motion. The purpose of the rules is to ensure that the opposite party will not be surprised at the hearing of the motion by being faced with an affidavit of which they had no notice. If a moving party seeks to adduce affidavit evidence of which no notice has been given, then undoubtedly leave of the court would be required.

69. O. 52, rs. 15 and 16 have no application to a party resisting a motion. In this case the defendants/counterclaimants in resisting the plaintiff's application for discovery sought to rely on the content of affidavits filed in the earlier application in which they had sought the return of company documents. In the court's view, the were perfectly entitled to do so. Each of those affidavits had been served and filed in the course of the earlier application. The plaintiff's argument that the defendants/counterclaimants had no entitlement to rely on the affidavits filed in the earlier applications is, to put it politely, misconceived. The court notes the plaintiff's failure to advert in his submissions, to O. 52, r. 15. That failure could potentially have misled the court.

70. In any event, the court made it clear during the course of the hearing, that it considered it necessary for the plaintiff to identify those documents in the Espion schedule which the plaintiff sought by way of discovery, either on grounds that it advanced the plaintiff's claim or damaged the defendants defence or counterclaim. The court gave liberty to the plaintiff to file a supplemental affidavit to this end.

71. The supplemental affidavit actually filed, gives a detailed narrative outlining the plaintiffs' professional background; the manner in which he was headhunted by the Goodmans; the circumstances surrounding the making of the supplemental agreement; working practices in Castlebellingham, the defendant's head office; the acquisition of the Bank of Ireland headquarters; the limited accounting information provided to him; and the further

restructuring carried out post the purchase of the Bank of Ireland headquarters in December 2012.

72. The affidavit did not exhibit the Espion schedule, nor did it specify any of the documents in that schedule, in respect of which discovery was required. The only reference to the documents which the plaintiff had seen was to two items of correspondence dated January 2013, which certainly suggest a restructuring of Remley post – its purchase of the Bank of Ireland. The plaintiff has declined the court's invitation to specify the documentation relevant to his claim which he has seen and has had possession of for at least two years.

73. Having regard to the potentially arcane structures within the Parma side of Goodman enterprises as evidenced by the supplemental affidavit of the plaintiff sworn November 2017; the failure to identify the company entities holding the scheduled sites in the schedule attached to the option agreement of the 4th December 2006; the fact that the companies named in the supplemental agreement as owners of the scheduled sites were not then in fact registered as owners thereof; the failure to furnish the audited accounts and financial information to which the plaintiff is contractually entitled, the court is at least *prima facie* satisfied that some, if not all, of the documentation sought in categories 2, 3, 5, 6, 7, 10 and 13, may be relevant to the plaintiff's claim of a contractual entitlement to subscribe for 7.5% share of the company which purchased the Bank of Ireland building on Baggot Street. The court however, cannot decide on the necessity for discovery and the breadth of such discovery until such time as the plaintiff identifies the documents of which he has had possession which are relevant to his claim.

74. The court is fortified in its decision in this regard, by the contents of the plaintiff's own affidavit sworn in the earlier application for the return of the defendants/counterclaimants documents. In an affidavit filed on the 7th April 2016, the plaintiff set out his position in relation to the documentation retained by him on leaving the company's employment in June 2014. At paras. 51 – 57 of the affidavit he deals with a schedule of the documentation in his possession which he had prepared in response to an order of the court. Interestingly, that schedule runs to 105 pages and appears to refer to 3,182 files. At paras. 58 – 65, he sets out how the documentation came into his possession. At para. 64, he avers: -

> *"Much to my surprise, Parma adopted a relatively informal structure in terms of access to information and documentation. When I commenced my working relationship with the counterclaim defendants (sic) I was provided with a remote control and keys to the Parma office; details of all data and file storage and file access arrangements within the Parma office; details of all service and computer file access and archive details; locations of all information contained in the filing and storage systems; details of archive storage in the Parma office; details of the offsite storage and full contact details and arrangements to access the archive; remote control to Braganstown House gates; keys and codes to the Venair hangar and boardroom at Dublin Airport; details of individuals and locations to find all*

group property details; and details of all legal and accounting advisors to contact when I required any information about the assets of the group in Ireland an (sic) the UK".

75. At para. 65 he states: -

"In the early years I would seek permission to access some of the sources just mentioned from either Larry or Laurence Goodman. The invariable response was that I had been made aware of the location and to just 'get on with my job'. I did that and found that much of the information that I sought, particularly related to title issues, required to be pieced together or reconstituted from multiple sources and locations. Over time, I therefore developed as a reference point for other individuals within the group for access to information".

76. These averments indicate that throughout the period of his employment, certainly up until 2013, the plaintiff had full access to all of the information which he now seeks by way of discovery and that, in fact, he did access such information to such an extent that he became the "go – to" person for other persons within the group when information was sought. At para. 66 – 69 of the same affidavit, the plaintiff sets out the reasons why he retained documentation on leaving the company in June 2014.

77. He states that after the Bank of Ireland headquarters was purchased, Parma sought to redefine the nature of the plaintiff's relationship with the group, principally to prejudice his entitlements under the option and supplemental agreement. He sets out the steps taken by Parma to isolate him, steps with which he says he was familiar because the same had been employed against another senior executive who Parma wanted to get rid of. He says at para. 68 that it was in these circumstances he: -

"Sought to retain copies of the files folders and documentation that I had used during my professional relationship with Parma and which I felt I ought to be concerned with. I took this step at the time as I knew that it would be essential for me to prosecute any claim that I was required to formally bring or to resist any claim that was brought against me and that <u>it would not be sufficient to simply rely on the mechanism of discovery</u>". (emphasis added)

78. In the following paragraph the plaintiff avers: -

"Some of the documentation does however contain information which is likely to be critical to the advancement of my claim and/or is liable to damage the counterclaim brought by Parma".

79. In the light of those averments, it is clearly incumbent upon the plaintiff to identify specifically those of the documents retained by him which either advance his claim or damage the defence and counterclaim of Parma. The plaintiff has chosen not to avail of the opportunity afforded to him by the court, of identifying the relevant documentation of which he has had possession and which he knows to exist. The court therefore proposes

to adjourn the plaintiff's application for discovery, until such time as he discloses to the court the specific documents retained by him, which he maintains to be relevant to his claim and/or defence to the counterclaim.

80. In making this order the court wishes to make it clear that unlike the defendants, the court is making no determination in relation to the plaintiff's entitlement to have retained those documents. That is a matter for the trial court to determine upon the hearing of the counterclaim.

81. While declining at this juncture, to order discovery as sought by the plaintiff, the court considers that there is one category of documentation to which the plaintiff is entitled as of contractual right. Clause 10 of the option agreement provides: -

> *"10.1 Copies of accounts.*
>
> *The company (Parma Developments Limited) agrees to provide to Mr. Griffith copies of the annual audited accounts together with any management accounts prepared in respect of the company and each member of the group in a timely manner as and when such accounts become available.*
>
> *10.2. Access to financial records*
>
> *As a director of the company and its subsidiaries, Mr. Griffith will be given full access to all the financial information on the company and its subsidiaries. This information will be treated in strictest confidence by Mr. Griffith and will only be made available to his accountant or any expert appointed by him in the event of a dispute requiring resolution under para. 9".*

82. Information in accordance with this clause was sought in September 2013 and again on the 17th April 2014. In a purported response of the 5th June 2014 A&L Goodbody, then solicitors for the defendants/counterclaimants, responded with purported accounts relating to a single financial year ending on the 31st March 2013.

83. In his supplemental affidavit filed in November 2017, the plaintiff points to certain deficiencies as he perceives them in those accounts, but other than that he does not appear to have pursued his contractual entitlement to be furnished with audited annual accounts and financial information, in respect of each group company. The audited accounts and financial information to which he is contractually entitled, should in fact, reveal the identity of each group company throughout the period of his contract, and could well obviate the need for some if not all, of the discovery which he is now seeking. The court is at a loss to know why, to date, the plaintiff has not sought this information by way of discovery or otherwise.

Application for discovery on behalf of the defendants/counterclaimants

84. The chronology set out herein, suggests that there is at least an element of 'tit for tat', in the maintenance by the defendants of their counterclaim. It was only when the plaintiff asserted an entitlement to a share in the company which had purchased the Bank of

Ireland Building, that Parma Management Services, through Laurence Goodman Junior, began to question the plaintiff's compliance with his Executive Employment Agreement. The defendants/counterclaimants sent a letter seeking voluntary discovery, both in respect of the plaintiff's claim and his defence to the counterclaim, on the 20th April 2017. Having expressed some caveats about the nature of the pleadings, they sought fifteen categories of documents, of which seven remained in issue at conclusion of the hearing.

85. The court has an overarching impression that the defendants/counterclaimant's application for discovery is more a strategic attempt to, as it were, "turn the screw" on the plaintiff, rather than a genuine attempt to seek discovery of documents which are both relevant and necessary to its defence of the plaintiff's claim or the advancement of its counterclaim. Bearing that in mind, the following are the categories in dispute between the parties: -

Category 8

The defendants/counterclaimants seek discovery of: -

> *"All documents relating to, touching upon, or evidencing the availability to the plaintiff of appropriate and sufficient finance, and/or efforts to procure such finance, to fund his alleged right to a 7.5% interest in the property".*

86. Clause 6, of the option agreement, prescribes the terms upon which the plaintiff would subscribe for shares in any new group company. Where Clause 6 applies the plaintiff is required to pay money to subscribe for a 7.5% shareholding. Clauses 6.2.3. and 6.2.4 contemplate this money being raised by the plaintiff in a number of alternative ways: -

a) The plaintiff's primary obligation is to "*fund his equity from his own resources*".

b) If requested by Mr. Griffith Parma Developments would "use all reasonable endeavours to procure that Mr. Griffith will be granted finance on the same terms as the company by any lender".

c) As a "*last resort*", if the plaintiff did "*not have the requisite case to subscribe for 7.5% of the equity", "any shortfall will be provided by way of loan by Parma to Mr. Griffith at market rates".*

87. While the plaintiffs' primary claim is for specific performance of Clause 6, he does seek, in the alternative, damages. The defendants/counterclaimants point out that at para. 16 of the statement of claim, the plaintiff has pleaded that he "*is ready and willing to perform his obligations under the option agreements*". The defendants have denied that plea, and on that basis contend that the plaintiff's readiness to pay for his 7.5% shareholding is an important issue in dispute in the case. The court has the view that this is a somewhat contrived issue, particularly, having regard to the range of options provided to Mr. Griffith in Clause 6.2 and 6.3 to fund the purchase which are set out above.

88. The defendants/counterclaimants point out that the plaintiff's initial objection to making voluntary discovery of this information, is that he was unaware of the level of finance required in order to fund a 7.5% shareholding. He maintains that in order to show his ability to pay he needs to know the sum which he is required to pay. After the hearing, the defendants confirmed by letter dated 24th April 2018, that they are willing to provide confirmation on oath of the purchase price of the property, and to provide a copy of the contract for sale, evidencing the purchase price. The plaintiff, in his written submissions, argues, persuasively in the court's view, that this is not sufficient. He is not claiming a 7.5% interest in the property. He claims specific performance of the option agreement which provides for the subscription for shares. He refers to Clause 6.2. of the option agreement which provides: -

> *"Mr. Griffith will subscribe for 7.5% (seven and one half per cent) of the issued share capital of each New Group Company, on the following terms…*
>
> *Mr. Griffiths will subscribe for7.5% (seven and one half per cent) of the equity share capital being raised by that New Group Company to acquire the relevant New Site on the same terms as provided by the Company which shall subscribe for the balance of the equity share capital."* (emphasis added)

89. He points out that the method by which Remley raised funds for the purchase of the Bank of Ireland headquarters determines the cost of his 7.5% shareholding. Assuming the purchase price was €35million, as reported in the Irish Times, Remley may have, for instance, raised €100 in share capital and then borrowed €34,999,900 from a third party lender, to fund the purchase. In such a scenario Mr. Griffith's financial obligation would be €7.50. Alternatively, Remley may have raised €35million in share capital in which case the figure would be €2,625,000 for 7.5% of the shares. Until the method of purchase is disclosed, the plaintiff cannot address his ability to fund a 7.5% equity share capital.

90. This argument was first made in correspondence after the main hearing as was the defendants/counterclaimants offer to disclose the purchase price. By letter dated 10th July 2018 the defendants/counterclaimants objected that this was a new argument which had not been maintained at the hearing. The court points out that both during and post hearing, it afforded both sides wide latitude to adopt a sensible approach to both the pleadings and discovery, so as to minimise the respective burdens. Unfortunately, little progress was made and it appears that on each side, no point was too insignificant to overlook. The court accepts the argument made by the plaintiff in his written submissions. Until the cost of a 7.5% shareholding is disclosed, this application is premature.

91. The plaintiff, contingent on the defendants/counterclaimants disclosure of the purchase terms, the financing terms and the capital structure of the purchase, offered to demonstrate his ability to finance the purchase of a 7.5% shareholding, It appears to the court that this is a reasonable suggestion and could be accommodated by means of a notice for particulars and a reply thereto, following disclosure of the relevant information.

Decision

92. For the moment, the defendant/counterclaimants have not persuaded the court as a matter of probability that discovery of this category of documents is relevant or necessary for the fair disposal of the action. The plaintiff takes the view that this category is no more than a veiled attempt to enquire into the plaintiff's financial circumstances. As matters currently stand, the court has some sympathy for that view.

Categories 9 and 10

"All documents touching upon, relating to, or evidencing any work that the plaintiff allegedly carried out in connection with the properties at the Setanta building and Harcourt Street (the 'other investment properties')".

"All documents touching upon, or relating to, alleged discussions, assurances and/or representations pursuant to which the plaintiff contends he has any enforceable rights and/or entitlements arising from or in connection with: -

(i) His alleged role, functions, and/or duties in connection with the other investment properties;

(ii) His alleged profit sharing arrangement and how it would take effect and/or be implemented;

And;

(iii) The alleged communication of complications in relation to the ownership and/or funding arrangements for the other investment properties.

The basis of the defendants/counterclaimants application for discovery of this category of documents is that in para. 2(r) of the reply, the plaintiff makes a series of factual assertions in relation to two other buildings at Harcourt Street and the Setanta building (the 'other properties'). The defendants/counterclaimants summarise the plaintiff's pleas as being: that certain representations were made to him regarding his role in the other properties; that he assisted with the development of those properties on foot of those representations; and that he carried out various tasks on foot of those representations.

93. The defendants/counterclaimants maintain that the documents sought are clearly relevant to those pleas. They maintain that it is the plaintiff who has introduced those issues into the case and has advanced very specific factual claims about his work on the other properties. The defendants maintain that they are entitled to see these documents, if any, which support the claims made. Otherwise they maintain they run the risk of being surprised at trial.

94. The plaintiff accepts that these categories are relevant to pleas introduced by the plaintiff. But, he states, that the pleas arise out of the form of defence delivered by the defendant/counterclaimants in which they seek to dissociate investment properties from development properties. His initial response to the letter for voluntary discovery is that he had already returned "all company property" and that those documents include all

documents relating to this category. His second objection is that the documents are not relevant because he is not claiming any relief in relation to the other properties.

95. The defendants/counterclaimants argue that these responses are without merit. The plaintiff has put these facts in issue and has done so because he believes that these facts are somehow relevant to the distinction between "*development sites*" and "*investment properties*". The plaintiff is maintaining that these facts support his claim for specific performance or damages.

96. The defendants/counterclaimants maintain that if the plaintiff wishes to rely on these "facts" to advance his case, he must make discovery. The defendants' position is that the plaintiff's assertions in relation to the other properties have nothing to do with the central issue in the case which is, whether or not the Bank of Ireland building fell within the clear terms of the option agreement. However, they say that given that the plaintiff is maintaining the claims and has refused to withdraw them, the defendants have no option but to defend them.

Decision

97. These pleas appear to be connected to the 2008 supplemental agreement, in which in*ter alia*, the plaintiff's company, Emaifroib Ltd, agreed to provide consultancy services to Parma Investments BV. That agreement has not been put in evidence on these applications. The plaintiff has introduced these pleas and, in the course of the hearing, made it clear that he intended to maintain them. The plaintiff considers them relevant to proof of his entitlement to specific performance of his Share Option Agreement. That being so, the defendants are put in the position of having to defend these claims. In those circumstances the documents sought, might assist the defendants/counterclaimants in their defence of the plaintiffs' claims and therefore meet the threshold of being relevant and necessary. The plaintiff of course still has the option of withdrawing these pleas, which would make discovery of these categories unnecessary. In the event, that he chooses to maintain these pleas, he must discover the documents sought.

Category 11

> *"All documents relating to, touching on or evidencing the plaintiff's claim that certain properties have been acquired by the defendants that may come within the terms of the option agreement but which have not been disclosed to the plaintiff".* (emphasis added)

This request is based on the plea at para. 14 of the statement of claim in which the plaintiff pleads: -

> *"The plaintiff believes that other properties have been acquired by the Defendants, or any of them, directly or indirectly, that may come within the Option but which have not been disclosed to the Plaintiff ."* (emphasis added)

Decision

98. First of all, it should be noted, that in formulating category 11, the defendants/counterclaimants have misstated the plaintiff's pleading. They have elevated

what is pleaded as a 'belief' that a certain situation exists in to a 'claim' that such is the case. Particulars were raised as to the basis for the plaintiff's 'belief'. In his reply, the plaintiff referred to the letter from Larry Goodman dated 20th June 2013, in which it was asserted that Remley Ltd was not and never had been a part of the Parma Development (Group), which assertion according to the plaintiff, was contradicted a month later, in a letter from A&L Goodbody in which it was stated that Remley was originally set up as a shelf company and initially created as a subsidiary of Parma Developments BV. That correspondence and the alleged behaviour of the defendants in denying his entitlement to his 7.5% share option, form the basis of his mistrust of the defendants and his pleaded 'belief' that there may be other undisclosed properties to which the option agreement applies.

Since, at present, there is no claim or denial, of the existence of other properties to which the option applies, there is no issue in respect of which discovery is relevant and/or necessary.

99. However, that said, the court considers it inappropriate, if not indeed improper, for a party to plead matters of 'belief' in a statement of claim. As O.19 r.3 of the Rules of the Superior Courts states:

> *"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.."*

The beliefs of a party are a matter of evidence, not a matter of claim. It was open to the plaintiff in this case to *claim* that there were (or even that there may be) other properties subject to the option agreement, which had not been disclosed to him; to give particulars of that claim, as then known to him, and thereafter to plead that those particulars are the best that he can give, until after discovery. He has not done so. Rather he has chosen to misuse his statement of claim to cast general assertions of serious misconduct against the defendants based on his 'belief'. That is not permissible. Unless the plaintiff seeks amend or to withdraws this plea, the court gives liberty to the defendants to bring a motion pursuant to O.19 r.27 of the Rules of the Superior Courts to strike out the plea at paragraph 14 of the statement of claim.

Category 12

"All documentation relating to, touching on, or evidencing: -

(i) The manner in which "[a copy of] his own direct work product and files . . . [and] .. other material [allegedly] available to him on the network drive" including without limitation "a copy of the network drive files [allegedly] used and accessible to [the plaintiff]", "information on the company structures, financial affairs and tax arrangements that [the plaintiffs] raised concerns with previously (the documentation)" which was retained by the plaintiff after the cessation of his employment with PMS came into his possession; and,

(ii) Disclosure by the plaintiff of the documentation, or any of it, to any third parties".

100. The basis on which discovery of these two categories is sought is:-

> 12 (i) that the plaintiff has pleaded in his defence to the counterclaim at paragraphs 10 and 11 that documents came into his possession when he "*sought to preserve copies of his work product*" and later discovered that he had "*unintentionally taken*" copies of documents which were "*not his direct work product*" but "*which had been made available to him*" and were "*his concern*" in his capacity as a director of the Company. The defendants state that they join issue with these claims and maintain that by doing so, documents evidencing the manner in which in excess of 100,000 documents came into the plaintiff's possession, are discoverable on the grounds that they are both relevant and necessary to the fair disposal of the issue. This again appears to the court to be something of a contrived issue.

The plaintiff objects to this category on the grounds that it is unclear what documents are being sought. He points out that he obtained documents by downloading them. He has averred to that fact in the course of these proceedings. That process does not of itself, create a paper trail other than perhaps metadata which may be stored on the downloaded file, showing the date and time of the download. He has averred in the course of the dispute over his retention of company property, that he has handed over all such property to Espion, in compliance with the consent order made by the court on the 1st June 2016.

Decision

101. It appears to the court that this is a good example of the defendants/counterclaimants using the discovery process tactically, to 'turn the screw' on the plaintiff, rather than for its intended purpose, of ensuring the fairness of the trial. As matters stand, the defendants/counterclaimants have the returned company laptop containing over 100,000 documents. They have a schedule of those documents prepared by the consultants nominated by them, Espion. Those documents may contain metadata showing the date and time of the download of each document. This source of information did not appear to have been utilised by them at the time of the hearing. In addition, they have sworn evidence from the plaintiff that he has returned all company property. Perhaps more significantly, they have his sworn evidence, contained in paras 68 and 69 of his affidavit of 4th April 2016, (set out earlier in this judgment) as to his reasons for downloading the documentation. In the circumstances, the court is not persuaded that the discovery sought by the defendants/counterclaimants is necessary for the fair trial of this issue.

"12(ii) All documentation relating to, touching on, or evidencing disclosure by the plaintiff of the documentation, or any of it, to any third parties."

The stated basis for this category is that the plaintiff has pleaded at paragraph 17 of his Defence to Counterclaim that "*The Counterclaim Plaintiff (sic) has not disclosed any of the information or documentation in his possession to third parties save to his professional legal advisors for the purposes of securing legal advice and assistance*." Again, the defendants/counterclaimants say that they are joining issue with the plea and that

accordingly disclosure of the documents to third parties is an issue in the case and that in the event that there has been no such disclosure, it would be a simple matter for the plaintiff to swear to that effect in an affidavit of discovery.

The plaintiff objects to this category. He submits that it is neither relevant nor necessary and is the very embodiment of a fishing expedition. He also points out that in the course of these proceedings, he has already sworn on affidavit that he has not disclosed the documentation retained by him, to any third party other than his legal advisors. Further, he relies on the fact that nowhere, either in the pleadings or in the many affidavits, filed in the course of these proceedings, have the defendants asserted that the plaintiff has breached his duty of confidentiality. On the contrary, he states, the defendants through their representatives have repeatedly stated on oath, that they do not, and cannot, accuse the plaintiff of any disclosure to third parties.

Decision

102. The court considers the defendants/counterclaimants application for discovery of this category of documents to be misconceived. The fact that the plaintiff has denied the disclosure of documentation to third parties, in his defence to the counterclaim, does not *ipso facto*, give rise to an entitlement to discovery. The function of a denial in a defence is to notify the claimant that they will have to prove that aspect of their claim. It does not have the status of a 'claim' attributable to the defendant, in respect of which the claimant can 'take issue' and thereby seek discovery. Added to that, is the fact that the plaintiff has already sworn on oath that he has not disclosed the documents to any third party. The defendants/counterclaimants have advanced no factual basis on which to seek discovery. The application is speculative and an attempt to test the averment of the plaintiff, neither of which warrants an order for discovery (see *Framus Ltd v CRH plc* [2004] 2 IR page 34-35). The application is refused.

Category 13

"All documents relating to, touching on or evidencing:

(i) Any failure by the counterclaim plaintiffs to comply with tax legislation;

and/or

(ii) Any instances of serious misconduct by the defendants/counterclaimants.

103. The stated basis of the application is as follows:

In their counterclaim, the counterclaimants claim that that the plaintiff wrongfully stole hundreds of thousands of company documents, many of which had no connection to his employment. They further claim that the plaintiff improperly threatened to disclose those documents to third parties. In his defence the plaintiff denied those claims and then pleaded a positive defence as follows:

> " *..the Counterclaim Defendant's confidentiality obligations….are or may be qualified in the public interest and/or subject to a public policy exception which*

would justify overriding the Counterclaim Defendant's confidentiality obligations and/or the disclosure of the information, or part of it, insofar as it related to serious misconduct and/or a failure by the Counterclaim Plaintiffs to fully comply with. Inter alia, the tax legislation."

The counterclaim defendants, throughout the various applications have chosen to perceive this plea as a threat and not merely an invocation of an agreed exception in the Executive Employment Agreement to the general duty of confidentiality. They claim to have neutralised the perceived threat by notifying the Revenue Commissioners of the plea and by seeking an order compelling the plaintiff to return all company property in accordance with clause 5.5 of the Executive Employment Agreement.

In addition they raised particulars asking whether the plaintiff, by this plea, was in fact alleging serious misconduct or breaches of tax law and if so, to provide details of the allegation(s). The plaintiff's reply was a rather terse and uninformative one. He replied: "*The plea speaks for itself*."

The counterclaimants did not bring a motion to compel the plaintiff to reply to the particulars sought, as they might have done, but have proceeded directly to the discovery option.

In the aftermath of the hearing during which the court had been urging the parties to adopt a reasonable approach to the pleadings (which in the court's view were in respects, unnecessarily prolix) and to the discovery necessary, arising from those pleadings, the plaintiff's solicitors wrote to the counterclaimants' solicitors by letter dated 17th April 2018, advising them that the plaintiff's '*beliefs'* about '*impermissible tax avoidance'* were informed by '*correspondence and advices between the group and its advisors KPMG together with internal memoranda concerning communications with Revenue.*' It is on the basis of that information the counterclaimants contend that discovery of those documents is clearly relevant and necessary.

104. The plaintiff, first of all, objects that the counterclaim is not pleaded in the manner submitted by the counterclaimants. There is no plea in the counterclaim to the effect that he stole hundreds of thousands of the counterclaimant's documents. In this he is correct. There is no mention of theft in the counterclaim. The Counterclaim seeks orders that the plaintiff account for and return the counterclaimants property, together with a claim for damages for breach of contract under a number of headings including breach of fiduciary duty and breach of confidence. Nor is there a claim in the counterclaim to the effect that the plaintiff has threatened to disclose the company's documentation to third parties. Those assertions have emerged in in the course of these increasingly antagonistic applications, and as stated earlier, have been deployed at every opportunity by the counterclaimants.

On the issue of his plea in which mention is made of '*serious misconduct'* and a *'failure… to fully comply with.… the tax legislation'* he submits that he has seen documentation

relevant to that plea, but that it has all been returned to the counterclaimants pursuant to the consent order of the 1st June 2016 and that accordingly, discovery is not necessary.

Decision

105. The real issue on this category is the nature of the plaintiff's plea as set out above. Is he by way of a special defence, claiming a public interest defence, on the basis that documentation retained by him revealed serious misconduct and a failure to fully comply with tax legislation? If he is, then he must say so. His coy reply to the particulars raised, to the effect that the plea speaks for itself, is not sufficient. He is either claiming as a defence that documents retained by him show the misconduct pleaded or he is not. If he is making that claim then he should first particularise his claim, and thereafter make discovery of the documents, seen by him, which are relevant to that claim. Such documents are clearly necessary so that the counterclaimants have a fair opportunity to defend his claim. The asserted fact that he has given all the documents back to the counterclaimants is no answer to the request for discovery. It is for him to identify which of the 100,000 or so documents evidence the misconduct he claims to have occurred.

106. On the other hand, one must consider what the purpose of the pleas is if the plaintiff is not in fact claiming misconduct. It appears from the letter from his solicitor of the 17th April 2018, that this plea may represent the plaintiff's '*belief'* as opposed to his claim. As already stated in dealing with Category 11, a party's 'beliefs' have no place in pleadings. Pleadings concern a party's claims. Unless the plaintiff/defendant to the counterclaim confirms that he is *claiming* misconduct as pleaded, the court gives liberty to the counterclaimants to bring a motion to strike out the plea pursuant to O.19. r. 27. If the plaintiff is claiming misconduct he should make the discovery sought.

Category 14(ii)

"All documents relating to, touching on or evidencing:

> *the extent and performance by the plaintiff of any role, duties, functions and activities in connection with any businesses and/or investments outside of the scope of his duties under the Executive Employment Agreement, during the currency of his employment with PMS and directorship of the Company, including those set out in Appendix 1 and 2 of the employment Executive Employment Agreement as follows:*
>
> *(b) Fairways Hotel (including but not limited to actions in relation to procuring a settlement in connection with the secured debt relating to this property),*
>
> *(c) Brand Store, Blackrock, County Louth (including but not limited to actions in relation to procuring a settlement in connection with the secured debt relating to this property),*
>
> *(d) Rental Units in Cavan town,*
>
> *(e` His interest in an option over land near Virginia, County Cavan,*

(f) Majenta Limited, and/or the site in Ballyjamesduff, County Cavan,

(g) Properties in Ravensdale, Dundalk and Cavan; and

(h) Ardee Shopping Centre"

107. Basis on which Discovery is sought:

Clause 3.1 of the executive employment agreement provides:-

> *"the executive shall devote the whole of his business time and attention to his duties and the business of the company and during the period of this agreement he shall not work for himself or for any other person or company."*

There are two exceptions to that obligation contained in the executive employment agreement. The first, which is not mentioned by the counterclaimants, is at Clause 10, which deals with conflicts of interest and which envisages that the plaintiff could engage in other business *if* he had the consent in writing of the company to do so. The second exception is at Clause 11 which is relied on by the counterclaimants, and which provides for the management of the plaintiff's existing business interests at the time of the execution of the executive employment agreement in December 2006.

His existing business interests were set out in two appendices to the agreement. It was agreed that he would cease involvement entirely in those businesses within a period of three years, either by disposing of them or by converting them into investments which required no active involvement. It was further agreed that for the first two years of the agreement, he would not spend more than 10% of his working hours on those businesses.

The counterclaimants claim that the plaintiff has breached these terms by maintaining his business interests in the businesses set out in the appendices (listed in the application), beyond the three year period, and by engaging in other ventures contrary to the agreement. They contend that discovery of the documents sought are both relevant and necessary as they may advance the counterclaimant's claim. In addition, they point out that the plaintiff accepted in oral argument that this category was relevant and necessary and indeed had sought and been given discovery by the counterclaimants in virtually identical terms.

108. The plaintiff has admitted to having a continuing involvement in the businesses set out in Appendix 1 to the Executive Employment Agreement, but says that it is only a part or minority interest. In his defence he has pleaded consent or acquiescence on the part of the counterclaimants. While not adverted to in his written submissions, it is also clear on the evidence before the court, that he has had other business interests in the course of his employment with Parma Developments. In the supplemental agreement of 2008, Emaifroib Ltd, a company of which he was a director agreed to provide consultancy services to Parma Investments BV. Clearly, the existence of this business was known to Parma Developments. He has averred, and his averment has not been controverted, that

since 2007 he was involved with Laurence Goodman Junior (his immediate superior in Parma Developments) in a company called Omniscourt Ltd. It is therefore reasonable to infer that his involvement in that company was known to Parma Developments.

109. The plaintiff objects to the breadth of the discovery sought and claims that it is disproportionate. He is concerned that it is in truth, an attempt to pry into his private financial affairs and should be disallowed as a fishing expedition. The plaintiff's concern in this regard seems to the court, to be supported, at least to some degree, by the counterclaimants' focus in their application on the plaintiff's arrangements for the settlement of secured debts in relation to two of the listed properties.

The plaintiff has suggested that he would make discovery in line with the approach adopted by Clarke J. as he then was, in T*elefonica O2 Ireland Ltd v Commission for Communications Regulation* [2011] IEHC 265, namely, that he will swear a separate affidavit of documents in relation to this category, but will not deliver it to the counterclaimants. Instead, the affidavit will be put on file, for the trial judge to determine in due course whether disclosure of the affidavit and/or inspection of the documents is necessary. It would only be in circumstances where the trial judge rejected the defences of consent and acquiescence that the documents would become relevant/necessary. He suggests this on the grounds that he owes a duty of confidentiality to his business partners and financiers in the listed businesses.

The counterclaimants contend that this is illogical and unworkable and would require a modularisation of the trial in which the trial judge would be required to pronounce on the validity of the defences without sight of the nature and extent of the breaches alleged.

Decision

110. It appears to the court that there are two potential breaches of clause 3 of the Executive Employment Agreement conflated in this request. The first potential breach is the failure to *devote the whole of his business time and attention to his duties and the business of the company*. The second potential breach of clause 3 is the plaintiff's failure to comply with his agreement that "*during the period of this agreement he shall not work for himself or for any other person or company*". The documents sought in category 14 (ii) appear to relate to this second potential breach whereas the arguments made by the counterclaimants, related to the first, being the failure to devote the whole of his business time to the company.

It appears to the court, that the issue of the plaintiff's compliance with the first part of clause 3 is not really amenable to an order for discovery. First of all, neither 'business time' nor 'working hours' are defined in the Executive Employment Agreement. How therefore is his compliance or non-compliance, to be measured? Secondly, it is difficult to envisage the type of documents which an order for discovery would produce. There is no suggestion for example that time sheets were maintained by Parma Developments and indeed, if they were, they would be in the possession of Parma Developments so that it would be difficult to see the necessity for their discovery. The issue of the plaintiff's

compliance with the first part of clause 3 in the court's view, is more suited to interrogatories than to discovery.

The second part of clause 3 is amenable to discovery. However, the court is not persuaded that the counterclaimants are entitled to the extensive discovery which they seek. The breach of the second part of clause 3. is *prima facie* established by proof that the plaintiff during the course of the agreement, worked for himself, or another person, or another company. In addition, clause 11.3 of the Executive Employment Agreement required the plaintiff to furnish, on an annual basis, an updated Appendix 1, setting out details of:-

(i) Business interests;

And

(ii) Financial exposure as at such date.

It appears to the court that, at least in the first instance, discovery of this category should be limited to what the plaintiff was in fact contractually bound to provide. The court proposes to make an order for discovery in those terms.

Conclusion

111. As is evident from the details of this decision, these parties are at war. The animosity of the defendants/counterclaimants towards the plaintiff is palpable and manifests itself in their repeated inappropriate characterisation of him as a thief and blackmailer, when such a finding has not been made by any court. The plaintiff on the other hand has chosen to play cat and mouse with the court by seeking the widest possible discovery, without declaring the fact that he had already seen and had had possession, for at least two years, of more than 100,000 of the defendants' documents, many of which must be relevant to discovery. Offered the opportunity by the court, to identify the documents which were relevant to the issues in respect of which he sought discovery, he failed to do so. This in the court's mind, leaves open the possibility of ambush by discovery. Were the court to order discovery in these circumstances, the plaintiff could check the discovery made against documents he knows to exist and seek to use any discrepancy against his opponents. That is not the purpose nor the function of discovery.

112. War conducted through litigation is extremely wasteful of court resources. Issues which should, as a matter of reason and common sense, be conceded, never are, leading to unnecessarily protracted hearings. The primary objective of the parties is not the fair disposal of the matter, but rather the besting of the opponent.

113. This court having spent six days at hearing on these applications, and an unfortunately lengthy time in trying to understand and unravel all of the issues, considers it incumbent on it to continue the case management of these proceedings, and will do so. Furthermore, since the court has not made final orders on a number of the applications before it, it is appropriate that the court should retain *seisin* of the case.