THE HIGH COURT

COMMERCIAL

[2021] IEHC 37

2016/5037 P

BETWEEN

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

PLAINTIFFS

AND

PATRICK COX, ROCKFORD ADVISORS LIMITED, LIAM FOLEY, FOLEY PROPJECT MANAGEMENT LIMITED, EOGHAN KEARNEY, CARROWMORE PROPERTY LIMITED, CARROWMORE PROPERTY GARDINER LIMITED AND CARROWMORE PROPERTY GLOUCESTER LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Quinn delivered on the 13th day of January, 2021 (Second Amendment to Statement of Claim)

1. This judgment relates to an application by the plaintiffs pursuant to Order 28, Rule 1 of the Rules of the Superior Courts ("RSC"), for leave to make a second amendment to the Statement of Claim. I have concluded that the application should be dismissed.

Background

2. The plaintiffs allege that the first named defendant, Patrick Cox, being a former employee of the plaintiffs and/or other entities within the O'Flynn Group of companies, competed with the plaintiffs, concealed and diverted certain investment opportunities for his own benefit or the benefit of the other defendants and appropriated and/or failed to return and used a substantial amount of confidential documentation relating to the business of the O'Flynn Group.

3. They allege that the third and fifth defendants, Liam Foley and Eoghan Kearney, also being former employees, appropriated and/or failed to return, and may have used, confidential information relating to the business of the O'Flynn Group.

4. The plaintiffs claim certain declarations and accounts, and damages for breach of contract, breach of duty, breach of confidentiality, breach of trust, breach of fiduciary duty, conspiracy, inducement of breach of contract, intentional interference with the plaintiffs' contractual and commercial relations and interference with the plaintiffs' economic and commercial interests.

5. As against Mr. Cox, the plaintiffs rely*, inter alia*, on a contract of employment entered into on 24 March, 2010, between Mr Cox and an entity known as Tiger Developments Limited, ("the Cox Contract of Employment"), and this contract is pleaded in the Statement of Claim.

6. On 24 April, 2015, ownership of Tiger Developments was acquired by Carbon Holdings One SARL. Its name was subsequently changed to Carbon Developments Limited ("Carbon").

7. Carbon is not a plaintiff in these proceedings.

8. In the Defence delivered in October, 2016, it is pleaded that there is not and never was any privity of contract between any of the plaintiffs and Mr. Cox.

9. By a "Deed of Assignment" ("the Assignment") entered into on 15 May, 2017, the plaintiffs took an Assignment of the Cox Contract of Employment from Carbon. The validity and effect of this Deed is disputed by the defendants.

10. On 14 November, 2018, the plaintiffs gave to Mr. Cox notice of the Assignment. No copy of the Assignment was enclosed with that notice. Nor does the notice state that a copy is attached.

11. On 21 November, 2018, the plaintiffs issued a motion to amend the Statement of Claim to plead the Assignment. The application was opposed and on 6 February, 2019, McDonald J. granted leave to the plaintiffs to amend the Statement of Claim. On 7 February, 2019, the plaintiffs delivered an amended Statement of Claim pleading the Assignment. Paragraph 23A of the amended Statement of Claim reads as follows:-

> *"By an Assignment dated 15th May 2017, Tiger Developments, now known as Carbon Developments Limited, assigned to the plaintiffs all of its rights, benefit, interest and title to and in the Cox Contract of Employment, together with all the benefit of the obligations owing to Tiger Developments under the Cox Contract of Employment and all the rights and remedies and claims and demands in respect of any breach of such obligations."*

12. On 21 March, 2019, the defendants delivered an amended Defence in which they denied the validity and effect of the Assignment. Without prejudice to the generality of that denial, the defendants pleaded that the Cox Contract of Employment was a personal right of Carbon which could not be transferred to a third party without the consent of the first defendant which consent had not been granted.

13. The plaintiffs' claims against Mr. Cox are not wholly reliant on the Cox Contract of Employment. They plead that in the alternative, insofar as the relationship between the plaintiffs and Mr. Cox is characterised as a consultancy or other arrangement, he assumed duties and obligations to the plaintiffs "*arising from his senior and trusted role within the O'Flynn Group, his agreement to provide services to the plaintiffs and/or the payments made by the plaintiffs".*

The hearing of this action

14. The trial of the action commenced on 14 January, 2020. In the period leading up to the opening of the trial, correspondence was exchanged between the parties in which the plaintiffs' solicitors sought confirmation from the defendants that documents discovered by the parties or appended to witness statements would be admitted into evidence without the need for formal proof, the so-called "*Bula/Fyffes*" model. A formal letter to this effect was written by the plaintiffs' solicitors, BHK, on 11 December, 2019. This correspondence continued up to the commencement of the trial and immediately before the opening of the trial, no agreement of the *Bula/Fyffes* type had been made. The

plaintiffs have from time to time and continue to protest at the defendants' unwillingness to admit without formal proof certain documents, including the Assignment.

15. Reference was made to the Assignment in the course of the opening and Mr. Sreenan, on behalf of the plaintiffs, informed the court that a *Bula/Fyffes* agreement had now been made "*but not necessarily in respect to all of the documents*". He noted that the defendants have a concern about proof of the Assignment. He stated that the plaintiffs would revert to that point if necessary in the course of the evidence.

16. On the third day of the trial, Mr. Michael O'Flynn was giving evidence for the plaintiffs. He referred to the Assignment. A copy of a version of the Assignment was handed into court and the defendants' counsel, Mr. Gardiner, requested also a copy of the document. It was said by the plaintiffs that the version shown to the court was the original Assignment, and that a copy was in the core book of documents before the court.

17. Mr. Gardiner informed the court that there would, in due course, be argument as to the admissibility of the Assignment and the inability of Mr. O'Flynn, then giving evidence, to prove its execution. He also said that no signed copy of the Assignment had been discovered. Mr. Cush for the plaintiffs stated that insofar as there was an objection to the admissibility of the document, he would undertake to formally prove it in due course.

18. Mr. Cush said:-

> *"So it's a Carbon witness to formally prove this document and we will ensure that, Judge. That's helpful. That's the document and there'll be debate about its legal effect in the case."*

19. While the case was at hearing, further correspondence was exchanged between the parties on this subject. On 23 January, 2020, the defendants' solicitors, Crowley Millar, requested that the plaintiffs make formal discovery of the original Deed of Assignment.

20. The plaintiffs' solicitors, BHK, replied pointing out that the Deed of Assignment did not fall within the scope of orders for discovery previously made, being outside the temporal limitation of the order for discovery. They continued:-

> *"Notwithstanding the fact that the Assignment was not subject to any order for discovery, a copy of the Assignment was furnished on 14th November 2018 and the original has been furnished to you and actually inspected by your Mr. Millar as well as counsel for the Defence.*
>
> *Having regard to all of the foregoing, please explain why you are now requesting discovery of the Assignment.*
>
> *The requirement for formal proof of the Assignment has already been confirmed by counsel for the Defence and counsel for the Plaintiffs has confirmed to the Court that a witness from the Assignor will attend Court to provide such formal proof."*

21. The Notice of the Assignment given on 14 November, 2018, did not, contrary to what is quoted above, include a copy of the Assignment.

22. On day 13 of the trial, a witness on behalf of Carbon, Mr. Robert Dix, was in court but he was not called to give evidence.

23. On day 14 of the trial, (5 February, 2020), counsel for the plaintiffs informed the court that Mr. Dix, who had been in court on the previous day, was not available today. He had informed the defendants' counsel that a problem had been identified in terms of the documentation which it was intended would be proved by Mr. Dix, namely that the version of the Assignment that the plaintiffs intended to prove did not have the execution page with the seal of Carbon affixed to it. He continued:-

> *"So there is a matter that we need to just tidy up in that respect."*

24. Mr. Gardiner for the defendants protested that it had been said on Day 3 of the trial that the document handed into court was the original of the Assignment and the court was now being told that there is a problem with the signature page and the seal.

25. The plaintiffs' counsel then informed the court that it was the plaintiffs' intention to investigate this matter further and Mr. Cush stated:-

> *"I tried to explain to Mr. Gardiner yesterday that the page that we have on which the signatures are to be seen does not have the seal of Carbon. Now, to the extent that that's an issue – and frankly we don't believe it is a significant issue – we want to see if we can find the page that does have the seal on it and we have gone looking for it and we haven't as yet found it."*

26. Mr. Cush submitted that a sensible approach would be that when the trial resumed, Mr. Dix would be called and would be a short witness and "*he will be able to speak to the background of the Assignment, the Assignment, his authority to sign it and his signature, he will be able to do all of that and be very short in doing it".*

27. The court noted that it appeared from the exchanges between counsel that the objection was potentially more fundamental than this and that the court would permit Mr. Dix to be called at the resumption of the trial when his evidence would *"include some explanation of what has been happening in the meantime … and you [referring to the defendants' counsel] will be still be able to make your fundamental points about its validity as a [deed]".*

28. The trial had originally been listed for a period of less than two weeks and then extended to two weeks. It emerged during the course of evidence that this revised estimate of two weeks was a serious underestimate and the trial then continued for a period of fourteen days, before adjourning to resume at another time.

29. It also emerged in the course of the hearing that an outstanding dispute concerning the scope of discovery of documents was still the subject of a pending appeal before the

Court of Appeal, a fact which had not been made known to this Court at the opening of the hearing. The trial adjourned without the new date being fixed.

30. The principal reason for the adjournment was that the hearing had outlasted all previous estimates given to the court and it became clear that a new date would be required for its resumption.

31. Later, the trial was tentatively rescheduled for a date in June, 2020 and later again for a date in November, 2020. Each of these dates was vacated due to public health restrictions.

Correspondence after adjournment of hearing

32. On the day on which the trial adjourned, namely 5 February, 2020, Crowley Millar wrote to BHK requesting certain explanations in relation to the Deed of Assignment. They referred to the references which had been made to this document in the course of the hearing so far and, in particular, to the Assignment having been produced to the court on the third day of the hearing. They enquired whether it was the intention of the plaintiffs to produce *"another version of the 'original' Assignment which has not as yet been produced to us or to the court?".* They also enquired as to precisely what were the nature of the further enquiries which the plaintiffs were undertaking.

33. Further letters were exchanged between the parties and on 14 May, 2020, BHK wrote to Crowley Millar stating the following in relation to the Assignment. The text of the letter is central to the contentious nature of the application:-

> *"The Assignment was executed in counterparts. The Assignment which the Plaintiffs had in Court was produced to the Defendants' legal team as requested and was reviewed by them. That document was original insofar as it bore the original execution of the Assignees. It was noted and acknowledged before Mr. Dix gave evidence that the Assignment the Plaintiffs had in Court did not bear the Company's seal of the Assignor and this was acknowledged by the Plaintiffs' counsel to the Defendants' counsel. A copy of the Assignment dated 15th May 2017 bearing the Company's seal of the Assignor is now attached. In the interest of making the best use of available Court time, you might please confirm that the Defendants now withdraw their requirement for the formal proof of the Assignment." [emphasis added]*

34. The copy of the Assignment enclosed with the letter of 14 May, 2020, was not identical to the document which had been presented to the court at Day 3 of the trial. This led to further correspondence between the parties, including a request by the defendants' solicitors, Crowley Millar, to inspect the Assignment.

35. On 2 June, 2020, BHK informed Crowley Millar that the version of the Deed of Assignment bearing the original seal of Carbon Developments Limited could not be located and stated that the copy furnished was the best available copy. They stated as follows:-

> *"The Deed was executed in counterparts and the original we had in Court in January, though bearing the seals (where applicable) of all of the Assignees, did not have the seal of Carbon Developments Limited affixed. Unfortunately, as was explained to your counsel, this was not noticed until Mr. Dix was due to give evidence. Searches have since been made for the version with the original seal of Carbon Developments Limited. Unfortunately, it would appear that the Deed bearing the original seal of Carbon Developments Limited cannot be located and the copy we have furnished to you, which evidences the affixing of the seal is the best available copy. Please clarify if your clients are prepared to admit the Deed in evidence."*

36. Further exchanges took place between the parties in which Crowley Millar on 16 June, 2020, confirmed that they wished to inspect the document.

37. On 17 June, 2020, BHK repeated their explanation of the fact that it was only in preparation for Mr. Dix giving evidence on day 13 of the trial that they had noted that the Deed of Assignment being produced by them in court did not have the seal of Carbon affixed. They repeated their offer of inspection and stated: *"Unfortunately the Counterpart Deed of Assignment executed by and bearing the original seal of Carbon Developments has been lost or mislaid. The copy of that counterpart Deed bearing the company seal of the Assignor enclosed with our letter and sent to you by email on 2 June 2020 is the best available copy of the Deed as executed by Carbon Developments Limited. While we can provide you with a further copy from the copy we hold, we are unsure what other document you wish to inspect."*

38. In response to this letter, Crowley Millar confirmed on 22 June, 2020, their intention to attend at the offices of BHK on Wednesday, 24 June, 2020, to inspect the document handed into court on Day 3 and the document enclosed with BHK's letter of 14 May, 2020.

39. In reply to this letter, again on 22 June, 2020, BHK confirmed that they would facilitate the inspection on that day. They then wrote a second letter stating the following:-

> *"In the interest of avoiding any confusion, we would like to make it clear that, as set out in our letter of 17th June 2020, we hold a copy only of the Assignment as executed by Carbon Developments Limited. We have provided you with a copy from the copy we hold which is the best available copy of the Assignment. You are welcome to inspect the copy we hold if that is your request."*

40. On 24 June, 2020, Mr. Millar and Mr. Dalton of Crowley Millar attended at BHK in Cork for the purpose of performing the inspection of the Assignment document.

41. On 6 July, 2020, Crowley Millar wrote to BHK stating that it was a matter for the plaintiffs to prove the Assignment. They referred to copies of the Assignment which had previously been exhibited firstly, to the affidavit of Mr. John Nesbitt sworn on 19 December, 2018 grounding the application for leave to make the first amendment, secondly, to a version

exhibited to an affidavit sworn by Mr. Nesbitt on 21 January, 2019 in the same application, thirdly, to the copy of the document handed into court on Day 3 of the trial and, fourthly, to the copy of the Assignment enclosed with BHK's letter of 14 May, 2020.

42. Crowley Millar stated that each of these copies represented a different "*iteration*" of the Assignment and requested explanations.

43. On 23 July, 2020, BHK replied stating "*as previously confirmed*" that the Assignment had been executed in counterparts on 15 May, 2017. They continued:-

> *"The seal of Carbon Developments was affixed at that time and your suggestion that it was proposed to affix it for the first time in February of this year is incorrect. Through an oversight, the Assignment brought to Court did not have the original seal of Carbon Developments Limited affixed and this was noted only just before Mr. Dix was to give evidence.*
>
> *The matter to be attended to was to locate the original Assignment with the original seal of Carbon Developments and to bring that to Court. Unfortunately, we have not been able to locate that counterpart Assignment, although we do of course, have a copy and this has been forwarded to you. Further you have seen the counterpart with the original executions of the Assignees. If the Defendants are refusing to admit the Assignment in the absence of the counterpart Assignment bearing the original seal of Carbon Developments Limited, the Plaintiffs will rely on the rules of evidence including the best available evidence rule".*

44. Arising from further exchanges between the parties in which Crowley Millar reasserted that it was a matter for the plaintiffs to prove the Assignment, BHK informed Crowley Millar by letter of 5 October, 2020 of the intention to execute a new Deed as follows:-

> *"As previously explained, the original Deed of Assignment executed by Carbon Developments Limited cannot be found. Unfortunately, it was not until Mr. Robert Dix was about to give evidence that it was noted that the Deed we had in Court was not the original executed by Carbon Developments Limited. Searches have been made for the original but unfortunately, it cannot be located, and the copy furnished to you evidencing the affixing of the seal, is the best available copy.*
>
> *Notwithstanding the Plaintiffs' position that the copy Deed of Assignment dated 15th May 2017 is admissible as the best available evidence, a Deed of Acknowledgement and Confirmation is currently being executed by the parties to the Deed of Assignment. We anticipate the execution of this Deed will be finalised and served this week. We will furnish a copy to you as soon as possible."*

45. BHK continued by indicating their intention to issue a notice of motion for leave to amend the Statement of Claim by reference to the Deed of Acknowledgment and Confirmation, and required confirmation that the defendants would consent to such amendment. No such consent was given.

This application

46. On 12 October, 2020, the plaintiffs issued this application seeking an order pursuant to O. 28, r. 1 RSC giving the plaintiffs liberty to amend in terms of an amended Statement of Claim exhibited to an affidavit of Patricia O'Brien, partner at BHK, sworn on 12 October, 2020, grounding this application.

47. The proposed amended Statement of Claim, included a new para. 23B as follows:-

> *"Further and/or alternatively and strictly without prejudice to the foregoing Assignment ("the Assignment") [pleaded in paragraph 23A and quoted at paragraph 11 of this judgment] and/or in any event a Deed of Confirmation of Assignment dated 8th October, 2020 was entered into between Carbon Developments Limited ("Carbon") and the Plaintiffs. Clause 2 of the Deed provides as follows:*
>
> > *"The parties HEREBY acknowledge, confirm and agree that with effect from the 15th May 2017 the Assignor, to the fullest extent permissible by law, transferred and assigned to the Assignees free from encumbrances all of its rights, benefit, interest and title to and in the Contract together with all the benefit of the obligations owing to the Assignor under the Contract and all the rights and remedies and claims and demands in respect of any breach of such obligations and each Assignee accepted and hereby confirms its acceptance of the said Assignment. For the avoidance of doubt, at the request of the Assignee and by way of confirmation and further assurance, the Assignor, to the fullest extent permissible by law, HEREBY absolutely confirms the Assignment with effect from the date thereof and to the extent necessary to give full effect thereto HEREBY transfers and assigns to the Assignees, with effect from the 15th May 2017, free from all encumbrances, all of its rights, benefit, interest and title to and in the Contract together with all the benefit of the obligations owing to the Assignor under the Contract and all the rights and remedies and claims and demands in respect of any breach of such obligations and each Assignee accepts the Assignment of such rights, benefit, interest and title to and in the Contract."*
>
> *The Plaintiffs will rely on the entirety of the said Deed as necessary at the trial of the action for the purpose of establishing the meaning and effect thereof."*

48. In her affidavit Patricia O'Brien refers to the correspondence before and after the commencement of the trial. She states that "*shortly prior to the commencement of the hearing of this action the Defendant's indicated that they would be requiring formal proof of the Assignment."*

49. Ms. O'Brien refers to the events at the hearing and continued as follows: -

> *"This firm produced in court for inspection the Assignment which it had in its possession. The Assignment was executed in counterparts. The document produced*

for inspection in court was a compiled original counterpart executed by the Assignees. It was however noted by Counsel for the Plaintiffs before Mr. Robert Dix was due to give evidence that the document the Plaintiff's had in Court did not bear the Company seal of the Assignor, Carbon Developments Limited ("Carbon")."

50. Ms. O'Brien referred to the break in the trial and searches carried out to "*find the counterpart with the original seal of Carbon affixed.*" She said that "*Unfortunately it appears that the original counterpart executed by Carbon bearing the original seal cannot be located."* She then referred to and exhibited the correspondence I have quoted earlier.

51. Ms. O'Brien stated that without prejudice to the plaintiffs' position that the original counterparts executed by the plaintiffs taken together with a copy counterpart to which the Carbon seal was attached were adequate to prove the Assignment, a further Deed of Confirmation of Assignment was executed by Carbon on 8 October, 2020, and she exhibited that Deed.

52. The plaintiffs submit that whilst they will continue to rely on the first Assignment, the Deed of 8 October, 2020, has been executed. They submit that in as much as they now seek to rely on that Deed being a confirmation and further assurance, this is now a *"real question in controversy between the parties"* and, accordingly, that the amendment ought to be permitted.

53. The plaintiffs submit the following:-

    (1) That the starting point on such an application is to establish that the amendment is necessary to enable the court to do justice between the parties in respect of the real questions in controversy (*Knowles v. The Electricity Supply Board [*2018] IEHC 761, (Noonan J.));

    (2) That it is not the function of the court on such an application to punish a party for failure to plead a matter in a timely way (*Knowles*);

    (3) that the rule permitting an amendment is an aspect of the constitutional right of access to the courts and has been described by the Supreme Court as a liberal rule (*Croke v. Waterford Crystal Limited* [2004] IESC 97, [2005] 2 IR 383, (Geoghegan J.) and *Moorehouse v Governor of Wheatfield Prison and Others* [2015] IESC 21 (MacMenamin J.));

    (4) That the court should not enquire into the merits of the amendment sought and that the court should allow the amendment unless it is manifest that the issue thereby raised must fail (*Woori Bank v. KDB Ireland Limited* [2006] IEHC 156 (Clarke J.));

    In *Moorview Developments v First Active Plc* [2009] 2 IR 788, Clarke J. made a refinement to this proposition which is important in this case. He stated that just because it cannot be demonstrated that a claim proposed to be included by amendment is bound

to fail is not a sufficient reason for permitting the amendment concerned when the case has been at hearing for a prolonged period. (See para. 148 below)

(5) That an amendment should be allowed if it would have been appropriate or permissible in the original claim as pleaded and would have withstood an application under O. 19, r. 28 RSC, namely, an application that it be struck out on the grounds that it discloses no reasonable cause of action or is shown to be frivolous or vexatious (*Patrick Cuttle v ACC Bank Plc* [2012] IEHC 105 (Kelly J.)).

The proposed amendment could never have formed part of the original pleaded claim, as it relates to an act of the plaintiffs made long after the commencement of the hearing of the action;

(6) that the court should be willing to permit the amendment if no prejudice to the defendants has been illustrated (*Knowles and Moorehouse*).

54. The plaintiffs refer to cases in which amendments have been permitted to pleadings either at the commencement of a trial or even at a later stage of the trial (*Moorview Developments Limited v. First Active PLC* [2008] IEHC 211 and [2009] 2 IR 788 (Clarke J.), *Wildgust v. Bank of Ireland & Norwich Union* [2001] ILRM (Supreme Court).

55. The defendants object to the amendment and their submissions may be summarised under three headings:-

(1) It is submitted that the amendment is not sought in order that real matters in controversy can be determined. They submit that the plaintiffs seek to introduce the alternative plea relying on a Deed of 8th October, 2020 in order to "*plug an evidential deficit in their case*" which emerged after relevant witnesses had given evidence.

(2) That the amendment if permitted is bound to fail. They submit that it seeks to permit the plaintiffs to use the Deed of Confirmation to convert what was not a Deed and never was a Deed, namely, the document of 15 May, 2017 into a Deed.

(3) They submit that the plaintiffs' conduct disentitles them to the discretionary order which they seek.

56. Under the third of these headings, the defendants submit that this application and the events leading up to the application amount to an abuse of process. They go so far as to submit that in the manner in which the plaintiffs prosecuted the first motion to amend, in the presentation of references to the Deed at the trial itself and in correspondence following the break in the trial, in particular, by the letter dated 14 May, 2020, the plaintiffs have sought intentionally to mislead both the defendants and the court in relation to the existence or otherwise of a valid Deed of Assignment in the first place.

57. The defendants submitted at the hearing of the motion that Ms. O'Brien intentionally misled at various stages of the process both this Court and the defendants in relation to matters concerning the original Deed of Assignment.

58. This latter allegation was very serious. In that light, the defendants gave notice of their intention to cross-examine Ms. O'Brien on the hearing of this motion by reference to her affidavits, sworn 12 October, 2020, and 2 November, 2020.

59. The plaintiffs agreed that Ms. O'Brien be cross-examined and, on the first day of the hearing of the motion, Ms. O'Brien was cross-examined by the defendants' counsel, Mr. Gardiner.

60. Having regard to the serious nature of the allegation made, it is necessary to recite in detail the sequence of events giving rise to the allegation and the evidence given by Ms. O'Brien and my conclusions as to the allegation made.

Evidence of Patricia O'Brien

61. A significant portion of the evidence given by Ms. O'Brien on this application concerns the circumstances of the execution of the Assignment on 15 May, 2017, pleaded in the Amended Statement of Claim. The validity, efficacy and lawfulness of that instrument is not a matter for determination on this application and by this judgment I make no finding on those questions. They are already issues in the case pursuant to the Amended Statement of Claim and the Amended Defence. Nonetheless, the circumstances relating to the execution of that document are relevant to the evidence given by Ms. O'Brien in response to the allegation made by the defendants on this application that the defendants and this Court were misled in relation to the Assignment.

62. In her affidavit of 2 November, 2020, Ms. O'Brien recites that in early 2017 the plaintiffs approached Carbon requesting that Carbon assign the Cox Contract of Employment to the plaintiffs. She says that she drafted an Assignment for submission to Carbon.

63. A Mediation had been arranged between the parties for 16 May 2017. A certain urgency developed in connection with the execution of the Assignment ahead of the mediation.

64. Ms. O'Brien states that the terms of the Assignment were ultimately finalised on 15 May 2017 between her and Kirkland and Ellis International LLP ("K&E"), Carbon's English solicitors, and arrangements were made to have the Assignment executed and sent electronically to BHK.

65. Ms. O'Brien states that on the morning of 16 May, 2017, the Assignment "*executed by Carbon"* was sent to her by email from K&E. The email instructed that the executed Assignment was to be held to the order of K&E until such time as it had been executed also by the assignees and a fully executed copy circulated which could then be released. Therefore, the Assignment executed by Carbon was delivered to BHK, Ms. O'Brien says in electronic form, by email.

66. On the copy of the Assignment exhibited by Ms. O'Brien the page for execution by Carbon shows the signature of two directors, namely Mr. Robert Dix and Ms. Diana Hoffmann. No copy or impression of a seal appears on that page. Opposite Ms. Hoffmann's signature appear the words "Director/Secretary".

67. Ms. O'Brien says that because she needed to be in a position to refer to and rely on the Assignment in the course of the mediation, she contacted a Mr. Steele at K&E for his agreement to release the escrow condition on the basis of her undertaking to furnish Mr. Steele with the Assignment once it was executed by the assignees. Mr. Steele agreed to the release, which Ms. O'Brien states completed the delivery of the Carbon counterpart of the Assignment to the plaintiffs.

68. Ms. O'Brien states that it had been her intention to follow up thereafter with K&E to obtain what she describes as a "wet ink" version of the counterpart. She states that although this was not ultimately done, that is a fact which is of no legal significance because the Carbon counterpart, as she describes it, became effective as a deed against Carbon once the escrow condition was released. In making this assertion, Ms. O'Brien referred to the process of executing agreements and deeds over email known as "*virtual" "execution", "signing", "closing"*, or "*completion*" and said this is a common way for parties to execute agreements and deeds. She referred to and exhibited Guidance Notes issued by the Law of Society of Ireland and by a joint working party of the Law Society (England and Wales) Company Law Committee and The City of London Law Society Company Law and Financial Law Committees. She said that for the purpose of sending the "*fully executed version to K&E, the signature pages from each of the counterparts executed by the Assignees and the Assignor were completed and attached to the complete copy of the Assignment and scanned and emailed to K&E*" on 19 December, 2018. She continued:

> *"…As completion had taken place virtually. I say and believe that it was appropriate to compile and circulate the Assignment in that form. It was a copy of this fully completed Assignment which was exhibited to the Affidavit of Mr. John Nesbitt dated 21 January 2019."*

69. Whether this sequence of exchanges constitutes valid execution and completion of the Assignment, either by reference to the Guidance Notes referred to by Ms. O'Brien or otherwise, is one of the issues for determination at the trial of the action.

70. Ms. O'Brien then states that "*although it had been our intention to follow up on the wet ink versions in due course, this was not actually necessary in the case of the Assignment, as it did not need to be registered anywhere*." She said that she and her colleague at her firm, David O'Keeffe, had each assumed that the other was following this up but she says that because this was not deemed critical it was overlooked. She says that as far as both Carbon and the assignees were concerned, completion had duly occurred and the Assignment had taken effect on 15 May, 2017.

71. Ms. O'Brien says that in December 2019 and early January 2020, she sought to engage with Crowley Millar in relation to documents to be admitted without formal proof, with a view to applying the "Bula/Fyffes" model.

72. Ms. O'Brien states that in the days immediately before the commencement of the trial on 14 January, 2020, in the absence of the finalisation of a Bula/Fyffes agreement, it was necessary to pack all of the documents referred to in the discovery and in the core books. This entailed considering what original documents might be needed to be brought to court, locating these documents and putting them safely among the documents being brought to Dublin for the trial.

73. Ms. O'Brien states that because the completion of the Assignment had taken place almost three years earlier and in the context of the extreme time pressures against which she and her team were working, she did not at that time recall that completion of the Assignment had taken place virtually. In the context of all of this pressure and the volume of documents she did not at that stage give the Assignment further consideration.

74. Ms. O'Brien states that when the trial commenced her counsel "*had elicited that the defendants were prepared to agree to the Bula/Fyffes model but not in relation to the Assignment"*. She states that when Mr. O'Flynn was giving his evidence on the third day of the trial, and a request was made that the original be handed into court, her associate Ms. Catherine Conway *"handed in the document which she believed to be the original Assignment. I was present in court but had not looked at the Assignment myself. Mr. O'Flynn relied on us entirely in relation to producing and identifying the correct original document to him and to the court".*

75. Ms. O'Brien then states that when it became apparent that the defendants were insisting on formal proof of the execution of the Assignment, Mr. Robert Dix, a former director of Carbon and who had been one of the signatories to the Assignment, agreed to give evidence.

76. On Day 13 of the trial, Mr. Dix attended at court with a view to giving his evidence as to the due execution of the Assignment. It emerged in the course of a short consultation with Mr. Dix at lunchtime on Day 13, that the version of the Assignment which had been handed into court and which it was intended he would prove as one of its signatories did not have on it the original seal of Carbon. Contact was then made with K&E and with Arthur Cox (Carbon's Irish solicitors), with a view to establishing the location of the Assignment bearing an original seal of Carbon.

77. On Day 14 the plaintiff's counsel Mr. Cush informed the court that there was a difficulty in that the document which it was intended would be proved by calling Mr. Dix was a version of the Assignment on which the seal of Carbon did not appear. At this stage it had become clear that the trial would be adjourning for an extended period of time. Mr. Cush said that the interval would be used to establish the whereabouts of the duly executed Assignment and said "*So there is a matter that we need to just tidy up in that respect".*

78. No explanation was offered for the fact that the absence or unavailability of an original assignment bearing the seal of Carbon was not discovered by the plaintiffs until lunchtime on the day it was intended Mr. Dix would give evidence. This is surprising since the requirement for this proof had become clear at the very latest at the start of the trial three weeks earlier.

79. Ms. O'Brien then refers to further efforts which were made after the adjournment of the trial to obtain what she referred to as the "wet ink version" of the Assignment from Carbon's solicitors.

80. Ultimately, after further inquiries, Arthur Cox confirmed to BHK that on their file copy of the Assignment the company seal of Carbon was visible and they sent that to BHK. That was the version which accompanied the letter of 14 May, 2020, to the defendants' solicitors.

81. On that version, the page for execution by Carbon contains again the signatures of Mr. Dix and Ms. Hoffmann and two differences (a) the impression of the seal is visible; (b) opposite the signatures of Diana Hoffmann where the words "Director/Secretary" appear the word "Secretary" has been deleted.

82. Different versions of the Assignment have been referred to variously by the plaintiffs and the defendants. All versions carry the date 15 May, 2017, and the dates referred to in the headings below refer to the dates on which they were presented by the plaintiffs.

Version 1 – 19 December 2018

83. This is the version which was exhibited to an affidavit of Mr. John Nesbitt sworn 19 December, 2018, grounding the application for leave to amend the statement of claim.

84. In this version the execution page for all parties, including Carbon, is entirely blank. No signatures or impression of any seal appears. Ms. O'Brien states that this was a simple error and it had been intended to exhibit the executed Assignment. She says that instead the final scanned "execution" version rather than a scanned "executed" version was printed and exhibited in error.

Version 2 – 21 January 2019

85. A supplemental affidavit was sworn by Mr. Nesbitt on 21 January 2019. On the page for execution by Carbon the signatures of Mr. Dix and Ms. Hoffmann appear. The phrase "*Director/Secretary*" is unchanged and there is no impression of a seal. Similarly, the execution page for each of the assignees appears to have been duly signed or executed by relevant directors.

86. This is the version which Ms. O'Brien described in her second affidavit as the "*fully compiled Assignment."*

Version 3 – 16 January 2020

87. This is the version which had been brought to court and a copy of which on Day 3 was shown to the court and to Mr. O'Flynn in the course of his evidence.

88. On the page for execution by Carbon, it is similar to Version 2 in that it shows the signatures of Mr. Dix and Ms. Hoffmann. The phrase "*Director/Secretary*" is unchanged and there is no impression of a seal.

89. Similarly to Version 2, it shows execution on behalf of the assignees. In addition to such execution by assignees, there are certain pages appearing blank and unexecuted by Victoria Hall Management Limited, Albert Project Management Limited.

Version 4 – 14 May 2020

90. This is the version attached to the letter of 14 May, 2020, from BHK to Crowley Millar.

91. On the page for execution by Carbon, there appears the signature of Mr. Dix and Ms. Hoffmann. There also appears an impression of the seal of Carbon. Where the words "Director/Secretary" appear opposite the signature of Ms. Hoffman, the word "Secretary" has been deleted.

92. On this version none of the pages for execution by the assignees contains any signatures or seals.

Cross-examination of Ms. O'Brien

93. In her evidence, Ms. O'Brien described Version 2 exhibited by Mr. Nesbitt as a compiled version which *"when the transaction has been completed virtually that becomes the original".*

94. The defendants' counsel, Mr. Gardiner, put it to Ms. O'Brien that this meant that when Mr. Nesbitt was exhibiting this version of the agreement to the court on 21 January, 2019, it had been represented to the court that this was a copy of an original document. She stated "*That's correct Judge. But that is the correct position, if you follow the [Law Society] guidance for virtual completions, the scanned copy is the original. That is an original".*

95. Ms. O'Brien stated in her evidence that at that point in time she had no reason to believe that the deed had not been fully executed with the seal on it, since the signatures appeared on a version containing the words "*given under the common seal*" and that it had been given to her signed by Mr. Dix and Ms. Hoffmann "*as being under seal*" by *"one of the most reputable firms and one of the most significant firms I have ever dealt with"* (i.e. K&E).

96. Ms. O'Brien stated that there was no question that this was not a deed on which she would have relied as having been sealed, in circumstances where it had been received by her in a virtual situation.

97. Ms. O'Brien referred again to the preparations for the trial which commenced on 14 January, 2020. No agreement concerning the admission of documents had been confirmed, yet she understood that all documents which were included in the exhibits or the core books were going to be admitted. When confirmation of this was not given in preparation for the trial, a process was undertaken of packing boxes to get originals to

Dublin for the commencement of the trial. She said that she asked her colleague Ms. Conway to get the Carbon Assignment. Ms. Conway told her that she had located the original "*…and I thought no more of it. I didn't look at it myself. That is the fatal mistake I made. I didn't look at it myself. And, you know. So when the deed was handed into court I believed that what was being handed in was the wet ink version and that it was executed by everybody. That was my belief of what was in that envelope. I didn't look at it myself, and I should and I apologise for that".*

98. Mr. Gardiner pointed out to Ms. O'Brien that it was apparent at the very latest from Day 1 that the original Assignment was going to have to be produced and proved and yet it was not even in the core book. The copy in the core book was not a copy of an executed version.

99. Ms. O'Brien repeated that in the numerous things which had to be done in the early days of the trial she had understood that the original wet ink version had come to her office and was in the envelope, which contained the document produced to the court on Day 3. Ms. O'Brien continued, referring to the "compiled deed" which had been circulated to the parties to the Assignment as follows: -

> *"So this deed was never meant to be handed into court, Judge. What was meant to be handed into court is what I believed was the wet ink version that I believed had been received but it turns out hadn't been received. So Judge, if I had known that the wet ink version wasn't available to us, we could have produced the virtual completion, we could have proved the virtual completion document, but we had understood - or sorry I had wrongly believed – that the wet ink version had arrived and that we had – and that's what was in the envelope that we had in court. So there was absolutely no intention to mislead anybody. I absolutely can't think of a single reason why I would want to jeopardise my own reputation, my client's case and everything I have ever believed in, to mislead the court or anybody. I didn't. Sorry, excuse me. I wouldn't and I didn't".*

100. Under cross-examination the evidence continued as follows: -

> Mr. Gardiner*: "So when the court was told, the court specifically asking is this an original, and was told it was an original, that was unintentional we'll say, for the moment, is that right?"*
>
> Ms. O'Brien: *"Judge, it was a mistake, it was a mistake that arose by virtue of the fact that I hadn't looked at the deed myself and as soon as it became apparent to us that a mistake had been made, Mr. Cush I believe informed Mr. Gardiner and then informed the court, as soon as we became aware that there was an issue with it ourselves. We weren't aware when it was handed into court. So a mistake was made and we were all working on the basis of a misunderstanding, ourselves included".*

Mr. Gardiner*: "Yes. I mean I have to suggest that facts would suggest it is a pretty amazing mistake and that it looks intentional".*

Ms. O'Brien: "*You may say that, Mr. Gardiner, but I have worked for 35 years to build a career for myself, I started this practice four years ago with others: my reputation is everything to me. There is no way in the world that I would intentionally bring in a deed purporting to be a sealed deed, an embossed sealed deed, to a room full of the eminent lawyers and a Judge of the High Court and think that that wouldn't be spotted, and think that I was going to try and hoodwink people. I couldn't. I didn't do that. I was working under a misapprehension myself. I absolutely accept it was a big mistake, it's a very public mistake, and I know that it is going to cause me enormous embarrassment but what you are suggesting, Mr. Gardiner, is that I would put my entire career at stake, I would put my partners at stake, I would put my family reputation at stake for the sake of doing something that could easily have been avoided had I known that the document wasn't what I thought it was. I genuinely thought that it was what I am saying it was. There is no way I would have presented it otherwise".*

"I let the ball drop, I assumed that Mr. O'Keeffe was following up on wet ink signature. He assumed I was … then when it came three years later with such short notice to get ready for everything for court, I just, it just didn't occur to me to check back to see, you know, to check – I did actually say have we the original of that deed? And I understood that my colleague had located it. There was enormous pressure on at that time to get ready to go to Dublin".

101. A recurring feature of this evidence and related submissions was that there was urgency or a last minute requirement that the original document be located and produced at the trial. This is based on a misplaced expectation that there would be agreement in relation to the admission of documents. Whilst such agreements are common, the defendants were never under any obligation to admit documents. Therefore, there is no validity to the complaint that when a Bula/Fyffes agreement was finally made at the commencement of the trial subject to the exception of the Assignment this was a "*sudden*" new proof requirement. It was always going to have to be proved by the plaintiffs, particularly in the context that the question of the privity of contract between the plaintiffs and Mr. Cox had been a controversial issue since the very commencement of these proceedings.

102. The cross-examination then moved to the correspondence which followed the adjournment of the trial. Reference was made to the letter of 14 May 2020 from BHK to Crowley Millar and in particular the following paragraph: -

"The Assignment was executed in counterparts. The Assignment which the plaintiffs had in court was produced to the Defendants' legal team as requested and was reviewed by them. That document was original insofar as it bore the original execution of the Assignees. It was noted and acknowledged before Mr. Dix gave evidence that the Assignment the Plaintiffs had in court did not bear the company seal of the Assignor and this was acknowledged by the Plaintiff's counsel to the

Defendants' counsel. A copy of the Assignment dated 15 May 2017 bearing the company's seal of the Assignor is now attached. In the interest of making best use of available court time, you might please confirm that the defendants now withdraw their requirement for the formal proof of the Assignment".

103. Mr. Gardiner put it to Ms. O'Brien that the statement "*a copy of the Assignment bearing the company seal is now attached"* amounted to a representation that it is a copy of an original in the possession of BHK. Ms. O'Brien said the following in reply: -

> *"Judge, if it's a copy of an original, I don't believe that it has to be in one's possession. If one has a copy of an original of anything, it's a copy. There is no representation that one holds the original by virtue of saying 'this is a copy of a deed'. There is absolutely no assumption that the person who's furnishing the copy has the original. I don't know why that would be suggested.*
>
> *Mr. Gardiner:* Well can I suggest, Ms. O'Brien, that that's not a credible answer and not truthful?
>
> *Ms. O'Brien:* Mr. Gardiner, or Judge, it is certainly truthful and it is factual and I have plenty of copies of deeds from plenty of transactions that are copies of the originals where I don't hold the originals. That is absolutely commonplace*".*

104. Mr. Gardiner put it to Ms. O'Brien that in circumstances where, on Day 14 of the trial, the plaintiffs had indicated that they were to go and find the original sealed page from Carbon, which Ms. O'Brien confirmed and agreed was what the plaintiffs "*were trying to do in the meantime",* the statement quoted above in her letter of 14 May amounted to a representation that the plaintiff's solicitors had then secured the original that they had gone looking for.

105. Ms. O'Brien again denied this proposition. She stated that when in correspondence it appeared that Messrs. Crowley Millar were suggesting that BHK had the original, she immediately went back and confirmed to them that she didn't have the original.

106. The request to admit the Deed as evidence without formal proof was repeated by BHK in a letter of 26 May, 2020. Ms. O'Brien then referred to a further letter of 2 June, 2020, in which she stated that *"the deed bearing the original seal of Carbon Developments Limited cannot be located and the copy we have furnished to you, which evidences the affixing of the seal is the best available copy. Please clarify if your clients are prepared to admit the Deed in evidence".*

107. Mr. Gardiner referred again to the subsequent correspondence and put the following questions: -

> "Mr. Gardiner: - *Ms. O'Brien, persons' readings solicitors' correspondence when they are told solicitors have copy, tend to believe the solicitors copied the original, not copied a copy, I suggest?*

Ms. O'Brien: *No Judge, that's absolutely not the case*".

108. Ms. O'Brien repeated that as soon as it became clear to her from a Crowley Millar letter of 28 May, 2020, that they were seeking arrangements to inspect an original document, she immediately reverted on 2 June, 2020, to confirm that she did not hold the original.

109. Ms. O'Brien continued: -

> *"If I had wanted to say we have located the original, I would have said that. We didn't say it. If we had located the original I would have said it. And just to go back to the position that you made there, that a solicitor represents that they have – by furnishing a copy, that they represent that they have the original, that is absolutely not the case. How that is done is that a solicitor stamps a copy as being a certified copy of the original, with which they have compared it themselves. That's how a solicitor represents that they hold the original. Not by saying 'we are furnishing a copy'. That's my experience over 35 years of practice. I have never heard it suggested that because one produces a copy that one is holding out that one has the original. That is just not the case. It's not what happens in practice".*

110. In relation to the events of Day 3 of the trial when the Assignment was put into evidence as part of the evidence of Mr. O'Flynn, Ms. O'Brien stated that when a request was made on that occasion that the original be handed into court, her colleague Ms. Conway handed in the document which she believed to be the original Assignment. Ms. O'Brien confirms that she was present in court but did not look at the document which was being handed into court. She says that it was only in preparation for the evidence to be given by Mr. Dix on Day 13 of the trial that she discovered that the version of the Assignment which had been handed into court and which Mr. Dix was then being called to prove, did not show the seal of Carbon.

111. As Ms. O'Brien openly acknowledged, it was a mistake to have allowed a document to be handed in to court on Day 3 and to be referred to as an original without having checked that it was in fact an "original" of the executed Assignment. To allow such a document to have been handed in to the court, and then shown to the other parties for inspection without making such a check was, as Ms. O'Brien has conceded in her evidence, a serious mistake which has caused significant embarrassment. Nonetheless, I found Ms. O'Brien to be frank and honest in the evidence she gave and I accept her evidence that she did not know that the document which was being handed into court was not an original Assignment sealed by Carbon. She did not therefore intend to misrepresent the position with a view to having the court or the defendants accept that the document handed in was something which it was not.

112. In summary, the defendants say that the plaintiffs have sought to mislead the court and the defendants on three separate occasions as follows: -

    (i) On the application for leave to make the first amendment heard by McDonald J.;

(ii) On Day 3 of the trial when Version 3 of the Assignment was handed into court and referenced in the evidence of Mr. O'Flynn;

(iii) In the correspondence postdating the adjournment of the trial, and in particular the letters of 14 May, 2020, and 26 May, 2020.

First application to amend

113. Although I was referred to the transcript of the hearing before McDonald J. the affidavits exchanged on that application were not opened to me or referred to in any detail. The defendants say that the initial affidavit of Ms. O'Brien sworn on 20 November, 2018, grounding the application did not exhibit any version of the Assignment. When this was objected to, an affidavit was sworn by Mr. Nesbitt on 19 December 2018 in which he exhibited, it is said inadvertently, an entirely unexecuted copy of the Assignment, showing no signatures or seal. When this was objected to, a further affidavit was sworn by Mr. Nesbitt on 21 January, 2019, exhibiting Version 2, which was referred to as an "*executed deed of Assignment*". It transpires that that version did not show the seal of Carbon.

114. Nowhere in the course of the hearing of the application before McDonald J. was there controversy concerning the form of the document itself, much less concerning its execution. The principal ground of objection was that the amended plea was bound to fail. McDonald J. rejected that argument and granted leave to make the amendment.

115. The version of the Assignment which was exhibited in Mr. Nesbitt's affidavit of 21 January, 2019, was what Ms. O'Brien described as the "*compiled*" version.

116. It now appears that the version of the Assignment which it is intended will be relied on at the trial, namely Version 4 presented with the BHK letter of 14 May, 2020, is not the same as the version which was exhibited before McDonald J.

117. It took three affidavits for the plaintiffs to exhibit a version of the Assignment on which they relied in the application before McDonald J. Clearly this was a series of errors, and was followed by more errors, and these do the plaintiffs no credit. However, I have been presented with no evidence to support the allegation that the plaintiffs or BHK intended to mislead the court when exhibiting the Assignment in the context of that application.

Day 3 of the trial

118. Ms. O'Brien has stated in her evidence that the version of the Assignment which was handed into court in the course of Mr. O'Flynn's evidence, being Version 3, was taken from an envelope among the papers which she had brought to court for the trial, believing that it contained the original Assignment duly sealed by Carbon. This has proved, on her own admission, to have been a serious error. It is remarkable that in a case of such difficulty and which was so contentious that the solicitor would not first check that the document being handed in and presented to court was an original as it was being described. I have earlier quoted from the cross-examination of Ms. O'Brien from which it is clear that she is deeply embarrassed by this mistake and regrets it and apologises to the court. I accept her evidence that she did not intend that the court would be misled. To

have intentionally sought to mislead the court in the manner alleged by the defendants would have been an extremely serious act by a solicitor and would have placed her reputation at risk and jeopardised her client's case in terms of its credibility as a whole.

119. I accept also Ms. O'Brien's evidence that she believes that if she had realised or discovered that the document was not the sealed original Assignment this was a matter which could have been rectified with Carbon because Carbon were what she calls a "*cooperating party*". In light of the opposition to this application, that proposition is contentious and questionable. Nonetheless, I accept Ms. O'Brien's evidence that there was no reason for her to take the risk of misleading the court if she herself believed that there were other ways to remedy a difficulty in relation to the document.

Correspondence after adjournment of the trial

120. On Day 14 of the trial (5 February, 2020), being the day on which the matter was adjourned, the plaintiffs' counsel Mr. Cush informed the court, having previously so informed the defendants' counsel, that the page of the Assignment on which he had signatures, and which it was intended would be proved by Mr. Dix, did not have the seal of Carbon. He continued: -

> *"Now, to the extent that that's an issue – and frankly we don't believe it is a significant issue – we want to see if we can find the page that does have a seal on it and we have gone looking for it and we haven't as yet found it.*
>
> *If I could find it by tomorrow. I just need to make enquiries. And they are being made. It is not within our compass, this a group of companies outside of any control that we have, Carbon, Blackstone. So I can't say that I will find it in that time. I haven't found it yesterday and I haven't found it so far today, or at least it hasn't been found in that time.*
>
> *So in my respectful submission it is much more sensible to do it whenever the case resumes. And Mr. Dix one way or the other will be a short witness, he will be able to speak to the background of the Assignment, the Assignment, his authority to sign it and his signature and he will be able to do all of that and be very short in doing it.*
>
> *It is the formal proof of it, Judge, we have been put on formal proof of the Assignment."*

121. In response to this, Mr. Gardiner had protested that he did not have a witness statement from Mr. Dix so does not know what it is will be said about the circumstances of execution of the Assignment. He said that the plaintiffs should have in their possession a signed and sealed Deed on which they would rely to prove the Assignment. He referred to the reference to the document made on Day 3 when "*the court was given the original of the document upon which the plaintiffs relied"*. It was then said that the problem appeared to be the absence of a seal on that document and Mr. Cush said:-

"It has the signature but on the execution page there is no seal of Carbon. Now, to the extent that that is a requirement at all is a debate, a legal debate to be had. But at the moment I'm just going to try and tidy it up as best I can."

122. The letter of 14 May, 2020, from BHK to Crowley Millar states the following: -

"... A copy of the Assignment dated 15th May 2017 bearing the company's seal of the assignor is now attached. In the interests of making best use of available court time you might please confirm that the defendants now withdraw their requirement for the formal proof of the Assignment."

123. In his affidavit sworn 23 October, 2020, in opposition to this application, Mr. Cox states the following:-

"I understood when I read this that the plaintiffs' solicitors had found the original of the Carbon counterpart and that what they were attaching was a copy of that original. That is the only reasonable inference that can be drawn from the letter in the light of what had transpired in relation to this issue."

This averment has not been contradicted.

124. In the letter of 26 May, 2020, BHK state the following:-

"We also refer to our letter of 14th May 2020 and request that, in a similar vein, and in circumstances where you have been furnished with a copy of the Deed of Assignment dated 15th May 2017 executed by Carbon on which the seal is clearly visible, you might indicate if you will now agree to admit the Deed as evidence without the necessity of formal proof."

125. On 28 May, 2020, Crowley Millar replied and stated that they wished to have the opportunity to inspect the document sent with the letter of 14th May, 2020 *"before confirming the position on the admission of that Deed as evidence without the necessity for formal proof".*

126. Crowley Millar also pointed out that the document attached to the letter of 14 May, 2020, differed from the version handed into court at the trial.

127. On 2 June, 2020, BHK replied to Crowley Millar stating*, inter alia*, the following:-

"… Searches have since been made for the version with the original seal of Carbon Developments Ltd. Unfortunately, it would appear that the Deed bearing the original seal of Carbon Developments Ltd cannot be located and the copy we have furnished to you, which evidences the affixing of the seal is the best available copy. Please clarify if your clients are prepared to admit the Deed in evidence."

128. In response to this correspondence, Messrs Crowley Millar again confirmed that they wished to inspect the Assignment. In a letter of 17 June, 2020, BHK repeated their description of the matter and stated as follows:-

> *"As explained in our letter of 2 June, unfortunately, the counterpart Deed of Assignment executed and bearing the original seal of Carbon Developments Ltd has been lost or mislaid. The copy of that counterpart Deed bearing the company's seal of the Assignor enclosed with our letter and sent to you by email on 2 June 2020 is the best available copy of the Deed as executed by Carbon Developments Ltd. While we can provide you with a further copy from the copy we hold, we are unsure what other document you wish to inspect."*

129. In her evidence, Ms. O'Brien stated that the reason she repeated this description of the fact that an original of the Assignment sealed by Carbon had been lost or mislaid was to ensure that the defendants would not be under any misapprehension as to what they would be inspecting when they travelled to Cork.

130. This was repeated again in a letter of the 22 June, 2020 when BHK stated that they *"hold a copy only of the Assignment as executed by Carbon Developments Limited".*

131. On 24 June, 2020, Mr. Millar and Mr. Dalton of Crowley Millar attended at the plaintiffs' solicitors' office, BHK, in Cork to inspect the document referred to in the correspondence.

132. On 6 July, 2020, Crowley Millar wrote to BHK referring to the various versions of the Assignment which have been seen and produced from time to time and repeating requests for explanations which they had made in their letter of 5 February, 2020.

133. In reply to this letter, on 23 July, 2020, BHK stated as follows:-

> *"The seal of Carbon Developments was affixed at that time and your suggestion that it was proposed to affix it for the first time in February of this year is incorrect. Through an oversight, the Assignment brought to court did not have the original seal of Carbon Developments Limited affixed and this was noted only just before Mr. Dix was to give evidence.*
>
> *The matter to be attended to was to locate the counterpart Assignment with the original seal of Carbon Developments Limited and to bring that to court. Unfortunately, we have not been able to locate that counterpart Assignment although we do, of course, have a copy and this has been furnished to you. Further you have seen the counterpart with the original executions for the Assignees. If the defendants are refusing to admit the Assignment in the absence of the counterpart Assignment bearing the original seal of Carbon Developments, the plaintiffs will rely on the rules of evidence including the best available evidence rule."*

134. This led to further exchanges and ultimately, on 5 October, 2020, the statement by BHK of the plaintiffs' intention to execute a new instrument being Deed of Acknowledgement and Confirmation.

Conclusion as regards correspondence

135. In the light of the statements which were made on Day 14, it is understandable that a reader of the letters of 14 May, 2020 and 26 May, 2020, would understand from those letters that the plaintiffs had found the document being searched for and that the enclosure to the letter of 14 May, 2020, was a copy of that document. This interpretation follows not only from what was said on Day 14 of the hearing but also from the invitation contained in those letters, and repeated on a series of occasions, to confirm that the defendants no longer required formal proof of the Assignment. Mr. Cox's averment in his affidavit of 23 October, 2020, that this was the only reasonable inference which could be drawn by him from the letter in light of what had transpired in relation to the issue has not been contradicted. However, the defendants' solicitors were not misled because they persisted, with justification as matters transpired, in their request to inspect the document. It was only then that BHK expanded by stating clearly that the Assignment bearing the original seal of Carbon could not be located.

136. BHK did not hesitate to permit the inspection, but clarified the position to ensure that Messrs Crowley Millar would be not under any misapprehension as to what they would be inspecting when they travelled to BHK's office in Cork. Therefore, inasmuch as Mr. Cox interpreted the letter of 14 May, 2020, to mean that the original had been found BHK very promptly in their letters of 2 and 17 June, 2020, clarified that this was not the case.

137. I have quoted earlier from Ms. O'Brien's evidence on this correspondence. I accept her evidence that the fact that she referred to a copy of the document did not amount to a representation that she was in possession of the original. In the context or prior communications and statements in court, the letter of 14 May, 2020, conveyed the impression that such an original had been located, but the evidence does not support the allegation that Ms. O'Brien intended to mislead.

138. Mr. Cush fairly stated in submissions that it would have been better if BHK had made it clear in the letter of 14 May, 2020, that they were not in possession of an original. He also said that this is an observation made by him as counsel with the benefit of hindsight. That is correct.

139. I have come to the conclusion that:

    (i) the letters of 14 and 26 May, 2020, lead to the inference that the document which was being searched for following the Day 14 exchanges had been located;

    (ii) the defendants' solicitors were not misled by these letters and declined to admit the Assignment;

    (iii) the inference that the original Assignment sealed by Carbon had been located was corrected in the letters of 2 and 17 June, 2020;

    (iv) Ms. O'Brien did not intend to mislead the defendants by this correspondence;

140. If the defendants had confirmed that formal proof of the Assignment would not be required they would have admitted a document, an original sealed version of which the plaintiffs were unable to produce. It was only after the plaintiffs had persisted with their requests for agreement to admit the Assignment without formal proof and after the defendants had declined these requests, that the plaintiffs stated on 5 October, 2020, their intention to procure a new instrument, the Deed of Acknowledgement and Confirmation. This is one of the matters which informs the exercise of my discretion on this application.

Order 28 rule 1 RSC

141. O. 28, r.1 RSC provides as follows:-

> *"1. The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

142. In *Knowles v. Electricity Supply Board* [2018] IEHC 761, Noonan J. stated:-

> *"…the starting point must be that amendments will in general be allowed in the absence of irremediable prejudice so that the court can do justice between the parties in respect of the real questions in controversy. The fact that the application is made late in the day is of course a factor to be considered but by no means conclusive and it is no function of the court to punish a party for a failure to plead its case in a timely manner."*

143. The plaintiffs emphasise the traditional description of O. 28, r. 1 RSC as a "liberal rule" as it was characterised by Geoghegan J. in *Croke v. Waterford Crystal Ltd*. [2005] 2 IR 383. As will be seen from the cases considered below, the test is less liberal when an application is made at a very late stage.

144. In *Wildgust v. Bank of Ireland and Norwich Union* [2001] ILRM 24, the court granted leave to amend the statement of claim after the conclusion of evidence. Whilst the pleadings had not made out a claim of negligent misstatement Morris P. was of the view that the plaintiffs had tendered evidence to the court in support of such a claim, and he permitted an amendment of the statement of claim to effect this.

145. The Supreme Court upheld this decision, finding that the second named defendant in that case had been sufficiently aware in general terms of the nature of the plaintiff's claim and that any prejudice caused by the absence of a pleading of negligent misstatement, could be alleviated by a short adjournment to allow for an amendment of pleadings.

146. In *Mooreview Developments Ltd. & Ors v. First Active plc & Ors* [2008] IEHC 211, Clarke J. (as he then was) permitted an amendment to the statement of claim in circumstances which were said to arise from documents obtained at a late stage in the discovery process. In the course of his judgment, he made the following observation: -

"…it is clear that the amendment is sought very late in the day and that such a situation gives rise to an obligation on the part of the court to scrutinise the application with particular rigour to ensure that no real prejudice, not otherwise capable of remedy, could be caused to the party against whom the amendment is sought".

147. In *Moorview Developments v First Active Plc* [2009] 2 IR 788, Clarke J. refused leave to amend the statement of claim where the case had been at hearing for three months. On the facts of that case he concluded that the plaintiffs had no prospect of success on the issues sought to be raised by the proposed amendment.

148. In considering generally the question of amendments at a late stage, he continued as follows: -

"…it seems to me that the timing of the application is of particular relevance. Whatever might be the situation that would pertain if an application to amend were made at an early stage in the process, it seems to me that all of the authorities (see for example, the judgment of the Supreme Court in Wildgust v. Bank of Ireland [2001] I.L.R.M. 24) indicate that an amendment during hearing is not a desirable practice and should not frequently be permitted. The reason, of course, is that the risk of prejudice is all the greater where the amendment occurs while the case is at hearing. This is not the occasion to attempt to analyse all of the principles relevant to the limited jurisdiction to allow an amendment during the course of the hearing. It may well be that what might loosely be called "technical" amendments can more easily be allowed. Where, for example, a flaw in the case as pleaded emerges in the course of the hearing but where that flaw can be remedied without any significant prejudice, it would hardly be surprising that a court would allow such an amendment rather than see a party lose on a narrow pleading point.

On the other hand, an amendment which would have the effect of allowing an entirely separate cause of action (even one which may bear some resemblance to at least some of the other claims already pleaded) is in a very different category. For the reasons which I have already sought to analyse there does not seen to me to be a stateable case on the evidence currently available for the proposition sought to be advanced by virtue of the amendment. [He then considered the prejudice which would be caused by the necessity for further discovery, further witness statements and the like].

… Just because it cannot be demonstrated that a claim proposed to be included by amendment is bound to fail is not, in my view, a sufficient reason for permitting the amendment concerned when the case has been at hearing for a prolonged period. To permit such a practice on such a test has the potential to cause chaos for litigation.

In those circumstances it seems to me to be unnecessary to address the interesting issue raised on behalf of First Active to the effect that no jurisdiction exists to

permit an amendment which would allow a new and separate cause of action to be raised where the cause of action concerned arose after the date of the original plenary summons. The question seems to turn on whether the undoubted rule to the effect that amendments of that type should not be allowed is a rule of law (in which case the court would have no jurisdiction to depart from it) or is a rule of practice (in which case the court would have a discretion, in an appropriate case, to allow such an amendment). I would prefer to leave over to a case in which the issue was decisive, a final view as to the law on this topic. My tentative view is to the effect that the rule is a rule of practice rather than a rule of law and that there would, therefore, be a discretion which would permit the court, in an appropriate case, to depart from the rule. I have come to that tentative view primarily because it is well settled that issues concerning remedies (as opposed to the causes of action giving rise to those remedies) can be revised in proceedings, even though the facts relevant to the availability or otherwise of a particular remedy or the extent of same may only have occurred subsequent to the proceedings being commenced." [emphasis added]

149. It is clear from the dicta of Clarke J. in Moorview that an amendment at a late stage must be subject to close scrutiny in terms of the exercise of the discretion by the court, and not as "*liberal*" as was characterised in *Croke or Knowles*.

150. The fact or "event" now sought to be introduced by the proposed amendment occurred long after the commencement and part hearing of the trial. It is not a fact which goes, as Clarke J. was contemplating in the passage above, to remedy, but goes to the cause of action. Critically, it is an act of the plaintiff made in response to their failure to persuade the defendants to admit the Assignment under a *Bula/Fyffes* agreement.

151. The fact or "event" sought to be introduced by the proposed amendment in this case is one which "*bears some resemblance to at least some of the other claims already pleaded*" in that it is intended to effect a confirmation and acknowledgment of the Assignment. It is nonetheless a new event, of the plaintiffs' making, sought to be introduced in response to a difficulty the plaintiffs have encountered in proving the Assignment.

152. In *Smith v. Tunney* [2009] IR 322, Finnegan J. considered the provisions of O. 28, r. 1 RSC and summarised his view: -

"In summary the law as to amendment now is that an amendment will be allowed if it is necessary for the purposes of determining the real issues in controversy between the parties. The addition of a new cause of action by amendment will be permitted notwithstanding that by the date of amendment the Statute of Limitations had run if the facts pleaded are sufficient to support the new cause of action. Facts may be added by amendment if they serve only to clarify the original claim but not if they are new facts. Simple errors such as an error in date or an error as to location which do not prejudice the defendant and enable the real questions in controversy between the parties to be determined will be permitted".

153. The Deed of 8 October, 2020, is a new fact sought to be introduced by the plaintiffs and which would not be permitted on the test described by Finnegan J.

154. *Healy v. McGreal* (Donnelly J., 29 February, 2016), concerned a challenge to the validity of the appointment of the defendant as receiver over assets of the plaintiffs.

155. The defendant was appointed receiver over certain assets of the plaintiffs by IBRC. Thereafter IBRC, acting by its special liquidators, sold the relevant loans and securities to Kenmare Property Finance. Deeds of Novation were then executed substituting Kenmare for IBRC.

156. At the hearing, the validity and due execution of the Deeds of Novation was put in issue by the plaintiffs.

157. The defendants sought to produce redacted copies of the Loan Sale Deed to Kenmare. The court declined to permit the defendants to rely on redacted copies in circumstances where the plaintiff did not have the opportunity to inspect them.

158. In the face of these issues, there was executed during the course of the hearing of the proceedings a Deed of Confirmation and Acknowledgment whereby IBRC, acting through the special liquidators, confirmed that IBRC had, by the original Loan Sale Deed agreed to sell, assign, transfer, convey, and deliver the relevant assets and related rights to Kenmare. It was said that the Loan Sale Deed contained commercially sensitive terms and the Deed of Confirmation and Acknowledgment stated that the parties wished to acknowledge and confirm and agree that the assets and all related rights insofar as they related to the plaintiffs as borrowers were sold and transferred to Kenmare.

159. Donnelly J. permitted the defendants to rely on the Deed of Confirmation and Acknowledgment executed during the course of the hearing. She noted that the need for this Deed arose out of her ruling restraining the defendants from relying on a redacted copy of the Loan Sale Deed.

160. In that case, the court found that the fact of the sale of the loans from IBRC to Kenmare was itself an uncontroversial issue which was now being verified by the production of the Deed of Confirmation and Acknowledgment.

161. *Healy v McGreal* was not an amendment of pleading application and the circumstances were entirely different to those in this application. Here the Assignment has been controversial and disputed, both as to its very existence as a validly executed instrument and as to its legal effect, since the commencement of this case. The plaintiffs seek now to address the proof requirements by introducing to the case a new event, namely the execution of the Deed of Confirmation.

Bula/Fyffes

162. The so-called *Bula/Fyffes* model derives from its use in the cases of *Bula Ltd. v. Tara Mines Ltd*. [1997] IEHC 202 and *Fyffes plc v. DCC plc* [2005] IEHC 477. The application of such agreements is of significant benefit to the court and to the parties in terms of the

reduction of time and cost associated with the trial. The parties agree that certain documents, typically documents which have been discovered, can be placed before the court without formal proof and may also agree that those documents can be taken to represent prima facie evidence of the truth of the contents thereof, with the party admitting the documents reserving the right to question any interpretation placed on them, but acknowledging that questions of proof no longer remain in the case as far as concerns those documents.

163. In *RAS Medical Ltd. v. Royal College of Surgeons in Ireland* [2019] IESC, Clarke C.J. discussed the application of the Bula/Fyffes model and identified the importance that there be in any such case clarity about the nature of the agreement. Clarke C.J. continued: -

> *"I . . . emphasise the need for there to be considerable clarity achieved as to the basis on which any agreement to depart from the rules of evidence has been made. Again, any lack of clarity in this regard is only likely to lead to confusion and potential injustice. It is, quite frankly, inappropriate for either party to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented".*

164. Agreements based on the *Bula/Fyffes* model are common in complex cases and in many cases before the Commercial Division of this Court and the court invariably welcomes the entry into such agreements. However, parties are under no obligation to enter into such model agreements. There may be cases in which a refusal to make such an agreement can at a later stage have costs implications. But the starting point is that documents being put into evidence must be proved in the normal way unless an agreement is made in relation to them. The plaintiffs' complaints about the defendants declining to admit the Assignment without formal proof are rooted in a failure to respect that starting point.

Conduct of the parties

165. The jurisdiction under O. 28 r.1 is discretionary. In the exercise of my discretion, I am informed by the conduct of the parties and all the circumstances surrounding their approach to the matter of the assignment of the Cox Contract of Employment.

166. The question of privity of contract as between the first defendant and the plaintiffs has been controversial from the very outset.

167. In the defence originally delivered, the first defendant Mr. Cox denies that he was an employee of any of the plaintiff companies. In response to this the plaintiffs entered into the Assignment of 15 March, 2017.

168. The plaintiffs sought leave to amend the Statement of Claim to plead that Assignment. This application was opposed but granted by the court.

169. In the amended defence, the defendant denies the validity and effect of the Assignment.

170. From the very outset of these proceedings there has been in controversy (a) The question of privity of contract, and (b) the validity and effect of the Assignment.

171. On 11 December, 2019, the plaintiffs invited the defendants to agree on the application of a *Bula/Fyffes* agreement. Only at the commencement of the hearing on 14 January, 2020, did the defendants indicate that they were willing to proceed on the basis of such an agreement, but that certain documents would be excluded from this, notably the Assignment.

172. The plaintiffs complain that it was not until the date of commencement of the hearing that the defendant's replied to this request. In a long running case which has been so vigorously contested at every stage, including interlocutory applications, it is regrettable that the plaintiffs waited until 11 December, 2019, to formally request a *Bula/Fyffes* agreement.

173. In circumstances where the defendants were under no obligation to enter into such an agreement, there is no warrant for the plaintiffs' complaint, repeatedly made, that such an agreement was not forthcoming, at the very least in relation to the Assignment.

174. On Day 3 of the hearing when the Assignment was first referred to in the course of Mr. O'Flynn's evidence, counsel for the plaintiffs stated that they would in due course if required call the necessary witness to prove the Assignment.

175. In the letter from BHK dated 23 January, 2020, they confirmed that a witness from the assignor Carbon would attend court to provide formal proof of the Assignment.

176. After procuring from Arthur Cox a copy of the Assignment showing the impression of the seal of Carbon (Version 4), BHK then returned to making requests for confirmation that the defendants would admit the Assignment without formal proof in their letters of 14 May, 2020, 26 May, 2020, and 2 June, 2020.

177. The BHK letters of 2 June, 2020, 17 June, 2020, and 23 July, 2020, contain the further clarification that a deed bearing the original seal of Carbon had not been located and state that the plaintiffs will rely on the best evidence rule.

178. It was only when repeated requests to admit the Assignment without formal proof were declined that the plaintiffs by letter of 5 October, 2020, introduced the new event of a Deed of Acknowledgment and Confirmation of the Assignment.

179. The plaintiffs' submission that it was not until the start of the trial that they knew that they would have to prove the Assignment carries little weight in circumstances where the defendants were never under any obligation to admit the document and the plaintiffs had no basis to rely on any expectation which they may have had that it would be admitted, having regard to the controversy which already attached to the question of the privity of contract and the question of the validity of the Assignment. The fact that the plaintiffs have encountered difficulty in producing the Assignment means that self-evidently the defendants were acting prudently in insisting on production of the original document.

They would otherwise have admitted the validity of a document, the original sealed version of which the plaintiffs have been unable to produce.

Real issue in controversy

180. The plaintiffs submit that insofar as there was a document executed on 8 October, 2020, and the plaintiffs now seek to rely on it at the trial, that is now a matter which is a real issue in controversy between the parties. This is not comparable to those cases in which an amendment to a pleading is permitted to capture facts that have already been put in evidence or which are already in the case or events or documents which come to light at a late stage which would justify an amendment to the pleading to capture them. The instrument of 8 October, 2020, is a new act of the plaintiffs' making, entered into by the plaintiffs after they have exhausted their efforts to locate an original Assignment sealed by Carbon and after they repeatedly but unsuccessfully pressed the defendants to admit the Assignment into evidence without formal proof.

181. This is the clearest case of an action by a plaintiff seeking to remedy a perceived infirmity in its own evidence long after the opening of the trial and where most of the plaintiffs' witnesses have given their evidence. This cannot on any view be equated to the emergence of a new fact or the discovery that pleadings do not address facts previously asserted.

182. I use the term "perceived infirmity" because this judgment is not an adjudication as to the validity or efficacy of the Assignment of 15 March, 2017. Evidence remains to be adduced on that issue and legal submissions will to be made arising from such evidence.

Prejudice

183. The plaintiffs submit that there would be limited if any prejudice to the defendants by reason of the proposed amendment. They submit that as the proposed amendment relates to a Deed of Acknowledgment and Confirmation of the Assignment and because the Assignment itself is already in the case, it is not likely to lead to the calling of any additional witnesses over and above those which are needed to prove that Assignment. It was also submitted that limited if any additional discovery would arise.

184. The defendants submit that it is not as simple as this. They submit that as insofar as the plaintiffs' standing to pursue the amended cause of action would only arise on 8 October, 2020, the claim is statute barred as regards events before 8 October, 2014. They submit that the plaintiffs can only overcome this obstacle by proving concealment, (s. 71 of the Statute of Limitations, 1957), and that this would necessitate further discovery and witness evidence. It is said that this gives rise to serious prejudice in that no questions around the matter of concealment were put in the course of the cross examination of the plaintiff's witnesses over the course of the first 14 days of the trial and therefore that there may be a necessity to recall certain of those witnesses.

185. I cannot find that the matter would be as straightforward as the plaintiffs suggest or that no prejudice would be suffered by the defendants by reason of the amendment.

Conclusion

186. O. 28, r. 1 RSC permits amendments in any case where the court is satisfied in the exercise of its discretion, that the amendment is necessary for the purpose of determining the real issues in controversy between the parties.

187. The rule has generally been regarded as a liberal rule (*Knowles and Croke*).

188. In a case where the application is made at a late stage, as here, the rule is not to be applied liberally. The court must carefully scrutinise the application.

189. The case has been at hearing for over three weeks and almost all the plaintiff's witnesses have concluded their evidence, save for a witness to be called to prove the Assignment.

190. The plaintiffs opened the case and adduced evidence by reference to a version of the Assignment which was not the version exhibited to the court in the first application for leave to amend which was granted by McDonald J.

191. The plaintiffs sought a *Bula/Fyffes* agreement at a late stage in the final preparations for the hearing of the action. The defendants agreed the application of the Bula/Fyffes model with the exception of the Assignment, which they were entitled to do.

192. It was only after the plaintiffs' efforts to locate the Assignment bearing the original seal of Carbon had failed and after the plaintiffs' efforts to persuade the defendants to agree to admit the Assignment without formal proof had failed that the plaintiffs adopted the new approach of procuring from Carbon a Deed of Acknowledgment and Confirmation.

193. The proposed amendment seeks not to cure an error or imperfection in the pleadings to address a matter in controversy in the case, but at a late stage and by a different method to mitigate objections by the defendants relating to proof of the Assignment pleaded. To grant leave for this amendment would be to permit a chaotic approach to the conduct of litigation, such as Clarke J. disapproved in *Moorview*.

194. At the trial of the action, on the pleadings as they stand, the court will be required to adjudicate on the validity and effect of the Assignment. Evidence will be adduced and legal submissions will be made and the plaintiff is not precluded by anything contained in this judgment from relying on that Assignment.

195. The contents of the letters of 14 May and 26 May, 2020, following as they did from the statement on Day 14 of the trial that the plaintiffs would seek to locate the Assignment duly executed by Carbon, and containing as they did also an invitation to then admit the Assignment into evidence without further proof, were misleading, but not intentionally so. The defendants' solicitors did not permit themselves to be misled. Instead they properly persisted with their request for inspection, and thereafter have maintained their position that they are entitled to insist on the Assignment being proved.

196. I accept the evidence of the plaintiff's solicitor, Ms. O'Brien and I find that she did not intend to mislead the court at the first application for an amendment (McDonald J.), in the

trial before me on Days 1 and 3, or that she intended to mislead the defendants in correspondence after the case had been adjourned.

197. I have concluded that I should exercise my discretion to refuse the application.