THE HIGH COURT
COMMERCIAL

[2020] IEHC 543
2018/10742 P

BETWEEN

BETTY MARTIN FINANCIAL SERVICES LIMITED

PLAINTIFF

AND

EBS DAC

DEFENDANT

JUDGMENT of Mr. Justice Quinn delivered on the 29th day of October 2020

1. This judgment relates to a contested motion for discovery of documents and an application by the defendant for an order for requiring the plaintiff to provide security for the costs of discovery.

2. The proceedings arise from the termination by the defendant of certain Tied Branch Agency Agreements between it and the plaintiff. The plaintiff claims that the termination was in breach of those agreements and breach of duty and statutory duty.

Background

3. The plaintiff operated tied agencies for the plaintiff at branches in Athlone, Longford and Lucan pursuant to three agreements referred to as "Tied Branch Agency Agreements", one for each branch. The agreements were executed on 20 April, 2011, and were expressed to be for a term commencing on 27 August, 2009, and which would expire following the giving of notice in accordance with Clause 15 of the agreement.

4. Clause 15.1 provided for termination of the agreement on the giving of three months' notice by the plaintiff or twelve months' notice by the defendant of their respective intention to terminate the agreement. Clause 15.1(b) was the provision invoked by the defendant in terminating the agreement and it provides that the term would expire

   "(b) Twelve months from the date on which the Society gives notice to the Tied Branch Agent of its intention to terminate this Agreement".

5. Clause 15.3 provided also for the immediate termination of the agreement by the defendant, without notice, on the occurrence of certain events including failure by the plaintiff to comply with the provisions of the agreement, insolvency, dishonesty, bad faith etc.

6. Pursuant to the agreements the plaintiff was appointed on a non-exclusive basis to conduct certain business as agents for the defendant including acting as a deposit agent in accordance with the terms of the agreement. The agreement outlined the scope of the appointment and conferred a series of obligations on the agent in terms of the manner in which it conducted its business, compliance with the requirements of the defendant, standards and procedures, responsibility for staff, handling of money, and regulatory compliance.

7. Within the scope of the agency was an authority to the plaintiff to negotiate the sale of financial products on behalf of the defendant.

8. The plaintiff claims the following:

    1. That prior to entering into the Tied Agency Agreements the defendant represented to it that the Tied Agency Agreement would not be terminated save for good cause such as insolvency or gross misconduct. It is claimed that the parties entered into a collateral agreement to this effect.

    2. That the Tied Agency Agreement also included implied terms including the following:

        (a) That the defendant would not request or pressurise the plaintiff to sell or provide any products or services otherwise than in accordance with statutory and regulatory provisions applicable to the agency business.
        (b) That the defendant would not request or pressure the plaintiff to engage in unethical or unprofessional behaviour.
        (c) That the defendant would not request or pressure the plaintiff to miss-sell investment savings and insurance related products.
        (d) That the defendant would not terminate the Tied Agency Agreement capriciously and/or without a bona-fide commercial reason and/or for an improper purpose.

9. The plaintiff claims that since in or about 2010 the regional manager of the defendant responsible for its three branches, Mr. Tim Gleeson applied pressure on the plaintiff and on other tied agents to engage in conduct which it claims was unlawful, in breach of regulatory requirements, unprofessional and unethical. In particular, it claims that Mr. Gleeson pressured the plaintiff to engage in the miss-selling of financial products. It alleges that in training which he provided to the staff of the plaintiff Mr. Gleeson advised and encouraged the staff to engage in the miss-selling of financial products by selling products to customers which were unsuitable to their needs. The plaintiff claims that Mr. Gleeson in the course of this training and generally directed that appropriate and necessary risk profile questions were not asked of prospective customers, that he directed the answers to risk profile questions to be ignored and that efforts be made to sell products to customers which were not suitable to their risk profile.

Termination of the agreement and the claims of the plaintiff

10. The plaintiff claims that it refused to engage in such conduct and that because of this refusal the defendant on the 18 May, 2017, purported to give notice of termination of the Tied Agency Agreements pursuant to Clause 15.1 without giving any reason for the termination.

11. The plaintiff claims that after it received this notice Mr. Declan Martin, a director of the plaintiff, met with Mr. Des Fitzgerald, the Managing Director of the defendant, and complained to him about the conduct of Mr. Gleeson and made full disclosure of these

matters. The plaintiff claims that this constituted a protected disclosure for the purposes of the Protected Disclosures Act, 2014.

12. The plaintiff claims that after this meeting the notice given on the 18 May, 2017, was withdrawn, although the defendant says that it was only suspended.

13. The plaintiff claims that on 23 June, 2017, (a date which is disputed) the defendant made contact with the plaintiff to arrange a meeting. The plaintiff claims that this was done at this particular time in the context of the proposed initial public offering of AIB Plc, which was the parent company of the defendant, and with a view to ensuring that in that context there was no public disclosure of allegations of miss-selling. The plaintiff claims that it was represented to it that the matters complained of would not reoccur. It claims also that the conduct of Mr. Gleeson complained of continued.

14. In August 2017, AIB Group Internal Audit conducted an investigation into the complaints and in December 2017 a report was issued. A copy of the report or a summary thereof was given to the plaintiff on 15 February, 2018.

15. The plaintiff claims that the defendant incorrectly and wrongfully asserted that the report exonerated Mr. Gleeson. It claims that the report was not independent and was deficient in that no attempt was made to obtain information from staff of the plaintiff or from other tied agents to ascertain the veracity of the complaints, and that the report cannot be relied upon.

16. On 19 February, 2018, the defendant gave notice to the plaintiff, again pursuant to Clause 15.1 of the agreements, of termination of the agency agreements, such termination to take effect on 19 February, 2019.

17. The plaintiff makes a number of complaints of alleged infirmities in the form of the notice of termination. It says that only one notice was given purporting to apply to all three agreements and that the notice was not delivered to the correct address provided for in the agreement. Of more central importance in the case is the claim by the plaintiff that the termination was in breach of the express and implied term of the agreements to the effect that the agreement would not be terminated otherwise for reasons of insolvency or misconduct. It claims that the termination was in direct retaliation for its refusal to engage in unlawful conduct, was intended to punish the plaintiff for making its complaints about Mr. Gleeson, and constituted a penalisation of the plaintiff for making a protected disclosure. It is claimed also that the termination constitutes a breach of the provisions of Directive 86/653/EEC ("the Commercial Agents Directive"), the European Union (Commercial Agents) Regulations, 1994 (S.I. No. 33/1994) and EC (Commercial Agents) Regulations, 1997 (S.I. No. 31/1997) (collectively "the Commercial Agents Regulations").

18. The plaintiff seeks declarations that the notice of termination of the 19 February, 2018 is invalid and of no legal effect and orders restraining the defendant from acting on foot of the notice of termination.

The defence

19. The defendant denies that the plaintiff was a commercial agent within the meaning of the Commercial Agents Regulations. It denies that prior to entry into the agreements the defendant represented to and assured the plaintiff that the agreements would not be terminated save for good cause such as insolvency or gross misconduct. It relies on Clause 15.1 (b) and says that this clause entitled the defendant to terminate the agreements on giving 12 months' notice without cause or reason.

20. The defendants deny all of the allegations regarding the conduct of Mr. Gleeson.

21. The defendant denies that the notice of termination was served in retaliation for a refusal of the plaintiff to engage in unlawful or unethical conduct or in order to punish the plaintiff for making a complaint about such conduct or the application of pressure to engage in such conduct.

Injunction

22. In December 2018 the plaintiff applied for an injunction to restrain the termination of the agreement pending the hearing of the action. An interlocutory order granting such an injunction was granted by Jordan J. on 13 February, 2019.

23. The defendants appealed against the injunction. The appeal was dismissed by the Court of Appeal.

Applications for discovery

24. In accordance with directions of the court each of the parties has issued motions for discovery of documents. The plaintiff has agreed to make discovery in the form sought by the defendant. For completeness and context, I shall identify the categories of discovery which the parties have each agreed to make, before turning to those which are in dispute and the subject of this judgment.

Defendant's motion for discovery

25. The defendant sought discovery of four categories of documents. The plaintiff has agreed to make discovery of all documents within these categories, as follows: -

    1. All notes, memoranda, correspondence or other documentation relating to or evidencing:

        (a) the purported representations made by the servants or agents of the defendant to the effect that the Tied Agency Agreements the subject matter of the proceedings would not be terminated save for good cause such as insolvency or gross misconduct; and/or
        (b) the collateral contract alleged by the plaintiff to have been created on foot of the said representations.

    2. All notes, memoranda, reports, recordings, correspondence or other documentation relating to or evidencing the plaintiff's allegations of misconduct on the part of the defendant, its servants or agents, and in particular its allegations that the

defendant sought to pressurise the plaintiff, its servants and agents into engaging in the miss-selling of financial products.

3. All notes, memoranda, reports, recordings, correspondence or other documentation evidencing complaints allegedly made by the plaintiff concerning the alleged misconduct of the defendants, servants or agents and in particular Mr. Tim Gleeson, prior to 18 May, 2017.

4. All documents evidencing the intention of the plaintiff and the defendant to create the relation of landlord and tenant in respect of the occupation by the plaintiff of the premises at Athlone, Longford and Lucan.

Plaintiff's motion for discovery

26. The plaintiff sought discovery of eight categories of documents, set out fully below.

27. As regards categories (d), (e), (f), (g) and (h), the defendant has agreed to make discovery, subject to the condition that the plaintiff would first provide security for the costs of making such discovery.

28. As regards categories (a)and (b) the defendant has offered a modification of the relevant categories and says that it is willing to make discovery of the categories as so modified, again subject to the condition that the plaintiff provides security for the costs of doing so. These categories are not agreed.

29. Category (c) was not pursued by the plaintiff at the hearing.

30. The categories of documents sought are as follows: -

(a) All documents recording, evidencing or relating to any communications and meetings that took place between any representatives of the plaintiff and any representatives of the defendant in the period from May 2017 to July 2017 and any representations made by or on behalf of the defendant during those communications/meetings.

(b) All documents relating to the AIB Group Internal Audit investigation.

(c) All documents recording, evidencing or relating to the reasons for the service of notices of termination on other Tied Agents of the defendant during the period from 2010 to 2018. (this category is not pursued by the defendant)

(d) All documents recording, or evidencing any representations made by Gerry Middleton or Tony Moroney on behalf of the defendant in the period from 1 January, 2011, to 20 April, 2011, to the effect that the Tied Agency Agreements would not be terminated save for good cause such as insolvency or gross misconduct.

(e) All documents recording, evidencing or relating to any communications by or on behalf of Mr. Tim Gleeson of the defendant to the plaintiff and/or other Tied Agents from the period from 2010 to 19 February, 2018, in relation to the sale of savings

and investment products, the training of staff to sell such products and the authorisation of staff to sell such products.

(f) All documents recording, evidencing or relating to any complaints made by or on behalf of the plaintiff or any other Tied Agent in relation to Mr. Gleeson in the period from 2010 to 2018.

(g) All documents evidencing or recording the reason(s) for the decision to serve the notice of termination of the 18 May, 2017.

(h) All documents evidencing or recording the reason(s) for the decision to serve the notice of termination of the 19 February, 2018.

31. The application for discovery is grounded on an affidavit sworn by the plaintiff's solicitor Mr. Cathal O'Sullivan on 6 November, 2019.

32. Mr. O'Sullivan exhibits the correspondence requesting voluntary discovery and exchanges between the parties relating thereto. In particular, by letter dated 14 October, 2019 the defendant offered to make discovery of all but two of the categories originally sought by the plaintiff, in modified form. I shall turn now to the outstanding issues which relate only to categories (a) and (b) of the plaintiff's notice of motion.

Category (a)

33. This category as requested is as follows:

> *"All documents recording, evidencing or relating to any communications and meetings that took place between any representatives of the plaintiff and any representatives of the defendant in the period from May 2017 to July 2017 and any representations made by or on behalf of the defendant during those communications/meetings."*

34. The defendant offered a more limited category as follows:

> *"All documents recording or evidencing any communications or meetings that took place between Declan Martin of the plaintiff and Des Fitzgerald and/or Robert Bree of the defendant in the period from 29th May, 2017 to 10th July, 2017 insofar as those documents were created in the period 29th May, 2017 to 31st July, 2017."*

35. There are two differences between the parties in relation to this category.

Scope of category

36. The defendant's proposed category would limit the discovery to evidence of communications between Mr. Declan Martin of the plaintiff and two named representative of the defendant namely Mr. Des Fitzgerald and Mr. Robert Bree. In proposing this limitation, the defendant says that the only contacts or communications between the parties during the period referred to and which are pleaded in the statement of claim are contacts between Mr. Martin on the one hand and Mr. Fitzgerald and Mr. Bree of the defendant on the other hand.

37. The defendant is correct in noting that in the statement of claim specific reference is made to a contact firstly between Mr. Martin and Mr. Fitzgerald and secondly to a contact between Mr. Bree and Mr. Martin.

38. The plaintiff says that this limitation would confine the discovery to contacts between those named persons and says that the category as originally sought would have captured any documents evidencing other meetings including communications which the plaintiff says took place between a representative of the plaintiff Mr. Greg Kavanagh and representatives of the defendant. In Mr. O'Sullivan's affidavit he refers also to contact between Mr. Kavanagh and two other named representatives of the defendant namely Mr. Bryan O'Connor and Mr. John Phillips.

39. The defendant says that the category must be identified in terms of relevance by reference to the case as pleaded and relies on the fact that only contact with Mr. Fitzgerald and Mr. Bree is mentioned in the pleadings. It refers also to the judgment of McCracken J. in *Hannon v Commissioner of Public Works and Others* [2001] IEHC 59, where he states as follows:

> *"Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forwards in Affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that Order 31 and Rule 12 of Superior Court Rules specifically relates to discovery of documents 'relating to any matter in question therein'."*

40. In the original letter requesting voluntary discovery on 9 September, 2018, the reason given by Messrs. O'Sullivan and Associates for the request in respect of this category was referable specifically to paras. 13 and 14 of the amended statement of claim.

41. Paragraph 13 refers specifically to a meeting held on 29 May, 2017 between Mr. Declan Martin of the plaintiff and Mr. Des Fitzgerald, managing director of the defendant.

42. Paragraph 14 refers to a contact between Mr. Martin of the plaintiff and Mr. Robert Bree of the defendant.

43. In circumstances where the plaintiff took the care to specifically refer to those contacts and the nature and content of these contacts is denied in the defence the defendant says that it is not open now to the plaintiff to claim, as it does in the grounding affidavit for this application, that another sequence of communications took place at this time between other parties.

44. Although para. 15 of the amended statement of claim is not referenced in the context of the request for this category, it forms a "*continuum*" from paras. 13 and 14 and refers to Mr. Gleeson on behalf of the defendant having "*continued to request and pressure the plaintiff to engage in conduct which was unlawful".* Such material or documents

evidencing any such communications would clearly be covered by category (e) (see para. 30 above) to which the defendant has consented to make discovery.

45. The plaintiff submits that it cannot have been expected in the statement of claim to plead each and every meeting or contact between the parties. That is correct, but the pleas in paragraphs 13 and 14 are very specific and this element of the claim is clearly grounded on the contacts recited therein. It seems to me that the reliance on the reference to other contacts in the affidavit of Mr. O'Sullivan is precisely the form of widening of the claim by a grounding affidavit beyond the pleas made in the statement of claim which was referred to in the judgment of McCracken J. in *Hannon* and should not be permitted.

Duration of the discovery

46. The second difference for this category is that the defendant sought to limit the category to documents created in period 29 May, 2017, to 31 July, 2017.

47. The principle reason given for this limitation is that the defendant states that proceedings had been threatened by the plaintiff on 2 June, 2017, and therefore communications post the end of July 2017, as well potentially as those in July 2017, "*are highly likely to be privileged".*

48. The fact that documents after the end of July may attract privilege does not mean that they should not be discovered even if privilege is asserted in respect of them. Accordingly, I do not consider that the limitation to documents created within that window is appropriate.

49. The plaintiff has offered to limit to end of November 2017 the end period of the date within which such documents must have been created. This limits the time period to an appropriate degree.

50. I shall order in respect of this category that the defendant make discovery of the following:

> *"All documents recording or evidencing any communications or meetings that took place between Declan Martin of the plaintiff and Des Fitzgerald and/or Robert Bree of the defendant in the period from 29th May, 2017 to 10th July, 2017, insofar as those documents were created in the period 29th May, 2017 to 30th November, 2017."*

Category (b)

51. The plaintiff seeks discovery of the following:

> *"All documents relating to the AIB Group Internal Audit investigation".*

52. In correspondence the defendant offered to make discovery of a category of documents as follows:

> *"All documents considered by AIB Group Internal Audit in the course of the investigation of the impugned conduct of Mr. Gleeson."*

53. In the course of the hearing the defendant confirmed that this category will include the full report of AIB Group Internal Audit, together with appendices to that report.

54. In submissions, the plaintiff indicated that it would accept a modification of the defendant's modified description of the category to extend to documents "*considered and/or generated by AIB Group Internal Audit"*. This would have the effect of extending the scope of discovery to the working papers of Group Internal Audit.

55. In his grounding affidavit Mr. O'Sullivan states that discovery of this category of documents is relevant and necessary to establish what investigations were carried out by the AIB Special Investigations Unit, a division of Group Internal Audit, what information was uncovered, what views were expressed by Irish Life, what other investigation was conducted in accordance with fair procedures and whether the outcome was pre-determined. He says that the revised category proposed by the defendant would exclude working papers of the unit.

56. In the statement of claim it is alleged by the plaintiff that the defendant has contended that the report of the defendant's internal audit found that the allegations made by Mr. Martin were not substantiated and that this was incorrect. The plaintiff says that the report "*records that it was not possible to determine whether cold calling took place and it is noted that Mr. Gleeson coached the staff of the plaintiff and other tied agents in relation to the sale of investment products and Irish Life took issue with how its products were being sold*".

57. The defendant asserts that the report concluded that there was no evidence to support the allegations made against Mr. Gleeson and denies that the report found that Mr. Gleeson had coached staff and other staff of the plaintiff in relation to sale of investment products and that Irish Life took issue with how its products were being sold.

58. The defendant denies that the report is fundamentally flawed, not independent and deficient.

59. In the context of this motion the defendant submits that it will not be a matter for this court at the trial of these proceedings to make findings as to the adequacy or otherwise of the investigation. It submits that this will not be a form of judicial review of the conduct of that investigation or of the report generated by the investigation.

60. Without prejudice to its assertion that it was entitled to invoke Clause 15.1(b) to terminate without reason, the defendant submits that whilst the investigation related to allegations which are the subject matter of these proceedings, the trial judge will himself hear evidence of the allegations made concerning misconduct and will be required to determine whether these allegations had been made out and if so whether they or the complaints arising therefrom were the reason for serving the notice of termination.

61. The plaintiff acknowledges that this action is not a judicial review. However, it submits that insofar as the purpose of the audit investigation was to investigate the very same

allegations which are at issue in the proceedings, and insofar as the defendant has relied on that investigation to assert that those allegations are not grounded, the report and documents generated in the course of the report are relevant and necessary for the fair disposal of the proceedings.

62. Although no evidence was given as to the range of data custodians which would be relevant under this category, the plaintiff submits that this cannot be an unduly burdensome category and that the group of data custodians in respect of whom searches would be necessary must of necessity be limited to those with knowledge of the allegations themselves.

63. In so far as the Report of Internal Audit and its contents are relevant to the matters at issue on the pleaded case, the material documents are the Report itself and documents "considered" in the conduct of the investigation. The subcategory of "*all documents considered by AIB Group Internal Audit*" embraces such material as would enable the plaintiff advance its case under this heading.

64. No good reason has been given to expand the category of documents to all documents *"generated by"* the investigation. Documents so *"generated"* may, as Mr. O'Sullivan says in his affidavit, be informative of the views expressed by members of the investigation team, which in turn may be informative if the court were embarking on an enquiry in the nature of a judicial review. However, I accept the defendant's submissions that the purpose of this action is not to conduct such a inquiry.

65. Accordingly, I shall order that in respect of this category the defendant make discovery of the following:

> *"All documents considered by AIB Group Internal Audit in the course of the investigation of the impugned conduct of Mr. Gleeson, together with the Report of AIB Group Internal Audit and appendices thereto."*

Security for costs

66. Order 31 r.12(2) of the Rules of the Superior Courts provides that on the hearing of an application for an order for discovery the court may make an order for discovery "*on terms as to security for the costs of discovery…".*

67. The defendant brought an application for an order under this sub rule. The application is grounded on an affidavit of Zelda Cunningham sworn 18 November, 2019. Ms. Cunningham is a solicitor at the legal department of Allied Irish Banks Plc, of which the defendant is a subsidiary company.

68. No affidavit was sworn in reply to the affidavit of Ms. Cunningham.

69. Ms. Cunningham says that the discovery which the defendant was agreeable to make, subject to the provision of security for costs, namely categories (d) to (h) in the plaintiff's motion for discovery is extensive. She says that in order to make that discovery in the region of 7.25 million separate files, the majority of which are documents from nine

different sources within the defendant will have to be processed. She continues that if the plaintiff were to obtain an order granting discovery in the terms sought in the three additional categories, namely (a), (b) and (c), the defendant estimates that this would increase the quantity of documents to 15.5 million documents and would involve gathering documentation from approximately nineteen different sources within the defendant.

70. Ms. Cunningham refers to the internal process required to comply with any order for discovery and the process approved by The Commercial Litigation Association of Ireland. She says that once sources of data are identified and collected it would be necessary to engage independent professionals Grant Thornton to oversee the processing review and analysis of the data to identify and gather the relevant documents for the purpose of making the discovery.

71. Ms. Cunningham says that in relation to the discovery which the defendant had offered to make Grant Thornton had advised that the cost would be in the region of €266,670, and that if the plaintiff is successful in obtaining an order for the additional three categories the cost will be in the region of €488,730.

72. Ms. Cunningham then exhibits a report from Grant Thornton dated 15 November, 2019, which contains these estimates.

73. In their report Messrs. Grant Thornton observed that it may be possible to use technology assisted review ("TAR") techniques which could generate certain cost efficiencies against these amounts, potentially in a range between 20% and 35% if the larger extended data set is to be reviewed.

74. Ms. Cunningham asserts that the financial position of the plaintiff as disclosed in its then last available accounts filed at the Companies Registration Office show that the plaintiff made for the year ended 31 January, 2018, a profit after tax of €19,625 and that its total assets less current liabilities as of the same date were valued at €120,625.

75. Ms. Cunningham states that these financial statements show that even if the tied branch agency agreements were not terminated the plaintiff would not be in a position to pay the costs incurred by the defendant in making discovery should an order for costs be made in its favour. She says that the ability of the plaintiff to pay such costs would be even more remote in the event that the defendant succeeds at the trial of the action and the agreements are terminated.

76. Ms. Cunningham says that it has been the position asserted by the plaintiff that the termination of the agreement would lead to the total collapse of its business. She refers to statements made to this effect on affidavit by Mr. Martin in the injunction proceedings, a statement repeated on its behalf at the hearing of the appeal from the injunction.

77. Ms. Cunningham says that she believes that the defendant has a strong defence to the plaintiff's claim and she refers in particular to what she describes as three elements of the claim, namely: -

(1) that certain terms were implied into the "no fault" termination clause of the contract;

(2) that there was a collateral agreement entered into as a result of representations made on behalf of the defendant at the time the Tied Agency Agreements were entered into despite the existence of an entire agreement clause in the tied branch agency agreements which include confirmation that no representations had been relied upon and

(3) that the termination notice was defective.

78. Counsel referred the court to only two cases in which the matter of security for costs of discovery had been considered, namely *Framus Ltd v CRH Plc* [2004] IESC 25 and *Quinn v Irish Bank Resolution Corporation Ltd* [2012] 4 IR 365.

Framus Ltd v CRH Plc [2004] IESC 25

79. In *Framus*, Herbert J. made an order requiring the plaintiff to provide security for costs, and on appeal the amount of a security to be provided was reduced by the Supreme Court. Although there was a significant overlap with the principles which would apply to an order for security for costs of the proceedings as a whole, in *Framus* Herbert J. considered the principles which should apply to an application for security for costs and identified a number of matters which he considered relevant, emphasising that they were not meant to be an exhaustive list.

(a) "Without attempting to prejudge in any way the ultimate outcome of the proceedings – and I cannot overemphasis this warning – the apparent strength on the pleadings and affidavits of the case of the party seeking discovery of documents having regard to the probable ultimate incident of the costs of discovery, on the basis that costs, including costs of discovery generally follow the event.

(b) Such evidence as may be before the court on affidavit of the burden, in terms of time and expense which the making of the order for discovery of documents would impose on the subject party. The greater that burden the more favourably the court should consider a request for discovery of documents.

(c) The probable extent (if any) of the detriment likely to be suffered by the party seeking discovery should that party be genuinely unable to provide security but bearing in mind that the sole purpose of discovery of documents is to enable the party seeking it to advance an existing case or to defeat the case of the other party and is not to enable the party seeking discovery to search for or set up a case.

(d) When the party seeking discovery of documents but appearing on application for security for the costs of that discovery asserts that its ability to provide security is

due solely or principally to the very actions of which complaint is made in the proceedings so that the party seeking security is in effect attempting to benefit from that party's own alleged wrong, the Court should require prima facie proof of both these matters from the party opposing the application for security…

If the party opposing an application to provide such security for costs of discovery is an incorporated or unincorporated body the court in my judgment is entitled to a proper and sufficient explanation as to why the person or persons in fact conducting the proceedings in the name or on behalf of that body is unable to provide or to obtain such security on behalf of that body. The party seeking to make that argument must further establish a prima facia case that the sole or principle cause of that party's lack of means and lack of free assets are the actions of the other party the subject matter of the suit…

(e) The proportion which the costs of discovery of documents are likely to bear to the probable total costs of the entire proceedings regardless of the ultimate outcome. The greater this is the stronger would appear to be the case for security to the costs of discovery.

(f) The strength of the case for discovery and the stage of the proceedings at which discovery is sought.

(g) Whether the case raises an issue of major public importance and the discovery sought is relevant to that issue. In such circumstances the court should be very slow to make an order for security for costs of discovery lest it inhibit or delay the determination of the issue.

(h) Whether an order for security of costs has been made pursuant to the provisions of O.29 of the Rules of the Superior Courts or s. 390 of the Companies Act, 1963."

80. In that case Herbert J. rejected a submission made on behalf of the plaintiffs that a failure to obtain discovery would amount to a bar to the plaintiff's claim or that it would "*seriously undermine*" that claim. Noting that O.31 required the court to be satisfied that the relevant discovery being permitted or ordered was necessary for fairly disposing of the case and for the saving of costs, he continued that "*the court is also entitled to have regard to the fairness of imposing a term as to security for the costs of that discovery*".

81. In the Supreme Court, Murray J. observed that having regard to the dearth of authority on the application of O.31 r.12 (2) regarding security of costs the court should approach the matter on the basis that issues similar to those which arise in an application concerning s.390 of the Companies Act, 1963 (now s. 52 of the Companies Act, 2014) arise and are therefore relevant in deciding an application.

82. Murray J. broadly approved of the approach taken by Herbert J. in the High Court with one modification. Herbert J. had approached the matter from the perspective that there would be a significant difference between the approach to security for costs of an entire

proceedings to the approach to be taken in relation to security for costs of discovery only. Murray J. continued: -

> *"Certainly there are distinctions to be made between the effect of an order for security for costs where this might amount to an obstacle to a party having access to the courts in respect of his or her substantive proceedings and one which may have the apparently more limited effect of simply being an obstacle to obtaining discovery. This may be a material distinction in the circumstances of a particular case, but in a case where discovery was essential to a party's ability to make a claim or to defend an action the implication may be substantially the same. In those circumstances, it would be a distinction without a difference. In short, while it is a matter for the party concerned to choose whether or not they seek discovery it may be the only choice open to them if they are to establish their case. Moreover, discovery is granted on the premise, as it was in this case, that discovery is necessary for the fair disposal of the issues between the parties. That is also an important consideration in whether or not to grant an order for security for costs and if so the amount of same. That is not to say that the sole fact that the granting of an order for security for costs of discovery would be an obstacle to a party proceeding with its action or its defence would in itself be a bar to an order for security for costs of discovery, but it is a factor to be taken into account, at least in fixing the amount of the security, because, as Kingsmill Moore J. pointed out, if too large it may defeat an honest and substantial claim because the plaintiff cannot find the necessary security."*

Quinn v IBRC [2012] IEHC 334

83. In *Quinn v IBRC* Moriarty J. considered case law regarding security for costs generally and considered the judgment in *Framus*. He then cited with approval the considerations relevant to security for costs of discovery which he said were summarised in Abramson, Dwyer and Fitzpatrick on Discovery and Disclosure, as follows:

(1) The apparent strength of the case of the party seeking discovery, having regard to the pleadings and affidavits.

(2) Any evidence before the court of the burden, in terms of time and expense, of complying with an order for discovery.

(3) The likely detriment to the party seeking discovery should he be unable to provide security for costs.

(4) Any evidence that the inability to provide security for costs is due solely or principally to the actions of which complaint is made in the proceedings.

(5) The likely proportion of the costs of the proceedings which will be attributable to the costs of discovery.

(6) The strength of the case for discovery and the stage of the proceedings at which it is sought.

(7) Whether discovery sought is relevant to any issue of major public importance raised in the proceedings or

(8) Whether an order for security for costs of the proceedings themselves has been made pursuant to O.29 or s.390.

Strength of the case for discovery

84. Many of the categories of discovery sought on both sides, have been the subject of agreement and therefore not the subject of close scrutiny by this court on the application for discovery, apart from the two contentious categories on which I have ruled. (See paragraphs 50 and 65 above). There appears to have been no disagreement at any fundamental level that this was an appropriate case in which extensive discovery should be made. The defendant contends that the breadth of the discovery sought by the plaintiff is wider than is necessary, having regard to its view on the core issues to be determined in the case. The defendant submitted that its agreement to make discovery of certain categories of documents, albeit subject to the condition of the provision of security for costs of such discovery, did not necessarily mean that each and every one of those categories of documents was wholly relevant and necessary for the fair disposal of the proceedings. When pressed on this subject counsel for the defendant suggested that its agreement to make discovery in relation to certain categories was made firstly subject to the conditionality as to the provision of security, and secondly because the defendant was advised or formed the view that if the issues were further litigated, as has occurred, a court could adopt the view that the categories concerned fell within the traditional tests concerning relevance and necessity.

85. I have adopted the approach that once the defendant agreed certain categories of documents of discovery, albeit on the condition of provision of security therefore, this court should treat that agreement as recognition that the categories are relevant and necessary for the fair disposal of the issues in the proceedings. To say otherwise is to burden the parties, and potentially the court itself, with unnecessary documents, which would generate inappropriate levels of cost and time. The question of whether the defendant is entitled to security for the costs of making such discovery is a separate matter. I shall consider that issue by reference to the principles identified in Framus v CRH and IBRC v Quinn.

Is there a prima facia defence?

86. No submission was made to the court that the defendant does not have a *prima facia* defence. There was extensive argument between the parties as to whether the court at trial will firstly need to consider the defendant's argument that Clause 15 (1) (b) of the Tied Agency Agreement conferred an absolute right to terminate without cause, in which case the defendant says that the court should take the mater no further, or whether the court needs to firstly consider the factual allegations made regarding the application of pressure to miss-sell and whether the plaintiff's complaints caused the defendant to penalise it by terminating the agreement. It is not for the court on this application to predetermine the sequence in which those issues should be considered. Whichever

sequence of issues is followed, the plaintiff has not disputed that the defendant has made out a *prima facia* defence.

Is the plaintiff unable to meet an order for costs made against it?

87. The assertions of Ms. Cunningham as to the prospect that if the plaintiff fails in the proceedings its business will collapse and that it will be unable to discharge any order for costs, has not been contradicted by any evidence.

Special circumstances

88. The special circumstance most commonly invoked where a plaintiff seeks to resist any order for security for costs is that its inability to meet such an order for costs derives from the actions of the defendant complained of in the proceedings.

89. The termination of the Tied Agency Agreements has not come into effect having regard to the injunction granted pending the trial. Therefore, its current financial status has not been said to be attributable to the service of the notice of termination.

90. It is not in dispute that the trading profits last reported by the plaintiff and the state of its balance sheet in accordance with the last filed financial statements are such that if the costs awarded against it, insofar as they relate to a discovery, were even significantly lower than the amounts estimated by Grant Thornton and perhaps even as little as one half of that amount, the plaintiff would be unable to meet those costs. The risk of that inability is heightened if the termination of the Tied Agency Agreement comes into effect, but its financial status as illustrated by the last exhibited financial statements is sufficiently marginal that it cannot make the case that the inability to meet the costs is attributable to the actions of the defendant. Nor has the plaintiff pressed such a position on the court.

Issue of major or substantial public importance.

91. The plaintiff submitted that the court should take into account that the case engages matters of major public importance. It says that the allegation of systematic miss-selling of unsuitable financial products to large number of customers including vulnerable persons, by a subsidiary of AIB, is a serious matter of public concern.

92. The plaintiff says that in the case as now pleaded the allegations extend not only to the plaintiff's tied agency but to other tied agents, in respect of whom affidavits were relied on at the injunction proceedings. The allegation that other tied agents were subjected to the same pressure to engage in miss-selling was introduced in an amended Statement of Claim. The defendant objects to any claim being made in relation to other tied agents and says that no leave was sought or obtained to make such an amendment. No amendment application was before the court. The plaintiff submits that it is entitled in a civil proceeding to introduce evidence of similar conduct by the defendant. Even if such evidence were permitted at the trial, which is also a separate question having regard to the objections made in the Defence, this can only be in the context of advancing the claim between the parties to this case and, for the reasons stated below, is not sufficient to elevate this case to one of such public importance as to justify refusing to order security for costs of discovery.

93. The plaintiff refers also to affidavits exchanged in the interlocutory injunction proceedings including certain acknowledgments it says have been made by Mr. Fitzgerald on behalf of the defendant that if the matters alleged were proven they would have disclosed criminal offences.

94. Reference was also made to a discussion of the matter before a meeting of a Joint Oireachtas Committee and that the miss-selling of financial products generally is a matter of public concern and significance.

95. The defendant says that the allegations have already been debated in the public forum of the Joint Oireachtas Committee and the defendant is not "*hiding*" from questions concerning such allegations. It submitted that the function of this court on a trial of the issues between these parties is not to take on the role of a "*public investigator*".

96. The plaintiff submitted that there is not before the court on this application any direct evidence as to investigations by the Central Bank or other regulators.

97. The core allegation by the plaintiff is that the defendant terminated the agreements in retaliation for complaints made by the plaintiff regarding pressure applied to mis-sell financial products. The core of the defence is that these allegations were false, that in any event they were not the reason for the termination, and that Cl. 15.1(b) entitled the defendant to terminate the agreement without cause or reason. The importance of these issues is unique to the parties in this case. Whilst the allegations may be of potentially wider interest, the issues to be determined between these parties – which concern the terms of the agreement, claims of implied terms and collateral contracts, the termination of the agreement and possibly the reasons for that termination – are fact specific to this case and do not raise for determination issues of such importance to the public at large as to justify the refusal of an order for security for costs of discovery on this ground.

The prospect that costs may not follow the event

98. The plaintiff posited a possible scenario in which it could lose the case at trial on the basis only of findings as to the strict effect of condition 15 (1) (b) of the Tied Agency Agreement, and the "entire agreement" clause and yet the court might find as a fact that the allegations regarding pressure to miss-sell financial products were made out. Counsel submitted that if such were the outcome a court may determine that a significant portion of the costs of the action should, at a minimum, not be awarded against the plaintiff and that this possible outcome should inform this court on this application.

99. Of course the trial judge will have discretion as to the award of costs and s.169 of the Legal Services Regulation Act 2015 expressly contemplates the possibility of orders for costs taking account of different outcomes to different issues. Nonetheless, the starting premise must be that if the plaintiff fails at the trial of the action, even by reason of a determination that Condition 15.1(b) absolutely permitted a termination without cause, the costs of the action would be awarded against it. Again, I cannot predetermine the analysis of such an issue, but I conclude that to speculate on the scenario put by the plaintiff would not be appropriate for the purpose of determining this application.

Apparent strength of the case of the party seeking discovery

100. The plaintiff has submitted that there is such extensive evidence before the court of grave wrongdoing alleged in the proceedings that the court should take this into account in the exercise of its discretion and that an order for security for costs of discovery would have the effect of stifling the hearing of an action scrutinising such serious matters.

101. Reference is made to a number of affidavits which were exchanged in the interlocutory injunction proceedings. Counsel referred to the affidavit evidence regarding pressure alleged to have been applied on the plaintiff and on other tied agents to miss-sell unsuitable products to consumers including vulnerable consumers. Reference was made to the Consumer Protection Code 2012 issued by the Central Bank of Ireland and the fundamental duty on firms such as the plaintiff to consider the suitability of products having established the customer's attitude to risk. It was submitted that the degree of pressure which was applied by the defendant to the plaintiff to act in breach of these guidelines is of such a serious nature that the court cannot ignore it in the exercise of its discretion at this stage.

102. Counsel referred to an exhibited extract from the report of AIB Group Internal Audit which includes references to a statement apparently made by Irish Life criticising the conduct of Mr. Gleeson in terms of the form of "coaching" which he applied to servants and agents of the plaintiff.

103. Counsel submitted that the court should take account of the fact that apart from relying on Clause 15 (1) (b) the defendant has never offered any other reason for the termination of the agreement.

104. The defendant says that all of these allegations are vigorously defended and have been robustly opposed in the context of the application for the interlocutory injunction.

105. The allegations made against the defendant, particularly regarding the conduct of Mr. Gleeson, and to the effect that the termination decision was rooted in the complaints made by the plaintiff are serious. However, on this application the court must avoid forming or expressing a view as to the merits of those allegations, having regard to the vigorous defence which is being made by the defendant and that there is clearly a *prima facia* defence. The mere gravity of the allegations cannot of itself be a sufficient ground for refusing security for costs of the discovery when other elements of the test for ordering such security have been met.

106. The defendant submits that by the very same token, the affidavits illustrate that the plaintiff is in a positon to adduce extensive evidence of the core allegation of pressure applied by Mr. Gleeson. Counsel described this as "an abundance of evidence" of such matters and cited such matters as transcripts of meetings with Mr. Gleeson and the affidavits of other tied agents.

107. It was also said that Mr. Declan Martin, the plaintiff's principle witness, was a direct party to discussions from the early stages of the relationship, leading to the signing of the tied

agency agreements. In particular, he says that he himself received the assurance from the defendant that it would never terminate the Tied Agency Agreements except for exceptional reasons such as misconduct or gross misconduct or insolvency.

108. All of this evidence is contested. However, it illustrates and supports the defendant's submission that the plaintiff has a certain volume of evidence already available to it, and it is therefore not established that an order for security for costs of the discovery would necessarily have a "stifling" effect on the action.

Inequality of arms

109. The plaintiff submitted that if the matters to proceed to trial without the court and the plaintiff having the benefit of the documents sought in the categories of discovery sought by the plaintiff this will lead to an inequality of arms at the trial. The effect it is said would be that such inequality would hamper the court in its function of adjudicating as to the facts in the case and can lead to an unjust outcome. Counsel referred to the judgment of the Clarke C.J. *Tobin v. Minister for Defence* [2019] IESC 57 in which he emphasised the importance of discovery to our system of justice.

110. This submission is made uniquely in the context of security for costs of discovery. In a case where the well-established tests for security for costs have been met, the proposition that an order for security for costs of discovery would create such an inequality of arms rests on proving both of the following:

    (i) That the plaintiff would be unable to provide the security; and

    (ii) That the plaintiff would seek to pursue the action to trial without the benefit of access to documents otherwise deemed relevant and necessary for the fair disposal of the action.

111. Although the evidence before the court on this application as to (i) above is that the plaintiff itself does not have the revenue or assets with which to meet an order for costs, no evidence was advanced, either way, as to whether it would be unable to provide security for costs of discovery. Again, this court should not speculate on the plaintiff's inability or ability to provide such security, by whatever means.

112. As to (ii) above, the submissions of both parties illustrate that the plaintiff intends to adduce extensive witness evidence, and it has not been stated definitively that the option of pursuing the matter to trial without access to all documents sought on discovery is excluded by the plaintiff.

Likely proportion of the cost of the proceedings attributable to the costs of discovery.

113. The only evidence before the court on this application as to quantum of the costs is the information contained in the report of Grant Thornton exhibited to the affidavit of Ms. Cunningham. It is acknowledged in that report that the quantum of costs associated with discovery could be reduced if technology assisted review methods were availed of.

114. Ms Cunningham says that "the very significant costs that will be incurred by the defendant in making discovery will be a significant proportion of the overall costs of the proceedings". No estimate has been given in relation to any other element of costs or the likely duration of a trial. In the absence of such evidence, even if the higher estimate of €488,730 were substantially reduced, by as much as half, it would be difficult to say that the costs associated with discovery represent a small or insignificant portion of the total costs of the action.

115. It is unclear from the discussion of this point in the case law as to what weight a court on the hearing of an application for security of the costs of discovery should attach to the question of proportionality. In many commercial cases discovery forms a high proportion of the total costs incurred. In the absence of any other information concerning the likely duration of this trial or the costs likely to be incurred, I cannot make a determination that discovery costs or an order for security for such costs would be disproportionate from the perspective of either party.

Conclusion

116. I have concluded that this is an appropriate case in which to order the plaintiff to provide security for the costs of discovery for the following reasons:

    1. The defendant has made out a *prima facia* defence to the proceedings.

    2. The uncontested evidence before the court on this application is that the plaintiff would be unable of its own resources to meet an order for costs of the discovery.

    3. No case is made that the plaintiff's inability to meet any such costs derives from or is caused by the actions of the plaintiff complained of in the proceedings.

    4. No other special circumstances justifying the refusal of an order for security for the costs of discovery have been made out.

    5. There is no evidence before the court either way to demonstrate whether the making of an order for security for costs would preclude the plaintiff from pursuing the action to trial, with or without the benefit of the categories of discovery sought.

Quantum

117. The only evidence before the court on this application as to quantum of the costs of discovery is the affidavit of Ms. Cunningham and the exhibited report of Grant Thornton. The higher range of the estimate by Grant Thorton includes what they refer to as the "*extended data set*". This is the three then unagreed categories sought by the plaintiff, being (a), (b), and (c) recited at paragraph 30 above. Category (c) is no longer pursued by the plaintiff and no attempt has been made to identify what proportion of the total costs it would represent. It refers to documents "*recording, evidencing or relating to the reasons for the service of Notice of Termination on other Tied Agents of the Defendant during the period from 2010 to 2018.*" At first pass, this has the potential to be extremely wide ranging and therefore there would be no basis to assume that the costs of making

discovery in such a category would be as little as one eighth of the entire costs of discovery.

118. No submissions were made as to the question of quantum, and counsel for the plaintiff suggested that submissions concerning quantum of security for costs should be made only after the court has decided the question in principle as to whether such security should be ordered.

119. Subject to further submissions, I do not propose to invite the parties to adduce further evidence in relation to the matter of quantum, but I shall hear the parties before ruling as to quantum and any other matters relevant to the form of order to be made.