THE HIGH COURT

[2022] IEHC 606

Record No. 2021/ 3509 P

BETWEEN

PATRICK KEARNEY AND KILMONA HOLDINGS LIMITED

PLAINTIFFS

AND

J&E DAVY, T/A DAVY, KYRAN MCLAUGHLIN, TONY GARRY, BRIAN MCKIERNAN, BARRY NANGLE, DAVID SMITH, TONY O'CONNOR, FINBARR QUINLAN, JOSEPH MCGINLEY, FIONA HOWARD, DONAL O'MAHONY, ANTHONY CHILDS, PAT LYSTER, BARRY KING, BARRY MURPHY, EAMON REILLY AND STEPHEN LYONS

DEFENDANTS

Judgment of Mr. Justice Quinn delivered the 2nd day of November 2022 (Discovery of Documents)

1. This judgment relates to applications for orders for discovery of documents pursuant to O. 31, r. 12 (1) issued respectively by the plaintiffs and the defendants.

2. The plaintiffs sought discovery of 47 categories of documents, many of which had multiple sub-categories. As against all of the defendants, twenty-four categories of documents were sought. As against the first named defendant only, a further seven categories of documents were sought. As against the seventh named defendant only, a further 16 categories of documents were sought.

3. The defendants sought from the plaintiffs eight categories of documents, most of which included a number of subcategories.

4. At the time of hearing the motions for discovery, the parties had reached agreement as to many of the categories sought and the applications regarding certain categories were withdrawn. There remained for decision by this court contests regarding three of the categories of documents sought by the plaintiffs and one category sought by the defendants.

The plaintiffs' claims

5. The first plaintiff was the owner of subordinated floating rate notes in Anglo Irish Bank, being 22.6 million units due 2016, and 5 million units due 2017, all referred to as *"the bonds"*. He had borrowed €18.45 million in 2009 from Anglo Irish Bank to fund the purchase of the bonds. His loans were later sold to Stapleford Limited. In 2014 the plaintiff sought to sell the bonds and was put in contact through an advisor, Mr. Tom Brown of LeBruin Private, with the seventh named defendant Mr. Tony O'Connor who it is said was at the time a *"member and employee of the first named defendant (Davy)"*.

6. The plaintiff first met Mr. O'Connor on 14 October 2014. He claims that in that meeting Mr. O'Connor represented to him that he was a financial advisor with Davy and that Davy and its servants and agents, including he, Mr. O'Connor, had the expertise to advise the plaintiffs in relation to the sale of the bonds and to act as the plaintiffs' agent in securing the sale of the bonds at the best price.

7. The plaintiff claims that based on these representations and assurances, he decided to instruct Davy for the purpose of obtaining advice and to act as his agent in the sale of the bonds.

8. The plaintiff claims that in addition to agreeing to act as his adviser and agent in the sale, Davy advised him to take out a loan to deal with or discharge his liability to Stapleford which held security over the bonds. The plaintiff says that in reliance on this advice, he entered into a loan agreement with an entity referred to as the *"O'Connell Partnership"*. The

terms of the loan agreement were that the O'Connell Partnership agreed to lend a sum of €2.36 million for the purpose of enabling the plaintiffs to settle the Stapleford debt.

9. It is also a term of the loan agreement that in consideration for the advance of the loan, the plaintiff would transfer the bonds to the O'Connell Partnership or its nominee for a net payment of €3.022 million which would be made to the second named plaintiff, Kilmona Holdings Limited. The transfer of the bonds would be effected on the release of the security held by Stapleford.

10. The loan agreement said to reflect these terms was entered into on 14 November 2014 between the plaintiffs and the O'Connell Partnership.

11. Each of the second to seventeenth named defendants was a member of the O'Connell Partnership. The defendants say that this was not a partnership, but a *"consortium"* established for the purpose only of this transaction.

12. In the statement of claim, the plaintiffs describe each of the second to seventeenth named defendants as being at all material times *"a member and employee of the first named defendant and a partner in the partnership which traded and was known as the O'Connell Partnership"*. Although the defendants assert that the O'Connell Partnership was not a partnership in the legal sense, they do not deny that they were all members of the "*consortium*". Nor is it denied that they were *"members"* or *"employees"* of Davy.

13. It is also admitted by the second to seventeenth named defendants that while they acquired the bonds in a single transaction entered into in the name of the consortium, each of them individually owned a certain number of the bonds.

14. The second to seventeenth defendants say that insofar as they had any other involvement in the events the subject matter of the proceedings, they acted exclusively in their capacity as employees or officers of the first defendant, Davy.

15. On 14 November 2014, Mr. O'Connor informed the plaintiff that Davy had identified a potential purchaser for the bonds. The plaintiff claims that he was informed that the purchaser was a client of Davy, based in the UK, which was interested in purchasing the bonds. He claims that when he asked for the identity of the purchaser, he was informed that this was confidential information and Mr. O'Connor refused to disclose the purchaser's identity.

16. The plaintiff claims that he was informed that the best price likely to be obtained for the bonds was 20.25 cent per unit and that the Davy client was offering to purchase the bonds at that price, namely a total sale price of €5,589,000. It is alleged that Mr. O'Connor, as servant and agent of Davy, advised the plaintiff that it was unlikely that a better price would be obtained.

17. The plaintiff says that when he was informed of this price, he made other inquiries and that he was informed by another financial service provider, Cantor Fitzgerald Private Clients, that the amount being offered was below the market price achievable for the bonds. He says that he disclosed this to Mr. O'Connor, who insisted that higher prices were not achievable. The plaintiff claims that Mr. O'Connor actively dissuaded him over the course of 13 and 14 November 2014 from seeking to have the bonds sold at a higher price and advised him that he should proceed with the sale to the Davy client.

18. The plaintiff claims that acting on the advice of Davy, he decided not to pursue a higher price and agreed to accept the advice of Davy to sell the bonds to its client for the total sum of €5,589,000.

19. The plaintiff says that neither Davy nor Mr. O'Connor or any of the defendants disclosed to him at the time that the purchaser was, not an external client of Davy, but the members of the O'Connell Partnership who were all members and employees of Davy, being the second to seventeenth named defendants. He characterises this as a "*surreptitious*

purchase of the bonds" by the defendants (paragraph 18 of Reply and Defence to First Defendant's Defence and Counterclaim).

20. All these allegations are denied by the defendants. It is denied that Davy itself became an advisor or agent of the plaintiff. It is said that Davy agreed to provide an execution only service, and certain limited ancillary services to the second named plaintiff in relation to the transaction, as evidenced by the terms of an "*account opening pack*". It is said that there was no fiduciary relationship between Davy and the plaintiffs, and that Davy gave no advices to the plaintiffs.

21. The defendants say that the plaintiffs were advised in the transaction by Mr. Tom Brown and/or LeBruin.

22. The defendants also plead that the structure whereby the O'Connell Partnership would advance a loan to the plaintiffs for the purpose of settling the debt with Stapleford was formulated not by Davy or any of the defendants, but by the plaintiffs' advisor, Mr. Brown.

23. They plead the doctrine of *ex turpi causa non oritur actio*, asserting that the plaintiff unlawfully concealed from and/ or misrepresented to Stapleford his intentions regarding the bonds and the price available for them.

24. The seventh named defendant, Mr. O'Connor who is represented separately from the other defendants, makes very specific allegations as to the manner in which the transaction came about and which he says prohibits the plaintiffs from maintaining this action by reason of the operation or the doctrine of *ex turpi causa sua non orito actio*. He alleges that, in the course of communications during October and November 2017, Mr. Brown informed him that Mr. Kearney owed a debt of approximately €18 million to Stapleford, which Stapleford had acquired from the liquidators of IBRC and that Mr. Kearney's objective was to reach a settlement with Stapleford for an amount in the region of €2.5 million to €3 million which Mr. Brown believed had been achievable based on initial discussions with Stapleford. Mr.

O'Connor says that Mr. Brown believed that the plaintiff, despite having access to significant funds, had represented to Stapleford that he had no money and that he would require a loan to settle his debt, and that he was also engaged in negotiations to settle his indebtedness, in an amount exceeding STG£300 million, to a Cerberus entity.

25. Mr. O'Connor alleges that Mr. Kearney's debt to Cerberus was close to being settled but that the Stapleford debt had to be addressed first. This in turn, Mr. O'Connor alleges, led to the transaction proposed by Mr. Brown and which led to the loan and purchase agreement made on 14 November 2014, the terms of which were as follows:-

(a) That the O'Connell Partnership would lend the sum of €2.36 million to Mr. Kearney to enable him to settle his debt with Stapleford.

(b) That the loan of €2.36 million could be drawn down on production of evidence that Stapleford had released its lien, and of an instruction to the first defendant Davy to transfer the bonds to the O'Connell Partnership.

(c) That the O'Connell Partnership would pay a further net sum of €3.022 million to the second named plaintiff in exchange for the transfer of the bonds to the O'Connell Partnership.

(d) The transfer of the bonds to O'Connell Partnership, would constitute full repayment of the loan.

26. Mr. O'Connor says that the amount of €2.36 million was paid to the first plaintiff at the meeting on 14 November 2014 and the amount of €3.022 million was then advanced to the second plaintiffs' account. These payments made up the total sale price of €5,589,000 (less certain adjustments). He alleges that the reason why Mr. Kearney wished to receive a loan at the same time as disposing of the bonds was his intention to misrepresent to Stapleford that the loan amount of €2.36 million was the entire amount he had received on disposal of the bonds in order to induce them to conclude a settlement.

27. The effect of this transaction was to yield a net €3.022 million on the completion and Mr. O'Connor alleges that it was agreed that this amount would be distributed between the plaintiff, LeBruin and Mr. O'Connor.

28. Mr. O'Connor also alleges that arising from discussions concerning the possibility of obtaining the higher price, he offered that the completion of this transaction might be deferred for a week, but that Mr. Kearney insisted that the transaction had to be completed on 14 November 2014 as he was due to travel to the United States of America on 16 November 2014 to conclude the refinancing of the Cerberus debt and needed the Stapleford matter disposed of before doing so.

The 2015 proceedings and 2016 settlement

29. The plaintiff claims that after completing the sale of the bonds to O'Connell Partnership, he discovered that the manner in which Davy had structured and arranged the sale deprived him of selling the bonds on the open market and achieving the best price. He claims that the financial loss sustained in selling the bonds at the price advised by Davy resulted from Davy seeking to secure for itself a share of the sale price.

30. On 30 July 2015 the plaintiffs issued proceedings against Davy alleging breach of contract, breach of fiduciary duty, misrepresentation and negligence. Those proceedings were settled on 12 February 2016. Discussions which culminated in that settlement took place initially in December 2015. At these meetings, Davy, was represented by the third defendant, Mr. Tony Garry, and the fifth defendant Mr. Barry Nangle.

31. Pursuant to the settlement Davy paid €1.125 million to the plaintiffs. A *"Final Settlement Agreement"* was signed which is said to be a compromise of all claims by the plaintiffs against Davy arising from the transaction of 14 November 2014. Each party undertook *"… not to re-initiate, all and any legal proceedings relating to the claims which are currently in being …"*.

32. The defendants all rely on that settlement and plead the plaintiffs are thereby precluded and estopped from maintaining this action.

33. In these proceedings the plaintiff claims that in the negotiations leading to the settlement agreement, it was at all times represented to him by Mr. Garry and Mr. Nangle that Davy had no association or connection with or involvement in the O'Connell Partnership. He claims that Mr. Garry refused to provide any information in relation to the composition of the O'Connell Partnership on the grounds of client confidentiality.

34. As part of the settlement terms, the plaintiffs issued a letter to Davy acknowledging and confirming that :-

> *"Neither Patrick Kearney nor Kilmona Holdings had an advisory or fiduciary relationship with Davy or Tony O'Connor and that neither Davy nor Tony O'Connor acted in an advisory capacity to either Patrick Kearney or Kilmona Holdings Limited in respect of any of the following."*

35. The plaintiff says that when concluding that settlement, he was not aware of the composition of the O'Connell Partnership. He says that he only became aware that the O'Connell Partnership comprised members of Davy after the publication on 1 March 2021 of a statement by the Central Bank of Ireland of the result of its investigation into the matter, following a complaint made by the plaintiffs to the Central Bank on 4 March 2015.

Statement of the Central Bank of Ireland 1 March 2021

36. On 1 March 2021 the Central Bank of Ireland made an announcement that it had fined Davy €4,130,000 and reprimanded it for regulatory breaches arising from personal account dealing. The statement referred to an investigation it conducted which arose from a transaction a group of 16 Davy employees, referred to as *"the Consortium"*, undertook in a personal capacity with a Davy client in November 2014. The client is not named in the statement but it is not denied that the client referred to by the Central Bank was the plaintiff.

37. The statement of the Central Bank says that it found certain breaches of the European Communities (Markets in Financial Instruments) Regulations 2017 (*"the MiFID"* Regulations) to have occurred over different intervals between July 2014 and May 2016. The breaches were as follows: -

a) Failure to take all reasonable steps to identify actual and/or potential conflict of interest that arose between the Consortium and the Client in the context of the transaction;

b) Failure to have in place an adequate framework in relation to personal account dealing;

c) Failure to ensure that it used sound administrative, accounting procedure and internal control mechanisms; and

d) Failure to ensure that Davy Compliance had access to all relevant information in relation to the Transaction

<u>These proceedings</u>

38. The plaintiff claims that it was only on publication by the Central Bank of its finding that it discovered for the first time that Davy had *"acted fraudulently and in concert with the partners in the O'Connell Partnership… with the objective of having the plaintiffs sell the bonds at an undervalue to the O'Connell Partnership and thereafter secure a substantial windfall on selling on the bonds."*

39. The plaintiff claims that the *"egregious breaches and wrongdoing engaged in by the defendants are substantially confirmed in the findings of the Central Bank*". He pleads also that *"the substance of the Central Bank's findings…corroborates the fraudulent concealment and wrongdoing alleged against the defendants…"*

40. The defendants deny the allegation that they deceived the plaintiffs in the transaction in 2014 and in the negotiations leading to the February 2016 settlement.

41. The defendants plead that the Central Bank findings are not admissible in these proceedings. They also deny the plaintiff's characterisation of the Central Bank statement and deny that its findings disclose any acts of fraud or conspiracy. They admit the fact of the statement of the Central Bank and say that they will rely on it as necessary for the purpose of establishing its meaning.

42. The plaintiff claims that the defendants are liable to *"account and disgorge to the Plaintiffs the full financial windfall ... secured by them"*. The defendants deny that they made any financial windfalls.

43. The reliefs claimed by the plaintiffs include certain declarations as to the legal status and duties of the defendants, damages including aggravated and exemplary damages, and an *"indemnity by way of reimbursement and/ or damages in a sum commensurate to the profits income, returns and benefits of whatever kind derived from the purchase and subsequent sale of the Plaintiffs' bonds."*

44. In its Defence, Davy places emphasis on the distinction between the first and second named plaintiffs. It acknowledges that a *"best execution policy"* agreement was entered into between it and the second plaintiff but denies the existence of any such agreement with the first named plaintiff.

Categories agreed: Plaintiffs' motion

45. Before turning to the categories in dispute, it is informative to summarise the categories of documents in respect of which the parties have agreed discovery should be made. They include the following (using category numbers identified in the Notice of Motion before the court and noting that certain categories originally sought were withdrawn by the plaintiffs) :-

(1)(a) Documents evidencing the alleged advice given, to include advice as to the price that might be obtained for the bonds, or services provided by any of the

defendants, their servants or agents to either of the plaintiffs in relation to any actual or potential sale of the bonds in the period between 1 October 2014 and 14 November 2014;

(1)(b)/ (c) Documents evidencing the retention of the first defendant as the advisor or agent of either of the plaintiffs for the purpose of any actual or potential sale of the bonds in the period between 1 October 2014 and 14 November 2014;

(1)(iv) Documents evidencing the arrangement of the loan facility advanced by the consortium to the first plaintiff;

(1)(vi) Documents evidencing any attempt by any of the defendants and/or any intention on the part of any of the defendants to conceal from either of the plaintiffs the identity of the members of the consortium;

(5)(i) Documents evidencing any communications, enquiries made, and information and knowledge acquired by the defendants, their servants and agents, in the period between 1 August 2014 and 14 November 2014 with regard to ascertaining and establishing the best price at which the bonds could be sold;

(5)(ii) Documents evidencing any communications between the parties regarding the arrangement and structuring by the defendants of any actual or potential sale of the bonds in the period between 14 October 2014 and 14 November 2014;

(7) Documents evidencing the manner and means by which the defendants identified to the plaintiffs the purchaser for the bonds.

(11)(i) Documents created between 1 October 2014 and 14 November 2014 evidencing the possibility that the bonds might be redeemed at full value;

(11)(ii) Documents created between 1 August 2014 and 14 November 2014 evidencing the price paid for (a) any Anglo Irish Bank Euro Callable

Subordinated Floating Rate Notes due to 2016 and (b) any Anglo Irish Bank Corp Euro Callable Subordinated Floating Rate Notes due to 2017.

(12) Documents created between 14 October 2014 and 14 November 2014 evidencing any commission fee of €207,000 which it is alleged was charged and received by the first defendant by deduction from the sale proceeds of the bonds.

(14) Documents created between 30 July 2015 and 22 February 2016 evidencing the reasons for the selection of Tony Garry and Barry Nangle to represent the first defendant in the negotiations which led to the 2016 settlement.

(17) Documents evidencing any representations, assurances and warranties allegedly made by Mr. Garry and Mr. Nangle to the plaintiffs between 1 December 2015 and 12 February 2016 that the first defendant had no involvement in or association with the purchaser of the bonds.

(25) Documents comprising a copy of the first named defendant's Best Execution Policy and Execution Only Account terms and conditions in the period between 1 October 2014 and 14 November 2014.

(27) Documents evidencing the first named defendant's role in the subsequent sale of the bonds by the second to seventeenth named defendants trading as the O'Connell Partnership.

(28) Documents evidencing all communications and meetings between the first named plaintiff and Mr. Alan Mains (advisor to the plaintiff) and Mr. Tony Garry, the third named defendant, and Mr. Barry Nangle, the fifth named defendant, during December 2015.

(29) Documents relating to advice which the first named defendant alleges was provided by LeBruin /Mr. Tom Brown to the plaintiff in respect of the loan agreement and the sale of the bonds.

(30) Documents relating to communications between the servants and agents, including senior management and/or directors, of the first named defendant concerning the discussions further and subsequent to which the Settlement Agreement dated 12 February 2016 and related agreements and letters were executed and issued;

(31) Documents relating to and evidencing the alleged loss, damage, inconvenience and expense allegedly suffered by the first named defendant.

Disputed categories

Category 18 – Central Bank of Ireland

46. Two subcategories were sought originally by the plaintiffs under category 18, each of which has been refined in correspondence prior to the hearing of this motion. The category as originally sought was as follows: -

"(18)(i) Documents, notes and memoranda (whether in writing or in electronic form) and of whatever kind comprising and evidencing the documentation furnished by the defendants, their servants and agents (to include witness or other statements, interview notes and queries/issues raised by the Central Bank) to the Central Bank in the course of and with regard to the Central Bank's investigation into the role played by the first named defendant subsequent to it being retained by the plaintiffs to advise and act as agent for the plaintiffs in the sale of the bonds up to and including the subsequent resale of the bonds by the O'Connell Partnership comprising the second to

seventeenth named defendants who were at all material times employees, servants and agents, of the first named defendant.

(18)(ii) *Documents, notes, and memoranda (whether in writing or in electronic form) relating to all meetings, including but not limited to management meetings of the first named defendant between October 2014 to date concerning the first named defendant's role in the sale of the bonds and its knowledge of the actions of its employees namely the second to seventeenth named defendants in procuring the sale of the bonds to them trading as the O'Connell Partnership."*

47. At the hearing, the court was informed that arising from correspondence between the parties the plaintiffs had refined the request under category 18. I set out below the refined request and the formulation of the category which the defendants are willing to discover: -

The plaintiffs' current position:

(18)(i) *All documents evidencing any internal consideration by and among the defendants, relating to the Central Bank of Ireland ("CBI") investigation referred to in the Statement of Claim.*

(ii) *All documents furnished to the CBI by the defendants, and/or by the CBI to the defendants in the course of the CBI investigation referred to in the Statement of Claim.*

Defendants' proposed formulation of these categories

(18)(i) *All documents evidencing any communications between the defendants, their servants or agents, and the Central Bank of Ireland evidencing the disclosure to the plaintiffs of the identity of the purchasers of the bonds.*

(ii) *All documents evidencing any internal consideration by the defendant, their servants or agents, with regard to the Central Bank of Ireland investigation evidencing the disclosure to the plaintiffs of the identity of the purchasers of the bonds."*

48. In essence, the defendants' submissions go to limiting the documents in this category to such documents as are relevant to the question of whether the defendants disclosed to or conceded from the plaintiffs the identity of the purchasers of the bonds, the *"identity disclosure issue"*.

49. The reason given by the plaintiffs in the letter of request for this category is that they allege in the Statement of Claim that it was not until March 2021 *"with the publication of the Central Bank's findings into its investigation"* that the plaintiffs discovered that the bonds had been purchased by the second to seventeenth named defendants. The letter of request refers to paras. 53 and 61 of the statement of claim. In para. 53 of the statement of claim, the plaintiffs allege that it was after the publication by the Central Bank of its investigation findings that they discovered for the first time that the defendants had *"acted fraudulently and in concert"*. In para. 61, they refer extensively to the communications with Mr. Garry and Mr. Nangle which led to the settlement of the 2015 proceedings in February 2016. They state that it was only on publication of the Central Bank's findings they first came to know of the association between the first named defendant and the purchasers of the bonds.

50. In the Statement of Reasons for this request, the plaintiffs continue as follows: -

"In circumstances where the plaintiffs who are relying on the Central Bank's findings in support of their causes of action in these proceedings and having regard to the defendants' denial in each of their defences of the wrongdoing alleged by the plaintiffs against the defendants in their statement of claim with which the plaintiffs have also joined issue in their reply to defence, the

plaintiffs request the defendants to make voluntary discovery of the above category of documents which are relevant to and necessary for the fair disposal of the matters in dispute…"

51. The plaintiffs continue by asserting that voluntary discovery of these categories *"will also assist the plaintiffs in establishing that there is no merit in the defendants' defences"* and, finally, they state that *"voluntary discovery of the above category of documents would also assist on saving costs"*.

52. Extensive submissions were made by the parties by reference to the well-established case law regarding relevance, necessity, proportionality and confidentiality, including the judgments of *Tobin v. Minister for Defence* [2019] IESC 57, *BAM PPP PGGM Infrastructure Cooperate UA v. National Treasury Management Agency* [2015] IECA 246, *Ryanair DAC v. SC Vola.Ro Srl & anor* [2021] IEHC 788, *Hartside v. Heineken Ireland Ltd* [2010] IEHC 3, *Independent Newspapers v. Murphy* [2006] IEHC 276, *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 265, *Word Perfect Translation Services v. Minister for Public Expenditure and Reform* [2020] IESC 56, *Waterford Credit Union v. J&E Davy* [2020] IESC 9 and others.

53. The key principles derived from those judgments which are relevant to this application may be concisely summarised as follows:

(1) Relevance of documents is determined by reference to the issues in the case defined by the pleadings.

(2) Where documents are relevant, the starting point is to regard them as necessary, but in assessing necessity the following factors inform the decision.

(3) Where there are alternative means of bringing the relevant information before the court, such as interrogatories, the court will consider whether there is a necessity to order discovery of documents relevant to such information. Only one brief reference

was made by the defendants to the absence of interrogatories, but no submission was made as to which if any categories were not necessary on this ground.

(4) Where confidential information or documents are subject to a request for discovery, the court must balance the interests of a party whose rights of confidentiality are affected against the traditional approach of requiring discovery of all documents relevant to the matters at issue in the case and falling within the categories ordered.

(5) As a general rule, confidentiality does not relieve a party from obligations of discovery, but it will be a factor affecting the balance to be struck in the context of proportionality.

(6) Where categories requested are extremely broad, the court must have regard to proportionality, such that excessively onerous discovery is not ordered.

54. Extensive reliance is placed by the plaintiffs on the statement issued by the Central Bank of Ireland on 1 March 2021. The findings include findings that *"Davy took no steps to ensure that their client was aware the consortium was comprised of Davy employees"* and that *"no disclosure was made to the client as to the identity of consortium members"*. The conclusions summarised in the statement which relate to breaches of the MiFID Regulations are summarised at paragraph 37 above.

55. The defendants admit that the statement of the Central Bank was made on 1 March 2021 but dispute its admissibility and its meaning in the context of these proceedings.

56. The defendants submit that if they were required, as sought by the plaintiffs, to discover all of their internal communications concerning the investigation undertaken by the Central Bank and all of their communications with the Central Bank this would be objectionable for the following reasons.

Relevance

57. The defendants say that they have pleaded in their defence and counterclaim that any breach of regulatory duties as found by the Central Bank is not relevant to the plaintiffs' pleaded case and afford the plaintiffs no cause of action. They are entitled to make this plea, but I cannot ignore the fact that the plaintiffs plead, inter alia, *"regulatory duties"* in paragraphs 28 (vii), 55, 62 and 65 of the Statement of Claim.

58. While the dispute as to the admissibility and meaning of the Central Bank findings and statement will be a matter for the trial judge, it is clear that those findings and the statement of the Central Bank regarding breaches of the MiFID Regulations are relevant to the pleaded case.

59. In resisting this category the defendants assert that the substance of the entire case is rooted in the claim that the 2016 settlement should be set aside because of misrepresentations made by Mr. Garry and Mr. Nangle to the effect that the purchaser of the bonds was not associated with the defendants. That claim of misrepresentation is relevant to the question of whether the 2016 settlement should be set aside or, as the defendants plead, acts as an estoppel to these proceedings which is one issue in the case. The disputes as to disclosure of the identity of the purchasers, central and critical as it is to the case, and which permeates the pleadings on both sides, may be one of the most important disputes of fact in the case, but it is not the only issue in these proceedings. Without seeking to define now all the issues, it seems to me that they at least include: -

1) Whether and which plaintiffs were clients of the first defendant or other defendants
2) The precise nature of the engagement between the parties and what duties (including statutory or regulatory duties) the defendants respectively undertook
3) Whether any of the defendants caused or permitted conflicts of interest to arise; and
4) Whether the defendants disclosed or concealed the identity of the purchaser of the bonds.

60. The defendants have submitted that the only aspect of their engagement with the Central Bank which is relevant is the question of disclosure of identity of the purchasers of the bonds, and that other issues referenced in the Central Bank statement are not issues in the case. That is incorrect. The plaintiffs have pleaded breach of regulatory duties in paragraphs 28(viii) and 62 of the Statement of Claim and these pleas are denied, on both factual and legal grounds. They have also pleaded that the defendants acted in breach of fiduciary duty, including a duty not to act in conflict with the interests of the plaintiff as client, in paragraphs 27, 28, and 29. It is clear from its statement that the Central Bank did not limit its enquiry to the disclosure of identity question. It concerned itself also with the capacity in which the defendants entered into the November 2014 transaction, the manner in which the first defendant addressed its obligations to identify a potential conflict of interest, and other questions relevant to its findings that the first defendant contravened the MiFID Regulations. The mere fact that the plaintiffs claim that they only became aware of the identity of the purchasers of the bonds after publication of the Central Bank statement does not mean that the identity disclosure issue is the only aspect of the investigation relevant to the issues in the case.

Confidentiality

61. The defendants were unable to refer the court to any third party whose rights of confidentiality would be infringed were the defendants to discover documents in Category 18. Extensive reliance was placed by the defendants on the public interest in maintaining the confidentiality of the Central Bank investigation process. This was submitted in very general terms.

62. References were made to the judgment of the Supreme Court in the Word Perfect Translation case (op cit), and the application of proportionality in achieving a balance where confidential material is engaged. Those cases concerned confidential information relating to competing bidders in a public tender. In this case, the investigation by the Central Bank related to the

transaction between the plaintiffs and the defendants. There has been no suggestion that any of the engagement between the defendants and the Central Bank touched on third parties or that it related to any matter other than the affairs of the plaintiffs. That is clear from the statement of the Central Bank.

63. The defendants referred to, but did not open, section 33AK of the Central Bank Act 1942. That section imposes certain obligations of non-disclosure on officers of the Central Bank and other persons in relation to confidential information concerning the business of any person or body which has come to the person's knowledge through such officer's office or employment with the Central Bank or concerning any matter arising in the performance of the functions of the Bank or the exercise of its powers, if such disclosure is prohibited by the Rome Treaty or certain statutes.

64. The investigation by the Central Bank related to the first defendant's dealing with the plaintiffs. Apart from referring to s. 33AK in its generality as a basis for describing the confidentiality of the process of every Central Bank investigation, no submission was made to demonstrate how this section or any other statutory provision would constrain the defendants from making discovery to these plaintiffs of documents in their possession, power or procurement, even where those documents evidence the defendants' engagement with the Central Bank, where that engagement concerns the relationship and the transaction between the plaintiffs and the defendants.

65. The court cannot assume that officers of the Central Bank have acted in breach of Section 33 AK or any other provision of the Central Bank Act, and there is no suggestion that any documents in this category are in the possession power or procurement of the defendants in breach of Section 33 or otherwise unlawfully. If any stipulations as to confidentiality were imposed by the Central Bank on documents emanating from it they have not been cited to the court.

66. The parties and their advisors are fully aware of the obligations of confidentiality which apply to them in respect of documents obtained on discovery (see Waterford Credit Union v. J&E Davy [2020] 2 ILRM 344, [2020] IESC 9).

Scope of this category

67. The defendants submit that the breadth of this requested category is such that compliance would be unduly burdensome. That submission has very limited force in circumstances where the defendants have already been required to comply with requests for documents and information by the Central Bank. The revised category 18 (ii) as sought concerns documents which have already been furnished to the Central Bank and which one would expect the defendants to have prepared and retained in an orderly form. The revised category 18 (i) as sought concerns documents evidencing internal consideration among the defendants relating to the investigation. It would be extraordinary if the defendants had not preserved such material in an orderly form. Therefore, I cannot find that the scope or breadth of this category would be unduly burdensome for the defendants.

Corresponding discovery of plaintiffs

68. Because of the agreement between the parties on a large number of categories of documents, there was limited focus at the hearing on the agreed categories. However, one of the agreed categories which was requested by the defendants was Category 4, as follows :-

> *"All documents relating to the Central Bank investigation pleaded at paragraphs 53 – 62 of the Statement of Claim, including but not limited to:*
>
> *(a) All documents evidencing or otherwise relating to any submissions, representations or other communications made by or on behalf of either of the Plaintiffs to the Central Bank of Ireland in relation to any actual or potential investigation involving any of the Defendants;*

(b) *All documents evidencing or otherwise relating to any communications revised by or on behalf of either of the Plaintiffs <u>from</u> the Central Bank of Ireland in relation to any actual or potential investigation involving any of the Defendants* (emphasis added)

(c) *All documents evidencing, or otherwise relating to, any advice or information received by either of the Plaintiffs from any party in relation to any actual or potential investigation by the Central Bank of Ireland involving any of the Defendants; and*

(d) *All documents evidencing or otherwise relating to any consideration or review by either of the Plaintiffs of any actual or potential investigation by the Central Bank of Ireland involving any of the Defendants.*

69. I quote this in full because of its remarkable breadth. In particular, it contains no limitation referable to the *'identity disclosure'* issue, which is the limitation the defendants seek to impose in their '*corresponding'* category of documents relating to the Central Bank investigation. Nor does it appear that, for the purpose of this category to be discovered by the Plaintiffs, the defendants are concerned that documents emanating from or submitted to the Central Bank should be subject to such a limitation.

70. This is no oversight on the part of the defendants. The Affidavit of Gillian Cox grounding the defendants' application for discovery, sworn 30 March 2022, recites the reasons for this category extensively. Ms. Cox refers to the pleadings and to paragraphs twenty and twenty-one of the Defence and Counterclaim of the Defendants (other than he first and seventh Defendants). In those paragraphs these defendants put the plaintiffs on proof of the particulars of the Central Bank investigation and they deny that the matters pleaded by the plaintiffs *"reflect the findings of the Central Bank investigation"*. They deny many other of the plaintiffs' claims, including such matters of the allegations that the plaintiffs were

deprived of the opportunity to obtain independent legal advice, and all the allegations of fraud, deceit, misrepresentation, conspiracy, breach of contract and breach of duty

71. Ms. Cox refers in these reasons also to paragraph 40 – 52 of the first defendant's Defence and Counterclaim. These paragraphs address firstly the Central Bank investigation allegations. They then contain a series of pleas regarding the allegations of a fraudulent scheme and of a *'substantial financial windfall'*. These are all cited as reasons for Category 4, and cannot on any view of the matter be said to be limited to the *'identity disclosure'* issue, however important and central that may be in the case.

72. Having sought documents so widely in relation to the Central Bank investigation, including documents emanating from the Central Bank, and without the limitation to the 'identity disclosure' issue, it is wholly inconsistent for the defendants to seek to impose that limitation on the category 18 to be discovered by them.

73. Taking all those considerations into account, I decline to limit the discovery which relates to communications with the Central Bank to documents which touch only on the identity disclosure issue. I shall therefore order discovery of the following:-

18 (i) All documents evidencing communications between the defendants, their servants or agents and the Central Bank of Ireland in the course of the investigation referred to in the Statement of Claim.

18 (ii) All documents evidencing internal consideration by the defendants, their servants or agents with regard to the Central Bank of Ireland investigation referred to in the Statement of Claim.

74. The defendants submitted that much of the documents in the categories 18 (i) and 18 (ii) as sought would be privileged, although it is acknowledged that this would not be a matter for determination on this application and would arise should privilege be asserted in respect of any documents when discovered.

Category 19 – documents relating to resale of the bonds

75. The plaintiffs request under this category is as follows:-

"Without prejudice to the discovery requested above, documents, notes, and memoranda (whether in writing or in electronic form) relating to and evidencing the defendants', their servants, and agents' actual involvement in the resale of the bonds by the second to seventeenth named defendants trading as the O'Connell Partnership, to include the following matters.

(a) The date or dates on which the bonds were sold by the partners of the O'Connell Partnership.

(b) The amount at which the bonds were sold.

(c) The identity of the party or parties who acted as advisors and agents to the O'Connell Partnership in the sale of the bonds.

(d) The identity of the party or parties who purchased the bonds and whether the purchaser or purchasers had any association with or involvement in the first named defendant and/or with the second to seventeenth named defendants.

(e) The gross income and/or gross profit derived by the O'Connell Partnership in the sale of the bonds subsequent to the 14th November, 2014.

(f) The distribution of the income and/or profit among the first named defendant, its servants, or agents, to include particular to the second to seventeenth defendants.

(g) The application of the income and profits earned by each of the defendants from the monies they each received on the distribution of the sale proceeds derived from the subsequent sale by the second to seventeenth named defendants of the bonds."

76. The reason given by the plaintiffs for the discovery sought in category 19 is stated to be that the plaintiffs' causes of action are based on a claim of fraudulent enterprise and concealment by the defendants, as a result of which it is said that the defendants *"made a substantial financial windfall for their personal benefit and to the detriment of the plaintiffs"*.

77. The plaintiffs submit that discovery of documents in this category is relevant to the reliefs sought and to the ascertainment of the *"actual sum by way of income and/or profits appropriated and obtained by the defendants to the detriment of the plaintiffs"*.

78. The defendants say that a number of the subcategories identified in this request have no relevance to the matters pleaded, notably those which relate to advisors and agents to the O'Connell Partnership, and the identity of the ultimate purchaser of the bonds. They submit that these categories are irrelevant and are *"fishing expeditions"*.

79. In relation to the sub subcategory which relates to the distribution of the income and profit among the defendants, the defendants say that discrete reliefs are not sought as against the individual defendants in the proceedings concerning the profit made on the onward sale of the bonds. They quote in particular the relief sought at para. 6 which is quoted as follows:-

> *"A declaration that the plaintiffs are entitled to an indemnity from the defendants and each of them by way of reimbursement and/or damages in a sum commensurate to the profits, income returns and benefits of whatever kind derived from the defendants and each of them from their (sic) purchase and subsequent sale of the plaintiffs' bonds."*

80. The defendants say that, on a proper reading of the statement of claim, the plaintiffs' assertion is that the defendants are jointly liable to pay to the plaintiffs the amount of any profit made on the onward sale of the bonds. That is by no means clear from para. 6 of the prayer for relief quoted above. The defence delivered on behalf of the defendants other than the first and seventh defendants contains an express plea at para. 10(c) as follows:-

"While the second to seventeenth defendants acquired the bonds as part of a single transaction entered into in the name of the consortium, each of them individually owned a certain number of the bonds."

81. The defendants deny that the O'Connell Partnership was a partnership, asserting that it was a consortium of persons acting as such for this single transaction. This will be a legal question for determination at the trial, but in light of these pleadings documents evidencing income or profit secured by each of the defendants is relevant.

82. The defendants emphasise that, in the 2015 proceedings, the claim was based on the difference between the price paid for the bonds and their market value on the date when they were sold to them. For the purpose of determining the relevance of this category in this case, this court is not concerned with the manner in which the claim was formulated in the 2015 proceedings. Nor is it correct to state, as has been suggested in submissions, that these proceedings are based only on the proposition that the settlement of the 2015 proceedings was based on a misrepresentation. The allegation of such a misrepresentation leading to that settlement forms part of these proceedings, and is relevant to the defence of compromise and estoppel, but these proceedings are not limited to that issue.

83. The defendants rely on the decision of Barr J. in *The White Country Inn (A Firm) v. Crowley & ors* [2020] IEHC 574. In that case, the court ruled that, in circumstances where the documents were genuinely confidential, it would be slow to direct production of those confidential documents *"unless it is sure that the production of same is both relevant and necessary to enable the requesting party to either properly and fully put its case before the Court at trial, or to defend itself from any assertions that may be made by the opposing party at the trial of the action"*. The court made an order, such as had been made in previous cases such as *Independent Newspapers Ireland Ltd v. Murphy* [2006] IEHC 276 and others for the preservation of documents under the relevant category pending further order of the trial judge

depending on the findings made by him in the course of the trial of the action. A similar order was made in Hartside Limited v. Heineken Ireland Limited [2010] IEHC 3.

84. The court recognises that the question of disgorgement of profits and other equitable remedies may only arise if the plaintiffs succeed in establishing that the defendants have perpetrated the wrongdoing alleged. However, it is clear from the case as pleaded, and which is fully contested by the defendants, that the involvement of the defendants and *"their servants and agents"* in the resale of the bonds by the O'Connell Partnership is relevant to the pleaded case that, as particularised in para. 66 of the statement of claim, the defendants acted in breach of a duty *"not to use its position as agent of the plaintiffs and the confidential information entrusted to them in that capacity to secure a personal and financial windfall for itself, its servants or agents, nor to conspire with the second to seventeenth defendants beyond the commission paid by the plaintiffs to the first named defendant"* (para. 66(ix)) and the allegation that they acted *"in breach of its and their duty to fully account and disgorge to the plaintiff all financial benefits of whatever kind procured by the first named defendants, its servants and agents, to include the second to seventeenth named defendants as a result of their fraudulent conduct in breach of fiduciary duty"* (para. 66(xi) of the statement of claim). These pleas are all denied. I cannot determine on this application that no issue will arise at the trial as to the question of benefits secured by the defendants.

85. The court was informed (although not referred to relevant documents) that in replies to particulars arising from the defence of the defendants (other than the first and seventh defendants) confirmation has been given of the total amount of the profit made, being an amount of €9,309,799.66.

86. I am not persuaded that the mere fact that the defendants have confirmed the total amount of the profit obviates the necessity for discovery of certain of the documents identified in category 19.

87. I was also informed in submissions that the defendants have proposed that, if necessary, an independent expert can be appointed to verify the amount of the profit earned on their onward sale of the bonds. There was a dispute at the hearing as to the basis on which that proposal was put, the defendants stating that it was put without prejudice. In any event the plaintiffs are under no obligation to accept such a proposal.

88. The defendants again cite confidentiality of this information. No third party's right to confidentiality is affected, and the records captured by this category would be only those which relate to the resale of the bonds and the income and profit gained by each of the defendants. Having concluded that the category is relevant to the issues arising on the pleadings, the assertion that this category includes confidential or sensitive documents of the individual defendants, and which relate to profit derived from bonds they acquired from the plaintiffs, is no answer to the obligation to make discovery.

89. Sub-category 19 (g) potentially includes all manner of personal expenditure of the defendants and is excessive. It is clearly distinguishable from sub-category (f), which relates directly to the flow of money derived on the onward sale of the bonds.

90. I have no hesitation in excluding from this category the references to the following:-

(c) The identity of the party or parties who acted as advisors and agents to the O'Connell Partnership in the sale of the bonds.

(d) The identity of the parties who purchased the bonds and whether the purchasers had any association with the defendants.

(g) documents concerning the application of income and profits accrued by the defendants from monies received on distribution of the sale proceeds of the bonds.

91. I shall make the order requiring the defendants to make discovery of the following category:-

"All documents, notes and memoranda (whether in writing or in electronic form) evidencing the defendants, their servants and agents, actual involvement in the resale of the bonds by the second to seventeenth named defendants trading as the O'Connell Partnership, to include the following matters:

(a) The date or dates on which the bonds were sold by the partners of the O'Connell Partnership;

(b) The amount at which the bonds were sold;

(c) The gross income and/or gross profit derived by the O'Connell Partnership in the sale of the bonds subsequent to the 14th November 2014;

(d) The distribution of the income and/or profit among the first named defendant, its servants and agents, to include in particular the second to seventeenth named defendants;"

Category 26 – (ii) and (iii) – concerning the State

92. This category as sought by the plaintiffs in the notice of motion is as follows:

"(ii). Documents, notes, and memoranda (whether in writing or in electronic form) relating to and evidencing the contract and/or terms of engagement and/or commercial relationship between the First Named Defendant and the State with regard to the role for which it was retained by the State to advise and sell Bonds for the State.

(iii). Documents, notes, and memoranda (whether in writing or in electronic form) relating to any advices furnished by the First Named Defendant, its servants, and agents, to any government department as to the manner and fashion the State ought to approach in the honouring of the bonds of the kind being sold by the Plaintiffs".

93. The first named defendant submits that to the extent relevant such documents are covered by category 11.1, quoted below. They say that any other documents sought are not relevant and invoke the confidence of the third party, in this case the State. Category 11.1 as proposed and agreed is as follows:

> *"All documents created between 1 October, 2014 and 14 November, 2014 evidencing the possibility that the bonds might be redeemed at full value".*

94. The reason given for the requested category 26 (ii) and (iii) is stated as follows.

> *"In paragraph 39 of the statement of claim the plaintiffs have pleaded that acting on the advice of the first named defendant and not otherwise, the plaintiffs decided not to pursue a higher price for the bonds and agreed to accept the first named defendant's advice to sell the bonds to a client of the first named defendant.*
>
> *The plaintiffs have also in that paragraph pleaded that at the time the first named defendant furnished such advice to the plaintiffs, the first named defendant failed to advise, identify, or establish what the government position was likely to be in relation to honouring bonds at full value, thereby precluding the plaintiffs the opportunity to consider realising the actual proper value of the bonds. This pleading is denied in paragraph 33 of the first named defendant's defence and counterclaim".*

95. Having referenced the pleaded case, the plaintiffs elaborate by stating that *"it is the plaintiff's position that as the first named defendant was retained by the State to act as its advisor and/or seller of a range of bonds including Anglo bonds, being bonds sold by the plaintiffs, voluntary discovery of the category of documents identified above was clearly relevant and necessary to the matters in dispute between the parties as this category of documents will establish the level of knowledge available to the first named defendant with*

regard to the value and/or price of the Anglo bonds or at the price at which the bonds could be sold." The plaintiffs continue by referring to what they describe as the *"knowledge available to the first defendant the first named defendant … being advisor to the government as to the value of the bonds".*

96. The case pleaded at para. 39 of the statement of claim, which is given as the first reason for this request is that the first defendant failed to advise, identify, or establish *"what the government's position was likely to be in relation to honouring the bonds at full value"*. No plea is made to the effect that the defendant had any particular knowledge of the government's intentions, based on any engagement or retainers of the defendant, such as would potentially be revealed by documents in the categories requested by the plaintiffs.

97. In para. 28 (xiv) of the statement of claim reference is made to the defendant's *"state of knowledge as to the government's intentions in relation to honouring the said bonds"*. Again, no plea is made as to any particular status of the first named defendant vis a vis the government.

98. The agreed category 11.1 requires the first defendant to discover all documents evidencing *"the possibility that the bonds might be redeemed at full value"*. This obligation is not conditioned by any limitation as to confidentiality. It therefore extends to all documents in the possession or procurement of the defendants created in the period referenced and evidencing the possibility of the bonds being honoured in full, regardless of who may have authored such documents.

99. I accept the submission of the defendants that documents concerning the engagement of the first defendant by the State in relation to the sale of bonds and advice given by the defendant to the State in relation to such matters are not relevant to the case as pleaded. Insofar as the expanded *"reasons"* appear to rely on the fact of the first defendant having been retained by the State to act as an advisor or seller *"of a range of bonds including Anglo*

bonds" this submission does not warrant discovery of this category, there being no pleading of the retainer of the defendants by the State.

Discovery sought by defendants

100. Of the categories of discovery sought by the defendants only one remains for determination by this court. Before considering the category in dispute, it is again informative to note broadly the categories in respect of which the parties have agreed that the plaintiffs would make discovery.

Category 1 : documents created between 1 January, 2014 and 30 July, 2015 evidencing or otherwise relating to the transaction for sale for the bonds by the plaintiffs. Nine subcategories are agreed within this category.

Category 2 : documents evidencing or otherwise relating to any advice or information received by either of the plaintiffs from any party other than the defendants and any communications or engagement with any party other than the defendants in relation to the actual or potential sale of any of the bonds to any party.

Category 3 : Documents created between 1 August 2014 and 22 February 2016 evidencing or otherwise relating to the compromise of the 2015 proceedings.

Category 4 : Documents relating to the Central Bank investigation. This includes a number of subcategories as follows.

(a) Documents evidencing or otherwise relating to any submissions, representations or other communications made by or on behalf of either of the plaintiffs to the Central Bank of Ireland in relation to any actual or potential investigation involving any of the defendants.

(b) Documents evidencing or otherwise relating to any communications received by or on behalf of either of the plaintiffs from the Central Bank in relation to any actual or potential investigation involving any of the defendants.

(c) Documents evidencing or otherwise relating to any advice or information received by either of the plaintiffs from any party in relation to any actual or potential investigation by the Central Bank of Ireland involving any of the defendants.

(d) Documents evidencing or otherwise relating to any consideration or review by either of the plaintiffs of any actual or potential investigation by the Central Bank of Ireland involving any of the defendants.

It is significant to note the breadth of this category. It is not in any way limited to the particular question of the controversy concerning disclosure or non-disclosure by the defendants of the identity of the purchaser of the bonds.

Category 5 : Documents relating to claims of Stapleford against the plaintiffs including documents relating to the Stapleford proceedings against the plaintiffs commenced in 2017.

Category 6 : Documents relating to any claims by Le Bruin or Mr. Brown against the plaintiffs.

Category 8 : Documents evidencing or otherwise relating to any alleged loss or damage of the plaintiffs in respect of which a claim is made in these proceedings including documents evidencing or relating to the computation of such alleged loss or damage.

101. The category in dispute and which was originally sought by the defendants was as follows:

Category 7. "*All documents evidencing or otherwise relating to, the application by either of the plaintiffs of the proceeds of sale of the bonds or any portion thereof."*

102. The reason stated for this was that the plaintiffs had pleaded that they suffered loss and damage but have given no particulars of the loss and damage or of the computation thereof. The defendants say that the information available to them is that the first named plaintiff made a substantial financial gain from the transaction, and that the documents sought in this category are necessary to "evaluate critically" and contest "the claims made".

103. Arising from further exchanges between the parties, the defendants indicated that they would not pursue Category 7 in its original form, but sought the following revised Category 7

"All documents created between 1st January 2014 and 30 July 2015 evidencing or recording:-

(a) The interaction between either of the plaintiffs and any Cerberus entity, in particular any interaction in relation to the liabilities referenced at paragraph 14(h), 15(f), and 15(t) of the Defence and Counterclaim of the Seventh Defendant ('the Cerberus Liabilities'); and

(b) Any actual or potential restructuring or compromise of the Cerberus Liabilities."

104. The reason stated for this changed formulation of Category 7 is that the Seventh Named Defendant in paragraphs 14 and 15 pleads the following: -

(a) That Mr. Browne represented to him that the plaintiff was indebted to Cerberus for over STG £ 300,000,000

(b) That the plaintiff's debt to Stapleford had to be settled before he travelled to the U.S. on 16 November 2014 to conclude his refinancing with Cerberus

(c) That this urgency was the reason the plaintiff declined an offer by Mr. O'Connor to defer completion of the O'Connell Partnership transaction, an offer made by Mr. O'Connor in response to the plaintiff's assertion that he could obtain a better price for the bonds.

105. This account of events is denied by the plaintiff. He pleads in the Reply to Mr. O'Connor's Defence that he was told that the loan offer was a one off offer and that if the transaction did not complete immediately it would be lost.

106. As regards the restated Category 7, the plaintiff submits that his engagement with Cerberus has no relevance to the fundamental of the defences pleaded, namely that the defendants did not conceal the identity of the purchaser of the bonds. That submission

contradicts his own submissions supporting the plaintiffs' motion and oversimplifies the case. It also ignores the positive plea of the defendants that the plaintiff concluded the transaction without availing of the time extension offered because of his time pressures concerning Cerberus, a plea which the plaintiff directly addresses in paragraph 13 of his Reply to the Seventh Named Defendant's Defence.

107. On a plain reading of the pleadings the question of whether the plaintiff concluded the sale on 14 November 2014 without availing of time to 'test the market' because of pressure from Cerberus is a relevant issue in dispute. Therefore, documents evidencing the plaintiff's interaction with Cerberus are relevant and I shall order discovery of the revised Category 7 as quoted in paragraph 80 above.

Conclusion

108. There will be an order that the defendants make discovery of the following categories of documents : -

Category 18 (i) All documents evidencing communications between the defendants, their servants or agents and the Central Bank of Ireland in the course of the investigation referred to in the Statement of Claim.

(ii) All documents evidencing internal consideration by the defendants, their servants or agents with regard to the Central Bank of Ireland investigation referred to in the Statement of Claim.

Category 19 All documents, notes and memoranda (whether in writing or in electronic form) evidencing the defendants, their servants and agents, actual involvement in the resale of the bonds by the second to seventeenth named defendants trading as the O'Connell Partnership, to include the following matters:

(e) The date or dates on which the bonds were sold by the partners of the O'Connell Partnership;

(f) The amount at which the bonds were sold;

(g) The gross income and/or gross profit derived by the O'Connell Partnership in the sale of the bonds subsequent to the 14th November 2014;

(h) The distribution of the income and/or profit among the first named defendant, its servants and agents, to include in particular the second to seventeenth named defendants;"

109. The application regarding Category 26 (ii) and (iii) is refused.

110. There will be an order for the plaintiffs to make discovery of Category 7 as follows: -

All documents created between 1st January 2014 and 30 July 2015 evidencing or recording: -

(c) The interaction between either of the plaintiffs and any Cerberus entity, in particular any interaction in relation to the liabilities referenced at paragraph 14(h), 15(f), and 15(t) of the Defence and Counterclaim of the Seventh Defendant ('the Cerberus Liabilities'); and

(d) Any actual or potential restructuring or compromise of the Cerberus Liabilities.

111. I shall hear the parties as to the final form of the order.