

Finlay C.J.
Griffin J.
O'Flaherty J.

000150

THE SUPREME COURT

52, 53 & 54/90

BULA LIMITED (IN RECEIVERSHIP) AND ORS.

Plaintiffs

and

LAURENCE CROWLEY, NORTHERN BANK FINANCE
CORPORATION LIMITED, ULSTER INVESTMENT
BANK LIMITED, ALLIED IRISH INVESTMENT BANK
LIMITED AND MCKAY AND SCHNELLMANN LIMITED

Defendants

JUDGMENT delivered on the 29th day of June 1990 by
FINLAY C.J. [NEM DISS]

These are three appeals against Orders made in the High Court with regard to discovery in these proceedings. Although the appeals relate to different Defendants the questions raised by them are interrelated. Although they arise on Motions nominally seeking the striking out of a defence as the primary relief

the relief really sought in each case is further and better discovery.

They are as follows:

1. An appeal against the Order made in the Motion brought against the Defendant Laurence Crowley seeking:
 - (a) a listing by him by way of further discovery of the individual documents in regard to which he claims legal professional privilege;
 - (b) further and better discovery of communications between him and the Defendant McKay and Schnellmann Limited after the date of the institution of these proceedings against the first Defendant, namely, the 2nd July 1986.
2. An appeal against the Order made on the Motion against the Defendants McKay and Schnellmann seeking that they should list the individual documents in respect of which they claim privilege.
3. An appeal against the Order made on the Motion against NBFC seeking further discovery of ten groups of

documents contained in ten separate files which were included in the original Affidavit sworn by Mr. Condell on their behalf and which were by a subsequent Affidavit excluded as not being relevant to any of the issues in the action and as having been included in the original Affidavit of Discovery by a computer error.

With regard to these several appeals I have come to the following conclusions.

The two issues arising on these appeals with regard to the proper manner of identifying documents in respect of which a legal professional privilege is claimed in an affidavit of discovery, that is to say, the appeal in the Motion against the Defendant Laurence Crowley and the appeal in the Motion against the Defendants McKay and Schnellmann Limited raises an issue which, in my view, is clearly covered by a decision of this Court which is unreported but which was delivered on the 5th February 1990 in a case of Bula Limited v. Tara Mines Limited.

In an ex tempore judgment delivered as the agreed

judgment on that occasion by Walsh J., a transcribed copy of which has been approved by him, he dealt shortly but extremely comprehensively with the format required in respect of documents in which such a claim of privilege is being made in an affidavit of discovery. He stated as follows:

"The format suggested by the Plaintiff in his claim here appears to me to be at least in effect what the Rules of Court require, because unless documents are identified and properly indicated no particular claim of privilege should be made about anything. One must know what the claim is. The Court directs that the Rules of Court should be followed in the format envisaged by the Rules and so far as I am concerned the format indicated or sought in the Motion to-day by the Plaintiffs is in effect what the Rules require. Therefore the schedule of documents should follow that format."

A consideration of the Motion in that case and the appeal from the Order of the High Court clearly indicate that what was required by this judgment and what the Plaintiff was seeking in that case was an individual

listing of the documents with the general classification of privilege claimed in respect of each document indicated in such fashion by enumeration as would convey to a reader of the Affidavit the general nature of the document concerned in each individual case together with the broad heading of privilege being claimed for it. Such a requirement, irrespective of what may have been a habitual form of affidavit of discovery in the past, seems necessary to comply with the principles laid down by this Court in the recent case of Smurfit Paribas Bank Limited v AAB Export Finance Limited in which judgments were delivered on the 15th February 1990.

I am therefore satisfied that in this case, each of these two Defendants, that is to say, the Defendant Laurence Crowley and the Defendant McKay and Schnellman Limited should be directed to make a further Affidavit of Discovery identifying and listing the documents in respect of which legal privilege is claimed in the manner indicated in this ruling.

With regard to the second ground of appeal in the Motion against the Defendant Laurence Crowley, dealing with the communications between him and the Defendant McKay and Schnellmann Limited subsequent to the 2nd July 1986, the position in my view is as follows. In the course of an ex tempore judgment delivered on the 19th December 1989 Murphy J., on the hearing of this Motion in the High Court stated as follows:

"Discovery is a procedure which is left to the integrity of the parties themselves. The party who fails to make an adequate discovery is precluded from relying upon that document. The deponent who swears the Affidavit has the final word on what is relevant and it is difficult, if not impossible, for the Court to go behind that."

I am not satisfied that such an absolute protection of the decision by a deponent with regard to the question of discovery is warranted on principle. I accept that a court should be satisfied, as a matter of probability, that an error has occurred in an omission from an affidavit of discovery of documents on the basis of

irrelevancy before making any Order for further discovery and that it should not, in particular, permit the opposing party to indulge in an exploratory or fishing operation.

Applying this principle to the questions and issues in this case, I am satisfied that in broad terms the Statement of Claim in this case and the particulars by which it was subsequently expanded and clarified make it probable that communications made between the Defendant Laurence Crowley and McKay and Schnellmann Limited after the 2nd July 1986 are relevant to the issues arising in this case, both as to claims made against the Defendant of continuing negligence and breach of duty and also, potentially, in regard to the quantification of loss if the Plaintiffs should succeed in their claims against the Defendant. A submission was made on behalf of the Defendant Laurence Crowley that these documents had in substance been discovered by McKay and Schnellmann Limited against whom the proceedings were not commenced until 1988. This does not, as a matter of principle, in my

view, absolve the first Defendant from discovering the documents if they are relevant, and the Plaintiffs are entitled to discovery from both the Defendants concerned. I would, therefore, order the further discovery of these documents.

With regard to the claim in the appeal against the Motion brought against NBFC, the position is as follows. In respect of one of the ten files originally discovered and subsequently withdrawn from discovery, it is now conceded that it should be discovered. The Defendants state that they do so for the purpose of expediting discovery and had already agreed to discover these documents in a related action in which Mr. Wood is a party.

Applying the principles which I have shortly outlined above concerning the issue of relevancy to these documents, I have come to the following conclusions. The Plaintiffs' case, both the individual Plaintiffs and the corporate Plaintiffs, is a broadly based attack on the validity of the lending transactions between these

Defendants and the Plaintiffs, including, of course, but not confined to the Plaintiff Bula Limited. The relevance of that issue with regard to Bula Limited has been clearly acknowledged in the Affidavit of Discovery already filed on behalf of the Defendants NBFC which discovers a vast number of documents concerning loan transactions prior to 1974 in regard to Bula Limited. In a limited number of instances loan transaction documents dealing with some of the individual Plaintiffs are also discovered prior to that date. The contention of these Defendants that loan transaction documents prior to the date in 1974 in relation to the other Plaintiffs are irrelevant, in my view, is not sustainable and is inconsistent with the interrelated nature of the claim being made by all the Plaintiffs with regard to loan transactions and with the breadth of the sweep of their challenge to the transactions entered into by these Defendants with all of them. In those circumstances, I would direct the replacing of the nine files originally

discovered and subsequently purported to have been
withdrawn from discovery in the Affidavit of Discovery by
a further correcting Affidavit.

approved
T.A. Finley
29:6:1970