[2020] IESC 4

THE SUPREME COURT

[Appeal No: 2019/188]

Clarke C.J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

Between/

Waterford Credit Union

Plaintiff / Appellant

and

J & E Davy

Defendant / Respondent

Judgment of Mr. Justice Clarke, Chief Justice, delivered the 24th of March, 2020.

1. Introduction

1.1 Ordinarily the private papers of any person or body are just that, private. There are, however, circumstances where a legal obligation may arise which can oblige such a person or body to make certain private papers available to other parties. In the public sector, the Freedom of Information Act 2014 allows members of the public to gain access, in certain circumstances, to documents held by relevant bodies. Certain provisions of the Data Protection Act 2018 allow persons to obtain information held about themselves by third parties.

1.2 However, in the context of civil litigation it has always been recognised that the fair resolution of civil cases may well require a party to disclose to its opponent relevant documents within its possession. While the criminal law recognises a right to avoid self-incrimination, there is no equivalent entitlement of a party to civil litigation to refrain from making relevant if unfavourable evidence available. This Court has, in *Tobin v. Minister for Defence* [2019] IESC 57, recently emphasised the importance of the discovery process in ensuring a fair result in civil proceedings, while also acknowledging that there can be circumstances where the process becomes so burdensome that it operates to defeat, rather than to enhance, justice.

1.3 However, it has also always been recognised that the reason why a party may be entitled to have access to its opponent's documents, often including confidential documents, is for the very specific purpose of enhancing the prospects of justice being done in the case in question. Given that very limited focus of the discovery process, it has also always been recognised that a party who gains access to documentation through the discovery process is obliged to use that documentation only for the purposes of the litigation. It is said that a party obtaining such documentation is

subject to an implied undertaking only to make use of the documentation in question in that limited fashion. That principle is not in dispute on this appeal.

1.4 The specific issue which does arise stems from the fact that while both the High Court (*Waterford Credit Union Ltd v. J&E Davy* [2017] IEHC 8) and the Court of Appeal (*Waterford Credit Union Ltd. v. J&E Davy* [2019] IECA 157) took the view that certain documents which the plaintiff/appellant ("Waterford") had requested in the discovery process were relevant and necessary for the purposes of satisfying the provisions of O. 31, r. 12 of the Rules of the Superior Courts, the Court of Appeal concluded that discovery should be declined arising out of what was said to be a breach by the solicitor acting on behalf of the requesting party of an implied undertaking of the type just described in previous proceedings involving a different client. The core issue which arises for consideration on this appeal is as to the extent, if any, of the discretion which a court enjoys to decline discovery in such circumstances. For reasons which I hope will become clear, that issue breaks down into a number of subsidiary issues and it is also appropriate to note that there is a cross-appeal which seeks to question the underlying decision of both the High Court and the Court of Appeal to the effect that the documents in question should have been found to be ordinarily subject to discovery in the first place.

1.5 In order to understand the issues in more detail, it is necessary to set out the procedural history of these proceedings insofar as relevant to the issues which arise on this appeal.

2. Procedural History

2.1 Waterford carries on the business of a credit union for the benefit of its members. The defendant/respondent, J & E Davy ("Davy"), is a firm of stockbrokers

and investment advisors which, at the material time, is said to have held itself out as having an established expertise to advise credit unions concerning appropriate investments for their funds. Underlying this discovery application is a claim for damages brought by Waterford for financial losses which it is alleged were incurred as a result of certain investments made by Waterford in reliance on the advice provided by Davy.

2.2 It is Waterford's case that, on the basis of a contract between the two parties entered into in January 2005, Waterford acted in reliance on Davy's representations and advice with regard to suitable bonds in which Waterford could invest its monies and that, as a result, over €5 million of Waterford's monies were invested in certain perpetual Constant Maturity Swap ("CMS") bonds throughout the course of 2005 and 2006. It is alleged that Waterford was advised and was led by Davy to believe that these were bonds which guaranteed the capital sums invested and which complied with the Trustee (Authorised Investments) Order 1998 ("the 1998 Order"). Waterford claims that it subsequently discovered that the bonds in which Davy invested its funds did not comply with the 1998 Order, did not guarantee the capital sum invested and did not provide for a definite maturity date in the future.

2.3 In the statement of claim issued by Waterford on 4 July 2011, it was maintained that Waterford would not have invested in these bonds had Davy not advised it to do so and had Davy advised it of the matters just referred to. It is alleged that Davy is guilty of wrongdoing in that regard under various headings such that Waterford is entitled to an indemnity and damages in respect of the financial losses it incurred as a result. Of particular relevance, for the purposes of this discovery application, is Waterford's claim of breach of statutory duty, to the effect that Davy

had failed to comply with its statutory obligations and duties under the Stock Exchange Act 1995 ("the 1995 Act") by failing to ensure that Waterford was furnished with all the necessary information as to the characteristics of and risks associated with the investment bonds in question.

2.4 Davy delivered a full defence to this claim on 8 March 2012. It was denied, amongst other things, that Waterford had invested in the bonds concerned in reliance on any representations made or advice given by Davy to the effect that the bonds guaranteed the capital sums invested, complied with the 1998 Order or had a definite maturity date. It was further denied that Davy had failed to comply with its statutory obligations and duties under the 1995 Act, as referred to in the statement of claim, or had failed to furnish Waterford with the necessary information and documentation in respect of the investment bonds concerned. In its reply, delivered on 24 October 2012, Waterford claimed, amongst other things, that Davy is estopped from denying that it failed to discharge the various duties that it owed to Waterford having regard, amongst other things, to Davy's conduct and the investigations into its conduct carried out by the Irish Stock Exchange, which prepared two reports in June 2007 and February 2008 ("the ISE Reports"), which Waterford said confirmed Davy's alleged failure to discharge its duties.

2.5 Following the commencement of the proceedings, both parties sought voluntary discovery of certain categories of documentation from the other. While a number of these categories were agreed between the parties, several categories remained in contention, in respect of which cross motions seeking discovery were brought by both parties under O. 31, r. 12 of the Rules of the Superior Courts. Only one category of documentation remains in dispute before this Court, being that which

relates to the ISE Reports referred to earlier. Discovery of this category was requested by solicitors on behalf of Waterford, as set out in their letter of 25 October 2012, in the following terms:-

> "The separate reports furnished by the Irish Stock Exchange to the Defendant in June 2007 and February 2008 and all communications passing between the defendant and the Irish Stock Exchange with regard to the investigation carried out by the Irish Stock Exchange into the Defendant's conduct of its business with regard to the sale by the defendant of investment bonds to Credit Unions including the Plaintiff"

However, the request for communications was not pursued after the High Court and thus the issues remaining relate only to the two specified reports.

2.6 It is necessary at this juncture to provide some more detail as to the ISE Reports requested. These refer to reports which were issued by the Irish Stock Exchange as a result of disciplinary proceedings which it had undertaken in relation to Davy's conduct in respect of certain of its credit union clients. Further detail as to this investigation was provided in a public statement issued by the Irish Stock Exchange on 8 April 2009 ("the ISE Statement"), which stated the following:-

> "The Exchange, as part of its oversight and supervision of stockbrokers, became aware in late 2006 of issues of concern regarding possible breaches by J&E Davy (Davy) of Irish Stock Exchange conduct of business rules. These related to its sale of a number of perpetual Constant Maturity Swap (CMS) bonds to some of its credit union clients.
>
> Following a detailed regulatory review, the Exchange issued its findings in a report to Davy, which was also provided to the Financial Regulator, in June 2007. Before various agreed measures had been implemented further relevant information became available to the Exchange. The Exchange's final findings

and the necessary actions to be taken by Davy were set out in a second report in February 2008. The report was also provided to the Financial Regulator.

In January 2008, Davy commenced a process which culminated in a proposal to credit unions, in May 2008, of a comprehensive arrangement which addressed performance issues with the bonds. This proposal was accepted by the vast majority of credit unions at a cost to Davy of over €35m. This negotiated settlement between Davy and its clients was welcomed by the Exchange as it dealt with the core issue of loss of value of the bonds.

The Exchange investigations concluded that there had been breaches of the Rules of the Exchange by the firm in particular in relation to:

- The completeness of disclosure of certain information to credit unions concerning the bonds and the provision of written evidence to demonstrate that it had taken due care to ensure that the relevant credit unions understood the characteristics of the bonds; and
- Taking all reasonable steps to ensure the bonds were full compliance with the Trustee (Authorised Investment) Order 1998.

The Exchange also acknowledged important mitigating factors such as:

- The changed investment demands of credit unions which were seeking higher yield investments,
- Fundamentally altered conditions and bond markets, and
- The extensive interaction between Davy and its credit union clients.

The Exchange is satisfied that Davy has taken appropriate remedial action to ensure that internal controls and conduct of business procedures have been rectified to mitigate against any recurrence of the breaches discovered. This and the arrangements agreed with credit unions bring closure to this matter and it addressed the actions required of Davy by the Exchange in its reports."

2.7 It was asserted by Waterford in its letter of 25 October 2012 that discovery of the ISE Reports was relevant and necessary in light of Waterford's claim of breach of statutory duty and Davy's subsequent denial. Reference was also made to the plea made by Waterford in its reply as to Davy's conduct as detailed in the ISE Reports. In its responding letter of 29 November 2012, discovery of this category was declined by solicitors on behalf of Davy on the basis that the ISE Reports, it was said, do not deal with, and are not relevant to, the issues arising in the proceedings and that, further, Waterford was "manifestly engaged in a fishing expedition". Lengthy correspondence was subsequently exchanged between the parties in relation to this matter, the relevant aspects of which will be set out here in brief. The principal basis for Davy's contention that the reports in question were not relevant stemmed from the fact that the Stock Exchange investigation and, therefore, the reports in question related to what was said to be a sample of credit unions that did not include Waterford.

2.8 On 7 March 2013, Waterford's solicitors responded to Davy's refusal to make discovery and referred to the public statement made by the Irish Stock Exchange as previously set out. The letter went on to say the following:-

> "We are aware that the investigations by the ISE concerned, inter alia, Davy's role in relation to the Jyske perpetual bond, which is one of the bonds at issue in the present proceedings, and the manner of Davy's remuneration in relation thereto. It may well relate to other bonds acquired by our client on the advice of Davy.
>
> Given these factors, and the findings of the ISE in its statement as quoted above, which corresponds to the allegations made by our client in the present proceedings, the reports are clearly relevant and can in no way be characterised as a 'fishing expedition'. Our client acquired its bond between

> January 2005 and August 2006, and it is reasonable to infer that this comprises at least part of the period during which the activities which gave rise to concern on the part of ISE occurred. The documents sought are necessary to establish the approach of the Defendant in relation to the matters in respect of which the ISE established that there had been breaches of the Rules of the Exchange in as far as they related to bonds sold to credit union clients and the Plaintiff in particular.
>
> It is the Plaintiff's position that voluntary discovery of the reports by the Defendant will assist the Plaintiff in establishing that the bonds in which the Plaintiff was advised to invest by the defendant were completely inappropriate and unsuitable and that the Defendant as an investment advisor knew of this fact and should not have advised the Plaintiff to invest in those bonds. The Plaintiff therefore renews it request for the defendant to make voluntary discover of this category of documents."

2.9 In its response dated 29 April 2013, solicitors on behalf of Davy restated their belief that the ISE Reports were not relevant to the proceedings. As already noted, it was said that the ISE Statement referred to an investigation carried out by the ISE on a sample set of credit unions and that Waterford was not one of the relevant credit unions. It was therefore suggested that the conclusions reached were specific to the relevant credit unions and were not relevant to these proceedings. Further, it was claimed that the reports and related correspondence were strictly confidential between the parties and that discovery had not been justified by Waterford. In respect of Waterford's solicitors comments in respect of the Jyske perpetual bond, Davy's solicitors said the following:-

> "We are very surprised to note your comment that you are aware that the investigations by the ISE concerned, inter alia, Davy's role in relation to the Jyske bond and the manner of Davy's remuneration in relation thereto. The Statement makes no reference to the Jyske bond or to any issues concerning

> Davy's remuneration in relation thereto. We are at a loss, therefore, to understand how you claim to be 'aware' of these matters, or indeed any such matters, given the confidential nature of the process referred to above. In the circumstances, please now identify the source of the information on which your alleged 'awareness' is based."

2.10 It is apparent from an affidavit sworn in these proceedings by Ms. Lisa Carty, solicitor on behalf of Davy, that Waterford did not respond to the letter of 29 April 2013. In correspondence subsequently exchanged between the parties between December 2013 and July 2014, Waterford repeated its request for discovery of the relevant documentation and Davy reiterated its request for the source of Waterford's information regarding the Jyske bond and its concern in relation thereto. On 7 July 2014, it was suggested that the knowledge of the solicitor acting for Waterford of Davy's role in relation to the Jyske bond was derived from discovery made by Davy in separate proceedings involving E-Services and Communications Credit Union, which was another client of the solicitor acting for Waterford ("the E-Services Proceedings").

2.11 In an amended statement of claim, which was dated 17 April 2014, Waterford claimed that Davy had failed to disclose that it was acting as principal in the sale of bonds in which it had advised Waterford to invest its monies and was thereby making a "secret profit" which it failed to disclose to Waterford. In its amended defence, Davy denied that it failed to disclose the relevant information to Waterford in respect of these matters and rejected the characterisation of the sum it earned from the sale of the bonds as a "secret profit". In a letter issued on behalf of Waterford on 18 July 2014, it was suggested that the amendment of the statement of claim meant that the "secret profit/conflict of interest" allegation was explicitly at issue in the proceedings

and that it failed to see the relevance of the source of the solicitor's information as to Davy's role in respect of the Jyske bond.

2.12 By letter dated 6 August 2014, Davy once again requested information as to the source of Waterford's information as to the Jyske bond. On 9 September 2014, a request for voluntary discovery of, amongst other things, the ISE Reports and related correspondence was made by Waterford, in reliance on both its previously stated reasons and the matters pleaded in the amended statement of claim. Following further correspondence between September 2014 and March 2015, in the course of which agreement was not reached between the parties, cross motions for discovery under O. 31, r. 12 RSC were issued by both parties.

2.13 It should be noted that, in the course of extensive correspondence between the parties, which is exhibited before this Court, and in the affidavits sworn on behalf of Waterford before the High Court, no explanation was provided as to the source of Waterford's information regarding Davy's role in the Jyske bond. In November 2015, the matter came before the High Court (Keane J.) and, in the course of the hearing, counsel for Waterford acknowledged that Waterford's solicitors had, on the basis of his instructions, inadvertently made use of information that had come into their possession through discovery in the E-Services Proceedings, being information which indicated that the ISE investigation related to Davy's involvement in the sale of the Jyske bond. There was no evidence put before the High Court as to this matter.

2.14 In the High Court, the trial judge granted discovery of the ISE Reports but considered that additional discovery of the "communications passing between the defendant and the Irish Stock Exchange" would be overbroad and, therefore, declined to order discovery beyond the ISE reports. This decision was appealed by Davy and,

in the Court of Appeal, Peart J. allowed the appeal and refused discovery of the ISE Reports for reasons which will be set out in more detail below.

2.15 In the light of that dispute, Waterford sought leave to appeal to this Court while Davy sought leave to cross-appeal. In those circumstances, it is appropriate to deal with the determination of this Court granting leave to appeal

3. Leave to Appeal

3.1 By determination dated 26th November 2019 (*Waterford Credit Union v. J&E Davy* [2019] IESCDET 278), this Court granted Waterford leave to appeal. The Court set out the issues of general public importance which it considered arose on the application for leave as made by Waterford in the following terms:-

> "8. The first issue is as to the precise scope of the obligations which arise under an implied undertaking of the type in issue in this case. While it is accepted that there had been a breach in the past by the solicitor concerned of such an implied undertaking in other proceedings, it seems to the Court that it is necessary to identify the precise obligations which arise from such an implied undertaking, in order to assess how serious the breach in question might be taken to have been.
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> 9. Second, there is an issue as to the extent of any discretion which a court may enjoy to decline to order discovery which would otherwise be appropriate on grounds such as an accepted previous breach of an implied undertaking. In particular, a question arises as to the extent of any such discretion in circumstances where any breach was not that of the party to the current litigation but rather of that party's solicitor acting in separate proceedings in which the party concerned was not involved."

3.2 In respect of Davy's application to cross-appeal the underlying finding of the Court of Appeal that the documents in question were relevant and that their discovery

was necessary, the Court held that the issues sought to be raised did not meet the criteria of being matters of general public importance. However, the Court held that it was in the interests of justice that those issues could be raised by way of cross-appeal in circumstances where consideration would necessarily have to be given by this Court as to whether discovery of the documents in question should be ordered.

3.3 In its submissions on the cross-appeal, Waterford argued that, in reliance on the fact that the discoverability of the ISE Reports has already been determined in Waterford's favour by both the High Court and the Court of Appeal, this Court ought to regard the Court of Appeal's decision as dispositive of this issue, having regard to the deference which an appellate court should show in reviewing decisions of lower courts and having regard to this Court's recent decision in *Tobin*. Waterford submitted that the role of this Court in the present appeal is not to rehear the application made before the High Court. As the Court of Appeal, in its review of the High Court's decision, was satisfied that the High Court correctly applied the relevant principles and identified the relevant factors, as well as carefully considering and analysing the competing submissions in the exercise of its discretionary jurisdiction to direct discovery of the ISE Reports, it was submitted by Waterford that this Court should regard the issue of the discoverability of the two ISE Reports as having been conclusively determined in its favour.

3.4 In order to place the submissions of the parties before this Court in context, it is useful at this stage to consider the judgments of both the High Court and the Court of Appeal insofar as they relate to the issues which are canvassed by the parties before this Court.

4. The Judgments of the High Court and the Court of Appeal

4.1 In the High Court, the trial judge first considered the question of whether the documents satisfied the requirements of O. 31, r. 12, being those of relevance and necessity. It was held that, by reference to the terms of the ISE Statement, the ISE Reports were relevant to the subject matter of Waterford's claim of statutory breach under the 1995 Act. The trial judge rejected Davy's contention that, because the ISE disciplinary proceedings against Davy dealt with a sample of credit unions of which Waterford did not form a part, this meant that it dealt with issues separate and distinct from the issues being raised in these proceedings by Waterford. In particular, the ISE Statement's reference to a proposal to credit unions of "a comprehensive arrangement which addressed performance issues with the bonds" was, the trial judge held, "strongly indicative of systemic issues, rather than of a disparate collection of distinct and unique problems in the defendant's dealings with each of a number of specific credit unions". In these circumstances, the trial judge was satisfied that it was reasonable to suppose that the ISE Reports contain "information which may, either directly or indirectly, enable the plaintiff to advance its own case or damage the case of the defendant".

4.2 In respect of Davy's submission as to the confidentiality of the documentation concerned and the associated regulatory or disciplinary process, the trial judge held that the contents of the ISE Reports are very likely to be material to issues which themselves are likely to arise in the proceedings and that the degree of confidentiality attaching to the relevant materials is not so significant as to outweigh the interest of the common good in their disclosure for the purpose of the administration of justice. In particular, the trial judge placed reliance on the terms of the ISE Statement which were to the effect that the contents of the reports were not entirely confidential. In this respect, he noted that copies of the reports had been furnished to the Financial

Regulator and further, in accordance with an explanatory note appended to the statement concerning Rule 9.44 of the ISE Member Firm Rules, details in relation to the disciplinary proceedings could be disclosed by the ISE without liability. Further, the documentation concerned was distinguished from those documents which involve the confidence of a third party, or which contain commercially sensitive information, which were factors which the trial judge considered might impact on the balancing exercise which a court is required to undertake when determining whether to grant discovery of documents in respect of which confidentiality is claimed.

4.3 Turning to consider Waterford's solicitor's breach of the undertaking which was implicitly provided in the normal course of discovery in the separate E-Services Proceedings against Davy, being that the requesting party is not to use information obtained through discovery for any other purpose, the trial judge criticised the solicitor's failure to admit to the breach over the course of more than two and a half years. It was submitted on behalf of Davy that the High Court should exercise its inherent jurisdiction to regulate its own procedures and to prevent an abuse of process by the refusal of the application for discovery on the grounds of the breach. However, it was held that Waterford, as the party to these proceedings, did not provide the undertaking in relation to the discovery process in the E-Services Proceedings and, hence, did not breach it. The trial judge therefore held that he was entitled to consider whether the requested documentation was discoverable. While disregarding, for that purpose, the information improperly deployed in breach of that undertaking (i.e. the purported confirmation that the ISE Reports specifically address Davy's role in the sale of the Jyske bond), he determined that the ISE Reports were very likely to be material to the issues likely to arise in the proceedings and granted discovery accordingly.

4.4 In the Court of Appeal, Davy sought to dispute the trial judge's findings in respect of the discoverability of the documentation and of the solicitor's breach of the implied undertaking. In respect of the former, the Court of Appeal concluded that the ISE Reports are both relevant and necessary for the purposes of satisfying the provisions of O. 31, r. 12 RSC. The conclusions of the trial judge in respect of the relevance of the ISE Reports were upheld and in response to Davy's submission that the documents only referred to a sample of credit unions, Peart J. stated at para. 22 of his judgment:-

> "...The fact that the press statement indicates that the reports were prepared on the basis of investigations carried out by reference to a sample of credit unions only does not detract from the relevance of the reports to the claims made by Waterford. It is reasonable to conclude that the sample was a representative sample – in other words representative of credit unions generally with whom Davy had dealings in relation to the type of bonds at issue in the case of Waterford. In so far as Waterford has pleaded criticisms, allegations and deficiencies relating to the advice given to it, or not given as the case may be, the investigation by the ISE into similar issues arising in relation to the sample of such credit unions chosen for investigation must be relevant to the issues in dispute in these proceedings. It is reasonable to suppose that relevant findings against Davy in relation to the sample credit unions which are contained in the report would either assist Waterford in asserting and proving its claims, and meeting the denials of its allegations by Davy, in conducting cross-examinations of Davy witnesses, and/or may adversely affect Davy's ability to defend the allegations made by Waterford."

4.5 On the basis of those considerations, Peart J. also held that the discovery of the ISE Reports can easily be considered to be necessary. Addressing Davy's submission that the trial judge erred in conflating relevance and necessity and in failing to reach any conclusion on whether the ISE Reports were necessary for the purposes of the

discovery application, Peart J. accepted that the trial judge did not carry out any discrete analysis as to necessity. However, he considered that this was not an infirmity that of itself should permit the appeal to be allowed and discovery be refused.

4.6 Peart J. further upheld the trial judge's conclusion as to the confidentiality of the documentation concerned. In considering the requirements of the administration of justice, he agreed with the trial judge's view that the confidential basis on which Davy engaged with the disciplinary process is not a sufficient interest to outweigh the interest of Waterford being able to deploy the reports at trial in order either to advance its own case or to damage the case put up by Davy in defence of the claims made against it.

4.7 Turning to the question of whether the conduct of the solicitors acting for Waterford, in breaching the implied undertaking which was given in relation to discovery in the E-Services Proceedings, should bear on the court's order for discovery in favour of Waterford, Peart J. considered that the trial judge took "too benign a view" of the breach of undertaking which had taken place. He further held that the analysis of the trial judge did not adequately reflect the seriousness of the breach. Emphasising that such an undertaking is one which is given to the Court and that, in these circumstances, the undertaking was made by an officer of the Court, Peart J. also noted that no explanation or apology was offered to the Court by the solicitor or by any other person responsible. The trust which is placed in officers of the court, such as a solicitor, is, it was held, fundamental to the administration of justice and to the conduct of the legal profession generally and such a breach may be considered to be a contempt of court.

4.8 Peart J. held that the purpose of the undertaking given to the court in relation to documents provided by another party in discovery is that the documents disclosed should not be used for any collateral, ulterior or improper purpose. Although it was submitted to be an inadvertent breach, Peart J. held that there was "no doubt" that the information gathered in the course of the E-Services Proceedings was used in these proceedings for an improper purpose, being to secure discovery of the relevant documents and to counter Davy's solicitor's allegations that the request amounted to "a fishing expedition".

4.9 Having regard to previous authorities as to how an acknowledged breach of undertaking ought to be dealt with by a court, including *Alterskye v. Scott* [1948] 1 All E.R. 469 and *Home Office v. Harman* [1983] A.C. 280, Peart J. concluded that, in order to protect its own process from abuse and to ensure the proper administration of justice and fairness of procedures between the parties to the litigation, a court can take such steps as may be open to it to ensure that discovered documents are not used other than in connection with the proceedings in which they were discovered. Such steps could include imposing a sanction on the contemnor appropriate to the particular circumstances of the breach, such as a fine or a committal order.

4.10 In disagreement with the trial judge's reliance on the fact that Waterford itself did not breach the undertaking, Peart J. stated the following, at paras. 48 and 49 of his judgment:-

> "48. I cannot agree with that approach to the breach of undertaking. It provides no protection to the offended party, Davy, to permit the information to be deployed simply because it was not Waterford itself who gave the undertaking and did not itself breach it, but rather its agent. If it is wrong that Davy should suffer a litigious disadvantage as a

result of the breach, and if the Court's duty is (using the words of Murphy J. in *Greencore Group plc. v. Murphy*) to 'ensure that documents are not used for any purposes other than the purpose of the particular legal proceedings in which they were produced', then once the undertaking has been breached in the circumstances of the present case, it matters not to Davy whether it was Waterford or its agent that breached the undertaking. The court can, and in my view should, ensure that the information so gained is not put to a use which advances the interests of the offending party (albeit through the actions of its agent) at the expense of the interests of, or prejudice to, the offended party in the litigation.

49. Equally it does not seem to me to be the correct approach, and to meet the justice of the situation, to say that if the Court disregards the wrongfully deployed information and is still satisfied that the documents are relevant and necessary and should be discovered, the order for discovery should still be made. The possibility that the Court in due course might proceed to mark its displeasure at the undertaking given to the court in other litigation by perhaps making no order in favour of Waterford in respect of its discovery motion, or even an order for costs against it, fails to recognise the seriousness of what occurred, and fails to ensure that documents or information obtained by way of discovery in one set of proceedings is not used for an improper, collateral or ulterior purpose, such as to gain a litigious advantage in another set of proceedings. It would seem to condone the breach (subject to a possible costs order) of undertaking provided that it has no adverse consequence for another party."

4.11 Having regard to his view that the trial judge's exercise of discretion had failed to protect the integrity of the administration of justice, Peart J. considered that it was open to the Court of Appeal to exercise its own discretion in a way that it considered to be more appropriate. In respect of the Court's powers under its inherent jurisdiction, he held that these are "as ample as may be required for its intervention to

be effective and appropriate and to maintain absolute fairness in the administration of justice". Further, it was held that the seriousness of the matter could not be appropriately dealt with by way of costs orders, as suggested by the trial judge.

4.12 In order to prevent Davy suffering a litigious disadvantage and to mark "in a meaningful way" the serious breach of undertaking which had taken place, Peart J. concluded that the Court should, as a matter of discretion, refuse to order discovery of the ISE Reports. In commenting on the approach adopted by the trial judge, whereby he disregarded the information wrongfully deployed in considering the issue of relevance, Peart J. stated at para. 49:-

> "Equally it does not seem to me to be the correct approach, and to meet the justice of the situation, to say that if the Court disregards the wrongfully deployed information and is still satisfied that the documents are relevant and necessary and should be discovered, the order for discovery should still be made."

On that basis, the appeal was allowed by the Court of Appeal.

4.13 Both parties filed submissions in respect of the appeal on which they were the moving party, together with replying submissions on the appeal to which they were the respondent. In order to identify the precise issues which arise for consideration by this Court it is, therefore, appropriate to set out a brief synopsis of the positions adopted by the parties.

5. The Positions of the Parties

5.1 As mentioned, leave was granted by this Court to Waterford to appeal the decision of the Court of Appeal to refuse to order discovery of the ISE Reports and to Davy to cross-appeal the underlying finding of the Court of Appeal in respect of the

relevance and necessity of the requested documents. It is appropriate for this Court to consider first whether the courts below were correct to conclude that discovery of the ISE Reports *prima facie* satisfied the requirements of O. 31, r. 12 RSC. Following the determination of that issue, questions as to the scope and consequences of the breach of the implied undertaking will then be considered, should they so arise.

5.2 In respect of the issues arising on the cross-appeal, a preliminary question to be determined is that of the Court's jurisdiction to review the decision made by the courts below regarding discoverability. As previously referred to, Waterford submitted that the decision of the Court of Appeal should be regarded as having conclusively determined the question of discoverability in its favour. The Court of Appeal, it was argued, was satisfied that the High Court had correctly applied the relevant principles, as identified in the jurisprudence of the courts, in its analysis of the question of whether the ISE Reports satisfied the requirements of the Rules of the Superior Courts in relation to discovery. The role of this Court, Waterford contended, is not to rehear the application which was made before the High Court.

5.3 During oral submissions, counsel on behalf of Davy accepted that, as a general principle, it is not the role of an appellate court to rehear a discovery application made before the High Court and the Court of Appeal, where those courts have already conducted a detailed analysis of relevance and necessity. However, it was argued that these proceedings ought to be distinguished on the basis that the disputed category of documents is unusually narrow, such that it would not be unduly onerous for this Court to revisit the question of discoverability. Further, it was submitted that the relevance and necessity of the ISE Reports is directly linked to the case made by Waterford so that to refuse to consider the relevance and necessity of the requested

discovery would amount to an injustice and for this reason it is said that it is appropriate that the relevance and necessity of the discovery of the reports be determined on this appeal.

5.4 Considering the substantive issues that arise on the cross-appeal, Davy submitted first that the Court of Appeal erred in concluding that the ISE Reports were relevant. In this regard, it was contended that there was no evidence to support the High Court's conclusion that the sample of credit unions which are considered in the reports was a "representative sample" and, moreover, the facts and circumstances of Davy's dealings with Waterford are separate and distinct from those of the credit unions considered in the reports. On this basis, Davy submitted that the ISE Reports are not relevant to these proceedings.

5.5 On a related basis, citing the well-established principle that relevance of documents which are subject to a request for discovery must be determined by reference to the pleadings, Davy also contended that the pleadings filed by Waterford cannot justify discovery of the ISE Reports. This argument was made on the basis that the pleadings allege that Davy failed to highlight the essential features and risks of the bonds in which Waterford was advised to invest, whereas the ISE Reports refer to the information which was provided to other credit unions unrelated to Waterford and therefore do not provide any insight into the issue in dispute in the pleadings. As the reports pertain to an investigation to which Waterford was not a party, it was submitted that, at most, the documents relate to the underlying dispute rather than the legal action and that these are circumstances which have previously led the courts to refuse to order discovery in *Framus Ltd v. CRH plc* [2004] IESC 25, [2004] 2 I.R. 20 and *BAM PPP PGGM Infrastructure Cooperatie UA v. National Treasury*

Management Agency [2015] IECA 246. Further, Davy argued that its conduct in respect of other credit unions will not demonstrate wrongdoing in its dealings with Waterford, and that discovery of the ISE Reports would, at best, enable Waterford to advance relatively weak inferences which would be prejudicial to Davy.

5.6 It was also submitted by Davy that the courts below failed to apply the correct threshold to their assessment of the relevance of the documents. An application for discovery, it was said, must show that it is reasonable for the court to suppose that the documents in question contain relevant information and therefore the court cannot order discovery where there is a mere possibility that documents may be relevant. Davy contended that the Court of Appeal's conclusion that the ISE investigation "must be relevant to the issues in dispute" amounts to a presumption of relevance, with no evidential basis to support the same. Finally, Davy submitted that the courts below failed to have sufficient regard to the legal status of the ISE Reports, because, as a matter of law, it was contended that the views formed in the course of the ISE investigation comprised of mere opinion and would be entirely irrelevant to a court's assessment of the dealings between Davy and Waterford, citing *Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542 and *Murphy v. Flood* [2010] 3 I.R. 136 in support of this contention.

5.7 Davy also argued that the Court of Appeal erred in conflating the concepts of relevance and necessity and by concluding that necessity had been demonstrated by the same reasons as those which were said to establish relevance. It was submitted that necessity is both a distinct requirement and a distinct concept which must be satisfied in addition to relevance and which requires an assessment of different criteria than those which are involved in an assessment of relevance.

5.8 In this regard, Davy submitted that an assessment of necessity requires a balancing between the litigious advantage which the requesting party will obtain and the prejudice which disclosure will cause to the requested party. Citing the principles set out by Kelly J. (as he then was) in *Cooper Flynn v. RTE* [2000] 3 I.R. 344, Davy contended that discovery will be necessary where it will give a litigious advantage to the requesting party, where the information sought is not otherwise available to that party by other means, and where such an order for discovery would not be oppressive. In reliance on this authority, and a number of others, it was submitted that the Court of Appeal erred in finding the ISE Reports necessary. Davy argued that Waterford will not suffer an unfair disadvantage in not obtaining the reports, that it cannot be said that Waterford's chances will be slim without the ISE Reports, and otherwise very strong with them, and that it cannot be said that the ISE Reports are required for Waterford to make its case.

5.9 In respect of the issue of relevance, Waterford first disputed Davy's characterisation of the claim made in Waterford's pleadings. Rather, it argued, the claim made was that Davy acted in breach of the duties and obligations which it owed to Waterford under the Stock Exchange Act 1995 in advising and causing Waterford to purchase CMS bonds. The ISE Reports relate to Davy's possible breaches of the ISE Conduct of Business Rules by advising and causing a number of credit unions to purchase CMS bonds. Waterford submitted that, with regard to the subject matter of the investigation, it is difficult to see how its entitlement to discovery of the reports can be credibly disputed by Davy on the grounds that it was not one of the credit unions included in the sample canvassed during the investigation.

5.10 Further, Waterford submitted that the High Court and the Court of Appeal were correct in determining that discovery of the ISE Reports was relevant to, and necessary for, the fair disposal of the proceedings. In support of this submission, particular reliance was placed on a number of principles set out in the recent decision of this Court in *Tobin*. In that case, it was held that documents whose relevance has been established should be presumed to be documents whose production is necessary and that, where the requested party claims that discovery of relevant documents is not necessary, the burden then lies on that party to advance reasons as to why the test of necessity had not been met. It was also submitted by Waterford that this Court in *Tobin* established that there is an additional burden on the party disputing the necessity of the requested documents to show that the relevant information or documentation could be obtained by the requesting party by some alternative means which is less burdensome but equally as effective as the discovery process, and that the requesting party does not have to establish that it has exhausted all other procedures available to establish relevant facts before discovery can be sought.

5.11 Waterford contended that it is appropriate for the Court to take into account the foregoing principles, as well as the manner in which the case has been pleaded, not only for determining relevance, but also in order to assess the extent to which a party that objects to making discovery on the grounds that it is onerous has contributed to that situation by the manner in which they have pleaded their case, as was also established in *Tobin*. In circumstances where Davy, in its defence, has denied in full the matters pleaded in the statement of claim filed by Waterford, it was submitted that, where it is established that the ISE Reports are relevant to the issues in dispute in the proceedings, it follows that those documents should be considered to be documents whose production is also necessary.

5.12 Finally, Davy submitted that the Court of Appeal erred in concluding that the confidentiality of the ISE Reports was outweighed by Waterford's interest in their disclosure. In this regard, Davy reiterated that the reports could establish, at most, relatively weak inferences against it and argued that the Court failed to have regard to Davy's right to confidentiality and the public interest in preserving the confidentiality of confidential regulatory processes. It was submitted that the ISE Reports arose from a strictly private and confidential process between Davy and the ISE, which, it was said, Davy engaged with in reliance on the confidentiality provisions contained in the ISE Rules. The limited terms of the ISE Statement which was released was suggested by Davy to be indicative of the confidentiality of the results of the investigation.

5.13 Further to this submission, Davy contended that the Court failed to recognise that its right to confidentiality under Article 8 of the European Convention on Human Rights was engaged. In reliance on the jurisprudence of the European Court of Human Rights, it was suggested that the ISE Reports can only be disclosed where "necessary in a democratic society" for the protection of the rights and freedom of others. In addition, Davy submitted that it enjoyed a constitutional right to privacy under the Constitution, which required a careful proportionality analysis regarding any interference therewith, citing *Framus Ltd v. CRH plc* in support of this contention. Davy also argued that the Court of Appeal failed to have adequate regard for the public interest in preserving the confidentiality of confidential regulatory processes in order to encourage open engagement.

5.14 It was submitted by Davy that a court must engage in a balancing of the competing interests of both parties and take a proportionate approach in order to ensure that minimal interference is caused to their rights. Referring to a number of

authorities in the Irish courts, including *Independent Newspapers v Murphy* [2006] 3 I.R. 566, Davy argued that, where confidentiality is invoked in relation to a discovery request, the confidential documents should only be discovered where that application demonstrates the necessity of the discovery and where the proceedings would be unfair in the absence of discovery. Here, it was contended, the ISE Reports were of limited to no materiality and the degree of confidentiality attaching to the reports, both as a matter of Davy's right and in the interest of public policy, was substantial so that, it was said, the balancing exercise ought to have resulted in a refusal to order discovery of the reports.

5.15 In its response on the issue of confidentiality, Waterford submitted that it is well established that the principle of confidentiality must yield to disclosure where the disclosure is necessary to enable the court to fairly dispose of the proceedings and do justice between the parties. Unlike privilege, it was argued, confidentiality does not provide a barrier to disclosure where it is necessary in the interests of justice. In particular, Waterford relied on the principle set out in *Telefonica O2 Ireland Ltd v. Commission for Communications Regulation* [2011] IEHC 265 to the effect that, if information is of some significance to the fair determination of proceedings, then it is most unlikely that any confidentiality would be sufficient to outweigh the need for the proper administration of justice. On the basis of the content of the ISE Statement issued in April 2009, which referred to both the ISE investigation into Davy's conduct and the fact that it resulted in Davy entering into a settlement arrangement with a number of credit unions to compensate for the financial losses which they sustained, it was submitted that the confidentiality attaching to the ISE Reports had been substantially eroded by the issuing of the ISE Statement.

5.16 Turning to consider the main appeal brought by Waterford against the Court of Appeal's decision to refuse discovery, I consider that three main issues arise for determination. These are the scope of the implied undertaking to use the documentation obtained in the discovery process only for the purposes of the litigation in question and the obligations which attach thereto, the severity of the breach which has occurred on the facts of these proceedings and the extent of the discretion which a court enjoys in the circumstances of this case, each of which will be addressed in turn.

5.17 In its submissions on the main appeal, Waterford first set out its position as to the nature and purpose of the implied undertaking rule, submissions which were uncontested by Davy. Waterford submitted that the implied undertaking rule in discovery is a rule of judge-made procedural law, arising from the inherent jurisdiction of the court to control its own process, which is imposed in the interests of the administration of justice, to encourage broad discovery and the disclosure of relevant material.

5.18 On the first question as to the precise scope of the obligations which arise under the implied undertaking rule, the parties were largely in agreement that the collateral or ulterior purpose which is proscribed by the implied undertaking rule refers to any purpose not connected with the conduct of the litigation in the course of which the information or documentation was discovered. Both parties were also in agreement that the implied undertaking rule not only applies to the documents made available in discovery but also to the information contained in these documents. As such, both Waterford and Davy adopted the position that the precise obligation created by the implied undertaking rule is that any information and documentation

obtained in discovery cannot be used for purposes unrelated to the proceedings in which the discovery is made.

5.19 Waterford further accepted that an implied undertaking is not only binding on the party to whom the documents have been disclosed, but also upon that party's solicitor and anyone else into whose hands the documents may come. Both parties appeared to be in agreement that any obligation arising under an implied undertaking is owed to the court and that breach of that implied undertaking, in the absence of proving "special circumstances" justifying the release or modification of the undertaking, constitutes a contempt of court, as was established by this Court in *Ambiorix Limited v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277.

5.20 In relation to the effects of the breach of the implied undertaking in the present proceedings, neither party disputed that there had been a breach of the implied undertaking made in the E-Services Proceedings on the part of the solicitor acting on behalf of Waterford. On this basis, Davy submitted that the Court of Appeal was correct in finding Waterford in contempt of court. Waterford acknowledged that the implied undertaking rule was, at least in part, designed to protect the privacy and confidentiality of a party to litigation and that, for this reason, it accepted that the obligations arising under an implied undertaking are potentially far reaching. Waterford submitted that the implied undertaking rule is not an absolute rule, however, and that it must yield to higher public interests, such as the doing of substantive justice between the parties to litigation and the protection of the public interest.

5.21 Waterford argued that the court's predominant duty in the administration of justice is to ensure the fair disposal of the proceedings between the parties which the

court is called upon to determine and that its overriding obligation is to ensure that substantive justice is done between the parties to litigation. While a party subject to the implied undertaking rule may apply to the court to release or vary the obligation on that party, it was Waterford's submission that, where the interests of justice so require, the court may exercise its discretion to release a party from an implied undertaking, even where that party has not, prior to making use of the documents, applied for an order securing such release. Following the comments of Kelly J. (as he then was) in *Roussel v. Farchepro Ltd.* [1999] 3 I.R. 567, to adopt an inflexible view in relation to the release or varying of an implied undertaking would, in Waterford's view, unduly and unnecessarily tie the court's hands and likely give rise to an injustice, as well as frustrating the constitutional obligation which is imposed on the court to administer justice.

5.22 In relation to the second issue arising on the main appeal, as to the seriousness of the breach of the undertaking which took place, the positions of the parties differed significantly. Waterford submitted that the breach was inadvertent and *de minimis*, and noted that that it was limited to a single reference to a particular CMS bond. Waterford also placed emphasis on the fact that that the breach was not committed by Waterford itself, but rather by its solicitor, who did not then deploy any information or documentation which was the subject matter of the implied undertaking in the E-Services Proceedings when requesting and formally applying to the Court for discovery of the two ISE Reports by Davy in the present proceedings.

5.23 In contrast, it was Davy's submission that the breach of the implied undertaking by Waterford's solicitor was serious. Davy first suggested that any breach of an undertaking to the court by a solicitor is necessarily a serious breach, as

it involves a breach by an officer of the court. In light of this, Davy argued that the Court of Appeal was correct in observing that, "[t]he breach of any undertaking, implied or otherwise, given to the Court and particularly as in this instance by an officer of the court, is a very serious matter, whether inadvertent or otherwise…". Davy further submitted that a breach of an implied undertaking does not require bad faith or deliberate impropriety to be relevant and that any use or disclosure other than for the purpose of the proceedings will constitute a breach.

5.24 It was further submitted by Davy that, in assessing the seriousness of the breach of the implied undertaking in the present proceedings, the court should have regard to both the general importance of the implied undertaking rule in the administration of justice, and the conduct of the party responsible for the breach. In relation to the general importance of the implied undertaking rule, Davy argued that the purpose of the rule is both to minimise the invasion of privacy inherent in ordering discovery or inspection and to protect the integrity of the proceedings by ensuring that parties do not withhold material for fear of the manner in which it will be used. Davy argued that that the implied undertaking rule therefore comprises a critical protection for those who disclose documents in discovery as well as an essential mechanism for encouraging full disclosure in litigation and that, as such, it is necessary for the proper administration of justice. Davy submitted that the importance of the implied undertaking rule to the process of litigation should influence the court's assessment of the seriousness of the breach of such an undertaking

5.25 Finally, Davy submitted that the Court of Appeal was correct, in assessing the seriousness of the breach, to have regard to the conduct of Waterford and their solicitor and, in particular, the lack of an explanation or an apology offered to the

court on affidavit by Waterford. Davy argued that Waterford's evasiveness and failure to adduce evidence relating to the breach underpins the seriousness of the breach of the implied undertaking. Davy submitted that the Court should also consider Waterford's omission to seek release from the implied undertaking as particularly striking when viewed alongside its failure to adduce evidence on the circumstances of the breach of said undertaking. It was Davy's view that this omission comprises an attempt by Waterford to bypass the well-established position that a decision on release of the implied undertaking must reside with the court.

5.26 During oral submissions, counsel on behalf of Waterford submitted that, while no explanation for the breach was provided by Waterford on affidavit, an explanation as to exactly what had caused the breach had been offered to the High Court by counsel at trial and that it was therefore inaccurate to allege that Waterford had failed to explain the breach of the implied undertaking to the Court.

5.27 The third question which arises on the main appeal concerns the extent of the court's discretion to decline to order discovery which would otherwise be appropriate on the grounds of an accepted breach of an implied undertaking, in circumstances where the breach was committed not by the requesting party in the current proceedings, but rather by that party's solicitor in separate proceedings in which the requesting party was not involved.

5.28 Waterford argued that the correct approach to be taken by a court in these circumstances is based on the overriding duty on the court to do substantive justice between the parties in the disposal of the proceedings. Where, it was submitted, the court has determined that the documents sought are relevant to, and necessary for, the fair disposal of the proceedings, a residual discretion cannot reside with the court to

decline to order discovery as this would effect an injustice. While Waterford accepted that the implied undertaking rule is binding on the party to whom documents are disclosed as well as the servant or agents of that party, it was submitted that a breach of an implied undertaking by a solicitor representing a party in proceedings should be treated by the court as a contempt of court by the solicitor and any sanction that may be imposed by the court must be personally directed to the contemnor who is responsible for the breach, as was the approach adopted by the House of Lords in *Home Office v. Harman* [1983] A.C. 280. To decline to order discovery in these circumstances, Waterford contended, was an approach which was not supported by precedent and would amount to an unjust and disproportionate punishment of an innocent party, who would then face a real risk of suffering an irreparable injustice by being permanently deprived of the benefit of such documents in their proceedings, in circumstances where the solicitor's breach related to separate proceedings in which the innocent requesting party was not involved. To allow such an outcome, it was submitted, would involve the court doing an injustice greater than the one that it seeks to remedy.

5.29 Waterford submitted that the correct approach which a court should adopt in determining an application for discovery where there was an accepted breach of an implied undertaking by the requesting party's solicitor is to address whether the documents in question are relevant to and necessary for the fair disposal of the proceedings, notwithstanding the breach of the implied undertaking. If it is concluded that the documents are relevant and necessary for the purposes of the discovery application, then Waterford argued that this should result in a determination that "special circumstances" exist which would justify the release or modification of the implied undertaking rule. It is this approach which, Waterford submitted, was

properly followed by the High Court and which leads to the conclusion that it is necessary to direct discovery of the ISE Reports.

5.30 Finally, Waterford contended that the Court of Appeal failed to correctly apply the principles which govern the exercise of its appellate jurisdiction in reviewing discretionary orders of the High Court. In reliance on *Re Comet Food Machinery Company Ltd (in Voluntary Liquidation)* [1999] I.R. 485, *Martin v. Moy Contractors Ltd* [1999] IESC 26 and *CFA v. O.A.* [2015] IESC 52, it was submitted that discretionary orders ought not to be interfered with by an appellate court where it is satisfied that the order made by the trial judge where it was made in accordance with established principles. In circumstances where it is submitted that the High Court adopted the correct approach in determining the discovery application in question, and considered the necessary principles, Waterford argued that the Court of Appeal erred in interfering with the decision of the High Court in declining the order of discovery.

5.31 In response, Davy argued that the Court of Appeal correctly identified that the court has a discretion to take whatever steps may be open to it in order to regulate the consequences of a breach of an implied undertaking in order to protect its own process from abuse and to ensure procedural fairness and the proper administration of justice as between the parties to the litigation. While it is open to the court to make a finding of contempt, Davy submitted that the courts have an inherent jurisdiction to take a wide variety of actions when faced with a situation in which the implied undertaking has been breached and that the Court of Appeal correctly identified the scope of this discretion.

5.32 Furthermore, Davy submitted that the Court of Appeal correctly held that this discretion is to be exercised in accordance with what is necessary "to meet the justice

of the situation". It was Davy's submission that, in these proceedings, the Court of Appeal was correct to conclude that the High Court's decision to reflect disapproval of the breach of the implied undertaking by way of an order for costs would not reflect the seriousness of the breach and would fail to recognise that significant countervailing factors weigh against the making of an order for discovery in the circumstances.

5.33 It was submitted that, similar to the balancing exercise which was undertaken in *Telefonica* in the context of a claim of confidentiality over requested documents in the discovery process, the court is entitled, in a case such as this, to consider the likely materiality of the documents when considering whether to order discovery in light of a breach of the implied undertaking. On the facts of these proceedings, Davy argued that, even if the ISE Reports are considered to be relevant and necessary, their likely materiality to the proceedings is minimal, such that no significant injustice would be suffered by Waterford if discovery is declined.

5.34 In respect of the point made by Waterford deriving from the fact that the breach was committed by its solicitor rather than the party itself, Davy submitted that first there was no evidence provided by Waterford as to the circumstances of the breach so that it could not be concluded that Waterford had no involvement. Further, it was submitted that there is a well-established identity between a litigant and its agent in this context, as the implied undertaking is given by the party in whose favour the order for discovery is made and is binding on that party, its legal representatives and on any others assisting that party in the litigation. Moreover, it was said to be well established that any litigant is fixed with the errors of its legal representatives. Therefore, Davy argued, there is no legally recognisable basis on which to distinguish

between a breach of the implied undertaking committed by Waterford and one committed by its legal representatives and to do otherwise would be to undermine the function of the implied undertaking rule in the litigation process.

5.35 Finally, in response to Waterford's contention that the Court of Appeal erred in its review of the discretionary order of the High Court, Davy submitted that, in light of the principles of review as set out by this Court in *Martin v. Moy Contractors Ltd.*, an appellate court cannot interfere with a decision of the trial judge where it is "within the limits of reasonable discretion". On the facts of these proceedings, Davy argued, the decision of the trial judge was not within such limits. To order discovery of the documentation, it was submitted, would be to remove for legal agents a significant disincentive to breach the implied undertaking and would jeopardise a fundamental element of the discovery process.

5.36 Against those submissions, I will turn first to the cross-appeal.

6. Relevance and Necessity – the Proper Approach

6.1 It is appropriate to start with a consideration of the point made by Waterford as to the proper approach which should be adopted by an appellate court where there is an appeal in respect of an application for discovery in which questions of necessity and/or relevance arise. It should first be said that many of the issues which potentially arise on a discovery application involve questions of degree. While there may well be categories of documents where the court is satisfied that the documents in question could not be relevant or, at the other end of the scale, would be manifestly relevant, nonetheless there are many points in between those two extremes. All judges have experience of the fact that, of the documents discovered, many are not actually deployed at the trial because they turn out to be of little value to the resolution of the

issues. However, the problem is that, without sight of the documents in advance, it can be very hard to tell exactly how relevant a document is likely to be. In such cases a first instance court must exercise a degree of judgment as to the likelihood of any document or documents being relevant, and must factor that into its overall conclusion.

6.2 Likewise, a court considering whether the disclosure of relevant documents may nonetheless not be necessary having regard to the principle of proportionality, may also have to make a judgment call, on the basis of whatever materials may be before the court, both as to the degree of relevance of the documents in question and the burden which their disclosure might be likely to place on the requested party. Many other examples could be given.

6.3 In my view, when a first instance court exercises a judgment of that type, it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court. Clearly, if the appellate court takes the view that documents whose discovery had been ordered were not relevant at all, then it should have little difficulty in overturning an order which directed that they be discovered. A similar approach should be adopted where clearly relevant and necessary documents were refused. However, the fact that the appellate court takes a somewhat different view from the trial court as to the degree of relevance should not lead to the overturning of the decision of the trial court unless the appellate court considers that the trial judge's assessment of the weight to be attached to relevance was clearly wrong and, as a result, he or she made an order which was outside the range of any order which could reasonably have been made.

6.4 Having identified the proper approach, and for reasons which I hope will become clear, it next seems to me to be appropriate to turn to the issues which arose on the appeal before returning to the question of relevance and necessity.

7. Breach of an implied undertaking – the consequences

7.1 I do not disagree, nor did I understand counsel for Waterford to disagree, with the statements made in the judgment in the Court of Appeal concerning both the importance of compliance with an implied undertaking and the seriousness of any breach. Furthermore, I understood counsel for Waterford to accept that the failure to provide any explanation for the breach, despite a number of requests from Davy's solicitors, compounded the seriousness of the breach in this case. As already noted, it was only in the course of the hearing in the High Court that some explanation was given by counsel speaking from his instructions.

7.2 I have no doubt, therefore, that the Court of Appeal was correct when it said that the breach here was serious and would warrant significant action being taken by a court to protect its own process. The issue on this appeal, however, is as to whether the precise action taken by the Court of Appeal was appropriate in all the circumstances.

7.3 In that context it should be noted that, in the High Court, the trial judge indicated that he would consider whether discovery ought be directed in respect of the ISE reports without reference to any of the information which was found in the wrongfully deployed documents. The Court of Appeal disagreed that such was an appropriate approach for the reasons set out in para. 49 of the judgment of Peart J., which I have already cited. The view taken by the Court of Appeal was that

excluding information wrongfully deployed from its consideration was insufficient to mark the seriousness of the breach.

7.4 In passing, I should note that counsel on both sides were in agreement that any use of information contained in discovered documents for purposes outside the litigation in respect of which discovery was ordered amounts to a breach of the implied undertaking. In other words, it is not only the deployment of the document itself but also the deployment of any information contained in it, which would not otherwise have been available to the requesting party and its advisors, that constitutes the breach.

7.5 Furthermore, counsel on both sides agreed, in accordance with well-established principles, that it is possible to invite a court to whom the undertaking has impliedly been given to waive that undertaking in the particular circumstances of a case. No such application was, of course, brought in respect of the documents or information at issue on this appeal. I should add that there may well be cases where an assessment of whether such a waiver would readily have been obtained may be material in assessing the seriousness of a breach.

7.6 However, in my view, Peart J. was incorrect in the approach which he adopted in para. 49 of his judgment. There are two bases on which a court may assess what action it should take to deal with a breach of an implied undertaking. The first may be to deprive a party of any litigious advantage which it may have obtained as a result of the wrongful deployment of documents or information obtained on discovery in other proceedings. However, that aim would be fully met by adopting the approach of the High Court in this case and considering the application for discovery without

reference to any of the information wrongfully deployed. By taking that approach, the Court ensured that there was no litigious advantage.

7.7 The second basis is the possibility that it may be considered necessary to impose some penalty or sanction to mark the seriousness of the breach and to act as a deterrent for other such breaches. I have no doubt but that a court has the power to impose such sanctions and should exercise such powers in a proportionate way, having regard to the seriousness of the breach. The real question, however, is as to whether it was appropriate to impose a sanction which potentially deprived Waterford of documents, deemed by both the High Court and the Court of Appeal to be relevant and necessary to the fair disposition of these proceedings, on the basis of imposing a sanction on Waterford's solicitor for a breach of an undertaking given in other proceedings for a different client.

7.8 It seems to me that different considerations apply when considering the appropriateness of a sanction than apply in a case where the court is seeking to remove a litigious advantage. Whether or not Waterford could be said to be at fault in the manner in which the relevant information came to be deployed in breach of the implied undertaking given in other proceedings, it would still be appropriate to deprive Waterford of any litigious advantage which it might have obtained. Such an advantage is one which Waterford should not have had and, therefore, its fault (or lack thereof) in obtaining that advantage would not seem to me to be particularly relevant in determining what measures should be taken to deprive it of the litigious advantage wrongfully obtained.

7.9 However, different considerations seem to me to apply when one is talking about a sanction. While it is true, as counsel for Davy argued, that parties to litigation

may sometimes suffer a disadvantage because of actions taken or advice given by their lawyers, it seems to me to be somewhat different to suggest that Waterford should be punished for the actions of its solicitor in respect of an undertaking given in other proceedings for a different client.

7.10 It is true that the solicitor concerned was acting on behalf of Waterford when he breached the implied undertaking given in previous proceedings. It is also true that no affidavit evidence was placed before the Court to make clear that Waterford was not, itself, knowingly involved in the breach. It is also true that an application could have been made to release the relevant solicitor from the undertaking and thus clarify the entitlement to deploy the information concerned in advance of taking any action.

7.11 On the other hand, the practical carriage of proceedings so far as purely procedural matters are concerned is primarily the responsibility of a party's advisors. The person who is, therefore, primarily to blame for a breach of an implied undertaking will ordinarily be an advisor rather than the party itself although there may, of course, be circumstances where it is clear that the actual use of the information in breach of the implied undertaking was done directly by the party itself. The primary focus of any sanction should, therefore, be directed at the person primarily responsible for the breach.

7.12 In those circumstances, I am satisfied that the Court of Appeal was incorrect to go so far as to impose what amounted to a sanction on Waterford and should, like the High Court, have confined itself to disregarding the information wrongfully deployed in making an assessment as to whether an entitlement to discovery had been established.

7.13 In those circumstances, it is appropriate to return to the question of relevance and necessity and to do so, as the High Court did, without giving any weight to the information wrongfully deployed.

8. Decision on Relevance and Necessity

8.1 For the reasons already set out, I am satisfied that the correct approach to adopt is to consider whether the decision of both the High Court and the Court of Appeal to the effect that the ISE reports were both relevant and necessary for discovery was within the range of decisions open to those courts. For the reasons also set out earlier, I am satisfied that the proper approach should be to consider those matters without reference to any of the information which was wrongfully deployed.

8.2 The central point made on behalf of Davy starts from an analysis of the pleadings, leading to a suggestion that the only real issue in this case is as to whether Davy gave various assurances about the suitability of the relevant investments or failed to provide appropriate advice and information. On Davy's case it is said that the ultimate resolution of these proceedings is, therefore, relatively straightforward. The trial court will have to decide, on the facts, as to whether any such assurances were given or advice provided and, to the extent that any such matters were established, the Court would then have to assess the investments in question to determine whether they complied with any such assurances or advice or whether other advice and/or information should have been given having regard to the nature of the investments.

8.3 However, it does appear that Davy were also involved in making the same or similar bonds available to other credit unions. I use the phrase "making available" so as to adopt a neutral phrase given that counsel suggests that Davy were really acting

as a salesperson of the bonds rather than an advisor to any of the credit unions. Be that as it may, it does seem likely that at least some of the issues investigated by the Irish Stock Exchange and which are, doubtless, recorded in its report, touch on similar issues to those raised by Waterford in these proceedings, albeit in the context of making relevant financial instruments available to other credit unions. In those circumstances, it seems to me that it was open to both the trial judge and the Court of Appeal to consider that the threshold for relevance had been met.

8.4 There is no doubt that the Irish Stock Exchange investigation and the report which flowed from it were confidential. There is equally no doubt that a court can reach an appropriate judgment to the effect that documents should not be discovered by reason of the significant confidentiality attaching to them, coupled with perhaps a very low level of relevance or materiality.

8.5 While Waterford was correct to argue that confidentiality (as opposed to privilege) does not provide a basis in itself for declining discovery, a court can exercise a judgment as to whether the undoubted interests of justice in ensuring that the court has all relevant materials before it when deciding a case can be outweighed by any breach of confidence, and in particular the confidence of third parties, which might be involved in directing disclosure. However, those interests of justice carry a very high weight so that confidentiality will certainly have to yield to those interests, unless the court assesses the documents in question to be only marginally relevant and the confidentiality interests as being very weighty.

8.6 Again, it seems to me that the decisions of the High Court and the Court of Appeal on that question were within the range of decisions which were reasonably open to those courts.

8.7 In those circumstances, it does not seem to me to be appropriate for this Court to second guess the views which both the High Court and the Court of Appeal took on those matters. The conclusions of those courts on relevance and necessity were within the range of determinations open to those courts and should not be upset on appeal. In those circumstances, it follows that the cross-appeal must fail.

8.8 For the reasons already given, it seems to me that the grounds on which the Court of Appeal based its decision not to order discovery, notwithstanding a finding of relevance and necessity, were incorrect and in those circumstances the appeal must be allowed and discovery directed.

9. Conclusions

9.1 For the reasons analysed earlier in this judgment, I consider that the proper approach of an appellate court when reviewing a decision of a lower court on issues such as relevance and necessity in the context of discovery is to decide whether the views of the courts below on those issues fell within the range of views which were reasonably open to them.

9.2 For the reasons also analysed earlier in this judgment, I have concluded that the Court of Appeal was in error in coming to the view that it would be appropriate to deprive Waterford of discovery of documents which had been determined to be both relevant and necessary as a means of imposing a sanction for a breach of an implied undertaking given in other proceedings in which it was not a party. It seems to me that, by considering the question of relevance and necessity without reference to any of the information wrongfully deployed, a court would deprive Waterford of any litigious benefit which it might otherwise wrongfully obtain. To go further would be

to impose a sanction on Waterford in circumstances where, at a minimum, the person primarily responsible for the breach of undertaking was its solicitor.

9.3 On that basis, it seems to me that it was appropriate to consider the questions of relevance and necessity in the manner adopted by the High Court being to exclude from any consideration the information wrongfully deployed.

9.4 I have also concluded that the views expressed by the High Court and the Court of Appeal on relevance and necessity were within the range of views which could reasonably be adopted on the materials before the courts. In those circumstances it does not seem to me to be appropriate for this Court to second guess the views of those courts in that regard.

9.5 For those reasons, it follows that the cross appeal should be dismissed on the basis that the High Court and the Court of Appeal came to a sustainable decision to the effect that the documents in question were relevant and that their discovery was necessary. In addition, the appeal should be allowed on the basis that the Court of Appeal wrongly declined discovery for the reasons already addressed. It follows in turn that I propose that this Court should make an order directing discovery of the two ISE reports.

9.6 I would propose that the parties be invited to seek to agree the order which should be made including any question of costs. In the event that the parties so agree, the Court will make an appropriate order. In the event of disagreement, the Court will invite the parties to exchange correspondence setting out their position on any matters in dispute. In the light of the receipt of any such correspondence, the Court will consider how to arrange for the determination of any issues arising.

Approved
12th - VIII - 2020