

*Unapproved  
No redactions required*



**COURT OF APPEAL**

**CIVIL**

**Court of Appeal Record No. 2022 /45**

**Neutral Citation No. [2022] IECA 155**

**Edwards J**

**Noonan J**

**Collins J**

**BETWEEN**

**PAT RYAN**

*Plaintiff /Respondent*

**AND**

**DENGROVE DESIGNATED ACTIVITY COMPANY**

*Defendant /Appellant*

**JUDGMENT of Mr Justice Maurice Collins delivered on 7 July 2022**

**BACKGROUND**

1. This is an appeal by the Defendant (“*Dengrove*”) from a discovery order made by the High Court (Twomey J) on 26 January 2022 (“*the Order*”)

2. The background to these proceedings and the nature of the claims made by the Plaintiff are considered at length in the judgment of Murray J (Faherty and Haughton JJ agreeing) in an earlier appeal in these proceedings: [2021] IECA 38. For the purposes of this judgment, a briefer account will suffice.
  
3. At all material times Mr Ryan was (and may still be) a member of two partnerships, the City Partnership (in which he had a 25% interest) and the City Arts Partnership (in which he had a 12.5% interest) (collectively "*the Partnerships*"). There were a number of other partners in these partnerships, with varying shares. The Partnerships were formed for the purpose of acquiring and developing property at City Quay/Moss Street, next to the River Liffey ("*the Property*"). Different parcels of the overall site were acquired by each Partnership. In order to fund the acquisition of the Property, the Partnerships took out two loans from Anglo Irish Bank plc (one loan for each Partnership). These loans ("*the Partnership Loans*") were secured on the Property by a number of security instruments. Importantly, the liability of the partners under these loans was several (rather than joint and several) in proportion to their respective interests in the Partnerships. In other words, the partners did not have a liability beyond their own partnership shares.
  
4. The Partnerships were formed and the Property acquired in 2003. In 2011, the Partnership Loans were transferred to the National Asset Management Agency (NAMA) and were sold on to Dengrove in January 2017.

5. Prior to the institution of these proceedings, a dispute arose between Mr Ryan and Dengrove as to the extent of the indebtedness secured on the Property. Mr Ryan's position was that only the Partnership Loans – the specific facilities advanced to the Partnerships for the purpose of acquiring the Property - were secured on it. Dengrove's position was that the security instruments were "*all sums*" mortgages/charges and that *all* debts due to it by any of the partners, however arising, were captured by them. While Mr Ryan had no other liabilities to Dengrove, other partners had very significant additional liabilities to Anglo-Irish Bank which had transferred to Dengrove. As Murray J noted at paragraph 9 of his judgment, the "*difference between the positions urged by the parties is, in financial terms, stark: as I have noted, on Dengrove's account the amount outstanding is €430M, while according to the appellants it is €17.3M.*"
6. Other issues also arose between Mr Ryan and Dengrove including as to whether Dengrove was entitled to charge default or penalty interest. A substantial amount of default interest had been charged by Dengrove but Mr Ryan contested its entitlement to do so.
7. It was in these circumstances that Mr. Ryan commenced these proceedings in March 2018. Again, I gratefully adopt the description of the proceedings given by Murray J:

*"The primary contention advanced in the proceedings, and elaborated upon in the Statement of Claim delivered on May 2 2018, was that the partnership agreements precluded one partner from charging the assets of the partnership, that Dengrove was bound by these restrictions, and that Dengrove could not*

*assert that the property could be used as security for indebtedness other than that arising from the specific facilities extended to those partnerships. The indebtedness accrued pursuant to the two partnership facilities which it is alleged was all Dengrove was entitled to require the borrowers (including the first named appellant) to redeem, was described in the proceedings as ‘ The Lawful Redemption Amount’. It was claimed in the proceedings that Dengrove could not charge default or penalty interest on that amount.”*

8. As it was put in paragraph 50 of the Statement of Claim, the proceedings had “*as their objective the establishment of the Plaintiff’s entitlement to discharge his own indebtedness and in addition that of each of the other partners partnership indebtedness and thereby secure the return of all security.*”
  
9. Dengrove delivered a full defence and the matter proceeded to trial in the ordinary way. Along the way, Mr Ryan sought discovery. Certain categories of discovery were agreed and others were the subject of adjudication by the High Court (Haughton J). Amongst the categories agreed was a category (category 5) directed to the calculation by Dengrove of interest on the indebtedness of the Partnerships.<sup>1</sup> Discovery was duly made by Dengrove.

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<sup>1</sup> The precise terms of category 5 were “*All documents evidencing and/or relating to the entitlement on the part of [Dengrove] to charge interest, default interest and/or penalty interest on the indebtedness, the subject matter of these proceedings. This should include bank statements of the accumulation and imposition of any such interest, default interest and/or penalties which the Defendant has asserted it is entitled to charge.*”

10. In the lead-up to the hearing, Dengrove abandoned its claim to default/penalty interest but it seems that there were other issues regarding the calculation of interest and, consequently, the calculation of the redemption amount. However, we were told by Ms Smith SC, counsel for Dengrove, that all the remaining issues affecting the calculation of the redemption amount had in fact been resolved following engagement between the parties respective financial experts and she explained that the experts had agreed the applicable rate(s) of interest and had agreed the amount that was due and owing on foot of the partnership loan facilities i.e. the redemption amount. No issue was taken with that account.
11. On the third day of hearing a settlement was agreed. The background to the settlement and the terms of it are discussed at paragraphs 15-18 of Murray J's judgment. The settlement stipulated the agreed redemption amount (€17,379,125.09). It provided for a consensual sale of the Property and provided that, when the Property was sold, Mr Ryan would receive 20.7% of the net proceeds (that percentage reflecting his overall share across the two Partnerships) as well as a contribution to his costs. On receipt of the sales proceeds, Dengrove agreed to release its security over the Property.
12. In circumstances unnecessary to recite, and which are in any event set out in detail in the judgment of Murray J, the settlement agreement broke down and in June 2020 Dengrove appointed a receiver over the Property. Further proceedings were then instituted by Mr Ryan and another partner, Phil Monaghan, challenging the appointment of the receiver and his entitlement to sell the Property. An injunction restraining the sale of the Property was then sought in both proceedings. An interim

order was made *ex parte* but an interlocutory order was refused by Twomey J ([2020] IEHC 533) and that decision was upheld by this Court on appeal. The decision of this Court was given in February 2021 and the Property was subsequently sold in July 2021. We were told by counsel that the sale proceeds exceeded the redemption amount and that there would be a “*proportionate return*” to Mr Ryan accordingly.

13. In April 2021 Mr Ryan delivered an Amended Statement of Claim. The amendments comprise additional pleas, as well as the addition of further reliefs. A number of the new pleas were directed to Dengrove’s entitlement to appoint a receiver and the receiver’s entitlement to sell. There are also pleas directed to the amount of the *Lawful Redemption Amount* and to Mr Ryan’s right of redemption, including in relation to the indebtedness of the other partners in the Partnerships.
  
14. For present purposes, however, the material pleas are those at paragraphs 74-77 of the Amended Statement of Claim. Paragraph 74 pleads that, if any additional sums are due (over and above the sums accepted to be due by Mr Ryan), Dengrove had come “*to a series of compromise agreements*” with the other partners, the effect of which “*compromise or settlement agreement*” was to reduce the indebtedness due to Dengrove. On that basis (so it is said) section 17 of the Civil Liability Act (1961) had the result that Mr Ryan “*should be indemnified and/or absolved from making any payment to [Dengrove].*” Paragraph 75 then pleads that such “*settlement or compromise agreements*” represent a “*release or accord*” of the other partners, such that Dengrove was to be identified as a wrongdoer, with the result that any claim that Dengrove had against Mr Ryan was reduced “*in accordance and/or proportionately*

*with the amount of the settlement or compromise agreement*". That, it is said, had the consequence that at no material time was an amount of €430 million secured on the properties.

15. I shall set out paragraphs 76 and 77 in full:

*"76 It is pleaded that the Defendant has sought to procure a breach of the Partnership Restrictions contained in the Partnership Agreements by John McCormack, Alan McCormack, Brian McCormack, Niall McCormack and Paddy Kelly by entering into a Co-Operation Agreement with them and seeking for those partners to act contrary to the Partnership Restrictions and the interests of the Plaintiff. It is pleaded that this action by the Defendant in procuring this breach has impeded the Plaintiff's equity of redemption.*

*77 It is further pleaded that the Defendant has compelled John McCormack, Alan McCormack, Brian McCormack, Niall McCormack and Paddy Kelly to unlawfully seek to allow increased interest amounts be applied to loans for the purpose of reducing tax leakage in circumstances where the Defendant has made the loans non-recourse to those partners. It is pleaded that the Defendant's actions have caused the Plaintiff loss and have further impeded his equity of redemption in circumstances where the Defendant has engaged with those partners in seeking to inflate the sums due and owing under the loans."*

The claims made in these paragraphs appear to be quite different to the claims made in paragraphs 74 and 75. The earlier paragraphs contend that the indebtedness of the other (unidentified) partners to Dengrove had been *reduced* by virtue of “*compromise or settlement agreements*” entered into by them whereas paragraphs 76 and 77 contend that the indebtedness of certain of those partners – those identified in paragraph 77 - had been artificially *inflated* by the loading of interest in excess of what was actually due. It is not entirely clear whether the loans referred to in paragraph 77 are the Partnership Loans only or whether it refers also to the other loans of Mr Ryan’s co-partners which had been transferred to Dengrove.

16. John McCormack, Alan McCormack, Brian McCormack, Niall McCormack and Paddy Kelly were also partners in the Partnerships. Despite the allegations made regarding their conduct, they are not parties to these proceedings. The “*Partnership Restrictions*” referred to in paragraph 76 are set out in para 14 of the Amended Statement of Claim and include a prohibition on any partner selling, mortgaging charging, disposing or encumbering the Property of the Partnership without the prior written consent of the other partners or increasing the liabilities of the Partnership without such consent.
17. The additional reliefs sought in the Amended Statement of Claim include a declaration that, pursuant to section 17 of the Civil Liability Act (clearly, the Civil Liability Act 1961), Mr Ryan be indemnified or absolved from making any payments to Dengrove on the basis of the “*Compromise Agreements*”. In the alternative, a declaration is sought that, by virtue of the Compromise Agreements, an amount of €430 million is



not secured on the Property. A further declaration is sought that Dengrove has “*induced and/or procured the breach of the Partnership Agreements*” and damages for inducement to breach of contract are also sought. In circumstances where the Property has been sold, Mr Ryan’s claim at this stage would appear, in reality, to be one for damages and/or other financial relief.

18. Dengrove sought particulars of these additional pleas. It complains that no proper particulars were provided. That is disputed and Mr Ryan makes the point that Dengrove did not bring an application to compel the delivery of further particulars. In those circumstances, so it is said, Dengrove cannot challenge the adequacy of the particulars provided. In any event, as regards the plea in paragraph 74, Mr Ryan says that he is not in a position to give any particulars of the *Compromise Agreements* because (so it is said) they are in the possession of Dengrove and have been concealed from him even though they “*materially affect and prejudice his interests and rights*” (para 3 of Mr Ryan’s Replies to Further and Better Notice for Particulars dated 19 July 2021). Quite how Mr Ryan is in a position to make that assertion is unclear. Reference is made to a statement in Dengrove’s Annual Report for the year ending 31 December 2018 that “*the Company also has in place a cooperation agreement which supports its ability to negotiate restructurings or discounted pay-offs with the debtors and enforce the underlying mortgages.*” That Annual Report is amongst the papers in the appeal. It does not identify the debtors in question or give any additional information on the terms of the cooperation agreement referred to or provide any basis for thinking that the agreements are in any way unusual or wrongful or otherwise may have any bearing on any issue in these proceedings.

19. As regards the pleas in paragraph 76 of the Amended Statement of Claim, Mr Ryan's Replies of 28 June 2021 refer to the appointment of a receiver and an alleged refusal to engage with Mr Ryan as actions by which his equity of redemption was impeded. His further Replies of 19 July 2021 also identifies "*unlawfully aggregating the indebtedness of the Partnerships with the indebtedness of the individual partners*" resulting in "*an artificial inflation of Partnership indebtedness*" as an action by which Dengrove prevented Mr Ryan from exercising his equity of redemption (para 4). As regards the plea in paragraph 77 of the Amended Statement of Claim, Mr Ryan's Replies of 28 June 2021 refer to the imposition of "*penalty interest*" by Dengrove, in concert with other partners, for the purpose of "*unlawfully and impermissibly seeking to increase the indebtedness and reduce the value of the assets for its own purposes and ends*" (para 9). That clearly refers to the Partnership Loans.
  
20. The application to amend the Statement of Claim relied to a significant extent on what was said to be new material that had not been available to Mr Ryan previously, comprising emails forwarded to his son in July 2020 from an unknown source. That material was exhibited in the application to amend and it was also before this Court on this appeal. It will be necessary to make some further reference to it below.
  
21. Dengrove delivered an Amended Defence in July 2021. It denied the contents of paragraphs 74 and 75 of the Amended Statement of Claim, specifically denying that Dengrove had come to a series of compromise agreements with Mr Ryan's partners, also denying the application of section 17 of the Civil Liability Act 1961 and denying that any compromise or settlement agreement would have the effects pleaded (para

36E). The Amended Defence also denied paragraphs 76 and 77, while also objecting that the allegation that Dengrove had sought to procure a breach of the Partnership Restrictions had not been adequately particularised, despite request. A similar objection was made to the plea that the matters alleged had “*impeded*” Mr Ryan’s equity of redemption (para 36F).

**THE (SECOND) APPLICATION FOR DISCOVERY  
AND THE ORDER OF THE HIGH COURT**

22. In September 2021, after the amended pleadings had closed with the delivery of a Reply to Dengrove’s Amended Defence, Mr Ryan’s solicitors sent a second request for voluntary discovery. It sought 6 categories of discovery, all referable (so it was said) to the issues arising from the amended pleas in the Amended Statement of Claim. In response, Dengrove’s solicitors refused certain of the categories outright and offered more limited discovery in respect of others. Agreement was reached in relation to 2 categories (Categories B & C) and, as a result, the application for discovery that issued in October 2021 sought 4 categories of discovery. Category A sought discovery of a broad range of documents recording or otherwise evidencing that an amount of €430 million was secured on the Property. Rejecting that category, the Judge noted that Dengrove had previously agreed to provide discovery identifying the amount of indebtedness of each borrower and had also agreed to provide a table showing what remained secured on the Property as well as agreeing to disclose the lending agreements entered into by the co-partners. Category E was another broad category of documents directed to communications between Dengrove and Mr Ryan’s co-partners relating to “*any aspect of the indebtedness of €430 million*” that Dengrove claimed to be secured

on the Property. That category was rejected by the Judge as amounting to a “*general trawl of every communication*” between Dengrove and Mr Ryan’s co-partners, which was not justified by the amended pleas in the Statement of Claim. The Judge’s refusal of these 2 categories is not challenged on appeal.

23. The appeal is thus concerned with Categories D and F only.

24. Category D is in the following terms:

*“All records, notes, memoranda, or other documents recording, describing or otherwise relating to any compromise agreement or agreements between the Defendant and the Plaintiff’s co-partners.”*

As required by the Rules, the letter seeking voluntary discovery set out the reasons for seeking discovery of this category. Having made reference to Dengrove’s claim that an amount of €430 million was secured on the Property, the letter noted that paragraph 74 of the Amended Statement pleaded that “*the Defendant has, in fact, compromised the co-partner’s indebtedness and, as such, [the Plaintiff] should be indemnified, or absolved from such indebtedness pursuant to, inter alia, section 17 of the Civil Liability Act.*” That pleaded case had been denied and “*as such these documents are relevant and necessary to determine this conflict on the pleadings*”.

25. The Judge directed discovery of this category in the terms sought. It was, in his view, directly and solely linked to the amendments to the Amended Statement of Claim as it

sought documents relating to the alleged compromise agreements, an issue which was not originally pleaded. The “*limited threshold of being able to specify a legitimate basis*” for access to this category had been reached. The Judge also observed that the alleged compromise agreement between Dengrove and Mr Ryan’s partners appeared to be “*the key claim*” advanced in the amendments to his Statement of Claim (that Dengrove engaged with Mr. Ryan’s partners to inflate the indebtedness secured on the property in order to avoid tax). Although Dengrove had offered to discover any compromise agreement, the Judge was of the view that it was appropriate that the discovery go beyond just the compromise agreement itself. In his view, Category D was still proportionate “*since the documents must relate to a very specific item, a compromise agreement.*”

26. The Judge’s suggestion that Mr Ryan’s “*key claim*” was that Dengrove had engaged with his partners to *inflate* the indebtedness secured on the property “*in order to avoid tax*” appears mistaken. Mr Ryan’s claim, as I understand it, is that Dengrove and certain of Mr Ryan’s partners effectively conspired to inflate the indebtedness secured on the property in order to frustrate the exercise by Mr Ryan of his asserted entitlement to redeem the Partnership Loans. That is certainly how the case was put in argument by Mr O’ Donnell SC for Mr Ryan. More significantly, perhaps, the Judge’s suggestion that the compromise agreements related to that “*key claim*” also appears to be mistaken. Category D was sought by reference to the pleas in paragraph 74 of the Amended Statement of Claim to the effect that Dengrove had compromised the debts due by Mr Ryan’s partners and that, by virtue of section 17 of the Civil Liability Act 1961, he was entitled to the benefit of whatever *reduction* may have been agreed by Dengrove.

27. In argument, Mr O' Donnell accepted that the category arguably swept too broadly, in that it captures all agreements with any of his client's co-partners whereas Mr Ryan is concerned only with those co-partners identified in paragraphs 76 and 77 of the Amended Statement of Claim. However, he observed that this issue had not been raised in the High Court. In any event, he indicated that his client would have no difficulty if the Court considered it appropriate to impose a limitation on the category at this stage by limiting it to the McCormacks and Mr Kelly.
28. The other category at issue is Category F. As sought, this was in the following terms:

*“All documents, board minutes and or other records dealing with or recording describing or otherwise relating to interest which has been charged or secured on the City Quay Properties.”*

The letter seeking voluntary discovery referred to the pleading in para 77 of the Amended Statement of Claim that Dengrove had *“compelled the Plaintiff's co-partners to allow interest to be charged on the City Quay Properties and accounts associated with those properties, to reduce tax leakage where the Defendant has made loans non-recourse to those parties.”* It noted that that had been denied by Dengrove and said that the documents sought *“aim to assist in determining this clear conflict in the pleadings which are relevant, necessary and proportionate in light of such conflict.”*

29. The Judge considered that this category “*may be relevant*” to the plea at para. 77 of the Amended Statement of Claim. He suggested that it “*may also be relevant*” to the plea at para 76 that Dengrove sought to procure a breach of the partnership agreements. As we shall see, Dengrove says that, in directing discovery on the basis that the documents “*may be relevant*” (my emphasis) the Judge applied too low a threshold, particularly in light of the fact that the material at issue is confidential.

30. In any event, the Judge observed that Mr Ryan had already obtained discovery of all documents evidencing his liability to Dengrove “*to include default interest and/or penalty interest, which will include bank statements to 05 March 2018.*” He also noted that the court was dealing with the disclosure of confidential information of persons who were not parties to the proceedings. In these circumstances, the Judge considered that a proportionate category of discovery was as follows:

*“All documents, board minutes and/or other records referencing any change or proposed change to the rate of interest which has been charged or secured on the City Quay Properties.”*

31. The Judge ordered discovery of that amended category. Mr Ryan has not challenged the Judge’s decision to limit the category sought by him. Both parties understand the category as directed to include *all* loans of Mr Ryan’s co-partners with Dengrove, not simply the Partnership Loans. It refers to all co-partners. Arising from the discussion on category D, it would seem to follow that Mr O’ Donnell would accept that the category arguably swept too broadly, given that Mr Ryan is concerned only with the

loans of those co-partners identified in paragraphs 76 and 77 of the Amended Statement of Claim. It also lacks any express temporal limit but Mr O' Donnell indicated that his client would have no objection to the imposition of such a limit on the category and he addressed the Court as to what an appropriate limit would be.



## THE ARGUMENTS ON APPEAL

32. The arguments made on appeal have a well-worn character. I will address the specific submissions made in relation to the particular categories in dispute later. At the level of general principle, Dengrove reminds us of “*the basic principles of relevance, necessity and proportionality*”. It emphasises that the material that the High Court directed to be discovered comprises “*extensive banking documentation about other borrowers who are not party to these proceedings*” which are confidential. The confidentiality of such documents is, it says, an important public interest, referring to the decision of the Supreme Court in *National Irish Bank v Raidió Teilifís Éireann* [1998] 2 IR 465. Discovery of such documents should not be ordered unless it is “*clear*” that the interests of justice require such an order to be made (citing the decision of the High Court (Clarke J, as he then was) in *Independent Newspapers v Murphy* [2006] 3 IR 566 and the judgment of same judge, by then Chief Justice, in *Tobin v Minister for Defence* [2019] IESC 57, [2020] 1 IR 211). “*Bare assertions*” in the Amended Statement of Claim which (in Dengrove’s telling) “*are entirely unparticularised and unsubstantiated by any evidence*” cannot, it is said, legitimately be used as a “*hook*” or “*device*” to gain access to highly confidential documents (referring to *Keating v RTÉ* [2013] IESC 22 and *Hartside v Heineken Ireland* [2010] IEHC 3). A further general point is made as to the form of the categories directed and in particular the use of the formula “*relating to*” which is said to be excessively broad (citing *Dunnes Stores v McCann* [2018] IEHC 123).

33. In response, Mr Ryan emphasises the relatively low threshold of relevance established by *Compagnie Financière du Pacifique v. Peruvian Guano and Co.* (1882) 11 QBD 55. Relevance is to be judged on the pleadings and there is no obligation to provide the allegations made in the pleadings. The relevant allegations could not properly be said to be “*bare assertions*” having regard to the email material exhibited by Mr Ryan and the statement in Dengrove’s Annual Report for 2018. There is, it is said, a legitimate basis for the pleas in the Amended Statement of Claim and in circumstances discovery of relevant documents should be ordered where the documents “*may*” (not, it is stressed, “*must*”) advance Mr Ryan’s case or damage Dengrove’s case or lead to a line of inquiry which may do so. While the documents to be discovered may be confidential, they were not in the nature of trade secrets or classified information and, in any event, *Independent Newspapers v Murphy* [2006] 3 IR 566 indicates that the requirements of justice (and the risk of injustice) outweigh any duty of confidence that Dengrove may owe.

## DISCUSSION

### The Standard of Review

34. Both parties addressed the appropriate standard of review on an appeal from a decision of the High Court relating to discovery.
35. The decisions of the Supreme Court in *Tobin* and in *Waterford Credit Union v J & E Davy* [2020] IESC 9, [2020] 2 ILRM 344 make it clear that such decisions ought not be disturbed on appeal unless they fall outside the range of decisions reasonably open to the High Court.
36. In *Tobin*, Clarke CJ observed that “*issues as to relevance, necessity and proportionality involve an adjudication based on a detailed understanding of the case*” and stated that “*in general, decisions as to discovery should involve a significant measure of appreciation by any appellate court reviewing a decision at first instance*” (at para 59).
37. The former Chief Justice returned to this issue in *Waterford Credit Union*, as follows:

*“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.”*

38. The burden is, therefore, on Dengrove to satisfy this Court that the decision to direct discovery in the terms he did was “*outside the range of judgment calls which were open*” to the High Court Judge. That does not, I should say, amount to a “*burden ... to show a clear error of principle*”, as was contended by Mr Ryan. No such threshold requirement is identified by the Supreme Court in *Tobin* or *Waterford Credit Union* or by this Court in its jurisprudence in this area.<sup>2</sup> Certainly, where such an error is demonstrated, this Court is entitled to intervene. But even in the absence of any error

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<sup>2</sup> Mr Ryan’s submissions refer to para 25 of the judgment of Noonan J (Donnelly and Haughton JJ agreeing) in *Minihane v Skellig Fish* [2022] IECA 68 in which (in the context of a costs appeal), he stated that “*this court will afford a wide margin of discretion to the High Court and will in general not interfere unless a clear error of principle or an injustice arises*” (my emphasis). That statement does not support the contention that this Court’s appellate jurisdiction is limited in the manner suggested. Any such suggestion also conflicts with the decision of this Court in *Lawless v Aer Lingus* [2016] IECA 235, per Irvine J (Hogan and Keane JJ agreeing) at para 22. Similarly, while emphasising that discovery appeals do not proceed by way of *de novo* rehearing, the judgment of Costello J (Birmingham P and Baker J agreeing) in *Goode Concrete v CRH plc* [2020] IECA 56 makes it clear that an appeal may properly be advanced on the basis of an alleged error in the exercise of the High Court’s discretion: at para 2.

of principle, this Court may and should intervene where it considers that the decision of the High Court falls outside the reasonable range. That is the true threshold test.

39. In *O v Minister for Justice and Equality* [2021] IECA 293, I considered the approach to be adopted when this Court is asked to review costs orders made in the High Court: see para 30 of my judgment (with which Noonan and Ní Raifeartaigh JJ agreed). In my view, the same approach applies when this Court is asked to review discovery orders made by the High Court.

#### **Order 31, Rule 12 RSC and the rules relating to discovery**

40. In October 2020, the Review Group chaired by Peter Kelly, the former President of the High Court, published the *Review of the Administration of Civil Justice Report*. In that Report, the Review Group expressed the view that the current discovery regime is failing all parties involved in litigation and that significant reform is required.<sup>3</sup> Anyone with experience of large-scale (or even medium-scale) civil litigation in Ireland, whether as litigant, legal practitioner or judge, would surely share those sentiments.
41. Remarkably, the extravagant conception of relevance articulated by Brett LJ some 140 years ago in *Peruvian Guano* continues to be the primary touchstone of whether documents ought to be discovered or not. It is widely acknowledged that the amendments to the Rules introduced by the Rules of the Superior Courts (No 2)

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<sup>3</sup> Chapter 6, section 5.1 (page 186)

(Discovery) 1999<sup>4</sup> - prompted it seems by the Supreme Court's decision in *Brook Thomas v Impac Ltd* [1998] IESC 18 [1999] 1 ILRM 171 – have failed to make any significant impact on the burden and cost of discovery: Biehler et al, *Delany and McGrath on Civil Procedure* (4<sup>th</sup> ed, 2018) at paras 10-07 – 10-10. The 1999 amendments arguably provided an opportunity for courts to give real teeth to the express requirement in Order 31, Rule 12 that discovery should be “*necessary either for disposing fairly of the cause or matter or for saving costs*” (my emphasis) by adopting a more exacting threshold test for discovery of general application, one requiring an applicant for discovery to establish materially more than a showing of *Peruvian Guano* relevance. However, that is not how the jurisprudence has developed. Necessity has, in this context, been given a rather attenuated meaning and is presumed to follow from the fact that a document or category of documents is relevant (though that presumption may be displaced).

42. Thus, in *Ryanair plc v Aer Rianta cpt* [2003] 4 IR 264, Fennelly J (Denham and McCracken JJ agreeing) expressed the view that “*the amended rule made no serious or fundamental change in the law regarding discovery*” (at 275) and dismissed any suggestion that the amended rule introduced “*a new or higher standard of proof of some objective necessity as a precondition to the grant of an order for discovery*” (at 274). Whatever the language of Order 31 Rule 12 might appear to suggest, relevance remains “*the primary requirement for discovery*” (*Ryanair*, at 275).

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<sup>4</sup> SI 233/1999.

43. Given that the 1999 amendments have had only limited practical impact, it may be unsurprising that the Review Group recommended the enactment of primary legislation sweeping away the existing regime and underpinning “*an entirely new scheme for discovery*” in accordance with its detailed recommendations.<sup>5</sup> The Minister for Justice and Equality has accepted those recommendations and has recently published a detailed plan, including a provisional timetable, for their implementation.<sup>6</sup> However, that timetable indicates that it will be 2025 before full implementation is achieved.
44. The observations just made are not intended to suggest that discovery is without value. *Tobin* is an apt reminder of its important role in the administration of justice: see per Clarke CJ at paras 33-37. But *Tobin* also recognises that discovery can hinder access to justice: *ibid*, at 38-41. That is a real and acute issue in civil litigation in this jurisdiction.
45. In any event, there was no real dispute here as to the principles governing applications for discovery of documents under Order 31, Rule 12 and so there is no need to engage in a detailed survey of the authorities. They are comprehensively discussed in chapter 6 of Abrahamson et al, *Discovery and Disclosure* (3<sup>rd</sup> ed, 2019) and were also considered in the subsequent (and significant) decision of the Supreme Court in *Tobin*.

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<sup>5</sup> *Ibid*, section 5.2 (page 190)

<sup>6</sup> *Civil Justice Efficiencies and Reform Measures: A Civil Justice System for the 21st Century* (May 2022).



46. As explained above, the primary test continues to be whether the documents sought are *relevant* to the issues in the proceedings. The touchstone of relevance continues to be the oft-cited formula offered by Brett L.J. in *Peruvian Guano*.
47. In addition to demonstrating relevance, Order 31, Rule 12 RSC requires the party seeking discovery to show that the discovery sought is necessary for disposing fairly of the cause or matter or for saving costs. However, as already noted, that does not require any showing of absolute necessity. Production of documents that are relevant (in the *Peruvian Guano* sense) will generally be considered to be necessary: the “*default position should be that a document whose relevance has been established should be considered to be one whose production is necessary*” (per Clarke CJ in *Tobin*, at para 48) or, as he also put it, “*the establishment of relevance will prima facie also establish necessity*” (at para 53). However, that default position is capable of being displaced “*for a range of other reasons*” (para 48), with the burden being on the requested party to identify grounds as to why the test of necessity has not been met (also at para 53).
48. A court asked to make an order for discovery must also consider the principle of proportionality. Some of the authorities appear to proceed on the basis that proportionality is an intrinsic element of considering whether the discovery sought is necessary. That appears to have been the approach of the Supreme Court in *Framus Ltd v CRH Plc* [2004] IESC 25, [2004] 2 IR 20, per Murray J (McGuinness and Geoghegan JJ agreeing) at para 36. Similarly, in his judgment in *Dome Telecom Ltd v eircom Ltd* [2007] IESC 59, [2008] 2 IR 726, Kearns J expressed the view that “*necessity is the true threshold where issues of proportionality must be assessed and clearly the more*

*necessary the document the more proportionate it will be for the requesting party to obtain discovery*” (at page 772). However, it has also been said that proportionality is a consideration in its own right, a “*third principle*” distinct from, and additional to, the express requirements of relevance and necessity in Order 31, Rule 12: see *Halpin v National Museum of Ireland* [2019] IECA 57, per Irvine J (Baker and Kennedy JJ agreeing) at para 12.

49. In *Tobin*, Clarke CJ (with whose judgment McKechnie, Dunne, Charleton and O’Malley JJ agreed) referred to the judgment of Murray J in *Framus* and observed that the “*principle of proportionality has subsequently become an important criterion employed by the courts in order to avoid the imposition of excessive burdens on parties to litigation as a result of wide-ranging orders for discovery*” (at para 28). Later in that judgment, he characterised the development of a proportionality test as “*a further refinement of the concept of ‘necessity’*”, which echoes the approach of the Supreme Court in *Framus* and suggests that proportionality is properly to be seen as an aspect – an important aspect – of the assessment of necessity.

50. However, for the purposes of this appeal, I do not think that anything turns on whether proportionality is an aspect of the necessity test or a stand-alone principle.

51. The authorities suggest that there are particular circumstances in which a court may be persuaded that, although documents may be *relevant* in the *Peruvian Guano* sense, their discovery may nonetheless not be *necessary* for the fair disposal of the proceedings or for saving costs. In *Abrahamson et al, Discovery and Disclosure* (at para 6-57) three

specific areas are identified where the courts have shown a willingness in principle to take that view:

- Where the applicant has alternative means of proof available to them
- Where the volume of documents likely to be discovered may be oppressive
- Where the documents to be discovered are likely to contain confidential material

52. The issue of alternative means of proof – specifically, by way of delivery of interrogatories - was, of course, the principal issue in *Tobin*. But it did not feature in the arguments here. While there may have been some faint suggestion that the discovery directed by the High Court might impose an undue burden on Dengrove, any such suggestion lacked any evidential basis. Dengrove did, however, rely significantly on the confidential character of the documents in issue as a basis for resisting discovery. Accordingly, it is necessary to consider how issues of confidentiality have been dealt with in the authorities.

53. Before embarking on that exercise, however, there are some additional points to be made about the approach to discovery generally. They can be stated briefly:

- Relevance is to be assessed by reference to the pleadings and particulars.

- Relevance must be demonstrated as a matter of probability. “*It is not for the Court to order discovery simply because there is a possibility that documents may be relevant*”: *Hannon v Commissioner of Public Works* [2001] IEHC 59 (per McCracken J at pages 3).<sup>7</sup>
- It follows that a party “*may not seek discovery of a document in order to find out whether the document may be relevant*”<sup>8</sup> and “*must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information.*”<sup>9</sup>
- “*A vague, unsubstantiated assertion may not be used to justify a trawl through an opponent’s documents in the hope that the allegation will crystallise into a substantial one. Moreover, a party may not make a vague or unparticularised plea of wrongdoing and then seek discovery in the hope of obtaining documents which will reveal evidence in support of that allegation.*”<sup>10</sup>

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<sup>7</sup> *Hannon* involved an application for further and better discovery but the principles set out by McCracken J were approved and applied to applications for discovery by the Supreme Court in *Framus*. See also the judgment of Finlay-Geoghegan J (Ryan P and Peart J agreeing) in *Boehringer Ingelheim Pharma GmbH v Norton (Waterford) Ltd*, at para 12(2).

<sup>8</sup> *Ibid.*

<sup>9</sup> Per Ryan P (Peart and Hogan JJ agreeing) in *O’ Brien v Red Flag Consulting Ltd*, para 21(4).

<sup>10</sup> *Discovery and Disclosure*, at para 6-35.

- In addressing whether discovery is “*necessary*”, the degree of relevance of the documents may be a relevant consideration: “*in considering the necessity of the discovery of relevant documents the nature and potential strength of the relevance is a consideration to be taken into account*”<sup>11</sup>
- Proportionality requires that there “*must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent.*”<sup>12</sup>

### **Discovery and Confidentiality**

54. It is evident from the authorities that applications for discovery of confidential material (and for production/inspection of such material) require special scrutiny. It is true, of course, that there is a significant distinction in this context between documents that are legally privileged and those that are confidential on some other basis. The former, but not the latter, are effectively protected from compulsory disclosure. In our legal order, legal professional privilege has a very high value: *Sweeney v Voluntary Health Insurance Board Limited* [2020] IECA 150, at para 34. However, it is not the only interest that warrants recognition and protection in this context. The fact that confidentiality is not, in itself, an absolute barrier to disclosure, must not be taken to

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<sup>11</sup> *Boehringer Ingelheim Pharma GmbH v Norton (Waterford) Ltd*, at para 44.

<sup>12</sup> *O’ Brien v Red Flag Consulting Ltd*, para 21(9).

imply that it is not a legitimate factor – and, at least in some circumstances, a significant factor - in the court’s assessment of whether to direct discovery/inspection (and as to the appropriate scope of such discovery/inspection).

55. The decision of the High Court (Kelly J) in *Cooper-Flynn v RTÉ* [2000] 3 IR 344 provides a convenient starting point. National Irish Bank had earlier been directed to make non-party discovery in a defamation claim brought by Ms Cooper-Flynn (an employee of the Bank) against RTÉ arising from a programme it had broadcast alleging that she had sought to induce customers of the Bank to participate in a tax evasion scheme. RTÉ had pleaded justification. The Bank had produced documentation from which the names and identifying information of customers had, by agreement, been redacted. RTÉ then sought an order directing the Bank to make this material available in unredacted form. It argued that its right to a fair trial of the defamation claim and the litigation advantage that it would gain from ascertaining the identity of the customers (who could potentially give highly relevant evidence in the action) outweighed any consideration of bank-customer confidentiality (page 18). Citing *Science Research Council v Nassé* [1980] AC 1028, *Taylor v. Anderton* [1995] 1 WLR 447 and *Wallace Smith Trust Co. v. Deloitte* [1997] 1 WLR 257, Kelly J expressed the view that the crucial question was whether the disclosure of the unredacted material could be said to be “*necessary*” for the fair disposal of the action. That in turn involved the court asking itself whether such disclosure would confer a “*litigious advantage*” on RTÉ. Kelly J concluded that it would:

*“ Applying these principles, I have come to the conclusion that an inspection of these customers files in an unredacted form which will disclose their identity to the representatives of the first and second defendants will confer a litigious advantage upon them. It will make known to them the names of persons who, on the basis of the testimony put before me, may well be able to give evidence in their favour upon their plea of justification. To deny them this entitlement would not be conducive to the fair disposition of this action. It must be borne in mind that the plaintiff has full knowledge of both the identity and the commercial affairs of her clients whereas the first and second defendants have only a very limited knowledge of the identity of such persons.” (at page 355)*

56. The customers whose records were at issue in *Cooper-Flynn* had invested in the scheme and, given the potential importance to RTÉ’s defence of the action of identifying other customers who might be in a position to give evidence that they had been encouraged to do so in order to evade tax, it is entirely unsurprising that Kelly J concluded that the balance of justice was decisively in favour of disclosure.<sup>13</sup>

57. *Cooper-Flynn* was concerned with Order 31, Rule 18 RSC but its approach to the question of necessity was applied to Order 31, Rule 12 RSC in *Ryanair plc v Aer Rianta cpt* in which the Supreme Court considered the effect of the 1999 amendments. Giving the main judgment, Fennelly J observed that discovery disputes generally revolved

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<sup>13</sup> In the event, a number of customers gave evidence on RTÉ’s behalf and their evidence played a crucial role in RTÉ’s successful defence of the action: *Cooper-Flynn v RTÉ* [2004] IESC 27, [2004] 2 IR 72.

around the issue of relevance rather than necessity. He noted that the issue of necessity had usually been debated “*in cases where some other interest is involved, particularly the confidentiality of documents, especially where they involve the interests of third parties.*” However, no issue of confidentiality actually arose in *Ryanair plc v Aer Rianta cpt.*

58. *Independent Newspapers (Ireland) Limited v Murphy* [2006] IEHC 276, [2006] 3 IR 566 concerned the discovery by the plaintiff of (*inter alia*) material communicated to journalists in confidence. There was also material which was *prima facie* privileged and, even if not privileged, was confidential. Clarke J was “*satisfied that the court should only order discovery of confidential documents (particularly where the documents involve the confidence of a person or body who is not a party to the proceedings) in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made.*” (at para 21). Where the refusal of discovery would produce “*a risk of an unfair result*”, the interests of justice in disclosure would outweigh any duty of confidence (para 22). However, the “*balancing of the rights involved also requires the application of the doctrine of proportionality*” from which it followed that it was “*appropriate to interfere with the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing*” (para 23). In the case before him, the balance was between “*a possible relevance and a high probability of a breach of confidence*” and in those circumstances, Clarke J considered that it would be disproportionate to order immediate discovery of the disputed material. Instead, he directed the plaintiff to preserve and list the material and provide that list to the



defendant so that, in the event that the trial judge decided that disclosure of the material was necessary, it could be made available (paras 23-26).

59. *Hartside Limited v Heineken Ireland Limited* [2010] IEHC 3 is another decision of Clarke J. The issue there was whether Heineken should be compelled to discover documents relating to product sales to a third party, Musgraves Group Cork. On Hartside's case, those documents were relevant because Musgraves was a wholesaler and, on that basis, Heineken was obliged under the terms of a joint venture agreement (JVA) between Heineken and Hartside to sell its product to Hartside on terms no less favourable than the terms given to wholesalers. Hartside contended that its terms of supply were less favourable than the terms given to Musgraves, in breach of the JVA. Heineken disputed that Musgraves was a wholesaler and accordingly denied that the provision of the JVA relied on by Hartside had any application. On that basis, Heineken disputed the relevance of the documentation. It also objected to its production on the basis that the terms and conditions on which it sold product to Musgraves were highly confidential.

60. Clarke J accepted that the documents contained highly confidential information. Having referred to his decision in *Independent Newspapers v Murphy*, he went on to refer to his decisions in *National Education Board v Ryan* [2007] IEHC 428, *Moorview Developments Limited v First Active plc* [2008] IEHC 211 and *Ryanair v Bravofly* [2009] IEHC 41. Those three decisions (the first two involving allegations of fraud and the latter involving a competition law claim) all involved the problem of balancing the need to facilitate a party who may have a legitimate claim but who requires access to

information held by the other party to properly plead and substantiate that claim, with the need to prevent a party, by making a “*mere allegation*”, from gaining access to its opponent’s documents, including what may be highly confidential documentation. According to Clarke J, the balance struck in those cases led to the conclusion that “*a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent’s relevant documentation.*” Such a restriction was necessary because of the “*undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information*” (at para 5.9). The learned judge went on to observe that in “*a case where the contested documentation is confidential (or particularly highly confidential), then special care should be taken to ensure that a party is not, in substance, being given free access to highly confidential information without having satisfied the court that there is some basis on which the relevant documentation is likely to be relevant at the hearing*” (para 5.10)

61. In circumstances where, in his view, Hartside would have to surmount “*significant hurdles*” in order to satisfy the court that the relevant provision of the JVA had any application to sales by Heineken to Musgraves, and having regard to the fact that the information sought was confidential not only to Heineken but to Musgraves, who was not a party, and might, if discovered, come into the public domain in the context of the proceedings, Clarke J considered it appropriate to adopt the same approach as in *Independent Newspapers v Murphy*. Such an approach did the “*least risk of injustice*” (para 7.2)

62. In *Thema International Fund plc v HSBC Institutional Trust Services (Ireland)* [2010] IEHC 19, Clarke J returned to this issue in the context of a dispute about the adequacy of replies to particulars given by HSBC in claims arising from the fraudulent activities of Bernie Madoff. In seeking further particulars, the plaintiffs emphasised the need for the issues to be clearly identified in the pleadings before discovery was undertaken. Clarke J referred to a passage from the judgment of Fennelly J in *Ryanair v Aer Rianta*, including the passage to which I have made reference in para [55] above. It had, Clarke J noted “*already come to be recognised that there must be some proportionality between the breadth of discovery sought and the likelihood of the discovered category of documents having some meaningful bearing on the proceedings.*” Likewise, he continued, “*similar consideration have led to the view that where documents which have a significant confidentiality attaching to them are sought, same should only be discovered (again on the basis of proportionality) where it is necessary that they be discovered...*” (at para 4.5)

63. In *Telefonica O2 Ireland Limited v Commission for Communications Regulation* [2011] IEHC 265, Clarke J. sought to summarise the proper approach:

*“3.3 However, it seems to me that the overall approach to discovery or disclosure can perhaps be summarised in the following fashion:-*

*1. In order for discovery or disclosure to be appropriate the documents or materials sought must be shown to be relevant.*

2. *If the documents are relevant, then confidentiality (as opposed to privilege) does not, of itself, provide a barrier to their disclosure.*

3. *The court is required to exercise some balance between the likely materiality of the documents concerned to the issues which are anticipated as being likely to arise in the proceedings, and the degree of confidentiality attaching to the relevant materials. In that context, the confidence of third parties may be given added weight for it must be accepted that those parties who become embroiled in litigation will necessarily have to disclose information about their confidential affairs when that information is necessary to the fair and just resolution of the relevant litigation. See the discussion of the relevant authorities by Kelly J. in *Koger Inc v. O'Donnell* [2009] IEHC 385.*

4. *In attempting to balance those rights the court can seek to fashion an appropriate order designed to meet the facts of the individual case so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of confidence asserted. *Thema, Yap v. Children's University Hospital Temple Street* [2006] IEHC 308 and *Hartside v. Heineken Ireland Ltd* [2010] IEHC 3. The discovery aspects of *Yap* are not addressed in the written judgment cited but involved a postponement of disclosure of confidential patient records until determined necessary by the trial judge."*

64. Later in that judgment, Clarke J stated that:

*“It does, of course, need to be re-iterated that, if information is really 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. At a general level, it seems likely that confidence will only come into play where there is a disproportion between the level of confidence which would be breached and a very limited potential relevance of the material concerned. Highly confidential information, which would only have a very tangential relevance in proceedings, might legitimately not be disclosed.” (para 3.4)*

65. In *Telefonica*, the applicant sought discovery of “*significantly confidential information*” from ComReg in proceedings challenging a pricing decision that it had made. The notice parties objected to the disclosure of that information. The relevance of that information depended to a very significant extent on what standard of review was applicable to the challenge. Telefonica contended that the applicable standard was more stringent than the irrationality standard identified in *O’ Keeffe v An Bord Pleanála* [1993] 1 IR 39. That was disputed by ComReg. If the standard was *O’ Keeffe* irrationality, the information would not be relevant. If the standard was the more intrusive standard contended for by Telefonica, the information might indeed be relevant. In the circumstances, Clarke J considered that it would be “*disproportionate*” to allow access to the information “*against the mere possibility that some (indeterminate) part of the information might be relevant to the court’s final determination, depending on the precise view which the court takes as to the basis of*

*review*” (para 5.8). The appropriate course, in his view, was to leave over any issue of discovery and to direct a modular trial of the proceedings, with the issue of the standard or basis of review being determined first. The proceedings subsequently settled.

66. Finally, there is the Supreme Court’s decision in *Tobin*. Although noting that *Tobin* was concerned with what was said to be over-burdensome discovery, Clarke CJ noted (at para 42) that similar issues could also arise where considerations such as confidentiality arose. Where an application for discovery is made in respect of confidential documentation “*the court should only order discovery in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made.*” Having referred (*inter alia*) to the measures taken in (*inter alia*) *Independent Newspapers (Ireland) Ltd. v. Murphy* and *Hartside Limited v. Heineken Ireland Limited* to balance the interest in disclosure against the protection of confidentiality, Clarke CJ continued:

“[44] *Those measures exist, of course, against the backdrop of the fact that confidentiality (as opposed to privilege) does not provide a legitimate basis for refusing to require disclosure of documents should they prove necessary to the proper administration of justice. But they do provide a warrant for the court adopting appropriate measures to respect the importance of confidentiality by ensuring that it is only displaced when the production of confidential documentation proves truly necessary to the just resolution of proceedings.*

*[45] Considering all of that recent case law, it seems to me that, at the level of the broadest generality, certain fundamental principles can be discerned. First, the key criteria remain those of relevance and of necessity. However, it also seems clear that there has been much greater scrutiny of the issue of “necessity” in more recent times. The traditional position, very much accepted, was that if documents were relevant, their discovery would almost inevitably be necessary. However, much of the recent case law has indicated a need to move away from that position. Where there are other equally effectual means of establishing the truth and thus providing for a fair trial then discovery may not be “necessary”. This will certainly be so where it can be shown that the cost of making discovery would be significant and would greatly outweigh the costs of pursuing some alternative procedural mechanism to establish the same facts. Similar considerations apply when the likely true relevance of documentation may not become clear until the trial but where the immediate disclosure of the documentation concerned would necessarily involve disclosing highly confidential information. Furthermore, the development of a proportionality test can itself be seen as a further refinement of the concept of “necessity”.*

*[46] It is, of course, the case that “necessity” means that the disclosure of the documents concerned may be necessary for the fair and just resolution of the proceedings and potentially for saving costs. ...*

*[47] In those circumstances, it seems to me that the starting point has to remain a consideration of what is “relevant”. If it cannot be demonstrated that*

*documents are relevant, then there could be no basis for requiring that they be discovered.*

*[48] Having regard to the importance which discovery can play in at least some cases, it should, in my view, remain the case that the default position should be that a document whose relevance has been established should be considered to be one whose production is necessary. However, that remains only a default position and one which is capable of being displaced for a range of other reasons. If it can be demonstrated that compliance with the obligation to make the discovery sought would be particularly burdensome, then a court will have to weigh in the balance, in deciding whether discovery is truly “necessary”, a range of factors, including the extent of the burden which compliance will be likely to place on the party concerned, the extent to which it might reasonably be expected that any of the contested documentation whose discovery is sought will play a reasonably important role in the proper resolution of the proceedings and, importantly, the extent to which there may be other means of achieving the same end as that which is sought to be achieved by discovery but at a much reduced cost. While not relevant to this case, it might be said that the postponement of the requirement to disclose confidential documentation may also come into play. Likewise, there may be other situations which arise in the particular circumstances of an individual case which would allow a court to consider that disclosure was not truly “necessary”, in the more nuanced sense in which that term has now come to be understood.”*



67. It seems to me that the following propositions may fairly be derived from the authorities just considered:

1. The starting point remains what is *relevant* in the *Peruvian Guano* sense. Absent relevance, a document will not be discoverable.
2. While the “*default position*” is that a document shown to be *relevant* should be considered to be one whose production is *necessary*, that position is not absolute and may be displaced. Establishing the relevance of a document gives rise to no more than a rebuttable presumption that discovery of that document is necessary.
3. Where the document at issue is confidential, its discovery should be directed only where it is “*clear*” that the interests of justice in ensuring the fair disposal of the proceedings make such an order necessary.
4. Impact on third parties is of particular significance. Addressing the discovery of commercially confidential material in *Telefonica O2 Ireland Ltd*, Clarke J suggested that “*it must be accepted that those parties who become embroiled in litigation will necessarily have to disclose information about their confidential affairs when that information is necessary to the fair and just resolution of the relevant litigation*” (as para 3.3(3)). A similar point was made by the Supreme Court (per Keane J, Murray and Hardiman JJ agreeing) in

*McGrory v ESB* [2003] IESC 45, [2003] 3 IR 407 in the context of the disclosure of confidential medical information by a plaintiff in a personal injuries action. Such a plaintiff “*by implication necessarily waives the right of privacy which he would otherwise enjoy in relation to his medical condition*” (at page 414). However, while greater weight may need to be given to the confidentiality of third parties, it does not follow that the confidentiality of the parties is not, in principle, worthy of protection. Furthermore, it would appear to be appropriate to distinguish between the respective position of plaintiff and defendant in this context. A plaintiff elects to sue. A defendant does not elect to be sued.

5. As is correctly emphasised in the authorities, confidentiality must ultimately yield to the interests of justice. Access to the courts and the right to a fair determination of civil rights and obligation are fundamental values under the Constitution, the ECHR and the Charter of Fundamental Rights of the European Union. But the confidential character of a document is properly to be regarded as a legitimate countervailing factor – and, in some circumstances at least, potentially a significant one - weighing against the making of an order for discovery, whether at all or at that stage of the proceedings (*Hartside* and *Telefonica* being examples of the court postponing discovery of confidential material until it was clearly established that its disclosure was actually necessary) and/or pointing to a need to limit its scope and/or impose conditions (such as conditions relating to redaction and/or conditions restricting the circulation of the discovered material) for the purpose of mitigating its impact.

6. In that context, a balance has to be struck between the likely materiality of any given document to the issues likely to arise in the proceedings and the degree of confidentiality attaching to it. A confidential document (and particularly one that is highly confidential) should not be directed to be discovered unless the court is satisfied that there is a real basis on which it is likely to be relevant at the hearing. The more material the document appears to be – the greater the likelihood that the document will have “*some meaningful bearing on the proceedings*” - the more clearly the balance will be in favour of disclosure. Such an assessment necessarily requires the court to look beyond the threshold test of *Peruvian Guano* relevance. The “*nature and potential strength of the relevance*”, and the degree to which the document is likely to advance the case of the requester, or damage the case of the requested party, are appropriate considerations in this context.
  
7. It follows from the foregoing that a court may – and in an appropriate case ought – to refuse to direct the discovery of a relevant document (relevant in the *Peruvian Guano* sense) on the basis that the document is confidential and that in the particular circumstances the interests of protecting its confidentiality outweigh the interests favouring its disclosure. If that is not so, then it follows that relevance trumps confidentiality in every circumstances. That is not the law as I understand it.
  
8. Where, however, it appears that a document “*is really of some significance to the fair determination of proceedings*”, and where accordingly refusal of

discovery would produce “*a risk of an unfair result*”, the interests of disclosure will in the ordinary course outweigh any legitimate confidentiality interests (though in such circumstances, a court might still be required to consider whether to adopt measures to mitigate the effects of disclosure).

9. It must always be remembered that contested issues of discovery are almost always addressed in advance of trial. The court must assess issues of relevance and necessity on the basis of the pleadings. At that stage, it will be difficult to predict the course of the trial. As proceedings move closer to hearing, some issues will loom larger and other will recede in significance. At the hearing of a discovery application, it may be very difficult to confidently assess the extent to which a document or category of documents (which, generally, the court will not have reviewed) will bear upon the resolution of any of the issues in dispute. The court will be concerned to adopt the approach that involves the least risk of injustice. Accordingly, where there appears to be any material risk that refusing discovery could give rise to unfairness, the court should generally err in favour of directing discovery (if necessary, on terms).

68. A party obtaining material on discovery is, of course, bound by an implied undertaking (which is occasionally required to be given expressly) not to use such material for any purpose other than the prosecution of the proceedings, without express permission from the court. But such a limitation may still allow for significant disclosure of discovered material. In some circumstances, the court will impose restrictions on the circulation of the material. Such restrictions are frequently imposed in intellectual property litigation:

see, for instance, the decision of the High Court (Kelly J) in *Koger Inc v O' Donnell* [2009] IEHC 385 and that of McDonald J in *De Lacy v Coyle* [2018] IEHC 428. The jurisdiction of the High Court to make discovery subject to a requirement for a “confidentiality ring” excluding any personnel from the party to whom discovery was to be provided was confirmed by this Court in *Goode Concrete v CRH* [2020] IECA 56, at para 152. However, as Clarke CJ explained in *AP v Minister for Justice and Equality* [2019] IESC 47, [2019] 3 IR 317, such restrictions can be imposed because the material at issue is effectively expert material, to the assessment of which the client may not be in a position to make any meaningful contribution. The scope for imposing any equivalent restrictions in respect of other categories of discovery material would appear to be more limited. The Supreme Court’s decisions in *Burke v Central Independent Television plc* [1994] 2 IR 61 and *Ward v Special Criminal Court* [1999] 1 IR 60 would have to be considered in this context also. However, a court is certainly entitled to impose restrictions on circulation short of excluding circulation to the parties themselves.

69. In any event, neither the implied undertaking nor any additional restrictions that may be imposed regarding the circulation of discovered material will necessarily prevent the subsequent disclosure of private or personal material at trial. Of course, that ought not to happen unless the material is relevant but any one with experience of litigation will be all too aware that, in reality, material is liable to be disclosed in court that has little or no real relevance to any issue in dispute. *Prima facie*, any such disclosure puts the information into the public domain, unless the proceedings are *in camera* or there are reporting restrictions in place. Thus, while the implied undertaking is an important

safeguard against the misuse of discovered material, it provides only limited protection against the wider disclosure of confidential material.

70. Quite apart from considerations of commercial confidentiality such as arise here, discovery may also involve the disclosure of sensitive private and personal information, relating not just to one or other of the parties but also to third parties. In my view, the interests involved are, at a minimum, deserving of the same solicitude as the preservation of confidentiality in a commercial context. There is a constitutional right to privacy, even if its precise parameters remain uncertain. A right to privacy was, of course, recognised as an unenumerated right protected by Article 40.3 of the Constitution in *Kennedy v Ireland* [1987] IR 587. In *Haughey v Moriarty* [1999] 3 IR 1, the Supreme Court had “*no doubt*” that the plaintiffs enjoyed a “*constitutional right to privacy*” (at page 58) and was willing to accept (without so holding) that the right to privacy extended to the privacy and confidentiality of a citizen's banking records and transactions. However, any such right had to yield to the exigencies of the common good, having regard to the importance of a thorough investigation of the urgent matters of concern that had prompted the establishment of a tribunal of inquiry.

71. Article 8 ECHR is also relevant in this context, providing as it does for a right to respect for private and family life. Article 8 was the subject of extensive consideration by the Supreme Court in the context of search and seizure of business records in *CRH plc v Competition and Consumer Protection Commission* [2017] IESC 34, [2018] 1 IR 521. As a matter of principle, Order 31, Rule 12 RSC must be interpreted in a manner

compatible with Article 8: see section 2(1) of the European Convention of Human Rights Act 2003.

72. The right to respect for one's private and family life (Article 7) and to protection of one's personal data (Article 8) is enshrined in the Charter of Fundamental Rights of the European Union. Personal information (personal data) is also the subject of extensive protection in the form of the General Data Protection Regulation (GDPR)<sup>14</sup> and the Data Protection Act 2018.<sup>15</sup> Again, Order 31, Rule 12 RSC must be interpreted and applied in a manner compatible with the requirements of the GDPR.
73. None of these protections is absolute or unqualified. The constitutional right to privacy is subject to limitation in the interests of the common good. The exercise of the rights conferred by Article 8(1) ECHR is subject to limitation in accordance with Article 8(2). The GDPR and the 2018 Act make provision for the processing of personal data in many different circumstances, including for the purpose of the administration of justice and the enforcement of civil law claims. However, it does not follow from the undoubted fact that the protections are qualified that, in making decisions about discovery, courts should not give weight to the fact - if fact it be - that the effect of the

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<sup>14</sup> Regulation (EU) 2016/679

<sup>15</sup> *Board of Management of Salesian Secondary College (Limerick) v Facebook Ireland Limited* [2021] IEHC 287 discusses the possible implications of the GDPR and the 2018 Act in the context of an application for a *Norwich Pharmacal* order. For the reasons set out in his judgment, Simons J considered it appropriate to refer a number of questions to the Court of Justice of the European Union pursuant to Article 267 TFEU. However, the proceedings were subsequently resolved and the reference did not proceed.

discovery sought would be to require the disclosure of private and personal information of one of the parties and/or of third parties.

74. I do not mean to suggest that the risk of such disclosure would in itself preclude the making of a discovery order. As I have already noted, access to the courts and the right to a fair determination of civil rights and obligations are also fundamental values under the Constitution, the ECHR and the Charter. But it may be that, in particular cases, the right of a party to obtain discovery from another party may have to yield to the need to protect sensitive private information from disclosure, at least in the absence of some “*pressing need*” for that disclosure.<sup>16</sup> Where the balance is to be struck in any given case will of course depend on the individual facts and circumstances. In any event, no issue of sensitive private and personal information arises here.

## **The Categories in Dispute**

### ***Category D***

*“All records, notes, memoranda, or other documents recording, describing or otherwise relating to any compromise agreement or agreements between the Defendant and the Plaintiff’s co-partners.”*

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<sup>16</sup> See the judgments of the High Court of Justice in Northern Ireland (Deeny J) in *McKimm v South and East Belfast Health and Social Services Trust* [2005] NIQB 32 and *Finn (a minor) v McKee* [2005] NIQB 79, [2006] NIJB 290.



75. By way of immediate observation, this category refers to *compromise agreements* between Dengrove and Mr Ryan's co-partners. It does not, as Mr Ryan's speaking note suggests, refer to any broader category of "*agreements made between the Defendant and the Plaintiff's co-partners*". That is evident from the reasons given for seeking discovery of this category. These referred to the pleading in paragraph 74 of the Amended Statement of Claim to the effect that Dengrove had compromised the indebtedness of Mr Ryan's co-partners and that he was entitled to the benefit of such compromise(s) pursuant to section 17 of the Civil Liability Act 1961. That pleading is developed in paragraph 75 of the Amended Statement of Claim.
76. As already noted, Dengrove offered to discover any compromise agreement(s) between it and Mr Ryan's co-partners. The issue in dispute is whether it was appropriate to direct Dengrove to go further.
77. Section 17 of the Civil Liability Act 1961 provides, in sub-section (1), that the release of or accord with one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the other be discharged. Section 17(2) provides that, in the absence of such an intention, there will be no discharge but the "*injured person*" shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers and in any such action the claim against the other wrongdoers shall be reduced in the manner provided for in the sub-section.
78. As already explained, some of Mr Ryan's co-partners have (or had) significant indebtedness to Dengrove over and above their liability on foot of the Partnership

Loans. It has not been suggested that Mr Ryan could have any liability to Dengrove in relation of that non-Partnership debt. That being so, it is difficult to see how any compromise that Dengrove might have entered into with Mr Ryan’s co-partners in respect of that debt might give Mr Ryan a basis for relying on section 17. Even if Part III of the 1961 Act applied to claims for the recovery of a debt – and in *Ulster Bank v McDonagh* [2022] IECA 87 this Court concluded that it does not – Mr Ryan cannot be a “concurrent wrongdoer” in relation to the non-payment by another party of a debt to which Mr Ryan is a stranger and for which, in law, he has no liability or responsibility whatever.

79. As regards the Partnership debt to Dengrove (i.e. the €17.3 million rather than the €430 million), the position might appear to be different. However, it will be recalled that the liability of each of the partners in relation to that debt is several. Accordingly, even if Dengrove has entered into a compromise agreement with one or more of Mr Ryan’s co-partners in relation to their Partnership debts, it is not clear on what basis Mr Ryan could claim any right to benefit from any discharge or reduction of those debts, whether pursuant to section 17 of the 1961 Act or otherwise.<sup>17</sup>

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<sup>17</sup> As noted, in *Ulster Bank v McDonagh* [2022] IECA 87, this Court held that Part III of the 1961 Act (which includes section 17) has no application to claims for the recovery of a debt. The reasons for the Court’s decision were set out in detail in the joint judgment given by Murray J and me. However, as we explained at para 104 of that judgment, that does not mean that a compromise between a lender and a debtor has no implications for another party liable for that debt, whether *qua* joint debtor or guarantor. But Mr Ryan and his co-partners are not joint debtors given that their respective liabilities to (successively) Anglo Irish Bank plc, NAMA and Dengrove are several.

80. But it is not necessary to consider that issue further, given Dengrove's stated willingness to make discovery of any such compromise agreements. In addition, as the Judge noted, Dengrove has also agreed to provide an affidavit identifying the amount of the indebtedness of each of the partners, as well as a table showing what remains secured on the Property and the underlying contractual obligations that Dengrove says are secured on it (Judgment, paras 50 – 51).
81. The only issue, therefore, is whether it was appropriate to direct Dengrove to go further and to discover not just any compromise agreements that may have been entered into but also "*all records, notes, memoranda or other documents recording, describing or otherwise relating to*" any such agreement.
82. While the Judge stated his view that it was appropriate that the discovery should go beyond the "*compromise agreement itself*" (Judgment, para 55), he did not explain why he took that view. That is a significant issue in itself. As already noted, the Judge appears to have misunderstood the basis on which this category was being sought. The category is not concerned with alleged *inflation* of the indebtedness beyond what was lawfully due to Dengrove. Rather, it is concerned with alleged *reductions* in that indebtedness arising from compromises (also referred to in the Amended Statement of Claim as releases or accords) suggested to have been entered into by Dengrove with other (unidentified) partners. On its face, the offer made by Dengrove to make discovery of any compromise agreement(s) appears to address the stated need for discovery of this category. If, as Mr Ryan suspects, the indebtedness of any of the other

partners has been discharged or reduced by reason of any compromise, release or accord, discovery of the relevant agreement(s) will disclose that fact and enable him to quantify any consequential financial advantage to which he may be entitled *vis a vis* Dengrove.

83. That the additional material within the scope of this category is confidential – relating as it does to relations between lender and debtors and the financial affairs of those debtors – was not seriously disputed and was accepted by the Judge (Judgment, paras 38-46). The Judge was of the view that the third party debtors “*are not completely unconnected persons*” given that “*they are persons who are alleged to have breached their partnership agreements with Mr Ryan.*” Insofar as the Judge intended to suggest that, in such circumstances, the weight properly to be given to the confidentiality of their records was diminished, I respectfully disagree. Mr Ryan has not chosen to sue any of his co-partners or make any claim against them in these proceedings. They are not notice parties to the discovery application. The fact that Mr Ryan has seen fit to make allegations regarding their conduct in these proceedings does not take away from the fact that they are third parties nor does it in my view provide any legitimate basis for discounting the weight to be given to maintaining the confidentiality of their financial affairs to the maximum extent possible, subject always to the requirements of ensuring that Mr Ryan’s claim against Dengrove can be fairly determined.
84. For the same reasons, I do not consider that the fact Dengrove had, by offering to discover/disclose certain information relating to the financial affairs of the co-partners, “*conceded*” that some breach of confidentiality of such affairs was necessary, in itself

provides any basis for going beyond the parameters of that offer. As the Judge correctly noted, any order should be “*as limited as possible*” (Judgment, para 45). The fact that disclosure of a certain amount of confidential information was accepted as necessary does not imply that reduced weight was to be given to maintaining the confidentiality of other such information. Any additional disclosure must be carefully scrutinised and justified.

85. In my view, the Judge failed to address himself sufficiently to the issue of whether, and to what extent, the additional material captured by category D (over and above the material which Dengrove had offered to disclose) was relevant to any issue in the proceedings and whether its disclosure could be said to be necessary for the fair disposal of Mr Ryan’s claim.
  
86. On appeal, it was said by Mr O’ Donnell that the negotiation of and application and operation of any agreements coming within category D was important. To a significant extent, that submission relied on the contention that category D encompassed not just any compromise agreements having the effect pleaded in paragraphs 74 and 75 of the Amended Statement of Claim but also included any co-operation agreements such as are referred to in paragraph 76. That contention requires the Court to ignore the manner in which Mr Ryan has chosen to plead his own case in the Amended Statement of Claim. It is said that “*compromise agreements*” and “*co-operation agreements*” are used interchangeably in the Amended Statement of Claim. I cannot accept that. Mr Ryan’s own pleading plainly distinguishes between the two. The compromise agreements referred to in paragraphs 74 and 75, which are the compromise agreements referred to in

category D, are agreements said to come within the scope of, and having consequences flowing from, section 17 of the 1961 Act. That is all that category D is concerned with. Dengrove has agreed to discover any such agreements and so the sole issue is whether additional material relating to such agreements - as opposed to other forms of agreement that may have been entered into by Dengrove and any or all of Mr Ryan's co-partners – ought to be discovered. As I have said, in my view the importance of category D to Mr Ryan's case is to enable him to identify any compromise, release or accord, that Dengrove has entered into with this co-partners and to quantify any consequential benefit to which he may be entitled *vis a vis* Dengrove. It has not been shown that the additional material has any particular potential utility in that context.

87. As regards the specific agreement(s) referred to in Dengrove's Annual Report for 2018, there is nothing before the Court that provides any basis for suggesting that such agreement(s) has any bearing whatever on any of the issues in the proceedings. Mr O' Donnell built various castles in the air in the course of his spirited submissions but he fairly accepted that his client did not know what the agreement(s) involved. It follows inevitably from that quite proper concession that the suggestion that such agreements gave Dengrove power to induce Mr Ryan's co-partners to breach their partnership agreements with Mr Ryan lacks any evidential basis and is entirely speculative. In any event, if any such agreement involves the release or compromise of any of the liabilities of Mr Ryan's co-partners, it will be discovered by Dengrove. If not, it falls outside the scope of category D.

88. In my view, having regard to what is pleaded in the Amended Statement of Claim (and, so far as relevant, the Amended Defence) the additional material is, at its height, of very tenuous relevance and it has not been shown that its discovery is necessary for the fair disposal of the proceedings. It is impossible to resist the conclusion that the wider disclosure sought by Mr Ryan is an exercise in fishing, founded on speculative assertions that have no adequate foundation in the pleadings or any evidential basis in the material before the Court. In the circumstances, I am of the view that the Judge clearly erred to making the order that he did in respect of category D and I would therefore set aside that order.

89. In light of that conclusion, it is not necessary to consider Dengrove's objections to the use of the "*relating to*" formula in category D. However, I would observe that, in my view, the judgment of Barniville J in *Dunnes Stores v McCann* does not purport to set down any absolute rule against the making of an order for discovery in terms of documents "*relating to*" some identified issue or event. In some circumstances, such a formula may indeed sweep too broadly; in other circumstances it will not.

***Category F (as ordered)***

*"All documents, board minutes and/or other records referencing any change or proposed change to the rate of interest which has been charged or secured on the City Quay Properties."*

90. As already explained, this was the Judge’s reformulation of category F as sought by Mr Ryan, which limits the scope of the category to *changes* or proposed *changes* to the relevant rate of interest.
91. The Judge considered that this category “*may be relevant*” to the pleas in paragraphs 76 and 77 of the Amended Statement of Claim (Judgement, paras 60 & 61). On the authority of *Hannon* (see paragraph 52, second bullet above), Ms Smith says that that reflects an erroneous approach. As a matter of principle, a “*possibility that documents may be relevant*” is not sufficient. *A fortiori*, a mere possibility of relevance cannot properly justify an order directing discovery of confidential financial information such as would come within this category.
92. There is undoubted force in this argument, particularly in light of the observations of McCracken J in *Hannon* set out above. Nevertheless, it may seem unduly severe to decide this aspect of the appeal on what might be said to be merely an inapt turn of phrase. However, the difficulties here go well beyond any issue of linguistic nuance or nicety.
93. The starting point is to consider that Mr Ryan had already been given detailed information concerning the calculation of interest on the Partnership Loans. That information was provided to him on discovery pursuant to the order made by Haughton J and, as Ms Smith explained, any issues regarding the calculation of that interest had been resolved prior to the settlement of the proceedings as a result of engagement between the respective experts engaged by the parties.



94. If there had been any improper “*loading*” of interest on the Partnership Loans, that would have become apparent to Mr Ryan and his expert from the information disclosed by Dengrove. That has never been suggested, however. There was, of course, a dispute about the imposition of penalty/default interest but that is a distinct issue. That interest was purportedly calculated and imposed in accordance with the loan agreements; the issue was whether Dengrove was entitled to impose it at all and/or retrospectively. In any event, the claim to penalty/default interest was abandoned before the trial before Twomey J.
95. Accordingly, insofar as category F refers to interest charged on the Partnership Loans (those loans being “*charged or secured on the City Quay Properties*”), including changes in the rate of interest charged, (1) that information had already been provided to Mr Ryan and (2) it seems reasonable to suppose that the information did not and does not substantiate Mr Ryan’s suspicion that interest was improperly loaded on those loans. If the position were otherwise, evidence to that effect would surely have been put before the High Court and would have been before us on this appeal.
96. What then of the other loans “*charged or secured on the City Quay Properties*”? Mr Ryan of course disputes that any other loans are (or were) secured on the Property. In fact, he makes a specific complaint that Dengrove improperly aggregated the other loans held by his co-partners (which, he says, were not secured on the Property) with the Partnership Loans (which were) in calculating the redemption amount. That remains an issue in dispute but that is an issue to be resolved by reference to the proper interpretation of the security instruments executed by the Partnerships. It is not an issue to which any

documents within category F could be said to be relevant and no argument to that effect was made by Mr Ryan.

97. What is suggested is that discovery of material relating to changes and/or proposed changes in the interest rate applied to the other loans of the co-partners (the non-Partnership Loans) may disclose interest loading, not for the purpose of tax minimisation (an issue which has no apparent relevance to these proceedings) but for the purpose of inflating the redemption amount, thus clogging Mr Ryan's equity of redemption. But, so far as appears from the pleadings, Mr Ryan's case appears to be that his equity of redemption was thwarted by Dengrove's claim that the security on the Property extended beyond the Partnership Loans, and included other liabilities of the Partners, rather than any issue or claim as to the precise extent and/or calculation of those other liabilities. At no stage, it seems, did Mr Ryan either accept any liability to pay more than what was due on the Partnership Loans, or suggest that he had the financial capacity to do so, in order to redeem the Property from the security held by Dengrove. On the contrary, the proceedings had "*as their objective the establishment of the Plaintiff's entitlement to discharge his own indebtedness and in addition that of each of the other partners partnership indebtedness and thereby secure the return of all security*" (Statement of Claim, para 50 (my emphasis)).

98. That analysis indicates that the material relating to the other loans has no relevance to any issue in the proceedings. More fundamentally, the suggestion that Dengrove and any of Mr Ryan's co-partners engaged in the conduct alleged is "*a vague, unsubstantiated assertion [that] may not be used to justify a trawl through*

*[Dengrove's] documents in the hope that the allegation will crystallise into a substantial one"* (Para 52, 4<sup>th</sup> bullet point above). The comments that I made above regarding the speculative and unsubstantiated nature of the arguments advanced in support of the discovery sought in category D apply with equal force here. There simply is no reason to suppose that the material sought by Mr Ryan, and directed to be discovered in modified form by the Judge, contain relevant information.

99. In reaching that conclusion, I have not overlooked the email material exhibited to Padraic Ryan's Affidavit of May 2021. In my view, that material does not provide a basis for category F. It makes no reference whatever to Mr Ryan (though it does contain a reference to the City Quay Properties) and offers not a hint of support to any of the colourful scenarios conjured up in argument as to why material relating to the interest rates payable on the non-Partnership Loans should be disclosed to Mr Ryan.
  
100. Again, even if this material could be said to have some tangential or tenuous relevance – and, in my opinion, that has not been demonstrated - it has not been shown that its discovery is necessary for the fair disposal of the proceedings. Here too it is impossible to resist the conclusion that the disclosure sought by Mr Ryan is an exercise in fishing, founded on speculative assertions which have no adequate foundation in the pleadings or any evidential basis whatever. In the circumstances, I am of the view that the Judge clearly erred to making the order that he did in respect of category F and I would therefore set aside that order also.

## CONCLUSIONS

101. I am mindful of the appropriate scope of this Court's review of discovery orders made by the High Court, as explained in *Tobin and Waterford Credit Union*. I am also mindful of the Judge's familiarity with these proceedings as a result of his previous involvement. Nevertheless, for the reasons set out above, I consider that the Judge erred in making the Order to the extent that such Order fell outside the range of orders that could reasonably have been made by him. Accordingly, I would set aside that Order and refuse the discovery sought by reference to category D (noting however Dengrove's offer to make discovery of any compromise agreements) and category F.
102. As Dengrove has been entirely successful on this appeal, it would appear to follow that it should have the costs of the appeal. That is only a provisional view, however. As regards the costs of the High Court, the order made by the Judge was that those costs should be costs in the cause. Presumably, that order reflected the fact that each of the parties had enjoyed a measure of success on the motion. However, the Judge erred in making the orders he did in favour of Mr Ryan. In these circumstances, it would seem to follow that Dengrove should also have its costs of the High Court application. Again, that is only a provisional view. If Mr Ryan wishes to contend that costs orders in different terms should be made, he will have 14 days in which to notify the Office (and Dengrove) and in that event the Court will arrange for a brief further hearing on costs. Mr Ryan will be at the risk of the costs of any such hearing in the ordinary way.

*Edwards J and Noonan J have indicated their agreement with this judgment and with the orders proposed.*