THE HIGH COURT

[2011 No. 771 P]

BETWEEN

GO2CAPEVERDE LIMITED AND BALWERK IX LDA

PLAINTIFFS

AND

PARADISE BEACH ALDEMENTO TURISTICO ALGODOEIRO S.A.

DEFENDANT

AND

TOM SHEEHY

DEFENDANT TO THE COUNTERCLAIM

JUDGMENT of Ms. Justice Baker delivered on the 4th day of November, 2014

1. The plaintiffs commenced these proceedings by plenary summons on 27th January, 2011, seeking, in the case of the first plaintiff, payment of outstanding commissions in the sum of in excess of €1.8m allegedly due and owing by the defendant to the first plaintiff and damages for breach of contract, negligent misstatement and breach of collateral contract. The second plaintiff seeks damages in the form of payment of outstanding commissions in the amount of over €6.2m allegedly due by the defendant, and also seeks damages for breach of contract and negligent misstatement.

2. The summons was amended by order of the Master of the High Court on 22nd July, 2001 to substitute the now defendant company as defendant. The statement of claim was delivered on 1st September, 2011, and a defence traversing the claim delivered on 10th November, 2011.

3. Following an order of the High Court on 18th June, 2012, the defendant was given liberty to deliver a defence and counterclaim, which was duly done on 22nd June, 2012, the counterclaim being made against both plaintiffs and against Tom

Sheehy, now named in these proceedings as defendant to the counterclaim. Mr. Sheehy resides in Lisbon, is an Irish citizen and a director of both the first and second plaintiff companies. He and his wife are the owners of all of the shares in the first plaintiff company. Mr. Sheehy and one Mr. Niall Fleming are the owners of the shares in the second plaintiff company.

4. The defendant was incorporated on 10th February, 2006 for the purposes of carrying out a development of residential properties in the Republic of Cape Verde. An agreement was entered into between the defendant, and Mr. Sheehy and the first plaintiff for the provision by them of certain services in connection with the construction, promotion and disposal of the units to be built in that development project. The claim by the first and second plaintiffs for commission arises from that agreement. Mr. Sheehy and the first plaintiff engaged the second plaintiff in discharging some of the obligations to the defendant. It is pleaded that the relationship of principal and agent obtained thereby between the second plaintiff and the defendant.

5. The counterclaim is made against both plaintiffs and Mr. Sheehy arising from an alleged breach of duty and/or breach of fiduciary duty and/or for an account of all profits made by these parties in the course of the sale of a substantial number of residential units part of the development project at Cape Verde. A reply and defence to counterclaim of the plaintiffs and of Mr. Sheehy was delivered on 4th October, 2012, in which the claims in the counterclaim are traversed, save to the extent that the agreements are admitted as between the plaintiffs and the defendant, but not as between Mr. Sheehy and the defendant. What is admitted is that the parties to the agreement were the defendant and the first plaintiff only, although the indices and terms of the agreement are denied.

6. Of particular note is a transaction particularised in the counterclaim involving the sale of 476 residential units in the Paradise Beach development to Sterling Mortimer Global Property Fund. It is asserted that the plaintiffs and Mr. Sheehy represented that this sale had been agreed at a price of €71,660,975, when, in truth, the agreed purchase price was €101,159,711. The assertion in the counterclaim is that the plaintiffs and Mr. Sheehy unlawfully failed to remit the full amount due to the defendant on foot of the Sterling Mortimer sale, and unlawfully and in breach of trust retained an undisclosed sum to their own benefit. This part of the claim came to be described as the first unlawful dual pricing scheme.

7. This description is significant in the context of what the defendant says has subsequently come to light, namely, a second alleged unlawful dual pricing scheme, in which it is asserted that the plaintiffs and Mr. Sheehy represented that on the sale of a package of 42 assorted units, the subject matter of a resale following the failure of an original purchaser, a Mr. Moylan, to complete a sale, was made at a figure represented by the plaintiffs and Mr. Sheehy at **€50,500** less than the amount actually achieved in respect of each of these 42 units.

8. The defendant sought voluntary discovery against the two plaintiff companies and against Tom Sheehy by a letter of 6th July, 2012. Niall Fleming swore an affidavit on behalf of the plaintiffs on 31st August, 2012. Tom Sheehy swore an affidavit on behalf of the plaintiffs on 16th November, 2012.

9. The defendant brings this motion under O. 31, r. 21 of the Rules of the Superior Courts for an order dismissing the claim of the two plaintiff companies for failure to comply with an agreement to provide voluntary discovery, and for an order striking out the defence to the counterclaim on the same basis.

10. The motion was fully contested and a somewhat unusual feature of the application was that Niall Fleming and Tom Sheehy, the deponents of the two affidavits, were cross-examined over two days on 16th May, 2014 and 4th June, 2014 on behalf of the defendant.

Discovery

11. By a letter of 6th July, 2002, in response to a request by the defendant that the plaintiffs and Mr. Sheehy make voluntary discovery, the solicitors then acting for these parties indicated a willingness to make discovery of Categories 1 to 6 and Categories 7(a) and (f) as set out in that letter. It is with regard to Category 7(f) that the dispute giving rise to the motion arises.

12. The defendant claims that the plaintiffs and Mr. Sheehy have failed to make full discovery. In particular, the complaint is made in respect of the affidavit of discovery sworn by Niall Fleming on the 31st August, 2012. It is asserted that certain documents were consciously and intentionally omitted with a view to obscuring from the defendant the existence of the second alleged dual pricing scheme in particular. The assertion is founded primarily on the fact that the certain documents came to the attention of the defendant from another source, primarily from Sterling Mortimer, the investment company which acquired both the original tranche of 476 residential units and the second tranche of 42 units in respect of which it is alleged the second unlawful due pricing scheme arose.

13. The documentation which so came to light and came into the possession of the defendant is outlined in the grounding affidavit of John Cotter and includes email correspondence between Tom Sheehy and various individuals in an investment company, Stately International Investments Ltd., and a law firm, ELS. Stately International acted as agents for Sterling Mortimer and it would seem the law firm

ELS acted as legal advisers to either Stately or Sterling Mortimer. What is clear is that the documents identified by John Cotter in his affidavit totalling nine emails between 21st September, 2007 and 27th August, 2008 were all sent either to or from Tom Sheehy and individuals with email addresses at one or other of these two entities.

14. It is argued that these identified emails directly implicate Mr. Sheehy in what is described as the second unlawful dual pricing scheme and that other emails directly implicate both Mr. Sheehy and Mr. Fleming in what is asserted to be a breach of fiduciary duties arising from the agency agreement between them. It is also argued that the emails identify a financial benefit received by Mr. Sheehy and by either or both of the plaintiff companies that amounts to the making of a secret profit from the sales through Sterling Mortimer.

The law

15. Order 31, r. 21 of the Rules of the Superior Courts 1986 provides as follows:

> *"If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect, and an order may be made accordingly."*

Certain elements of the power of court are not in dispute in the application before me. It is accepted by both counsel that the power given to the court to strike out proceedings is a discretionary and not an obligatory power and that it should not be exercised unless the court is satisfied that the failure to comply with an order for

discovery is culpable, what is described by the Supreme Court in *Mercantile Credit Company of Ireland Ltd and Anor v. Heelan and Ors* [1998] 1 I.R. 81 as "a wilful default or negligence on the part of the defendant".

16. It is also accepted by counsel for both sides that the power of the court to secure compliance with the rules and orders of the court should not be exercised so as to punish a party for failure to comply with an order of court. This is clear from *Murphy v. J. Donohoe Ltd (No. 2)* [1996] 1 I.R. 123, also a decision of the Supreme Court, where it was stated by Barrington J. giving the judgment of the Court that:

> *"Order 31, r.21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court."*

17. Subsequent decisions of the Superior Courts have shown a willingness on the part of the courts to permit a trial to proceed, so long as a fair trial can be ensured and to penalise a litigant failing to make discovery in accordance with an order, by awarding costs or some costs against that litigant. An example of this, relied on by both parties, is the case *Geaney v. Elan Corporation Plc* [2005] IEHC 111, where Kelly J. quoted with approval the judgment of Hamilton C.J. in *Mercantile Credit Company of Ireland Ltd v. Heelan and Ors* where the Court took the view that the way in which the defendant had met or purported to meet its discovery obligations was substandard and gave strict directions with regard to the making of an affidavit of supplemental discovery and expressed what he described as "the court's displeasure" by way of a cost order, making not only an order that the plaintiff be entitled to the costs of the application, but also lifting a stay on the execution of an earlier cost order made in the case.

18. It is equally clear, and has been accepted implicitly by counsel for both parties to this application, that the courts recognise that the nature of a failure or omission by a party to comply with a discovery obligation may fall at various points on a spectrum, on one end of which one finds cases where a party innocently omits or fails to disclose a document, and on the other end of the scale, where the failure or omission is wilful and deliberate. For example, in *Murphy v. J. Donohoe Ltd (No. 2),* the Supreme Court noted that the meaning of the discovery order in question was unclear and that the defendant had sought and obtained legal advice as to the meaning and scope of the order, which legal advice was in the event not accepted as correct by the Court. The Supreme Court held, *inter alia,* that the High Court had not attached sufficient weight to the fact that the meaning of the original order for discovery was not altogether clear, and that the relevant parties had been acting on advice from their independent legal advisers, even if that advice had been found to be wrong. In addition in that case, the Supreme Court highlighted another factor that the court would take into account, namely the willingness of the defaulting parties as expressed to the Court in unequivocal terms that further and better discovery would be made.

19. The analysis and approach by the Supreme Court in that case shows the extent to which the court will examine each case on its individual facts, and have regard the reason for the failure or omission, and one factor identified in the jurisprudence is whether the court believes or has confidence that if an order for further and better discovery be made it would be complied with satisfactorily. That such confidence is an element in the approach of the court is evident from the decision of Kelly J. in *Geaney v. Elan Corporation Plc* and in that case, the learned judge made detailed orders and directions for further and better discovery, and in doing so, he recognised that a balance was to be struck between the interests of justice on the one hand, and

the clear principle from the authorities that the power to strike out should not be used merely to punish a party in default. This has the effect that even a party whose culpability is on the extreme end of the spectrum, may find that the court's discretion is exercised by the making of a costs order against that party and the giving to that party of a further opportunity to complete the discovery process.

20. Culpability, then, of itself, is not the test, and the defendant in *Geaney v. Elan Corporation Plc* was in essence found to have been culpable to a very significant degree. The central plank of the exercise by the court of its discretion is the interests of justice, and whether this could or was likely to be achieved, and Kelly J. took the view that the interests of justice could properly be served by the giving of further discovery and the imposition by the Court of strict directions as to how and when that was to be done. Implicit in this approach, is that the court must regard it as likely that the interests of justice would be served by a further opportunity being given and that such opportunity would mend the possible injustice to the other party. On the other hand if a court lacked confidence in the preparedness or willingness of the defaulting party to correct the omission by the making of a further affidavit of discovery, then the court could not achieve justice between the parties and would, in fact, merely double the injustice to the innocent party by granting an indulgence to the defaulting party by making an order for further and better discovery.

21. The decision of Johnson J. in *Murphy v. J. Donohoe Ltd. (No.2)* was overturned by the Supreme Court as his approach had been governed solely by whether or not, in his view, if allowed, the defendant would make a fair and honest effort to comply with any further order of the Court, and he took the view, having watched the deponents on behalf of the defendant in the witness box for a number of days, that he could not rely on them to fulfil and carry out honestly the requirements

that would be imposed by the Court's further directions. It was the fact that the High Court had failed to give weight to the other factors in the case, which led to the reversal of its order on appeal.

22. The Supreme Court in *Murphy v. J. Donohoe Ltd. (No.)* pointed out that striking out a party's pleadings for failure to make discovery was a measure to be taken in certain "extreme" cases, where one party may not be able to get a fair trial because of the other party's wilful refusal, as the Court recognised that even a party whose failure was wilful could be given an opportunity to make further and better discovery. To hold otherwise would have been to have treated non-compliance with the Rules as a reason to punish a party rather than further the interest of justice.

23. Such approach is found also in the judgment of Clarke J. in the High Court in *Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance Plc and Anor* [2010] 4 I.R. 1 where the question of discovery arose in the course of the trial, when the plaintiff made complaint that the discovery furnished by the defendant was inadequate. Clarke J. took the view that there was little doubt that some of the documentation not disclosed was significant to the issues that he had to try, and recorded that it was "very regrettable indeed" that a major public company and a prominent businessman should be guilty of very significant failure to deal properly with their obligations to the court in respect of discovery. Again, Clarke J. identified the jurisprudence as suggesting that the court should not exercise its discretion to strike out pleadings if in doing so it is seeking to punish the defaulting party. He said the following at paras. 20 and 21:

> *"20. I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The*

proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequence of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.

21. It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place, that the failure concerned was designed for the purposes of not giving access to the other central relevant information, and where it will be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the court's decision on the merits of the case."

Clarke J. went on to say that in his view, it would not be proper to allow the discovery issue to influence the decision on the case unless he was satisfied "that it was appropriate to draw inferences of the type suggested".

24. Clarke J's judgment shows what could only be described as an extreme reluctance on the part of the courts to allow discovery issues, or perhaps to allow procedural issues, to interfere with the trial judge's duty of coming to a decision on the evidence and law following a full hearing of a case, and raises a very high bar in an application to strike out such that the court will strike out proceedings only if satisfied that having found a failure, and having found that the failure was culpable, that it was appropriate and proper for the court to draw an inference as to the reason or purpose behind a failure to disclose relevant information. In that particular case,

the question before the Court was the refusal of the defendant landlord to consent to a change of use of a unit occupied by the plaintiff under lease. Clarke J. found as a fact that the failure to make adequate discovery did not arise as a result of inadvertence or even negligence and that the documents were too recent and too important to have been accidentally overlooked. He took the view that the documents were deliberately suppressed with a view to minimising the extent to which the plaintiff would be able to provide a factual basis for its refusal to consent. The Court was invited, but refused, to draw an inference from the failure of the defendant to make discovery that the true motivation in refusing consent was other than that which the disclosed documentation and evidence has shown, and that the true merits of the case were sought to be influenced by the defendant in its less than fulsome disclosure of documentation. Clarke J. made a distinction between a procedural failure and a failure or omission that could or did go to the merits of the case.

25. One element of the facts in *Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance Plc and Anor* is that the documents which were concealed were in fact available at the trial so the Court was in a position to remedy the identified failure on the part of the defendant and was satisfied that it did have a true picture of the relevant evidence in order to come to its decision, and at that point in time was not at all concerned as to the fairness of the trial, and the trial judge did not abrogate his obligation to decide the case on the basis of the evidence before it. In particular I note that Clarke J. was satisfied that there were no other documents which could have come to its attention but which had not yet come to light.

26. In the more recent judgment of *Green Pastures (Donegal) v.Aurivo Co-operative Society Ltd and Anor.*, Ryan J. said the true question before the Court was as to the meaning or scope of the discovery obligation in respect of one category of

documents ordered to be discovered. Ryan J., having reviewed the authorities with regard to the striking out of pleadings for failure to make discovery, identified "malicious determination to evade the obligation to make discovery" as a hurdle that an applicant faces in an application to dismiss. I find that phraseology helpful to identify two essential elements of the test. The failure must be malicious and arise from a determination to evade an obligation to make discovery. To say that a failure must be malicious means that it must be deliberate and not merely negligent, and not merely arising from a flawed interpretation of the legal import of the obligation or the true legal interpretation of a category.

The test: a three part process

27. I am satisfied, having regard to the authorities, that the purpose of O. 31, r. 21 is not to punish the defaulting party, but to secure the interests of justice, and that the true test I must apply is to ask whether there has been a failure to make discovery, and then to consider the reasons for the failure. At that point even in circumstances where that failure is deliberate and malicious, the proceedings should be struck out only if it satisfied that justice cannot be done between the parties. The failure to make discovery is not the determining factor and the fact that a party deliberately obscures documents is not sufficient, there must in addition be a substantial risk of injustice which cannot be remedied by the making of an order for further and better discovery and/or in costs. What this means in essence is that the court must be satisfied that the risk of injustice has been or can be ameliorated, and that the omitted documentation has or will be furnished before trial, Thus the court must take a view as to the degree of contrition shown by a party in default, as well as whether that party has shown a willingness to remedy the omission, and whether the omission can be dealt with in a way that furthers the interest of both parties.

The purpose of discovery

28. This brings me to consider briefly the purpose of discovery and its role in the administration of justice. The object of discovery is to secure a fair trial of the action in accordance with the due process of the courts, and the *locus classicus* remains the *dicta* of Finlay C.J. in *AIB Banks plc & Anor v. Ernst & Whinney*[1993] 1 I.R. 375, at 390

> *"... to ensure as far as possible that the full facts concerning any matter in dispute before the court are capable of being presented to the court by the parties concerned, so that justice on full information, rather than on a limited or partial revelation of the facts arising in a particular action, may be done."*

This purpose supports the fair conduct of proceedings, prevents ambush, ensures that the facts are properly before the court, and in the words of O'Flaherty J. at p. 396 is "an instrument to advance the cause of justice". The courts have a particular role in ensuring that discovery is fulsome but this role must be balanced against the principle that justice is best achieved by a trial on oral evidence.

The affidavit evidence

29. Replying affidavits were sworn by Niall Fleming and Tom Seedy in response to the motion and both use identical language in many parts of their respective affidavits. Both say that they "cannot offer any explanation" for the failure of the plaintiffs and/or Mr. Sheehy himself personally to discover the documents identified by John Cotter in the grounding affidavit. Both also, again in identical terms, say that they "will undertake to review the discovery" that has already been provided and to cure any omission or defect. Both, again in identical terms, confirm on affidavit that the omission of the identified documents was neither a "wilful or deliberate

concealment". Mr. Fleming in particular points to the fact that he was unaware of the existence of the application to strike out the claim and the defence to the counterclaim, and that his former solicitor had come off record on 21st March, 2014, before the matter first came on for hearing before me on 29th April, 2014. He says "I was taken by surprise", the precise phrase used by Mr. Sheehy, to learn that the matter was listed before the court on that date. Again both identified the fact that the proceedings were of "critical importance" and that the striking out of the proceedings would have serious consequences for the plaintiff companies.

The oral evidence given at the hearing of the motion

30. Tom Sheehy was first cross examined by counsel for the defendant. He said that he estimated that the two plaintiff companies and he himself had somewhere around 10,000 pages of documents, what he described as a "hugely intensive file", and that if any one document was "bypassed" it was not with an intent to hide that document. He was pressed at some length on an averment made in this affidavit that no order for discovery was made against him personally. I found Mr. Sheehy elusive in his answers, and he was unable to explain how he could have sworn to that effect when he himself personally accepted in cross examination that the letter seeking discovery specifically identified him in his personal capacity as defendant to the counterclaim. He could give no explanation as to why he had ignored the first warning letter sent by the solicitors for the defendant on 7th February of this year. He was equally unhelpful with regard to the reminder letter of 20th February. When pressed he said that he was completely unaware of the existence or threat of a motion to dismiss the proceedings for failure to make discovery, but when pressed, he admitted that he knew that the defendant's motion for security for costs was listed on 29th April of this year, but continued to deny that he knew that this was also the return

date of the motion to strike out the proceedings for failure to make discovery. His former solicitors had come off record on 21st March, 2014, and there was elicited in cross examination from him a letter from that firm of solicitors which was sent immediately after an order was made by the President of the High Court on 21st March permitting the firm to come off record. I accept that this letter suggested that the motion was "a motion for discovery", but I do not accept that Mr. Sheehy did not understand the difference, and he was well aware in my view that the defendant had threatened to bring a motion to strike out the proceedings for failure to make discovery, and he could not reasonably have believed that the defendant would, in those circumstances, have brought a motion for discovery.

31. When Mr. Sheehy was pressed as to whether he had made any attempt to do a trawl of his documentation to ascertain whether there were any other documents which had not been discovered, he also gave elusive answers.

32. Mr. Sheehy described at some length the class of documents that he believed were relevant to discovery and while he accepted that some of the documents in respect of which the defendant complained had the appearance of being relevant, he said that there were not in fact relevant as they related to a joint venture which, as he put it, "never got off the ground". He makes a distinction between what he described as the Paradise Beach sales, which were the sales in respect of which a commission is claimed by the plaintiffs, and the re-sales, presumably arising after the failure of the purchaser to close.

33. Furthermore, I note as a matter of some importance that Mr. Sheehy constantly, through his oral evidence, made reference to what he described as "voluminous documentation" that had already been furnished in discovery. In truth the amount of discovery made by the plaintiff companies and Mr. Sheehy is relatively

small and it comfortably fits in a folder of moderate size. Furthermore, Mr. Sheehy was not able to explain why, between the time he heard of the motion, which he says was at the end of April, 2014, and the date of the hearing before me when he gave evidence on 16th May, 2014, he made no attempt to use the search engines on his email accounts to access any further documentation that might have been relevant to the issues, and that might have been discoverable. Mr. Sheehy ultimately accepted the category of discovery in respect of which the issue arose was one agreed to be discovered, he accepted, albeit not without demur, that the documents were relevant, but he persisted to make, what I regard as a fanciful or unmeritorious distinction, between some classes of documents which he said related to the sale of the Paradise Beach units, and another class which he said related to the resale of other units following the failure of the Moylan purchasers to complete. I say this is an unmeritorious distinction because Mr. Sheehy accepted in cross examination that his claim for commission arose in respect of all of the units, including the Moylan resale.

Conclusion on the evidence of Mr. Sheehy

34. Mr. Sheehy was elusive in his responses. What concerned me was that he seems to believe that thousands of documents have already been discovered by him and Mr. Fleming for the purpose of these proceedings, and he persists in trying to argue that the documents the subject matter of this application are not relevant to the proceedings, albeit that when each individual element of the documentation and of the claim is put to him, he accepts their relevance. He accepts that the relevant persons identified in the relevant category are persons to whom the disputed emails were sent. He accepts that the second joint venture, which is alleged by the defendant to be a second dual pricing scheme, arose in respect of the units at Paradise Beach. His

answers were contradictory, self-serving and not given in many cases with any degree of conviction.

The evidence of Mr. Fleming

35. Niall Fleming was also cross examined on his affidavit. He gave evidence that he "went through each and every email" on his computer which he described as running to some 10,000 documents, a figure also mentioned by Mr. Sheehy. As far as he was concerned, he had given full disclosure. In answer to the question of why he did not discover the documents the subject matter of this application, he answered, "Actually, I don't know".

36. It was pointed out to him that he had disclosed emails from 30th May, 2007 to 27th August, 2007, and had left out two emails, one of 20th September, 2007, and another of 21st September, 2007. He did discover emails from 9th October, 2007 to 27th November, 2007, but none at all from 2008. The emails described by counsel for the defendant as "troublesome" were mainly in 2008. Mr. Fleming expressed surprise that no disclosure of emails from 2008 had been made by him. I find this quite extraordinary in the context of what was a strong averment from both Messrs. Fleming and Sheehy, in affidavit and orally, that the survival of the first plaintiff company depended on this litigation being successful. If that was so, and it seems to be the case, as the company's primary role was to service the sale of the Paradise Beach units, then Mr. Fleming must have thought it important to have fully reviewed the discovery that he did make prior to coming to court for cross examination. When pressed as to the amount of documentation he thought might be relevant to the case, he described this as being "six or seven binders". He accepted that the entire discovery was contained in one binder. He explained this discrepancy by saying that the binders "were left" in court to be taken by the solicitors for the defendant after a

hearing at the end of 2013. When pressed, Mr. Fleming said he "assumed" that the documents contained in those binders were in the affidavit of discovery.

37. Mr. Fleming was equally elusive about the distinction between the sale of the Paradise Beach units and the resales. He explained why certain documents were not disclosed, that they were "not relevant to our case against Paradise Beach". I note that his reference was to the plaintiffs' case "against" Paradise Beach and he does not take note of the counterclaim in respect of which some of these documents are alleged to be relevant.

Analysis

38. It is of importance in this case that the trial of these proceedings commenced and were compromised in December 2012. The settlement was not implemented in accordance with the agreement reached and the case then proceeded to trail, and had been given a date for hearing in April of this year. It was not until January or February of this year that the defendant became aware of the existence of the documents now in issue. Mr. Sheehy and the plaintiff companies now find themselves in a position where certain documentation has come to light that might have escaped the attention of the defendant altogether. They accept that the documentation is relevant. They implicitly accept that there may be other documentation. No attempt has been made by either of them to examine their electronic or paper files to ascertain whether there are additional documents. Neither deponent has examined the folders they described, or has any idea that those folders contained the so-called "troublesome" documentation. In the course of cross examination, Mr. Fleming said that he could not remember seeing the emails and that maybe the explanation for why they were not disclosed was that there was "a batch on the computer that didn't come up in the search". I find this explanation unconvincing.

It is not, in my view, an accident that the documents were not disclosed as they were particularly problematic for the plaintiff companies and for Mr. Sheehy. They were documents in the middle of a chain of emails, not ones at the beginning or end. The first expression of concern and warning letter with regard to this documentation was three months before Messrs. Sheehy and Fleming were cross examined. Neither made any attempt to carry out a fresh search in the intervening three months and ascertain the correct position with regard to the documentation and to be able to say with certainty that there were no other relevant documents. For the deponents to now say that they would, if given an opportunity, carry out a full search, seems to me to be too little too late. I find the elusiveness of both Messrs. Fleming and Sheehy to lead me to the conclusion that the failure to disclose these documents was deliberate and maliciously done in order to obscure any hint of the joint venture to which the documentation points. Mr. Fleming said, given an opportunity, he would "forensically trawl through absolutely everything". He offered no explanation as to how he had not done this before the case came on for hearing.

39. Further, it must be noted that the "troublesome" documents came into the possession of the defendant by chance. The question that must arise in that context is whether there might be other documents, also relevant to the proceedings, which remain unsecured, which would render the trial unfair.

The further evidence that came to light after the first day

40. After the first day of cross examination, the matter was adjourned for a period of approximately two weeks and in that intervening period, correspondence was received by the solicitors acting for the defendant from the former solicitors for the plaintiffs and Mr. Sheedy, Messrs. Powell & Co. In that letter confirmed that neither Mr. Fleming nor Mr. Sheehy had been sent a copy of the letter of 7th February, 2014

but that the letter "was discussed with them on numerous telephone calls". Mr. Fleming in cross examination had denied that he had discussed the letter. It also appears that Messrs. Powell informed Mr. Fleming and Mr. Sheehy after they were given liberty to come off record in the proceedings on 21st March, 2014, that the trial date had been vacated but that there were two motions listed on 29th April, namely the motion for security for costs and a motion described as for "extended discovery". It seems clear from the correspondence from Messrs. Powell & Co. that the parties were well aware of the adjourned date and the type of motions then listed.

41. I take particular note of the fact that in an affidavit sworn by Mr. Fleming at para. 7, he stated "unequivocally to the court", that the never received a copy of nor was he advised of the existence of the application to dismiss the claim and that he was taken by surprise to learn of this on 28th April, 2014. Mr. Fleming accepted that he knew at the latest following an email from Messrs. Powell on 21st March, 2014, that there were two motions listed before the court on 29th April, 2014, one motion for security for costs which is yet to be heard, and the other motion which he described as a motion for "extended discovery", or a motion for discovery or some such. My view is that Mr. Fleming was not merely evasive in his answers, but regrettably it seems me impossible to reconcile the averment in the affidavit with the evidence that he gave under cross examination and the letter from his former solicitors. He knew, and this was clear to me from the independent evidence, and from the evidence elicited in cross examination, that there were two motions. In my view, he has tried to hide behind a characterisation of this motion as a motion for "extended discovery", and to have taken the position that if what was being sought by the solicitors for the defendant was further discovery, he could safely give that motion less attention, and could focus his attention and energies, and what seems to be limited financial

resources, on the motion for security for costs. I note however, that no affidavit in reply has been sworn by either of the plaintiffs or by Mr. Sheehy to the affidavit for security for costs and I find Mr. Fleming's answer unconvincing, evasive and untrue.

42. Unfortunately, the tone of his answers, and those of Mr. Sheehy, and the fact no attempt was made by either of these persons to endeavour to conduct a search of their documentation before the hearing of the motion, and before they were cross examined on two separate days three weeks apart, and before this motion concluded gives comfort to me or to the defendant that there was no further documentation available to them. It seems to me that the two plaintiffs and Mr. Sheehy had hoped to get a further opportunity to file an updated affidavit of discovery but they were not prepared to spend either the time or resources in examining their documentation unless they were given this indulgence. This seems to me to have been a tactical decision by them, and they opted to ignore or not fully engage with what they perceived to be a motion for "extended discovery", as that motion, even were it to be successful, would not have led to the striking out of their proceedings. I find this approach to be suggestive of indifference, at best to the interest of the defendant in this litigation and to the process of these courts.

Conclusion

43. The conclusion I draw as a matter of fact is that the failure by the plaintiffs and Mr. Sheehy to make discovery was deliberate, and the documents which had come to light incidentally could not have been omitted other than by a deliberate intervention or intention on the part of the person disclosing documentation to conceal them. Accordingly, it seems to me that there was a failure to make discovery, and that the failure was deliberate and malicious. The failure was on the extreme end of the spectrum of culpability.

44. I take the view the documents not discovered were relevant to a matter of which the defendant had no knowledge, namely what has come to be called in this application, the second alleged dual pricing scheme. The documentation that was discovered refers to a joint venture between some people or groups of people and no credible explanation has been offered by the plaintiffs and Mr. Sheedy as to why certain documents which refer to this joint venture were discovered and certain other documents were omitted. Equally, no credible statement was given by the deponents of the affidavits as to whether documents might be outstanding, and as to what searches or inquiries they have done or carried out to ascertain whether there any such documents. Nothing has been said to assure me that the defendant and indeed the court will not be prejudiced in the conduct of this trial and in particular in the conduct of the counterclaim.

45. In particular I am not satisfied that it can safely be assumed at this juncture that all documentation in relation to the alleged second dual pricing scheme has come to light. There were several persons or bodies involved in the sale of the units at Paradise Beach, and both Mr. Sheedy and Mr. Fleming say that the documentation in general is voluminous, which is scarcely surprising in a development of such magnitude which was sold through investment schemes and through intermediaries. The defendant has now identified nine documents only, and it seems more likely than not that the files in relation to the Moylan sales and the joint ventures run to several hundreds of documents. In those circumstances it is more likely than not that more documents were generated around the Moylan sales and the joint venture, and the nine documents now available are likely to be part of a larger folio of paperwork. The plaintiffs and Mr. Sheedy have offered no comfort to me that there are no other documents and as I am not satisfied that they have treated the court process or their

discovery obligations with due solemnity or seriousness. I am equally not satisfied that they will use their endeavours to make discovery of other relevant documents at his juncture.

Decision

46. I am mindful of the reluctance shown by the Superior Courts to strike out a claim for failure to make discovery, and in particular the emphasis found in recent case law on the importance of allowing litigation to be decided on oral evidence by a trial judge. Equally I am mindful of the importance of the preservation for all parties to the litigation of the interests of justice. With that in mind, and noting too that I must be satisfied that I can draw some inference as to the merits of the case from the omitted documents or class of documents, I am satisfied that the correct approach to the motion is to consider that the interests of justice cannot now be met by allowing the plaintiffs to continue to defend the counterclaim. There are two remedies available to the defendant: the claim could be struck out in its entirety, or in the alternative the defendant could be permitted to take judgment on the counterclaim on the basis that it is undefended. In that regard I note that the failure to make discovery relates to certain documents or class of documents that go, or could go, to the claim in the counterclaim that the plaintiffs or Mr. Sheedy breached their fiduciary and other duties, failed to give full account, converted monies to their own use and/or made a secret profit. The documents do not directly relate to the claim, which in simple terms is a claim for commission and in respect to which there is a full defence. The existence of one, or two, dual pricing schemes by which it is alleged the plaintiffs and Mr. Sheedy skimmed off a further amount from each sale, and a plea of breach of duty and the making of a secret profit, is pleaded in set off in the counterclaim. There is no plea in the defence itself that there was a fundamental breach by plaintiffs

that the contract in some way came to an end as a result of the conduct of the plaintiffs in failing to perform their obligations, and the defence is a general traverse. The alleged breach of duty or the making of a secret profit are pleaded in the last paragraph of the defence as matters in respect of which the plaintiffs and Mr. Sheedy are indebted to the defendant and a set off is claimed. Accordingly I am of the view that the correct approach to what I find to be a serious breach by the plaintiffs and Mr. Sheedy of their respective obligations to make discovery is to strike out the defence to the counterclaim by each of them, as it is in respect of the matters pleaded in counterclaim that the omitted documents may be relevant. I consider that I may draw an inference from the nature and contents of the omitted documentation that other relevant documentation that may go to the merits of the counterclaim has not been discovered and that the plaintiffs and Mr. Sheedy are unlikely to satisfactorily complete disclosure even if given an opportunity to do so.