[2022] IEHC 651

THE HIGH COURT

2017/2387P

BETWEEN/

PATRICK HURLEY AND JOSEPHINE HURLEY

PLAINTIFF

AND/

VALERO ENERGY (IRELAND) LIMITED

DEFENDANT

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 30 NOVEMBER 2022

Contents

INTRODUCTION

1. This is my judgment in a motion to dismiss the entire proceedings for want of prosecution pursuant to Order 31 Rule 21 of the Rules of the Superior Courts ("O.31 R.21") and by reason of the Plaintiffs' failure to make discovery. The parties have made written and oral submissions.

2. The Plaintiffs have since 1989 occupied and operated, under repeated agreements with the Defendant and its predecessors in title, the Texaco Westside Service Station, Model Farm Road, Bishopstown, Cork ("the Service Station") – a petrol station and shop owned by the Defendant. There is a dispute whether the Plaintiffs occupy as tenants or licensees – there is even a dispute as to whether that is in dispute in separate Circuit Court proceedings. But that is not my present concern. The Plaintiffs pay an annual stipend to the Defendants – whether license fee or rent -

which, they say, averaged €56,627 in the period in question. The Plaintiffs are, as is usual in such arrangements, obliged to buy their fuel supplies from the Defendant at prices set by the Defendant.

3. The Plaintiffs claim damages on the basis that, in breach of various contractual and tortious duties, warranties, collateral warranties and/or actionable representations, the Defendants undermined the Plaintiffs' operation of the Service Station by, inter alia, failing to maintain, repair, update and keep its premises, plant, IT systems and equipment to up-to-date, modern and competitive standards, such that they became dilapidated and outdated. The Plaintiffs also claim that the Defendants charged excessive annual fees and fuel prices. All this, they say, rendered the Plaintiffs' service station business uncompetitive with its local commercial rivals. The claim relates to the years 2009 to 2016 inclusive. Damages are claimed as to costs, incurred by the Plaintiffs, of maintenance, repair and/or replacement of equipment and as to lost earnings/profits exceeding €1 million – as to proof of which they have retained expert advice. This brief paraphrase of their case, of which fuller particulars are pleaded, suffices for present purposes.

4. Notably, the Plaintiffs plead that they expressed their dissatisfaction at the foregoing matters, inter alia, by letter dated 23 May 2011, email dated 30 September 2014 and email dated 4 December 2014. Thus, they say that from 2014 at least the Defendant was aware of the prospect of such proceedings as these. That, of course, implies that the Plaintiffs were also aware from that time of that prospect. This position of awareness is perhaps amplified by the fact that there have been other proceedings between the parties[1].

5. The Defendant denies the entire claim and also pleads a Deed of Settlement dated 3 September 2012 which, it says, compromises the claim or part of it. The Defendant purchased the Irish Texaco business from Chevron Corporation in August 2011. In doing so acquired all records of that business and, for present purposes, I need not concern myself with the distinction between the Defendant and Chevron.

6. Quite a number of affidavits were filed in the motion – affidavits sworn by a solicitor for the Defendant, by the First Plaintiff, by Mr Twohig of the Defendant and by Mr Jacob, forensic accountant to the Defendants. It does not seem to me that a sequential recital of their content will much assist. I have read all and will refer to relevant content as seems useful. The deponents were not cross-examined.

[1] See Chronology below

O.31 R.21 RSC, THE DISCOVERY ISSUE AND THE MOTION

7. O.31 R.21 states:

> *"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 be placed in the same position as if he had not defended, the party interrogating may apply to the court for an Order to that effect, and an Order may be made accordingly."*

8. It will be seen from O.31 R.21 that this is not the usual form of motion to dismiss for want of prosecution, grounded in delay. Rather, it is grounded in a failure to comply with an interlocutory order as to the discovery of documents to the Defendant. So, while there has been considerable delay in this case, the parties are agreed that it is of little, if any, relevance to the motion before me.

9. The Defendant, by letter dated 26 May 2020 sought, and the Plaintiffs by letter dated 25 June 2020 agreed to make within 12 weeks, voluntary discovery of nine categories of documents. Categories (1), (5) and (6) consisted of all documents relating to:

> 1: the calculation of the average payment made by the Plaintiffs to the Defendant in respect of their occupancy of the Westside Service Station for the years 2010 to 2016 including but not limited to invoices, remittances and proofs of payment, reconciliation documentation and supporting information.
>
> 5: the price (at which)[2] the Plaintiffs were supplied petroleum products from the Defendant for the period 2007 to 2 July 2017.
>
> 6: the price (at which)[3] the Plaintiffs sold petroleum products supplied by the Defendant for a period 2007 to 31 July 2017.

10. The Plaintiffs did not make discovery within the 12 weeks which, by my calculation, expired on 17 September 2020. They did so by affidavit as to documents sworn 21 April 2021 and sent to the Defendant under cover of letter dated 22 April 2021. That affidavit avers, as to each of Category 1, 5 and 6, that all relevant documents

> *"for the period 2007 to 31 December 2014 have not been retained by the Plaintiffs, as documentation of such nature is typically only retained for 6 years."*

As to Categories 1 and 5, the Plaintiffs add:

[2] Words clearly missing from text.
[3] Words clearly missing from text.

"If the Defendant has these documents in its possession and intends to rely on these documents, then the Plaintiffs will need to provided[4] with copies of these documents, so the Plaintiffs can deliver a Supplemental Affidavit of Discovery in order for the Plaintiffs to complete this category of discovery."

11. The Defendant says that it was advised by its forensic accountant that by reasons of the Plaintiffs' disposal or destruction[5] of the documents in question, it could not properly defend the Plaintiffs' claim as it could not interrogate the losses alleged by the Plaintiffs, whether by means of forensic accounting, cross-examination of witnesses at trial or otherwise. Hence, they issued the present motion in August 2021.

12. The Plaintiffs deny any wilful or negligent destruction of documents - saying that *"any document destruction was pursuant to a well-established policy of disposal of business documents after six years as accepted by the Revenue Commissioners".*

DOCUMENTS TO HAND SINCE THE MOTION ISSUED & REMAINING ISSUES

13. In reply to the motion, the First Plaintiff swore an affidavit on 1 February 2022. Inter alia, it stated[6] that in response to the motion, he had made further searches and enquiries and had found some documents within the scope of the agreed discovery which would be discovered. It seems these previously undiscovered 227 documents, discovered by supplemental affidavit sworn by the First Plaintiff on 22 February 2022, relate to Category 5 from January 2012 to December 2014.

14. The Defendant says that, despite this supplemental discovery, the issue of adequacy of discovery is not resolved. It says that, since issuing the motion and by expending substantial time and resources, it has itself obtained from third parties the documents in Category 1 and is now able to defend the Plaintiffs' claim as to fees paid by them for the occupation of the Service Station in the years 2010 - 2016. The Defendant says it has also located the documents in Category 5 (the price at which the Defendant supplied fuel to the Plaintiffs).

15. But, the Defendant says, it has failed to locate in any meaningful degree the documents in Category 6, (the price at which the Plaintiffs sold the fuel supplied by the Defendant). That is the remaining category of discovery now at issue. The Defendant's essential point is that it does not record retail prices set by operators, such as the Plaintiffs, of Texaco service stations and has no means of ascertaining at what price the Plaintiffs sold the fuels supplied to it by the Defendant. So, it

[4] sic
[5] While the Plaintiffs objects to the word "destruction", preferring "disposal", there seems to me to be no relevant difference.
[6] §19

says, without the documentary evidence of the prices charged by the Plaintiffs from time to time - not least in a market in which prices fluctuate considerably - they cannot interrogate and have no means of defending the Plaintiffs' claim that the prices they were wrongfully charged for fuel by the Defendant caused them to incur loss of profits.

16. In light of this narrowing of the issue, I present here a somewhat truncated account of the parties' positions as they were "on paper" before me.

RETAIL PRICES OF FUELS & THE PLAINTIFFS' MARGINS

17. A considerable part of the Plaintiffs' claim for lost profits on fuel sales depends on the assertion that the Defendant wrongfully charged it excessive wholesale prices for fuels, which rendered its operation uncompetitive and less profitable than it should have been, as it was unable to charge a sufficient, or what it considers the usual, retail margin on its fuels. By way of example, in August 2014 the Plaintiffs complained to the Defendant that the wholesale prices they paid for fuel exceeded the retail prices being charged by competing nearby service stations such that the Plaintiffs were forced to charge uncompetitive retail prices for fuels.

18. Given that complaint, it is notable that the Plaintiffs do not plead or otherwise disclose the retail prices at which they in fact sold fuels from time to time. However, gross profit figures in the spreadsheet enclosed with their replies to particulars ("the Loss of Profits Spreadsheet") as setting out the calculation of their loss of profits claim include "*actual margin*" figures in monetary and percentage terms for each year. Accordingly, sale prices per litre, averaged over a year and without distinguishing between diesel and petrol, should be calculable. However, this rather crude figure will not reveal volumes and sale prices as between different fuel categories or fluctuations of both volumes and sale prices over a given year. It seems to me to be information far short of the granular information which discovered documents as to retail sale prices ought to have revealed and considerably diminish the possibility of interrogating the Plaintiff's accountant's calculations, which possibility such documents would likely have afforded. To put that point another way, if the Plaintiff was obliged by Revenue to keep those documents for 6 years, presumably that was to enable the Revenue to audit and verify the figures in the accounts. The Defendant, it seems to me, required them for essentially the same purpose. That purpose, in my view, is perfectly reasonable.

19. The Defendant says that comparison between fuel supply prices to the Plaintiffs and "competing service stations", at least where the competitors are lessees as opposed to licensees, is "futile" as the price at which fuel is supplied by the Defendant to individual service stations depends on various factors. Notably, unlike a lessor, a licensor (the Defendant), not the licensee (the Plaintiffs), bears various maintenance and other costs associated with a service station and this will be reflected in the price at which fuels are supplied to licensees. I observe that while this may be a fair point in general, it may not address the practical problem of wholesale prices to a licensee

exceeding the retail prices charged by competing service stations. Nor do we know if the competitors were lessees or licensees. But those are just observations and do not represent any conclusions on the evidence as to what in fact occurred and whether it is explicable or justifiable.

20. The Plaintiffs also assert, and the Defendant denies, that the Defendant not merely set the price at which it sold to the Plaintiffs but also set the retail prices at which the Plaintiffs sold fuels – thereby determining the Plaintiff's margin on such sales. While I should be cautious in resolving that dispute on affidavit evidence, in my view, and from the Plaintiff's side, it is an assertion only - for which no underlying evidence is tendered. The Plaintiffs make what seems to me an entirely vague assertion that, in some unspecified way and on foot of no stated mathematical or other quantified relationship, the prices at which they sell fuels is *"pegged to the wholesale price at which the Defendant sold the product*". While clearly the retail price will be informed by the wholesale price, that observation falls far short of enabling inference of the retail prices. On the other hand, the Defendant's assertion[7] that such control by it of retail prices at which service stations sell fuel is forbidden by competition law appears to me far more likely to be correct. As this motion concerns the Plaintiffs' obligations as to the preservation and discovery of documents which were or had been in its possession - regardless of whether like documents are in the Defendant's possession - I consider that the Plaintiffs bear, and has failed to discharge, the onus of proof of its assertion. I decline to proceed in this motion on a basis that the Defendant set the retail prices at which the Plaintiffs sold fuel. In fairness, that proposition was not pressed by Counsel for the Plaintiffs at the hearing – no doubt properly.

21. The Defendant also makes the general point that fuel prices and sales volumes differ as between petrol and diesel and those prices are volatile. I think I can take judicial notice that petrol and diesel prices are volatile. And the Plaintiffs did not dispute the proposition. The Defendants say they need to know the precise retail prices daily for each of petrol and diesel for the entire period as to which the claim is made. I am not convinced that is necessarily so, but it will be a matter for the trial judge. However, I do accept that they reasonably expected to have gleaned relevant and valuable information from documents recording the retail prices charged by the Plaintiffs but for their destruction.

22. The Plaintiffs assert, and the Defendant denies, that it was reasonable for it to expect to make the "average" national margin of 5.5c per litre. The Plaintiffs, so far, have tendered no evidence beyond assertion of this 5.5c. It must be said that, even accepting the premise that the claim could be based on such an average, it seems inherently unlikely to have remained stable for the entire decade between 2007 and 2017 – the period in respect of which discovery was ordered. For its part, the Defendant says that the so-called average margin is baseless, meaningless and does not exist – for example it does not distinguish between petrol and diesel.

[7] Affidavit of James Twohig 22/6/22 §10

23. The Defendant also observes that the First Plaintiff's figure for their actual margin has varied. It says that:

- In his affidavit of 1 February 2022[8] Mr Hurley asserts an average margin of 2.4c. per litre.
- In his affidavit of 2 September 2022[9] this figure has changed, without explanation, to 2.84c. per litre, based on a total margin of €336,519 (i.e., a sum calculated by their accountant based on actual data).
- In his affidavit of 1 November 2022[10] the figure of an average of 2.4c is repeated, but now as an "estimate".

24. The Plaintiffs do not explain these differences but say that the figure of 2.84c in the affidavit of 2 September, 2022[11] gives significant detail of the claim – inter alia in asserting "*a high of 3.72 cent per litre with a low of 1.89 cent per litre"*. I do not find the Plaintiffs' position in this regard reassuring. It is entirely unclear what is meant by this phrase. They have not exhibited their accountants' documents. It seems entirely possible that the so-called "high" and "low" are merely average margins for particular years, with the asserted average margin of 2.84c merely being an average of annual averages. Of course, that may not be so, but absent the accountant's documents one simply cannot tell. However, it may be significant, as to the so-called "low" of 1.89c per litre, that Mr Jacob confirms that the Loss of Profits Spreadsheet purports to disclose an average actual margin for all of 2015 of 1.89c per litre and implies an average actual margin for 2009 to 2015 inclusive of 2.7c per litre. He observes that a document discovered by the Plaintiffs in another category appears to show a handwritten notation by the Plaintiffs in April 2015 showing a margin of 5.02c.

25. The Defendant's point is that, absent the documents in Category 6, it cannot ascertain what retail prices the Plaintiffs charged and so cannot interrogate their asserted actual margins. Mr Jacob has sworn that it has no means of defending the Plaintiffs' claim that the prices they were charged for fuel by the Defendant has caused them to incur lost fuel profits. This is because what the Defendant is essentially being asked to do by the Plaintiffs is to rely upon the calculations of the Plaintiffs' accountant without any mechanism for the Defendant to "*go behind*", test or interrogate such calculations in any meaningful degree in the absence of the destroyed documents. He asserts that the Plaintiffs' suggestion that the Defendant can rely on the Plaintiffs' accountant's calculations to forensically analyse the Plaintiffs' claim is nonsensical.

26. Some documents within Category 6 are available to the Defendant. The Plaintiffs say, and the Defendant does not strongly dispute, that between 2007 and 2009 they participated in a Value Commitment Programme whereby they sent monthly Price Support Claim forms to Chevron recording the daily retail prices they charged for petrol and diesel. The Defendant says it searched for these claim forms but found one only – dated May 2009 – and the associated internal Chevron

[8] §15
[9] §18
[10] §11
[11] §18

management and approval record for the amount payable to the Plaintiffs under that programme in May 2009[12]. It demonstrates 3 different prices charged for each fuel in May 2009. I accept that this does not make up the deficiency in Category 6 discovery and it provides some illustration of fuel price differences between petrol and diesel and of fuel price volatility.

27. The Defendant also has some records relating to fuel cards[13] which record retail fuel prices on days on which fuel card transactions occurred at the Service Station. It exhibits data from 2016 by way of example. I am unclear whether and to what extent similar information is available for all other relevant years but, as the Defendants did not address it, the issue I must assume so. The Plaintiffs say these details should be available from 2010. I need not record the complexities of those fuel card systems to which the Defendant has averred. I do not rule out the possibility that they could assist a forensic analysis of the claim - at least to some degree and whether or not sufficiently. But it not apparent that these records make up the deficiency in Category 6 discovery.

THE LAW

28. I will attempt to set out the law here to put the parties' submissions in context. But it will be necessary to return to the law thereafter. **Mercantile Credit**[14], as to O.31 R.21, states that the power to dismiss proceedings or strike out a defence is discretionary, not obligatory, and should be exercised only if the court is satisfied of an endeavour to avoid giving discovery – of wilful default or negligence - and not where the omission or neglect to comply with the order is not culpable, for instance, if it is due to loss of memory or illness. The Defendant cites Collins J in **McNulty**[15] for the proposition that, while the exact import of **Mercantile Credit** in this regard may be open to debate, it

> *"……. certainly appears to provide a basis for an argument that negligence may, in principle, be sufficient in this context." That certainly was the approach taken by the High Court … in Hansfield Developments[16] …… In the view of Gilligan J in "referring to "wilful default or negligence" the judgment [in Heelan[17]] therefore clearly contemplates two alternative bases on which an order to strike out a defendant's defence may be granted" though also emphasising that a negligent failure to make discovery would not, without more, suffice to justify the exercise of the Order 31, Rule 1 jurisdiction*."[18]

[12] These are exhibited.
[13] These are a form of credit card or similar, issued by various issuers under various brands (including the Texaco brand licensed to issuers) pursuant to fuel price discount schemes, to commercial fleet operators and the like.
[14] Mercantile Credit Company of Ireland Limited v Heelan [1998] 1 I.R. 81 @ 85 – also referred to as "Heelan".
[15] Orla McNulty -v- The Governor and Company of the Bank of Ireland [2021] IECA 182; Collins J.
[16] Hansfield Developments v Irish Asphalt Ltd [2010] IEHC 32
[17] i.e. Mercantile Credit
[18] §59

29. The Defendant cites Keane CJ in **Johnston**[19] to the effect that, if it prevented the possibility of a fair trial, it was irrelevant whether destruction of documents was deliberate or innocent:

> "*The court has a jurisdiction …. to strike out proceedings or to strike out a defence filed by a defendant where it is satisfied that the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result and of course that may also arise where it appears from the affidavit that some particular documents or some category of documents have been in fact destroyed by the party concerned, whether innocently or whether deliberately*[20] *in order to interfere with the further conduct of the case.*"

The Plaintiffs cite **Johnston** for its citation of Barrington J in **Murphy v J Donohue Limited**[21] to the effect that:

> *"Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an Order for Discovery. In such cases it may be necessary to dismiss the Plaintiff's claim or to strike out the Defendant's defence and such cases will be extreme cases."*

Johnston also records that the powers of the courts to secure compliance with the Rules and Orders of the court relating to discovery should not be exercised to punish a party for failure to comply with an order for discovery within the time limited by the order.

30. The Defendant cites Collins J in **McNulty** as to that dictum of Keane CJ:

> *"As this passage recognises, the destruction of relevant documents may impact on the fairness of a trial and that is so whether such destruction is done deliberately by a litigant to avoid the discovery/production of such documents or whether it results from the negligence of a litigant in failing to take appropriate steps to preserve documents. Seen in that light, a rigid and absolute distinction between the deliberate and the negligent in all circumstances may appear difficult to justify."*[22]

31. Collins J noted that Ms McNulty had relied on Megarry J in **Rockwell Machine Tool**[23] as to retention of discoverable documents:

> *".. it seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by possibility have to be disclosed."*

[19] Johnston -v- Church of Scientology [2001] WJSC 3513 (Supreme Court, Ex Tempore, Keane J 7 November 2001), cited in McNulty §60
[20] Emphases in this judgment are added unless the contrary is indicated.
[21] [1996] 1 IR 123
[22] §61
[23] Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd [1968] 1 WLR 693

32. **Matthews & Malek**[24] long since devoted an entire chapter to these duties: observing, inter alia:

> *"A solicitor's duty is to investigate the position carefully and to ensure so far as is possible that a full and proper disclosure of all relevant documents is made. This duty owed to the court is one in which the administration of justice very greatly depends. And there is no question on which solicitors, in the exercise of their duty to assist the Court, ought to search their consciences more. …… this duty extends to explaining to the client the obligation of discovery and the need to preserve documents. Solicitors should not wait until proceedings have been commenced .. once litigation is contemplated the solicitor should advise his client as to his obligations on discovery."*

33. Collins J in McNulty commented, as to "*whether or in what circumstances a party might be required to put in place (and a party's solicitors might be obliged to advise) a so-called "litigation hold" (also referred to as a " legal hold")*", that "*at the level of principle, it seems difficult to argue with what was said in Rockwell Machine Tool"* though "*no doubt there is significant room for debate as to the scope of the duty involved and the consequences of its breach*". Collins J re-affirmed that discovery is an "*essential element of civil litigation*"[25]. It "*improves the chances of the court being able to get at the truth in cases where facts are contested*" and so "*makes a significant contribution to the administration of justice*". Those objects are *"…..obviously undermined if potentially relevant documents are permitted to be destroyed while litigation is contemplated and, a fortiori, while litigation is actually pending*." Collins J cites English and US decisions[26] recognising a duty to preserve documents – to the effect that while there is no general duty to preserve documents prior to the start of proceedings (though deliberate spoliation in anticipation of litigation might have adverse consequences), after the commencement of proceedings "*the situation is radically different*". He notes that in England[27], by practice direction, as soon as litigation is contemplated the parties' lawyers must notify their clients of the need to preserve disclosable documents. The widespread practice of "*litigation holds*" has resulted. Collins J observed that the principle that parties should take all steps necessary to preserve sources of data as soon as they become aware of a matter which is likely to require discovery has been described as an "*overarching principle*"[28]. He cited the Good Practice Discovery Guide[29] under the heading "Legal hold process":

> *"One of the first steps in the discovery process is to inform relevant parties of their duty to preserve data which may be of relevance to the matter and to <u>suspend routine/automatic data destruction processes</u>[30]. This is vital to helping ensure that relevant data is not lost or destroyed, whether deliberately or accidentally. This is best achieved by putting in place a 'legal hold', i.e. informing all of the relevant personnel, in writing, of their obligation to*

[24] Discovery, Sweet & Maxwell 1992 Chapter 13 §11.02
[25] Citing Tobin v Minister for Defence [2019] IESC 57
[26] Earles v Barclays Bank plc [2009] EWHC 2500 (Mercantile); Zubulake v USB Warburg LLC 220 FRD 212 (2003) (US District Court, S.D.NY)
[27] England and Wales Practice Direction 31B – Disclosure of Electronic Documents
[28] Citing very clear advice given in the Good Practice Discovery Guide (V2, November 2015) published by the Commercial Litigation Association of Ireland. This Guide has been referred to with approval in a number of High Court decisions.
[29] §8.1
[30] Emphasis added

preserve all data that may be relevant to the actual or threatened proceedings. All actions taken to preserve data, and actions not taken, should be fully documented, along with the reasons why."

34. Collins J concluded that litigants are obliged to take reasonable steps to preserve relevant documents to ensure their availability on discovery and their legal advisors must advise their clients of this obligation. He considered that it *"is not sufficient to address issues of preservation only at the point discovery is requested or when discovery is ordered. There may be – and frequently will be – a significant gap between the commencement of proceedings and the finalisation of the parameters of discovery, whether by agreement or by court order."* Though the authorities on this matter are not always consistent[31], Collins J considered the better view to be that there will be some circumstances in which a duty to preserve arises before the formal start of proceedings and where the cut-off is to be drawn is likely to involve a case-by-case assessment.

35. Collins J observed that what steps are reasonable will depend on all of the circumstances – inter alia, the nature and scope of the proceedings, the extent of the universe of potentially relevant documents and the number of potential custodians, the experience and resources of the parties, and whether they are legally represented. Frequently, in practice, a party will write early in litigation (or even before it starts) identifying categories of documents to be preserved.

36. The relevant duties were also, and notably, described in **Wicklow County Council v O'Reilly**[32]. O'Keeffe J approved Johnson J's citation in the High Court in Murphy v. J. Donohoe Ltd[33] of Halsbury[34] the duties which arise in this regard.

37. Both parties in this case cite **Go2CapeVerde**[35] as an example in which a pleading was struck out. The Defendant in that case sought dismissal of the claim under O.31 R.21. Baker J considered the caselaw[36] in detail. She reiterated that the objective of discovery was a fair trial[37]:

[31] Rockwell Machine Tool Co Ltd frames the duty of the solicitor as one arising when the writ issues. Similarly, Earles v Barclays Bank plc suggests that there no general duty to preserve arises until proceedings are commenced. In contrast, Practice Direction 31B refers to contemplated proceedings. The Good Practice Discovery Guide and Zubulake refer to threatened proceedings.

[32] [2010] IEHC 464.

[33] [1996] 1 IR 123. Though the Supreme Court in Murphy allowed the appeal, Barrington J said: *"Nor can this Court criticize the trial judge's statement of the law. The problem arises with his application of the law to the circumstances of the present case."* So those propositions as to the duties of solicitors appear to have the imprimatur of the Supreme Court.

[34] *Laws of England* (4th Ed.) Vol. 13 para 45 (note: the original not the reissue). That passage in Halsbury seems to be based on *Myers v Elman* [1940] AC 282, [1939] 4 All ER 484, 109 LJKB 105 and on the views of Megarry J in *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaires) Ltd* [1968] 1 WLR 693, at 694. Those views Collins J in McNulty describes "as set out in Abrahamson et al, *Discovery and Disclosure* (at para 19-15) but which did not appear to have been judicially cited here." It would seem that neither Wicklow County Council v O'Reilly nor Murphy v. J. Donohoe Ltd were cited to the court in McNulty. The passage from Myers is recited in Hansfield Developments v Irish Asphalt Ltd [2010] IEHC 32.

[35] Go2CapeVerde Limited & Anor -v- Paradise Beach Aldemento Turistico Algodoeiro S.A. [2014] IEHC 531

[36] Murphy v. J. Donohoe Ltd (No. 2) [1996] 1 I.R. 123; Geaney v Elan Corporation Plc [2005] IEHC 111; Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance Plc and Anor [2010] 4 I.R. 1; Green Pastures (Donegal) v. Aurivo Co-operative Society Ltd and Anor [2014] IEHC 209

[37] Citing AIB Banks plc & Anor v. Ernst & Whinny [1993] 1 I.R. 375

"… 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."

It *"supports the fair conduct of proceedings, prevents ambush, ensures that the facts are properly before the court, and … is "an instrument to advance the cause of justice".*

38. Baker J pointed out that the purpose of O.31 R.21 is not to punish default but to facilitate the administration of justice by ensuring compliance with court orders. Even in a case of malicious destruction of documents, the Court should only strike out proceedings when satisfied that otherwise justice cannot be done between the parties and particularly that the injustice cannot be ameliorated by an order for further and better discovery and/or in costs.

39. Baker J cited **Mercantile Credit** as meaning that the power to strike out proceedings is discretionary not obligatory and should not be exercised unless the court is satisfied that the failure to make discovery is culpable. She considered that such a failure may fall at various points on a spectrum, at one end of which is innocent omission. At the other end lies wilful and deliberate failure. But, Baker J held, culpability, of itself, is not the test - the central plank of the discretion is the interests of justice. If the interests of justice could be served short of striking out a pleading, even in a case of culpable omission, it would not be struck out as punishment is not the objective. Even a party whose failure was wilful could be given an opportunity to make further and better discovery and pleadings would only be struck out in "*extreme*" cases.

40. However, the observation by Baker J that culpability, of itself, is not the test must be understood in context. Her point was that culpability was not enough by itself to justify striking out a pleading. She does seem to have considered culpability a threshold test. She observed that

"Certain elements of the power of the 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 …… as "a wilful default or negligence on the part of the defendant"."

41. Also, in **Green Pastures**[38], Ryan J identified "*malicious determination to evade the obligation to make discovery*" as a hurdle for an applicant in an application to dismiss. Baker J in **Go2CapeVerde** found *"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.*

[38] Green Pastures (Donegal) v. Aurivo Co-operative Society Ltd and Anor [2014] IEHC 209

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." So, it seems clear that Baker J did consider culpability a threshold test – and culpability not merely in the form of negligence but in the form of a deliberate and "*malicious determination to evade the obligation to make discovery*".

42. Baker J considered that the cases set the bar for dismissal or striking out very high – based on an extreme reluctance to allow discovery 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. Accordingly, the court will examine each case on its individual facts, and have regard to the reason for the failure or omission. It will further examine, inter alia, whether the court has confidence that an order for further and better discovery would be complied with satisfactorily (as the documents are destroyed, that does not arise in the present case). Baker J was mindful of:

- the reluctance of the Superior Courts to strike out a claim for failure to make discovery,
- in particular the emphasis in case law on the importance of allowing litigation to be decided on oral evidence by a trial judge and
- the importance of the preservation for all parties to the litigation of the interests of justice.

Baker J concluded that:

> *"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."*

43. Baker J found that the Plaintiffs had deliberately and maliciously omitted relevant documents from their discovery and were thus at the extreme end of the spectrum of culpability. She was not satisfied that it could safely be assumed that all relevant documents had since come to light – nor was she satisfied that, if given the opportunity, the Plaintiffs would satisfactorily endeavour to discover other relevant documents. She considered that she could strike out the Plaintiffs' claim and/or its defence to counterclaim. <u>As the undiscovered documents related to the latter</u>, she struck it out, such that the counterclaim would proceed undefended. She let the claim proceed.

44. In similar vein, the Plaintiffs cite Clarke J in **Dunnes Stores (Ilac Centre) Ltd v Irish Life**[39]. However, that was a judgment after trial on oral evidence, not a motion under O.31 R.21. The views of Clarke J as to the significance of deliberate breach of obligations of discovery must be viewed in that light – though that is not to say they are irrelevant to present concerns given that the Defendant, in effect, here seeks final judgment in its favour.

[39] [2010] 4 IR 1 §20

"[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 consequences 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 side to relevant information, and where it would 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."[40]

45. The Plaintiffs also cite Ryan J in **Campion v Wat**[41]. He said:

"… [O]nce discovery has actually been made it is not generally the function of this court to make determinations of fact in order to decide whether the claim should be struck out. It would not be possible on the basis of the Affidavits alone for this court to do that. It would obviously be necessary to have a hearing at which the plaintiff is cross-examined".

Ryan J also said:

"It was clearly reasonable and prudent and appropriate for the defendant to bring this motion because it was only at the last minute that the plaintiff actually produced the affidavit in proper form. As to whether it is correct or credible or is any other way to be criticised, that is best considered in the context of the trial as a whole in light of the evidence. Nothing in my decision will inhibit the exploration by the defendant's counsel of any of the matters that he raises by way of comment or criticism of the conduct of the plaintiff including, in particular, the manner in which he has dealt with the order of Cross J. in respect of discovery of documents. Indeed, it is in my view most convenient just and appropriate that the consideration of the veracity of assertions made by the plaintiff should be carried out in the course of the trial of the issues in accordance with the pleadings"

46. Generally, the Plaintiffs say that the Defendant's approach seeks to direct the Plaintiffs' proofs at trial. They cite **Leahy v OSB Group**[42] as a case in which Noonan J refused to strike out the claim despite similar complaints that inadequacy of his discovery concealed how the plaintiff's claimed losses were computed, such that the defendants allegedly could not get a fair trial.

[40] The Plaintiff also cited §59 of that judgment but I do not find it assists here.
[41] [2013] IEHC 45
[42] [2015] IEHC 10

47. In **Leahy,** the plaintiff alleged the defendant's failure, in breach of contract, to supply raw materials for his kitchen manufacturing business, such that his business failed and he suffered losses of €6.5 million, including considerable loss of profits. By the time the motion came on, the plaintiff had discovered the accounts for the relevant years and the dispute related to the calculations, books and records, files, notes supporting those accounts[43].The plaintiff said he had sent these to his accountant, from whom he had not recovered them as his accountant only kept paperwork for four years. The defendant said that, for want of these documents, it was unable to see how the losses claimed by the plaintiff were computed, such that it could not get a fair trial. Noonan J considered, on the facts, that any difficulty the defendants faced emanated, not from a failure by the plaintiff to make discovery, but from the defendant's failure to seek discovery of the documents in question in the first place. This seems to have been his primary conclusion in this case. To that extent the case is not much on point here.

48. But I further observe that Noonan J derived from the caselaw, a three-limb test to be passed before he could strike out the claim:

- first, that there is an ongoing failure to comply with the discovery order,
- second, that such failure is clearly deliberate and,
- third, that the consequence of that failure will be to deprive the defendants of a fair trial.

49. The Plaintiffs note that, in **Leahy**, Noonan J, while suspicious, was unable to conclude, on affidavit evidence only, whether any non-compliance was deliberate or inadvertent. That issue could only be resolved by cross-examination at the trial. And if deliberate non-compliance emerged there, that would have a major bearing on the plaintiff's credit in all aspects of his claim.

50. Noonan J also said the following, which has some factual resonance with the Defendants' complaints in the present case:

> *"It is of course perfectly understandable that a forensic accountant retained for the defence would want to see all documents that he considered relevant to the computation of the claim so that he could critically evaluate them and provide a report to the defendants to assist in the defence of the claim. Mr. Berney[44] clearly faced a difficulty in this regard …. Mr. Lynch sets out in some detail the problems Mr. Berney was having in understanding the claimed losses against the background of the accounts recently discovered by the plaintiff. In particular, Mr. Berney said that the accounts did not allow him to understand how either the loss of profits or loss of investment as claimed in the pleadings had been calculated."*

[43] This is a simplified and arguably not quite precise description of what lay between the parties but suffices here.
[44] The Defendant's forensic accountant.

51. And, as the Plaintiffs observe, Noonan J said:

> *"How losses are computed by a plaintiff is normally a matter for particulars and of course discovery may be sought of the documents underlying the particulars given. It must be remembered that the onus of proving his losses rests with the plaintiff so if the documents supporting the calculations do not exist, that is an even bigger problem for the plaintiff than the defendants. If such documents do exist, then the plaintiff cannot rely on them if he has not discovered them, assuming always that they are covered by the order for discovery."*

Noonan J said that, in light of his findings, the third limb of the test did not arise. But he said for completeness that he was far from convinced that any failure to make discovery would result in any unfairness to the defendant at the trial for the reasons already given. This, I understand, is referring to the passage cited above as to onus of proof of losses.

52. It is of considerable interest that Collins J in **McNulty** considered that he was unable to assess the prospect of a fair trial as affected by the destruction of documents. He said:

> *"Even if, in principle, negligence may suffice[45] the evidence before the Court would not allow for any reliable or informed conclusion to be reached on this point at this stage."*
>
> *"… the Court is not, in my view, in a position at this point to assess the impact of the absence of the destroyed documents …. on the fairness of the trial of these proceedings or determine whether that impact is likely to be so significant as might warrant the extreme remedy of striking out the Bank's defence or whether some more limited remedy might be sufficient to vindicate the rights of the Plaintiff. The documents in Category 2(iii) and (iv) relate to a specific aspect of the Plaintiff's claim and it would appear to be entirely disproportionate to strike out the entirety of the Bank's Defence on the basis of the loss of those documents."*

53. The foregoing from McNulty seems to me significant in three respects:

a. While it was a conclusion as to the facts of that case, it contains an underlying, implied warning. In any but the clearest cases, it may be perilous in a motion decided on affidavit to attempt to measure the prospects of a fair trial in circumstances likely to be more fully disclosed in a plenary trial on oral evidence and on additional information which may to be to hand by that time. Furthermore, it may be perilous to try to anticipate those circumstances with such confidence as to justify a final order, on a motion and on affidavit, dismissing a plaintiff's claim. This is not to say that the Court should shrink from striking out the claim where it is clear that there is no prospect of a fair trial, but Barrington J no doubt deliberately referred to "extreme cases" and the cases emphasise reluctance to make such an order.

[45] i.e. that merely negligent destruction of documents could ground an order under O.31 R.21

b. The passage also identifies the criterion of proportionality which should relate any remedy to be granted on such a motion at this to the substance of the complaint upheld against the party making discovery.

c. Finally, it is also clear that the court can fashion a remedy to meet the case. Any remedy should, if required and to the extent possible, be tailored to its likely effect on the possibility of a fair trial. In **McNulty,** the missing documents were relevant to only part of the claim. So too in the present case.

54. Importantly, Collins J in **McNulty** addresses the consequences of his refusal to strike out the Bank's defence:

> *"That does not, I stress, preclude Ms McNulty from pursuing the issue of discovery at the trial of these proceedings or renewing her application to have the Bank's defence struck out if such an application appears appropriate in light of the evidence that may be given at trial, including by way of cross-examination of Mr Coleman and of any other witness or witnesses from the Bank who may be called (or tendered) on this issue."*

Of course, the trial judge is not released from, or constrained in performing, by a refusal on such a motion as this to dismiss the claim, his/her duty under the Constitution to ensure a fair trial.

CHRONOLOGY

55. As at present apparent and relevant, the chronology is as follows:

Date	**Event**
1989	The Plaintiffs' occupation of Chevron's Texaco Westside Service Station starts.
2007 to 2009	The Plaintiffs say they participated in a Value Commitment Programme from whereby it sent monthly reports to Chevron recording the daily prices charged for unleaded petrol and diesel. The Defendant says its searches have revealed only a single monthly report – of May 2009.
2007 to 31 July 2017	Period in respect of which the Plaintiffs agreed to discover documents relevant to the retail price at which the Plaintiffs sold fuels supplied by the Defendant. (Document Category 6)
2007 to 31 December 2014	Period in respect of which the Plaintiffs say that they have disposed of the documents "*as documentation of such nature is typically only retained for 6 years*."[46]

[46] Affidavit of Discovery of Patrick Hurley 21 April 2021

Date	Event
2010	The Plaintiffs say Fuel Card details of retail prices should be available to the Defendant from its own records from this point.
12 April 2011	The Defendant pleads[47] that the Plaintiffs issued other proceedings against the Defendant[48].
23 May, 2011	The Plaintiffs plead[49] that they, by letter, expressed their dissatisfaction at the matters the subject of complaint in these proceedings.
August 2011	Valero took over the Texaco business from Chevron - including their records[50].
3 September 2012	The Defendant pleads[51] a deed of settlement compromised the proceedings issued on 12 April 2011 and all current, pending and contingent claims against the Defendant.
23 June, 29 August, 30 September, 8 October & 4 December 2014	The Plaintiffs plead[52] that they, by letter and e-mails, expressed their dissatisfaction at the matters the subject of complaint in these proceedings.
Comment	Notably, the Plaintiffs assert in consequence that the Defendant knew since 2014 that a claim was intimated. On that view, they themselves must have contemplated litigation at that time on the matters the subject of complaint in these proceedings. In June 2014 the Plaintiffs remained, on their own account, in possession of all relevant documents back to the start of 2008.
2016	The Defendant exhibits[53] an example of records of fuel card data showing some fuel retail prices. It says data for petrol is considerably sparser than data for diesel.
2016	The Defendant pleads[54] that the Plaintiffs issued Circuit Court proceedings against the Defendant.
14 March 2017	Plenary Summons.
Comment	At this point the Plaintiffs were, on their own account, in possession of all relevant documents back to the start of 2011.
16 March 2017	Memorandum of Appearance.
7 April 2017	Statement of Claim.
24 May 2017	Notice for Particulars served by Defendant.

[47] Defence §5 et seq
[48] Presumably Chevron, not the Defendant.
[49] Replies to Particulars 26 March 2019
[50] Information provided by counsel for the Defendant at hearing of the motion.
[51] Defence §5 et seq
[52] Replies to Particulars 26 March 2019
[53] Affidavit of James Twohig 21/10/22 Exhibit JT3
[54] Defence §7 et seq

Date	Event
19 July 2017	The Defendant pleads[55] that the Plaintiffs compromised, by "Heads of Terms", the Circuit Court proceedings issued against the Defendant in 2016 and thereby compromised the claims in the present proceedings.
14 November 2017	The Defendant pleads[56] that the Circuit Court proceedings compromised on 19 July 2017 were struck out by consent following implementation of the compromise.
20 March 2019	Notice of Intention to Proceed served by Plaintiffs.
26 March 2019	Replies to Particulars served by the Plaintiffs. I refer to this further below.
6 June 2019	The Defendant delivers a full Defence. Inter alia, it pleads that the Plaintiffs are licensees and pleads the compromise as set out above.
26 May 2020	The Defendant by letter sought, and the Plaintiffs by letter agreed to make within 12 weeks, voluntary discovery of 9 categories of documents including Categories (1), (5) and (6) listed above.
25 June 2020	
13 November 2020	Affidavit of Discovery of James Twohig for the Defendants.
21 April 2021	Affidavit of Discovery of Patrick Hurley. Inter alia, it states that, as to Category 6, *"all documentation relating to the price the Plaintiffs sold petroleum products supplied by the Defendant for the period 2007 to 31 December 2014 have[57] not been retained by the Plaintiffs, as documentation of such nature is typically only retained for 6 years."*
Comment	This affidavit of discovery is defective as to Schedule Two in that, • the description of documents no longer in the Plaintiffs' position is entirely inadequate – merely being a recitation of the categories in question rather than identifying specific documents or even types of documents. • it fails to comply with the obligation to state when those documents were last in the possession of the Plaintiffs – in other words the date of the disposal or destruction.
1 January 2021	On the basis of the Plaintiffs' explanation of their six-year disposal policy, this is the first date on which the documents for the year to 31 December 2014 could have been disposed of/destroyed.
12 February 2021	Notice of Intention to Proceed served by the Defendant.
10 August 2021	Notice of Motion to dismiss for want of prosecution for failure the make discovery.
2 March 2022	Affidavit of Supplemental Discovery of Pat Hurley discovers 227 additional documents.
Comment	The Defendant says that, if nothing else, this Affidavit of Supplemental Discovery justifies its issuing the present motion. The Plaintiffs say supplemental discovery is in practice not unusual. The Defendant in turn

[55] Defence §7 et seq
[56] Defence §7 et seq
[57] sic

Date	Event
	replies that the Plaintiffs explicitly averred[58] that the supplemental affidavit was in response to the motion.

DEFENDANT'S SUBMISSIONS AS TO THE FACTS & COMMENT THEREON

56. The Defendant says that, on their own account of a six-year document destruction practice, when the Plenary Summons issued on 14 March 2017, the Plaintiffs remained in possession of all records from January 2011 onwards and so destroyed those records after the Plenary Summons issued. Indeed, it notes that when sending the letters from June 2014 which, the Plaintiffs say, put the Defendant on notice of the possibility of proceedings, the Plaintiff was in possession of all relevant documents back to the start of 2008. At the other end of the relevant period, documents as to the year to 31 December 2014 must have been destroyed as late as January 2021. This was almost four years after the proceedings started and over six months after the Plaintiff's letter dated 25 June 2020 agreeing to make discovery and months after even the deadline by which they had agreed to make discovery.

57. The Defendant cites the emphasis placed by Collins J. in **McNulty** on placing a "*litigation hold*" on the destruction of documents - particularly once proceedings have issued. They submit that the proper inference is of unjustified, deliberate and wilful destruction of the documents which the Plaintiffs must have known would be relevant to their claim. To this one might add reference to the duty, noted above, *"to suspend routine/automatic data destruction processes"*. The Defendant goes further and submits that I should infer that the Plaintiffs destroyed these documents because they were positively unhelpful to their case. The Defendants say that, even if the destruction was not deliberate and/or wilful, it was negligent. They cite Hamilton C.J. in **Mercantile Credit**, Collins J. in **McNulty** and Keane C.J. in **Johnson** to the effect that negligent - even innocent - destruction of relevant documents suffices to warrant striking out a plaintiff's claim where the consequence of such destruction is that a Defendant cannot get a fair trial.

58. The Defendants point, not least, to an averment by the First Plaintiff, specifically in explaining his disposal of the documents, in which he says, *"in circumstances where at all times I understood the Defendant to hold copies of the documentation issued by them, I did not, in hindsight, previously fully appreciate that such an issue could arise given that the Defendant already had the documentation."* I find it difficult to derive a precise meaning from this averment. But it is clear at least that the First Plaintiff's assertion that "*at all times I understood the Defendant to hold copies of the documentation issued by them"* first, is irrelevant to his own obligation to make discovery and, second, cannot apply to Category 6 as it relates the retail prices set by the Plaintiffs themselves and not to documents "*issued by*" the Defendants. The remainder of the averment and,

[58] Affidavit of Patrick Hurley 1/2/22 §17

in particular, the interrelationship of the words "*in hindsight", "previously" and "given that",* is unclear. The Defendant, understandably, says I should infer that here the First Plaintiff was saying that, when destroying the documents, he adverted to the possibility that they might be required in the litigation but considered he could destroy them safely as the Defendant had copies. On that inference, the Defendant says, the destruction was malicious or at very least reckless. That may well be a conclusion which a trial judge would draw following cross-examination of the First Plaintiff by reference to this averment. But it does not seem to me that I should draw it with sufficient confidence at this point to have it much inform my decision on the motion to finally dismiss the proceedings.

59. The Defendants submit that the Plaintiffs' destruction of documents has seriously prejudiced the Defendant's right to a fair trial and, as certain relevant documents no longer in exist further and better discovery cannot remedy the prejudice. To the Plaintiffs' point that no deficiency of discovery subsists as to the claim years 2015 and 2016, the Defendant responds that context is vital – in this case consisting in part of the years to 2014. I broadly accept that context is very relevant, not least to a loss of profits claim, but whether it is in this case vital to a fair trial I think a trial judge should decide.

PLAINTIFFS' SUBMISSIONS AS TO THE FACTS & COMMENT THEREON

60. The Plaintiffs' position in written submissions is as follows:

i. There has been no failure by the Plaintiffs to make the agreed discovery.
ii. Any document destruction was pursuant to a well-established policy of disposal of business documents after six years as accepted by the Revenue Commissioners and others.
iii. Their admitted disposal of documents did not amount to their wilful/negligent destruction.
iv. Even if that disposal amounted to wilful/ negligent destruction, the Defendant is not prejudiced thereby.
v. Any prejudice to Defendant by that same disposal does not warrant the draconian relief of dismissal of the proceedings.

<u>No failure to make discovery and no wilful/negligent destruction</u>

61. The Plaintiffs say in written submissions that:

- Their affidavit of discovery of 21 April 2021 averred that documents of the nature sought are typically only retained for six years and that the documents to 31 December 2014 are unavailable.
- As discovery was sought in May 2020 and agreed to on 25 June 2020, "*no criticism can lie for the disposal of any documents prior to 26 June 2014, leaving the complaint effectively relating to just over five months of documentation*".

- They could not have known "*exactly*" what documents would be required for the purposes of this litigation prior to the discovery request on 26 May 2020.
- The First Plaintiff did not fully appreciate how such an issue could have arisen given that much of the documentation emanated from the Defendant
- They have "*agreed*" not to dispose of any further documents[59].

62. I observe at this point that I find the submission that *"no criticism can lie for the disposal of any documents prior to 26 June 2014, leaving the complaint effectively relating to just over five months of documentation"* untenable and surprising.

63. The First Plaintiff states[60] that the relevant documents are stored in a small back office at the Westside Service Station, taking up significant space. He suggests, without quite asserting, that they are a fire hazard. His replying affidavit[61] clearly implies that it was from this back office that he disposed of the documents. However, in his supplemental affidavit of discovery sworn later the same month[62], he states that all the documents in the back office were relocated in boxes to his home garage in 2017. It seems to follow that the documents to 2014 missing from the discovery had not been in the back office since 2017. Given that, as to his making supplemental discovery, he says that *"On this occasion I also searched old boxes which had remained in my garage since ….. 2017",* it would seem that he did not search that home garage when originally making discovery. Given had moved all documents to there in 2017 it surprising, at least, that he does not explain why, when making his original discovery, he did not search his home garage or make clear that he had done so.

64. The First Plaintiff says he adopts the six-year retention rule and disposes of the documents once six years has passed, such that any disposal was not wilful/negligent. The Plaintiffs submit that the manner in which they disposed of documents can be dealt with by cross-examination at trial, where the trial judge will be better positioned than I am to rule on any assertion of *'wilful'* destruction.

The Defendant is not prejudiced

65. The Plaintiffs submit that the Defendant is not irreparably prejudiced by the disposal of the documents in Category 6 for the following reasons:

- (i) The Defendant has argued this motion as if there is a complete absence of

[59] Written submissions, citing §10 of Replying Affidavit of Patrick Hurley dated 1st February 2022
[60] Affidavit of 01 February 2022
[61] Affidavit of 01 February 2022 §8
[62] 22 February 2022 §4

documents in this category. The Plaintiffs say that, in fact, the documents provide their total spend on fuel and avers that these will show their average profit of 2.4 cents per litre compared to the national average of 5.5 cents per litre.

- I observe that it is a non-sequitur to assert that documents showing the Plaintiffs' total spend on fuel will show their average profit per litre.
- As recorded above, the Defendant disputes the alleged national average of 5.5 cents per litre.

- (ii) The Plaintiffs say that the most important figure as to uncompetitive petrol and diesel pricing, is the price at which the Defendant sold fuel to the Plaintiffs "*as clearly this will determine the level of profitability for the Plaintiff, particularly if that price is uncompetitive compared to other filling stations*".
    - I observe that that may not be incorrect of itself, but that one figure may be the most important does not imply that others are unnecessary. And profit, crudely (more accurately margin), consists of sales price minus cost price. To calculate profit requires both. The same goes for allegedly lost profit.

- (iii) The Plaintiffs cite **Leahy** as to proofs – I have already recorded their submission in that regard. I consider that it has force.

- (iv) The First Plaintiff has averred that his accountant has advised that he will be in a position to prepare, based on the documents discovered, a calculation of the "*price at which fuel was charged at*" by the Plaintiffs and that the Plaintiffs will, in early course, share that document with the Defendant:
    - I presume the phrase in italics above refers to the prices at which the Plaintiffs sold fuels from time to time.
    - I would add that, clearly, as a matter of general practice, but in particular in the circumstances of this case, I must presume that the accountant's report, as an exercise explicitly in forensic accounting, will identify in full, in detail, and precisely,
        - all assumptions underlying his report,
        - all documents and other sources of information on which he relies and the precise relation of each to the assumptions, calculations and conclusions of his report and
        - all steps taken by him to verify his assumptions, calculations and conclusions.
    - I enquired of the Plaintiff why this accountant's calculation was not before me now and was told it was privileged. In my view, the averment described above waives any such privilege and does so for the purpose of addressing the issue of the prospect of a fair trial. Also, the parties were agreed that an experts meeting would precede trial in any event. So the question of the provision of that document seems to me to be not a question of principle or privilege but merely one of timing of its provision.

- (v) The Plaintiffs submit that the Defendant applies to the Plaintiffs a different standard, as to preservation of documents, than that it applies to itself. The Plaintiffs submit that the Defendant appears freely to admit that it does not possess various categories of document despite knowing since 2014 that a claim of this nature was intimated but is critical of the Plaintiffs for not possessing/retaining such documents.

- I observe that submission fails to appreciate that:
  - It is the Plaintiffs, not the Defendant, whose alleged failure to make discovery is at issue. There is no similar motion against the Defendant.
  - Since issuing the motion, the Defendant, has itself and by means other than discovery, succeeded in procuring relevant documents, in substitution for the Plaintiffs' obligations of discovery and in ease of their default - to the extent that Categories 1 and 5 are no longer at issue.

- (vi) The Plaintiffs note that, according to Mr Jacob's Affidavit[63] and on the Plaintiffs' calculations, loss of profit for the shop comprises 76% of the total gross profit shortfall - showing that the claim as to fuel prices is a lesser aspect of the claim.
  - This point is well-made.

- (vii) The First Plaintiff's Affidavit of 23 September 2022 highlighted various sources of information available to the Defendant as to the prices charged by the Plaintiffs as from the Value Commitment Programme from 2007 to 2009 and fuel discount cards – as to which, see above.

- (viii) The First Plaintiff's Affidavits as to its actual margins – as to which, see above.

The Plaintiffs also pointed out that no deficiency of discovery subsists as to the claim years 2015 and 2016.

Dismissal not warranted despite prejudice

66. Here, the Plaintiffs, as to the draconian relief sought, cite the authorities I have cited above. I need not repeat them here but agree in general terms that the relief sought is draconian and that any relief granted must be tailored to any particular risk of an unfair trial created by the absence of specific documents or categories of document.

[63] 17 June 2022

DISCUSSION AND DECISION

67. I have already expressed above my views on certain aspects of the case.

68. The Plaintiffs' denial of any wilful or negligent destruction of documents on the specific basis that "*any document destruction was pursuant to a well-established policy of disposal of business documents after six years as accepted by the Revenue Commissioners*" is misconceived. A wiser course would have been to acknowledge their error in failing to comply with their obligations of preservation of documents - which obligations are clear from the authorities. Whatever period of retention of documents the Revenue require, it is not an obligation of disposal. Even as the Plaintiffs describe it, it is a six-year retention rule – not a disposal rule. In any event, whether the Revenue Commissioners for their purposes no longer require preservation of such documents after six years is completely irrelevant to the question whether they are required for other purposes. Specifically, it is irrelevant to whether they are required the purposes of pending litigation and compliance with the obligation of preservation of documents for such purposes.

69. Equally misconceived is the Plaintiffs' submission that, as discovery was sought on 26 May 2020 and agreed to on 25 June 2020, "*no criticism can lie for the disposal of any documents prior to 26 June 2014, leaving the complaint effectively relating to just over five months of documents*" and that until the discovery request in May 2020 he could not have known "*exactly*"[64] what documents would be required. That amounts to an alarming assertion of a right of destruction of documents even after a claim is contemplated by the party destroying them, not least after proceedings have started and, in any event, until discovery is requested.

70. I should say that these arguments were not repeated in oral submissions. Indeed, Counsel very properly conceded at the hearing that that the documents in Category 6 should not have been disposed of is a "given". But it is clear that the Plaintiffs came very late to that realisation.

71. And there is no explanation at all of the Plaintiffs' destruction of documents after discovery had been agreed.

72. Other than by reference to their "*policy*" of disposal "*after 6 years*" the Plaintiffs have been entirely non-specific as to when the documents were actually destroyed. We do not know if each tranche was destroyed in January of each year or if disposal occurred at other times or less often. However, I do accept the inescapability of the Defendant's inference that at least a considerable part of the documents in question were destroyed long after the proceedings had started. At least some were destroyed as late as January 2021 - after discovery had been requested and even after the Plaintiffs had agreed to make discovery and after the agreed deadline for their doing so.

[64] Written submissions.

73. There was no argument before me by reference to the long- and well-established duty on legal advisors to take positive steps to advise their clients in litigation of the scope of their duties as to the discovery of documents - including the importance of not destroying documents which might have to be disclosed (see the discussion of the law in this regard above). Nor was there argument as to how that duty relates in this case to the clear evidence of destruction of documents as late as January 2021 - even after the Plaintiffs had agreed to make discovery and after the deadline for their doing so. Accordingly, I make no findings in those regard. However, and not least given the submissions initially made, the circumstances seem to me to justify the recitation of the law on these issues, as I have set it out above, if only in hope of drawing attention to it.

74. There is no doubt that the destruction of these documents was deliberate. No other conclusion is possible. But the question also arises whether the intention in destroying them was deliberately to frustrate their discovery or, more generally, to ensure they were unavailable at trial. It may well be that, in an appropriate case, that inference will be readily drawn on affidavit evidence and without cross-examination, from the mere fact of their deliberate destruction by businesspeople with access to professional legal advice and already engaged in litigation to which those documents are relevant. The attractiveness of that inference in this case is amplified by the misconceived basis of the Plaintiffs' defence of this motion as described above. All that restrains me from that inference here is the fact that it seems to me likely that the Plaintiffs will suffer more by their destruction of documents than will the Defendants, such that there remains an appreciable possibility that the destruction was incompetent rather than malicious.

75. In this, I echo the view recently expressed, and the caution it implies, by Heslin J in **McNally**[65] when invited to infer mala fides by the party which had made impugned discovery: "*…. one could well understand those suspicions. However, carefully weighing up the totality of the evidence, and with no little hesitation, I do not believe that it would be entirely safe for this Court to take such a view."* He took this view *"in a motion which has necessarily comprised an exclusively 'papers-based' consideration of matters".*

76. That said, it seems to me that whether destruction of documents is deliberate or negligent is a matter of degree of fault and whatever its degree it is, as a matter of principle and at least generally, the person at fault who should bear its consequences. That seems to me a matter of principle not of punishment. As has been said, punishment is not the issue. For that reason, it seems to me that where a party has itself[66] destroyed relevant documents or allowed them to be destroyed, questions of the purpose or intent of destruction (while deliberate frustration of court orders is a contempt of court and must always attract opprobrium and may lead to other types of order against the miscreant) should not much affect the issue. After all, if the destruction would in truth deprive the other side of a fair trial, why should it avail the destroyer to say he was merely

[65] McNally v Molex Ireland Limited & Molex Incorporated [2022] IEHC 555
[66] Different considerations may arise in the case of destruction by a third party.

negligent? Or, to put it another way, why should his opponent bear the consequence of his negligence – not least if that consequence is an unfair trial? That seems at least arguably consistent with views expressed by Hamilton CJ (O' Flaherty and Denham JJ agreeing) in **Mercantile Credit** and certain views of Collins J in **McNulty** that this "*certainly appears to provide a basis for an argument that negligence may, in principle, be sufficient in this context."* and that *"a rigid and absolute distinction between the deliberate and the negligent in all circumstances may appear difficult to justify*".

77. But it must also be said that in **Green Pastures**[67] Ryan J identified "*malicious determination to evade the obligation to make discovery*" as a hurdle that an applicant faces in an application to dismiss. Baker J in **Go2CapeVerde** found *"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."* And in **McNulty**, Collins J observes that the proposition that the jurisdiction under O.31 R.21 is exercisable only where the failure to make discovery is "*deliberate and not merely negligent*" has significant support in the jurisprudence and in the textbooks. He cites **Delany & McGrath**[68] to the effect that "*nothing short of deliberate conduct on the part of the defaulter will suffice to persuade a court that this rather drastic step should be taken*" – though also **Abrahamson**[69] to the effect that the extent of the requirement for culpability has not been applied uniformly. Collins J cites Gilligan J in **Hansfield Developments**[70] as emphasising that a negligent failure to make discovery would not, without more, suffice to justify the exercise of the O.31. R.21 jurisdiction. It does seem to me that the weight of authority is to this effect. And Collins J concludes that, where relevant documents are lost due to a litigant's failure to take reasonable steps to preserve them, "*that litigant must, at a minimum, expect to be the subject of criticism"* but *"the weight of authority indicates that some deliberate attempt to avoid the obligation to make discovery must be established before such an order could be made."*

78. In **McNally**[71] Heslin J recently revisited these issues[72]. He emphasised that the power to dismiss a claim or strike out a Defence is "*a measure which could only be taken in cases considered to be "extreme" or at the extreme end of the scale in terms of wilful and culpable refusal to make discovery was concerned and, even then, only if the court was satisfied that a plaintiff would not be able to have a fair trial or where the evidence allowed the court to conclude that there was a realistic prospect of a fair trial being impossible, due to the other party's wilful refusal"* I respectfully confess to the view that, at least generally, even a realistic prospect of a fair trial being impossible should be left to a trial judge to decide.

[67] Green Pastures (Donegal) v. Aurivo Co-operative Society Ltd and Anor [2014] IEHC 209
[68] Civil Procedure (4th ed; 2018)
[69] Abrahamson et al, *Discovery and Disclosure* (3rd ed; 2019)
[70] Hansfield Developments v Irish Asphalt Ltd [2010] IEHC 32
[71] McNally v Molex Ireland Limited & Molex Incorporated [2022] IEHC 555
[72] Inter alia citing his own judgment in *Ward v An Post* [2021] IEHC 470

79. While I confess to some difficulty in reconciling the authorities, it seems to me that the ultimate question in a motion under O.31 R.21 should be whether the moving party has been irremediably prejudiced and so deprived of a fair trial. But there are degrees of even irremediable prejudice (or, to put it another way, there are degrees of remediation of prejudice) and whether a party has been deprived of a fair trial may also be a matter of degree and extent. One must also bear in mind:

- the constitutional right of access to the Courts.
- that this is a motion for final – not interlocutory – relief: that is, dismissing a plenary action on information less than that likely to be available at trial on oral evidence and on, as in this case, affidavit evidence in the absence of cross-examination.
- that, in consequence the trial judge is likely to be appreciably better placed than am I to discern where justice lies in consequence of the destruction of the documents.
- that if this motion fails that outcome will not constrict the trial judge in the exercise of his/her constitutional duty to ensure a fair trial.

80. As I have said, to the Plaintiffs' point that no deficiency of discovery subsists as to the claim years 2015 and 2016, the Defendant responds that context is vital – in this case consisting in part of the years to 2014. I accept in general terms that context is important but, as applicable to the specifics of a given case, that seems to me to be the kind of point best decided on a conspectus of the evidence and following cross-examination of witnesses. It does not seem to me safe to dismiss the action on that basis on foot of necessarily incomplete evidence in a motion on affidavit.

81. In this light I respectfully adopt and adapt the view of Baker J in **Go2CapeVerde**[73] to the effect that, while claims will be dismissed in "*extreme*" cases, the bar is very high. This is based on a reluctance to allow discovery 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. She observes that *"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."*

82. The spreadsheet enclosed with the Replies to Particulars dated 26 March 2019 asserts a loss of earnings claim of €1,051,304 for the years 2009 – 2015. This implies that the claim for loss of profit attributable to fuel sales is in the region of €170,000[74] – this seems to be common case, at least as a "ballpark" figure. While by no means an inconsiderable sum, it is about 16% of the lost profits claim and a smaller still percentage of the overall claim. I do bear in mind the possibility that

[73] What follows does not necessarily follow the order of content of the judgment of Baker J but I consider it a fair summary.

[74] I estimate this percentage in the following calculation of amount of lost profits claim turning on categories 5 & 6 and using the figures from the spreadsheet enclosed with the Replies to Particulars.

Gross Profit Shortfall	Dec-15	Dec-14	Dec-13	Dec-12	Dec-11	Dec-10	Dec-09	Total	
Wet Stock	€64,133	€66,000	€49,210	€33,096	€36,140	€34,200	€10,702	€293,481	16%
Shop Sales	€213,733	€219,014	€238,667	€232,703	€171,419	€207,093	€90,999	€1,373,628	
Car Wash Sales	€21,961	€21,518	€19,806	€19,807	€19,382	€19,397	€14,177	€136,048	
Total	€299,827	€306,532	€307,683	€285,606	€226,941	€260,690	€115,878	€1,803,157	
Loss of Profit Claim	€1,051,340	X 16%	€168,214.40						

the Plaintiffs may assert that the other losses were in part caused by lost footfall by reason of his being forced to sell fuels at an uncompetitively high price. Counsel for the Defendant emphasises that point but the Plaintiffs respond, I think correctly, that the Defendant has not sworn to it, and it is a matter for the trial judge to decide - presumably on expert evidence as to the business models on which such service stations operate. Whatever my general view in that regard, I do not think I should take judicial notice of it.

83. But even assuming deliberate and malicious destruction of documents to avoid their discovery and remembering that, ultimately, my discretion is to be exercised in light of the prospects of a fair trial as opposed to for the purpose of punishing the Plaintiffs, it seems to me that it would be disproportionate to strike out the Plaintiffs' claim at this point as the documents relate, at least directly, only to a part (and a relatively small part) of the claim for lost profits. Further, and as Noonan J points out in **Leahy**, given they bear the onus of proof of their claimed losses, the destruction of documents necessary to their proof seems an even greater problem for the Plaintiffs than for the Defendants. I see an appreciable analogy between this case and **Leahy**.

84. Indeed, on this issue, I consider that I can, somewhat paradoxically in the Plaintiffs' favour and in the short term, take into account in exercising my discretion to refuse to dismiss the proceedings on the basis that prejudice to the Defendant's prospect of a fair trial has not been shown, that there is at least some prospect of the application against the Plaintiffs at trial of the principle that, in the case of documents not preserved after the commencement of proceedings, the defaulting party risks "*adverse inferences*" being drawn for "*spoliation*" of evidence: e.g. **Earles v Barclays Bank plc**[75] and **Kolton v Parmont**[76]. But I express no stronger view - that is ultimately a matter entirely for the trial judge to decide following oral evidence and argument if made.

SUBSTANTIVE ORDERS

85. In the foregoing circumstances, and with no little hesitation, I will not dismiss the proceedings. I repeat that, in doing so, I in no way purport to circumscribe the scope of inquiry or of cross-examination at trial or of any orders which might be made to ensure a fair trial or abandon an unfair one – see **McNulty** and **Campion**. I note in particular that the Plaintiffs accept that this present application may be renewed at trial even if I permit the proceedings to continue. Thus, while a dismissal of the proceedings would have been a final order, the refusal of such dismissal is not and, like any interlocutory order, can be revisited.

[75] [2009] EWHC 2500 (QB) Citing *Infabricks Ltd v Jaytex Ltd* [1985] FSR 75. The 1997 "White Book" §24/2/7 cites Infabricks to that effect The maxim *omnia praesummuntur contra spoliatorem* was applied in *Infabricks.*

[76] Kolton v. Parmont Ltd [2022] IEHC 134 (High Court (General), Simons J, 8 April 2022) – in which the presumption was canvassed but not applied.

86. In the circumstances and in an attempt to reduce any potential for injustice to the Defendant, I will:

i. Direct that the First Plaintiff swear a further affidavit identifying, as best he can, by reference to date, each occasion on which he disposed or destroyed of documents and, with reference to each such occasion and with such precision as is possible, the number and nature of the documents in question and the time-periods to which they related. I invite the parties to agree a deadline for the provision of that affidavit. In substance this will amount to the correction of the inadequacy of the Second Schedules to the affidavits of discovery but in the circumstances I consider that a full and distinct narrative affidavit is required.

ii. Give directions as to the date by which the Plaintiffs are to fulfil their commitment to provide their accountant's forensic report to the Defendant in early course. I invite the parties to agree such directions. The intention is to enable the Defendant, sooner rather than later, to reconsider whether a fair trial remains possible and whether their application should be renewed and, if so, when and how.

COSTS

87. In **McNulty**, Collins J expressed the provisional view that Ms McNulty was entitled to her costs "*where the Bank was clearly in breach of its discovery obligations until the delivery of the Composite Affidavit in May 2021 and where the Bank has been directed to deliver a further affidavit on appeal.*" In my provisional view, the Defendant is likewise entitled to its costs of this motion.

- First, I am of the view that, whether innocently, negligently or deliberately, the Plaintiffs acted in breach of their obligation, both before and after discovery was sought, to preserve relevant documents. I accept that the Plaintiffs did not at particular points know, to use their word, "exactly" what documents required by the Defendant. But, far from entitling that Plaintiffs to destroy relevant documents, that is all the more reason to take a prudent and cautious view as to the preservation of all documents of which it was reasonably foreseeable that the Defendant might require them.

- Second, it is clear that the present motion prompted the supplemental affidavit of discovery by the Plaintiffs discovering no less than 227 documents which discovery ought to have been made in the first affidavit of discovery. I accept the Defendant's observation that they would probably not have got this supplemental discovery but for their motion - or at least that, as I have said, it was this motion that prompted the supplemental discovery. The Plaintiffs' point that supplemental discovery is not unusual and did not prompt the Defendant's withdrawal of the motion is unimpressive given, not least, Mr Hurley's express averment[77], made shortly before making his supplemental discovery, that he, "*in response to this motion … carried out further searches for relevant documentation potentially coming within the parameters of the discovery request and made further enquiries. As a*

[77] Affidavit of Patrick Hurley 1/2/22 §17

result, certain further documents have come to light and same will be the subject of a supplemental of discovery".

- Third, while I have refused to strike out the proceedings, I have directed that the First Plaintiff swear an additional affidavit disclosing full detail of their disposal or destruction of documents, which detail has been conspicuously lacking to this point. Indeed, the Plaintiffs initial affidavit of discovery is defective as to schedule two in that,
    - the description of documents no longer in the Plaintiffs' position is entirely inadequate. It is merely a recitation of the categories in question rather than identifying specific documents or even types of documents.
    - the First Plaintiff failed to comply with the obligation to state when those documents were last in the possession of the Plaintiffs – in other words the date of the disposal or destruction.

- Fourth, I have given directions, with a view to reducing the potential for injustice, as to the provision of the Plaintiffs' accountant's report. I of course note that this provision in early course was volunteered by the Plaintiffs - though only in response to this motion.

- Fifth, that the Defendant has compensated, by its own efforts and at its own cost, for the Plaintiffs' failures, by reason of their destruction of documents, to comply with their obligations of discovery, and thereby has itself diminished the prospect of an unfair trial for which prospect the Plaintiffs were responsible, in no way disentitles them to the costs of this motion.

88. I will list the matter on 20 December 2022 for mention only as to the directions intimated above and as to costs in hopes of final orders can be made on that occasion.

DAVID HOLLAND
30 November 2022