Neutral Citation Number: [2007] IEHC 461

THE HIGH COURT

[2001/15389P]

BETWEEN

ATLANTIC SHELLFISH LIMITED AND DAVID HUGH-JONES

PLAINTIFFS

AND

THE COUNTY COUNCIL OF THE COUNTY OF CORK,
THE MINISTER FOR COMMUNICATIONS, MARINE AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Budd delivered on the 15th day of August, 2006.

1. This appeal, from an order of the Master of the High Court made on 15th December, 2004, came before the High Court eventually by way of an appeal on foot of a motion dated 22nd December, 2004, against the First Named Defendant and on foot of a second motion dated 1st February, 2005, seeking a variation of the Master's orders in respect of discovery made on 15th December, 2004, and seeking two very similarly worded orders on the following lines:-

2. As against the First Named Defendant:-

> A. An order reversing the Master's refusal of the Plaintiffs' application for discovery in respect of certain categories of documents;
>
> B. An order directing the First Named Defendant to make discovery on oath of the documents and categories of documents referred to in the Plaintiffs', notice of motion issued on 5th April, 2004;
>
> C. Such further or other order as to the court shall seem fit.
>
> D. An order providing for the costs of and incidental to the application
>
> E. An order extending the time in which to bring this application.

3. As against the Second, Third and Fourth Named Defendants:-

> A similarly phrased motion was brought by way of a similar appeal from the order of the Master made on 15th December, 2004;
>
> > A. Seeking an order reversing that part of the order of the Master made on 15th December, 2004, whereby he refused the Plaintiffs' application for an order for discovery against the Second, Third and Fourth Named Defendants in respect of certain categories of documents;
> >
> > B. An order in lieu of the order made by the Master, directing the Second, Third and Fourth Named Defendants to make discovery upon oath of the documents and categories of documents referred to in the notice of motion issued on behalf of the Plaintiffs on 5th April, 2004; and then similar orders to those sought at C, D, and E of the first motion, with both applications being grounded upon the proceedings already had in the case and on the affidavits of Richard Martin, the applicants' solicitor, sworn on 5th April, 2004, and on 23rd July, 2004, and in the case of the First Named Defendant, the affidavit sworn on 16th November, 2004, with the exhibits to those affidavits.

4. In respect of the second application the wording is very similar except that the application is against the Second, Third and Fourth Named Defendants rather than the First Named Defendant and the order sought is directing the Second, Third and Fourth Named Defendants to make discovery upon oath, whereas in the first application the order sought is for Cork County Council to make discovery upon oath.

5. These two appeals in respect of discovery orders made by the Master on 15th December, 2004, are both part of what appears like a stream of appeals which have come from the Master's Court to the High Court on appeal in respect of the application of the principles enunciated in a number of helpful and clear Supreme Court decisions as to the practical application of O.31, r. 12 of the Rules of the Superior Courts, 1986 and as to the law and principles pertaining to the development of the rules and principles governing discovery which have evolved from general discovery of relevant documents to a more refined and selective type of discovery.

6. Before I outline the contents of the two notices of motion for discovery dated 5th April 2004, the first as against the First Named Defendant and the second notice of motion for discovery as against the Second, Third and Fourth Named Defendants, both for hearing on 11th May 2004, it would be appropriate to give a summary of the principles and the law as they have now evolved with regard to the making of orders for discovery. Then it will be necessary to set out briefly the long and unhappy saga which has taken place between the Plaintiffs and these Defendants. This sorry situation caused previous proceedings between the same parties leading to the Plaintiffs suing the Defendants in respect of the pollution of their oyster beds by the location and construction of sewage pumping stations with sewage outfalls and discharge therefrom under the control of the First Named Defendant and under the general supervision and licensing by the second Defendant. In order to set out the story behind the present proceedings it will be necessary to go through the history of the setting up of the Plaintiffs' mollusc fishery in or about 1970 and then the success of the Plaintiffs' oyster beds with growth of the export business being very substantial in the 1980's with direct marketing to hotels and restaurants in London with the Plaintiffs exporting about one third of Ireland's official production of native and pacific oysters. Then came the subsequent conception and implementation of the notion of the Defendants in designing and placing sewage treatment works and in particular an outfall at Rathcoursey Point, where the estuarine and tidal flows were likely to carry sewage in untreated contaminated form, and then partially treated form, into and over the oyster beds in the vicinity of the sewage outfall. This location of the outfall and the dangerous and disastrous effects of the pollution of the growing oysters took place, according to the Plaintiffs by reason of the negligent and defective thinking or thoughtlessness and insouciance, inappropriate location of the outfall, inadequate and inept design and operations of the Defendants and had seriously damaging consequences for the Plaintiffs. As a result of this they initiated proceedings against the Defendants which culminated in a settlement on 27th November, 1996, in the previous proceedings before Laffoy J. This compromise between the parties took the form of an order by Consent that a formal Consent be received and filed. It was also ordered that the Plaintiffs' costs be taxed and that the First Named Defendant pay seventy five percent of the costs and that the Second Named Defendant pay twenty five percent of the costs when taxed and ascertained, including all costs reserved by orders made in that case and to include costs of discovery in that case. Under the terms of the

Consent steps to remedy the pollution were to be undertaken by the Defendants and a payment of £500,000 was to be made by way of damages to the Plaintiffs with the First Named Defendant to pay £350,000 for damages and 75% of the Plaintiffs' costs and the second Defendant to pay £150,00 for damages and 25% of the Plaintiffs' costs. For accuracy of chronology and the sequence of events, I propose to follow the progression set out in the Statement of Claim with the proviso that while it appears fairly accurate as to the time sequence, it does emanate from a partisan source.

7. First it would be appropriate to set out the essentials of the development of the law with regard to the principles governing the making of discovery of documents for an awareness of the principles to be applied to the factual matters detailed in the pleadings. I propose then to return to the pleadings as being the factual background which forms the basis for the application of the touchstones of relevancy and necessity in respect of the making of discovery in order to ensure justice, especially in the situation where the Defendant parties have in their possession much of the information, documentation and reports as to the events which have taken place. In particular in the nature of this case the Defendants will be very likely to have in their possession records, reports and log-books about the cause of the pollutant and poisoning affect of the alleged sewage contamination of the Plaintiffs' licensed oyster beds, which are the matter of the Plaintiff's complaints against the Defendants.

8. For ease of reference and to make clear the development of the rules with regard to discovery of documents, I have set out below the former

9. O. 31, r. 12 of the Rules of the Superior Courts and also S.I. number 233 of 1999, the Rules of the Superior Courts (No. 2) (Discovery), 1999 which substitutes an amended O. 31, r. 12, for the existing O. 31, r. 12 as and from 3rd August, 1999. An order for discovery under the Superior Court Rules carries with it the duty to search archives of records and files diligently for material documents including computer records. When giving standard disclosure, a party is required to make a reasonable search for documents falling within the scope of the order. The factors relevant in deciding the reasonableness of a search include the following:-

A. The number of documents involved;

B. The nature and complexity of the proceedings;

C. The ease and expense of retrieval of any particular document;

D. The significance of any documents which is likely to be located during the search.

3. Where a party has not searched for a category or class of document on the grounds that to do so would be beyond the bounds of a reasonable search, he must state this in his disclosure statement and identify the category or class of document in point.

10. The suggestion was made during the hearing by Counsel for the First Named Defendant that information obtained under the Freedom of Information Act, 1997 could to an extent fulfil the role of discovery of documents. I have reservations about this proposition as it seems to me that information obtained under the Freedom of Information Act, 1997 can indeed be useful but should not be equated with the process of eliciting material documentary information sought under the formal procedure for discovery of documents sought by way of court procedure and involving the listing of documents either voluntarily or under court order in schedules to a formal affidavit of discovery. I would be anxious that some vital material or even many documents would slip through the less stringent and rigorous net prescribed under the Freedom of Information Act, 1997. For the purpose of serious litigation, as in this case where the documentation is crucial probably, it is preferable and necessary that there should be the formal listing of documents in the different categories and an actual verifying affidavit testifying on oath as to the completeness of discovery. There is much to be said for the formal swearing as to the listing of all relevant documents in their appropriate schedules, so that the opposition has the security of the listing and subsequent production for inspection of the relevant documents by the formal swearing on oath as to the completeness or otherwise of the schedules of documents. The taking of the oath as to the completeness and propriety of the making of the affidavit of discovery is to ensure that care is taken to include all the relevant and admissible documents and also to ensure the careful listing of all relevant documents in respect of which privilege is being claimed and to encourage that these documents are carefully listed by the other party and that the nature of each of the documents in respect of which privilege is claimed should be properly and recognisably disclosed. The Court would discourage "swamping", as when "a haystack of papers" are listed in such a way as to hide the "needle", or vital document of critical importance.

11. I trust that it will be helpful at this stage if I set out the salient principles with regard to discovery as enunciated by the Supreme Court so that, when I go through the items of discovery that are still in contention between the parties, it may be understood what the principles are which I am applying and also what touchstones I am looking to for guidance. I should make clear that matters have developed and evolved from the time when the Master made his order in each motion for discovery back on 15th December, 2004. I shall set out how by a slow and manifestly diligent process of discussion, concession and consensus, several aspects of discovery have been argued about and compromised. This leaves matters for the then eventual decision of the court where there has remained a residual conflict as to what on the one hand is discoverable and what on the other hand is privileged or should not be discoverable for other reasons under the new rules or for other reasons.

Synopsis as to the present law with regard to discovery of documents

12. It may be helpful to set out some of the relevant considerations governing the situation in respect of discovery of documents and to outline the relevant rules as an aide-memoire. A litigant in civil proceedings may be able to obtain by way of discovery before a trial the disclosure of documents in the possession or control of another party, or sometimes in the possession or control of a person who is not an actual party, provided that the documents are relevant to the issues in the litigation. Often much information can be obtained voluntarily, but at times the most vital documents are in the hands of a person who will not be prepared to disclose such documents if this informative material will damage the case which this person intends to make. Accordingly, the discovery process was developed and has become an extremely valuable legal procedure. At the same time some litigants have deployed tactics of delay and the strategy of "swamping" with documents in order to frustrate the efficacy of the process. Judges have become increasingly conscious and wary of the fact that discovery of documents can impose a considerable burden on a litigant and that there is a peril that this useful legal tool and procedure may be invoked unnecessarily or may become an oppressive tactic in its application. In *Hannon v. Commissioners of Public Works* (Unreported, High Court, McCracken J., 4th April, 2001.) McCracken J. at p. 4 commented:-

"The court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties."

13. A basic rationale is that orders for discovery should only be made where they are necessary and that the court should be aware of the effectiveness of discovery as an instrument for extracting documentary evidence of the true situation and also as a means to reduce the time spent in trial listening to what actually occurred about which there could have been more consensus, particularly after discovery of contemporaneous accounts and documents. At the same time the court must bear in mind the onerous burden put on a party who has to make discovery on oath of documentary or other materials relevant to the issues in contention. In *McCarthy v. O'Flynn* [1979] I.R. 127 at p. 129, Henchy J. at page 129 gave a concise summary of the aims of the discovery process as follows:-

> "The aim of the relevant rules is to enable a party to learn, in advance of the trial, of the existence of the documents on which his opponent might rely at the trial; to give a party who has obtained an order for discovery an opportunity of seeking production for inspection of any of those documents; and to debar the party who has made discovery from introducing in evidence at the trial documents which he ought to have, but has not, discovered."

14. In *Allied Irish Banks plc v. Ernst and Whinney* [1993] 1 I.R. 375 at 390, Finlay C.J. made the helpful comment that:-

> "[T]he basic purpose and reason for the procedure of discovery …
>
> is 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."

15. Issues may arise with regard to confidentiality and also as to the time of making discovery and it is clearly important the court ensures that this useful and often necessary legal procedure is used in order to further the aim of achieving justice between the parties to an action and so as not to allow a party to delay or increase the costs of proceedings unnecessarily. Order 31, r. 12(1), as initially set out in the Rules of the Superior Courts 1986, provided that a party might apply to the court for an order directing discovery without filing an affidavit, and that the court might refuse or adjourn such an application, if satisfied that it was not necessary, or not necessary at that stage of the proceedings. Order 31, r. 12(3) went on to provide that an order should not be made

> "if and so far as the court shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs".

16. In 1993, O. 31, r. 12(4) was added and provided that an order directing discovery should generally not be made unless the applicant had previously applied for voluntary discovery and the person to whom such a request was made had failed to make such discovery within a reasonable time. Increasing concern as to the way in which O. 31, r. 12 was being used and misused brought about the substitution of another rule with effect from 3rd August, 1999, and this altered the discovery process significantly. By S.I. No. 233 of 1999, the following was inserted as O. 31, r. 12:-

> "Any party may apply to the Court by way of notice of motion for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his or her possession or power, relating to any matter in question therein. Every such notice of motion shall specify the precise categories of documents in respect of which discovery is sought and shall be grounded upon the affidavit of the party seeking such an order of discovery which shall:
>
> (a) verify that the discovery of documents sought, is necessary for disposing fairly of the cause or matter or for saving costs;
>
> (b) furnish the reasons why each category of documents is required to be discovered.
>
> (2) On the hearing of such an application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or by virtue of non-compliance with the provisions of sub-rule 4(1), or make such order on terms as to security for the costs of discovery or otherwise and either generally or limited to certain classes of documents as may be thought fit.
>
> (3) An order shall not be made under this rule if and so far as the court shall be of the opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.
>
> (4) (1). An order under subrule 1 directing any party or under rule 29 directing any other person to make discovery shall not be made unless:
>
> (a) The applicant for same shall have previously applied by letter in writing requesting that discovery be made voluntarily, specifying the precise categories of documents in respect of which discovery is sought and furnishing the reasons why each category of documents is required to be discovered; and
>
> (b) A reasonable period of time for such discovery has been allowed; and
>
> (c) The party or person requested has failed, refused or neglected to make such discovery or has ignored such request
>
> Provided that in any case where by reason of the urgency of the matter or consent of the parties, the nature of the case or any other circumstances which to the Court seem appropriate, the Court may make such order as appears proper, without the necessity for such prior application in writing.
>
> (2) Any such discovery sought and agreed between the parties or between parties and any other person shall, subject to subrule 4 below, be made in like manner and form and have such effect as if directed by order of the Court."

17. These seem to be the salient features of r. 12 in respect of the issues in contention in this case.

18. One last preliminary point is that the word "document" in the Order should be construed so that it would

> "comprehend the full range of things which could become part of the court file at the end of the hearing of the proceeding in question."

19. This is taken from the judgment of Henchy J. in the Supreme Court in *McCarthy v. O'Flynn* [1979] I.R. 127 at p. 129 when he said :-

> "I think that where the word occurs in the discovery rules it should be construed in terms of the scheme and purposes of those rules. Thus read, I consider that the word [documents] includes any thing which, if adduced in evidence at the hearing of the proceedings, would be put in, or become annexed to, the court file of the proceedings. All such things are part of the documentation of the case and qualify for preservation as part of the court archives."

20. Kenny J. made clear that the *McCarthy* case point concerned the inclusion of x-ray plates or photographs, and since both of these, the plates and photocopies, gave information they should be regarded as a document and so tape recordings and compact discs and material on computer are now encompassed as containing information which, if relevant to the issues, should be considered for discovery. In this context the statement of Vinelott J. in *Derby and Co. Ltd. v. Weldon* (No 9) [1991] 1 W.L.R. 652 is helpful in his conclusions that a computer database or information stored in back up files are documents for the purpose of discovery. He explained further at page 658:

> "Similarly, there can be no distinction in principle between the tape used to record a telephone conversation in *Grant v. South Western and County Properties Ltd*. which was an ordinary analogue tape … and a compact disc or digital tape on which sound, speech as well as music, is mapped by coordinates and recorded in the form of groups of binary numbers. And no clear dividing line can be drawn between digital tape recording messages and the database of a computer, on which information which has been fed into the computer is analysed and recorded in a variety of media in binary language."

21. I note that Delaney and McGrath in *Civil Procedure in the Superior Courts* (2nd Ed. 2005) suggest that the broad interpretation placed on the word "documents" in *McCarthy v. O'Flynn*, would indicate that a flexible attitude will probably be adopted by the judiciary in this jurisdiction and that what was said by Vinelott J. is likely to be followed and indeed developed when necessary. Hopefully Cork County Council and the Minister will have much of the relevant information by now on computer and this can be located quickly by way of computer search as well as by extraction from files dealing with the relevant information.

22. Order 31, r. 12 of the Rules of the Superior Courts (as amended), requires the party seeking to obtain discovery of documents to demonstrate that the documents in respect of which discovery is sought are both relevant and that it is necessary that the applicant obtains discovery of those documents for the fair disposal of the case or to save costs. The reforming amendments to O. 31, r. 12, are suggested to have been brought in subsequent to the decision of the Supreme Court in *Brooks Thomas Limited v. Impac Limited* [1999] 1 I.L.R.M. 171 in which Lynch J. made reference

> "to the trend in modern times to seek discovery in almost every case."

23. There was also comment on the delays which were caused by each interlocutory application being increasingly made for discovery.

24. Order 31, r. 12(1) requires a party to make discovery of documents which are or have been in his possession or power "relating to any matter in question therein". The classic answer to the question as to what documents would be relevant in this context was considered by Brett L.J. in the *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55 at 63:-

> "It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly', because, as it seems to me, a document which can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either these two consequences."

25. As Murray J. stated in *Aquatechnologie Limited v. The National Standards Authority of Ireland* (Unreported, Supreme Court, 10th July, 2000.) at p. 11:-

> "[T]here is nothing in that statement which is intended to qualify the principle that documents sought on discovery must be relevant, directly or indirectly, to the matters in issue between the parties."

26. In the present case it may well be difficult for each of the deponents acting for the First and Second Named Defendants to assess how the contents of the documents under their control or within their procurement might advance the case being made by the Plaintiffs against the Defendants or damage the defence being raised by the Defendants. Accordingly, there is imposed on the solicitor for the party making discovery the duty to take positive steps to ensure that the clients appreciate the extent of their obligation imposed by an order for discovery. The solicitor owes a duty to the court carefully to explain the extent of the duty to the client and to go through the documents disclosed by the client to make sure, as far as possible, that no relevant document has been withheld from discovery and to ensure that the schedule should include those documents and material which it is reasonable to suppose contain information which might enable the Plaintiffs' advisers to advance their case or to damage that of the Defendants. For example, in the present case this would include the manner in which the Defendants conducted their business and correspondence between each other relevant to the matters in issue in the case and also the correspondence with experts and assessors and producers of reports and recommendations as to the peril of pollution and contamination of the oyster beds and disease and the methods for prevention thereof. The First and Second Named Defendants and each of their officials and agents and each of their solicitors are likely to be peculiarly in the position of having the vital reports, records and informative materials in their possession or procurement and must be conscious of the onus on them to be careful to make a full and proper discovery. I would expect that in respect of the aspect of damages and quantum of damages the boot may be on the other foot in the sense that the Plaintiffs should have the basic information reports and accounts in their procurement. It is to be hoped that a comprehensive report from an appropriately expert accountant may reduce the quantity of documentation at least on this part of the case.

27. It will be necessary to take cognisance of the issues arising in the pleadings and the reasons which are given in the Plaintiffs' solicitors' letter dated 16th December, 2003, for discovery of each category of documents. The contents of the affidavits of Richard Martin sworn on 5th April, 2004, 23rd July, 2004 and 16th November, 2004, the affidavits of Seán Ó Breasail of 4th June, 2004 and 19th October, 2004, and the affidavit of Maria Greene sworn on 21st June, 2004, which all are relevant.

Background History

28. A plenary summons was issued by the Plaintiffs on 16th October, 2001, against the Defendants seeking a declaration that by virtue of the failure by the First Named Defendant, its servants or agents, to bring into operation on or before 30th June, 2000, a secondary waste water treatment plant, incorporating ultra violet disinfection facilities, for the town of Midleton in compliance with its undertaking contained in clause 4 of the Consent executed by the Plaintiffs and the First Named Defendant and the Second Named Defendant (then known as the Minister for the Marine) on 26th November, 1996, (the "Consent"), whereby proceedings bearing Record Number 1992 No. 7445P between the Plaintiffs and the First and Second Named Defendants were compromised, the First and Second Named Defendants have repudiated the Consent which said repudiation has been accepted by the Plaintiffs.

29. A declaration that consequent upon the declaration granted at paragraph 1 above, the Consent is at an end.

30. In the event of the Court granting the declarations sought at paragraphs 1 and 2 above then the Plaintiffs sought relief restraining the First Named Defendant, its servants or agents from discharging sewage and other effluent into the sea at or near Rathcoursey, Midleton, Co. Cork, so as to cause or to become a nuisance to the Plaintiffs' oyster fishery at or near Rathcoursey, Midleton, Co. Cork, and a number of other orders directing the First Named Defendant its servants or agents to take such steps as are necessary to prevent the discharge of sewage and other effluent into the sea at or near Rathcourrsey, including the construction of a secondary waste water treatment plant incorporating ultra violet disinfection facilities for the town of Midleton, Co. Cork, and an order restraining the First Named Defendant its servants or agents from continuing to operate the sewage outfall at present situate at Rathcoursey, Midleton, Co. Cork. The Plaintiffs also sought an order directing the First Named Defendant to relocate the sewage outfall pending construction and completion of the secondary waste water treatment plant incorporating ultra violet disinfection facilities for the town of Midleton, Co. Cork. The Plaintiffs also sought a declaration that a Foreshore Licence dated 5th March, 1986, granted by the Minister of Communications (the predecessor in title of the Second Named Defendant) to the First Named Defendant was *ultra vires* the powers of the said Minister, being in breach of the provisions of the Foreshore Act, 1933, contrary to the constitutional rights of the Plaintiffs pursuant to Article 40.3 and Article 43 of the Constitution of Ireland and/or as being irrational and that as a consequence the said Foreshore Licence is null and void and of no legal force or effect. The Plaintiffs sought a number of other reliefs against the Second Named Defendant and also sought damages for nuisance, negligence and breach of duty (including statutory duty) and for breach by the First Named Defendant of the Foreshore Licences. In the alternative the Plaintiffs sought relief by way of an order for a specific performance of the Consent executed by the Plaintiffs and the First Named Defendant and Second Named Defendant whereby the proceedings, bearing Record No. 1992 No. 7445P, brought by the Plaintiffs against the First and Second Named Defendants were compromised. The Plaintiffs also sought an order sequestering the assets of the First Named Defendant by reason of the failure, neglect and refusal of the First Named Defendant to comply with the undertaking given by it at clause 4 of the Consent that it would on or before 30th June, 2000, bring into operation a secondary waste water treatment plant incorporating ultra violet disinfection facilities for the town of Midleton, Co. Cork. The Plaintiffs sought further reliefs including an Order restraining the First Named Defendant its servants or agents from continuing to operate the sewage outfall situate at Rathcoursey Point, Midleton, Co. Cork, referred to at clause 4 of the Consent and also seeking damages against the Defendants for breach of the Consent and for damages for breach of contract, and damages in lieu of or, alternatively, in addition to specific performance of the Consent.

31. The Plaintiffs also sought a declaration that the First Named Defendant had failed to construct the Midleton sewage treatment plant in accordance with the modifications imposed by the Minister for the Environment and Rural Development in the certificate granted by him in respect of the said plant pursuant to the provisions of Part IX of the Local Government (Planning and Development) Regulations 1994 (S.I. 86 of 1994), and in particular, Modification II thereof which requires that untreated storm water flows contaminated with faecal matter shall not be discharged at either of the outfalls referred to in Modification I, and that any storm water discharged at such outfalls shall be subject to the full treatment provided at the treatment plant.

32. The Plaintiffs also seek a declaration that in the circumstances the discharge of faecal matter constitutes a nuisance unprotected by the said certificate given by the Minister for the Environment and Rural Development and that it is therefore actionable at the suit of the Plaintiffs.

33. At paragraph 7 of the General Endorsement of Claim the Plaintiffs also claimed:-

> 7. Damages for nuisance
>
> 8. Exemplary and/or aggravated and/or punitive damages and the usual pleas for further and other relief, interest pursuant to statute and costs.

34. I have tried to set out in this synopsis, the gist of the matters in the Plenary Summons in order to convey a flavour of the nature of these proceedings. It is essential that there is an understanding that the Plaintiffs began and built up their Oyster Fishery at Rossmore with the full knowledge and encouragement of the present Defendants' predecessors in title. The Plaintiffs since in or about 1970 built up, by their expertise in the cultivation of shellfish and by investment of capital and hard work, a very substantial business. By the early 1990's the Plaintiffs' claim they were successful in securing the business of about 90% of the top chefs in London for their oysters from Rossmore. This market accounted for most of the Plaintiffs' turnover and was extremely profitable. The value of the Plaintiffs' production of Rossmore oysters constituted at the time about one third of the official national production of native and pacific oysters. The Plaintiffs' breeding ponds for native oysters were the largest artificial breeding complex for this type of oyster in the world.

For ease of reference there is annexed hereto in Appendix 1 a list of Ministerial Decisions relevant to these proceedings.

The Proceedings

36. This action was begun on 16th October, 2001. The Statement of Claim was delivered on 20th August, 2002. As appears from the Statement of Claim, the Plaintiffs are the owners of and operate an oyster fishery in Cork Harbour, near Rathcoursey, Midleton, Co. Cork. Their oysters have been sold in Ireland, the United Kingdom, Europe and in the Far East under the name of "Rossmore". The Plaintiffs claim is against the Defendants arising out of the contamination of the Plaintiffs' oyster fishery in the period from December, 1988 to date, from sewage discharged into the sea in Cork Harbour, from the Midleton Sewage Scheme.

37. The First Named Defendant is the Local and Sanitary Authority, "the Council" for County Cork, and has responsibility for the

construction, operation and maintenance of a sewage scheme and treatment plant, including pumping stations and pipe lines and a discharge outfall at Rathcoursey Point in the vicinity of the Plaintiffs' established oyster beds in the waters of Cork Harbour particularly those in the North Channel. The Second Named Defendant, "the Minister" is a corporation sole and was previously known as "the Minister for the Marine". The Third Named Defendant is joined as a party being vicariously liable for the wrongful acts and omissions of the Second Named Defendant, his servants or agents. The Fourth Named Defendant is the Chief Law Officer of the State and is joined as the proper person to represent the Third Named Defendant in these proceedings.

38. The Plaintiffs' claim is that the discharge of such sewage is and has at all material times been wrongful in several respects. It is alleged in the Statement of Claim that the Plaintiffs' have suffered and sustained considerable loss and damage as a result of the discharge of the sewage. The Plaintiffs were required by the Minister to close their oyster fishery on a number of occasions due to the risk of illness from viral infections to persons consuming the Plaintiffs' oysters. The Plaintiffs' oyster fishery has remained closed since October, 2002. As appears from the Statement of Claim, previous proceedings were brought by the Plaintiffs (referred to as the "First Proceedings"). The First Proceedings were settled in November, 1996 subject to a number of conditions. However it is the Plaintiffs' claim that those conditions were breached by the First Named and Second Named Defendants in fundamental ways and that the Defendants repudiated the settlement. The Plaintiffs seek various reliefs impugning the settlement and they seek damages, injunctive and declaratory relief arising from the contamination of their oyster fishery in respect of the period from December, 1988. The Council and the State Defendants have delivered full defences to the Plaintiffs' claims. All matters are put in issue by the Council and by the State Defendants.

39. It is clear that the Plaintiffs' legal advisers, having reviewed the pleadings including the reply to a Notice for Particulars, composed letters dated 16th December, 2003, seeking voluntary discovery directed towards matters which the Plaintiffs' legal advisers considered that the Plaintiffs' would be required to prove in the light of the Defendants' pleadings in the proceedings in order to succeed in the claim in matters which the Defendants had put in issue in their pleadings. Accordingly, after consideration of the defences delivered on behalf of the First Named Defendant on 6th August, 2003, and the defence delivered on behalf of the Second, Third and Fourth Named Defendants on 12th February, 2003, and having consulted with the Plaintiffs and with their Counsel, the Plaintiffs' solicitor sent letters seeking voluntary discovery to the First Named Defendant on 16th December, 2003, and to the State Defendants also on 16th December, 2003. A copy of the letter seeking voluntary discovery, sent to the Council on 16th December, 2003, is exhibited at exhibit RM1 in the affidavit sworn by the Plaintiffs' solicitor, Richard Martin, on 5th April. 2004, at Tab 11 of the Plaintiffs' book of pleadings. A copy of the letter dated 16th December, 2003, sent to the Chief State Solicitor, as acting for the other Defendants, on behalf of the Plaintiffs by their Solicitor is also at RM1 of the affidavit sworn by Richard Martin in support of the Plaintiffs' application for discovery against the State Defendants and is to be found at Tab 13 of the Plaintiffs' book of pleadings. As appears from his letters dated 16th December, 2003, the Plaintiffs' solicitor explains by reference to each document or category of documents the basis on which the Plaintiffs' claim that the document or category of documents are relevant and why it is claimed that it is necessary for the Plaintiffs to obtain discovery of that document or category of documents. In his affidavit sworn on 5th April, 2004, Mr. Martin said that he received a reply from the First Named Defendant in response to his letter seeking voluntary discovery on 5th January, 2004, which indicated that the First Named Defendant's solicitor was taking instructions from her client and would revert to his firm. However, up to 5th April, 2004, there had been no further response. A copy of the letter sent to the Chief State Solicitor on behalf of the Plaintiffs seeking discovery is at RM1 in the affidavit sworn by Mr. Martin in support of the Plaintiffs' application for discovery against the State Defendants and this letter is to be found at Tab 13 of the Plaintiffs' Book of Pleadings in his affidavit also sworn on 5th April, 2004. Mr Martin referred to a reply dated 19th December, 2003, from the Chief State Solicitor on behalf of the Second, Third and Fourth Named Defendants, which letter indicated that instructions were being sought and clarification was also sought in respect of one matter, which clarification was provided in a letter dated 22nd December, 2003, sent by the Plaintiffs' solicitor. By letter dated 21st January, 2004, it was contended on behalf of the Second, Third and Fourth Named Defendants that the Plaintiffs' request for discovery was premature on the basis that the pleadings had allegedly not been closed. Reference was made to a Notice for Particulars which was stated was going to be served on the Plaintiffs that day and when this was duly served it was apparent that this notice had been sent some considerable time after the Plaintiffs' letter seeking voluntary discovery and in any event there was no reason why that notice for particulars should preclude the Plaintiffs from seeking the discovery sought. Accordingly in the absence of satisfactory responses to his letters, motions seeking orders for discovery against the Council and against the State Defendants were issued on behalf of the Plaintiffs on 5th April, 2004. These applications were grounded on the affidavits sworn by Richard Martin on 5th April, 2004, and exhibited his letters seeking voluntary discovery. In the case of the Council, the Plaintiffs sought some fourteen categories of documents. In the case of the State Defendants, the Plaintiffs sought discovery of some sixteen categories of documents. The basis on which it was contended on behalf of the Plaintiffs that the Plaintiffs were entitled to discovery of the documents sought by reference to the matters in issue on the pleadings was explained with reference to each category of documents in the letters seeking voluntary discovery. Replying affidavits were sworn on behalf of the Council by Seán Ó Breasail, the Senior Engineer with the Council, on 4th June, 2004, and a replying affidavit sworn on behalf of the State Defendants by Maria Greene was sworn on 21st June, 2004. Two further affidavits in response to each of these two affidavits were sworn by Mr. Martin both on 23rd July, 2004. A further affidavit was sworn by Mr. Ó Breasail on behalf of the Council on 19th October, 2004. A third and final affidavit was sworn then by Mr. Martin on 16th November, 2004. In his further affidavits, Mr. Martin seeks to address the points put forward on behalf of the Council and on behalf of the State Defendants for the purposes of their resisting the application for discovery sought on behalf of the Plaintiffs. While the Council and the State Defendants have made certain concessions and have agreed to make discovery of certain categories of documents, for the reasons explained in Mr. Martin's affidavits, those concessions were insufficient and did not address the Plaintiffs' legitimate requirement in relation to discovery. In fairness to the parties I should say that I recognise the efforts made to try to agree aspects in contention and to show the progress made over time in reconciling differences on certain issues I propose to annex the sequence of agreed categories in Appendix 2.

40. The motions for discovery were duly heard by the Master and he reserved his decisions to 15th December, 2004. On that date the Master made orders for discovery of certain documents and categories of documents. However, the discovery fell far short of the requirements of the Plaintiffs and the Plaintiffs' advisers took the view that the Master's orders did not grant to the Plaintiffs the discovery to which the Plaintiffs were entitled on the basis of the pleadings and on the grounds of the reasons advanced in the letters seeking voluntary discovery and in the subsequent affidavits. In those circumstances the Plaintiffs' legal advisers, for the reasons set out in the original letters seeking voluntary discovery of 16th December, 2003, and as further explained and elaborated upon where necessary in the subsequent affidavits sworn by Mr. Martin on 23rd July, 2004, and 16th November, 2004 respectively, and accordingly the Plaintiffs were advised to appeal the orders made by the Master on 15th December, 2004, to the High Court.

41. All three parties have made extensive and diligent submissions as to the relevant legal principles. I propose to set out a synopsis of the relevant legal principles so as to have set out a legal framework for tackling the issues still in contention between the parties. I am happy to say that through the diligence of the legal representatives in the course of the proceedings, both initially before the Master and subsequently during the hearings before this Court, strenuous efforts were made to agree matters which were in contention between the parties. I have a sheaf of memoranda which were compiled by Counsel which bear witness to the sequence of these efforts and the progression of discussions between the parties. These agreed memoranda are annexed in Appendix 2 and are helpful to show the progression of the discussions. I am particularly grateful for the clear and useful memorandum prepared by Seamus

Woulfe SC for the Plaintiffs and agreed with Stephen Dodd BL for the First Named Defendant. I acknowledge with thanks the Plaintiffs' Book of Authorities prepared by Counsel and Mr. Martin. This Book is relatively concise and contains the vital version of O. 31, and the relevant and crucial three cases of *Ryanair plc v. Aer Rianta c.p.t.* [2003] 4 I.R. 264, *Taylor v. Clonmel Healthcare* [2004] 1 I.R. 169 and *Framus v. CRH plc* [2004] 2 I.R. 20 as well as part IX of the Local Government (Planning and Development) Regulations 1994.

42. I should also like to thank Stephen Dodd BL Counsel for the First Named Defendant and his solicitor Ms. Mary Roche acting on behalf of the First Named Defendant for the comprehensive index of authorities and the weighty folder in which they have compiled no less than twenty three relevant authorities. I am also grateful for the folder of skeleton arguments of Counsel for the Second, Third and Fourth Named Defendants which contains certain other documents and authorities referred to in argument and which has been helpfully gathered together for ease of reference. It is my deep regret that, after this diligent work of Counsel and the extensive submissions made by the parties, that two particular cases in the Court of Criminal Appeal had to be given priority. When I completed hearing the submissions in this case, the criminal cases engaged my attention and in fact occupied both the Easter and Whit vacations so that I was unable to deal with the issues in this case at once as would have been preferable and more efficient while the arguments were fresh in mind. For this I express my regret and apologise. I can only ask for understanding of the situation which arose, when a judge who is dealing with relatively complex arguments in respect of the evolving law with regard to discovery is at the same time dealing with issues involving the liberty of a prisoner who is in custody and whose case in justice demands priority.

43. I revert now to the succinct exposition of the relevant legal principles submitted on behalf of the Plaintiffs.

Relevant Legal Principles in Respect of Discovery Applications

44. Order 31, r. 12 of the Rules of the Superior Courts (as amended) requires the party seeking to obtain the discovery of documents to demonstrate that the documents in respect of which discovery is sought are both relevant and also that it is necessary that the applicant should obtain discovery of those documents for the fair disposal of the case or in order to reduce the time required for proving the case or to save costs. Both elements of this test have recently been considered by the High Court and the Supreme Court. Apparently the amendment to O. 31, r. 12 is generally understood to have been introduced in the light of the judgment of the Supreme Court in *Brooks Thomas Limited v. Impac Limited* [1999] 1 I.L.R.M. 171.

45. The classic statement of the test of relevance is that made by Brett LJ in the *Peruvian Guano* case (1882) 11 Q.B.D. 55 which was quoted most recently by the Supreme Court in *Framus v. CRH plc* [2004] 2 I.L.R.M. 439 per Murray J. at 454.

46. Murray J. in the Supreme Court in *Aquatechnologie v. MSAI* (Unreported, Supreme Court, 10th July, 2000) stated that:-

> "… there is nothing in that statement [of Brett L.J.] which is intended to qualify the principle, that the documents sought on discovery must be relevant, directly or indirectly to the matters in issue between the parties in the proceedings. Furthermore, an applicant for discovery must show it is reasonable for the court to suppose that the documents contain information which may enable the applicant to advance his own case or to damage the case of his adversary. An applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition."

47. In *Hannon v. Commissioners of Public Works* (Unreported, High Court, McCracken J., 4th April, 2001) the relevant principles were succinctly set out by McCracken J. (in the High Court) as follows:-

> "1. The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the Court to order discovery simply because there is a possibility that documents may be relevant.
>
> 2. Relevance must be determined in relation to the pleadings in the specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in Affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that Order 31 Rule 12 of the Superior Court Rules specifically relate to discovery of documents "relating to any matter in question therein".
>
> 3. It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other parties documentation is not permitted under the rules.
>
> 4. The Court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties."

48. This summary of the principles set out by McCracken J. was cited with approval by the Supreme Court in *Framus v. CRH plc* [2004] 2 I.R. 20.

49. The next aspect of the test which a party seeking discovery must satisfy is that the documents in respect of which discovery is sought are necessary for disposing fairly of the cause or matter or for saving costs. (See Order 31 Rule 12 as amended). It was held by the Supreme Court in *Ryanair plc v. Aer Rianta Cpt* [2003] 4 I.R. 264 that the burden of proving that the discovery sought was "necessary for disposing fairly of the cause or matter" rests with the applicant for discovery and that it is not "a mere formulistic requirement" per Fennelly J. at p. 275.

50. The question as to what is meant by "necessity for discovery" has also been addressed in a number of recent decisions of the Supreme Court. In *Ryanair plc v. Aer Rianta Cpt*, Fennelly J. dealt with this issue by referring to the judgment of Kelly J. in *Cooper Flynn v. Radio Telifís Éireann* [2000] 3 I.R. 344. There the term "litigious advantage" was used. Kelly J. had adopted the following statement of Bingham MR in *Taylor v. Anderton* [1995] 1 WLR 447, 462:

> "The crucial consideration is, in my judgment, the meaning of the expression "disposing fairly of the cause or matter". Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that the party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious advantage by not seeing it and will gain no litigious advantage by seeing it. That, in my judgment, is the test."

51. Having referred to this statement of Bingham MR, Fennelly J. in *Ryanair* went on to state as follows at page 276:-

> "It may not be wise to substitute a new term of art, "litigious advantage", for the words of the rule. Nonetheless, the discussion gives guidance as to the context in which the matter has to be considered. Within that context, the court has to reach a conclusion as to the likely effect of the grant or refusal of the discovery on the fair disposal of the litigation. The change made to O. 31, r. 12 in 1999, exemplifies, however a growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burden on parties, and the courts, arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.
>
> The court, in exercising the broad discretion conferred upon it by O.31, R.12 (2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant. These may no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation. The behaviour of the opposing party is relevant. That party may, for example, have made or may offer to make admission of facts, and thus persuade a court that discovery on some issues is not necessary. This is, perhaps, axiomatic. Those facts will no longer be in issue. On the other hand, it is difficult to see how a party, such as the Defendant in the present case, which contests all the relevant facts on the pleadings and has formally objected to the right of its opponent to resort to affidavit evidence can plausibly ask the court to deprive its opponent of access to documents which will enable it to prove matters which it disputes."

52. Also in the Supreme Court in *Ryanair*, McCracken J. touched on this issue in stating:-

> "One of the main purposes of the Rules of the Superior Courts (No. 2) (Discovery), 1999, is certainly to do with away with the practice of ordering blanket discovery. This is in ease of both parties and to avoid an abuse of the discovery procedure. This abuse sometimes consisted in seeking vast numbers of documents which it would cause great hardship on the recipient of the request to identify and list, or equally can consist of vast numbers of documents being discovered by the recipient of the request which would cause grave hardship to the other party to inspect and identify the relevant documents. The object of the rules was certainly to prevent these abuses …" (per McCracken J. at p. 280).

53. It is notable that in the *Ryanair* case extensive discovery was ordered by the Supreme Court having had regard to the matters put in issue in the defence delivered by the Defendant. That is particularly apposite to the present case having regard to the vast range of matters clearly in issue on the pleadings. In this particular case, both the Council and the State Defendants have "contested all the relevant facts on the pleadings" if one may adopt the words of Fennelly J. in Ryanair. In these circumstances, it is difficult to see how the Council and the State Defendants can "plausibly ask the court to deprive the Plaintiffs of access to documents which will enable them to prove matters which the Defendants dispute" and again I have adopted the terms used by Fennelly J. in *Ryanair* at p. 277.

54. The Supreme Court continued with this theme in the case of *Taylor v. Clonmel Healthcare Limited* [2004] 1 I.R. 169. Having referred to the previous decisions of the Supreme Court in *Brooks Thomas Limited v. Impac Limited* [1999] 1 ILRM 171 and *Ryanair plc v. Aer Rianta Cpt* [2003] 4 I.R. 264, Geoghegan J. said at page 182 of *Taylor*:

> "In most instances if they [i.e. the documents sought by way of discovery] are relevant they will be necessary but there will be cases where that will not be so."
>
> The purpose of the amendment [to O.31, R.12] was so that the Master or the court as the case may be and the respective parties would focus on what documents were really needed for the purpose of advancing the case of the moving party or defending as the case might be."

55. Thus, in establishing necessity, the party seeking discovery is required to demonstrate to the court that the documents in question are "really needed for the purposes advancing the case … or defending as the case might be".

56. In the subsequent decision of the Supreme Court in *Framus v. CRH plc* [2004] 2 I.R. 20, reference was made to some of these earlier decisions. Murray J. has reproduced with approval the passages from the judgment of Fennelly J. on the issue of necessity which have been referred to and then put all this in context with a helpful summary at p.38:-

> "It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out the crucial question is whether discovery is necessary for "disposing fairly of the cause or matter". I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues."

57. It is noteworthy that Geoghegan J. in his judgment in *Taylor* and Murray J. in his judgment in *Framus*, both stated that in general once a document is relevant, then it will follow in most cases that discovery of this document will be necessary for the fair disposal of the matter in issue. I would add that in the present type of case the vast bulk of the information about the circumstances in which there is a need for sewage treatment and the release of sewage or treated effluent from a discharge point, together with the scientific and engineering evidence with regard to the suitability of the discharge point and the effect on the environment particularly licensed fish farms in the vicinity, would be likely to be all or mainly in the possession of the two Defendants. This information would clearly include all reports and documents pertaining to the pros and cons of the location and capacity of the treatment works and of the suitability and likely effects of the location of the outfall and the various pumping stations. This is a situation in which the Defendants almost certainly must have considerable files and expert reports and correspondence which would be material to the matters in issue on the pleadings in this case. When considering what should be included in the discovery a Defendant needs not only to be conscious that there is not just the usual claim for damages, in this case for nuisance, negligence and breach of duty (including breach of statutory duty) but there is also a claim in the alternative for specific performance of the Consent and for damages in lieu thereof, as well as relief sought by way of injunctions and in addition to the usual claim for damages, there is also a claim for exemplary and/or aggravated and/or punitive damages. It is not enough for the official nominated by the Defendant County Council to say that information has been given on foot of the Freedom of Information Act, 1997. That is no substitute for the making of a sworn

affidavit of discovery by a nominated officer and it is incumbent on both the officials of the local authority and of the Minister to make sure that the files are examined carefully to ensure that full discovery is made of the relevant documents. They need to consider this scrutiny from the point of view of the Plaintiffs making their case in accordance with the issues put in the pleadings and also from the aspect of relevance to the Plaintiffs being able to shorten the case because the Defendants' documents confirm the Plaintiffs' allegations without the need for massive proofs or because material documents have to be discovered which preclude the Defendants from making a particular defence as their own reports and correspondence clearly contradict such defence as is being suggested and put forward.

58. Counsel for the Plaintiffs submits that the letter dated 16th December, 2003 from the Plaintiffs' solicitor seeking voluntary discovery and, for the reasons set out in the subsequent affidavits for and on behalf of the Plaintiffs, the documents in respect of which discovery is sought by the Plaintiffs are relevant to matters in issue in the proceedings between the parties and that it is necessary for the Plaintiffs to obtain discovery of those documents for the fair disposal of the claim. He further submits that in trying to define as precisely as possible the categories of documents in respect of which discovery is being sought (albeit accepting that discovery is likely to be extensive), the Plaintiffs have borne in mind the views of Murray J. in *Framus* to the effect that there "must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent." (Per Murray J. at p.38). The point is also made that discovery of relevant documents sought will also result in a saving as to costs as material produced in discovery will cut down and narrow the issues and may well make clear the answers to certain issues presently in stark conflict on the pleadings.

59. Both orders of the Master were made on 15th December, 2004 whereby he refused the Plaintiffs' application for an order for discovery in the first motion against the First Named Defendant in respect of certain categories of documents and then in respect of the second motion he refused discovery against the Second, Third and Fourth Named Defendants in respect of certain categories of documents and in due course the court will have to tackle the issue of the categories of documents still in contention, although I am happy to note that Counsel for the parties have worked hard to agree a certain number of the issues, so that there only is what I might describe as a "hard core of contentious issues" left to be confronted and resolved by the court. One of the orders sought in each of the motions is in respect of an order extending the time in which to make this application and since one motion was brought on 31st January, 2005, in respect of the First Named Defendant and the second motion was brought on 14th February, 2005 in respect of the Second, Third and Fourth Named Defendants, there need be no hesitation in extending the time in view of the season of the year and of the complexity of these motions. While it is fair to say that an examination of the provisions of Order 31 Rule 12 indicates that a court will only order a person to make discovery if it is satisfied that it is in possession of documents that are:-

1. Relevant to the issues in the proceedings and

2. That discovery is necessary for disposing fairly of the matter or for saving costs. It is clear that it is the applicant for discovery that bears the burden of satisfying the court as to these requirements.

60. While I expect that the parties would agree with these statements, I propose to outline the submissions made on behalf of the First Named Defendant with a particular view to showing where differences emerge between his view point and the approach submitted on behalf of the Plaintiffs.

61. Before I embark on a synopsis of the submissions made by Counsel on behalf of the Defendants, it may be helpful if I outline the history of the Oyster Fishery and describe the location of the oyster beds and their whereabouts in Cork Harbour particularly in relation to the estuary of the confluence of the Owennacurra and Dungourney Rivers which make Midleton a picturesque as well as a prosperous town. As one drives east from Cork city on the N25 Coast Road one passes Fota Island and Barryscourt Castle. After Carrigtohil one approaches the first turn off to the left to Midleton and then one can see again to one's left the estuary of the two rivers flowing down from Midleton, which is to one's north and, before one crosses the bridge, one should be able to see to one's left the Bailick No. 1 Pump House. On one's right as one approaches the bridge, according to the Cork County Council Midleton Sewerage Scheme map indicating the location of treatment works and outfall, there appears to be an extensive area designated as a waste water treatment plant on the Garryduff side of the road. From the bridge over the estuary looking towards one's right one can see the Bailick no.2 Pump House. My understanding from diagram no. 1 is that it was intended that untreated domestic sewage from Midleton would be pumped from Bailick no.1 Pumping Station to the treatment plant together with untreated sewage from Ballinacurra no 2, Bailick no.3 and Bailick no.2 Pumping Stations also going to the treatment plant on the far side of the estuary from Bailick no.1 and Bailick no. 2 with the pipe going across the start of the estuary to the red area on the map designated as the treatment plant. I note that on map no. 1 there are overflow tanks at Bailick no. 1, Bailick no. 2 and Ballinacurra no. 2 Pumping Stations each of which is located on the side of the estuary below the town. On map no. 2 the pipe containing the treated domestic sewage is shown in blue going from the treatment plant to Ballinacurra no.1 Pumping Station which appears to be beside the church at Ballinacurra before the rivers move on south along the Ballinacurra River towards the mud flats with Bawnard to the east and the North Channel and Rossmore to the west and the Rathcoursey tank to the south side of the North Channel which goes along to Fota Island and Belvelly Channel past no less than two Martello Towers. The Rathcoursey tank is at Rathcoursey Point from where one can look north up the estuary of the two rivers coming from Midleton and west to the Ahanesk oyster beds and the oyster beds in the North Channel near Rossmore. The Rathcoursey outfall according to map no. 3 is on the east side of what is marked on map no. 3 as the Ballinacurra River above the channel known as the East Ferry and I expect that there is or was a ferry from Great Island across to the east for people wishing to get to Rathcoursey and Scartlea. I am grateful to Counsel and solicitor for the County Council for making available these three maps which assist greatly in understanding the type of area, design and location of the sewage scheme. On map no. 1 I noted that there is a red line designating the pipe containing industrial effluent presumably from the town of Midleton. This is shown as coming into Bailick no. 1 Pumping Station, which has an overflow tank, and then proceeds down to Ballinacurra no. 1 and from there it proceeds along with the treated domestic sewage as combined effluent to the outfall at Rathcoursey Point. I trust that the reports and documentation concerning the treatment of the various sewage and industrial effluents coming into the system at Ballinacurra no. 1 Pumping Station will deal with the aspect of what treatment is accorded to the industrial effluent and what facilities there are for testing and coping with these industrial effluents as well as the sewage. No doubt this seeming lacuna will be dealt with in the course of the Defendant's discovery of documents or that some explanation for the seeming gap in the information will be forthcoming as otherwise this could cause an initial problem at the start of the hearing of the action as it seems to be a fairly obvious question to ask and it would be inconvenient to say the least that this aspect should not have been covered in the pleadings and particulars if it is in fact germane.

62. Secondly, I note that on map 1 there is a black cross and a yellow highlight at a point to the south of the treatment plant on the west side of the estuary opposite to the pipe running south from Bailick no.1 to near Bailick no.2 and then on to Ballinacurra no. 1 Pumping Station from whence the combined effluent of industrial effluent and treated domestic sewage proceeds on to the tank beside the Rathcoursey outfall. The whole scene from Rathcoursey Point is reminiscent of the tidal mud flats being mapped by the young sailors in Arthur Ransome's story called "Secret Waters". It is my understanding, but I am certainly open to correction on this detail, that the local authority is responsible for the monitoring of the waters in the Owenacurra, Dungourney and Ballinacurra Rivers

which run from above down through Midleton into the east end of the North Channel and then on south into Cork Harbour proper. To anyone who has seen the extensive French oyster beds on the west coast of France it is easy to understand why the Rossmore area was apparently so very suitable for oyster beds. The members of the Irish Bar are only too well aware, due to fatalities in the past, of the susceptibility of shell fish to poisonous pollution. Accordingly one would expect that there was extensive information gathering in respect of the tidal flows coming in and out of Cork Harbour and particularly through the East Ferry and Ballinacurra River channel past Rathcoursey Point and also as to what the effect is of the confluence of the incoming tide and the outflow from the rivers coming from Midleton at the east end of the North Channel. One would reasonably assume that the Minister for Lands having made the oyster fishery (Cork Harbour) Order, 1963 in respect of the area of Cork Harbour opposite to Cobh and with Spike Island to the west, and north of Whitegate and of Aghada and Rosstellan, would have been alert to the perils of a sewage outfall in such inland tidal waters, particularly with the difficulty of predicting tides in stormy conditions and the variation of river flows in times of drought or heavy rainfall. At all events, by the Oyster Fishery Order made by the Minister for Agriculture and Fisheries on 5th November, 1970, the area to the south of Brown Island and Brick Island in the North Channel was the subject of an Oyster Fishery (Cork Harbour) Order, 1970 and so both Cork County Council and the Minister and his successors in title must have been well aware that there were oyster beds in the vicinity of Rathcoursey Point. Since we are an island nation most Irish people are aware of the huge differences between high tide and low tide and the effect of spring and neap tides and one can safely assume that both the local authority officials and their engineers and the Minister for the Marine and Natural Resources and his predecessors with this responsibility would all have been well aware of the variation in tides and estuarine water flows depending on the stages of the moon and the vagaries of the weather, whether in drought or in storm and gale force rain storms. The peril of susceptibility of shellfish, including oysters, to danger of infection from pollutant materials is only too well known in this country. Accordingly one would expect careful and stringent testing to have been included in the planning and design of any modern sewage scheme, particularly if it was intended to discharge sewage into the Irish sea or indeed ever more so if into the inland seas of the great harbour of Cork, one of the finest natural harbours in the world. I note on map no. 1 the "approximate location of inspection chamber" as being to the south of the waste water treatment plant on the south side of the N25 as one approaches the bridge and the Midleton roundabout where the road to the left goes to Midleton and the road to the right goes to Ballinacurra and on to Cloyne and Whitegate. No doubt this inspection chamber was intended as an added safeguard and security to the proper functioning of the system. I have to confess to being rather mystified by the location of the inspection chamber since the arrows on map no. 1 showing the movement of untreated sewage in the pipeline would appear to indicate that at least the industrial effluent from Midleton and perhaps some other effluent would not appear to have been the subject of inspection at this chamber before it enters into the combined effluent being pumped from Ballinacurra no. 1 Pumping Station to the outfall at Rathcoursey Point. In the course of argument, Counsel for the Plaintiffs suggested that the inspection chamber had been put in the wrong location. It would seem that discovery of documents and reports on this aspect may well be significant. Likewise the question of an alternative installation and also a different line of route for the pipeline to a less controversial location of outfall would appear to be significant in view of paragraph 20 of the Statement of Claim. This paragraph makes the point that on 14th July, 1997, the Minister for the Environment and Rural Development certified pursuant to Part IX of the Local Government (Planning and Development) Regulations 1994 that the works proposed for the construction of the sewage treatment plant at Midleton embodied the best practicable means to prevent or limit significant adverse effects on the environment subject to the following modifications:-

> 1. The impact of the discharge on the water quality in the licensed oyster areas of the North Channel (i.e. the Plaintiffs' oyster fishery and two other oyster fisheries) should be reduced by either of the following means:
>
> > (a) Secondary treated effluent containing faecal micro organisms should be discharged through an alternative outfall upstream of the present outfall. It is provided that this new discharge, subject to necessary licensing, should be located in an appropriate area to the north east of the existing discharge such that the incoming tide carries the discharge into the Owenacurra estuary. It was further provided that the selection of this location should have due regard to the available dilutions; or
> >
> > (b) Alternative additional treatment as may be proved to be effective and capable of providing equivalent water quality in the vicinity of the licensed oyster beds in the North Channel (i.e. including the Plaintiffs' oyster fishery) should be provided subject to the necessary licensing.
>
> 2. Untreated storm water flows contaminated with faecal matter should not be discharged at either of the above outfalls. It was further provided that any such storm water discharged at this location should be subject to the full treatment provided at the treatment plant.
>
> 3. Testing of treated effluent samples should include for the determination of the faecal coliform concentration at a frequency no less than required for sampling by the Urban Waste Water Treatment Directive."

63. I have included the helpful maps provided by the First Named Defendant and I propose to annex them to this judgment in appendix 3. Map 1 shows the Owenacurra and Dungourney Rivers flowing into Midleton above Bailick Pumping Station no.1 it shows the treatment plant to the west of the N25 with the untreated domestic sewage coming from Bailick no. 1 Pumping Station and Bailick no. 2 Pumping Station and Bailick no. 3 Pumping Station and Ballinacurra no.2 Pumping Station to the treatment plant. It also shows the red pipeline carrying industrial effluent, presumably from Midleton, to Bailick no.1 Pumping Station and then directly down to Ballinacurra no.1 Pumping Station and apparently on then to the Rathcoursey outfall. It also shows in a blue line the treated domestic sewage coming from the treatment plant to Ballinacurra no. 1 Pumping Station and then on as combined effluent to the outfall. This map also indicates that there are overflow tanks at Bailick no.1, Bailick no.2 and Ballinacurra no.2 Pumping Stations. Map no. 2 shows the N25 road and the location of Bailick no.1 Pumping Station to the north of the N25 and the waste water treatment plant to the south of the N25 and to the west of the bridge and the Midleton roundabout. This map also helpfully indicates the location of Rathcoursey discharge point and all the oyster beds at Ahanesk and the oyster beds in the North Channel as well as the Ballinacurra River and the East Ferry Channel, and to the south of this the area of the Oyster Fishery (Cork Harbour) Order 1963 in Rostellan Bay. Looking at this map with an inexpert eye one can only wonder why an inland tidal area with apparently proven shellfish beds was chosen for a sewage outfall. No doubt there were good reasons for the relevant Minister granting the relevant licences and for the Council designing the system so that the chosen outfall location discharged sewage effluent in such an inland tidal larder for marine and insect and bird life. One would have thought that engineering capabilities would have improved since the time of the great Irish engineer Charles Yelverton O'Connor (1843-1902) who designed not only the harbour at Fremantle in Western Australia but also the great dams and reservoirs supplying water to the pipeline which ran from near Perth to the Goldfields mines at Coolgardie and Kalgoorlie in the barren and dry centre of Western Australia, a distance of more than 300 miles with Pumping Stations along the route. The pipeline of C.Y. O'Connor, C.M.G., was completed in 1903 and has supplied water from Mundaring Weir near Perth to Mount Burgess to the north of Coolgardie from where the water is still reticulated to the mining centres. Since 1903 to the present day C.Y. O'Connor's pipeline from the Helena River has carried 5 million gallons per day pumped in 8 successive stages of 30 inch diameter pipe by pumping stations. One

64. Reverting to Cork Harbour and the Midleton Scheme, one cannot help wondering whether a longer pipeline to the open sea or elsewhere would be a better option. If there has to be a discharge into the sea of treated effluent, then might this expedient not have been a much more environmentally friendly and more efficient and economic solution for the sewage problems of the Midleton area in the long run. I have mentioned these matters as they are clearly lurking in the background of this case and are likely to occur to the judge who has to deal with the trial in this case and it would be as well that the parties should reflect on these matters at this stage rather than when the trial is imminent or has started.

65. Cork harbour has been a recognised area for shellfish fisheries and this is clearly recognised by the Oyster Fishery Order made by the Minister for Lands on the 8th March, 1963 and then by the further Oyster Fishery Order made by the Minister for Agriculture and Fisheries on 5th November, 1970, in respect of the North Channel. The Plaintiffs had started their oyster fishery in the North Channel in the Rossmore and Brick Island areas around 1970 and their business grew in the mid 1980s with the breeding and growing of native and pacific oysters. In 1979 Cork County Council started to discharge untreated sewage into the estuary of the Midleton Rivers. The County Council in 1986 had to apply for a Foreshore Licence for the discharge of raw sewage and in 1988 the County Council started to discharge raw sewage upstream of the oyster fishery. Between 1970 and 1988 there were only four reports of illness having affected customers but in the autumn of 1991, 175 people were reported to have become ill after eating the oysters. In 1992 the Minister for the Marine accepted the need for an effluent treatment plant but discharges of raw sewage continued and the reports of persons becoming ill after the consumption of oysters from the Plaintiffs' fishery increased with 375 persons being reported as infected. On 19th November, 1992, the Plaintiffs issued the first proceedings against the First and Second Named Defendants in which the Plaintiffs sought various reliefs against the First and Second Named Defendants. They claimed among other things that:

> 1. The Foreshore Licence should not have been granted to the First Named Defendant and that the Second Named Defendant acted irrationally and/or unreasonably and/or in disregard of proper and/or relevant considerations and contrary to the provisions of s. 3 of the Foreshore Act 1933 in purporting to grant the said licence and that as a consequence the licence was *ultra vires*, null and void and of no force or effect.
>
> 2. Without prejudice to 1 above, the First Named Defendant, its servants or agents ought not to have operated the Midleton Sewage Scheme without providing for a treatment plant to treat the sewage prior to its discharge into the sea.
>
> 3. Without prejudice to 1 above, the continued operation to the Midleton Sewage Scheme and consequent deterioration in water quality and contamination of the Plaintiffs' oyster fishery amounted to and was caused by the negligence, breach of duty, breach of statutory duty and nuisance on the part of the First and Second Named Defendants.
>
> 4. As a consequence the Plaintiffs suffered financial loss and damage and damage to their business and reputation.

66. At the time that the first proceedings came on for hearing in November, 1996, the number of illnesses reported had risen to 648 according to paragraph 15 of the Statement of Claim. The Consent provided for the payment of £500,000 to the Plaintiffs by the Council and the Minister between them and by clause 4 the Council undertook that it should, on or before 30th June, 2000, bring into operation a secondary waste water treatment plant incorporating ultra-violet disinfection facilities for the town of Midleton. By clause 5, the First Named Defendant was entitled, pending the bringing into operation of the said plant, to continue to operate the sewage outfall at present situate at Rathcoursey Point subject to the provisions of clause 6. By clause 6 it was provided that pending the construction of the treatment plant, the Plaintiffs should have no right of action in respect of events thereafter occurring and arising from the First Named Defendants' operation of the said outfall, save insofar as the operation of the said outfall should be proved to have caused;-

> (i) A deterioration in the flesh quality of the Plaintiffs' oysters by reference to the standard of 6,000 Faecal Coli per 100g of oyster flesh, and
>
> (ii) Illness in one or more human beings resultant on the matters described at (i) above.

67. Clause 7 of the Consent stated: a "Schedule" attached to the Consent was to form part of the Consent under which the Second Named Defendant agreed with effect from 2nd December, 1996, until 30th June, 2000, to monitor the water and oyster flesh in the North Channel on a fortnightly basis and on the further terms set out in the Schedule. Under this Schedule it was agreed that in the event that the Plaintiffs, in the weeks in which the Second Named Defendant does not itself collect samples for monitoring, furnishes samples to an approved laboratory designated by the Second Named Defendant, the Second Named Defendant (the Minister) will procure that the samples are tested by the laboratory and incorporated in the data collated by the Second Named Defendant. The Minister will make available to the Plaintiffs the data collated by it on request. This Consent was received and filed in court. By clause 9 it was set out that the "First proceedings should be adjourned generally with liberty to re-enter." The status of these first proceedings should be either agreed of clarified by adjudication or as advised by the parties in preparation for trial.

68. The Plaintiffs' case is that the vital aspect of all of this being embodied in the Consent was that the Defendants were to comply with their obligations to make safe the environment for the oyster fisheries so that the Plaintiffs' business could be revived and restored. The Plaintiffs alleged that there were then delays and failure by the Council in putting in the plant as agreed in accordance with the undertaking given by the First Named Defendant at clause 4 of the Consent which the Plaintiffs say was a fundamental term of the Consent and went to the root of the agreement between the Plaintiffs and the First and Second Named Defendants under which the first proceedings were settled. Without the said undertaking the Plaintiffs simply would not have agreed to settle the first proceedings or to have executed the Consent. The Plaintiffs had been suffering very serious and ongoing damage to their business as a result of the discharge of the untreated sewage into the sea at Rathcoursey Point and required that situation to be remedied as a matter of priority. The Plaintiffs further say that the First and Second Named Defendants, their respective servants or agents, knew or ought at least reasonably to have known that the Plaintiffs would rely on the undertaking given by the First Named Defendant at clause 4 of the Consent that it would on or before 30th June, 2000, bring into operation a secondary waste water treatment plant incorporating ultra violet disinfection facilities for the town of Midleton. The Plaintiffs contend that the Defendants failed to comply with the terms of the Minister's certificate. From paragraph 20 to paragraph 30 inclusive of the Statement of Claim the Plaintiffs set out their contentions with regard to the fundamental breaches of the agreement embodied in the Consent by the First and Second Named Defendants and I envisage having to return to these paragraphs when confronting the contentious issues in respect of discovery between the parties.

69. Finally I should add that my understanding is that "primary treatment" would involve sedimentation in septic tanks and comminution which involves the reduction of sewage into minute particles in the effluent. "Secondary treatment" is the process whereby there is a reduction in the biochemical oxygen demand in the sewage by means of a process of aeration, usually done by mechanical paddles in a tank. Thirdly, "tertiary treatment" is the process of reducing the quantity of phosphorous and nitrogen and pathogens in the contents of the sewage by processes on the lines of or similar to ultra violet treatment.

70. At paragraph 18 of the Statement of Claim the Plaintiffs specifically alleged that the undertaking given by the Council at clause 4 of the Consent was a Condition or, alternatively, a fundamental term of the Consent, and went to the root of the agreement between the Plaintiffs and the Defendants under which the first proceedings were settled. Without this undertaking the Plaintiffs would not have agreed to settle those proceedings or have executed the Consent. The Plaintiffs were suffering very serious and ongoing damage to their business as a result of the discharge of the untreated sewage into the sea at Rathcoursey Point and required that situation to be remedied as a matter of priority. Both the First and Second Named Defendants knew or ought to have known that the Plaintiffs would have to rely on the undertaking given by the Council at clause 4 of the Consent that it would on or before 30th June, 2000, bring into operation a secondary waste water treatment plant incorporating ultra-violet disinfection facilities for the town of Midleton. The Plaintiffs did rely on and were induced by the undertaking in agreeing to settle the first proceedings and to execute the "Consent". The Schedule attached to the Consent was to form part of the Consent under which the Minister agreed with effect from 2nd December, 1996, until 3rd June, 2000, when at the latest the Council was to bring into operation the secondary waster water treatment plant incorporating ultra violet disinfection facilities for the town of Midleton and that, in the meantime the Minister was to monitor the water and oyster flesh in the North Channel on a fortnightly basis and on the further terms set out in the Schedule. The Schedule was to the effect that not only was the Minister to carry out the monitoring until 30th June, 2000, of the water and oyster flesh in the North Channel as before on a fortnightly basis but in the weeks in which the Minister did not by its servants or agents collect samples for monitoring then in the event that the Plaintiffs furnished samples to an approved laboratory designated by the Minister, the Minister would procure that the samples were tested by the laboratory and incorporated in the data collated by the Minister, who would make available to the Plaintiffs the data collated by his agents as requested. In the handwritten copy of the Consent furnished to me it would appear that the Consent was signed for and on behalf of the Minister by Michael Enright but in the schedule most of the signature of the person signing on behalf of the Minister has been guillotined. I would have thought that proper clean and complete copies of the original would have been made before the original documents were placed on the Court file and that copies of such a basic document would be to hand in a case which has been so diligently prepared.

71. Under the Minister's Certificate of 14th July, 1997, in respect of the construction of the sewage treatment plant at Midleton, the certificate was subject to modifications so that the impact of the discharge on the water quality on the licensed oyster areas in the North Channel (meaning the Plaintiffs' oyster fishery and two other oyster fisheries) should be reduced by either of two means. The first alternative was that effluent should be treated by secondary treatment, which would mean aeration to reduce the chemical oxygen demand probably by mechanical stirring in a tank; since this secondary treatment of the effluent would leave it still containing faecal micro organisms, this effluent should be discharged to an alternative outfall upstream of the Rathcoursey outfall. It was provided that this new discharge, subject to necessary licensing, should be located in an appropriate area to the north east of the existing discharge such that the incoming tide carries the discharge into the Owenacurra estuary. It was further provided that the selection of this location should have due regard to the available dilutions. I have a note to the effect that I was told that this proposed solution was not tried which frankly is hardly surprising as the incoming tide would be likely to have carried the sewage back up into the Owenacurra estuary and on to the tidal mudflats on either side, or the Loughatalia side to the east and on the Ballyannan side to the west and up towards the Ballinacurra pump house and the quays at Bailick. I am no marine engineer but I cannot divine why, if the incoming tide carries the sewage up into the Owenacurra estuary, then with a change of tide and a wind from the East, the flow of the two rivers down into the estuary combined with the outgoing tide and the wind from the East, would not carry the sewage back down out of the estuary into the North Channel and over the Plaintiffs' oyster beds. Perhaps this is why this "solution" was not adopted by the Minister. As for the Minister's alternative solution of additional treatment as may be proved to be effective and capable of providing equivalent water quality in the vicinity of the licensed oyster beds (i.e. including the Plaintiffs' oyster fishery) in the North Channel, this was to be provided subject to the necessary licensing. I take this to mean that the Council was to put in effective sewage treatment to ensure that the water quality was as good as before they started to discharge effluent from the sewage scheme in the vicinity of the licensed oyster beds, including the Plaintiffs' oyster fishery in the North Channel.

72. The second modification required by the Minister was that untreated storm water flows contaminated with faecal matter should not be discharged at either of the outfalls. It was further provided that any such storm water discharged at this location should be subject to the full treatment provided at the treatment plant. Since the previous sentence referred to "the above outfalls" this modification seems ambiguous but I take it to mean that the Minister is referring to any storm water discharge at the alternative location for an outfall since the word location is used in this context when the Minster stated that the selection of this location should have due regard to the available dilutions. The crux was that the Minister was requiring that untreated storm water tainted with faecal matter was not to be discharged at either outfall.

73. The third modification stipulated by the Minister was that testing of treated effluent samples should include provision for the determination of faecal coliform concentration at a frequency no less than required for sampling by the Urban Waste Water Treatment Directive. I have a note to the effect that I was told that these modifications, which appeared to be associated with and to envisage in part an alternative outfall to be located in an appropriate area to the north east of the existing discharge point, were never in fact acted upon which seems surprising in view of the Minister's advice and expressed views on the matter. Presumably there must be correspondence and reports and documents about this and discovery will clear up this gap in the jigsaw and correct this lack of information.

74. According to paragraph 21 of the Statement of Claim, apparently there was an addendum to the EIS which dealt specifically with the environmental impacts of the proposed works, which were to take place at various locations on the fore shore. Dealing with the crucial issue of storm overflows, these overflows can increase the flow of domestic waste (a euphemism for sewage). Thus the domestic sewage system receives the rainfall from much of the town as well and this can increase the flow by a factor of forty times that of the domestic waste. In respect of the capacity of the storm overflow balancing tank designed to take this excess, the EIS stated that overflows of untreated effluent to the river would only occur on average 5 to 6 occasions per annum and the volumes discharged would be no more than 1 to 1.5% of the total storm water collected in the catchments. In Appendix 1 of the addendum to the EIS, the volume of this discharge of untreated storm overflow was calculated

75. as 2,973 cu.m. per annum. It is on the basis of the EIS that the Minister specified the works dealt with in his certificate. At paragraph 22 the Plaintiffs plead that the Council was obliged to comply with the terms of the certificate of the Minister in the construction of the sewage treatment plant and was obliged by virtue of the certificate to ensure that:-

> 1. The impact of the discharge on the water quality on the Plaintiffs' oyster fishery should be reduced by either of the means referred to in the certificate;
>
> 2. Untreated storm water flows contaminated with faecal matter should not be discharged at either of the outfalls referred to in the certificate and that any such storm water discharged should be subject to the full treatment provided at the treatment plant and;
>
> 3. Testing of treated effluent samples should include for the faecal coliform concentration at a frequency not less than

required for sampling by the Urban Waste Water Treatment Directive.

76. On or about 28th May, 1998, the Council applied to the Minister for a new foreshore licence to use and occupy part of the foreshore at Midleton and Ballinacorra River, Midleton for the purpose of laying, using and maintaining foreshore crossings, domestic rising main, outfall pipes, pumping stations, storm water outfall and overflow pipes thereon in connection with the Midleton sewage scheme. It was expressly represented by the Council in its application to the Minister for this new foreshore licence that it was estimated that overflow to the tide at the Bailick Road pump house would occur on five to six occasions per annum, that the total discharge volumes would be 1 to 1.5% of the total storm water collected in the system and that the volume of discharge would be 2,973m3 per annum (i.e. cubic metres per year.) The Council further represented to the Minister in its application for the second foreshore licence that with regard to Rathcoursey Point, it was proposed to retain this outfall but that the discharge therefrom would change from being a comminuted raw sewage to a secondary treated effluent complete with ultra-violet disinfection and that this treatment would have the effect of reducing faecal coliform numbers in the discharge by four orders (10,000 fold). The Minister granted the new Foreshore Licence to the First Named Defendant on 22nd September, 1999, on foot of the Council's application for the second foreshore licence.

77. At paragraph 27 the Plaintiffs plead that the following were express conditions or, alternatively, fundamental terms of the second foreshore licence granted by the Minister to the Council on 22nd September, 1999:-

> 1. At Condition 5 of the License it was stipulated that the Council should provide a level of treatment, including ultra violet treatment, which should ensure the following effluent quality at the inspection chamber in the channel downstream of the treatment plant:- the geometric mean of faecal coliforms per 100ml of effluent was required to be 250f.c. or less. This limit could be reviewed in event of variation of effluent inputs. Compliance with this requirement was to be measured on the basis of a 50 sample rolling programme, as applicable. 95% of all samples were required to be less than 1,000f.c./100ml. In the event of a result of over 1,000f.c./100ml, the Council was obliged immediately to contact the Minister to agree necessary action.
>
> 2. Condition 6 of the licence required that a detailed sampling programme to monitor compliance with Condition 5 be agreed between the Council and the Minister before any discharge was allowed through the pipelines. It was required that the programme would cover "*inter alia*" frequency and times of sampling and analysis centres and methodology. It was further provided that should the analysis show that the standards laid down were not being complied with, an immediate programme should be put in place to redress the situation. Costs of the sampling and monitoring was required to be borne by the Council.
>
> 3. Condition 7 of the licence provided that should a viral health problem arise in the adjacent oyster beds (being the Plaintiffs' oyster fishery) an objective study of the sources of contamination would be carried out to determine the contribution, if any, by the Midleton municipal discharge to this contamination and that the standards laid down in Condition 5 would be reviewed. I observe in passing that this was clearly a very significant Condition and that the documentary records in respect of this and the follow up pursuant to and in respect of this Condition 7 could well be of serious significance to the issues in conflict.
>
> 4. Condition 8 provided that should a statutory viral classification system be laid down for molluscan production areas, the licence would be revised and amended if necessary to take this into account particularly having regard to Condition 5.
>
> 5. Condition 9 required the Council to ensure that any breakdown of the effluent treatment system would be notified immediately to the Department of Marine and Natural Resources Sea Fishery Officer and Fish Quality Officers so that any health problems posed by the oysters could be contained.
>
> 6. Condition 14 provided that, in the event of the non performance or non observance by the Council of any of the conditions contained in the licence, the Minister was entitled forthwith to terminate the licence without prior notice to the County Council.

78. The Plaintiffs contend at paragraph 28 that it was an implied Condition, or alternatively a fundamental term of the Second Foreshore Licence granted by the Minister to the Council on 22nd September, 1999, that the Council would comply with the terms of the Second Foreshore Licence and that the Midleton sewage scheme would be operated in all respects in compliance with the terms and conditions of the Second Foreshore Licence and in accordance with the representations made by the Council to the Minister in its application for the licence. Accordingly it was an implied condition or a fundamental term of the Second Foreshore Licence that the overflow to the tide at the Bailick Road pump house would occur on five to six occasions per annum, that the total discharge volumes would be 1 to 1.5% of the total storm water collected in the system and that the volume of discharge would be in region of 2,973m3 (cubic metre) per annum. There was a further implied condition or fundamental term of the Second Foreshore Licence that there would be a reduction in faecal coliform numbers in the effluent discharged at Rathcoursey Point by four orders (10,000 fold).

79. At paragraph 29 the Plaintiffs contended that the Minister owed to the Plaintiffs, as the owners of the oyster fishery in Cork Harbour, a duty of care in prescribing the terms and conditions of the Second Foreshore Licence so as to ensure that the interests of the Plaintiffs as the owners were not adversely affected as a result of the operation of the Midleton Sewage Scheme or, alternatively, that the adverse effects to the Plaintiffs were kept to a minimum.

80. I have set out the factual background matters as they set the scene for the next paragraphs in the pleadings which indicate what the Plaintiffs say went wrong because of the culpability of the first two Defendants. This seems to be very much at the core of the matters in conflict between the parties particularly where issues with regard to the contention about the discoverability of the remaining unagreed categories of documents are concerned.

81. The Plaintiffs contend that in breach of Condition 4 of the Consent, and consequently in breach of a condition or fundamental term of the Consent and in breach of the Council's undertaking contained therein, the Council, its servants or agents, did not bring into operation the secondary waste water treatment plant incorporating ultra-violet disinfection facilities for the town of Midleton on or before 30th June, 2000. Notwithstanding considerable and consistent correspondence from and on behalf of the Plaintiffs to the Council and the Minister, their servants or agents, from the date of the Consent, the Council did not bring into operation the treatment plant by 30th June, 2000. While they brought it partially into operation by the dates required, it could only accept a fraction of the design flow for a further ten months until the end of April, 2001. Additionally, the plant was missing a critical and essential element, namely the storm overflow holding tank. The operation of the treatment plant in the absence of any storm overflow holding capacity, and the removal at the same time of the existing storm water overflow provision at the Midleton Bailick 1 pumping station during the construction of the storm overflow holding tank, resulted at times of rainfall in the discharge of untreated sewage

directly into the sea adjacent to the Plaintiffs' oyster fishery. Despite constant correspondence from the Plaintiffs, the new storm overflow holding tank was not constructed and brought into operation by the Council until in or about July, 2001. In reality these two default factors, first the inability of the new plant to accept more than a fraction of the design flow until the end of April, 2001, and secondly the lack of a storm overflow holding tank, a crucial and essential element, between them meant that at times of rainfall untreated sewage was discharged directly into the North Channel inland sea near the oyster beds. The Plaintiffs contended that this failure by the Council in practical terms to bring into operation a secondary waste water treatment plant before 30th June, 2000, went to the very root of the agreement under which the Plaintiffs compromised and agreed with the Council and the Minister to settle the first proceedings and this default deprived the Plaintiffs of the performance of a fundamental element of the agreement comprised in the Consent. As a result of this failure by the Council, the Plaintiffs were entitled to treat and have treated the agreement comprised in the Consent as at an end and as repudiated by the First and Second Named Defendants, which repudiation has been accepted by the Plaintiffs. Accordingly, the Plaintiffs say that they are entitled to continue the prosecution of the first proceedings and to seek the reliefs sought therein together with the further reliefs sought in these proceedings.

82. The Plaintiffs submit that since the date of the Consent on 26th November, 1996, the Council has continued to discharge untreated sewage into the sea at Rathcoursey Point causing contamination of the Plaintiffs' oyster fishery and the oysters harvested from the fishery. The Plaintiffs attempted to give their oysters extra cleansing time by holding them in ponds separate from the sea for six to eight weeks prior to final purification. But notwithstanding this, the number of complaints received by the Plaintiffs from people who had become ill after consuming the Plaintiffs' oysters increased and, by the date that the treatment plant should have gone into operation, the number affected had risen to 856 persons.

83. Paragraph 33 recounts how about 30th June, 2000, the Plaintiffs were invited to inspect the treatment plant at Midleton and were informed by the Council's agent that notwithstanding that the plant was not fully in operation, the sewage from the town of Midleton was being satisfactorily treated.

84. However, after the plant was in operation for in or about a month, it appeared that although the plant itself appeared to be giving good bacteriological results, the level of pollution where the sewage was being discharged into the sea at Rathcoursey Point was greatly in excess of the level set by the Second Foreshore Licence and was in breach of the express and implied conditions or, alternatively, fundamental terms of the licence. The Plaintiffs continued to receive complaints from persons who became ill having consumed their oysters. Having regard to the number of reported illnesses from such persons on 8th January, 2001, the Minister advised the Plaintiffs that there was a significant and real risk of illness due to viral infections to persons consuming the Plaintiffs' oysters and the Plaintiffs were advised only to sell oysters from production areas that would not present a similar risk. The Plaintiffs were requested to make immediate arrangements to effect this change with regard to all further consignments from the Plaintiffs' oyster fishery until test results indicated that the risk to persons consuming the oysters had been eliminated. The Plaintiffs were informed by the Minister that the Plaintiffs were obliged to take all appropriate measures to ensure the safety for consumption of their product and that the Plaintiffs should act as requested, notwithstanding the source or cause of any contamination. The Plaintiffs had no option but to comply with the Minister's advice and request. The Plaintiffs' oyster fishery remained closed from 8th January, 2001, until 27th July, 2001. The Plaintiffs say that the number of persons who reported with illness having consumed the Plaintiffs' oysters in the period since the commencement of the Midleton Sewage Scheme and furthermore since the date on which the treatment plant was required under the terms of the "Consent" to be fully in operation, now 955 persons, was radically different to the number of incidents of illness reported in the 18 years prior to the commencement of the said Scheme, since this number was only about 4 persons.

85. In December, 2001, there were very high levels of bacteriological indicators showing up in the Plaintiffs' oysters, although the sewage scheme including the storm overflow tank was now meant to be complete. Bacteriological indicators in the oysters remained dangerously high during January and by early February, 2002 27 people had reported illness in the United Kingdom and there had been a serious outbreak of illness in Hong Kong.

86. On 20th February, 2002, the Plaintiffs were directed by the Minister and by the Food Safety Authority of Ireland to cease harvesting oysters from Cork Harbour pursuant to the European Communities (Live Bi-Valve Molluscs) (Health conditions for Production and Placing on the Market) Regulations 1996 (S.I. No. 147 of 1996) as amended by the European Communities (Live Bi-Valve molluscs) (Health conditions for Production and Placing on the Market) (Amendment) Regulations 2000 (S.I. No. 390 of 2000). The Plaintiffs were further directed that no depuration of oysters brought in from outside the area should be undertaken by the Plaintiffs and that both the oyster beds and the depuration plant were to remain closed pending further Direction by the Minister. The Plaintiffs' allegation in the next paragraph, paragraph 36, may well have added significance in that the Plaintiffs in this case claim exemplary and aggravated damages over and above the usual restitutionary damages. Here the Plaintiffs' claim that despite their earlier repeated requests for information as to whether there had been any overflows of untreated effluent from the sewage system into the estuary, despite the terms of the Consent and the spirit of that agreement, including the schedule thereto, and the knowledge of the First and Second Named Defendants of the apprehensions of the Plaintiffs. Nevertheless, despite repeated requests it was not until 26th March, 2002, that the Council admitted to the Plaintiffs that there had been massive overflows of untreated effluent from their sewage system into the estuary. There had been 56 overflows since October, 2001. This was ten times the number certified in the EIS as possibly occurring in one year. From 21st January, 2002, to 3rd March, 2002, there had been overflows of untreated sewage every day. On 18 of these occasions these overflows had exceeded in a single day the total overflow envisaged and certified for a year. From 21st January, 2002, to 4th April, 2002, 70% of all oyster samples tested positive for human Norwalk Like Virus (NLV). The sorry saga went on. The Plaintiffs' oyster fishery was closed pursuant to the Minister's Direction until 26th April, 2002, the end of the native oyster season. Two tonnes of native oysters that had been dredged in anticipation of the fishery being opened, were sold in May but they had been stored for a long time and were weak and there were very large losses. The Plaintiffs were unable to sell any more of their stock from the beds after Christmas. Following further sustained rainfall in May, 2002 there was a report of two more people ill in London. The bacteriological results from oysters produced in this period showed that the beds had been grossly polluted. All seven samples tested in May for NLV were positive and the fishery was closed again on 21st June, 2002, by the Food Safety Authority of Ireland and the Minister, both for the sale of any production from the fishery and the sale of any shellfish brought in from outside for the purpose of depuration.

87. The Plaintiffs contend that they were unable to undertake any form of economic activity from their oyster fishery during these closures as both production and depuration of oysters brought in from outside in their tanks was banned on the advice of the Centre for Environmental, Fisheries and Aquaculture Science (CEFAS) at Weymouth in England. The fishery has been closed and appears likely to remain closed whilst almost any rainfall event of over half an inch (13mm) causes untreated effluent to overflow into the estuary and this has repeatedly caused viral contamination of the oysters.

88. At paragraph 41 the Plaintiffs contend that the Council has been in breach of the terms of the certificate issued by the Minister on 14th July, 1997, on foot of which the Council carried out the construction of the sewage treatment plant in that:-

1. The Council did not reduce the impact of the discharge on the water quality in the licensed oyster areas of the North Channel in the manner required by modification I of the said certificate.

2. The Council, its servants or agents, permitted the discharge of untreated storm water flows contaminated with faecal matter into the sea at Rathcoursey Point and failed to ensure that storm water discharged at the said location had been subjected to the full treatment provided at the treatment plant in breach of modification II of the certificate.

3. The Council, its servants or agents, failed, neglected and refused to ensure that a standard of 15mg per litre total nitrogen which was required by the Environmental Impact Statement to be achieved in the final effluent was actually achieved.

89. At paragraph 42 the Plaintiffs contend that the Council, its servants or agents, have acted in breach of express and implied conditions of the Second Foreshore Licence granted by the Minister to the Council on 22nd September, 1999. The Plaintiffs rely on the following breaches:-

1. In breach of Condition 5 of the licence, the Council did not provide the level of treatment necessary to ensure the quality of the effluent discharged into the sea as required by Condition 5. This Condition was imposed solely for the protection of the receiving waters in which the Plaintiffs' oysters grow. The geometric mean of faecal coliforms per 100ml of effluent discharged into the sea has never met the standard required by Condition 5 which requires that the geometric mean of the effluent must be 250f.c./100ml or less. By way of example, for the period from the commencement of the treatment plant on 30th June, 2000, to the closure of the Plaintiffs' oyster fishery on 8th January, 2001, the geometric mean of faecal coliforms per 100ml at Rathcoursey/Ballinacurra pump house was 38,209f.c./100ml and not 250f.c./100ml or less. Furthermore, 95% of the samples were not less than 1,000f.c./100ml. No one single weekly sample was below 1,000f.c./100ml.

2. The Council, its servants or agents, did not put in place a system whereby if analysis of samples showed that standards required by Condition 5 were not complied with, then the Council would at once comply with its obligations immediately to contact the Minister. The Council should have put an immediate programme in place to address the situation.

3. In breach of Condition 9 the Council, its servants or agents, did not ensure that any breakdown of the effluent treatment system was notified immediately to the Local Sea Fisheries Officers and Fish Quality Officers of the Department of the Marine and Natural Resources so that any risks to health from oysters consumed from the Plaintiffs' oyster fishery could be contained. The Plaintiffs believe that between December, 2001 and January, 2002, there were further breakdowns or malfunctions in the treatment plant which caused a further increase in pollution levels recorded in the Plaintiffs' oysters during this period and this led to the further reported illnesses in the United Kingdom and Hong Kong

4. In breach of an implied condition or alternatively a fundamental term of the licence, the Council, its servants or agents, did not ensure that the overflow to the river at Bailick Road Pump House was limited to 5 or 6 occasions per annum and that the volume of discharge would be limited in the region of 2,973m3 per annum (cubic metres). In the 59 days of January and February, 2002 there were overflows of untreated sewage on 45 days. The total volume overflowing in these two months alone was 138,654m3 which was 46 times the certified limit of the total annual storm overflow of 2,973m3.

5. In breach of a further implied condition or, alternatively, a fundamental term of the licence, the Council, its servant or agents failed to ensure that the faecal coliform numbers in the discharge at Rathcoursey Point was reduced by 4 orders (1,000 fold). In fact, in comparison to the accepted faecal coliform numbers that could be expected from a population of the size of Midleton, approximately 15.6 times 1012f.c./perday, the observed number in the final discharge to the estuary from the start of the plant until the first closure of the fishery on 8th January, 2001, was 3.2 times 1012f.c./per day, a reduction of a little less than 5 fold.

6. At paragraph 43, the Plaintiffs' complaint is that the Minister owed to the Plaintiffs a duty of care in relation to the compliance by the Council, its servants or agents, with the conditions of the Second Foreshore Licence granted on 22nd September, 1999, and with the terms of the undertaking contained in clause 4 of the "Consent". The Minister, his servants or agents, knew or ought reasonably to have known that in the event of any failure by the Council, its servants or agents, to comply with the conditions of the licence or with the undertaking given, that the Plaintiffs as the owners and operators of an oyster fishery adjacent to the appointed point of discharge of the effluent into the sea would suffer loss and damage. In addition both Defendants failed to take any adequate steps, although repeatedly requested so to do by the Plaintiffs, to relocate the outfall point from Rathcoursey Point to a location as far as possible from the oyster beds.

90. At paragraph 45, the Plaintiffs' claim that the Minister, his servants or agents, failed negligently and in breach of duty including statutory duty to protect the Plaintiffs' position by the terms of Condition 5 of the Foreshore Licence, in that while it was arranged that the inspection provided for in Condition 5 should take place, nevertheless the inspection chamber was sited in the wrong location and accordingly the inspection chamber was inadequate and inappropriate and insufficient to assess the quality of the effluent being discharged to the sea. I would observe that this would appear to be an important and contentious aspect of this case. On this the Plaintiffs say that the Minister, his servants or agents were negligent and in breach of the duty of care owed to the Plaintiffs and in breach of statutory duty in failing, neglecting and refusing, to take any adequate steps to ensure that the effluent quality required under Condition 5, and the steps required by Conditions 5, 6 and 9 and the implied Conditions pleaded of the Second Foreshore Licence were undertaken by the Council, its servants or agents.

91. The Plaintiffs' further complaints are that in causing or committing untreated sewage to be discharged into the sea at Rathcoursey Point subsequent to 26th November, 1996, when the Consent was executed and, without prejudice to the foregoing, subsequent to 30th June, 2000, by which date the Council was required by virtue of clause 4 of the "Consent" to bring into operation the Secondary Waste Water Treatment Plant, the Council, its servants or agents, have acted negligently and in breach of duty and are guilty of negligence at the suit of the Plaintiffs. Without prejudice to that the Plaintiffs say that, if the agreement whereby the Plaintiffs and the First and Second Named Defendants agreed to settle and compromise the first proceedings on the terms of the "Consent" is not at an end, or alternatively, has not been repudiated by the First and Second Named Defendants (which is denied), then the Plaintiffs maintain these proceedings to enforce the terms of the "Consent". Thus they say that in breach of clause 4 of the "Consent", the Council, its servants or agents, failed to bring into operation a secondary waste water treatment plant incorporating ultra-violet disinfection facilities on or before 30th June, 2000, and as a consequence of this breach, the Plaintiffs suffered and sustained loss and damage. Finally, the Plaintiffs say that the repeated closures of the Plaintiffs' oyster fishery were caused by the deterioration in the quality of the water due to the wrongful acts and omissions of the First and Second Named Defendants.

92. As for the defence of the First Named Defendant, there is a very real joinder of issues in that the defence in the main is a traverse. Certain paragraphs contain affirmative pleading and for ease of reference I will deal with them in conjunction with the reply to defence delivered by the Plaintiffs' solicitor on 24th January, 2006. For example, by way of special reply to paragraph 3 of this defence, it was claimed that the Plaintiffs' rights, if any, derive only from Oyster Fishery Orders which orders are permissive only the Defence and continue in this vein. The Plaintiffs reply by denying that the oyster fishery orders are permissive only or are in the nature of licences and further deny that they do not create proprietary rights or rights against third parties and do not restrict the permitted user of Cork Harbour and its waters by third parties. I note that at paragraph 4 the Plaintiffs are put on strict proof that the operations of their business are within the terms of the said Oyster Fishery Orders – inter alia, as to the location of their oyster beds. At paragraph 12 of the defence it is pleaded on behalf of the Council that if the alleged discharge occurred, which is denied, it is pleaded that it was committed in the performance by their Defendant of its functions as a sanitary authority. As one would expect, by way of special reply the Plaintiffs denied that the discharge of raw untreated sewage into the sea was committed by the Defendants in performance of functions as a sanitary authority and that the discharge was authorised by statutory rights. The plea that no action lies because of the nature of the discharge is predictably denied by the Plaintiffs. As to paragraphs, 15, 16, 17 and 20 of the defence, by way of special reply the Plaintiffs plead that the pollution of the Plaintiffs' oyster beds and the contamination of their oysters occurred as a result of the discharge of sewage by the First Named Defendant and not otherwise. The traverse continues until at paragraph 68 the Council claims to have acquired by prescription or by statute the right to engage in the actions complained of in the suit. Again, predictably, the Plaintiffs deny that the First Named Defendant has acquired, whether by prescription or by statute or otherwise, the right to engage in the actions complained of in the proceedings and plead that the First Named Defendant has no right to engage in those actions. At paragraph 72 the defence suggests that the court should deny to the Plaintiffs the equitable relief sought in that:

a) Damages are adequate

b) Such reliefs would work excessive hardship to the Defendants and those whom they represent.

93. By way of special reply to this, the Plaintiffs deny that the court should not give equitable relief in these proceedings and, without prejudice to this plea, they deny that damages are an adequate remedy for the Plaintiffs or that the grant of relief sought by the Plaintiffs would work excessive hardship to the Defendants or those members of the public or the population and businesses of the town of Midleton whom the Defendant allegedly represents. It was further denied in the reply that the matters alleged at paragraph 72 afford any basis on which the court should decline to grant any of the reliefs sought by the Plaintiffs.

94. By way of special reply to paragraph 75 the Plaintiffs deny that the loss and damage suffered by the Plaintiffs was caused or contributed to by reason of the alleged negligence on their own part. By further way of special reply to affirmative pleading in paragraphs 76 and 77, the Plaintiffs refuted suggestions that they failed to operate their business properly or to mitigate their loss and damage and by way of special reply to paragraph 78 they denied they were guilty of delay or acquiescence and joined issue with other allegations in paragraph 79, 80, 81 and 84 of the defence. In particular by way of special reply to paragraph 84 of the defence the Plaintiffs denied that they were not entitled by reason of the compromise of 27th November, 1996, to claim the relief sought in these proceedings. Furthermore, they denied that the First Named Defendant had performed the said agreement or that any alleged or purported performance by the First Named Defendant of that agreement was acquiesced in or accepted by the Plaintiffs or either of them.

95. The defence of the Second, Third and Fourth Named Defendants was delivered on 12th February, 2003; it was largely a traverse. For the purpose of ensuring that issues were joined between the parties, the Plaintiffs accepted my suggestion that a reply should be put in to the defence of the First Named Defendant and to the reply of the other Defendants so as to ensure clarity as to the issues joined. I propose to comment on only a few of the matters raised where this seems necessary. The first paragraph in this defence denies that the Second Named Plaintiff has suffered any personal loss and says that references to "the Plaintiffs" hereafter are without prejudice to the right of these Defendants to non-suit the Second Named Plaintiff. Predictably by way of special reply to paragraph 1 of the defence of the State Defendants, the Plaintiffs deny the suggestion that the Second Named Plaintiff did not suffer loss and damage. In paragraph 2 of the defence it is admitted that consent was arrived at between the Plaintiffs and the Defendant, on 26th November, 1996, by which the first proceedings were compromised. The Defendants, other than the Council, plead that the claims of the Plaintiffs for losses prior to the Consent are thereby merged in the Consent which was implemented by them. However, the Plaintiffs' reply denies that the claims of the Plaintiffs for loss prior to the Consent are merged in the Consent and denies that the Consent was implemented by the State Defendants. Besides the joinder of issues in the first paragraph of the Reply, there are thirty six denials of positive allegations made by the State Defendants so it may be taken that not only have most positive statements in the Plaintiffs' claim been denied but also most affirmative statements in the defence are in turn denied by the Plaintiffs and so I shall refer as necessary to the relevant pleadings in respect of the residual conflicts about discovery which have not been resolved. On three particular matters, Counsel for the Plaintiffs made their stance clear. Firstly he took strong issue with the Defendants' Counsel suggesting that the Plaintiffs "chose to close their oyster fishery." He reiterated that in no way had his clients chosen to close but were compelled to close their fishery in order to comply with the Minister's notices and directions. Secondly, he made it clear that the Plaintiffs' case had been treated on certain aspects on two alternative bases. The first alternative was grounded on the basis that there had been a fundamental breach of the Consent which had formed the basis and underlying premise for the compromise of the first proceedings and that the Consent had been repudiated by the acts, defaults and omissions by the Defendants. The second alternative was that, although the terms and conditions of the Consent had been breached by the Defendants, the Consent was still continuing in existence. Accordingly he submitted that the discovery of documents should be made on the basis of each contingency. This seems to me to be a pragmatic and economically sensible submission in that it takes cognisance of the two possible outcomes of arguments about the fundamental repudiation of the Consent or its continued valid existence. It seems perfectly feasible for discovery to be ordered or not ordered, as the appropriate case may be on a particular aspect, on the basis of the two alternative outcomes of the rival contentions firstly on that of the persisting continuance of the compromise or secondly by reason of the repudiation of the Consent. Certainly it is preferable that the judge dealing with the full action at the hearing should deal with this particular issue, if it is indeed still a live issue, after the hearing of evidence and submissions, if necessary, in the overall context of the hearing of the case. Furthermore, no motion has been brought by any Defendant seeking a preliminary issue about the status of the Consent. Counsel for the State Defendants did air and tentatively canvass the suggestion of whether a preliminary issue on motion should be brought as to whether, there having been an agreed settlement, this should act as an estoppel. However, no such motion was brought by any of the Defendants. Since the Statement of Claim was delivered on 20th August, 2002, in which the Plaintiffs had clearly pleaded repudiation by the Defendants of the Consent by their actions and omissions, with the further addition of the adoption of "a belt and braces" approach of an alternative to fall back upon, in the event that the Court were to decide that the Defendants had not repudiated the Consent and that at least certain of the terms agreed were still extant for the present purposes in relation to discovery. The proper approach would seem to be to focus on the pleadings and to adjudicate on the contentions in respect of discovery on the basis of the present pleadings before me. Counsel on behalf of the Plaintiffs made certain other points. The first was that the Certificate given by the Minister of itself does not authorise the commission of a nuisance. Furthermore, any development done under the auspices of a certification by the Minister must be done in accordance with the Certificate, otherwise the

developments would be in breach of the 1994 Regulations. He also made it clear that the Plaintiffs were claiming for nuisance both in the earlier proceedings and in these proceedings. Counsel for the Plaintiffs further referred the Court to clause 9 of the Consent and made the point that the earlier proceedings were to be adjourned generally with liberty to re-enter. He submitted that this was important because it indicated that it was contemplated that the Consent was not to be regarded as a final conclusion to the case or the contentions between the parties.

Submissions on behalf of the First Named Defendant

96. Counsel with great diligence has referred me to Order 31 Rule 12 as amended, the transcript of the decision of the Master on 15th December, 2004, relevant extracts from the Foreshore Act, 1933 and the European Communities (Environmental Impact Assessment) Regulations 1989 (S.I. 349 of 1989); and then also an extract from *Foskett on Compromise* (6th Edition), in addition to 20 cases of assistance on the matter of discovery of documents. He also has stressed the principle of relevancy in determining whether discovery should be granted in any particular case and in this context he has referred me to *Sterling Winthrop Group Limited v. FBA* [1970] I.R. 97, the *Brooks Thomas Limited v. Impac Limited* case, and the *Aquatechnologie v. MSAI* case as well as the summary of the general principles made by McCracken J. in *Hannon v. Commissioners of Public Works* which was approved by the Supreme Court in *Framus Limited v. CRH plc*. The passage which I have cited above from Hannon has all the characteristic clarity and simplicity of expression expected from McCracken J. and his phrases are a useful touchstone. In *VLM Limited v. Xerox* (Unreported, High Court, Clarke J., 25th February, 2005) Clarke J. at p. 5 said that he considered the relevant question is " … whether there are real grounds for believing that discovery of the category concerned might advance the Plaintiffs' case or damage the Defendants case." This involves identifying what are the core issues in the case. He points out that the mere fact of a matter being mentioned in the pleadings does not mean that all documents relating to that matter advance the Plaintiff's case or damage the Defendant's case. He submitted that there was a gradation of materiality of matters which are contained in the pleading. Documents in relation to some of these may materially advance the party's case, while others will not advance it to a material degree. Counsel referred me to a useful concept described as "the spectrum of materiality" which was used in *O Company v. M Company* [1996] 2 Lloyd's Rep. 347, which identifies certain degrees of materiality. He submitted that in terms of the spectrum of materiality it is only where discovery is expected to yield documents of "substantial or evidential materiality" that they will be discoverable. In *O Company v. M Company* Colman J. commented on the oft cited passage in the *Peruvian Guano* case cited above and approved by Fennelly J. in *Ryanair v. Aer Rianta*. At p.350 of the O Company case Colman J. said:-

> "The principle was never intended to justify demands for disclosure of documents at the far end of the spectrum of materiality which on the face of it were unrelated to the pleaded case of the Plaintiff or Defendant and which were required for purely speculative investigation. The excessively wide application of Lord Justice Brett's formulation of relevance has probably contributed more to the increase of the costs of English civil and commercial litigation in recent years than any factor other than the development of the photocopying machine. That formulation must not, in my judgment, be understood as justifying discovery demands which would involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation merely on the off chance that something might show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn. On the contrary, the document or class of documents must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of documents which in the ordinary *way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it in the broad sense which I have explained*. If the document or class cannot be demonstrated to be *clearly connected* to issues which have already been raised on the pleadings or which would in the ordinary way be expected to be raised in the course of the proceedings, if sufficient information were available, the application should be dismissed" (my underlining).

97. These comments of Colman J., while his phrase "substantial evidential materiality" uses long words, are another useful measure to add to the sets of criteria more simply expressed by Fennelly J, McCracken J. and Clarke J. Counsel for the County Council submits that there is a lack of particularity in the pleadings as to how or the manner in which emanations from the sewage system resulted in the food poisoning which are pleaded as the basis for the Plaintiffs' claim. He goes on to suggest that the vast majority of the categories sought by the Plaintiffs are highly speculative and do not relate to specific matters in the pleadings. He criticises the request for discovery of documents about the operation of the sewage system and details concerning the treatment plant and the Rathcoursey outfall as being tantamount to a fishing expedition. He makes a second point that the Plaintiffs' lines of inquiry are speculative and arguably unnecessary to advance this case as the Plaintiffs believe that contamination of their fisheries was directly linked causally with the operation of the sewage system by the First Named Defendant. For these purposes, he said, it was arguable that the Plaintiffs merely have to prove that contamination of their fisheries were directly linked causally with the operation of the sewage system by the Council. He went on to submit that it was arguably irrelevant how, why, or in what manner the sewage system allegedly failed. For this proposition he seeks to draw support from the judgment of the Master at p. 28:-

> "It is quite clear that if the Plaintiff has evidence of sewage, raw sewage, being discharged into the sea that he does not need to know why it was that the plant failed on any given day. It adds nothing to the Plaintiffs' case to determine that the reason it failed was because somebody switched the wrong switch or because a wall crumbled or whatever. There is no excuse, the Defendant can't offer an excuse that they sub-contacted it to somebody else or that they have an insurance policy which covers it or anything".

98. Perhaps it is best if I say straight away that in practice I do not think that the proofs in such a claim are as simple as suggested. A moment's reflection on the difficulties which the Plaintiffs encountered in the High Court in the case of *Hanrahan v. Merck Sharpe and Dome [*1988] I.L.R.M 629 might lead to careful consideration of the essential proofs required to prove that there were acts or omissions on the part of the Defendants which caused the tort of nuisance by the discharge of raw sewage into the North Channel and over the Plaintiffs' oyster beds. It should be recalled that Mr. Hanrahan lost in the High Court and that it was only the careful and deliberate proof in the High Court of all the constituent ingredients of the case which allowed the Supreme Court to come to the conclusion that the falling ill of the animals was covered by the principle of *res ipsa loquitur*, meaning the matter spoke for itself in that the problem had to be caused by an escape of toxicity from the pharmaceutical factory and not by other suggested and perhaps seemingly plausible reasons, such as poor animal husbandry, which explanations Counsel for the Plaintiffs had painstakingly negatived. In the present case Counsel for the County Council stresses that it is part of the defence of the First Named Defendant that, assuming that there was food poisoning, then there was no chain of causation which related this outbreak of illness to the sewage treatment plant. I suspect that Counsel used the phrase "arguably" no less than three times because he had reservations about the propositions when advancing the conclusions of the Master who stated apparently at p. 13 that:-

> "… the Plaintiff has no difficulty in proving that the authorities acted in the way he has alleged they acted. He doesn't need to prove why they acted in this way. His cause of action arises out of the fact that they did act in this way. Whether there was justification for such actions or not is neither here nor there. He certainly is alleging he suffered a loss as a result of such actions. The court will not enquire into why the actions were taken, nor will justification for the actions be a matter of enquiry by the court."

99. Counsel for the State Defendants has made crystal clear that he does not accept this thesis and indeed has gone surprisingly far in indicating that he may well argue that when a sanitary authority and the Minister are acting under legal powers to deal with sewage problems arising from the increasing population of a town, then they have considerable latitude. I should hasten to add that this seemed to me to be the substantial gist of his argument. However, I would have considerable reservations about any suggestion that a sanitary authority or even the Minister are protected from the commission of acts of tort whether of nuisance or of negligence or breach of statutory duty by reason of actions or omissions, unless there is some specific and unusual statutory protection and any such provision excluding liability for tort should be spelt out in the pleadings and not unexpectedly produced like a rabbit out of a hat.

100. In view of the traverses seriatim of the allegations in the Plaintiffs' pleadings by both Defendants, I have concluded that it is necessary to look closely at the pleadings in the case and what is admitted and what is denied before coming to conclusions about the necessity for and the relevance of and the proper scope of discovery in this case in respect of the several categories of document still in contention. It is expedient to consider the two submission which seem to be made at the same time, first that, even assuming that there was food poisoning, then there was no train of causation which related this to problems at the Council's sewage treatment plant; and secondly the attempt to make the submission that if the Plaintiff has evidence of raw sewage being discharged into the sea then he does not need to know why it was that the plant failed on any given day or whether there was any justification or exception from liability for such matters. I would venture to suggest that there may be an element of riding two horses at the same time in different directions in respect of this proposition, with the peril of falling into the mid-stream of a polluted river. The Defendants have put the Plaintiffs on proof of many matters on the pleadings. In this case by the very nature of the history of the case and the geography of the place, the Council and the Minister hold most of the reports, documents and records relevant to the design considerations which went into the planning and construction of the Midleton Sewage Scheme. Early in this judgment I quoted the wise words of Henchy J. in *McCarthy v. O'Flynn* where he gave a concise and lucid summary of the aims of discovery with its basis being to enable the party to learn, in advance of the trial, of the existence of the documents on which an opponent might rely at the trial. This ties in with what Finlay CJ said in *AIB v. Ernst and Whinney* [1993] 1 I.R. 375 to the effect that the basic reason for the procedure of discovery is to ensure as far as possible that the 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.

101. Having been given a legal thesis entitled "Discoverectomy" by a Texan judge on the need to cut down and to carve through demands for voluminous discovery, I should certainly be alert to obstructive and excessive demand and conversely to swamping, and the need to be astute to prevent the Plaintiffs seeking documents for speculative reasons or by merely making unsubstantiated allegations. I should also be careful to stress the need for the search to be diligent in respect of relevant records and documents so that the pertinent documents are included in the schedules to be included in and appended to the affidavit of discovery. However the careful drafting of the Statement of Claim and the clear themes set out based on a progression of acts by the Defendants leading to the very problems about which the Plaintiffs had forewarned them, are far from speculative reasons or seemingly unsubstantiated allegations. On the contrary a rather logical sequence of events seems to have been pleaded.

102. No doubt arrangements will be made between the solicitors so that the most pertinent documents are copied so that these can be checked against the originals and the lists in the schedules. Many of them will have to be copied in any event for the purpose of trying to agree books of documents for the trial.

103. One particular aspect of this case is that on the one hand there is a need for astuteness to prevent the expense of over-expansive discovery involving an unnecessarily wide search through files which are genuinely outside the periphery of relevance and necessity. On the other hand, in this particular type of case there is a very real need for the solicitors acting for the parties having to make discovery to impress on their clients the need for a diligent search through the computer records and files for each and every report, record, notebook or logbook, particularly with regard to salient records with regard to overflows and discharges of raw sewage and untreated effluent or of a mixture of untreated and treated effluent into the rivers which have their confluence at or near Midleton and which all flow into the estuary of the Ballinacurra River and the North Channel. I would draw particular attention to the words of wisdom about discovery stated by Henchy J. and Finlay C.J. quoted above and also the perceptive words of Fennelly J. about the balance to be struck between necessarily wide discovery and the need for careful diligence in ensuring that all necessary documents, records, including computer records, and other materials are properly included in the affidavit of discovery.

104. Counsel for the County Council has referred me to two further cases. In *Galvin v. Twomey* [1994] 2 I.L.R.M. 315, O'Flaherty J. sitting in the High Court, said at p.318:-

> "The point of discovery is to aid a party in the process of litigation; it is not to be invoked so as to enable a person to plead a cause of action which he is not otherwise in a position to do."

105. Secondly, Counsel drew attention to the case of *Carlow/Kilkenny Radio Limited v. Broadcasting Commission* [2003] 3 I.R. 528, in which, although it was a judicial review case related to discovery in general, Geoghegan J. observed at p. 536:-

> "On all the established English and Northern Irish jurisprudence on discovery and judicial review and, indeed, on our own jurisprudence in relation to discovery generally, the mere making of an unsubstantiated allegation will not entitle a party to discovery. Otherwise it would be quite simple to mount a 'fishing' exercise in almost any case. But it is particularly inappropriate in a judicial review application where the merits are not an issue."

106. While acknowledging the good sense of these observations, these two examples are of instances away at the far end of the spectrum of materiality. However, I am bound to add that there may be exceptions, for Counsel are likely to have encountered specific performance actions which have been launched by purchasers who believe that they had made an agreement to purchase a property and then found out that they did not possess a memorandum in writing sufficient to satisfy the Statute of Frauds and what they believed was a gentleman's agreement turned out to have been made with a vendor who was not a gentleman. Not infrequently in such cases a motion for discovery will on inspection produce the suspected and anticipated documentation which the vendor or his estate agent have brought into existence and which satisfies the requirements of the Statute of Frauds.

107. As for the second case, one can only agree with the comments of Geoghegan J. that the mere making of an unsubstantiated allegation will not entitle a party to discovery. This is particularly so in a judicial review application where defects in procedure are particularly in issue rather than the merits and equity of the case. Such an application for discovery, having no genuine basis in true facts, would appear to be a good example of a 'fishing expedition'. However, the situation in a judicial review application, where the Plaintiff has put forward no grounds or reasons for an unsubstantiated allegation, would appear to bear no comparison with or similarity to the facts in the present case. Counsel for the County Council submits that the Plaintiffs make a wide general claim that the operation of the treatment plant resulted in the contamination of the inland waters and the oyster beds and in food poisoning. He criticises this on the basis that this is a very general allegation and is not particularised so as to identify a specific defective aspect

of the design or operation of the plant or of the outfall at Rathcoursey Point. In the circumstances of the litigation between these parties this criticism of the Plaintiffs and their advisers seems to be unjustified. The Plaintiffs' Statement of Claim has all the hallmarks of clarity and careful comprehensiveness. The history of the oyster fishery in Cork harbour and particularly the fisheries in the North Channel is given chronologically and in admirably clear language. The reader is left in no doubt about the Minister's licensing of the oyster fisheries in previous decades, the establishment and the building up of the Plaintiffs' very successful business, their communications with the Council and with the Minister in respect of their apprehensions with regard to the Councils' plans for the discharge of raw sewage or untreated sewage from an outlet at Rathcoursey Point or other locations which they believed to be unsuitable. The pleading covers the construction of the pumping stations and pipeline and discharge outfall and then the catastrophic consequences which they allege have occurred with outbreaks of illness among the consumers of their oysters and the hugely damaging consequences for the business which the Plaintiffs, with their expertise and experience, had built up at Rossmore. The allegations in the Statement of Claim cover the sorry saga of their loss of the huge business they were doing in the London market and the success which they had had in opening markets for their oysters in the Far East. The perils to oyster beds from raw sewage and from treated sewage, when combined with untreated sewage from storm water tanks of inadequate capacity to cope with Irish rainfalls, have all been pleaded with considerable particularity. Of course, this is a case in which nearly all of the documents about the design and planning of the sewage system and the reports with regard to the likely effect on the marine environment are all in the possession of the County Council and of the Minister. This is a classic case for the application of the sage words quoted above of Henchy J. and Finlay C.J. The defences in this case are mainly traverses. In the earlier litigation between these parties there was a settlement on foot of which the County Council and the Minister between them agreed to pay no less than £500,000 in damages together with the Plaintiffs' costs Bearing in mind the similar origin and nature of the present claim, albeit the present claim is at an early stage and based on some different facts from the earlier compromised case, I suspect that the Comptroller and Auditor General would raise an eyebrow or two at the suggestion made that the Plaintiffs are engaged in a speculative claim based on unsubstantiated allegations. There is a further important factor in this case as to why the Plaintiffs are entitled to the documentation covering the inception, design and planning of this sewage scheme and the relevant reports and correspondence in relation thereto. This is not just a claim for restitutionary damages, for the Statement of Claim sets out grounds on which the Plaintiffs allege that they are entitled to both exemplary, aggravated and/or punitive damages. While in the past there may have been considerable overlap between these categories of damages, there has been a view, since the Law Reform Commission Report on Exemplary and Aggravated Damages, that it is preferable to use the phrase 'aggravated damages' in respect of the manner in which a party has conducted the proceedings, either in respect of the pleadings and the procedural stages or in the conduct of the trial, as opposed to exemplary damages, which are appropriate as a measure of disdain for, and to mark disapproval of the misconduct and insouciant wrongdoing of the tortfeasors. There are several allegations in the Statement of Claim which carry the implication that, if the Plaintiffs succeed on liability, then aggravated and exemplary damages could be a real issue in this case. By way of illustration in respect of this perception, I refer to paragraph 36 of the Statement of Claim which alleges that it was not until 26th March, 2002, that the Council, despite earlier repeated requests as to whether there had been overflows of untreated effluent from the sewage system into the estuary, only then at last admitted that there had been massive and frequent overflows of untreated sewage effluent into the estuary. The allegation is that there had been 56 overflows since October at last eventually admitted, which would be ten times the number certified in the EIS as possibly (at most) occurring in one year. From 21st January, 2002, to 3rd March, 2002, there had been overflows of untreated sewage every day. On eighteen of these occasions these overflows had exceeded in a single day the total overflow envisaged and given as the limit for a whole year in the Minister's certificate. It is further alleged that, from 21st January, 2002, to 4th April, 2002, 70% of all oyster samples tested actually proved positive for Human Norwalk-Like Virus (NLV).

108. Paragraph 41 details the alleged breaches of the Certificate issued by the Minister on 14th July, 1997, on the basis of which the Council carried out the construction of the sewage treatment plant. Further complaints were about how the Council failed to put in place a system to remedy the situation if analysis of samples showed that standards required by Condition 5 of the Consent were not being complied with by the Council's treatment system. Furthermore, the Council allegedly failed to notify the local officers of the Minister about breakdowns in the effluent treatment system thus exacerbating the risks to health from oysters consumed from the Plaintiffs' oyster fishery. Also, despite full knowledge of the perils to the oyster beds from the failure to take adequate steps to remedy the alleged nuisance and other tortious conduct, and despite repeated requests for information and remedial measures from the Plaintiffs, the First and Second Named Defendants persisted in failing to remedy their tortious misconduct and failed to relocate the outfall discharge pipe from Rathcoursey Point to a location away from the oyster beds. I should reiterate that the Council and the State Defendants have denied nearly all the allegations in the Plaintiffs' Statement of Claim and thus in the present state of the pleadings, the Plaintiffs have the onus on them of having to prove each and every one of the allegations in the Statement of Claim save for such rare matters as are admitted. I note this in passing and in the context of the observations of the Master and submissions of Counsel for the Defendant Council about the lack of need for discovery of documents with regard to why it was that the plant failed on any given day, if the Plaintiffs have evidence of raw sewage being discharged into the sea. The allegation at paragraph 32 of the Statement of Claim is met with a denial that a discharge of sewage, treated or untreated, has occurred at all and more particularly, that a discharge of sewage at Rathcoursey Point or near the Plaintiffs' fishery, or that contamination of the Plaintiffs' fishery or contamination of the Plaintiffs' oysters, has occurred. Furthermore, there is a denial that any contamination of the Plaintiffs' fishery or oysters was caused by discharge of sewage; in addition there is a denial that the Plaintiffs gave their oysters any extra cleansing as well as a denial that such extra cleansing was likely to be effective. In the light of the paragraph after paragraph of denials of the matters alleged in the Statement of Claim, it would seem that discovery of documents is vital for the purpose of Counsel for the Plaintiffs being able to study the records, documents and reports which must surely be held by the Defendants in respect of relevant matters from the point of view of being in a position to call for the relevant witnesses and the appropriate documents to prove those parts of the case which are dealt with in those documents, or to call upon the Defendants to admit the matters therein for the purpose of expedition in reaching the real live issues at the trial and also for the purpose of reducing the anticipated large cost of this litigation, if the Plaintiffs are forced by non-disclosure of the documentation to have to prove the case on the basis of their own limited documentation and the evidence of a string of expert witnesses. One might have thought that in view of £500,000 having been paid by way of damages by the Defendants pursuant to the Consent they would have been astute to the need for care. There are allegations in paragraph 36 to the effect that the Council, despite repeated requests from the Plaintiffs for information as to whether there had been overflows of untreated effluent from the sewage system into the estuary, at last on 26th March, 2002, eventually admitted that overflows of untreated effluent had taken place and that 56 overflows had occurred since October, 2001, being ten times the number certified in the EIS as possibly occurring in one year. The allegation is also made that from 21st January, 2002, to 3rd March, 2002, there had been overflows of untreated sewage every day. Perhaps it comes as no surprise that in paragraph 55 of the Council's defence such overflows are denied in every respect. It stands to reason in the light of the substantial damages already having to be borne by the ratepayers, because of the Council's default, and by the taxpayers in the light of the Minister's contribution which was hardly made if the Minister was blameless, that the Defendants would have carefully and diligently ensured that meticulous log books and records would have been made and preserved in respect of any further malfunctions, miscalculations or mishaps causing further discharges of untreated sewage or mixed untreated sewage and treated sewage and industrial effluent from the Rathcoursey Point outfall. It would be very surprising, if not incredible, that these records which should be in the possession and procurement of the First and Second Named Defendants, have not been preserved carefully and readily available for inspection by the Plaintiffs' solicitor, thereby enabling him to brief copies of these in due course to Counsel, when consideration can then be given as to whether notices to admit should be served and appropriate *subpoenae duces tecum* obtained.

It may be that once the Plaintiffs are aware of the documents listed and discovered and their contents, efforts can be made to reach agreement on certain factual matters to reduce the time and expense which has to be devoted to proving the ingredients of chunks of the Plaintiffs' case.

109. On reflection, the balance struck in and the perspicacity of the observations of Fennelly J. in the *Ryanair* case incline me to quote his observations on p. 277 as being a particularly helpful approach to the considerations involved in adjudicating on the relevance, necessity, convenience and practicality and other considerations involved in making an order for discovery. Having written the instructive passage setting out the change made in O. 31, r. 12 and practical matters to be considered, he then said in the context of the Ryanair case, continuing on from the passage on p. 277 of that case quoted above, in which Fennelly J. points out that the behaviour of the opposing party is relevant and illustrates this point by the example of the conduct of the Defendant Aer Rianta c.p.t. in that case:-

> "In the present case, I am satisfied that the Plaintiff has sufficiently specified the categories of documents in respect of which it seeks discovery, for the purpose of compliance with the rule. It does not follow that the court will not cut down the categories specified. It has also sufficiently verified that discovery of these categories is necessary for the fair disposal of the action and has complied with its obligation to give reasons why each category is required. I do not accept that the Defendant has shown that its discovery is not necessary. In particular, I reject that contention that Plaintiff has sufficient alternative means of proving the relevant facts to deprive it of its right to discovery. A notice to admit facts or documents is not a means of proof. It does not, I think, lie in the mouth of a party, which has denied almost all of the pleaded facts and put the opposing party to proof, to evade discovery by claiming that the facts can easily be proved. Competition cases have, as McCracken J. suggests in his judgment, the special features that any documents relating to anti-competitive behaviour, whether by being party to agreements or concerted practices or protecting a dominant position, are likely to be in the possession of the party engaged in that behaviour. Anti-competitive agreements or practices will be kept secret."

110. I place considerable reliance on the navigation beacons set out in the helpful passages written from the wealth of experience of Fennelly J. In the *Shellfish* case a comparison can be made with the competition case in that both Defendants in the oyster case have denied almost all of the pleaded facts and put the Plaintiffs to proof of nearly every conceivable matter and accordingly it does not lie in the mouth of the Defendants to evade discovery by claiming that the facts can easily be proved. At this stage they should have a very considerable knowledge of what documents they hold and, from the lesson which one would assume that they learned in the previous proceedings, one would expect them to have kept very full and comprehensive records of any and all discharges of untreated sewage, treated sewage and the mixture of both and any other pollutants, such as industrial toxins emanating from the sanitary scheme for which between them they have responsibility in respect of its design, planning and plant location, including the situation of discharge outlets and inspection chambers, and in particular the monitoring systems, the treatment tanks and the capacity for water storage and treatment particularly when the effluent is contaminated with untreated sewage.

Submission of First Defendant in respect of the Status of the Consent in respect of the Earlier Proceedings

111. Counsel for the First Named Defendant submits that the earlier proceedings were not pursued as a result of the Consent entered into between the parties which was received and filed in court by order of Laffoy J. on 27th November, 1996, with all parties being given liberty to apply. In the Statement of Claim in the present proceedings, the Plaintiffs allege that there was a failure on the part of the Defendants to comply with the terms of the Consent to the extent that there was a fundamental breach and a repudiation by them of the Consent agreement and the Plaintiffs allege that this repudiation entitles them to revive and continue their earlier claim. Counsel for the County Council rejects this proposition and relies on a passage from *Foskett on 'Compromise'* (6th edition), which states at page 151:

> "Given the normal meaning, purpose and effect of a compromise, the natural inference is that the common intention of the parties is that the compromise will henceforth govern their legal relationship in connection with the disputes in which they have been engaged and that, accordingly, those disputes would still be regarded as 'dead' even in the event of breach of the compromise. In the circumstances, it is submitted that recourse to the original claims will not be permitted unless, upon a true construction of the compromise, it is clear that this is what the parties intended."

112. He goes on to argue that it has been accepted by the Irish courts that where proceedings are settled, the original proceedings are superseded by the settlement which is a new contract. In *Taylor v. Smyth* [1991] 1 I.R. 142 Lardner J., in the High Court declared at page 156:-

> "It is also well established that where proceedings between parties are settled by an agreement to compromise, such as the Consent here, the agreement to compromise constitutes a new and independent contract between the parties made for good consideration and the original rights of the parties and causes of action become superseded by the compromise agreement: see *Green v. Rozen* [1955] 1 W.L.R. 741; *MacCabe v. Joynt* [1901] 2 I.R. 115; *O'Mahony v. Gaffney* [1986] I.R. 36."

113. The issue of whether there has in fact been a repudiation of the Consent settlement has not yet been determined and I agree, and have already decided, that this Court at this stage should not try to resolve the matter of whether there has been a repudiation and expend much time at this stage debating what the implications of this are during an application for discovery. However, the parties differ as to what the implications of this apparent and prospective impasse should be. The Plaintiffs have pleaded their case in the alternative and Counsel for the Plaintiffs have taken the stance that discovery should be made on the basis of each contingency, namely first on the basis that the Consent has been repudiated by both Defendants and also then, secondly, on the premise that the terms of the Consent have been breached by the Defendants but the Consent still has some continuing validity. Counsel also made the practical point succinctly that since the delivery of the Statement of Claim on 20th August, 2002, both Defendants have known about the dilemma facing them with regard to this pleading in the alternative and have chosen not to bring a motion in respect of any preliminary issue with regard to the Consent. Indeed, when Counsel for the Defendants were faced with the stark reality of this point, while Counsel for the State Defendants did air the notion that he might bring a motion for a preliminary issue in relation to this aspect of the Plaintiffs' claim, no such motion was brought despite the passage of time during which the hearings of these appeals were so vigorously fought, with intervals because the court and Counsel had other commitments at times. Counsel for the First Named Defendant submits that it would be premature and unnecessary to order discovery for any matter concerning the period before the making of the order receiving the Consent and furthermore that it would be inappropriate to put the Defendants to the trouble, delay and expense of making discovery in relation to matters which they contend should not form part of the proceedings. I agree with the suggestion that the tackling of the issues with regard to the status of the Consent is a matter for the trial judge and probably for directions at the start of the trial, if not before. However, I think that there are sensible and pragmatic reasons for the court at present to deal with the matter of discovery on the pleadings as they stand at present. Bearing in mind that similar discovery to a limited extent was probably made in the previous proceedings one would have thought that a part of the work of sifting through the

earlier records and files would already have been accomplished and that indeed, in the meantime, much of the documentation and records have probably been put on to computer, quite literally with regard to the issue of sewage treatment and sewage discharges from the Midleton Sewage Scheme since this has been the subject matter of litigation and of problems which were obviously on-going, at least from the Plaintiffs' point of view. To judge by the voluminous correspondence from the Plaintiffs, they have taken an active and continual interest in very properly reminding the Defendants of their fishery and their apprehensions about the contamination of their oyster beds by sewage, which they say has contaminated the fishery by reason of the nuisance and negligence and breach of statutory duty perpetrated by the Defendants by their actions and omissions.

114. I have come to the conclusion that discovery should cover both alternatives and eventualities at this stage as being the more economic and pragmatic way of dealing with the situation in this case. The previous conduct of the parties and the history of the success of the oyster fishery and the initiation of the Council's scheme to deal with the increase of sewage coming from Midleton were all part of the background to what then became, allegedly, a nightmare of contamination by raw sewage of the oyster beds with catastrophic consequences, as suggested by the Plaintiffs, for the pioneering enterprise of growing and exporting top quality oysters from Cork Harbour. From a practical point of view it could be argued that previous conduct is all relevant to whether negligence or nuisance on the part of the Defendants caused contamination by the release of sewage which was a continuing nuisance. The Plaintiffs claim the damage was caused by negligence, nuisance and the lack of proper design and operation of the sewage scheme and the continued insouciant disregard for the damage being caused to the Plaintiffs' business and for the appropriate protection of the marine environment, which presumably is a matter for the Local Authority being the sewage authority and ostensibly also presumably the monitoring and protecting authority in respect of a clean and safe environment in the County of Cork. I hope that I have made it clear that I think that it would not be appropriate for this court to take a preliminary view about the status or effect of the Consent and that it is preferable for this court to deal with the application for discovery on the basis of the present pleadings and to leave this particular issue to the trial court. However, I would be surprised if a party can settle on terms and then simply ignore the terms and leave a damaging nuisance (if this indeed is what has happened) and that this then would not be regarded as a repudiation of the basic terms of the Consent. I note that Counsel for the First Named Defendant submits that discovery was made on affidavit on 30th November, 1995, in the earlier proceedings and that this affidavit of discovery was made on foot of a general order for discovery and that the old dispensation (the former general order for discovery) effectively covered all relevant documents relating to the matters in issue in the proceedings and which are or have been in the possession, custody or control of the Defendants or either of them. Thus, much of the work of search and sift of records for the early period will have at least been partly done. However, these are new proceedings and the present discovery is related to the matters relevant to the present pleadings and the issues in contention therein and not to those matters as pleaded in the previous proceedings. I am sure that the solicitor for the County Council this time will carefully explain the essentials of the law about discovery to the official appointed to make the affidavit of discovery on behalf of the County Council. No doubt she will explain why documents produced under the Freedom of Information legislation do not at all suffice and certainly such an averment similar to that already made could have serious implications for the Council in the event that during the proceedings material but undisclosed documents turn up or are called for and it turns out that such records would be an important aspect of the defence case or of the Plaintiffs' case and they have not been included in the affidavit of discovery. The consequences of not including a discoverable document, which could reasonably be expected to be relevant and material to the opponent in proving their case or indicating a line of inquiry which could forward their case, or indeed even be relevant in a bid to counter and damage the defence of the party, on whose behalf the deponent is swearing the affidavit of discovery, then serious consequences can ensue. For example, no doubt the court will take cognisance that the First Named Defendant has supplied a significant volume of documents as suggested; however, I note that the Plaintiffs' solicitor at paragraph 4 of his second affidavit points out that the FOI requests were "to enable the Plaintiffs to ascertain whether the waste water treatment plant is performing correctly". I do not accept that the proposition that the giving of documents in response to an FOI request can be regarded as a substitute for the schedules which must be made out carefully, bearing in mind relevance and materiality to the issues in the pleadings and then also with the contents being attested to on a sworn affidavit. I note the submission by Counsel for the First Named Defendant stating that an enormous amount of information, which has been verified on affidavit, has already been supplied to the Plaintiffs. I am unclear as to what "enormous amount of information" he is referring and as to the specific reason why it was given and the nature and reason for and the manner in which the verification of this documentation was made. Perhaps the crux of this aspect is put by the questions as to whether these documents were subjected to the criteria for making discovery of documents and whether they were listed in schedules as required by an order for discovery or were they merely bundles handed over under the heading of some general request or reference? The problem with any such informal handing over of documents is that if a serious problem arises during the trial as to whether a document has been included in a sworn discovery affidavit and it turns out that it has not, then what are the consequences of this non disclosure? There is also the problem that the handing over of voluminous documentation which is not subjected to the rigorous discipline of a discovery affidavit, with careful listing of described documents, may well lead to the swamping of the party receiving such documents. In short the handing over of massive documentation, whether under a Freedom of Information request or otherwise, may be unhelpful and leave the recipient trying to sift through a haystack of material looking for the needle of significant relevance to the case. This is why the sieve of "material relevance" to the issues, which is implicit in the discovery process, is essential. Counsel for the First Named Defendant also draws attention to the fact that wide ranging discovery has been sought by the Plaintiff against the other Defendants and that some of these categories against his client would more appropriately be sought against these other Defendants and that this constitutes a source of unnecessary duplication. I doubt if this is realistic. The Plaintiffs have the onus of having to prove their case against each Defendant and the onus is on them in proving a particular point against each Defendant. It may be necessary for the Plaintiffs to call on each of these Defendants to produce the very same correspondence between them but is this necessarily duplication from the Plaintiffs' or the court's point of view? Surely not in circumstances, for example, where the Plaintiff has to prove that each of the Defendants is aware of the contents of a fantastical, hypothetical report which might contain the views of a leading marine engineering and tidal expert, who at an early stage of the planning and design of the Midleton Scheme was asked to investigate the currents in the estuary of the rivers flowing from Midleton into the North Channel, and also the effects of the tidal currents coming from Rostellan Bay up the East Ferry Channel and the Ballinacorra River past Rathcoursey Point and also their confluence and the tidal and estuarine currents in the North Channel and then perhaps the expert also answered the simple question as to where raw sewage from the discharge outlet is likely to go and to cause contamination of fisheries in the vicinity. I have of course chosen an extreme example to illustrate this point that it would be a vital and basic proof showing. That each defendant was aware of the contents of the Report and could obviously have foreseen the pollution of the oyster beds. If the marine expert then reproduced the whole area of Cork Harbour and the North Channel and the estuary of the Owenacurra and Dungourney rivers in a large tank with models of topographical features and appropriate winds and currents as they tended to exist at the time long before any choice of location or construction had taken place, then the results of the marine expert's tests could be very significant. By way of further elucidation, if his report contained an account of how he placed oranges in the water being discharged from an outfall at Rathcoursey Point with coloured red water coming from there together with the oranges which then were inexorably taken by the currents and prevailing winds straight across to the oyster beds in the North Channel belonging to the Plaintiffs, would this not be significant material for discovery? If, because of this, his report contained his view that such an outfall would indubitably contaminate the molluscs in the North Channel and would have poisoned the people who would consume them in the future, then surely this would be a proof that both and each of the Defendants were well aware of the peril of going along with such an intended design for the sewage system of Midleton with such an outfall into the greater Cork Harbour and its inland sheltered North Channel waters so ideal for oyster farming. I reiterate that I have illustrated this point by selecting an

extreme fictitious example. Of course, if such a report did exist then one would expect such a document to be prominently produced in the affidavit of discovery and clearly described so that the significance of the contents are not concealed by confusing label or by subterfuge. Incidentally while computer systems no doubt now simulate the currents and tides in mock-ups in such practical experiments, perhaps the tank and reconstructions of the features of the estuary of the Liffey and the currents between Ringsend and Howth Harbour would have pleased the ghost of Captain Bligh, the cartographer of Dublin Bay, and it might even have amused the ghost to note the oranges released at Ringsend floating on wind, tide and currents across into Howth Harbour under one particular configuration of the currents and forces of nature in such a tank one evening about 1966!

115. Counsel has cited *Simba-Tola v. Elizabeth Fry Hostel* [2001] E.C.W.A Civ 1371, where there was an allegation by the claimant of racial discrimination against her. Ms Simba-Tola lived in the Fry Hostel. The hostel had disclosed their file on the claimant together with the hostel logbook recounting daily incidents, and a notebook and message book. The claimant sought disclosure of the hostel files on other residents to see whether the incidents were noted on those files. The Recorder, Mr Hungerford, sitting at Oxford County Court, observed that the log book recounts day-to-day occurrences including incidents involving particular persons in the probation hostel and these were duplicated enough in the message book, log book and note book already disclosed and that matters in the personal files would not contain any additional matters of relevance and also contained matters which were highly confidential. Counsel suggests that the Court of Appeal held that it would be not be proportionate to make an order for disclosure which would result in duplication. My reading of the decision of Keene L.J. is different. He quoted the Recorder, who had read the appellant's own file and the log book, message book and note book already disclosed and who had then said "in this case it seems to me that the relevance of the material is highly questionable, and duplicated already sufficiently by the message book, log book and note book already disclosed, and, furthermore, these matters are highly confidential, on people who in most cases are undergoing or have undergone hard times in their lives…". Keene L.J. then at paragraph 22 said: "It would not be proportionate to order the disclosure and inspection of documents which, in so far as they are relevant at all, very largely duplicate what is already available". He further stated on paragraph 27:- "… I do not read the judgment below as finding that there was any additional relevant information likely to be in those files. The confidentiality of the information appears to have been an additional reason for the Recorder's decision. It is enough for present purposes that the personal files sought would be unlikely to add to the information already available." It seems to me that this is the true ratio decidendi and that the situation in the oyster case is very different, bearing in mind the distinction between documents given in response to an FOI request and documents given in compliance with a formal order in discovery procedure. Counsel submits that if the court here were to order discovery of categories of documents which had been dealt with in the FOI request, then this would amount to duplication and would be disproportionate. I doubt whether this is correct as it seems that there is a basic difference for reasons already stated about the distinction between an FOI request in both purpose and procedure and the formal discovery procedure and the implications for diligent "search and sift" and the dire consequences for nondisclosure and concealment. If the documents are relevant and material and accordingly necessary, then they must be listed in the schedule, in the affidavit of discovery. No doubt those with experience in dealing with complicated discovery have ways of referring to files in the schedules to reduce complexity and complications and to ensure that the relevant and material documents located on a diligent discovery search are properly, clearly and methodically listed and made available for inspection.

Criticism of the failure of the Plaintiff to pinpoint documents and to give reasons suggested by Counsel for the County Council

116. Counsel for the First Named Defendant stressed that one of the changes brought about by S.I. 233/99 is the express requirement "to specify the precise categories of documents" and to give reasons why such categories of discovery are sought. In *Swords v. Western Proteins Limited* [2001] 1 I.R. 324 Morris P. at p. 328 held that the 1999 rules imposed:-

> "[a] clearly defined obligation upon a party seeking discovery to pinpoint the documents or category of documents required and required that party to give the reasons why they required. Blanket discovery became a thing of the past. The new rule was brought into being to ensure that in the first instance that the party against whom discovery was being sought would, upon receipt of the preliminary letter, be in a position to know the document or category of documents referred to and be able to exercise a judgment on whether the reasons given for requiring these documents to be discovered was valid."

117. This passage was approved by the Supreme Court in *Burke v. D.P.P.* [2001] 1 I.R. 760 and it was also cited in *Ryanair plc v. Aer Rianta*. Indeed in *Taylor v. Clonmel Healthcare Limited* [2004] 1 I.R. 169, Geoghegan J noted at p. 181 that:-

> "Under the amended rule, there is a preliminary requirement that the applicant shall have previously applied by letter in writing requesting that discovery be made voluntarily, specifying the precise categories of documents in respect of which discovery is sought and furnishing the reasons why each category of documents is required to be discovered, then a reasonable time for discovery has to be allowed and thirdly, there has to be a failure, refusal or neglect to make the discovery or an ignoring of the request."

118. Counsel submits that there has been a failure to pinpoint several categories of documents with sufficient precision so as to comply with Order 31 rule 12 as amended. He submits that some of the categories of discovery are drafted in such a broad manner as to breach Order 31, rule 12 as amended, while for other categories there are insufficient reasons given. My initial reaction to these submissions is one of surprise as my strong impression had been that the drafting of the Statement of Claim was clear, logical and concise as well as being comprehensive, and my perception of each of the letters, dated 16th December, 2003, seeking voluntary discovery was that they were well set out and gave cogent and convincing reasons founded appropriately in the pleadings. However, much good work has been done by Counsel and Solicitors and the parties since they locked horns in the Master's Court on these discovery issues. Indeed it is interesting to note the progression of the discussions which led to the series of documents handed in during the hearings which mark the progress of the emergence of consensus on an increasing number of categories as the matter went on. This can be observed from an inspection of the categories of discovery consented to and marked Alpha, Beta, Gamma, Delta and Epsilon in Appendix 2, which sets out the sequence of agreed categories of discovery in the progression of consensus.

Agreed categories of documents

119. As can be deduced from a look at the categories of documents to be discovered as consented to by the First Named Defendant's Counsel before the Master's Court and the progression afterwards of documents whereby Counsel for the Plaintiffs and Counsel for the First Named Defendant clearly expended time, deliberation and negotiation on trying to tease out progressively more and more agreed categories of documents during the constructive intervals between the conflicting arguments being addressed in court. Much progress has been achieved by discussion but a hard core of paragraphs remain in dispute. In deference to the reasons which I was informed were given by the Master for his order and to explain the case law and reasons on which I base my conclusions, I intend to set out the rationale for the decision I have reached and the factual basis for the orders made.

120. I propose to concentrate on the most recent memorandum containing a list of the agreed categories of documents which is to be found in Appendix 2 document E/Epsilon. This document will be relevant from the point of view of the order to be made by this

court. The agreed categories of documents are to be found in paragraph (a), paragraph (c), paragraph (d), paragraph (f) paragraph (h), paragraph (i). paragraph (j), paragraph (k), paragraph (l), paragraph (m), and paragraph (n).

121. The contents of these paragraphs is important as being likely to form the basis for the court order regarding discovery. Such concessions as have been eventually made by the First Named Defendant should in reality have been made at a much earlier stage on the basis of the issues made and matters put on proof by the Plaintiffs by the contents of the defence.

122. Category (g) is no longer sought by the Plaintiffs.

Categories not agreed (final text of such catagories)
123. There are left five paragraphs for adjudication by the court. These are the categories in paragraph (b), paragraph (e), paragraph (o), paragraph (p), and paragraph (q).

124. I propose to take each paragraph separately and in sequence, and I shall endeavour to try to set out what has been said in the relevant affidavits with the reasoning therein and then the gist of the submissions of Counsel and I would propose then to reach appropriate conclusions.

Category "b"
125. "Final Text of paragraph (b) as not agreed between Counsel for the Plaintiffs and Counsel for the First Named Defendant

> "(b) All documents comprising notes, memoranda, reports, correspondence and any other documentation howsoever described concerning the initial choice by the First Named Defendant, and also the retention of the location of the sewage outfall point at Rathcoursey Point near the Plaintiffs' oyster fishery both following its commission in 1988 and for use after the construction of the waste water treatment plant, including (but not limited to) all investigations carried out into alternative discharge sites and all or any complaints made to the First Named Defendant, its servant or agents, concerning the location of the said sewage outfall point."

126. I am concerned about ambiguities in this draft. After consideration it would seem best that I should set out what I understand to be the intended scope of this paragraph on the understanding that the text discussed by Counsel has not actually been agreed. I think it preferable that I should work on a text which lacks ambiguities and of which I hope that at least I have an understanding of the meaning of this text. If the sense of what I have drafted is equivocal or still ambiguous, I shall in any event be seeking the assistance of Counsel in respect of the implementation of the decision taken in this judgment, particularly with regard to the appropriate wording of each of the paragraphs of the order to be made and so I make it clear that the working draft of paragraph (b) is not written in stone. I suggest that it should read:-

> (b) All documents comprising notes, memoranda, reports, correspondence, or any type of memo or notebook or record of any sort and any other documentation howsoever described concerning:-
>
> 1. The initial choice by the First Named Defendant and also
>
> 2. The retention by the First Named Defendant of the location of the sewage tank and outfall discharge point at Rathcoursey Point near the Plaintiffs' oyster fishery both:-
>
> (A) following the commission of the outfall, sewage tank and the outfall discharge pipe in 1988 and
>
> (B) concerning its use after the construction of the waste water treatment plant, including (but not limited to)
>
> (C) all investigations of any type carried out into alternative discharge sites and
>
> (D) all or any complaints made to the First Named Defendant, its servants or agents, concerning the location of the said sewage outfall point.

127. In his first affidavit sworn on 5th April, 2004, in this application, the Plaintiffs' solicitor explained that, having received the defences of the Defendants, he consulted Counsel and they formed the view that there were certain categories of documents, relevant to the issues raised in the pleadings, which it was necessary that the Plaintiffs obtained by way of discovery for the further processing of the claim and to save costs. He accordingly sent the letters dated 16th December, 2003, seeking voluntary discovery. At 2 in that letter he set out the original text as set out at (b) above, and then he gave the reasons as below.

Reasons

> "The documents described in this paragraph are relevant to matters at issue in the proceedings. As is pleaded in the Statement of Claim, the Plaintiffs and others objected to the granting of the First Foreshore Licence in November, 1982 under which the First Named Defendant, its servants or agents, commenced the discharge of raw untreated sewage into the sea at Rathcoursey Point at some time in or prior to December, 1988 when the Midleton Sewage Scheme was officially opened. The Statement of Claim pleads that objections were made by the Plaintiffs and by others and that the Plaintiffs made representations in relation to the serious deterioration in water quality as result of this discharge of raw untreated sewage into the sea under the Midleton Sewage Scheme. Notwithstanding the earlier proceedings brought by the Plaintiffs which resulted in the execution of a Consent (the terms of which are described at paragraphs 17 and 18 of the Statement of Claim), and notwithstanding the ongoing difficulties being experienced by the Plaintiffs' oyster fishery, the First Named Defendant applied to the Second Named Defendant for the Second Foreshore Licence which was granted by the Second Named Defendant to the First Named Defendant in September, 1999. Further and ongoing problems were experienced by the Plaintiffs as a result of the continued discharge of untreated or inadequately treated sewage into the sea from the outfall point at Rathcoursey Point. Following the location of the outfall point to Rathcoursey in 1988, the Plaintiffs experienced and continued to experience serious outbreaks of illnesses in consumers of the Plaintiffs' oysters. *The First Named Defendant was aware of those difficulties the Plaintiffs having advised them both verbally and by correspondence at all time of the difficulties concerned.* The Plaintiffs objected to the retention of the outfall at Rathcoursey. However, despite the Plaintiffs' pleas and objections, the outfall was never relocated and was further licensed by the Second Named Defendant as the outfall for the effluent from the waste water treatment plant under the Second Foreshore Licence. Documents concerning the retention of the location of the sewage outfall point at Rathcoursey point are, therefore relevant to matters at issue in the proceedings. Furthermore, it is necessary that the Plaintiffs obtain discovery

of these documents for the fair disposal of their claim. The Plaintiffs have no means of obtaining access to such of these documents as are in the possession, power or procurement of the First Named Defendant, its servants or agents, other than by way of discovery. Furthermore, discovery is likely to result in a saving as to costs for the reasons outlined in category 1 above."

128. My initial reaction is that this request goes to the very heart of the issues and indeed should include "and the documentation or computer records and all results of experiments and tests carried out in respect of the currents, tides, winds and other features likely to affect the discharge of sewage from Rathcoursey Point including the flow of the Midleton rivers into the estuary and the North Channel below Midleton". Counsel should consider this addition and whether such documentation is already embraced and included, as it seems very relevant and it would be embarrassing for all if such material were not disclosed, with its omission leading to and causing delay and expenses in the trial.

129. I turn now to the contention of Counsel for the First Named Defendant suggesting these are background matters in (b) which are insufficiently linked to the pleadings. He breaks down this category for the purpose of his argument into four sub parts:-

(a) Concerning the initial choice by the first Defendant of the location of the sewage outfall pipe at Rathcoursey Point;

(b) The retention of the location of the sewage outfall pipe at Rathcoursey Point near the Plaintiffs' oyster fishery following its commission in 1988 and concerning its use after the construction of the waste water treatment plant;

(c) Including (but not limited to) all investigations carried out into alternative discharge sites; and

(d) all or any complaints made to the First Named Defendant, its servants or agents concerning the location of the said sewage outfall point.

1. I have already decided to the contrary on the First Named Defendant's submission that it is not appropriate for the Plaintiffs to obtain discovery for any period prior to the Consent which settled the earlier proceedings in 1996. Accordingly all such relevant and discernable documentation prior to the Consent is to be covered in discovery.

2. The second submission is that the documents sought in this category relate to the Rathcoursey outfall which was constructed in 1988. Counsel argues that since the First Named Defendant granted comprehensive discovery in the first proceedings in November, 1996, "it is not possible for the Plaintiffs to obtain discovery for any period prior to this". I do not accept this proposition. The fact that discovery was granted in a previous set of proceeding between the same parties may greatly assist the Defendants in making the discovery on foot of the different pleadings in this case but the search must be conducted and discovery made in the light of the pleadings in the present case and the fresh issues in contention therein.

3. The third point is that category (b) overlaps with category (n) which the First Named Defendant is now consenting to give and which discovery includes all documents concerning:

> "The extent of the consideration (if any) given by the First Named Defendant, its servants or agents, to the likely impact or effect on the Plaintiffs' oyster fishery of the location of the outfall point at Rathcoursey Point and of the waste water treatment plant and the location of the outfall point at Rathcoursey Point."

Counsel for the First Named Defendant rightly points out that this description in (n) is more specifically related to the Plaintiffs' own fisheries. He also suggests that this category overlaps with category (a) concerning types of discovery to which the Defendant is also consenting. It seems to me that category (a) has a different scope and concentrates on the First and Second Foreshore Licences and covers the much wider spectrum of construction being "a licence to use and occupy part of the foreshore at Midleton and Ballynacorra River, Midleton for the purpose of laying, using and maintaining foreshore crossings, domestic rising main, outfall pipes, pumping stations, storm water outfall and overflow pipes thereon in connection with the Midleton sewage scheme to include the licences themselves."

If there is some minute overlap then the experienced solicitors acting for the parties can deal with this in a pragmatic way by making clear that certain of the documents included in (a) are relevant to both categories so that there is no unnecessary duplication of work. However, I should warn that where this is done then the solicitor superintending the making of discovery should be alert that no relevant document, which includes material computer records and models, such as tank tests with replication of the tidal and river estuarine flows and prevailing winds at the relevant locations, is left out and not listed. It is quite clear that category (a) is of much wider scope and that, as Counsel for the Second Named Defendant has pointed out, category (b) is more specific about the initial choice of Rathcoursey Point by the First Named Defendant and then again it is more specific about the subsequent choice of the retention of the location of the sewage outfall pipe at Rathcoursey Point near the Plaintiffs' oyster fishery, both after the commission of the outfall in 1988 and then again about the choice to continue to use it after the construction of the waste water treatment plant. There is also the very relevant aspect of discovery in respect of all investigations carried out into alternative discharge sites and finally also about the aspect of complaints made to the Council about the location of the sewage outfall pipe at Rathcoursey Point. The Defendants are sued not only in nuisance by also in respect of negligence and breach of duty, including statutory duty. The Defendants are sued for having committed these alleged torts which involve the proof by the Plaintiffs of nuisance and negligence and breach of statutory duty on the part of the Defendants. This suggestion of blameworthiness may perhaps be ascribed to negligence or to insouciance or recklessness on the part of the Defendants in not giving proper care and consideration to the implications of their siting of the discharge outfall near the Plaintiffs' oyster fishery in the enclosed seas of the North Channel. Where did they think that the contaminating sewage would go other than across and over the oyster beds? Whether and what investigations did they do with regard to alternative ways of disposing of the sewage or of treating the sewage so that it would not affect the flourishing oyster fisheries in the North Channel? This is surely highly relevant and necessary information from the point of view of the proofs required on foot of the pleadings in this case, particularly the contents of the Defences.

4. I do not accept the submission that this category of documents is too remote or that the only issue is whether the system contaminated the Plaintiffs' oysters or that it is irrelevant as to why the First Named Defendant decided to locate the outfall at Rathcoursey Point and then later to retain that location. I reiterate that the Plaintiffs had

sued for negligence and breach of statutory duty and maintained consistently in correspondence and in the pleadings that the Defendants designed and put the discharge outlet in the completely wrong place where it was obvious that it was likely to pollute the oyster beds and thus to poison both the oysters and their consumers, the Plaintiffs' customers. I have already outlined why I respectfully disagree with the reading of the pleadings which Counsel for the First Named Defendant ascribes to the Master of the High Court. I prefer to follow the sensible suggestion of Counsel for the the State Defendants, being that I should focus on the actual pleadings to assess what discovery of documents is within the ambit of necessity and relevance.

5 Counsel's point on behalf of the First Named Defendant that the EIS relates to the construction of the waste water treatment plant and that this is a very lengthy document which addresses all issues in relation to the construction of the waste water treatment plant may well be correct but I do not comprehend why the length of the EIS is material to an objection to making discovery which involves the listing of documents in the procurement of the Defendant relevant and material to the matters in issue and to such things which have to be proved by the Plaintiffs on the pleadings. It is a very simple task for the deponent of the affidavit to ensure that these documents are listed in the appropriate schedule and, no doubt if the Plaintiffs already have all of them, then they are unlikely to request to be given copies of them since they already have them.

6 The point seems to have been made in the affidavit of Seán Ó Breasail, Senior Engineer with the Council, that the Plaintiffs already have copies of the EIS as to the Foreshore Licence applications and the addendum to the EIS and that these documents set out the County Council's reasons for choosing the Rathcoursey Point for the outfall and that apparently the assessment of alternative sites is included. The objection continues by saying that although the EIS is not exhibited in the affidavits of discovery, nevertheless this does not matter as by the Second Schedule of the European Communities (Environmental Impact Assessment) Regulations 1989 the mandatory content of an EIS is set out which includes at paragraph 2(c) "A description of the likely significant effects direct and indirect, on the environment of the development, explained by reference*, inter alia* to human beings, flora, fauna, soil, water, etc." While it is interesting to know that the matters sought in this category for discovery are the very questions which are designed to be addressed as part of the EIS process and would "clearly encompass the Plaintiffs' fisheries", it should be understood that what the Plaintiffs are seeking at this stage of the process are the listing of the categories of documents in the possession or procurement of the Defendant to be set out in schedules as required by the discovery procedure. The fact that the Plaintiffs may already have a document is not the point or to the point. What the Plaintiffs require is that the deponent nominated by the Council swears a comprehensive affidavit setting out each and every document included in the category of documents ordered to be discovered which means listing them in the schedules of documents so that these may then be inspected in an arranged and orderly manner. In this particular case this is especially important in the light of what appears to be misunderstandings expressed in the previous affidavits sworn by Seán Ó Breasail on behalf of the Council as to what is the purpose of and what is involved in the making of proper discovery, particularly with regard to his suggestions that the Plaintiffs do not need certain documents. The depth of misunderstanding is obvious from the fact that most of these documents quite frankly are clearly relevant on the issues in the pleadings and should be listed. No doubt the solicitor for the County Council will be alert to the need for careful explanation of what is required in the diligent search, sifting and listing of all the pertinent documents to reduce or eliminate the peril of further misunderstanding of the requirements of the discovery procedure and she should explain the startling implications of a failure in compliance. It is essential that there is compliance with the terms of the order with regard to category b) as these matters go to the core of the case as pleaded. I refute the suggestion that "where the matters sought in the category are matters which are ventilated as part of the formal and public statutory process, which documents the Plaintiffs had available to them, any other documents sought are unnecessary" as being simply an incorrect description and a wrong construction of the law with regard to discovery and a recipe for inadequate, misleading and incomplete discovery. Of course all the relevant documents within the category must be listed in the schedule so that there is the assurance of a sworn affidavit as to the comprehensiveness of the list of documents in the schedules. It is an entirely different matter whether the Plaintiffs' solicitor, after reviewing the list of documents and having inspected the documents selected for inspection after arrangements in this respect, should then seek copies of the documents. No doubt both solicitors would wish to cut down on the volume of copying to be done and so will avoid duplication of documents already in the Plaintiffs' possession but this does not discharge the deponent from the duty of including in the schedule the comprehensive list of material documents held. The other documents sought which are labelled "unnecessary" by the Council may well be the very documents which the Plaintiffs should be entitled to have listed, and which are the documents the plaintiffs will request to inspect and if necessary to take copies. Furthermore these records might well assist Counsel and Solicitor for the County Council to pick up the point made by the Plaintiffs' solicitor that the documents referred to by Mr. Ó Breasail namely, the preliminary Report, Environmental Impact Statement, Foreshore Licence applications and addendum to the environmental impact statement do not adequately disclose any documents or plan to safeguard the oyster beds or documents justifying the initial choice by the Council of the location of the sewage outfall point at Rathcoursey Point and the subsequent retention of that discharge pipe as the outfall point after the construction of the waste water treatment plant. By way of example, p. 1 of the introduction to the addendum to the EIS states that:-

> "A meeting was convened with the Department of the Marine to ascertain various impacts which they felt could also be of concern."

130. Counsel went on to say that the Plaintiffs believe that documents concerning that meeting or similar meetings outlined in correspondence between the Council and the officials of the Department of the Marine are likely to be highly relevant and are omitted from and simply not covered by the reports and documents to which Mr. Ó Breasail refers. Moreover there is no reference to the word "oyster" in the addendum to the EIS prepared in respect of the Second Foreshore Licence. Nor is there any mention of the words "oyster" or "virus" in the applications for the Second Foreshore Licence or in the addendum to the EIS. While the word "virus" does appear once in the EIS itself, it is in another consultant's report prepared for M.C. O'Sullivan, the Council's engineers. That reference states that "the impact of bacteria/viruses on the shellfish cultivation in the North Channel area will be considered in a separate report". However, in the separate report (prepared by M.C. O'Sullivan) the word "virus" is not used. Therefore, the primary reason for the waste water treatment plant being required, namely, the impact of viral infection from sewage from the oysters does not appear to have been considered at all in the documents to which Mr. Ó Breasail refers. The Plaintiffs are clearly entitled to know whether there are any other documents in which that impact was mentioned or considered whether in relation to the location of the outfall point or otherwise. Mr. Martin went on to confirm therefore that the Plaintiffs do require discovery of the documents requested in paragraph (b) of the notice of motion. I note the comment of Counsel for the County Council that the primary reason for the Waste Water Treatment plant was not simply the impact of viral infection from sewage on oysters. This confirms the need for full, relevant and necessary discovery of all documents having a bearing on the thinking and plans and consideration given by the Council and its

officers and agents, including its consultants in respect of documentation sought in paragraph (b). One would expect coverage of other considerations as well as from the aspect of the alleged torts perpetrated against and affecting the Plaintiffs' fishery and business. If the Defendants propose to lead documents about these other considerations and about the contemplation and investigation of alternative sites, then it behoves the Council to consider discovery in respect of these matters or face the consequences during the conduct of the trial if such documents exist and there is a call for them and they have not been discovered by the Council. Counsel further says that the mere fact that documents do not contain details of the matter which a Plaintiff wants is not justification for seeking further discovery or that there are likely to be other documents. This is a trite criticism as the Plaintiffs' request is for relevant documents in the possession or procurement of the Council in respect of the category (b) as set out which would include Reports on the matters described in their possession or held by their consultants. Surely, it stands to reason that at least one good reason for the waste water treatment plant was that the Defendants were or should have been concerned about having chosen the location for a sewage outfall at a point where the release of sewage effluent was causing such contamination of the oyster beds, as alleged by the Plaintiffs, and that the Minister had to make orders closing the fishery and the Plaintiffs were alleging huge losses to their good name and good will and to the reputation of their business because of contamination of their oyster beds by the Midleton sewage. It seems extraordinary that there is a suggestion that there is an absence of direct references to viruses or oysters in such documents in the procurement of the Council and their consultants as have been produced. Having read Mr. Ó Breasail's comments that the discovery sought is "wholly unnecessary to the fair disposal of the action" or that it would be "unfairly burdensome" on the Council, I can understand why these remarks would cause grave anxiety to the Plaintiffs as describing the inappropriate criteria which the County Council is applying in respect of discovery. Furthermore clearly there is anxiety about the Council's admitted failure of retention of what are, or should have been obviously vital records in the light of the previous litigation and payment of damages by the Council, and the allegations that there are continuing problems of contamination and poisoning of the oyster beds by reason of the discharge of sewage at the Council's chosen discharge point. I note with increased apprehension that in a letter to the Plaintiffs of 22nd August, 2002, Mr. Ó Breasail himself stated that:-

> "Telemetry records have been retained at the treatment plant for March, 2002, only. I understand the previous records were automatically overwritten on the computer disc when it was full."

131. Mr. Martin makes the comment on this that it would appear, therefore, that some 20 months of records were destroyed. Furthermore in paragraph 5 of Mr. Martin's affidavit he says that he has been informed by the Second Named Plaintiff and believes that all "ultra violet continuously recorded data" prior to July, 2002 (namely, data for the first two years of operation of the treatment plant) have been over written and no copies kept. Even more incredible in respect of the First Named Defendant's insouciance about records, is the admission in his letter of 22nd August, 2002, Mr. Ó Breasail stated that all the data on the operation of the aeration basin for 2001 "was lost in moving from the site hut to the treatment plant offices". Mr. Martin says that he has been informed by the Second Named Plaintiff and believes that such data has never been provided to the Plaintiffs. This catalogue of disasters with regard to apparently vital records very pertinent to this case would seem to smack of carelessness on the part of the First Named Defendant to say the least, but perhaps an explanation will be forthcoming. One thing is certain and this is that the deponent must include scrupulously in the schedules all the records which have in the past been in the custody and procurement of the Council and he must say whether there are still copies extant and what steps have been taken to procure them and also what other reports there are which have reproduced or have summarised the contents of such lost records as these also are manifestly relevant and should be listed. No doubt as an engineer, Mr. Ó Breasail was very concerned himself at the results in these recordings and probably kept a note himself of what he was reading and wrote to the County Manager and others to alert them to these results and so presumably he will be able to give evidence in due course about this as Senior Engineer with the County Council. I note the comments at paragraph 8 and can only remark that "the proof of the oysters is in the eating of them" and if many people who consume the oysters become ill with gastroenteritis then it is reasonable to assume that they have been contaminated and no doubt there will be expert views with regard to the source of this contamination. If certain matters have already been covered in one of the other categories, as is suggested about category (a), then the relevant part of the schedules can be referred to but the important matter is that full coverage listing of documents for the purpose of discovery should take place so that some relevant and important document does not slip through the net in the search of the files and fails to be discovered. In view of the loss of records already admitted by the Council the court of trial may have good cause to be vigilant and apprehensive about how careful the agents of the County Council are in preserving records which contain bad news and which are manifestly of critical importance, bearing in mind the earlier litigation.

132. Accordingly in my view the Plaintiffs are fully entitled to an order for discovery in respect of all the documents sought in paragraph (b) although I think that the drafting of this might perhaps be improved and I will hear Counsel on this aspect. It is quite clear on the pleading that the information likely to be in the documents sought is pertinent to a very important issue in the case, particularly as to the actions and omissions of the Defendants in the context of claims of nuisance, negligence and breach of statutory duty.

133. Category (e) "All documents in the possession or power of the First Named Defendant including correspondence, reports, notes, minutes of meetings, memoranda and all other documents, howsoever described, concerning the compliance by the First Named Defendant, its servants or agents, with clause 4 of the Consent executed by the Plaintiffs and the First and Second Named Defendants on 26th November, 1996 under which the first proceedings were settled." The wording of the original paragraph (e) has been refined by Counsel in the meantime but the reasons given are still in point and valid. Clause 4 reads:-

> "The First Named Defendant hereby undertakes that it shall, on or before 30th June, 2000, bring into operation a Secondary Waste Water Treatment Plant incorporating ultra violet disinfection facilities, for the town of Midleton."

134. In his letter dated 16th December, 2003, Mr. Martin gave his reasons:-

Reasons

> "The documents referred to in this paragraph are relevant to the matters at issue in the proceedings. The First Proceedings are described at paragraphs 13 and 14 of the Statement of Claim. As pleaded at paragraph 16 of the Statement of Claim, those proceedings were settled between the Plaintiffs and the First and Second Named Defendants on 26th November, 1996, on terms which were set out in a "Consent" which was executed by the parties on that date. As appears from paragraph 17 of the Statement of Claim, various obligations were imposed on the First and Second Named Defendants under the terms of the Consent. So far as the Second Named Defendant is concerned, the Second Named Defendant agreed, with effect from 2nd December, 1996 until 30th June, 2000, to monitor the water and oyster flesh in the North Channel on a fortnightly basis on terms which were set out in a Schedule to the Consent. It is the Plaintiffs' claim that the First and Second Named Defendants failed to comply with the terms of the Consent and relief is sought in that regard in these proceedings. While the First Named Defendant admits the First Proceedings and the compromise of those proceedings, the First Named Defendant denies that the terms of the Consent were conditions or fundamental terms. The First Named Defendant further denies that without the undertaking given at clause 4 of the

> Consent, that the Plaintiffs would not have compromised the First Proceedings. The First Named Defendant further denies that it knew or ought to have known that the Plaintiffs would rely upon its undertaking in relation to the bringing into operation of the secondary waste water treatment plant incorporating ultra violet disinfection facilities. In this regard reference may be made to paragraphs 27 to 33 of the First Named Defendant's defence. Accordingly, the documents sought in this paragraph are relevant the matters at issue in the proceedings. It is necessary that the Plaintiffs obtain discovery of these documents. The Plaintiffs have no means of obtaining discovery of these documents other than by way of discovery. In the circumstances, discovery is necessary for the fair disposal of the claim. It will also result in a saving as to costs for the same reasons as are outlined in respect of category 1 above."

135. I note that Counsel agreed the wording of this paragraph (e) for improved clarity.

136. I do not accept the submission made on behalf of the First Named Defendant that an order for discovery should not be made pending determination of the issue as to whether repudiation of the Consent by the Defendants had taken place. I have given my reasons for this previously. Clearly, discovery is necessary on this aspect concerning the documents and records with regard to the compliance by the Defendants with the terms of clause 4. If certain matters are as claimed either irrelevant or privileged, then these documents can be listed separately in the Schedules and the claim and the grounds therefor in respect of privilege or irrelevancy can be made. The privilege suggested is presumably that of the First Named Defendant and such a claim may well prove an embarrassment subsequently. As for the suggestion that a response to a Freedom of Information request is a substitute for an affidavit of discovery and the schedules of documents annexed thereto, I have already stated why this "hare" will not run. Discovery is a formal legal procedure and the handing over of some documents in response to a Freedom of Information request may be helpful but it is no substitute for a formal affidavit of discovery with all the implications thereof. The reasons why the Plaintiffs require this aspect of discovery are given in Richard Martin's letter dated 16th December, 2003, and certainly the documentation sought should be germane to the issue of the compliance by the First Named Defendant with the terms and conditions of the Consent. If there is an overlap then in complying with an order for discovery it is practicable for the deponent to refer to such documents already discovered by reference to the schedule which they are in or the relevant particulars can be extracted and put in the list in the appropriate schedule in respect of paragraph (e). On the pleadings the documents predating the Consent are relevant, necessary and material and not irrelevant and the Defendants have chosen not to bring a motion in respect of this particular issue and accordingly I have already made clear that the issue of discovery should and is being decided on the pleadings as they stand at present. I note that at paragraph 15 of the second affidavit of Richard Martin he does not accept that the documents already provided to the Plaintiffs are adequate for the Plaintiffs' purposes in respect of the issue of compliance as contended by Mr. Ó Breasail. The First Named Defendant was required under clause 4 of the Consent to bring into operation a Secondary Waste Water Treatment Plant incorporating ultra violet disinfection facilities for the town of Midleton on or before 30th June, 2000. As explained in the Statement of Claim, the Council failed to do this. The Plaintiffs believe that in addition to the documents provided to them, there is also likely to be relevant correspondence between the Council and the Second Named Defendant's department, the Department of the Marine, as well as correspondence between the Council and its consultants and contractors. In addition to such correspondence there are also likely to be minutes of meetings referable to the compliance or rather non-compliance by the Council with its obligations under the terms of the Consent. Such documents would clearly be relevant and are required by the Plaintiffs to enable the proper prosecution of their claim and to demonstrate non-compliance by the Defendants with the terms of the Consent. These statements by Mr. Martin seem to me to be irrefutable and I would regard his belief as perfectly sensible that there should be relevant correspondence as he suggests and also correspondence and minutes of meetings referable to the issue of compliance or non-compliance by the Council with its obligations under the Consent. Accordingly an order for discovery will be made in the terms of paragraph (e).

137. Further to Counsel's submissions for the County Council about category (e), the fact that factual matters relating to the Consent have been released already does not preclude the need and entitlement of the Plaintiffs to an order for discovery in the terms of category (e) and if there is an overlap of documents then the deponent of the affidavit can make his point about this overlap by reference to the scheduled lists of documents. Documents and records with regard to the acts and omissions in respect of the alleged non compliance with the terms and conditions of the Consent can certainly be envisaged which would not inevitably involve or contain legal opinion. There may be memos and reports and even Consultants' Reports which describe the factual situation with regard to compliance or non compliance with the Undertaking given by the Council. As for the question of legal privilege, if this should arise in respect of any document, then this document can be put in the appropriate schedule and privilege can be waived or claimed, although the Council may find this to be an unnecessary complication as the document may be helpful to their defence. As for the suggestion that documents in this category predating the Consent are irrelevant, this would appear to be incorrect on the basis that there is an issue between the parties on this and the Defendants have chosen not to bring a motion to have this issue decided. Since the Plaintiffs have pleaded the matter in the alternative, it would seem practical, just and economically efficient to deal with the question of discovery on the basis of the pleadings as they stand. Certainly the Defendants have had considerable time since the delivery of the Statement of Claim to bring a motion if they wished about the status of the Consent and its effect in respect of discovery.

As for category (f) an agreed formula has been reached between the parties.

Category (g) is no longer sought by the Plaintiffs.

Category (o) is still in contention.

Category (O) "All documents comprising notes, memoranda, studies, correspondence and any other documentation howsoever described concerning the contamination of the Plaintiffs' oyster fishery by sewage from the Midleton Sewage System to the period from December, 1988 to date."

138. Originally this application had the added passage after "to date" of "and all internal correspondence and records of meetings involving the First Named Defendant and its servants or agents in relation to the Plaintiffs' oyster fishery for the said period". I have a note to the effect that Counsel for the Plaintiffs said that this latter part might be too broad and accordingly he was only seeking documents concerning the contamination of the fisheries. The contamination of the Plaintiffs' oyster fishery by sewage from the Midleton Sewage System is very much at the heart of the contentious issues in this case. The Plaintiffs' solicitor in his letter dated 16th December, 2003, seeking voluntary discovery gave reasons for his request.

Reasons

> "The documents referred to in this paragraph are relevant to the matters at issue in the proceedings. The Plaintiffs have corresponded and met with the First Named Defendant on numerous occasions before and since December, 1988, when the discharge of untreated sewage from the Midleton Sewage Scheme commenced. That correspondence from the meetings with the First Named Defendant its servants or agents, will clearly show the extent to which the First Named

> Defendant was aware of the risks to the Plaintiffs' oyster fishery from the operation of the sewage scheme and of the consequent impact on the Plaintiffs' business. These documents are not only relevant but it is necessary that the Plaintiffs obtain discovery of them for the fair disposal of their claim. The Plaintiffs believe that these documents will support the allegations contained in the Statement of Claim. Furthermore, discovery is likely to result in a saving as to costs for the reasons outlined in respect of category 1 above."

139. At paragraph 18 (xii) of his first affidavit, Seán Ó Breasail, Senior Engineer with the County Council, respectfully suggested that the formulation in paragraph (o) was excessively broad and could be interpreted as covering almost all documents produced in meetings held concerning the Midleton Sewage Scheme. I doubt if the criterion of relevance in the context of the pleadings in the case and the issues in conflict have been taken into account in making this suggestion. If documents are material and relevant they must be recognisably listed in the Schedules. If they are not relevant according to the legal criteria, then the Council should not include them and thus avoid the peril of "swamping" with irrelevant listings. I reject his other two bullet point comments as simply incorrect on the basis of the issues in the actual pleadings both in respect of documents prior to the Consent of 26th November 1996 and since 26th November 1996. I have also set out why this discovery is relevant and necessary and rule against his suggestion of the schedules being "unnecessary."

140. At paragraph 23 of his second affidavit Mr. Martin says of the documents sought in category (O) that it is very difficult to understand Mr. Ó Breasail's objections to the discovery of these documents. Contrary to the impression which Mr. Ó Breasail has sought to convey, the description of the documents in this paragraph is clear and specific. It is difficult to see how the request can be construed as for "almost all documents produced in meetings held concerning the Midleton sewage scheme". What is being sought are the documents concerning the contamination of the Plaintiffs' oyster fishery. It would seem quite incredible that the only knowledge which the First Named Defendant could have of the contamination of the oyster beds is what they are told by the Plaintiffs. As for the suggestion that the term contamination is too vague, the word is in common use and can be taken in its ordinary meaning as it would be understood by the citizens of the town of Midleton in the context of sewage contamination or pollution of oyster beds, so there should be little difficulty in understanding what is meant. Mr. Martin makes the point that it is hardly the case that no other documents have been generated by the Council in relation to the Midleton Sewage Scheme and the operation of the plant other than those which concern the contamination of the Plaintiffs' oyster fishery and he says that the Plaintiffs do not accept that discovery of documents prior to the Consent in 1996 is irrelevant. What does seem especially important is that discovery should be made of all documents as described during the period from December, 1988 to date, being such documents in the power and procurement of the County Council, as they should be very pertinent to the acts and omissions and attitude of the County Council towards the alleged contamination of the oyster fishery by sewage from the Midleton sewage system. Mr. Martin says that he has been informed by the Second Named Plaintiff and believes that there are likely to be documents other than those which have been made available to the Plaintiffs relevant to this issue. He points out that Mr. Ó Breasail does not suggest that other documents do not exist and he, Mr. Martin, submits that, if such do exist, then that they would indisputably be relevant, so it is difficult to understand the Council's reluctance to list them for the purpose of discovery and accordingly he affirms that the Plaintiffs maintain their request for such discovery. The documents sought are at the core of the case. The fact that the Plaintiffs may have enormous amounts of information concerning the water does not affect their entitlement to have the Defendants swear in an affidavit of discovery as to what documents of the variety mentioned and any other documents which the First Named Defendants have in their procurement about the contamination of the Plaintiffs' oyster fishery. Accordingly an order will be made in the terms of paragraph (O) as amended.

Category (P)
141. All documents consisting of studies, reports, test results and data, notes, records and memoranda and all or any other documents howsoever described concerning the monitoring (if any) by the First Named Defendant, its servants or agents, of the discharge of sewage at the outfall point at Rathcoursey Point from December 1998 to date and concerning the assessment and monitoring (if any) of all other sewage discharges into Cork harbour for that period.

142. In his letter of request dated 16th December, 2003, seeking voluntary discovery on oath, the Plaintiffs' solicitor gave-

Reasons

> "The documents referred to in this paragraph are relevant to the matters at issue in the proceedings. The Plaintiffs plead in Statement of Claim that untreated sewage was discharged into the sea at Rathcoursey Point contaminating their fishery from in or around December, 1988 and that such discharge continued even after the secondary waste water treatment plant was allegedly brought into operation. The First Named Defendant has denied this. Further the First Named Defendant has denied that the alleged discharge has caused any deterioration in water quality. The First Named Defendant is likely to have monitored the nature and extent of the discharge which was taking place together with other sewage discharges into Cork Harbour. Documents in relation to that monitoring and any tests carried out on the sewage discharged would be highly relevant to matters at issue in the proceedings. Documents relating to other sewage discharges in to Cork Harbour are relevant to the matters at issue in the proceedings having regard to the denial by the First Named Defendant that the alleged discharge has caused any deterioration in water quality. The Plaintiffs have no means of obtaining access to those documents other than by way of discovery. The Plaintiffs believe that these documents are likely to support their claim. Therefore discovery of these documents is necessary to enable the fair disposal of the Plaintiffs' claim. Furthermore discovery is likely to result in a saving as to cost for the reasons outlined in respect of category 1 above."

143. Clearly these reasons go to the heart of this claim. Furthermore paragraph 36 of the Statement of Claim contains the serious allegation that the First Named Defendant, despite earlier repeated requests for information as to whether untreated effluent was being discharged from the sewage system into the estuary, nevertheless failed to admit that there had been massive overflows of untreated effluent into the estuary until 26th March, 2002. One would have thought that in view of the previous claim and settlement that the Council would have been strict and vigilant in ensuring that all releases of effluent either from overflow tanks, pumping stations, pipeline or the discharge outfall at Rathcoursey Point would be scrupulously monitored and that the records would have been meticulously kept. This will obviously be an important factor when it comes to the question of the claim for exemplary and aggravated damages. If there is truth in the Plaintiffs' allegations that there had been 56 overflows since October, 2001 and that from 21st January, 2002, to 3rd March, 2002, there had been overflows of untreated sewage everyday and that on 18 of these occasions these overflows had exceeded in a single day the total overflow as being the maximum envisaged and certified for a year, then this documentation is at the core of the claim and is discoverable. It would be surprising indeed if the allegation is correct that the First Named Defendant has not kept or has lost vital records, despite the knowledge of the Plaintiffs' requests and the previous huge damage done to the Plaintiffs' business, as indicated by the First Named Defendant having previously paid substantial damages. No doubt the large sums paid in compensation already would have been considerably greater if the Defendants had not held out the hope to the Plaintiffs that they were serious about the remedying of the mischief and were prepared to give an undertaking in paragraph 4 of the Consent "that it shall, on or before 30th June, 2000, bring into operation a secondary waste water treatment plant

incorporating ultra violet disinfection facilities, for the town of Midleton and that part of the settlement was to put in place a competent recording and monitoring system." It is inconceivable that the First Named Defendant was not only well aware of the need to collect and keep safely records of and to monitor the releases of sewage effluent from Rathcoursey Point but also that it would be expedient that the Council would be diligent and vigilant in the assessment and monitoring of all other sewage discharges into Cork Harbour for that period. Manifestly these records are of huge significance in a case in which the Defendants have put the Plaintiffs on proof that it was the discharges from the Midleton system that caused the alleged pollution, contamination and poisoning of the Plaintiffs' oyster beds in the North Channel. Since it is presumably the duty of the County Council to monitor all the pollutants going into Cork Harbour at least in their area, one would have thought that it was a simple matter for the local authority to conduct a computer search of their records and to give this very pertinent information to the Plaintiffs by way of including it in a schedule to the affidavit of discovery. It is a nonsense on the issues of the pleadings to suggest that "it is entirely irrelevant to the Plaintiffs' case as to whether there would be other sources" of contamination of the Plaintiffs' shellfish. It is patently obvious that the First Named Defendant may well try to prove that there were other sources of contamination and the Plaintiff is entitled to know about such sources in advance of the trial by seeking discovery as to what records, including reports, the First Named Defendant hold in this respect. Cork Harbour may be a great harbour but one would have thought that at this stage in the light of experience, as well as in compliance with their legal obligations as a monitoring authority, the local authority would have had this aspect thoroughly investigated and from their previous experience in having to pay substantial damages, one would have thought that they would have had the grace to accede to the request to make voluntary discovery on this aspect. I do not accept that the request for production of records in this respect is "extremely broad and onerous". As for the suggestion that this category covers documents granted in the discovery made in 1995, prior to the Consent, I have already explained why the deponent in the present affidavit of discovery should have to consider the pleadings in the present case and supervise the listing of the documents in the schedules according to the issues in the present proceedings. Of course, much time and energy and expense can be spared by reference to, and re-listing of, the records previously made, providing that careful thought is given as to whether other files, Reports and documents are now relevant and also that care is taken to ensure that no vital records or pertinent documents slip through any gaps in the diligent search. I note the suggestion by Mr Ó Breasail that "All data relating to the monitoring of the outfall at Rathcoursey is already in the Plaintiff's possession" in paragraph 18(xiii)(b) of his first affidavit.. This certainly seems to be very much in issue, despite Mr. Ó Breasail's statement above, in the light of the allegations that the Council wrote admitting that they had lost or printed over and perhaps destroyed the records for periods in respect of the monitoring of the outfall at Rathcoursey Point. Discovery should cover the relevant documents held and any records previously in the possession or procurement of the Council with explanations for non production of originals and copies therof separately stored on computer or in hardcopy. As for the suggestion that the Second Named Defendant and the Plaintiffs themselves have monitored the waters and so it is unnecessary for the Plaintiffs to seek a category of discovery from the First Named Defendant, this is to misconstrue the purpose of discovery of documents. I hope the passages and explanations from the Supreme Court quoted above will remedy these misconceptions. Besides, the Defendants have put the Plaintiffs on proof of nearly all matters in issue and one would have thought that the contents of the records would be important to show the state of knowledge of the Council's officials as to the likely contamination of the Plaintiffs' fishery from the records of discharge of pollutants in their possession. I note the submission that the Council does not have the function or role of monitoring the water purity in Cork Harbour. Even assuming this to be correct, I would certainly be dubious about the Council having no role in monitoring the water quality in the North Channel, the estuary of the Midleton rivers and Rostellan Bay, since the Council itself installed and controls the sewage discharge point and the sewage system. I still take the view that the Plaintiffs are entitled to have discovery of all the records which the First Named Defendant has in its power or procurement in respect of discharge of pollutants into the areas of Cork Harbour, relevant from the point of view of contamination of the Plaintiffs' fishery, bearing in mind the discharge points and tidal and estuarine currents in Cork Harbour. I note the contents of paragraph 19 of the first affidavit of Mr. Ó Breasail and would make the comment that no doubt the Defendants should be well aware of what reports they hold or have in their procurement which are relevant to the issues in this case and that the affidavit of discovery should be made bearing in mind the criterion of relevance. I need not emphasise that if any relevant report or document in the possession of the Council has a bearing on this aspect and is not listed in the discovery or, on request, not made available for inspection, then there will be problems likely, if any attempt is later made to use such a report or the information therein to damage the Plaintiffs' case. Relevance is an important limiting factor to any too wide an ambit of discovery. I note that in the submission on behalf of the Council the point is made that the First Named Defendant is carrying out a study into other sources of pollution and that the Second Named Defendant by letter dated 12th February, 2004, in accordance with the Foreshore Licence requested that an objective viral study be carried out by the Council in accordance with condition 7 and no doubt the deponent will list the correspondence and documentation concerned along with this report or other relevant records in the schedules so that this is properly covered and disclosed. In his second affidavit sworn on 23rd July, 2004, I note that Mr. Martin has concerns that the Plaintiffs require discovery of the documents in order to demonstrate that the only possible source for the contamination of the Plaintiffs' oyster fishery is the discharge of untreated sewage from the Midleton Sewage Scheme. If the Council is prepared to accept that this is the case and if it does not contend that there was some other source of that contamination, then the Plaintiffs are content not to pursue this paragraph "otherwise the discovery is required". This seems eminently logical and reasonable. In the absence of any such concession from the Council, the Plaintiffs are clearly entitled to an order in the terms of paragraph (p) and I make the comment that the criterion of relevance should prevent this being over burdensome and should also prevent the swamping of the Plaintiffs.

144. *Category Q*: All documents including records, reports, studies, correspondence, minutes of meetings, drawings, logs and all other documents howsoever described concerning the occurrence, measurement and discharge of all storm water to the rivers adjacent to the Bailick 1 pump house from all overflows prior to, during and after the construction of the storm overflow holding tank.

145. In his letter dated 16th December, 2003, to the County Solicitor, Mr. Martin at paragraph 14 gave reasons for this requirement:

Reasons

> "The documents described in this paragraph are clearly relevant to the matters at issue in the proceedings. It is pleaded at paragraph 21 of the Statement of Claim that an addendum to the EIS dealt specifically with the environmental impact of the proposed works and that it was on the basis of the figures disclosed in the EIS which, inter alia, provided that the volumes discharged would be no more than 1-1.5% of the total storm water collected in the catchment, that the Minister for the Environment and Rural Development certified the works. The Statement of Claim pleads at paragraph 30, that the treatment plant operated upon and subsequent to its commission in the absence of a storm overflow holding tank and further pleads, at paragraphs 36 and 42(4), that following the construction of the storm overflow holding tank, massive overflows of untreated sewage were being released into the estuary. Documents relating to the discharge to the estuary of all storm waters resulting from overflows and relating to release, from the storm overflow holding tank, of water and sludge to the waste water treatment plant are clearly relevant to the matters at issue in the proceedings. It is necessary that the Plaintiffs obtain discovery of these documents. The Plaintiffs have no means of obtaining access to these documents as they are in the possession or power of the First Named Defendant, other than by way of discovery. In the circumstances, discovery is necessary for the fair disposal of the Plaintiffs' claim. Furthermore, discovery is likely to result in a saving as to costs for the reasons outlined in respect of category 1 above."

146. I should make clear that originally paragraph Q had a further passage of "and containing the release of water and sludge from the storm overflow tank to the waste water treatment plant" but this has been deleted by agreement of the parties. At paragraph 17 of his replying affidavit the Senior County Engineer Mr. Ó Breasail says that

> The results of the bacteriological analysis of samples taken weekly from the treatment plant and the pumping stations and tanks are sent to the Plaintiff regularly by the first Defendant's Area Engineer in Midleton;
>
> The records of storm water overflows to the tide from the pumping stations at Bailick 1, Bailick 2, and Ballinacurra 2 are also sent to the Plaintiff regularly by the same engineer;
>
> These records are sent as soon as received (analysis results) or compiled (overflow records). It is not necessary for the Plaintiffs to request them before they are sent to him (them).
>
> Data on the number of houses in villages on the shores of Cork Harbour which discharge their sewage to the tide;
>
> Drawing of the plant

147. On this basis the submission is made that the order sought for discovery on oath would be wholly inappropriate. This again shows a misunderstanding of the nature and purpose of discovery of documents upon oath. In fact at paragraph 25 of Mr. Martin's affidavit he makes it clear that his clients do not accept that the documents requested have been provided or that the Plaintiffs have all that they need under this heading. He says that he has been informed by the second Plaintiff and believes that two critical points arise in relation to this request. The first concerns the manner in which the Council dealt with storm overflows of sewage during the construction of the storm tank. The Plaintiffs believe that those overflows joined the industrial sewer via the flap valves in the pre-existing system and went directly into the sea at Rathcoursey where they caused contamination of the Plaintiffs' oyster fishery. The second vital point is that the Plaintiffs believe that the pumping out of the sumps of the various storm tanks at the pumping stations appears to be the root cause of the continued contamination of the Plaintiffs' oyster fishery. Very large BOD (biological oxygen demand) loads are regularly received at the plant, which are far too big to be treated (referred to in the plant operator's monthly reports as "shock loads") and these must therefore be by-passed through or around, the plant untreated. Mr. Martin makes the point that the Plaintiffs do not have documents sufficient to enable them to ascertain what occurred. For example, the Plaintiffs do not have drawings or calculations in respect of the overflow system during the construction of the Bailick storm overflow tank. The importance of this is that the flow to the plant prior to Christmas, 2000 was approximately 3,000 cubic metres per day rising to 4,000 cubic metres per day. However, a year later it was more than double that at 7,500 cubic metres per day. In circumstances where Mr. Martin says that he has been informed by the Second Named Plaintiff and believes that the volume of domestic effluent would have been about the same for the first six months of the operation of the plant (from July, 2000 to Christmas, 2000) then approximately 3,500 – 4,500 cubic metres per day of effluent must have been discharged somewhere else and the Plaintiffs believe that it was discharged into the sea to the detriment of their oyster beds. However, the Council is likely to have documents which will disclose what did occur. The Plaintiffs do not have those documents. The Plaintiffs do not have documents showing the Council's computation of the volumes (in cubic metres), which overflowed from the Bailick 1 pump house from the commencement of the scheme on 1st July, 2000, to the time of the first overflows to the river through the storm tank in August, 2001. Nor do the Plaintiffs have the copies of the logs in respect of the pumping down of sumps in the pump stations and especially from the Bailick No.1 storm tank to the treatment plant. Mr. Martin averred that he was informed by the second Plaintiff and believes that he has requested copies of those logs under the Freedom of Information Act, 1997 but that Mr. Ó Breasail has refused the request by stating that "no sludge" is pumped across to the plant from the storm tanks and that therefore no record exists. Accordingly, Mr. Martin says that the Plaintiffs do require discovery of these documents and the documentation provided to date does not adequately address the Plaintiffs' requirement. I would comment that there is a distinct difference in the furnishing of documents either voluntarily or under the Freedom of Information Acts procedure and from the process of formal discovery. The making of an affidavit of discovery is a part of the court process and there are obligations in respect of the making of proper and complete listing in schedules in an affidavit of discovery, and omissions to list relevant and discoverable documents can have dire consequences, not least the striking out of a defence, and the refusal to allow a party to produce a document like a pink rabbit out of a hat during the trial, if the document had not been included in the schedules in the affidavit of discovery. There is the further incentive to take care in compiling the list and making a thorough search for and sift of relevant and discoverable documents as a failure in this respect may attract the making of a costs order in retribution for negligent or insouciant or deliberate omissions or swamping.

148. In addition to all those reasons, it is manifest that this complaint is about an alleged serious ongoing problem in respect of which the County Council should have all the relevant records. If the Council's admission is true that its agents failed to notify the Plaintiffs of the system's failure and the discharge of untreated sewage as alleged in paragraph 36 of the Statement of Claim, then perhaps proper discovery may restore the loss of trust caused by this apparent insouciance. I note that Counsel for the First Named Defendant falls back on a statement of the Master, already quoted. I do not think that Counsel can ignore the pleadings and the need for the Plaintiffs to prove their case and that the torts were allegedly caused by the acts or omissions of the Defendants. Since most of the defence is a traverse it is quite clear that the Plaintiffs have been put on proof of their case and specifically by denial of this core aspect of their claims. I note the submission that the Plaintiffs' claim at paragraph .25 is erroneous and that overflows were not pumped directly into the sea at Rathcoursey Point and it is stated that before Bailick 1 came into operation storm water overflows were pumped directly into the Owenacurra estuary close to Midleton town. This confirms the view that the First Named Defendant holds relevant reports, logbooks and information and, accordingly, that it is more than time that the reports and records showing what precisely happened were disclosed. They are clearly relevant and should be included in the schedules to the Plaintiffs' discovery, particularly as this case falls squarely within the type of case in which one party holds most, if not all, of the relevant and necessary records on this crucial aspect and these should be made available both to the adversary and to the court for the fair adjudication and disposition of the case. Since the figures for the volumes of storm and waste water overflowing from Bailick No 1 pump house are obviously germane and allegedly there are no logs of the pumping down of sumps, it would seem all the more important that the nominee of the County Council should make a full affidavit of discovery in particular with regard to the absence of the normal type of records which should be available for such pumping operations and the nominee should give an explanation for each and every failure to keep records and to preserve them in written form or on a computer, especially in view of the fact that experience would suggest that further conflict between the parties was likely. Accordingly one would have thought that meticulous records would have been kept as a sensible precaution. Furthermore, I do not for one moment accept that the discovery sought is disproportionately burdensome, particularly in this era of the need for prudent keeping of records and bearing in mind the type and the nature of the records to be maintained and preserved.

149. I refute the suggestion that the Plaintiffs are embarking on a 'fishing' expedition. In fact in view of their experience in the previous proceedings where the Defendants paid substantial damages, one would have thought that the local authority would have been scrupulous in keeping records with regard to the various locations and operations particularly in respect of the discharge of sewage, in light of the likelihood of further litigation if they were alleged to have yet again contaminated and polluted the Plaintiffs'

oyster fishery.

150. Accordingly I propose to make the orders in respect of discovery sought subject to the few variations and redrafting suggested.

Discovery as against the Second, Third and Fourth Named Defendants (the State Defendants).
151. I am grateful to Counsel for the State Defendants for his skeleton argument addressed to the procedural matter of discovery and for the documents which he has annexed thereto which are helpful for ease of reference. He starts by explaining that the Second Named Defendant is sued as a corporation sole under the Ministers and Secretaries Act, 1924. Ireland is sued as representing the State under the Constitution of Ireland; see *Byrne v. Ireland* [1972] I.R. 241 at 290. The Attorney General is sued in order that service may be effected on the State of which he or she is the designated law officer who in effect would be joined in a representative capacity as the law officer of the State designated by the Constitution (per Walsh J. in *Byrne v. Ireland* at p. 289).

152. Counsel for the State Defendants concedes, for the purposes of this discovery motion only, that the issue surrounding pre 1996 documents sought to be discovered does arise on the within pleadings and the State Defendants seek only on this motion to make limited submissions in that regard. I was aware from Counsel's initial submissions that the State Defendants were arguing that the pre-consent documentation should not be discoverable because of the settlement which was embodied in the Consent with the schedule thereto. This was received and filed by the Court Order made on 26th November, 1996, and perfected on 27th November, 1996, which Order included terms that the matter should be listed for mention before Laffoy J. on 16th January, 1997 with liberty to all parties to apply, with the ninth term of the Consent being that "the proceedings shall be adjourned generally with liberty to re-enter". Counsel for the Plaintiffs indicated that the phraseology indicated that all parties intended the situation to be likely to continue to evolve. Also I have a note to the effect that Counsel for the State Defendants said that "post repudiation, the Plaintiffs only claim remains on the basis of the contents of the Consent". However, as he wisely advised on a number of occasions that the court should particularly consider the contents of the pleadings for the purpose of dealing with the appeals with regard to discovery, I propose to act on his advice. For reasons of principle, pragmatism and practical expedience and economics, in view of the need to push on with this case and to reduce costs, I propose at this stage to deal with discovery on the basis of the present pleadings, in particular reflecting the Plaintiffs' pleading in the alternative. This factor arises from the Plaintiffs' plea that the first proceedings between the Plaintiffs and the First and Second Named Defendants had been settled on the terms of the Consent made on 26th November, 1996, as set out in paragraph 17 of the Statement of Claim. The Plaintiffs alleged that the undertaking given by the First Named Defendant at clause 4 of the Consent was a condition or, alternatively, a fundamental term of the Consent and went to the root of the agreement between the Plaintiffs and the First and Second Named Defendants under which the first proceedings were settled and that, without this undertaking, the Plaintiffs would not have agreed to settle the first proceedings or have executed the Consent. The Plaintiffs were suffering very serious on going damage to their business as a result of the discharge of untreated sewage into the sea at Rathcoursey Point and they required that situation to be remedied as a matter of priority. The Plaintiffs went on to plead that the Defendants were in fundamental breach of the basic terms on which the agreement had been made and that they had repudiated the agreement. Both Defendants deny the allegation of fundamental breach and repudiation of the agreement and so the Plaintiffs' pleading both on the basis of repudiation and alternatively on the basis of non repudiation are alive on the pleadings. Neither Defendant, since the delivery of the Statement of Claim on 20th August, 2002, has brought any motion for directions or done more than moot a preliminary issue and so for the reasons given, it would seem expedient and sensible to deal with the applications for appeals in relation to discovery now on the basis of the present pleadings, as it would seem more economic and sensible that the issue of fundamental terms and repudiation should be dealt with, if necessary, by the court at the hearing of the action.

153. The State Defendants had plenty of time to bring any such motion as contemplated and in fact the matter was briefly canvassed near the start of the hearing but no motion was forthcoming. I was surprised to read in the submission the statement that "the court is aware that instructions have been issued for an application to be brought separately by the State Defendants in these proceedings to deal with this issue". However this passage goes on to say that it must be conceded that in the motion the only grounds upon which an order for discovery can be resisted, insofar as such documentation emanates from the period prior to the execution of the compromise by the parties of the previous proceedings between them, are very limited.

154. I am well aware that during the hearings before me and before that there had been strenuous efforts between Counsel for the parties to try to agree categories of documents of discovery. Indeed this is exemplified by the original memo handed in on about 26th January, 2006, which I have marked 'delta 1' indicating that agreed categories of documents embrace paragraphs D, G, including G(a), and H and I, leaving categories as not agreed:- A, B, C, E, F, G other than G(a) J, L(M), N, O and P. Then an updated memo, 'delta 2', was handed in on 14th February, 2006, which indicates that the parties were continuing to work to try to narrow the contentions in issue. However, the first change indicates a regression as in H the words "first and" at the end of paragraph H have been deleted and so now there is only agreement about discovery in respect of the Second Foreshore Licence and matters concerning the First Foreshore Licence are still contentious. In due course this will be dealt with under the list of categories not agreed which I propose to go through seriatim. I intend to proceed by setting out the terms of the request for discovery of each category, then Mr. Martin's reasons, the State Defendant's response and the submissions of the parties.

Submissions made on behalf of the State Defendants
155. The onus of proof that the documents sought in the application are "necessary" for "disposing fairly of the cause or matter or for saving costs" lies entirely on the Plaintiffs. This onus of proof cannot be discharged merely by reference to the pleadings or by the claims that all of the categories of documents sought appear relevant by reference to the pleadings because this requirement is 'not a mere formalistic requirement'" per Fennelly J. in *Ryanair v. Air Rianta* c.p.t. [2003] 4 I.R. 264. Counsel drew attention to the passages already quoted above where Fennelly J. gives practical advice with the voice of authority from much experience of the matters to be taken into consideration. Counsel then set out how the cases demonstrate the steps to be taken by the court once the categories of documents sought have been identified.

156. The court must be satisfied that the documents are relevant directly or indirectly to the issues raised in the pleading;

157. Secondly, the court must be satisfied that the Plaintiff has discharged the onus of proof by demonstrating that it is "reasonable for the court to suppose" that such documents contain information which may enable the applicant to advance his own case or to damage the case of his adversary in the sense that "an applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition" per Murray J. in the *Aquatechnologie* case quoted above. Counsel then went on to refer to *Hannon v. Commissioners of Public Works* (Unreported, High Court, McCracken J., 4th April, 2001) and the statement by McCracken J. that "The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the Court to order discovery simply because there is a possibility that the documents may be relevant"… 'relating to any matter in question therein.' ". A general trawl through the other party's documentation is not permitted. All of these observations are helpful and provide useful criteria set in the context of the basic purpose of discovery of documents already discussed. Counsel drew attention to the useful test suggested in the *Ryanair* case that the court has to reach a

conclusion as to the likely effect of the grant or refusal of the discovery on the fair disposal of the litigation. Counsel emphasised what was said by Murray J. in the *Framus* case, already quoted at p. 32 above, as a useful touchstone to be kept in mind.

Categories Consented to Before the Master of the High Court
158. Counsel helpfully set out these categories as follows, which I mention as an indication that there must have been some discussion between the representatives of the parties before or at the threshold of the Master's Court:-

> B. Subject to instructions arising on the concession of Plaintiffs re Bailick 1, but not prior to 1996;
>
> D. Subject to the right to claim privilege;
>
> E. Subject to argument against background documentation;
>
> F. As reflected in the schedule to the Consent;
>
> G(b). Except returns re the Irish Coast;
>
> (c) Subject to looking behind the Second Foreshore Licence;
>
> (d) Subject to duplication under (H) post;
>
> (e) Subject to duplication under (H) post;
>
> H. Save in regard to the First Foreshore Licence;
>
> I. As regards the Treatment Plant;
>
> O. Subject to duplication as Plaintiffs already have this.

159. I have set out this in fairness to the State Defendants to indicate that some effort was made to agree some aspects although the amount still at issue unagreed could hardly cause any acclamation. Whether more should have been achieved by agreement remains to be discussed after disposing of the list of categories left in dispute for adjudication by the Court.

Disputed Categories
160. *Category (a)* "All documents comprising all applications and objections and all other documents (howsoever described) concerning the consideration of the said applications and objections, relating to (a) the Foreshore Licence granted by the predecessor in title of the Second Named Defendant to the First Named Defendant on 5th March, 1986, (the "First Foreshore Licence") and (b) the Foreshore Licence granted by the Second Named Defendant to the First Named Defendant on 22nd September, 1999 (the "Second Foreshore Licence") under which the Second Named Defendant and/or his predecessor in title granted to the First Named Defendant a licence to use and occupy part of the foreshore at Midleton and Ballynacorra river, Midleton for the purpose of laying, using and maintaining foreshore crossings, domestic waste mains, outfall pipes, pumping stations, storm water outfall and overflow pipes thereon in connection with Midleton sewage scheme to includes the licences themselves.

161. By letter dated 15th December, 2003, the Plaintiffs' solicitor sought voluntary discovery upon oath for this category of documents and gave his reason as required:-

Reasons

> "The documents described in this category are clearly relevant to matters at issue in the proceedings as they appear from the pleadings. The Plaintiffs have (*inter alia*) challenged the grant of the First and Second Foreshore Licences and have sought declarations and injunctive relief in relation thereto. The Plaintiffs have pleaded in the Statement of Claim the circumstances in which the First and Second Foreshore Licences were granted by the Second Named Defendant and/or his predecessor in title to the First Named Defendant. In the defence delivered on behalf of the Second, Third, and Fourth Named Defendants those Defendants do not admit the granting of the First Foreshore Licence and deny they accepted that a treatment plant was necessary to address the serious deterioration in water quality as a result of the discharge of raw untreated sewage into the sea under the Midleton Sewage Scheme. While those Defendants admit that the Second Named Defendant granted the Second Foreshore Licence, they do not admit the terms of that licence as alleged by the Plaintiffs. They deny that the Second Foreshore Licence contained the alleged fundamental or implied conditions alleged in the Statement of Claim and assert that the Plaintiffs have no right in law to enforce or rely on the terms thereof. They also deny that they owed any duty of care in relation to the granting of the Second Foreshore Licence and plead that they did not owe any obligation to the Plaintiffs in executing that Licence (see, for example, paragraphs 28 to 32 of the defence of the Second, Third and Fourth Named Defendants). The circumstances in which the First and Second Foreshore Licences were granted (despite objections) and the consideration given by the Second Named Defendant and his predecessor to the grant of those licences are, therefore, relevant to the matters at issue in the proceedings. Furthermore, it is necessary that the Plaintiffs obtain copies of these documents by way of discovery. The Plaintiffs require discovery of these documents in order to demonstrate the extent to which the Second Named Defendant and/or his predecessor in title and their respective servants or agents failed adequately to take into account the position of the Plaintiffs as the owners of the oyster fishery in Cork Harbour near Rathcoursey, Midleton, County Cork and to the damage which would be caused to the Plaintiffs as a result of the grant of the First and Second Foreshore Licences. The Plaintiffs have no means of obtaining access to all of these documents other than by way of discovery. Discovery is, therefore, necessary. Furthermore, discovery of these documents is likely to result in a saving as to costs in that it will ensure that all relevant documents are available to the parties in advance of the trial and will avoid unnecessary waste of court time whether caused by the Defendants' attempted reliance on documents not previously disclosed to the Plaintiffs or otherwise."

162. While an initial reaction to this is that on the pleadings and the matters which the State Defendants have chosen to deny and put in issue, it is surprising that the Defendants have not made concessions since the Plaintiffs should have had no difficulty in obtaining discovery of all this documentation which is clearly relevant to the issues, which the Defendants have largely chosen to put in issue and on which they have put the Plaintiffs to formal proof. One might be inclined to think that the Defendants have opted for

this choice of the strategy of traverse and accordingly are bound to have to make the discovery sought in many instances since they have made these matters contentious. The commonsense likelihood of the situation is that once the Plaintiffs see the lists of the scheduled documents then they would be entitled to call for the material documents concerning each contentious aspect so as to inspect them and to obtain copies in order to put themselves in a position to prove their case. Thus discovery is doubly necessary to enable them to try to reduce the costs involved by being able to prove this aspect of the case simply by calling for the originals of the documents which are very likely to be produced on discovery.

163. In the replying affidavit of Maria Greene, at tab 15, at paragraph 6, she makes clear that the State Defendants, in respect of the documents sought in respect of the First Foreshore Licence are not willing to make discovery of documents prior to 26th November, 1996, the date of the Consent. For the several reasons given previously, that 'hare will not run', not least because the State Defendants have had plenty of time to bring a motion since the delivery of the Statement of Claim in August, 2002 and, anyway, it is pragmatic and expedient in terms of time and cost that discovery should be made on the pleadings as they stand on the basis of the two alternatives pleaded and the traverse of them.

164. Secondly, with regard to the Second Foreshore Licence, paragraph 7 of the affidavit of Maria Greene asserts that the State Defendants have admitted at paragraph 28 of their defence that the Second Named Defendant granted a Foreshore Licence to the First Named Defendant on 22nd September, 1999, and then goes on to say that at paragraph 30 the State Defendants plead that the terms of the Foreshore Licence represents the totality of the agreement in respect of that Licence between the First and Second Named Defendants. She goes on to say that:

> "The State Defendants are willing to provide a copy of the Second Foreshore Licence to the Plaintiffs. In those circumstances the State Defendants do not consider that it is necessary for the Plaintiffs claim that all documents comprising all application and objections and all other documents concerning the consideration of the said applications and objections relating to the Second Foreshore Licence be discovered as the only relevant document is the actual Foreshore Licence itself. In those circumstances the request for additional documents over and above the Foreshore Licence would appear to be a fishing exercise on the part of the Plaintiffs."

165. Mr. Martin replied to these suggestions by paragraphs 5, 6 and 7 of his second affidavit sworn on 23rd July, 2004. In paragraph 5 he noted that the State Defendants were not prepared to make discovery of documents in respect of events which occurred prior to 26th November, 1996, being the date of the Consent in the previous proceedings. The basis for this refusal was that the State Defendants had pleaded that the matters raised in those proceedings "merged" in the Consent and that the Plaintiffs were not entitled to rely on events that occurred prior to the execution of that Consent. He points out that this completely ignores the case made by the Plaintiffs in these proceedings which is that by reason of the failure by Cork County Council to bring into operation the secondary waste water treatment plant on or before 30th June, 2000, there was a fundamental breach of the undertaking contained in condition 4 of the Consent which went to the very root of the agreement under which the Plaintiffs agreed with the First and Second Named Defendants to settle the first proceedings and that as a result of that breach, the Plaintiffs were entitled to treat and have treated the agreement comprised in the Consent as at an end or, alternatively, as repudiated by the First and Second Named Defendants. He said: "Accordingly, it is pleaded on behalf of the Plaintiffs that they are entitled to continue the prosecution of the first proceedings and to seek the reliefs sought therein together with the further reliefs sought in these proceedings (see, for example, paragraphs 30 and 31 of the Statement of Claim). The issue therefore, as to whether the Plaintiffs are entitled to rely on events which occurred prior to the execution of the "Consent" is a matter in issue in the proceedings and it is not open to the State Defendants, merely because they have raised this plea and have not sought determination of any preliminary issue in relation to it, to avoid discovery in respect of events which occurred prior to 29th November, 1996." I assume that the word "allow" is a clerical error for "avoid" in the context in the last passage. Clearly, in view of the issues which the Defendants have put the Plaintiffs on proof of and for the justice and expedition of the case, the Plaintiffs are entitled to the discovery sought on this leg of the case.

166. As for the second leg which concerns the Second Foreshore Licence, Mr. Martin replies to the suggestion that the Plaintiffs are not entitled to the documents underlying the Second Foreshore Licence by responding as follows:-

> "While it is the case that the Plaintiffs do have a copy of the First Foreshore Licence and the Second Foreshore Licence, I am informed by the Second Named Plaintiff and believe that the Plaintiffs do not have any of the other documents referred to in this paragraph of the notice of motion. For example, I am informed by the Second Named Plaintiff and believe that the Plaintiffs do not have a copy of any of the correspondence between the First Named Defendant, Cork County Council, ("the Council") and the Minister for the Marine and Natural Resources and his predecessor, the Minister for the Marine, (the "Minister"). It is notable that at paragraph 18(ii) of the affidavit which he has sworn on behalf of the Council, Mr. Ó Breasail has confirmed that the Council is prepared to make discovery of such correspondence. There appears to be no reason why the State Defendants should not make discovery of such correspondence together with the other documents referred to in this paragraph. I remain of the view that with the exception of the First Foreshore Licence and the Second Foreshore Licence (copies of which the Plaintiffs have), the Plaintiff do require discovery of the further documents referred to in this paragraph. I say and believe that the consideration by the Minister and the officials in his Department given to the Council's request for the Second Foreshore Licence is critical in assessing the approach taken by the Minister and his Department to the protection of the Plaintiffs' oyster fishery. While various conditions were prescribed in the Second Foreshore Licence (as pleaded at paragraph 27 of the Statement of Claim), the Plaintiffs require to ascertain the extent to which specific consideration was given to the protection of the Plaintiffs' oyster fishery in the Ministers' considerations concerning the grant of the licence and concerning the conditions which the Minister determined to impose. These are, I believe, all relevant in determining whether there was compliance with the terms of the Consent and for the purpose of the further causes of action asserted by the Plaintiffs in the proceedings. I say and believe therefore, that discovery of these documents is necessary both for the proper prosecution of the Plaintiffs' claim and to save costs."

167. I have no hesitation in making the order sought by the Plaintiffs for the reasons given by Mr. Martin. My view on this is reinforced by noting that a similar approach appears in the category of documents agreed at (a). in the similar paragraph A in the motion and in the list of categories agreed to be discoverable by the First Named Defendant at (a). I find it difficult to divine a reason why these Defendants should persist in refusing to make discovery of what are clearly relevant, pertinent and necessary documents from the point of view of the Plaintiffs proving their case and needing to ascertain what documents the Defendants hold on these crucial issues for the reasons given by Mr. Martin. Accordingly, the Plaintiffs are entitled to an order in the terms of paragraph (a).

168. *Category (b)*: "All documents comprising notes, memoranda, reports, correspondence and any other documentation howsoever described concerning the initial choice, any adjustment following its commission in 1988 and also the retention of the location by the First Named Defendant of the sewage outfall point at Rathcoursey Point near to the Plaintiffs' oyster fishery for use after the construction of the waste water treatment plant including (but not limited to) all investigations carried out into alternative discharge

sites and including (but not limited to) all or any complaints made to the Second Named Defendant and/or his predecessor in title and their respective servants or agents concerning the location of the said sewage outfall point."

169. Mr. Martin in his letter dated 16th December, 2002, requesting voluntary discovery as required, gave reasons;

Reasons

> "The documents described in this paragraph are relevant to matters at issue in these proceedings. As is pleaded in the Statement of Claim, the Plaintiffs and others objected to the granting of the First Foreshore Licence in November, 1982 under which the First Named Defendant, its servants or agents commenced the discharge of raw untreated sewage into the sea at Rathcoursey Point at some time in or prior to December, 1988 when the Midleton sewage scheme was officially opened. The Statement of Claim pleads that objections were made by the Plaintiffs and by others and that the Plaintiffs made representations to the Second Named Defendant in relation to the serious deterioration in water quality as a result of this discharge of raw untreated sewage into the sea under the Midleton Sewage Scheme. Notwithstanding the earlier proceedings brought by the Plaintiffs which resulted in the execution of a Consent (the terms of which are described at paragraph 17 and 18 of the Statement of Claim), and notwithstanding the ongoing difficulties being experienced by the Plaintiffs' oyster fishery, the Second Foreshore Licence was granted by the Second Named Defendant to the First Named Defendant. Further and ongoing problems were experienced by the Plaintiffs as a result of the continued discharge of untreated or inadequately treated sewage into the sea from the outfall at Rathcoursey Point. Following the location of the outfall point to Rathcoursey in 1988, the Plaintiffs experienced and continued to experience serious outbreaks of illness in consumers of the Plaintiffs' oysters. These were and are facts within the knowledge of the Defendants, the Plaintiffs having advised them at all times both verbally and by correspondence about the problems experienced. The Plaintiffs objected to the retention of the outfall point at Rathcoursey. However, despite the Plaintiffs' pleas and objections, the outfall point was never relocated and was further licensed by the Second Named Defendant as the outfall for the effluent from the waste water treatment plant under the Second Foreshore Licence. Documents relating to the location of the sewage outfall point at Rathcoursey Point are, therefore, relevant to matters at issue in the proceedings. Furthermore, it is necessary that the Plaintiffs obtain discovery of these documents for the fair disposal of their claim. The Plaintiffs have no means of obtaining access to such of these documents as are in the possession, power or procurement of the Second Named Defendant, his servants or agents, other than by way of discovery. Furthermore, discovery is likely to result in a saving as to costs for the reasons outlined in respect of category (1) above."

170. In the replying affidavit of Maria Greene, at paragraph 8, she says that the State Defendants are not willing to make discovery of any documents prior to the Consent of 26th November, 1996 or of documents prior to the commissioning of the Midleton plant prior to 1989; and also that they are not willing to make discovery of any documents underlying the Second Foreshore Licence by saying: "To the extent that the documents sought were provided by any party to the State Defendants as part of an application for or in contemplation of the Second Foreshore Licence, the considerations set out in respect of category (a) apply." Again these documents are obviously very relevant to issues which these Defendants have put in issue and the Plaintiffs are entitled to discovery as sought. In paragraph 9 she makes it clear that the State Defendants are not willing to make discovery of investigations carried out into alternative discharge sites as she says "the Plaintiffs have not made a case to the effect that the State Defendants had an obligation to carry out research into alternative discharge sites and in those circumstances the discovery source is neither relevant nor necessary". In his second affidavit replying to this, Mr. Martin in paragraph 7 takes issue with the unwillingness of the State Defendants and to their mounting an objection to making discovery of any documents predating 26th November, 1996, the date of the Consent. I have already decided that the Defendants are not entitled to pre-determine an issue which has not yet been adjudicated upon by the court and for the present discovery will be made on the basis of the pleadings before the court, and on the case made and the matters denied in the defence, and so the discovery sought will be covered by our order for discovery in respect of the documents referred to concerning the initial choice of outfall discharge point and any adjustment following its commission in 1988, and also the retention of the location of the sewage outfall point at Rathcoursey Point for use by the First Named Defendant after the construction of the waste water treatment plant. In paragraph 8 of her affidavit Ms. Greene states that the State Defendants are willing to make discovery of documents which do not fall into category (a). I suspect that she means category (b) in the context but it is unclear what documents it is that the State Defendants are prepared to discover in respect of this category, so I propose to make an order which I trust will clear up uncertainty. As for the second leg, Mr. Martin does not accept that the State Defendants are entitled to resist discovery of any of the documents referred to in this category, including investigations carried out in respect of alternative discharge sites. He contends that, contrary to the impression which Ms. Greene has sought to convey by her affidavit, the Plaintiffs are not obliged to prove their entire case for the purpose of obtaining discovery and he goes on to say that the Statement of Claim together with the defence of the State Defendants provides sufficient basis for seeking the discovery sought in this category. He is correct on this. It is clear that consideration of the problems of the effluent discharge point has been central to the Plaintiffs' submissions to the Minister and his officials. The consideration given by officers within the Department of the Marine on any change to the discharge point after 1988 (which was the subject of considerable correspondence between the Plaintiffs and the Department between 1992 and 1997) and the retention of the discharge outfall pipe at Rathcoursey Point for the purpose of the Second Foreshore Licence was at the core of and extremely important to the Plaintiffs' case. Notwithstanding the ongoing difficulties being experienced by the Plaintiffs at their oyster fishery, the Second Foreshore Licence was granted by the Minister to the Council. Despite the Plaintiffs' pleas and objections to the Department, the outfall point at Rathcoursey was never relocated and was further licensed by the Minister as the outfall for the effluent from the waste water treatment plant under the Second Foreshore Licence. Accordingly documents relating to the location of that outfall point and any documents concerning its retention and all and any considerations contemplated by the Minister and his officials about alternative discharge points are clearly relevant to and necessary in respect of the claim made by the Plaintiffs in these proceedings, notwithstanding contentions to the contrary. The Plaintiffs have asserted that the Minister and his servants or agents owed to the Plaintiffs as the owner of the oyster fishery a duty of care in prescribing the terms and conditions of the Second Foreshore Licence. The location of the outfall point is, therefore, highly relevant. For example, Mr. Martin says that he was informed by the Second Named Defendant and believes that the Department itself made a submission to the Department of Communications in 1984 and was critical of the site of the discharge point for the effluent at Rathcoursey Point. He was further informed by the Second Named Defendant and believes that it is the Plaintiffs' understanding that the Marine Licence Vetting Committee of the Department recommended an alternative and more suitable outfall location for the effluent at Ballinacurra as opposed to Rathcoursey. The Plaintiffs believe that the Department did support an investigation into putting the discharge point back to the Ballinacurra Estuary and that this investigation was funded by An Bord Iascaigh Mhara. However, the Plaintiffs have no means of obtaining access to documents such as these other than by way of discovery. The discovery of documents in this category therefore is necessary to enable the Plaintiffs to prosecute their claim properly.

171. These documents are at the core of the allegations of negligence against the Defendants and there is almost complete certainty that documents such as those mentioned or similar reports and investigations must exist and be in the possession of the Second Named Defendant or within his procurement. In the light of the principles in relation to discovery set out above, it seems incredible that an order for discovery has been resisted when, quite clearly, such documents are relevant and necessary and in all likelihood,

once listed and copies on request are furnished, this should greatly reduce the cost involved in this case by indicating what expert reports and advices were obtained about the discharge at Rathcoursey Point and alternative sites. For example, reports and estimates as to what the costs would have been of piping and pumping the sewage to a point where it would not contaminate or provoke allegations of contamination of the wonderfully productive inland waters of Cork Harbour, particularly the North Channel thereof. I would add that, in the context of the claim for negligence against the Second Named Defendant, his consideration of alternative sites or the lack of such consideration would appear to be a very significant factor, particularly in the context that in this claim there is not just a claim for restitutionary damages but also for exemplary and aggravated damages. No doubt particular care will be taken in ensuring that a comprehensive schedule of relevant documents material to this particular issue is included. For these issues are among those at the heart of this claim and the construction already put on the principles of law about what documents are relevant and necessary has certainly given rise to grave apprehension about failures to make full and proper discovery of relevant documents, in the wide sense of that term. I have averted to these worries earlier in this judgment and I do not propose to reiterate my concerns further, other than to quote from the words of Murphy J. in *Irish Nationwide Building Society v. Charlton*, (Unreported, Supreme Court, 5th March, 1997) in the context of determining what is relevant for the purposes of discovery. He stated that often the deponent would be familiar with the documents in his possession or power but will have little understanding of the manner in which they may advance his own case or also so as to damage his opponents. Murphy J. then said at p.15:-

> "It is this problem which imposes on the solicitor to the party making discovery the duty to take positive steps to ensure that his client appreciates the extent of the obligation imposed by an order for discovery. The solicitor owes a duty to the Court carefully to go through the documents disclosed by the client to make sure, as far as possible, that no relevant document has been withheld from disclosure. (See *Woods v. Martin's Bank Limited* [1959] 1 Q.B. 55) However the deponent cannot abdicate his duty in relation to disclosure to his legal advisers nor could the lawyer accept the responsibility of inspecting all of the documents in the possession of his clients. Careful consultation between the solicitor and the client should enable the deponent to extract all documents in his possession or procurement which are relevant – in the wide sense to which that word is used in relation to discovery – to matters in issue in the proceedings and to obtain the advice of his lawyers, if necessary, in relation to any particular documents the discoverability of which might be in doubt."

172. I hope that these observations will prove helpful. Since the matters sought in category (b) appear to be very germane to the issues in the pleadings and the objections on behalf of the State Defendants appear to be wide of the mark, I propose to make an order for discovery in the terms of paragraph (b).

173. *Category (c)*: "All documents comprising notes, memoranda, correspondence, minutes of meetings, reports and all other documents howsoever described concerning the representations made by and on behalf of the Plaintiffs to the Second Named Defendant's predecessor in title (the Minister for the Marine) in respect of the period from December, 1988 to the date of the settlement of the first proceedings (as defined in the Statement of Claim) concerning the serious deterioration in water quality as a result of the discharge of raw untreated sewage into the sea from the Midleton sewage scheme."

174. In his letter of request dated 16th December, 2003, Mr. Martin when seeking voluntary discovery on oath, gave the following reasons as required:-

Reasons

> "The documents described in this paragraph are relevant to matters at issue in the proceedings. At paragraph 11 of the Statement of Claim it is pleaded that the Plaintiffs made urgent representations to the Second Named Defendant's predecessor in title (the Minister for the Marine) concerning the serious deterioration in water quality (in Cork Harbour) as a result of the discharge of raw untreated sewage into the sea under the Midleton sewage scheme. That scheme was officially opened by the First Named Defendant in December, 1988 and the First Named Defendant, its servants for agents, had commenced the discharge of raw untreated sewage into the sea at Rathcoursey Point at some time in or prior to December, 1988. (See paragraph 9 of the Statement of Claim). At paragraph 10 of the Statement of Claim it is expressly pleaded that the discharge of raw untreated sewage into the sea under that scheme and/or under the First Foreshore Licence contaminated the Plaintiffs' oyster fishery and caused outbreaks of food poisoning following consumption of oysters harvested from the Plaintiffs' oyster fishery (see paragraph 10 of the Statement of Claim). It is pleaded at paragraph 11 of the Statement of Claim that notwithstanding the representations made by the Plaintiffs to the Second Named Defendant's predecessor, the discharge of raw untreated sewage into the sea continued from Rathcoursey Point and further damage was caused to the Plaintiffs. Illnesses were reported by persons who consumed the Plaintiffs' oysters as pleaded at paragraph 12 of the Statement of Claim. The Second, Third and Fourth Named Defendants do not admit those matters (as appears from paragraph 9 of their defence). These documents are necessary to show the extent of the on going problems and the fact that they were drawn to the attention of the Second Named Defendant at an early stage. It is necessary that the Plaintiffs obtain discovery of these documents. Such discovery will demonstrate the extent of the knowledge of the Second Named Defendant and his servants or agents and are relevant to the Plaintiffs' pleas that the Second Named Defendant, its servants or agents owed to the Plaintiff a duty of care so as to ensure the interests of the Plaintiffs as the owners of the oyster fishery were not adversely effected as a result of the operation of the Midleton Sewage Scheme or alternatively, that the adverse effects to the Plaintiffs were kept at a minimum (see paragraph 29 of the Statement of Claim). The Plaintiffs have no means of obtaining copies of the documents in the possession or power of the Second Named Defendant other than by way of discovery. Accordingly, discovery of these documents is necessary for the fair disposal of the Plaintiffs' claim. Discovery will also result in a saving as to costs for the reasons outlined in respect of category 1 above."

175. In view of the pleadings and the reasons so clearly given by Mr. Martin, I cannot but feel that the State Defendants would need an oratorical Houdini to escape from having to make the discovery sought. But paragraph 10 of the deponent's affidavit simply states this category relates to the period December, 1988 to the date of the settlement of the earlier proceedings on 26th November, 1996, and the State Defendants are not willing to make discovery of documents prior to 26th November, 1996. The reasons for refuting that argument have already been explained and accordingly I make an order for discovery in respect of paragraph (c) as drafted.

176. *Category (e)*: All documents including reports, minutes of meetings, notes, memoranda, correspondence and all or any records or documents howsoever described concerning the extent of the consideration (if any) given by the Second Named Defendant, its servant or agents, to the likely impact or effect on the Plaintiffs' oyster fishery of the waste water treatment plant and the location of the outfall at Rathcoursey Point.

177. Mr Martin in his letter dated 16th December, 2003 gave the reasons why this discovery was required:

Reasons

> "The documents referred to in this paragraph are relevant to the matters in issue in the proceedings. At paragraph 23 to 28 of the Statement of Claim, the Plaintiffs refer to the First Named Defendant's application to the Second Named Defendant for the Second Foreshore Licence which was granted by the Second Named Defendant in September 1999. In that application, the First Named Defendant proposed retaining the outfall at Rathcoursey point but represented to the Second Named Defendant that the discharge would change from contaminated raw sewage to a secondary treated effluent complete with ultra violet disinfection. The documents concerning the extent to which the Second Named Defendant gave consideration to the likely impact to the Plaintiffs' oyster fishery are clearly relevant to the Plaintiffs' claims that notwithstanding the new plant and notwithstanding the alleged operation of the ultra violet disinfection system, raw untreated sewage continued to be discharged into the sea at Rathcoursey Point further contaminating the Plaintiffs' oyster fishery. These matters are denied by the Second Named Defendant in its defence. The Plaintiffs have no means of obtaining access to these documents other than by way of discovery. Discovery will greatly assist the Plaintiffs in substantiating the detailed allegations made against the Second Named Defendant in the Statement of Claim. In these circumstances, it is necessary that the Plaintiffs obtain discovery for the fair disposal of their claim. Furthermore, discovery is likely to result in a saving as to costs for the reason outlined in category (1) above."

178. In reply, at paragraph 12 of the affidavit of Maria Greene she makes it clear that the State Defendants are not willing to make discovery of any such documents to the extent that they are documents underlying the Second Foreshore Licence for the same reasons as they refused to give the documentation in category (a). From the affidavit sworn on behalf of the Defendants it appears the State Defendants are prepared to make discovery of certain documents falling under this category; however it is unclear what documents they are prepared to discover. Mr. Martin avers, in his second affidavit, that irrespective of whether the documents falling under this category may have been provided to the State Defendants or may have arisen as part of the proceedings leading to the Second Foreshore Licence, the documents are clearly relevant, are necessary to enable the prosecution of the Plaintiffs' claim and ought to be discovered by the State Defendants. He submits that at the heart of the discovery sought in this category (e) are documents which concern the nature and extent of the consideration given by the Department officials to the appropriateness or otherwise of discharging the sewage effluent from 8,000 people so close to long established oyster fisheries. In the light of the Defendants' traverse of this part of the Plaintiffs' pleadings and the Defendants having chosen to put the Plaintiffs on proof and when clearly this is a vital aspect of the Plaintiffs' claims and when it is also highly likely that the Minister's officials do or, at least should, in all likelihood, hold relevant documentation on this crucial aspect of the case, and it is clear that there should be a discovery order in the terms of paragraph(e). Since the Minister's predecessor in title was thoroughly involved in the licensing of the outfall at Rathcoursey Point and a number of his predecessors holding responsibility for Fisheries gave the licences in respect of the oyster fisheries and made the Oyster Fishery Orders in respect of Cork Harbour, one would have thought that there should be little difficulty in the making of such discovery as no doubt the Minister's officials must have been looking at these files when considering the application both as to the location of the outfall and subsequently as to the retention thereof at Rathcoursey Point, and presumably consideration would have extended to alternative locations as already mentioned. Accordingly an order for discovery in the terms of paragraph(e) as drafted should be made.

179. *Category (f)*: All documents in relation to the Certification made by the Minister for the Environment and Rural development as agent for the Third Named Defendant, the Minister for the Environment, Heritage and Local Government on 14th July, 1997, pursuant to part IX of the Local Government (Planning and Development) Regulations 1994, referred to at paragraph 20 of the Statement of Claim and in relation to the assessment by that Minister of the adequacy and efficacy of the certified works.

180. I should mention that part of the original wording of this request has been amended by consent of the parties by the omission of the words "within the possession or power of the Minister for the Environment and Rural Development (as agents of the Third Named Defendant)" and by deletion also of the final phrase "and the location of the outfall".

Reasons

181. Mr. Martin in his letter dated 16th December, 2003, gave the reasons why this discovery was required and requested voluntary discovery on oath.

> "The documents referred to in this paragraph are relevant to matters at issue in the proceedings. The Plaintiffs have pleaded in the Statement of Claim the terms of the certificate issued by the Minister for the Environment and Rural Development on 14th July, 1997, in relation to the works proposed for the construction of the sewage treatment plant at Midleton. It is expressly pleaded (at paragraph 21 of the Statement of Claim) that it was on the basis of the figures disclosed in the EIS that the Minister certified the works in accordance with the said certificate. It is further pleaded (at paragraph 22 of the Statement of Claim) that the First Named Defendant and its servants or agents were obliged to comply with the terms of the certificate in the manner more particularly pleaded therein. In their defence the Second, Third and Fourth Named Defendants do not admit the matters alleged at paragraph 20 of the Statement of Claim and further deny that the Plaintiffs, are entitled to rely on the said Certification in these proceedings. They further deny the contents of the addendum to the EIS pleaded at paragraph 21 of the Statement of Claim. They also plead that the EIS has no legal effect and that the Plaintiffs are not entitled to rely on the terms of the EIS in these proceedings. Finally in this regard those Defendants do not admit the alleged obligations on the First Named Defendant (see paragraphs 21 to 25 of their defence). Having regard to the nature of the claim in these proceedings as disclosed in the Statement of Claim, the Certification of the said works by the Minister for the Environment and Rural Development and the assessment (if any) of the adequacy and/or efficacy of those works by or on behalf of the Minister are of central importance to the Plaintiffs' claim in these proceedings. The documents referred to in this paragraph are, therefore, clearly relevant to matters at issue in the proceedings. It is necessary that the Plaintiffs obtain discovery of these documents. The Plaintiffs have no means of obtaining these documents other than by way of discovery. Since they go to matters which are of central importance to the claim, discovery of these documents would greatly assist the Plaintiffs in making their claim in these proceedings. Without them, the Plaintiffs would be deprived of a legitimate juridical advantage in the proceedings. In those circumstances, it is necessary that the Plaintiffs obtain discovery of these documents for the fair disposal of their claim. Furthermore, discovery is likely to result in a saving as to cost for the reasons outlined in respect of category 1 above."

182. At paragraph 13 of the affidavit of Maria Greene the State Defendants make it clear that they are only willing to discover the actual Certification itself and are not prepared to make discovery of any other documents as they do not regard them to be necessary and label this request as a "fishing exercise on the part of the Plaintiffs". In his replying affidavit sworn on 23rd July, 2004, Mr. Martin refutes the contention that discovery of the Certification made on 14th July, 1997 itself is sufficient discovery of the documents sought in this paragraph. He says that he has been informed by the Second Named Plaintiff and believes that while the Certification made by the Minister for the Environment and Rural Development did take some of the Plaintiffs' views and submissions

into consideration, it is the Plaintiffs' case that the consideration was inadequate and did not go far enough and that their oyster fishery was closed down and remains closed as a consequence of this. Documents concerning the Certification in relation to the assessment by the Minister of the adequacy and efficacy of the certified works and the location of the outfall are therefore relevant and the Plaintiffs require this to establish why the conditions which were imposed were stipulated and why conditions which would have provided greater protection for the Plaintiffs' oyster fishery were not imposed. On the pleadings this is a highly contentious and relevant issue at the heart of the case and the Plaintiffs are clearly entitled to this leg of the category of discovery.

183. There is a second leg to paragraph(f) in respect of documents in relation to the assessment by the Minister of the adequacy and efficacy of the certified works and the location of the outfall. According to paragraph 14 of the affidavit of Maria Greene, the State Defendants are prepared to make discovery of this leg of the category from 26th November, 1996, onwards. The documentation involved would all have been created after the date of Certification on 14th July, 1997, and so the State has agreed to make discovery of all documentation with regard to assessments after 14th July, 1997. However, Mr. Martin makes a valid point about this artificial distinction conjured up by the State Defendants. He says that it is likely that there are relevant documents prior to the 26th November, 1996, and that these documents, prior to the Consent, are clearly relevant to this issue. In the absence of any determination by the Court that issues prior to the Consent are not relevant, the State Defendants, he says, should be required to make discovery of such documents which fall within this category and which pre-date the Consent in November, 1996. Mr. Martin says that he is informed by the Second Named Plaintiff and believes that it is the Plaintiffs' understanding that documents do exist prior to 1996. In particular he says that he has been informed and believes that documents would have been created both prior to November 1996, for the purposes of the plant and after the preparation of the preliminary report on the sewage treatment plant for Midleton in October, 1993. The Plaintiffs believe that those documents are relevant to issues concerning the design of the plant, the approval of that design and the circumstances in which the plant appears to have deviated from the requirements of the Strategy Study on Options for the Treatment and Disposal of Sewage Sludge in Ireland, commissioned by the Third Named Defendant (The Department of the Environment) and completed in 1994 and, in accordance with the implementing circular L.6/94 issued by the Third Named Defendant on 2nd June, 1994, almost two and a half years before the Consent in November, 1996.

184. There seems to be an irrefutable logic in Mr. Martin's contention and since this is an issue at the core of this case in which the Defendants, despite the earlier settlement and payment of substantial damages, have deliberately put the Plaintiffs on proof of most of the allegations in the pleadings, as they are entitled to do, but in so doing they must expect a court to wonder why the Minister should be so reticent in making discovery which involves listing the documents, including reports and correspondence, on the basis of which he and his officials made their assessments and formed the views which led to the Certification and subsequent retention of the sewage discharge outfall at Rathcoursey Point, despite the previous costly settlement and the concerns about the Rathcoursey outfall..

185. Oyster beds are susceptible to contamination from sewage pollution and the outfall point at the North end of the East Ferry Channel where it meets the estuarine waters from the Midleton Rivers and the waters of the North Channel must obviously be susceptible to the vagaries of tidal currents, estuarine storm water floods, rain storms and gales as well as the peculiar movements of currents in the inland waters of the greater Cork harbour. In view of the claim for exemplary and aggravated damages in this case, one would have thought that the Minister would have been eager to produce the documentation on the basis of which he and his officials can refute such allegations of negligence or breach of duty including statutory duty and nuisance on their part and in particular the omission to pay proper heed, care, consideration and attention to the oyster fisheries in the vicinity of Rathcoursey Point outfall. While being astute to the requirement that the Court should be careful that the expense and burdensome nature of discovery should be taken into account, on this aspect it would seem that the material documentation relevant to issues concerning the design of the plant, the approval of that design and the circumstances in which the plant appears to have deviated from the requirements of the strategy study and any other relevant requirements in the knowledge and possession of the Minister should be included in the schedules in the discovery. After all, if the State Defendants wish to refute the Plaintiff's allegations, one would have thought they might wish to refer to this documentation themselves. No doubt the lawyers advising the Minister and his officials will be careful to warn of the need for full disclosure of relevant documents pursuant to an order and will be conscious of the embarrassment which can be caused by non-disclosure, particularly when Counsel for the Minister may wish to call for a report or assessment or other documentation to refute the Plaintiffs' case or to explain the Minister's diligent consideration of the problem. Whatever about the Minister's problem if inadequate discovery is made on his behalf, in any event the Plaintiffs are clearly entitled to discovery of the documentation sought and I make an order in the terms of category (f).

186. *Category (g)*: "All documents comprising correspondence, reports, test results and data, notes, memoranda and all other documents howsoever described concerning:-

> (g)(a) The monitoring by the Second Named Defendant of the water and oyster flesh in the North Channel between 2nd December, 1996, and 30th June, 2000, on the terms set forth in the "schedule" attached to the Consent." The State Defendants have agreed to make discovery in terms of paragraph(g)(a) above.
>
> "(b) The monitoring by the Second Named Defendant of the water and oyster flesh in the North Channel from 1st July, 2000 to the present date and all other CEFAS laboratory results taken from the North Channel by or on behalf of the Second Named Defendant or furnished to him and all other results from samples taken around the Irish coast over the same period and sent to the same laboratory.
>
> (c) The conditions prescribed by the Second Named Defendant for the discharge to be achieved by the treatment plant, together with the requirements for monitoring, recording and the storage of data obtained;
>
> (d) The monitoring by the Second Named Defendant, its servants or agents, of compliance by the First Named Defendant, its servants or agents with the conditions of the First and Second Foreshore Licences including all correspondence between the First Named Defendant and the Second Named Defendant and all operational performance data supplied in relation to the First Named Defendant's compliance with the said conditions;
>
> (e) The reporting of all faults, failures or breakdowns of the plant by the First Named Defendant to the Second Named Defendant whether pursuant to condition 9 of the Second Foreshore licence or otherwise and all investigations undertaken into the remedying of such faults, failures or breakdowns whether arising as a result of the design or the operation of the waste water treatment plant and sewerage system."

187. As for Paragraph 15 (b) of the affidavit of Maria Greene, she says that the State Defendants are only willing to discover documents from 1st July, 2000 to the date of the institution of the proceedings, not to the date of the swearing of the affidavit of discovery, or indeed to date. There is a bald statement that the Plaintiffs are not entitled to documentation after the commencement of the proceedings and that neither are the Plaintiffs entitled to documentation relating to monitoring in geographical areas other than

those in which the Plaintiffs are operating. She submits that discovery under category (g)(b) should be limited to the North Channel, Cork Harbour, also she submits that documentation in relation to "the Irish coast" is far too wide ranging and the Plaintiffs have not even attempted to establish why this would be either relevant and/or necessary to the proceedings. At paragraph14 of his replying affidavit, Mr. Martin says that there is no reason why the discovery in respect of the documentation should be limited to the date of the commencement of the proceedings. The Plaintiffs' complaint is of an ongoing problem and the State Defendants should therefore be required to make discovery of documents up to the date on which such discovery is made as is usual and not up to the date on which the proceedings were commenced. From my note I think that the Plaintiffs are content with the geographical limitation in respect of the monitoring and CEFAS Laboratory results from 1st July, 2000, to the present date being those taken from the North Channel rather than other results from samples taken around the Irish coast over the same period and sent to the same laboratory. Counsel can inform me if I have misunderstood what was agreed on this. As for the suggestion that there should be a cut off point at the date of the plenary summons, since this is an ongoing problem the State Defendants should make discovery up to the date of the swearing of the affidavit. Otherwise there would be the peril that, as this is an ongoing and continuing claim, a further set of proceedings could be issued to cover the claim and loss during the period from the date of issue of the plenary summons to the date of trial or indeed into the future if there is a likelihood of the torts continuing and there being a claim into the future. Accordingly an order should be made in the terms of paragraph (g)(b) for discovery as sought from 1st July, 2000, to the date of the swearing of the affidavit.

Category (g)(c):
188. "The conditions prescribed by the Second Named Defendant for the discharge to be achieved by the treatment plant, together with the requirements for monitoring, recording and the storage of data obtained."

189. In his letter dated 16th December, 2003, requesting voluntary discovery, Mr. Martin gave the reasons required:;-

Reasons

> "The five categories referred to in this paragraph are relevant to the matters at issue in the proceedings. Under the "Schedule" attached to the Consent (which was to form part of the Consent) in which the first proceedings were settled, the Second Named Defendant agreed with effect from 2nd December, 1996, until 30th June, 2000, to monitor the water and oyster flesh in the North Channel on a fortnightly basis and on further terms which were set out in the Schedule. The Second, Third and Fourth Named Defendants have denied the summary of the terms of the Consent pleaded at paragraph 17 of the Statement of Claim (at paragraph12 of their defence). They plead that their obligations were limited to the obligations set out at paragraphs 2, 3, 7 and 8 of the Consent. The Plaintiffs have pleaded that the First Named Defendant its servants or agents continued to discharge untreated sewage into the sea at Rathcoursey Point nearer the Plaintiffs' oyster fishery which caused and continued to cause contamination of the fishery and of the oysters harvested from the fishery (see paragraph 32 of the Statement of Claim). Documents relevant to the monitoring which the Second Named Defendant agreed to carry out under the terms of the Consent are relevant to the Plaintiffs' claim in the proceedings. It is also necessary that the Plaintiffs obtain discovery of these documents in order to demonstrate the extent to which the water quality continued to deteriorate following the terms of the Consent. The First Named Defendant was obliged under the terms of the Second Foreshore Licence to agree a detailed sampling programme with the Second Named Defendant before any discharge was allowed through the pipelines (see for example, condition 6 of the Second Foreshore Licence). The First Named Defendant was also obliged under condition 9 of that licence to ensure that any breakdown of the effluent treatment system was notified immediately to the Second Named Defendant's servants or agents being the Department of Marine and Natural Resources, Sea Fishery Officer and Fish Quality Officers so that any health problems posed by the oysters could be contained. Condition 14 of the Second Foreshore Licence provided that in event of the breach, non performance or non observance by the First Named Defendant of any of the conditions contained in the Second Foreshore Licence, the Second Named Defendant was entitled forthwith to terminate that licence without prior notice to the First Named Defendant. The Plaintiffs plead that the First Named Defendant failed to comply with fundamental terms and conditions of the Second Foreshore Licence and that the Second Named Defendant, its servants or agents, owed to the Plaintiffs a duty of care in prescribing the terms and conditions of that licence so as to ensure that the Plaintiffs' interests were not adversely effected or, alternatively, that the adverse effects to the Plaintiffs were kept to a minimum. Documents relating to the monitoring by the Second Named Defendant, its servants or agents, under the Second Foreshore Licence are, therefore, relevant to the matters at issue in the proceedings. It is necessary that the Plaintiffs obtain discovery of these documents. The Plaintiffs have no means of obtaining access to any of these documents other than by way of discovery. Accordingly it is necessary that the Plaintiffs obtain discovery of these documents for the fair disposal of their claim. Discovery will also result in a saving as to costs for the reasons outlined in respect of Category 1 above."

190. The response, in paragraph15(c), of the affidavit of Maria Greene states that the State Defendants are not willing to make discovery of any such documents which arose either in contemplation of or as part of the application for the Second Foreshore Licence. She said that to the extent that any of the documents sought under this category or any other category are documents which were provided either in contemplation of or as part of the application for the Second Foreshore Licence, the State Defendants are not willing to make discovery of them for the reasons she had set out already. In his replying affidavit Mr. Martin says at paragraph 15 that:-

> "As regards the restriction sought to be imposed in respect of category (c) it is difficult to see what documents would remain if that restriction applied. Documents provided in contemplation of or as part of the application for the Second Foreshore Licence clearly fall within subcategory (c) of this paragraph of the notice of motion and there is, I believe, no basis in which the restriction sought in respect of this subcategory should be imposed."

191. Mr. Martin goes on to say that he is informed by the Second Named Plaintiff and believes that to do so (i.e. to impose such a restriction) would be likely to deprive the Plaintiffs of highly relevant documents relevant to the discharge by the Minister of his duty of care in prescribing the conditions in the Second Foreshore Licence.

192. Again this application is in respect of issues at the very heart of the case in respect of which the State Defendants have chosen to deny the Plaintiffs' claim and I accept the averments of Mr. Martin that the documentation which came into being in contemplation of or as part of the application for the Second Foreshore Licence and all reports and memoranda in that respect thereof as described in (g)(c) should be the subject of an order for discovery in the terms in paragraph (g)(c) which I accordingly make.

193. My understanding is that an order in the terms of paragraph (g)(d) as set out above is to be made by agreement.

194. As for category (g)(e), I note from paragraph 15 (d) of the affidavit of Maria Greene that this category is already covered by

category H (agreed category above) and I should like the confirmation of Counsel that this is agreed between the parties and that there is no longer an issue arising with regard to paragraph(g)(e) (so that a composite order can be made in respect of paragraph (g).

195. I note that paragraphs H and I are agreed.

> *Category (j):* "All documents comprising correspondence, reports, test results and data, complaints, minutes of meetings and all other documents howsoever described relevant to the Direction given by the Second Named Defendant to the Plaintiffs on 8th January, 2001, only to sell oysters from production areas that would not present a risk of illness to persons consuming the oysters and directing the Plaintiffs to take appropriate measures to ensure the safety of their product.
>
> (k) All documents comprising notes, memoranda, reports, test results and data, minutes of meetings and correspondence concerning the Direction given by the Second Named Defendant to the Plaintiffs on 20th February, 2002 on the further closure of the Plaintiffs' oyster fishery.
>
> (l) All documents comprising notes, memoranda, reports, test results and data, minutes of meetings and correspondence and all other documents howsoever described concerning the closure of the Plaintiff's oyster fishery on 21st June, 2002 by the Second Named Defendant.
>
> (m) All documents comprising notes, memoranda, reports, test results and data, minutes of meetings and correspondence and all other documents howsoever described concerning the closure of the Plaintiffs' oyster fishery by the Second Named Defendant on 15th October, 2002.
>
> (n) All documents comprising notes, memoranda, reports, test results and data, correspondence and minutes of meetings and all other documents howsoever described concerning the decision taken by the Minister for Communications, Marine and Natural Resources (the successor to the Second Named Defendant) prohibiting the harvesting of oysters in the North Channel East of Cork Harbour, County Cork effective from 25th February, 2003, and withdrawing the prohibition on the harvesting of oysters in the North Channel West of Cork Harbour, County Cork with effect from the same date which decisions were published in the national press on 27th February, 2003, and which remain in force to date."

196. It would seem appropriate to deal with these paragraphs j, k, l, m, n, and o as a group together as fairly similar considerations apply. In respect of paragraph J. Mr. Martin in his letter dated 16th December, 2003, at paragraph 10 as required gave reasons in relation to category (j):-

> "The documents referred to in this paragraph are relevant to the matters at issue in the proceedings. At paragraph 51 of the Statement of Claim it is pleaded that the Second Named Defendant issued certain directions to the Plaintiffs on 8th January, 2001, arising from the risk of illness to persons consuming the Plaintiffs' oysters as a result of the exposure to the sewage from the Middleton Sewage Scheme. As pleaded at paragraph 51 of the Statement of Claim, the Plaintiffs had no option but to comply with the Second Named Defendant's advice and request and the Plaintiffs' oyster fishery remained closed from 8th January, 2001 until 27th July, 2001. These matters are admitted at paragraphs 42 to 45 of the defence of Second, Third and Fourth Named Defendants. It is pleaded by them that the purpose of the closure was to safeguard human health and safety. Documents relevant to this Direction and to the reasons for the closure are relevant to the matters at issue in the proceedings. The Plaintiffs require disclosure of these documents in order to demonstrate to the Court the extent of the damage and interference to their business and to the reasons therefore stated by the Second Named Defendant. The Second Named Defendant is likely to have documents on the basis of which it took the said decision and issued the said Direction to the Plaintiffs. The Plaintiffs have no means of obtaining those documents other than by way of discovery. It is necessary that the Plaintiffs obtain discovery of those documents for the fair disposal of their claim. Furthermore, discovery is likely to result in a saving as to costs for the reasons outlined in category 1 above."

197. At paragraphs 18 and 19 of the affidavit of Maria Greene, she says in reply to Mr. Martin's reasons for the request for documents in category category (j) that:

> "In respect of the request for documents relevant to the Direction of 8th January, 2001, the State Defendants have admitted the Direction at paragraphs 42 - 45 of their defence. The State Defendants are willing to provide a copy of the Direction given by the Second Named Defendant to the Plaintiffs on 8th January, 2001. In those circumstances the State Defendants do not consider that it is necessary for the Plaintiff's claim that all documents relevant to the Direction be discovered as the only relevant document is the actual Direction given by the Second Named Defendant to the Plaintiffs on the 8th January, 2001 itself. In those circumstances the request for additional documents over and above the Direction given by the Second Named Defendant to the Plaintiffs on 8th January, 2001, would appear to be a 'fishing' exercise on the part of the Plaintiffs.
>
> Moreover, the Plaintiffs seek discovery of those documents to demonstrate to the Court the extent of the damage and interference to their business and the reasons therefor stated by the Second Named Defendant. The documents sought by the Plaintiffs will not assist the Plaintiffs in ascertaining the extent of the damage and interference to their business. The Plaintiffs plead that the damage and interference arose from the Direction itself and not from any underlying documents."

198. A moment's reflection is enough to refute the narrowness and unreasonableness of these arguments. The closure order was caused by the Minister's fears for public health and his anxiety presumably based on expert reports which no doubt contain the evidence about the perils from contaminated oysters and how the molluscs have been made poisonous when previously the North Channel had been a clean and prolific production area and the pioneer of Irish oyster beds. It is clear that the reasons which caused the Minister to make the closure directions are vital and hence the "underlying documents" and the expert and other reports and advices as to the causes of the contamination are germane to the issues put in conflict in the pleadings in delivered by the defendants. The suggestion that the Plaintiffs' solicitor had embarked on "a fishing exercise" is cogentently and carefully refuted by him in his restrained and reasoned response which follows.

199. In his second replying affidavit Mr. Martin responds that:- "the State Defendants' attitude to the discovery sought is contained at paragraphs 18 and 19 of Maria Greene's affidavit. The State Defendants seek to have the discovery under this paragraph confined to the Direction itself. However, documents relevant to that Direction, including documents in the possession of the Minister when the Direction was given, are relevant to matters at issue for the reason outlined in the letter seeking voluntary discovery in respect of category j. It was as a result of the Minister's Direction that the Plaintiffs' oyster fishery was closed between 8th January, 2001, and

27th July, 2001. Documents surrounding that Direction are relevant. For example, the Minister clearly had information available to him to demonstrate that it was necessary to impose the Direction. Those documents are likely to support the Plaintiffs' case that there was serious contamination of their oyster fishery and that this posed a threat to human health to those consuming the Plaintiffs' oysters. The Plaintiffs claim in these proceedings is that the blame for that contamination must lie with the Council or with the Minister and his servants or agents. It is, I believe, therefore, wrong to suggest that 'the only relevant document' is the decision itself. It is not the case that the other documents requested amount to a "fishing exercise" as alleged by Ms. Greene. They are relevant and it is necessary that the Plaintiffs obtain them by way of discovery. Contrary to the assertions made by Ms. Greene at paragraph 19 of her affidavit, discovery of these documents will show why the Minister felt it necessary to impose the Direction and will support the Plaintiffs' case concerning the severe contamination of their oyster fishery and the consequent threat to persons consuming oysters as a result of the contamination of the fishery by the effluent from the treatment plant." Thus in his second affidavit Mr. Martin takes issue with the State Defendants' attempt to have the discovery under category j confined to the Direction itself. He submits that documents relevant to that Direction, including documents in the possession of the Minister when the Direction was given, are relevant to matters at issue for the reasons outlined in the letter seeking voluntary discovery in respect of category j. It was as a result of the Minister's Direction that the Plaintiffs' oyster fishery was closed between 8th January, 2001, and 27th July, 2001. Documents pertinent to and grounding that Direction are likely to be very germane and pertinent. For example, the Minister clearly must have had information available to him indicating that it was necessary to impose such a Direction. Those documents are likely to support the Plaintiffs' case that there was serious contamination of their oyster fishery and that this posed a threat to human health to persons consuming the Plaintiffs' oysters. The Plaintiffs' claim in these proceedings is that the blame for that contamination must lie with the Council or with the Minister and his servants or agents. It is therefore, wrong to suggest that the only relevant document is the Direction itself. It is clearly not the case that the other documents requested amount to a "fishing exercise" as alleged by the State solicitor. The request is for documents which are relevant either to support the Plaintiffs' case or to negative the Defendants' responsive defences thereto. It is necessary that the Plaintiffs obtain such documentation by way of discovery. As to the assertions made by the solicitor nominated by the Minister to be the deponent, at paragraph 19 of her affidavit, about the aim of obtaining these documents being to demonstrate the extent of damage to and interference with the Plaintiffs' business, on the contrary the discovery of these documents is likely to demonstrate why the Minister felt it necessary to impose the Direction and presumably is likely to give information which may well support the Plaintiffs' case concerning the severe contamination of their oyster fishery and the consequent threat to persons consuming oysters as a result of the contamination of the fishery by the effluent from the treatment plant. I conclude therefore that not just the Direction itself but also the relevant underlying documentation pertinent to grounding the Minister's Direction closing the fishery and the documents and expert reports on which this Direction was based which presumably justify that Direction should be discovered as being very relevant to the issues put in conflict. The point is clearly well made that the Minister must have had information available to him and it would seem in the context very likely that the Minister had reports and documents which he considered, since he took the view that it was necessary to impose the Direction. It seems very likely that those documents will support the Plaintiffs' case that there was serious contamination of their oyster fishery and that this posed a threat to human health for those consuming the Plaintiffs' oysters. The Plaintiffs claim in these proceedings that the blame for that contamination must lie with the Council and with the Minister and its servants or agents. One might expect reports and advices to the Minister to express opinions as to the source and causes of the contamination and these would almost certainly be discoverable. Mr. Martin sums up by saying that it is wrong to suggest that the only relevant document is the decision itself and he refutes the suggestion that the only relevant document is the Direction of 8th January 2001 itself, for other documents are likely to be important and relevant and the Plaintiffs need them for their proofs and to reduce the time and expense involved in the trial. Furthermore I note that, since these proceedings were initiated on 16th October 2001, it would be unlikely that any of these reports and documents about food poisoning from contaminated oysters before January 2001 were prepared for the purpose of litigation.. Since it was the Second Named Defendant who advised the Plaintiffs that there was a significant and real risk of illness due to viral infections to persons consuming the Plaintiffs' oysters, there can surely be little doubt but that there are memoranda and the reports about reported illnesses made on the part of and about the persons who had consumed contaminated oysters from the Plaintiffs' oyster fishery. It is understandable that, on the basis of serious reports, the Minister advised the Plaintiffs that there was a significant and real risk of illness due to viral infections to persons consuming the Plaintiffs' oysters and the Plaintiffs were advised by the Minister only to sell oysters from production areas that would not present a similar risk. The Plaintiffs were requested to make immediate arrangements to effect this change in harvesting. In view of the traverse in this case it is clear that the Defendants have chosen to put the Plaintiffs on proof of their allegations. It is likely that the Minister was acting on the basis of information from expert reports referred to him by the Health Authorities and the Council and that his documentary information would be very relevant to a crucial aspect of the case. Furthermore these documents would be in the possession or procurement of the Minister. It would be difficult for the Plaintiffs to obtain such reports, memoranda and other material from any other source. Accordingly, I am satisfied that the Plaintiffs are entitled to an order for discovery in the terms of category (j). One would certainly expect strongly that such documents would be likely to contain material supporting the Plaintiffs' case concerning the contamination of the oyster beds and the ensuing risk to persons consuming oysters, and they may well also include opinions and narratives about the sources and cause of that contamination.

200. *Category (k)*: - All documents comprising notes, memoranda, reports, test results and data, minutes of meetings and correspondence concerning the Direction given by the Second Named Defendant to the Plaintiffs on 20th February, 2002 on the further closure of the Plaintiffs' oyster fishery.

201. Mr. Martin made his request for voluntary discovery on oath in his letter dated 16th December, 2003, and gave the required reasons:-

Reasons

> "These documents are relevant to the matters at issue in the proceedings. The Direction given by the Second Named Defendant to the Plaintiffs on 20th February, 2002, is described at paragraph35 of the Statement of Claim. The second, Third and Fourth Named Defendants admit that that Direction was given at paragraph 47 of their defence. Documents relevant to this Direction are relevant to the matters at issue in the proceedings. The Second Named Defendant is likely to have documents in its possession or power concerning that Direction. This issue is also of central importance to the Plaintiffs' claim in the proceedings. The Plaintiffs have no means of obtaining access other than by way of discovery. Discovery of these documents is necessary to enable the fair disposal of the Plaintiffs' claim. Furthermore discovery is likely to result in a saving as to costs for the same reasons as are outlined in respect of Category I above. The documents sought are those which concern the Direction given by the Minister to the Plaintiffs on 20th February, 2002 which further closed the Plaintiffs' oyster fishery. The Plaintiffs' fishery was closed on foot of that Direction from 20th February, 2002, until 26th April, 2002. For the same reasons as are outlined above in respect of category (j), documents underlying and concerning the Direction and not merely the Direction itself are relevant. Accordingly there should be discovery in the terms of category (k) and the Plaintiffs are so entitled.

202. *Category (L):* All documents comprising notes, memoranda, reports, test results and data, correspondence, minutes of meetings

and all other documents howsoever described concerning the closure of the Plaintiffs' oyster fishery on 21st June, 2002, by the Second Named Defendant.

203. Mr. Martin gave the required reasons in his letter dated 16th December, 2003 seeking voluntary discovery on the basis that the documents described are relevant to the matters at issue in the proceedings. At paragraph 38 of the Statement of Claim it is pleaded that following further sustained rainfall in May 2002, bacteriological results from oysters produced during this period showed that the oyster beds had been grossly polluted. On 21st June, 2002, the Plaintiffs' oyster fishery was once again closed by the Food Safety Authority of Ireland and by the Second Named Defendant both for the sale of any production from the fishery and for the depuration of any shellfish brought in from outside. The Second, Third and Fourth Named Defendants in their defence admit that the Plaintiffs' oyster fishery was closed on that date for the reason pleaded by the Plaintiffs (see paragraph 52 of their defence). Documents concerning this closure are relevant to the matters at issue in the proceedings. The Second Named Defendant is likely to have documents in relation thereto. The Plaintiffs have no means of obtaining access to those documents other than by way of discovery. They require those documents (in addition to the documents referred to in the previous category) in order to demonstrate the reasons for the closure and the impact of that closure on the Plaintiffs' business. Discovery of these documents is necessary for the fair disposal of the Plaintiffs' claim. Such discovery is also likely to result in a saving as to costs for the same reason as outlined in category 1 above. Mr. Martin's reasoning is correct. Accordingly I think that the Plaintiffs are entitled to an order for discovery in the terms of paragraph L.

204. *Category (m)*: All documents comprising notes, memoranda, reports, test results and data, correspondence, minutes of meetings, and all other documents howsoever described concerning the closure of the Plaintiffs' oyster fishery by the Second Named Defendant on 15th October, 2002.

Reasons
205. Mr. Martin in his letter dated 16th December, 2003 to the Chief State Solicitor wrote seeking voluntary discovery:-

> "The documents described in this paragraph are relevant to the matters at issue in the proceedings as they concern the continuing and ongoing effects of the Defendants' unlawful actions and omissions on the Plaintiffs and their business. On 15th October, 2002, the Plaintiffs' oyster fishery was again closed by the Food Safety Authority of Ireland and by the Second Named Defendant both for the sale of any production from the fishery and for the depuration of any shellfish brought in from outside. This closure occurred after the delivery of the Statement of Claim on 20th August, 2002, but documents concerning the closure are relevant to the matters at issue in the proceedings as they show the continued effect on the Plaintiffs and their business of the Defendants' unlawful actions and omissions. The Second Named Defendant is likely to have documents in relation thereto. The Plaintiffs have no means of obtaining access to those documents other than by way of discovery. They require those documents (in addition to the documents referred to in the previous categories) in order to demonstrate the reasons for the closure on 15th October, 2002, and the impact of that closure on the Plaintiffs' business. The Plaintiffs believe that discovery of these documents would greatly assist them in the prosecution of their claim. In those circumstances discovery of these documents is necessary for the fair disposal of the Plaintiffs claim. Such discovery is also likely to result in a saving as to costs for the same reasons as are outlined in respect of category 1 above."

206. At paragraph 24 of her affidavit, Maria Greene makes the point that as the Statement of Claim was delivered on 20th August, 2002, the Direction of 15th October, 2002 and documents concerning the closure arose after the issuing of the Statement of Claim. She suggests that the State Defendants have not had an opportunity to admit or deny this Direction as the period of time after the Statement of Claim is not covered by the Plaintiffs claim. Without prejudice to this, she says that "the State Defendants are willing to provide a copy of the Direction given by the Second Named Defendant on 15th October, 2002, and that in those circumstances the State Defendants do not consider that it is necessary for the Plaintiffs' claim that all documents relevant to the Direction be discovered as the only relevant document is the actual Direction given by the Second Named Defendant to the Plaintiffs on 15th October, 2002." In those circumstances she asserts that the request for additional documents over and above the Direction given by the Second Named Defendant to the Plaintiffs on 15th October, 2002, would appear to be "a fishing exercise" on the part of the Plaintiffs. She then contends that the Plaintiffs seek discovery of those documents to demonstrate to the court the extent of the damage and interference to their business and the reasons therefor stated by the Second Named Defendant. She avers first that the documents sought by the Plaintiffs will not assist the Plaintiffs in ascertaining the extent of the damage and interference to their business. She submits then that the Plaintiffs plead that the damage and interference arose from the Direction itself and not from any underlying documents. Both these propositions seem to defy reason. First, the documents sought under category M. are those concerning the closure of the oyster fishery by the Minister on 15th October, 2002. The documents concerning and underlying the making of the decision to give the Direction to close the fishery are manifestly relevant in the light not only of the pleadings but also the denials by the Defendants putting the Plaintiffs on proof. When one considers the contents of paragraphs 34 to 51 of the Statement of Claim alleging the acts and omissions of the Defendants causing the contamination by sewage of the oyster beds and the nature of the traverse type of the defence, one can envisage how very germane to the issues in the pleadings and how important such discovery is for the Plaintiffs. Admittedly there are a few token admissions thrown in on the lines of paragraph 42 of the defence that it is admitted that on 8th January, 2001, these Defendants advised the Plaintiffs that there was a significant and real risk of illness due to viral infections to persons consuming the Plaintiffs' oysters and the Plaintiffs were advised only to sell oysters from production or that would not present a similar risk. At paragraph 45, it was admitted that the Plaintiffs' oyster fishery remained closed from 8th January, 2001, until 27th July, 2001, with the purpose of the closure being to safeguard human health and safety. Notably paragraph 47 of the defence admits that on 20th February, 2002, the Plaintiffs were directed by these Defendants immediately to cease harvesting oysters from Cork Harbour as alleged at paragraph 35 of the Statement of Claim. Unusually at paragraph 48 there is a positive pleading as follows:-

> "the Plaintiffs failed to report the incidence of illnesses to these Defendants and caused or contributed to the alleged incidents of illness which incidents are denied."

207. Thus the Defendants make an allegation against the Plaintiffs of failure ot report incidence of illness which very illness the Defendants formally deny and in respect of which they put the Plaintiffs on formal proof. The Plaintiffs' claim is continuing as in the pleadings it is made quite clear that when there is heavy rainfall then the inadequacy of the Defendants' design or construction of the system, including the capacity of the storm water tanks and the location of the sewage outfall close to the Plaintiffs' oyster fisheries, brings about the situation that the oyster beds are contaminated. Notably at paragraph 49 of the defence, the Defendants deny each of the "averments" set out in paragraph 36 of the Statement of Claim. This is the allegation that the First Named Defendant failed to respond, despite repeated requests from the Plaintiffs and many enquiries from them as to whether there had been overflows of untreated effluent from the sewage system into the estuary. Then only and eventually on 26th March, 2002, the Council made admissions and revealed to the Plaintiffs that there had indeed been massive overflows of untreated effluent from the sewage system into the estuary. Clearly, records and reports about these mishaps are very significant and relevant.

208. One might have thought that the main spirit of the agreement in the Consent and settlement was to remedy the mischief of untreated sewage effluent polluting the estuaries and the North Channel and damaging the oyster farms. As for the massive overflows of untreated effluent, I note the suggestion that from 21st January, 2002, to 3rd March, 2002, there had been overflows of untreated sewage every day and that on 18 of these occasions, these flows had exceeded in a single day the total overflow envisaged and certified as being for a whole year. Also there is the allegation that from 21st January, 2002, to 4th April, 2002, 70% of all the oyster samples tested positive for Human Norwalk Like Virus (NLV). The Defendants deny these allegations thus putting the Plaintiff on proof. Of course the Defendants are correct that the Direction of 15th October, 2002, arose after the delivery of the Statement of Claim but the claim in any event is a continuing claim as the allegations are that the nuisance is continuing and that untreated sewage is being released into the estuaries by reason of the nuisance and negligence and breach of duty of the Defendants, particularly in relation to the design and management of the sewage works where storm water and untreated sewage have confluence and are then released from discharge outlets or else from storm water holding tanks of allegedly inadequate capacity.

209. I well recall in the course of the hearing the reaction of senior Counsel for the Plaintiffs to the suggestion that his clients had voluntarily opted to close their fishery. He took restrained but firm issue with the suggestion by the Defendant's Counsel that the Plaintiffs had chosen to close their fishery and made it clear that in no way did the Plaintiffs close other than in compliance with notices from the Minister. In view of the continuing nature of the claims, it seems to me that it was perfectly pragmatic and economic for the Plaintiffs to include the further Directions from the Minister for closure of the oyster fishery in this claim rather than to be issuing a plenary summons initiating further litigation. Surely it is in the interests of all the parties that efforts should be made to include and resolve all differences in this one set of proceedings? In view of the continuing nature of the claim, it was reasonable for the Plaintiffs to include these matters in their request for discovery. Lest there be any uncertainty about this, I reiterate Mr. Martin's submission that documents concerning the closure in October, 2002 are relevant to the matters at issue in the proceedings as they show the continued effect on the Plaintiffs and their business of the Defendants alleged, unlawful actions and omissions. Obviously the reports and memos and correspondence on the basis of which the Minister acted are relevant. Furthermore these documents are very likely to assist the Plaintiffs in proving their case and probably in damaging the Defendants' defence, since these are reports presumably about the contamination of the Plaintiffs' oyster fisheries by untreated sewage which has caused the oysters to be poisoned. No doubt the Minister and his officials, bearing in mind the substantial damages which they have already had to pay in the previous action, were careful to study, minute and file all these materials and memoranda and reports on each occasion when the Minister had to be advised and had to receive written advices and to make a careful decision to issue a Direction that the oyster fishery should be closed, as it was by Direction of the Minister on 15th October, 2002. I am tempted at this point to suggest that similar discovery should be made of all further Directions for closure which have been made but exercise restraint under provocation by curbing impatience and merely suggesting that the parties should consider bringing the pleadings up to date in respect of any further episodes of the poisoning of the oysters so that the pleadings and particulars and procedural matters such as discovery and requests for particulars are all completed and tidied up so that the proofs for the trial can be advised without further delay.

210. Accordingly, there will be an order for discovery in the terms of category (m).

211. *Category N*: "All documents comprising notes, memoranda, reports, test results and data, correspondence, minutes of meetings and all other documents howsoever described concerning the decision taken by the Minister for Communications, Marine and Natural Resources (the successor to the Second Named Defendant) prohibiting the harvesting of oysters in the 'North Channel East' of Cork Harbour, County Cork, effective from 25th February, 2003, and withdrawing the prohibition on the harvesting of oysters in the 'North Channel West' of Cork Harbour, County Cork, with effect from the same date which decisions were published in the national press 27th February, 2003, and which remain in force to date."

212. I cite the required reasons given in his letter dated 16th December, 2003, by the Plaintiffs' solicitor, headed:-

Reasons

> "The documents described in this paragraph are relevant to the matters at issue in the proceedings as they also concern the continuing and ongoing effects of the Defendants' unlawful actions and omissions on the Plaintiffs and their business. On 27th February, 2003, a notice was published in the national press (including the Irish Examiner newspaper) which referred to the following decisions made by the Minister for Communications, Marine and Natural Resources (the successor to the Second Named Defendant). The decision in effect split the North Channel of Cork Harbour into the 'North Channel East' and the 'North Channel West'. The Plaintiffs' oyster fishery fell within the North Channel East. In the first of the said decisions, the subject of the said notice, the Minister prohibited the harvesting of oysters in the North Channel East with effect from 25th February, 2003. Pursuant to that decision, no depuration or re-immersion of shellfish can take place at the approved depuration centres in the area during the prohibition. The notice stated that scientific monitoring of the area was ongoing and that the withdrawal of the prohibition would be published as and when the Minister decided that it was suitable to harvest the oysters from the area affected. The second decision by the Minister was to withdraw the prohibition on the harvesting of oysters in the North Channel West which was put in place on 15th October, 2002, and which withdrawal was to take place from 25th February, 2003. These events occurred after the delivery of the Statement of Claim but are clearly relevant to the claim by the Plaintiffs in that they show the continuing and ongoing effect of the Defendants' actions and omissions on the Plaintiffs' business. The effect of these decisions is that while the Plaintiffs' oyster fishery was kept closed and no depuration or re-immersion of shellfish could take place, a neighbouring oyster fishery (merely a few hundred metres away) was opened and permitted to harvest oysters. The Plaintiffs, through their solicitors, sought to ascertain the basis for and the reasons for these decisions but received no substantive response from the Second Named Defendant or from the Chief State Solicitor. Since documents concerning these decisions are relevant to the ongoing and continued effects on the Plaintiffs' business of the unlawful acts and omissions which are the subject of these proceedings, the documents described in this category are relevant to matters at issue in these proceedings. The Plaintiffs have no means of obtaining access to these documents other than by way of discovery. The Plaintiffs require these documents (in addition to the documents referred to in the previous categories) in order to ascertain and demonstrate the reasons for the continued closure of the Plaintiffs' oyster fishery and the impact of that closure on the Plaintiffs' business. The Plaintiffs believe that these documents are likely to assist them in the prosecution of their claim and on that basis discovery is necessary for the fair disposal of that claim. Such discovery is also likely to result in a saving as to costs for the reasons outlined in category 1 above."

213. I should mention that category 1 above is otherwise referred to as category A.

214. I agree with the clear and concise reasons given by the Plaintiffs' solicitor above and I note again that the State Defendants per Maria Greene make clear that they are only willing to provide a copy of the Direction itself and do not consider discovery of any other documents to be necessary. This is obviously incorrect on a reading of the pleadings and a proper understanding of the case law bearing in mind the helpful passages cited above from Murray J., Fennelly J. and Geoghegan J. Furthermore, I do not accept the

theme in paragraphs 19, 22, 25 and 28 of the affidavit of Maria Greene setting out the State Defendants' contention that the documents sought by the Plaintiffs will not assist the Plaintiffs in ascertaining the extent of the damage or interference to their business. Clearly her observations show that she has misconstrued the thrust and purpose of the Plaintiffs' application. In view of the allegations of negligence and breach of duty, including statutory duty, against the State Defendants, the contents of the underlying documents giving cause for the Minister's Direction on the basis of the decision taken by the Minister for Communications, Marine and Natural Resources effective from 25th February, 2003, are quite clearly most relevant to understanding the reason for the Minister's decision. This is so not only in respect of the continued prohibition on the Plaintiffs' oyster fishery, but also in respect of the discontinuance of prohibition on the rival oyster fishery close by to the west which is no longer prohibited, these oyster beds being on the west side of the newly created division of the North Channel. From the point of view of Counsel advising proofs for the Plaintiffs, it would seem essential that the documentation underlying the Minister's decision would be included in an affidavit of discovery so that the relevant documents may be inspected and copies thereof taken so that the Plaintiffs can gain an understanding of this differentiation. From the inexpert point of view of one given to "messing about in boats" in tidal bays and channels, it is difficult to understand the basis for this differentiation since wind and estuarine and tidal currents do not observe such an artificial boundary and one would have thought that the rising tide which carried untreated sewage over the oyster beds of the Rossmore fishery would also proceed to cross over such an artificial division and cover the neighbouring oyster fishery which is in the Channel only a few hundred metres away to the west. Clearly the Plaintiffs are entitled to this underlying documentation which is highly relevant to the matters at issue in the pleadings and also necessary for the fair disposal of the claim and which could have vital implications from the point of view of the Plaintiffs' headings of loss and damage with implications for damages and loss continuing into the future. Accordingly, discovery will be ordered in the terms of category N.

215. Since the Plaintiffs' claim is ongoing I would suggest that the parties should consider and discuss whether there is a need to update the Statement of Claim and defences and the notices for particulars and replies thereto, and indeed the giving of voluntary discovery on oath of particulars of any further directions to close and as to differentiations between the 'North Channel East' and the 'North Channel West' in Cork Harbour, so that all the pleadings and procedural matters are taken care of in good time for the advices of proofs before the trial, both for the purpose of agreeing the documentation required and for the narrowing of the essential issues with accompanying savings of expense.

216. *Category O*: "All documents in the possession or power of the Second Named Defendant concerning the request by the Plaintiff for the relocation of the outfall point from Rathcoursey Point to a location as far as possible from the oyster beds which had been repeatedly requested by the Plaintiffs and the documents concerning the consideration and assessment of those requests including the data for and assessments in respect of all sewage discharges to Cork Harbour."

217. By his letter dated 16th December, 2003, the Plaintiffs' solicitor again gave his required reasons:

Reasons

> "The documents referred to in this paragraph are relevant to the matters at issue in the proceedings. At paragraph 44 of the Statement of Claim, it is pleaded that the Second Named Defendant failed to take any or adequate steps to relocate the outfall point for the sewage from Rathcoursey Point to a location as far as possible from the oyster beds which had been repeatedly requested by the Plaintiffs. It is pleaded at paragraphs 61 and 62 of the defence delivered on behalf of the Second, Third and Fourth Named Defendants that those Defendants had no statutory obligation to take the steps alleged and that it was not within their power to relocate the outfall point. Documents relevant to the requests by the Plaintiffs to move the outfall point are relevant to the matters at issue in the proceedings. It is necessary that the Plaintiffs obtain discovery of these documents in order to demonstrate the extent to which the Second Named Defendant was on notice of the steps which the Plaintiffs were requiring to be taken in order to minimise the adverse effects on their oyster fishery as a result of the operation of the Midleton Sewage Scheme. These documents are necessary in order to enable to the Plaintiffs to further their claim that the Second Named Defendant acted negligently in this regard. Accordingly, discovery of these documents is necessary for the fair disposal of the Plaintiffs' claim. Discovery will also result in a saving as to costs for the same reasons as are outlined in respect of category 1 above."

218. The response of the State Defendants per the affidavit of Maria Greene is that they are only willing to make discovery of documents in respect of the request by the Plaintiffs, for the relocation of the outfall point at Rathcoursey Point provided that this request was after the 26th November, 1996. I reiterate the reasons already given for seeking discovery on the basis of the pleadings as they stand at the moment and on the basis of relevance and necessity in the context of the issues as pleaded. In his replying affidavit dated 23rd July, 2004, the Plaintiffs' solicitor responds to paragraph 29 and 30 of Ms. Greene's affidavit by stating:-

> "The request by the Plaintiffs for the relocation of the outfall point from Rathcoursey Point, should the new outfall point lead to pollution of the Plaintiffs' beds, was first made to the Department on 1st December, 1988. Subsequently, following the catastrophic number of cases of illness reported in the Autumn of 1991, further requests to relocate the outfall were made on 5th, 11th, 18th November, 1991; 27th, 29th January, 1992; 19th, 22nd, 24th February, 1992; 12th March, 1992; 23rd April, 1992; 31st July, 1992; 5, 6 August, 1992; by a meeting in the offices of the Second Named Defendant on 25th September, 1992; 26th September, 1992; 3rd February, 1993; 2nd March, 1993; 17th May, 1993; 18th February, 1995; 12th March, 1996; 9th August, 1996 and 21st July, 1997. Although the requests were first made prior to the date of the Consent, for reasons already outlined in this affidavit it is not accepted that the State Defendants are entitled to restrict discovery to the period arising after the date of that Consent. Documents which predated the Consent and which fall under this heading are relevant and should be discovered."

219. The question of relevance of documentation in the possession or procurement of the State Defendants cannot be simplistically demarcated by an arbitrary date or the date of the Consent in view of the pleadings before this court at present. The Defendants have chosen to put nearly every conceivable issue into contention on the pleadings and so the Plaintiffs are entitled to seek relevant and necessary documentation, particularly in a case of this sort where the Defendants hold nearly all the relevant documentation with regard to reports, correspondence and memoranda and with regard to scientific reports and expert memoranda in respect of the issues of nuisance and negligence on their part. I earlier adverted to the clear and concise nature of the Plaintiffs' Statement of Claim which has also been comprehensive in setting out the themes involved in the Statement of Claim. Since the Defendants have chosen to deny and traverse the allegations, which they are entitled to do, they have put the Plaintiffs to proving their case. Hence in many instances the Plaintiffs are clearly entitled to the documentation underlying the decisions of the Defendants and particularly the expert reports and memoranda in the possession or procurement of the Minister. I have already adverted to the fact that one might have thought that the Minister would wish to stand over decisions made by himself and his predecessors and so would welcome the discovery of documents and the listing of all those memoranda which he considered before making his decisions, particularly as one would have anticipated that he or his officials might be relying on such reports giving expert advice and other memos all of which would be helpful in showing that the Minister did act carefully and after seeking and receiving properly qualified and independent

expert advice. This would be particularly in point when the Minister was licensing discharge of sewage close to oyster fisheries, as molluscs are well known for their susceptibility to becoming contaminated and also for infecting human beings who consume them.

220. Accordingly, I propose to make an order for discovery in the terms of paragraph and category O.

221. Care should be taken with regard to the criterion of relevance as it has dual importance in respect of this category from several points of view; first of all it is important that a diligent search is done to gather the appropriate documentary information of every sort in the procurement of the Minister, particularly records concerned with the aspect of the consideration of the relocation of the outfall point, and then secondly all documentation concerning the consideration and assessment of those records and requests. I should add that the last phrases about "including the data for and assessments for all sewage discharges to Cork Harbour" brings into play the question of relevance in the context of the issues, I would envisage that this is meant to cover all discharges which might affect the inland waters of the North Channel but the criterion of relevance would give a limiting factor and so, for example, neither discharges in the remote upper tributaries of either the River Lee or of the Owenacurra or Dungourney Rivers would probably be within the net of relevance unless these discharges do affect these rivers and the North Channel.

222. *Category (P)*: All documents in the possession or power of the Second Named Defendant concerning the decision to locate the place at which the inspection provided for at Condition 5 of the Second Foreshore Licence was to take place and concerning the operation of that inspection chamber and the criteria set for compliance of the secondary waste water treatment plant.

223. The required reasons given in the letter of request dated 16th September, 2003, from the solicitor for the Plaintiffs, gives the following reasons:-

Reasons

> "The documents referred to in this paragraph are relevant to the matters at issue in the proceedings. Under condition 5 of the Second Foreshore Licence granted by the Second Named Defendant to the First Named Defendant, the effluent was to be inspected at an inspection chamber in the channel downstream of the treatment plant so as to ensure that it complied with the standards referred to in condition 5. The Plaintiffs claim (at paragraph 45 of the Statement of Claim) is that the Second Named Defendant acted negligently and in breach of its duty of care to the Plaintiffs and in breach of statutory duty in failing and neglecting adequately to protect the Plaintiffs' position because of the place at which the inspection provided for in condition 5 was to take place. It is pleaded that because of the location of this inspection chamber, it was not possible to properly assess the quality of the effluent being discharged to the sea so as to ensure compliance with the standards required by condition 5. This is denied by the Second, Third and Fourth Named Defendants at paragraphs 63, 64 and 65 of their defence. These documents are relevant to the matters at issue in the proceedings. It is necessary that the Plaintiffs obtain discovery of the documents which the Second Named Defendant has in his possession or power concerning the inspection chamber referred to in condition 5. The Second Named Defendant granted the Second Foreshore Licence and provided for the terms of condition 5. The Plaintiffs require access to the documents in the possession or power of the Second Named Defendant relevant to the matter in which the standards required by condition 5 would be complied with. Such discovery, therefore, is necessary for the fair disposal of the Plaintiffs' claim. Discovery of these documents will also result in a saving as to costs for the same reasons as are referred to in respect of category 1 above."

224. I would be grateful for the assistance of Counsel as to whether the word "matter" was intended to be the word "manner" as this would appear more apposite in the context. The purpose and intention seems clear enough but any ambiguity is to be avoided in the context of the surprising amount of strenuous and strong opposition to the making of relevant and necessary discovery in this case. The State Defendants per paragraph 32 of the affidavit of Maria Greene make it clear that they are not willing to make discovery of any such documents on the basis that any such decision regarding the location of the inspection chamber is set out in the Second Foreshore Licence, and they contend that the Plaintiffs are not entitled to any documents underlying that licence. In his second affidavit sworn on 23rd July, 2004, the Plaintiffs' solicitor in rejoinder said that these documents are relevant for the reasons clearly outlined in the letter seeking voluntary discovery and should be discovered. He goes on to say:-

> "I am informed by the Second Named Plaintiff and believe that the decision concerning the siting of the inspection point in order to determine the quality of the effluent which would affect the oyster fisheries in the North Channel of Cork Harbour is of considerable importance in this case. Having regard to the claim being made by the Plaintiffs against the Minister, the Plaintiffs ought to be provided with discovery of documents which would demonstrate why it was decided to locate this point some miles from where the effluent is discharged into the sea as a result of which it only covers a fraction of the effluent discharged from the town of Midleton, whilst an equally large volume of effluent containing human sewage discharges from the town into the sea via the industrial sewer and elsewhere go unmonitored. This is an important issue in the case and I believe that the State Defendants ought to be required to make discovery of these documents."

225. Having examined the map of the layout of the sewage treatment system as depicted on maps 1, 2 and 3 annexed in the appendix hereto with my inexpert and untutored eye, I had difficulty in understanding why the inspection chamber was placed on the west side of the treatment plant while there were overflow tanks at Bailick No.1, Bailick No. 2 and Ballinacurra Pumping Station No. 2 which apparently all had overflows going into the estuary or else were being channelled along with the industrial effluent into Bailick No. 1, from whence it was then being pumped to the Rathcoursey outfall without any analysis or inspection of the mixed contents flowing down to the Rathcoursey tank and to the outfall in the East Ferry Channel of the Ballinacurra River. From there it would be likely to be swept in by the incoming tide into the currents in the North Channel and from there on over the oyster beds. Quite clearly, since negligence and breach of duty are alleged against the State Defendants, as well as the "tort of nuisance", if this allegation is proved that the inspection point was located at a location where the inspection was so ineffective that it only covers a fraction of the sewage effluent being discharged from the town of Midleton, then this would be likely to be significant. The allegation would appear to be that a large volume of sewage effluent discharges from the town sewers into the sea, via the industrial sewer and from inadequate overflow tanks at no less than three pumping stations. With the allegations and denials in the pleadings, the documents in category P are vital to the issues set out in the pleadings and in issue in this case. Furthermore there is a claim for exemplary and aggravated and punitive damages in this case. If the allegation that the Minister has been negligent in allowing the construction of the inspection chamber in a location which renders it, by reason of the layout of the rest of the system, totally ineffective for the purpose of common sense monitoring of all the sewage effluent and also for the purpose of remedying the mischief, this would be of vital importance. No doubt the true spirit of the Consent was intended in order to remedy the mischief of untreated sewage sluicing in to the tide from the outfall at Rathcoursey Point and then being carried by incoming tide and outgoing tide and winds and estuarine flow over the oyster beds in the North Channel. The underlying documents in the possession or procurement of the Second Named Defendant concerning the decision to locate the inspection chamber, and the operation of that inspection chamber, and also the criteria set for compliance in respect of the operations of the secondary waste water treatment plant would all

seem to be very vital issues requiring the discovery of documents pertinent to these matters by the Defendants. These type or records clearly are very significant in respect of the pleadings of negligence and breach of duty and they would have significance for the claims of exemplary, aggravated and punitive damages. Accordingly there will be an order for discovery of the documents in category P. Perhaps Counsel would consider further whether the last phrase should read "the criteria set for compliance as to the secondary waste water treatment plant".

226. I regret the tediousness and length of this judgment. This is not the first of these lengthy battles in relation to discovery of documents to have come before me on appeal from the Master. They have involved lengthy submissions with contests and conflicts which one would have hoped might have been resolved at an earlier stage now that there are a number of clear and helpful decisions of the Supreme Court to assist the Master of the High Court and Counsel. In the present case, since the County Council and the State Defendants between them, because of the nature of the case, are bound to hold most of the documentation and reports and expert memoranda on the matters in issue, the issue of discovery becomes vitally important, not least since the Defendants have chosen to put the Plaintiffs to formal proof on each of the many issues in contention. In a case such as this, there seems little alternative but to have to tackle each category of discovery sought and deal with it by setting out the wording of the category sought, the reasons given by the Plaintiffs' solicitor for requiring this discovery on foot of the issues in the pleadings, and other matters such as the relevance and need for the documents and the likelihood of their eventual production reducing the expense and time to be spent in proving matters which could be briefly proved by the calling for and cursory production of a document being held by the opposition. Perhaps with the advent of the amended Order 31 rule 12 the wise words quoted above of Henchy J. and Finlay C.J. are given too little consideration. There is no reason for this when one bears in mind their consistency with the balanced views and careful setting out of the principles by Fennelly J. in the Ryanair case. Perhaps the phrase "a fishing expedition" is at times too lightly used when a party is in fact entitled to discovery of the documents sought within the parameters of the principles governing the eligibility for an order for discovery of documents, which process can be such a useful weapon in the just and fair disposition of a case. When liability is in issue and the Plaintiff has properly pleaded the ingredients of the claim in a comprehensive way, then the obtaining of relevant and necessary discovery of documents may well reduce the time and expense involved in the litigation and in the trial itself.

227. I propose to make orders in the terms outlined. I will hear what Counsel have to say about the length of time required for the making of discovery. I am inclined to suggest that seven weeks would be appropriate as much of the documentation should already have been assembled relevant to the case. I am anxious that the parties should have certainty and be able to proceed with making proper discovery. I have already indicated that I will give Counsel an opportunity to make submissions in respect of the time aspect, any ambiguities which arise in respect of the orders envisaged and also to address the court on the aspect of costs.

228. Finnegan P. indicated that preparatory orders and directions should come back before the same Judge as this case is likely to require considerable "preparatory management and directions".

Appendices

Appendix 1

List of Ministerial Decisions relevant to these proceedings.

Appendix 2

Alpha

Categories of discovery consented to by the First Named Defendant before the Master's Court.

Beta

Additional Categories of Discovery agreed between Plaintiffs and First Named Defendant prior to commencement of Hearing before Mr. Justice Budd.

Gamma

Categories of Discovery outstanding between the Plaintiffs and the First Named Defendant

Delta

Delta 1

Memo dated 26th January 2006.

Delta 2

Memo dated 14th February 2006.

Epsilon

Plaintiffs' Memorandum (Final) re Discovery as against the First Named Defendant.

Appendix 3

Map 1

Map 2

Map 3 – Cork County Council – Midleton Sewerage Scheme – Location of Treatment works and Outfall.

Appendix 4

List of cases mentioned.

1. *MacCabe v. Joynt* [1901] 2 I.R. 115

2. *Green v. Rozen* [1955] 1 W.L.R. 741

3. *Woods v. Martin's Bank Limited* [1959] 1 Q.B. 55

4. *Sterling Winthrop Group Limited v. FBA* [1970] I.R. 97

5. *Byrne v. Ireland* [1972] I.R. 241

6. *McCarthy v. O'Flynn* [1979] I.R. 127

7. *O'Mahony v. Gaffney* [1986] I.R. 36

8. *Hanrahan v. Merck Sharpe and Dome* [1988] I.L.R.M 629

9. *Taylor v. Smyth* [1991] 1 I.R. 142

10. *Derby and Co. Ltd. v. Weldon* (No 9) [1991] 1 W.L.R. 652

11. *Allied Irish Banks plc v. Ernst and Whinney* [1993] 1 I.R. 375

12. *Galvin v. Twomey* [1994] 2 I.L.R.M. 315

13. *Taylor v. Anderton* [1995] 1 WLR 447

14. *O Company v. M Company* [1996] 2 Lloyd's Rep. 347

15. *Brooks Thomas Limited v. Impac Limited* [1999] 1 I.L.R.M. 171

16. *Aquatechnologie v. MSAI* (Unreported, Supreme Court, 10th July, 2000)

17. *Hannon v. Commissioners of Public Works* (Unreported, High Court, McCracken J., 4th April, 2001)

18. *Cooper Flynn v. Radio Telifís Éireann* [2000] 3 I.R. 344

19. *Swords v. Western Proteins Limited* [2001] 1 I.R. 324

20. *Burke v. D.P.P.* [2001] 1 I.R. 760

21. *Simba-Tola v. Elizabeth Fry Hostel* [2001] E.C.W.A Civ 1371

22. *Carlow/Kilkenny Radio Limited v. Broadcasting Commission* [2003] 3 I.R. 528

23. *Ryanair plc v. Aer Rianta c.p.t.* [2003] 4 I.R. 264

24. *Taylor v. Clonmel Healthcare* [2004] 1 I.R. 169

25. *Framus v. CRH plc* [2004] 2 I.R. 20

26. *VLM Limited v. Xerox* (Unreported, High Court, Clarke J., 25th February, 2005)

Appendix 5

List of Legislation mentioned

1. Ministers and Secretaries Act, 1924.

2. Foreshore Act, 1933

3. Freedom of Information Act, 1997

4. European Communities (Environmental Impact Assessment) Regulations 1989 (S.I. 349 of 1989)

5. Local Government (Planning and Development) Regulations 1994 (S.I. 86 of 1994)

6. European Communities (Live Bi-Valve Molluscs) (Health conditions for Production and Placing on the Market) Regulations 1996 (S.I. No. 147 of 1996)

7. European Communities (Live Bi-Valve molluscs) (Health conditions for Production and Placing on the Market) (Amendment) Regulations 2000 (S.I. No. 390 of 2000)

Other Relevant Legislation

8. Council Directive 79/923/EEC

9. Quality of Shellfish Waters (Amendment) Regulations, 2001 (S.I. No. 459 of 2001)

10. European Communities (Quality of Shellfish Waters) Regulations 2006 (S.I. No. 268 of 2006)