



THE COURT OF APPEAL

Record No. 2015/191

Record No. 2015/192

Record No. 2015/193

Ryan P.
Peart J.
Hogan J.
BETWEEN/

IBB INTERNET SERVICES LTD., IRISH BROADBAND INTERNET SERVICES LTD. (TRADING AS IMAGINE NETWORKS) AND IMAGINE COMMUNICATIONS LTD.

Plaintiffs/Appellants

- AND -

MOTOROLA LTD.

Defendant/Respondent

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 7th day of December 2015

1. These are appeals and cross-appeals from the decision of the High Court (Barrett J.) delivered on 3rd February 2015, *IBB Internet Services Ltd. v. Motorola Ltd.* [2015] IEHC 54, dealing with applications for discovery made by both the plaintiffs and the defendant in these proceedings. Both parties have appealed (in part) aspects of the judgment in respect of particular categories of discovery insofar as it orders them to make discovery in favour of their opponent and fails to direct their opponent to make discovery.

2. The parties originally sought highly detailed categories of discovery from each other. Some of these matters were agreed or compromised. The disputed categories were dealt with by Barrett J. in the course of a very detailed judgment. So far as this appeal is concerned, naturally this judgment addresses only those categories of discovery which were the subject of an appeal or cross-appeal.

3. The plaintiff companies are internet service provider companies who specialise in cloud computing and advanced internet delivery systems. The present proceedings commenced in 2010 and involve a claim made by the plaintiff companies ("the Imagine Group") for damages for breach of contract and for negligence for some €138m. arising from the roll-out of a WiMax Network by the defendant ("Motorola"). Although the proceedings were swiftly admitted to the Commercial Court, it is a matter of regret that the action still has not proceeded to trial, in part because of a plethora of preliminary pre-trial applications which have delayed its progress.

4. The essence of the plaintiffs' case is that Motorola acted in breach of contract and were negligent in the manner in which it supplied this WiMax network. The plaintiffs contend that the network as supplied did not have the requisite capacity for their needs. They contend that that Motorola undertook or represented that the network would have sufficient throughput *and* capacity and that whereas the network might have had sufficient throughput or capacity, they say that it did not meet *both* requirements. So far as the plaintiffs are concerned, this combination of throughput and capacity is vital, because it is this very combination which determines the speed of the broadband connectivity. This is then relevant to the number of customers on each base station which can be provided with the requisite broadband speed and, by extension, the commercial viability of each such station.

5. It is also important to note that the plaintiffs further contend that the defendant is guilty of negligent misrepresentation and negligent misstatement regarding the capacity and suitability of the WiMax network.

6. In approaching the issues of discovery it is important to recall that there are essentially three separate periods of time which form the background to this dispute. First, there was the tender period from 5 August 2008 until March 2009 after which Imagine contends (and Motorola disputes) that Motorola was selected as the preferred bidder. Second, there was the period from March 2009 until 13th October 2009 when what has been described as the Master Services Agreement ("MSA") was signed. Third, there was the period from 13th October 2009 to 3rd December 2009 when the Equipment Financing Agreement ("EFA") was signed. It was only when the latter agreement was signed that the MSA became binding.

7. The agreement envisaged that the equipment and services to be provided by Motorola were to be built in clusters of 15 sites at a time. Imagine ultimately ordered 8 clusters, with 120 sites in total. The sites contained masts which connected with computer equipment within the home. Such connectivity was vital if the customer was to have satisfactory access to internet or voice technology by means of a high broadband speed. The questions of whether this equipment worked satisfactorily and whether there was a delay in the roll-out are at the heart of the present case.

8. Although the present proceedings were commenced on 23rd December 2010, the contractual relationship between the parties did not end until 29th April 2011 when Motorola's rights and liabilities under the MSA were assigned to a new entity called NSM. Like Barrett J., I would gratefully adopt the summary of the issues and the general background which is found in the judgment of Charleton J. at an even earlier stage of the proceedings in *IBB Internet Services Limited & Ors v. Motorola Ltd.* [2013] IEHC 541 where he stated:

"1. This action was commenced by plenary summons on 23 December 2010. While the plaintiffs are separate legal entities, they claim to be a single economic entity and assert the right to be treated as such in law and in fact. They claim damages for breach of contract and in negligence and in misrepresentation against the defendant due to alleged delay in the rollout of a broadband Internet network and in the dysfunction of such portion of that network as was provided. The relevant contract was negotiated between March and October 2009 and was to become operational in December of that year. The parties agree that on 13 October 2009 a written contract, called a master services agreement, was signed between the second named plaintiff and the defendant and that this was later novated to the

first named plaintiff on 10 November 2009. In addition, the plaintiffs allege that the third named plaintiff entered into a collateral agreement, apparently oral, with the defendant.

Representations and warranties seem crucial to the case made by the plaintiffs as to the suitability and functioning of the network. The main contract of 13 October 2009 contains clauses limiting liability and confining the relationship between the parties to contract in the terms as therein set out. The series of sites over which this network was to operate was to be supplied by the defendant to the plaintiffs in groups of 15, amounting eventually to 120 sites actually supplied, and there were 5 others included in a test module. In all, 402 sites were projected ultimately. Provisional acceptance of the sites under a term of the written contract is alleged by the defendant to be a warranty of satisfaction. Of these there are said to be 51 signed acceptances, on behalf of which plaintiff or on behalf of all plaintiffs, together with 74 deemed acceptances by virtue of the elapse of time. In addition, the contract provided for a final acceptance of which 31 were signed, in the same context, and 94 are deemed. The terms of the contract seem to be such that unless a batch of 15 sites is ordered, by whichever of the plaintiffs is responsible, there is no obligation on the defendant to supply anything or on the plaintiff to order anything. Because of dissatisfaction, whether for good reason or not, no sites have been ordered since July 2010.

2. It is more than unusual for a case entered into the commercial list to be three years old and not to have been tried. This case has not even proceeded to the stage of discovery. The plaintiffs claim to have been bombarded by procedural motions, of which they say this is the latest. The defendant claims that by reason of pleading alternate facts, there has been a necessity for the plaintiffs to recast the statement of claim on three occasions, the current version being the fourth. There are three prior written judgements of the High Court on this claim about this very lengthy statement of claim; of Kelly J on 6 July 2011, of Clarke J on 9 November 2011 and of McGovern J of 12 October 2012. In addition, the High Court has refused the defendant security for costs, which ruling has been appealed to the Supreme Court and is awaiting judgement. It is impossible to feel satisfaction with the progress of this case even since that date of the last version of the statement of claim; the fourth. The Court is entitled to emphasise that, whatever the rights and wrongs of this series of pre-trial manoeuvrings, about which no comment is made, the parties are under a duty to the court to prepare a case for hearing through cooperating with each other in aid of the fundamental obligation of identifying the issues to be tried and making the case ready for hearing."

9. There is no significant dispute between the parties in these proceedings as to the applicable law, or that the applicable criteria for ordering discovery are the relevance of the documentation and the necessity of its discovery to the fair disposal of the matter arising or for the saving of costs, subject to the observation of Murray J. in *Framus v. CRH plc* [2004] 2 I.R. 20, 38 that once relevance is established, a finding of necessity will generally follow.

10. As is clear from many of the comments which follow in the body of this judgment, I entirely share the concerns which Barrett J. voiced in his enormously comprehensive judgment regarding the burdens which applications for discovery are placing on the entire legal system. The fact that the present discovery application in the High Court lasted four days is ample testimony to this. Moreover, as Barrett J. indicated, experience has regularly shown that the practical benefits of such discovery is often entirely outweighed by the costs and delays in the entire process. How often is it the case that even in complex litigation only a relatively small number of documents prove to be the important ones, despite the generation of thousands of documents in the course of the discovery process, most of which are never used or deployed in court?

11. The courts have thus often struggled to contain the appropriate volume of discovery in recent years, the rule changes to Ord. 31 of the Rules of the Superior Courts effected in the wake of the comments of Lynch J. in *Brooks Thomas Ltd. v. Impact Ltd.* [1999] 1 I.L.R.M. 171 notwithstanding. The Supreme Court has accordingly in recent times stressed again that the documentation must not simply be relevant, but must also be necessary for the fair disposition of litigation: see, e.g., *P.J. Carroll Ltd. v. Minister for Health and Children* [2006] 3 I.R. 431, 438, *per* Geoghegan J.

12. The Supreme Court has also emphasised the importance of ensuring that the scope of discovery should be constrained by a general doctrine of proportionality. As Murray C.J. stated in *Framus v. CRH plc* [2004] 2 I.R. 20, 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....the critical 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 cause 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 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."

13. The Supreme Court has also further made it clear that in those cases where discovery would potentially impose an "unusual scale and burden" on a party, the court must examine "whether what is sought is likely to produce genuinely useful evidential material": *Dome Telecom Ltd. v. Eircom Ltd.* [2007] IESC 59, [2008] 2 I.R. 726, 747 *per* Fennelly J.

14. Similar principles were also applied by Kelly J. in *Astrazeneca AB v. Pinewood Laboratories Ltd.* [2011] IEHC 159 where he stated that, in this context, the principles of proportionality required an assessment of "the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of an applicant or damage the case of his opponent." Kelly J. added that the public interest in the proper administration of justice "is not confined to the relentless search for the perfect truth." This case-law demonstrates that it is thus necessary for this Court to ensure that the discovery does not potentially overwhelm the action.

15. As it happens, many of the categories of documents sought have now either been agreed by the parties or have been determined by Barrett J. in the course of his judgment. While, as I have already noted, both parties have appealed and cross-appealed different parts of his judgment, many of his determinations regarding specific categories of documentation have not been appealed. Although this has simplified somewhat the task of this Court, the fact remains that we have been obliged to rule on the scope of discovery by reference to hugely complex pleadings and highly specific categories of documentation sought. The task facing Barrett J. was a formidable one and thanks to his comprehensive judgment, the task confronting this Court is somewhat less onerous. The fact, however, that significant - and, many might think, disproportionate - judicial resources are now routinely devoted to questions of discovery suggests that a reconsideration of the practical functioning of the discovery rules in complex commercial disputes is, perhaps, overdue.

16. It is against that background that I can proceed to consider the discovery sought in respect of specific categories of documentation sought by the parties. It is necessary here, however, to say a word about the layout of this judgment. Part of the difficulties regarding the layout are caused by the fact that both parties sought extensive discovery against each other which was then followed by appeals and cross-appeals against parts (but only parts) of the judgment of Barrett J. In some instances the appeal relates only to a specific and isolated sub-category of documents. The category numbering may appear to overlap in places, but this reflects the fact that sometimes similar numbering has been used by the opposing parties.

17. All of this has meant that it is not easy to set out the various categories of discovery in a schematic or even orderly fashion. To assist the parties, I have however indicated in the heading of each category whether the request originated from either Imagine or Motorola.

Category 1(a) Documents dealing with whether clause 65 is fair or reasonable (request of Motorola)

18. While the defendant has sought to rely upon the "entire agreement" provisions of clause 65 of the MSA, the plaintiffs have riposted by pleading that such an agreement is neither fair nor reasonable for the purposes of s. 46(1) of the Sale of Goods and Supply of Services Act 1980 ("the 1980 Act"). In effect, therefore, the plaintiffs contend that insofar as clause 65 of the MSA excludes any liability for misrepresentation, it is to that extent void as contrary to s. 46(1) of the 1980 Act.

19. Motorola has sought discovery of all documentation "*evidencing, record or relating to the claim in reply that clause 65 of the MSA is not fair or reasonable.*" Barrett J. refused to order discovery on the ground that it was likely that this category would result in the discovery of a vast quantity of documentation and was therefore oppressive.

20. I would affirm this decision, but on slightly different grounds. It seems to me that the question of whether the "entire agreement" provisions of clause 65 of the MSA are fair and reasonable for the purposes of s. 46(1) of the 1980 Act is fundamentally a question of law. This will depend, in the first instance, on the proper construction of Clause 65. If, however, Clause 65 is a provision which excludes or restricts liability "by reason of any misrepresentation made by him before the contract was made", then s. 46(1) of the 1980 Act provides that such a provision shall not be enforceable "unless it is shown that it is fair and reasonable."

21. Assuming for the purposes of argument that Clause 65 does have the effect of excluding liability for prior misrepresentation, then the onus will be on Motorola to show that such is fair and reasonable. Again, this will be fundamentally an issue of law. It may be, for example, that in the context of a major commercial agreement containing individually negotiated and detailed clauses and where the parties are at arms length with access to the very best legal advice available that it would be fair and reasonable to exclude liability in this manner. But if this is (or is not) so, it will fundamentally be for legal reasons. It is hard to see how any discovery would be relevant to an assessment of what is principally a legal issue.

22. It follows, therefore, that I would decline to order discovery in respect of this category of documents on the ground that such documents are irrelevant to the determination of what is essentially a purely legal issue.

Categories I(i) to (v): The pre-contractual documents (request of Imagine)

23. The plaintiffs, Imagine, sought discovery from the defendant, Motorola, of certain pre-contractual documents in the period from 1st August 2008 until 13th October 2009. The motion was in the following terms:

(a) Category I.(i). Documents created during the period from 1st August, 2008 and 13th October, 2009, that evidence and/or record any representations made to the Plaintiffs or any of them concerning (a) the testing, approval and commercial availability of equipment, software and configuration to be used in the Network; (b) [withdrawn]; (c) the suitability of the proposed Network for the Plaintiffs' requirements; (d) the roll-out of the network in a specific timeframe.

(b) Category I.(ii). Documents produced by the defendant, its servants or agents and any communications passing between the defendant and Motorola Inc., Motorola Credit Corporation at senior management level and during the tender stage in respect of the assessment and/or escalation of risk relating to the defendant's ability to deliver the WiMAX Network tendered for (or to be tendered for), including any relevant 'risk models' to include but not be limited to documents produced by the following persons: a. Joe Cozzolino; b. Steve McCaffery; c. Owen Bridle; d. Eric Pradler; e. Jim Hall; f. Neil Phimister; g. Andy Hunt; h. Gerard Grady.

(c) Category I.(iii). Documents created during the period from 1st October, 2008, to 30th November, 2011, that evidence and/or record the manner in which any assessed risk associated with the WiMAX Project was accounted for including, but not limited to, relevant project profit and loss assessments or models.

(d) Category I.(iv). Any mitigation plans (or similar type documents) and/or documents created during the tender stage that evidence and/or record the preparation thereof arising from the assessment, escalation and/or reassessment of risk associated with the defendant's tender.

(e) Category I.(v). Any discrepancy reports (or similar type documents) produced during the tender stage in relation to the Defendant's Tender and the equipment and/or services to be provided pursuant to the terms of the Master Services Agreement to include, but not being limited to, the following matters: a. Project Delivery; b. Technical Capability/Performance; c. Staff, Skills and Resources; d. Financial.

24. The significance of the dates chosen under this heading (1st August 2008 until 13th October 2009) is that these dates relate entirely to the pre-contractual stage, since the Master Services Agreement ("MSA") between the parties was executed on the latter date.

25. Barrett J. directed the making of discovery under this heading, saying:

"The defendant has rejected these categories of discovery on the basis that each of them relates to a plea of fraud that has not been made (hereafter referred to as the "Fraud Argument"). It has also raised the contention (hereafter referred to as the "Admitted Representation Argument") that once the fact that a representation is admitted as having been made, the discovery of documentation relating to such representation becomes an irrelevance. Furthermore, the defendant argues that the documentation sought in these categories is not probative of any matter in issue. The court does not accept this last contention. As to the Fraud Argument, the plaintiffs have acknowledged that no claim as to fraud is being made, thus rendering it unnecessary for the court to consider this argument. As to the Admitted Representation Argument, the court does not accept the contention made. It appears to the court that while a

representation may be admitted, the context within which the representation was made will almost certainly be of relevance to, for example, a claim of misrepresentation, one of the many grounds of claim that is relied upon by the plaintiffs. The court is satisfied that the documentation sought is relevant and necessary to the case being made by the plaintiffs, not least as regards the claim of misrepresentation made by the plaintiffs. The court orders discovery of this category of documentation."

26. To put all of this in context, it has to be acknowledged that Motorola has agreed to make discovery of category 1(1)(ix) which is in the following terms:

"All documents evidencing or recording the testing of the defendant's solution created in the period 1 March 2009 to 3 December 2009, such category to include any testing or assessment carried out in accordance with standard Motorola quality assurance requirements prior to commercial deployment."

27. It seems to me, that in the absence of any claim of fraud, this latter category captures the essence of that discovery to which the plaintiffs are properly entitled in respect of pre-contractual documents. After all, the MSA contract itself sets out the rights and obligations of the parties, not least because clause 65.1 of that contract provides for an "entire agreement" clause. This clause expressly stipulates that save to the extent specified in the contract neither party relied on any representation prior to entering the MSA.

28. In these circumstances, the status of pre-contractual agreements, understandings or representations would seem to be irrelevant. Such documentation could only be relevant if the plaintiffs had maintained a plea of fraud whereby it was sought to in effect to overturn or otherwise nullify the effect of clause 65.1 of the MSA contract. In the absence of such a plea, therefore, I am of the view that this documentation is irrelevant and I would allow the appeal under this heading.

Category I (vii) to I(xi) Pre-contractual reports, tests and other similar documentation (request of Imagine)

29. Under this heading the plaintiffs sought discovery of internal reports, analyses and tests prepared by Motorola in the pre-contractual period prior to 13 October 2009. Discovery in terms of category 1(x) was agreed by the parties. Save in the case of category 1(ix), Barrett J. considered that these reports were relevant and ordered discovery in these terms. Barrett J. considered that the specified in category 1(ix) was too vague and declined to ordered discovery of this category. No appeal has been taken against this decision.

30. The categories themselves are in the following terms:

(a) Category I.(vii). Any internal reports prepared by the defendant, its servants or agents during the Tender Stage addressing the ability or otherwise of the defendant to deliver the equipment and services, the subject matter of the tender, including, but not limited to: a. Core; b. Transmission; c. Ran; d. Base Stations; e. CPE [Customer Premises Equipment]; f. Throughput; g. Capacity; h. Performance; i. End to End performance.

(b) Category I.(viii). Documents that evidence and/or record the sign-off by the defendant, its servants or agents, in respect of any equipment or services to be provided by it to the Plaintiffs or any of them during the preparation, submission and/or revision of the Tender including, but not being limited to compliance considerations such as: a. Product availability and suitability; b. Services; c. Legal; d. Accounting.

(c) Category I.(ix). Documents created during the Tender Stage that evidence and/or record the project business case, together with documents evidencing the consideration thereof that guided the decision of the defendant and the approval by Motorola Inc., for it to enter into the MSA [Master Services Agreement].

(d) Category I.(x). Documents that evidence and/or record the testing of the defendant's solution at the tender stage, including any testing and/or any assessment carried out, in accordance with standard Motorola quality assurance requirements and/or in commercial deployment.

(e) Category I.(xi). Documents created during the Tender Stage that evidence and/or record that the Network to be provided could not be implemented and/or supported by the Motorola services or support organisations.

31. In his judgment Barrett J. found that categories 1(vii), 1 (viii) and 1(xi) were relevant to the issue of misrepresentation and ordered discovery of these categories. At the heart of the claim, however, is the plaintiffs' contention that the Wi-Max network supplied by Motorola did not effectively deliver in the manner for which the parties had bargained. If that is so, then the issue becomes whether, viewed objectively, the Wi-Max functioned in the manner intended by the parties.

32. Viewed thus, the beliefs of Motorola during the negotiating phase as to how the system *might* operate are essentially *irrelevant to a claim of breach of contract*, issues of misrepresentation aside. If, for example, these pre-contractual documents showed Motorola had doubts (whether by reason of testing or otherwise) about the capacity of the network, this would not undermine the defence if the Wi-Max had, in fact, functioned satisfactorily. Conversely, statements made by Motorola in this pre-contractual phase to the effect that the Wi-Max was fit for purpose would not be in point if had transpired that the Wi-Max had not in fact operated satisfactorily, again, issues of misrepresentation aside

33. It has to be noted, however, that the plaintiffs have sued not merely for breach of contract, but also for actionable misrepresentation, both in contract and in tort. In this context, the state of knowledge of the contracting party is relevant to the claim in both contract and tort. So far as contract is concerned, it is clear from the terms of s. 45 of the Sale of Goods and Supply of Services Act 1980 that the state of knowledge of the representer is highly material to liability, even in cases where fraud is not alleged. Moreover, the knowledge of the representer – and what he or she either does know or should know- is at the heart of the tort of negligent misstatement.

34. In effect, therefore, the state of knowledge of Motorola in this pre-contractual phase is relevant to the claim that it supplied a network system to the plaintiffs which it knew or should have known was defective or not suitable for its purpose. For these reasons I would affirm the decision of Barrett J. to order discovery in the terms which he did in respect of these categories of documents.

Category IV(iii): Brian Grewe briefing notes (request of Imagine)

35. The plaintiffs have appealed against the decision of Barrett J. to refuse to order discovery in respect of the briefing notes of Brian Grewe (a senior Motorola project manager) in relation to the WiMAX project in Ireland. Motorola offered to make those notes available for the period for February 2010. Barrett J. indicated that while he was prepared to make discovery in terms of this offer, he did not

consider that these notes were in fact relevant and he refused to order any further discovery.

36. The parties are agreed that Mr. Grewe had an important role in the project during the calendar year 2010. The plaintiffs further plead – and the defendant to some extent tacitly admits – that Mr. Grewe’s role was to lead the co-ordination of the project and to assist in the resolution of outstanding issues. The plaintiffs plead that Mr. Grewe’s appointment and his endeavours to remedy the outstanding issues formed part of a collateral contract upon which they can rely.

37. While it may be (as the defendant accepts) that these briefing notes (or some of them) may well be discoverable under other categories as well, it must be accepted that these notes are relevant and necessary to the plaintiffs’ case as pleaded. In that respect I would allow the appeal of the plaintiffs under this heading and vary the order made by Barrett J. by directing discovery of the briefing notes in the terms of the original category 1(IV)(iii), i.e., the notes of Mr. Grewe from 1 February 2010 to 1 December 2010.

Category 4(i): Motorola’s knowledge of the plaintiffs’ corporate structure (request of Imagine)

38. In respect of category 4(i) the plaintiffs seek discovery of documentation that evidences or records:

(a) The knowledge of the defendant as to the corporate structure of the Imagine Group of Companies during the period from the 1st August 2008 to the 31st October 2010;

(b) The defendant’s knowledge and/or awareness that the profits, losses and/or liabilities that may arise from the WiMAX Network would be losses, profits and/or liabilities of the first plaintiff, the second plaintiff and/or the third plaintiff (all or any of them) during the period from the 1st August 2008 to the 31st March 2011.

39. In his judgment Barrett J. summarised these issues succinctly:

“The plaintiffs have pleaded and particularised their claim that the defendant was at all material times aware of the corporate structure of the Imagine Group. The plaintiffs are seeking discovery of the above category of documentation so as to enable them to counter the defendant’s defence regarding the corporate structure of the Imagine Group (whereby the defendant is seeking to defeat each claim made against it on the basis that the entity within the Imagine Group that would have suffered the loss has no valid claim against the defendant to recover that loss). If, as the plaintiffs contend, the defendant was at all times aware of the corporate structure of the Imagine Group, the documents that evidence this are both relevant and necessary to many of the matters in issue between these parties. The defendant maintains that this category of discovery is not necessary and duplicates information that is being provided under Category 3 above. It is difficult to see that there is much, if any, such duplication; the court has already addressed the issue of necessity. ”

40. This argument was further developed by counsel for the plaintiffs, Mr. Collins S.C., in the course of argument. He stressed that such documentation would also support the plaintiffs’ contention that Motorola knew that the project was being delivered through the Imagine Group of companies and that it is now, in any event, estopped from denying this. Viewed thus, the documentation is clearly relevant and necessary and I would affirm the decision of Barrett J. in that respect.

Category 4(ii) Knowledge of Motorola of negotiation of agreements by Imagine Communications Group Ltd. (request of Imagine)

41. The conclusions I have just reached in respect of category 4(i) also apply, *mutatis mutandis*, in respect of documents sought under category 4(ii). In this category the plaintiffs seek:

“Documents that evidence or record the knowledge of the defendant that any or all of the following agreements were negotiated by the third named plaintiff.

(a) Heads of Agreement

(b) Test Agreement

(c) PSA

(d) Master Services Agreement

(e) Novation Agreement

(f) Equipment Financing Agreement

(g) The collateral contract as contended for by the plaintiffs in the statement of claim and any amendments, variations or supplements thereto;

(h) Amendment to the Master Agreement;

(i) Amendment to the Equipment Financing Agreement.”

42. The plaintiffs have pleaded and particularised their claim that the defendant was at all material times aware of the corporate structure of the Imagine Group. They seek discovery of the above category of documentation so as to enable them to counter the defendant’s defence regarding the corporate structure of the Imagine Group (whereby the defendant is seeking to defeat each claim made against it on the basis that the entity that would have suffered the loss has no valid claim against the defendant to recover that loss).

43. If, as the plaintiffs contend, the defendant was at all times aware of the corporate structure of the Imagine Group, documents that evidence this in the specific case of negotiations carried out by Imagine Communications Group Ltd. (the third plaintiff) are both relevant and necessary to the case made by the plaintiffs. Barrett J. ordered discovery on this basis and in this respect he was clearly correct. One might add that such documentation would also be relevant to the plaintiffs’ argument that Motorola are, in any event, estopped from contending that the wrong corporate plaintiffs have sued them.

Category 5(v): Evidence of technical problems and operation standards (request of Imagine)

44. By category 5(v) the plaintiffs seek discovery of documentation which shows or records technical or operational problems with the network system:

"Documents that evidence and/or record technical and/or operational problems relating to any of the following:

1. Failures and delay experienced during the upgrade to 10MHz;
2. Failures and delays experienced in the upgrade to WiMAX 3.1 and 4.0;
3. Failures and delays experienced in relation to the upgrade from 5 to 10MHz configuration;
4. Software upgrades to the core Network including Redback AAA, EMS, and SAG;
5. Failure to complete the upgrade of the core Network to the agreed decision for Phase 1b as per Contract schedule and LLD;
6. The complete review of Phase 1b design during August to September 2010 resulting in revised LLD and architecture for Phase 1b;
7. Variance in the implementation of Phase 1b from the original HLD and LLD;
8. Variance in the design and implementation of Phase 1b from Motorola standards and best practice."

45. The only disputes arising regarding this category of discovery are the appropriate timeframe for discovery and the defendant's proposed exclusion of category 5(v)(8). The defendant has proposed a timeframe of 1st February 2010 to 17th February 2011. However as Barrett J. noted in his judgment, the *"deemed acceptance of Phase 1b, 1 and 2 clusters and sites was not possible until September 2011."* It was for that reason that Barrett J. concluded that the plaintiffs' proposed end-date of 17th September 2011 was a more sensible one. He added:

"It appears also to the court that in a case in which negligence is alleged any, if any, deviation by Motorola from its own standards and from such standards as are suggested by best practice is a relevant issue. Consequently the court orders discovery of the above category of documentation."

46. As Barrett J. noted, there was little dispute so far as the principle of the matter was concerned and the only real issue was the suggested timeline. I consider that Barrett J. gave sound reasons for the suggested timeframe for this discovery and I would affirm his decision in this respect.

Category 5(vi):Discovery in relation to other projects (request of Imagine)

47. In category 5(vi) Imagine sought discovery of document that evidence and/or record the knowledge and/or awareness of the defendant at any time up to December 2009 regarding any equipment, software or configuration problems identified by it or experienced in the Network and/or the roll-out by the defendant of:-

- (i) the Axtel project in Mexico and
- (ii) the Mena Telecom project in Bahrain or any other deployment and/or any evaluation of the defendant's WiMAX solution, that pertains to any matter complained of by the plaintiffs in the within proceedings and which were not made known to the plaintiffs (or any of them) prior to 13th October, 2009.

48. The plaintiffs thus seek discovery of documents which it claims would show the defendant's state of knowledge in respect of the roll out of WiMAX projects in Mexico and Bahrain, along with a similar project (known as the Clearwire project) in the USA. Barrett J. considered that the location of the projects was essentially irrelevant for this purpose, stressing that it was *"clearly of relevance to the case brought by the plaintiffs that the defendant may have encountered in other projects similar issues as are alleged to have arisen in its dealings with the plaintiffs."*

49. There is, however, one fundamental objection to discovery under this heading. The plaintiffs' claim is essentially that *this particular WiMAX project* was not a success, as distinct from contending that the WiMAX system was *inherently defective*. In these circumstances, it is hard to see how the fact that the defendant experienced problems with the system (if such be the case) in different countries with different employers and with doubtless different contract specifications could be relevant to the present claim. Even if it were relevant, the necessity of such documentation seems doubtful.

Category 5(viii): The throughput and capacity features of the network (request of Imagine)

50. The documentation sought by the plaintiffs in respect of category 5(viii) is as follows:

"All documents drafted, created or issued between 1 December 2008 and 30 April 2010 that evidence or record the introduction of "throughput or capacity" as a CPE feature, why this feature was introduced, the purpose and benefit of this feature, when it was commercially released and all release notes and product feature descriptions explaining the purpose and benefits to customers."

51. As I have already indicated, the plaintiffs' contention was that adequate network throughput and capacity was central to the entire agreement between the parties. Barrett J. noted that Motorola's awareness of throughput and/or capacity restrictions from the time it was – as Imagine contend – selected as the preferred bidder in March 2009 is of central importance to the latter's claim. He added:

"It is reasonable to conclude that the documentation that immediately preceded the selection phase may be of relevance."

52. There is, in fact, little enough difference between the parties on this question, since Motorola have agreed to discovery of this documentation in respect of the period from 1st September 2009 to 30th April 2010. Part of the background to this is that the plaintiffs say that the defendant introduced a reconfiguration of the CPE so that it could operate alternatively in a capacity or throughput mode, although this switching option between throughput and capacity offered no benefit to them.

53. Motorola contends that all of this information was made available to the plaintiffs by José Omedes, one of its senior operatives, at a presentation on 7th September 2009, *i.e.*, several weeks before the conclusion of the MSA. It further submits that all networks always have processing restrictions and limitations.

54. The plaintiffs say that this presentation by Mr. Omedes simply shows that Motorola was aware of these potential issues associated with the CPE network, but that it had nonetheless represented that it was in a position to deliver a satisfactory outcome. If – as the plaintiffs contend – the defendant was aware of these potential output restrictions then documents pertaining to this awareness are relevant to both issues of breach of contract and misrepresentation.

55. All of this assumed an importance from March 2009 onwards and I would therefore affirm the decision of Barrett J. insofar as he ordered discovery of this category of documents for the period from March 2009 until February 2010.

Category 5(xvi): Awareness of senior Motorola management of capacity and throughput limitation in the network (request of Imagine)

56. By category 5(xvi) the plaintiffs seek discovery of the following documentation:

"Documents that evidence and/or record the awareness of senior Motorola Product Management and Senior Motorola executives of any capacity, throughput or processing restrictions or limitations in the network provided to the plaintiffs including, but not limited to Fred Gabbard and Fred Wright."

57. On this point Barrett J. stated:

"This category of discovery relates to the knowledge of the defendant of throughput, capacity and/or processing restrictions or limitations at material times. ...the point in time when throughput or capacity was introduced as a CPE feature is vitally important in time as it has a direct bearing on what was tendered for by the defendant and what was contracted to be delivered under the MSA. The awareness of the defendant of throughput and/or capacity restrictions or limitations is of importance to the plaintiffs' claim. The court therefore orders discovery of the documentation sought, subject to the plaintiffs identifying in greater detail the particular management or class/level of management to whom they mean to refer; as drafted, this category of documentation appears overly broad as regards the management/executives to which the plaintiffs mean to refer."

58. I agree with Barrett J. that these documents are plainly relevant and necessary, but I also agree that the plaintiffs must particularise and clarify what is meant by "*senior Motorola Product Management and Senior Motorola executives*" before any order for discovery in respect of this can be finalised.

Category 5(xix): Internal Motorola documents showing throughput (request of Imagine)

59. The plaintiffs' application for discovery in respect of category 5(xix) was as follows:

"Documents that evidence and/or record briefings as between representatives of the defendants pre-sales group and the services organisation in relation to the throughput demonstrated during the Pilot and the inclusion of the requirement to meet the 8MB throughput in the acceptance test plan in the MSA, including but not limited to the following people, Joe Cozzolino, Kenny Steele, Andy McKinnon, Eric Pradler, Jose Amedius or any of them."

60. I agree with Barrett J. that this category of discovery is relevant and necessary as it would tend to show the internal workings of the defendant, the allocation of responsibility within Motorola for the WiMAX project and its knowledge at material times of its ability or otherwise to meet the performance requirements of the MSA. I would accordingly affirm this aspect of the order of the High Court.

Category 8(i): Documents in relation to contractual timeline (request of Imagine)

61. In category 8(i) the plaintiffs seek documents that evidence and/or record:

(a) "That during the tender phase (namely 1st August, 2008 - 13th October, 2009) that it was intended and/or that the defendant understood, that the Network was to be rolled out in accordance with a specific timeframe (or timeframes);

(b) The agreement of the defendant to the delivery of the network or any constituent parts thereof within a specified timeframe (or timeframes);

(c) That the defendant operated in accordance with an agreed timeline requiring that the network be rolled out within a specified timeframe, whether through the use of a specific roll out schedule (or schedules) including the roll out schedule at Schedule 5 or 6 of the MSA and/or a project plan (or plans) including the Project Plan at schedule 3 to the MSA;

(d) Any delays experienced by specific reference to the failure to meet a project plan and/or roll out schedule."

62. Motorola maintains that there simply was no timetable for the roll-out of the project and that the matter is governed entirely by the MSA and the system of project contracts and orders. It maintains that it should not have to make discovery in respect of matters falling outside the mechanism of the MSA. It further contends that the plaintiffs' replies to interrogatories clearly confirm this and that there simply was no such contractual arrangement of the kind argued for by the plaintiffs.

63. In his judgment Barrett J. found that the plaintiffs had not abandoned this aspect of their claim. Furthermore, the question of whether there was indeed a contractual timeline which operated independently of the MSA was one of the schedule of issues to be tried.

64. Given that this is so, it seems to me that this Court cannot look beyond the scope of the issues as defined by the High Court. If the scope of discovery is determined by the pleadings, this is true *a fortiori* in the case of a schedule of issues set out by the High Court.

65. It follows, therefore that I would affirm the decision of Barrett J. and direct discovery of documents which evidence or record that the defendant understood and agreed that the network was to be rolled out in accordance with an agreed timeframe, that it was in fact rolled out in accordance with an agreed timeframe and that record delays experienced by reference to project plans and/or any roll-out schedule.

Category 5(d) Negotiations between the plaintiffs and Motorola Credit Corporation (request of Motorola)

66. Motorola sought discovery in category 5(d) of documentation dealing with the negotiations between the plaintiffs and Motorola Credit Corporation ("MCC"). While there was agreement as to sub-categories (2), (3) and (4), the remaining parts of Category 5(d) which are in dispute are in the following terms:

(d) "All documents evidencing, recording or relating to:-

(1) Negotiations between the plaintiffs and MCC in relation to the EFA dated 3rd December, 2009, and the Side Letter thereto.....

(5) Negotiations between the plaintiffs and MCC in relation to the amendment of the equipment financing agreement ("EFA"), which amendment was executed in May 2010.

67. It is not in dispute that the EFA was agreed between the second plaintiff and the MCC in December 2009. It is also agreed that there was an amendment to the EFA in May 2010 and this had the effect of deferring certain financial obligations on the part of the plaintiffs which would otherwise have fallen due. One of the issues, however, fixed by Charleton J. at an earlier stage of the proceedings was the actual identity of the contracting parties. Barrett J. ordered the plaintiffs to discovery of all documents evidencing the identity of the party who negotiated with the MCC and the amendment thereto. He concluded that any further discovery sought by the defendants would be oppressive.

68. I agree with the approach of Barrett J. in this respect. This category of discovery was, after all, fundamentally concerned with the identity of the contracting party. In other words, the negotiations between the plaintiffs and the MCC were only relevant to the extent that they helped to show light on the identity of the contracting party (which is one of the scheduled issues to be tried) and not because they were of interest in themselves. An order for any further discovery in this regard would, however, be unnecessary and, indeed, potentially oppressive.

Category 6: The defendant's knowledge of the plaintiffs' business plans and internal organisational methods (request of Motorola)

69. In this category Motorola have sought the following documents:

"(a) All documents evidencing, recording or relating to the defendant's alleged knowledge or agreement that the second plaintiff might act as a wholesale company and leave or transfer customer and retail costs to the third plaintiff or any other company under the control of the third plaintiff.

(b) All documents evidencing, recording or relating to the defendant's alleged knowledge or agreement that the second plaintiff might choose to implement its business plan using other companies in the Group, or by acting as wholesale company leaving or transferring customers and retail costs to the third plaintiff, or any other company under the control of the third plaintiff.

(c) All documents evidencing, recording or relating to the alleged agreement between the first plaintiff and/or the second plaintiff and the defendant that those plaintiffs could implement their Business Plan through utilisation of other companies in the Group by leaving earned revenues with other companies in the Group.

(d) All documents evidencing, recording or relating to the agreement between the first plaintiff and/or the second plaintiff and the defendant that only a nominal amount per customer per month would be accounted for by other retail companies in the Group."

70. There is no doubt but that this documentation is clearly relevant to a fundamental issue in the proceedings, namely, whether the plaintiffs traded as one single economic entity and, if so, whether Motorola knew of this and acted accordingly. Motorola deny that the plaintiffs ever traded in this fashion or, if they did, whether it had knowledge of this.

71. In his judgment, however, Barrett J. concluded that ordering discovery in these terms would be oppressive:

"The above sub-categories of discovery are without limitation in time and wide in scope. The relevance of the documents sought has not been disputed by the plaintiffs. However, every document that issued to the defendant from the plaintiffs (or any of them) has the potential to "relate to" the defendant's knowledge or agreement to the matters in question. Moreover, the extent of discovery sought is to some extent surprising as it will, of course, fall to the plaintiffs to prove the fact and terms of the agreement in question and to prove the defendant's knowledge insofar as it is alleged that it was aware of various matters at particular times. Given the unquestioned relevance of the categories sought versus the oppressive latitude in which the request for same is formulated, the court orders discovery of all documents that are internal to the plaintiffs, that are not otherwise available to the defendant and that evidence and/or record a). the defendant's alleged knowledge or agreement that the second-named plaintiff might act as a wholesale company and leave or transfer customer and retail costs to the third-named plaintiff or any other company under the control of the third-named plaintiff, b). the defendant's alleged knowledge or agreement that the second-named plaintiff might choose to implement its business plan using other companies in the group, or by acting as a wholesale company leaving or transferring customers and retail costs to the third-named plaintiff, or any other company under the control of the third-named plaintiff, c). the alleged agreement between the first-named plaintiff and/or the second-named plaintiff and the defendant that those plaintiffs could implement their business plan through utilisation of other companies in the group by leaving earned revenues with other companies in the group, or d) the agreement between the first-named plaintiff and/or the second-named plaintiff and the defendant that only a nominal amount per customer per month would be accounted for by other retail companies in the group."

72. I entirely share the concerns of Barrett J. that ordering discovery in the terms sought under this sub-category would be oppressive. It is true that at one level it might be tempting to say that such discovery is also necessary. Nevertheless, it is hard to avoid the impression that an order of this kind would do little in real terms to advance the orderly and efficient conduct of the litigation. The likelihood is rather that any order for discovery would simply generate a huge tranche of documents, the vast majority of which would doubtless be superfluous. While it is understandable that the parties would wish to advance such claims, requests for discovery of this kind are in their own way nevertheless illustrative of the extent to which the discovery process is, in truth, distorting the entire litigation process.

73. It is for these reasons that I consider that the order made by Barrett J. is likely also to work in an oppressive fashion, since, on one view, virtually every document generated by the plaintiffs is nonetheless liable to be discovered under this heading. Indeed,

despite the best efforts of the trial judge, it might not be easy to formulate the terms of a specific discovery request in respect of this sub-category without also potentially generating a vast quantity of documentation.

74. In these circumstances, I consider that the discovery request under this category should stand adjourned pending the exhaustion of other potential remedies by Motorola. It seems to me that many of these questions could probably be best addressed by a notice to admit facts or by further interrogatories. After all, Motorola is not really interested in the details of the plaintiffs' business arrangements. It is, after all, rather anxious to learn whether its dealings were – as it claims – with specific entities within the Imagine Group and that neither party to the litigation treated the plaintiffs as one single economic entity.

75. If it should ultimately transpire that Motorola have no other effective means of demonstrating this other than by means of seeking discovery, then I would give liberty to Motorola to seek such further discovery under this heading. It should be understood, however, that it would be incumbent on Motorola to show that, prior to this renewed application, it had made every reasonable effort to address these issues otherwise than by discovery. It would also be necessary for Motorola to formulate its discovery request in a manner which clearly specified limitations in terms of contents, time and range of documents sought.

Category 7: Whether the plaintiffs traded as a single economic entity (request of Motorola)

76. Under this heading Motorola have sought:

"(a) All documents evidencing, recording or relating to the pleas that the plaintiffs inter se and/or with other companies in the "Imagine Group" ("the Group") as referred to in the statement of claim are as a fact a single economic entity."

77. As Barrett J. commented:

*"The sheer breadth of this category, as sought, suffices to render it oppressive. It is also somewhat surprising given that the burden of proof in establishing this claim will fall to the plaintiffs. In an effort to bridge the gap between the parties, the plaintiffs have volunteered to make available five categories of documentation upon which they intend to rely to establish their 'single economic entity' claim. (These categories are identified hereafter). The plaintiffs have further undertaken to volunteer additional documentation at a later stage with their witness statements so that there is no question of the defendant being taken by surprise at the plenary hearings. Rather than refuse this entire category of discovery, as sought, on the ground that it is oppressive, the court **orders** discovery of (a) documents that evidence and/or record the taxation policy of the Imagine group of companies as a single economic entity for the period 1st January, 2006, to the date of this judgment; (b) all company filings of the Imagine group of companies; (c) documents that evidence and/or record the accounting of the Imagine group of companies as a single economic entity for the time period referred to in (a); (d) documents that evidence and/or record ComReg licences provided to the Imagine group of companies for the time period referred to in (a); and (e) relevant minutes or relevant extracts from minutes of the Imagine group of companies for the time period referred to in (a) that relate to the corporate structure of the Imagine group of companies. Should the plaintiffs, consistent with their offered undertaking, wish to make discovery of documents supplementary to those of which the court has ordered discovery that is a matter for them."*

78. I entirely agree with Barrett J. that the documentation sought in respect of this category is oppressive. I further agree with the restrictive approach which he has taken and the manner in which this category has been re-formulation by him. I would, however, vary the order made by confining the date for the details of the tax filings to the period from 1st January 2008 (the date of the first tender) rather than 1st January 2006 as proposed by Barrett J.

Category 10(a): Technical standards (request of Motorola)

79. Barrett J. considered that category 10(a) (which seeks discovery in relation to the technical standards and the functioning of the equipment) was so similar in relation to category 8(c) (which relates to the technical standards set or to be agreed and in respect of which the parties had agreed should be the subject of a discovery order) that he declined to make the order sought.

80. I find myself taking a different view of this. Category 8(c) essentially related to what the technical specifications were, whereas category 10(a) addresses a different matter, namely, whether the equipment actually met these standards. For my part, I think that there is indeed a sufficient difference between these two categories that they cannot be properly regarded as purely overlapping and duplicative. I would therefore order discovery of the documents in category 10(a), as they are plainly relevant and necessary for the proper running of the litigation.

Category 10(b): negotiation documents (request of Motorola)

81. Under this heading the plaintiffs sought discovery of all documents relation to the negotiation of Schedule 6 (equipment to be provided) and Schedule 8 (how the performance of the equipment was to be monitored). Barrett J. ordered discovery of this documentation subject to certain conditions which I will presently address.

82. I am bound to say that I entertain considerable reservations as to whether this material (even if discovered) could ever be admitted in evidence. This evidence would seem to run counter to the requirements of the parole evidence rule and, in any event, assuming this clause to be valid, such discussions would seem to have superseded by the "entire agreement" provisions contained in clause 65 of the MSA. (It should be noted however that Imagine contend that the "entire agreement" clause is invalid as an unfair contract term by reason of s. 46 of the Sale of Goods and Supply of Services Act 1980).

83. Passing from this, the objection now is to the conditions imposed by the trial judge that the discovery should be confined to "internal documents" which evidenced or record the negotiation of the schedule. For my part, I find it difficult to identify with precision what documents could properly be regarded as "internal documents." Moreover, while once again commending the trial judge's endeavours to ensure that the discovery sought remains within manageable boundaries, it has never been the law that the party requesting discovery could properly be disentitled to otherwise necessary and relevant documentation by reason of the fact that he or she may already have some or all of such documentation. Nor could such entitlement be conditioned on the making of counter-discovery by the requesting party. The entire purpose of discovery is to ensure that the requesting party knows what documentation the requested party has in his or her possession.

84. In these circumstances, I would allow the appeal in respect of category 10(b) insofar Barrett J. imposed conditions relating to internal documentation and the making of counter-discovery by Motorola.

Category 10(c): Whether customer premises equipment functioned properly (request of Motorola)

85. A key feature of the plaintiffs' claim is that the customer premises equipment ("CPE") did not function properly. The defendant has accordingly discovery in category 10(c) of all documents "evidencing, recording or relating to" the problems affecting the CPE as of

particular dates in October 2009 and April 2010.

86. Barrett J. acknowledged the centrality of this aspect of the claim, but he concluded that the wording of Category 10(c) – specifically its use of the words “relating to” – was too broad. He accordingly ordered discovery, but directed that the words “relating to” be deleted.

87. At the hearing of the appeal counsel for the defendant, Mr. Gardiner S.C., stressed that the effect of the decision of Barrett J. to remove the words “relating to” was to create an unfairness in the manner in which the discovery operated, since it meant that the plaintiffs were obliged to discover only the reports of investigations which showed complaints, as distinct from investigations which showed that the equipment operated satisfactorily.

88. I share the concerns of Barrett J. that the discovery ordered in the present case should not be so unwieldy that it threatens to overwhelm the parties and the litigation. At the same I agree with Mr. Gardiner S.C. that there is a danger that the order as drafted will not operate in an even-handed fashion. The defendant’s anxiety here is that it be supplied with the results of any investigations concerning the CPE, whether those results be favourable or unfavourable from its point of view.

89. I consider that this is at the essence of the discovery sought under this heading. I would therefore vary the order made by Barrett J. and instead direct that the plaintiffs made discovery of the results of such investigations (if any) concerning the operation of the CPE as of the dates specified in the statement of claim, 13th October 2009, 3rd December 2009, and April 2010.

Category 10(f): provisional acceptance certificates (request of Motorola)

90. Under this heading the defendants sought discovery of the provisional acceptance certificates for each site. Barrett J. considered that discovery of this category was relevant and necessary. He did, however stipulate, in the interests of efficiency, that Motorola must previously detail to the plaintiffs “*the sites to which the request refers and that [Motorola] makes discovery of certificates that it shows to have been received.*”

91. While I again appreciate and sympathise with the endeavours of the trial judge to place some limits on the scope of discovery, once the documents in question are relevant and necessary, there is then no warrant for subjecting the discovery to the making of counter-discovery. I would accordingly vary the order made under this category by deleting the proviso in relation to counter-discovery. For exactly the same reasons I would make precisely the same orders in relation to category 10(g), category 10(h) and category 10(i).

Category 13(b): Discovery of competing tenders (request of Motorola)

92. Under this category Motorola seeks discovery of all documents in the possession of Imagine which relating to the “consideration given by [Imagine] to competing tenders.” The background to this specific request is as follows: Imagine claims that certain representations were made by the Motorola at the tender stage, although it denies that there was a formal tendering process. It is said that the representations made by a third party in the course of the (alleged) tender process could be of relevance to determining whether there were misrepresentations by the Motorola in the context of its tender.

93. Barrett J. declined to order discovery of this category on the grounds of relevance and I think that he was perfectly correct in reaching that conclusion. There is no real connection between any representations made by other (unsuccessful) tenderers and the issue as to whether Motorola did (or did not) make representations during the course of any (alleged) tender process. I would therefore affirm the decision of Barrett J. in respect of this category of documents.

Category 13(i) Documents evidencing any base station not installed by Motorola (request of Motorola)

94. Motorola sought discovery in category 13(i) of:

“All documents evidencing, recording or relating to any base stations in one which were not installed by the defendant.”

95. Barrett J. ordered discovery in respect of this category save for the deletion of the words “in relation to”. He considered that these additional words potentially captured a swathe of documents which were in truth oppressive and superfluous to the defendant’s requirements. Motorola have now appealed against this part of the order, *i.e.*, the exclusion of the words “in relation to”. There was otherwise little dispute between the parties in respect of this category of documents.

96. It is true that – as Barrett J. frequently noted in his judgment – there are some instances where the inclusion of the words “in relation to” in the request for discovery have the potential greatly to expand the scope of discovery. There are, however, also instances where the term “in relation to” must be used if the requesting party is to be certain that all potentially useful or relevant documents will emerge during the discovery process.

97. For my part, however, I am not persuaded that this is one such case. I think that it is sufficient that Motorola is made aware of documentation which evidences or records the existence of other base stations which were not installed by Motorola. There is in this particular instance at least no necessity for Motorola to delve further than simply knowing of the existence of any such sites. It is not necessary, for example, for Motorola to learn anything about the cost of construction or the reasons for the construction of such sites or the other wider categories of documentation which might be captured if the words “in relation to” were to be included in the discovery order.

98. For these reasons, therefore, I would affirm the decision of Barrett J. so far as this category of discovery is concerned.

Category 13(j) Documents relating to the financing of the project by MCC (request of Motorola)

99. Under the financing arrangement, the plaintiffs were required to certify that the equipment was functioning before the financier of the project, MCC, would release funds for the next clusters. While Barrett J. ordered discovery in terms of category 13(j)(which sought discovery of all documentation “evidencing, recording or relating to communications with the MCC in relation to payment in respect of monies paid to” Motorola), he again deleted the words “in relation to” since he was concerned that this might yield oppressive results in terms of the volume of discovery:

“MCC has paid in excess of €9m to the defendant for equipment and services provided by the defendant. That sum was paid by MCC to the defendant on foot of the furnishing by the plaintiffs to MCC of approval requests and drawdown requests. Such requests were allegedly accompanied by representations made by the plaintiffs to the effect that the equipment was doing what it was intended to do. This is clearly relevant to the issue of loss and also adequacy of the equipment. The court notes, however, the latitude of the request as formulated, in particular its reference to documents “relating to...” a formulation that if applied would, in the court’s opinion, render discovery of this category of

documentation oppressive. The court therefore orders discovery of all documents that evidence and/or record communications with MCC in respect of monies paid to the defendant."

100. As I previously indicated in relation to category 10(c), I entirely understand and completely share Barrett J.'s concerns regarding the potential of overbroad discovery. As I have just indicated with regard to category 13(j), I further agree that the use of the words "in relation to" will generally broaden – sometimes unnecessarily – the scope of the discovery.

101. Just as with category 13(j), I consider that it is sufficient that Motorola should obtain documentation which "evidences or records" communications with the MMC in respect of payments to Motorola by the plaintiffs. As it is not necessary to order any wider discovery in respect of this, I would accordingly affirm the decision of Barrett J. in respect of this category of documents.

Category 14: All documents evidencing the backhaul transport and core network employed by the plaintiffs (request of Motorola)

102. Motorola has specifically pleaded that the plaintiffs' re-mediated their backhaul transport and core WiMax network and that as a result of doing so problems which had been experienced with throughput were thereby addressed. Barrett J. ordered discovery of all documentation which evidenced or recorded this, along with "any other remedial action taken in relation thereto or modification thereto by the plaintiffs since October 2009." The discovery order was subject to the caveat that Motorola clarify what was meant by both "remedial action" and "network", since there are significant elements of the plaintiffs' network which have no connection with the WiMax network at all.

103. Subject to these caveats, the only issue remains is the first use of the words "in relation to" the remediation of the backhaul and core WiMax network. I agree with Barrett J. that it is unnecessary to go any further. It is sufficient for the purposes of this litigation that the defendant should have access to documentation which evidences or records such remediation works. It is not necessary that Motorola should obtain documents which pertain to the much potentially much wider category of documentation which is "in relation" to such works.