THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 56

Record Numbers 2017/513

2017/514

2017/515

2017/516

Birmingham P.
Baker J.
Costello J.

BETWEEN/

GOODE CONCRETE

PLAINTIFF/
APPELLANT

- AND -

CRH PLC, ROADSTONE WOOD LIMITED AND KILSARAN CONCRETE

DEFENDANTS/
RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 19th day of February 2020

1. On 31 October 2017, Barrett J. in the High Court made four orders for discovery in these proceedings following a lengthy judgment delivered on 7 September 2017 ([2017] IEHC 534). The appellant alleges that the respondent has been guilty of breaches of s.4 of the Competition Act 2002 and/or Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), or in the alternative breaches of s.5 of the Competition Act 2002 and/or Article 102 of the TFEU. It seeks various declaratory and injunctive reliefs as well as damages for breaches of sections 4 and 5 of the Act of 2002 and damages for conspiracy, inducement to breach contract, interference with contract and other relief. This judgment is concerned with the appeals against the orders for discovery made in the case.

Relevant legal principles

Not a rehearing

2. These appeals do not proceed by way of a rehearing. The onus is on the party who appeals an order for discovery to show where the trial judge erred in the identification, or application, of the applicable legal principles, or in the exercise of his or her discretion in applying them to the discovery sought.

3. Furthermore, when the litigation is under case management by a judge with an intimate knowledge of the issues involved, as in these proceedings where the trial judge was, and is, the judge in charge of the Competition Law List of the High Court, decisions as to discovery should involve a significant measure of appreciation by any appellate court

reviewing a decision at first instance. See the decision of Clarke C.J. in *Tobin v. Minister for Defence, Ireland and the Attorney General* [2019] IESC 57, at para. 7.27.

Threshold for discovery

4. The categories sought by a requesting party must be shown to be both relevant and necessary to issues in the proceedings. Relevance is determined by reference to the pleadings: *Hannon v. Commissioners of Public Works* [2001] IEHC 59; *Tobin v. Minister for Defence* [2018] IECA 230. However, a requesting party cannot rely on a mere allegation or bare assertions to establish relevance and thereby justify a broad request for discovery. In *Carlow/Kilkenny Radio Limited v. Broadcasting Commission* [2003] 3 I.R. 528, Geoghegan J. in the Supreme Court held at p. 534:-

> *"It is not open to a plaintiff in a civil action, or to an application for judicial review, to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertion that the applicant, or the plaintiff, is otherwise unable to begin to substantiate. This is the proscribed activity usually described as 'fishing': the lowering of a line into the other side's waters in the hope that the net may enclose a multitude of fishes, the existence or significance of which the applicant has no rational reason to suspect."*

5. In *Framus Limited v. CRH Plc* [2004] 2 I.R. 20, Murray J. held 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."*

6. In *O'Brien v. Red Flag Consulting Limited* [2017] IECA 258, Ryan P. noted that while it was legitimate to seek discovery in support of a case, it was not legitimate to seek discovery *"in order to make a case which otherwise did not exist"* or by reference to a case which might potentially be made out if extensive discovery was ordered against the defendant. At para. 21 of the judgment he summarised various principles in relation to discovery and at point 6 he held:-

> *"6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [Hartside Ltd v. Heineken Ireland Ltd, para.5.9.]"*

The party requesting discovery must meet the *"low threshold separating a genuine case perhaps lacking in evidence from one which was speculative and unsupported by facts."*

7. The reference to *Hartside Ltd v. Heineken Ireland Ltd* [2010] IEHC 3 was to a decision by Clarke J. where he held at para 5.9:-

> *"…a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation. The need for such restriction seems to me to stem from the undoubted undesirability of allowing a mere allegation to give rise to an entitlement to access highly confidential information."*

8. Usually if documents are found to be relevant, discovery will be ordered (see *Framus Ltd*.). Where a party opposes discovery on the ground that it is not necessary for disposing fairly of the cause or matter, or for saving costs, the onus shifts to the requested party to put forward reasons as to why the test of necessity has not been met. The party should do so initially in the reply to the request seeking voluntary discovery, but if the matter goes to court, it is for the requested party to place evidence before the court to establish the relevant facts upon which it bases its argument (see the Supreme Court decisions in *Tobin* at para. 7.21; *IBRC & INBS v. Fingleton & ors.* [2015] IEHC 296; *Bristol Myers Squibb Company Ono Pharmaceutical Company Ltd & anor. v. Merck Sharp & ors.* [2016] IEHC 540).

Proportionality

9. For some time, the burden and cost of discovery have been matters which have given rise to difficulty and concern amongst judges and practitioners. Indeed, it is currently under review as part of a review of civil procedures in the High Court. In recognition of this burden and potential serious injustice to parties to litigation, the requirement for proportionality between the extent, or volume, of the documents to be discovered, and the degree to which those documents are likely to advance the case of the requesting party (or to assist it in damaging the case of the requested party) has been recognised as an important factor to be weighed by the court. It was considered by Murray J. in *Framus* and by Geoghegan J. in the Supreme Court in *Dome Telecom Limited v. Eircom Limited* [2008] 2 I.R. 726 at para. 15 where he held that:-

> *"…discovery may be "necessary" and yet so disproportionate as to render it unreasonable for a court to benefit the party seeking such discovery by making the order."*

10. In *Tobin v. Minister for Defence* [2018] IECA 230 Hogan J. held at para. 4 that it is *"necessary for this Court to ensure that the discovery does not potentially overwhelm the action or impose unreasonable burdens on the parties."*

11. Where a party asserts that the discovery requested is simply disproportionate, the onus rests on that party to adduce the evidence to support this argument.. Therefore, once a requesting party satisfies a court that the discovery sought is both relevant and necessary, it is for the requested party who alleges that nonetheless discovery should not be ordered on the terms sought to satisfy the court that it would be disproportionate and unduly burdensome, by reference to the exercise involved and the likely time and costs involved in complying with the proposed discovery. If a requested party fails to do so, it cannot rely upon a proportionality plea.

Is the role of the High Court as a competition authority relevant to applications for discovery?

12. The appellant argues that the role of the High Court as a competition authority was relevant to the application of the principles of discovery where the case concerned allegations of anti-competitive behaviour. S.I. Number 195/2004 European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) Regulations 2004 designated the High Court as a competition authority for the

purposes of Article 5 of the Council Regulation 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty. Article 5 empowers competition authorities of the member states to require that an infringement be brought to an end; to order interim measures; to accept commitments; and to impose fines, periodic penalty payments and other penalties provided for in national law. The Competition and Consumer Protection Commission ("CCPC") could not exercise powers of the nature identified in Article 5 by virtue of the provisions of Bunreacht na hÉireann. The High Court was designated as a competition authority for the purposes of Article 5 of Regulation 1/2003, as a means of solving this difficulty. Where the CCPC would otherwise exercise the powers specified in Article 5 if it were a competition authority of another member state and could make a decision of the kind specified in Article 5 without recourse to court, the CCPC must instead apply to the High Court for such orders or reliefs. In those circumstances, where the CCPC issues proceedings seeking orders pursuant to Article 5 of Regulation 1/2003, the High Court is acting as a competition authority. It does not follow that the court is acting as a competition authority in all litigation between private parties where issues of competition law are raised.

13. The appellant relies upon the decision of Cooke J. in an earlier application in these proceedings ([2011] IEHC 310) to support its argument that the court must have regard to the fact that it is a competition authority when dealing with litigation between private parties alleging anti-competitive behaviour. Cooke J. held that it must also be borne in mind that the High Court has been designated as a competition authority for the purposes of Article 35 of Regulation 1/2003:-

> *"As a result, the Court ought not to prejudge the future relevance or admissibility of evidence or unnecessarily preclude itself from receiving or examining possible future evidence alleging serious infringements of what are now Articles 101 and 102 TFEU, particularly if it is claimed that the consequences of such conduct are continuing or have continued until recently."*

14. Firstly, and most importantly, there was no argument before Cooke J. as to whether he was acting as a competition authority in the application before him, and whether this had any implication for the decision he was required to make (on the admissibility of evidence). The comments quoted were obiter. The basis of his judgment was, in fact, O.40, r.12 of the Rules of the Superior Courts, and he ruled that certain averments to which objection was taken were inadmissible at that point in the proceedings on the basis that they were irrelevant to the issues arising on the motions for security for costs before him.

15. Secondly, even if the High Court could be considered to be acting both as the High Court and as a competition authority in hearing a discovery application in the proceedings, in my judgment, this makes no difference to the approach properly to be applied to the discovery application. Nothing in Regulation 1/2003 has any implication for the procedural rules which otherwise apply in litigation before national courts of EU member states. Case C-432/05 *Unibet (London) Limited v. Justitiekanslern* [2007] ECR I-2271 and *Gaswise*

Limited v. Dublin City Council [2014] IEHC 56 establish that the courts of member states are required to apply national procedural rules so as to ensure the effective judicial protection of a plaintiff's directly effective EU law rights. The fact that the High Court has been designated as a competition authority, for the purposes of the Regulation, does not alter the rules of discovery to be applied to a private claim for damages. This was made clear by the Supreme Court in *Framus*. In the absence of community rules governing discovery, the principles set out in O.31, r.12 of the Rules of the Superior Courts apply equally to proceedings in which a plaintiff seeks to enforce its rights under national or EU competition law rules. Accordingly, there was no basis for the High Court (or this court) to assess the applications for discovery on a basis other than the normal principles governing discovery, so as to ensure the efficient judicial protection of the appellant's EU law rights. The ordinary principles governing discovery apply without any modification as to their application based on the fact that the case concerns allegations of breaches of national and EU competition law.

The appellant's case

16. The central allegation made by the appellant is that the respondents have engaged in collusive tendering, and/or engaged in concerted practices to tender, offered for sale and/or sold concrete at prices below cost, and, in particular, below average variable cost (AVC) in concrete tenders in Dublin, since at least late 2007, in breach of s.4 of the Competition Act 2002 and/or Article 101 of TFEU. In the alterative, the appellant contends that by such acts the respondents have abused a collective dominant position in the Dublin ready-mix concrete market in breach of s.5 of the Competition Act 2002 and/or Article 102 TFEU. In addition, the appellant contends that the first named respondent ("CRH") has abused its dominant position in the *cement market* by selling at prices which are below cost in the downstream *ready-mix concrete market* thereby abusing its dominance in the upstream cement market. It pleads that CRH is engaged in the business of manufacturing, sale and distribution, *inter alia*, of ready-mix concrete in the Dublin market.

17. CRH is the 100% owner of Irish Cement Limited ("Irish Cement"). Irish Cement is the dominant supplier of cement in the Irish market and the appellant estimates that CRH, through Irish Cement, enjoys 70% of the Irish market in cement and thus, enjoys a dominant position in that market.

18. Cement is an essential constituent of concrete products. Therefore, the cement market is a relevant market in the proceedings. The second named respondent ("Roadstone") is a wholly owned subsidiary of CRH and is engaged in the production and supply of concrete and concrete products in the Dublin and Leinster areas. For the purposes of Irish and EU competition law, the appellant contends that CRH, Roadstone and Irish Cement are presumed to be part of the same undertaking.

19. The third named respondent ("Kilsaran") is an unlimited company engaged in the business of production and supply of concrete and concrete products, particularly in the Dublin and Leinster areas. It is not part of the CRH Group. The relationship between CRH

and Kilsaran is central to the appellant's case. The case is pleaded in the alternative. At para. 5 of the statement of claim the appellant pleads:-

> *"The plaintiff pleads that there are close links between CRH and Kilsaran. Discovery and/or interrogatories will be required to establish whether CRH exercises decisive influence over Kilsaran such that CRH and Kilsaran are part of one and the same undertaking. In the premises, the conduct of the defendants the subject matter of these procedures may constitute a violation of sections 4 and/or 5 of the Competition Act 2002 and/or Articles 101 and/or 102 of the Treaty on the Functioning of the European Union ("TFEU")."*

20. At para. 6, it explains that the pleas are made in the alternative to take account of the possibility either that CRH/Roadstone and Kilsaran are part of one and the same undertaking or they are separate undertakings, and therefore, whether the alleged breaches of competition law are breaches of s.4/Article 101 or s.5/Article 102. At para. 6 it pleads:-

> *"As the alleged anti-competitive agreements and practices have been kept secret by those involved in them, the plaintiff cannot know, in advance of discovery, how precisely the defendants' breaches of the competition rules ought to be characterised at this point in time."*

21. The case concerns two relevant markets, the cement market and the ready-mix concrete market. The appellant estimates the combined market share of Roadstone and Kilsaran in the Dublin ready-mix concrete market in 2009 was 100%, based on the outcomes of tenders by construction firms. Alternatively, estimating the market share on estimates of total sales in a given year, it estimates that in each of the preceding four years (2007-2010) their combined shares had been in excess of 50%, and in 2010 was between 70-80%.

22. The appellant alleges that CRH/Roadstone and Kilsaran are in a position of collective dominance in the Dublin ready-mix concrete market. Alternatively, Kilsaran is part of the same undertaking as CRH/Roadstone and this undertaking holds a dominant position in the Dublin ready-mix concrete market.

23. Thus, two distinct cases are advanced by the appellant. One involving collusive practices between two undertakings (CRH/Roadstone on the one hand and Kilsaran on the other) and one where all three respondents are in fact part of one undertaking, said to enjoy a dominant position in the Dublin ready-mix concrete market, that CRH enjoys a dominant position in the cement market, and that there are abuses of dominance in each market.

24. Kilsaran is not part of the CRH Group, in contrast to Roadstone or Irish Cement which are subsidiaries of CRH. The appellant's pleaded case is that there were "close links" between CRH and Kilsaran. CRH requested the appellant to specify precisely what was meant by the term "close links" and to specify the material facts relied on to support the contention that there were "close links" between CRH and Kilsaran. In replies to particulars to both

CRH/Roadstone and Kilsaran, the appellant stated that Kilsaran is secretly controlled by CRH and that the material facts relied upon were a matter for evidence. It contends that CRH exercises decisive influence over Kilsaran.

25. When asked to specify the material facts relied upon to support the allegation, the appellant replied that it was a matter for evidence. No further fact or particular has been furnished.

26. Thus, the case is that CRH secretly controls Kilsaran and exercises decisive influence over Kilsaran. How this is so is said to be a matter for evidence, or a matter which cannot be particularised until receipt of discovery, or the delivery of replies to interrogatories. In submissions to this court, counsel for the appellant confirmed that the appellant had decided not to pursue the issue of interrogatories. This means that the appellant's case is that it cannot know whether CRH exercised decisive influence over Kilsaran until it obtains discovery which, it believes, will establish this fact.

27. At paras. 17 to 21 of the statement of claim the appellant set out its claim that there were breaches of competition law in the Dublin ready-mix concrete market:-

> *"The majority of sales of concrete in the Dublin area are made following tenders, conducted by construction firms. Since at least late 2007, each of CRH/Roadstone and Kilsaran have tended, offered for sale and sold concrete at prices below cost, and in particular below average variable cost ("AVC"), in concrete tenders in the Dublin area. The aim of this practice has been to distort competition and eliminate the plaintiff as a competitor in the concrete market."*

28. During this period, the "winning" prices put forward by each of CRH/Roadstone and Kilsaran in concrete tenders have fallen in line with each other.

29. The appellant claims that the pricing practices of each of CRH/Roadstone and Kilsaran in concrete tenders are explicable only on the basis that they have breached and are breaching competition law, in particular, in one or more of the following ways:-

> *"(i) CRH/Roadstone and Kilsaran have engaged in collusive tendering in the Dublin concrete market in breach of section 4 of the Competition Act 2002 and/or Article 101 TFEU;*
>
> *(ii) CRH/Roadstone and Kilsaran have engaged in an agreement or agreements and/or have engaged in a concerted practice or concerted practices, to tender, offer for sale and/or to sell concrete at below cost prices contrary to section 4 of the Competition Act 2002 and/or Article 101 TFEU;*
>
> *(iii) CRH/Roadstone and Kilsaran have abused a collective dominant position in the Dublin concrete market by tendering, offering for sale and/or selling concrete at below cost prices contrary to section 5 of the Competition Act 2002 and/or Article 102 TFEU."*

30. Each of the respondents raised particulars in relation to these pleas and were informed that it was a matter for evidence, and that the "winning" prices were set out in the contracts listed in schedule 1. Selling at "below cost prices" was at prices below average total cost.

31. The reply to Kilsaran's notice for particulars made clear that the level referred to is below average total cost (ATC) and/or below average variable cost (AVC). The contracts listed in schedule 1 are stated to be the best particulars that the appellant can provide until after the respondents have made discovery.

32. At para. 20 the appellant pleads:-

> *"The defendants have succeeded in their aim of eliminating the plaintiff as a competitor in the concrete market. Due to its inability to compete with the defendants' pricing concrete at below AVC, the plaintiff was forced to cease trading as of 18th February 2011. Furthermore the price of ready mixed concrete in the Dublin area has increased significantly since the Plaintiff's exit from the market."*

33. While this paragraph refers to pricing below AVC, elsewhere it is pleaded that the respondents sold concrete at prices below cost, which the appellant clarifies is below average total cost.

34. Separately, it is alleged that CRH is abusing its dominant position in the cement market in breach of s.5 and/or Article 102 by engaging, through Roadstone, in below cost selling of concrete, and concrete products, in the Dublin market. In other words, that by selling at prices which are below cost in the downstream ready-mix concrete market, CRH is abusing its dominance in the upstream cement market. However, the appellant gives no particulars of this claim. It pleads that the agreements and/or arrangements between CRH/Roadstone, and between CRH and Kilsaran, for the supply and purchase of cement are unknown to it. It then pleads that *"[s]uch agreements and/or arrangements may also give rise to breaches of competition law"* (emphasis added). The appellant reserves the right to provide particulars of such breaches following discovery having been made by the respondents. It particularises the alleged below cost selling of concrete and concrete products in the Dublin market, through Roadstone, by reference to the tenders set out in schedule 1. It does not allege that CRH abused its dominance in the cement market by engaging, through Kilsaran, in below cost selling of concrete and concrete products in the Dublin market; though it includes the particulars of the tenders in which Kilsaran engaged in below cost selling set out in schedule 1 of the statement of claim, as part of its particulars of this plea.

35. There is no plea of any effect on the cement market, or any object of affecting the cement market, the market in which CRH is alleged to be dominant. Furthermore, no special circumstances in respect of this plea are alleged or set out. This is relevant as I will discuss below.

36. In paras. 26-29, the appellant set out further, or alternative, claims based upon the assertion that CRH/Roadstone and Kilsaran are part of the same undertaking

37. Finally, the appellant pleads that the respondents and some or all of them induced clients of the appellant to breach contracts with the appellant, and/or have intentionally interfered with the appellant's contractual and/or economic relations, and have unlawfully conspired with each other to damage or destroy the business of the appellant, or have otherwise unlawfully conspired with each other to injure the appellant. At para. 30 the appellant particularises six contracts where it alleges that the respondents interfered with the appellant's contracts by offering to supply concrete at prices below those at which the appellant was supplying concrete "which prices were below AVC", or which forced the appellant to lower its prices "to levels below AVC". In relation to the plea of conspiracy, the appellant alleges that the respondents and some or all of them unlawfully conspired to tender, offer for sale and/or sell concrete "at below cost prices in the Dublin market" with the aim of causing damage to the appellant and eliminating it from the market. The particulars of the tenders are those set out in schedule 1.

Discovery sought by the appellant against CRH/Roadstone

38. I shall first consider the categories of discovery which were refused by the trial judge and in respect of which the appellant appealed. It is important to emphasise that this court will afford the decision of the trial judge a significant measure of appreciation in respect of each of these categories of discovery. This court is reviewing the decision of the trial judge and ought not lightly substitute its view on a discretionary order in the circumstances, unless it is persuaded that there was a clear error or injustice by the trial judge in the manner in which he approached his task and exercised his discretion. Relevance is to be assessed by reference to the pleaded case.

39. The appellant appeals the trial judge's refusal to award discovery of Categories 2, 4, 7, 8 and 11 of its request for voluntary discovery from CRH/Roadstone.

40. Category 2 seeks discovery of:-

> *"All documents created between 30 June 2006 and 30 June 2011 relating to the market share and/or competitive position of Irish Cement and/or competitors in the cement sector, including but not limited to all documents containing market shares of Irish Cement and/or competitors in the cement sector and further including but not limited to marketing and sales reports, reports on existing and potential competitors, external reports, strategic plans, business forecasts and documents relating to the competitive environment in general. This category also includes but is not limited to reports made to executives, management monthly reports, identification of target/assessment of performance against those targets, minutes of business review meetings and other regular/one-off reports dealing with such issues."*

41. The trial judge rejected this as a form of blanket discovery which was criticised by Murray J. in *Framus* at para. 47. He also rejected it on the basis that the appellant had not

adequately pleaded a claim that CRH is abusing its dominant position in the cement market by engaging, through Roadstone, in below cost selling of concrete and concrete products in the Dublin concrete market because it neither pleaded nor identified special circumstances as required by the decision in *Tetra Pak International SA v. Commission of the European Communities* (Case C-333/94P). To the extent that this category of discovery was sought by reference to para. 24 of the statement of claim, that paragraph pleaded that the agreements and/or arrangements between CRH/Roadstone, and between CRH and Kilsaran, for the supply and purchase of cement were unknown to the appellant and that they "may" give rise to breaches of competition law. The appellant reserved the right to provide particulars following discovery. The trial judge characterised this as a baseless plea and one that was entirely speculative.

42. The appellant submitted that the trial judge misstated the law in this regard, that there was no requirement that Kilsaran be a subsidiary of CRH and that the trial judge misinterpreted *AKZO Chemie BV v Commission of the European Communities [1991] ECR I-3359* (Case C-62/86) and *Tetra Pak* (Case C-333/94P).

43. In *AKZO Chemie*, the CJEU held that certain conduct on markets other than the dominant market, which had effects on the dominant market, was abusive. In this case, the appellant does not allege that the conduct of Roadstone or Kilsaran on the ready-mix concrete market had any effects on the cement markets, or *vice versa*. Further, in *Tetra Pak* the CJEU held at para. 27 that:-

> *"…[the]application of Article 86 presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. In the case of the distinct, but associated, markets, as in the present case, application of Article 86 to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances."*

44. In this case, the appellant has not pleaded any special circumstances which would justify a finding that the alleged anti-competitive conduct by Roadstone in the ready-mix concrete market (the associated, non-dominant market) constituted an abuse by CRH of its alleged dominance on the cement market (the upstream market). This is fatal to this category of discovery.

45. Further, the relevance of a category of discovery is to be assessed by reference to the pleaded case. The appellant has not pleaded a case which would justify the need for this category of discovery. Insofar as the discovery could be sought on the basis that CRH/Roadstone and Kilsaran are a single economic unit for the purposes of the proceedings, this amounts to no more than a bare assertion and cannot form the basis upon which to order the discovery sought. The plea is that CRH secretly controls and exercises decisive influence over Kilsaran. The appellant has refused to give any further particulars until it obtains discovery in and of this allegation.

46. It is perfectly understandable that a person bringing a claim of anti-competitive activity is unlikely to be able to plead the claim with a great degree of particularity in advance of discovery. However, that does not mean that a party is thereby entitled to make a bald and general accusation of wrongful activity and thus, gain access to its opponent's private papers for the purposes of seeing if it can make out a case. (*Ryanair Limited v. Bravofly and Travelfusion Ltd.* [2009] IEHC 41, at para 5.16; *Hartside Ltd. v. Heineken Ireland Ltd.*; *O'Brien v. Red Flag Consulting Ltd.*). As was clearly stated by Clarke J. in the High Court in *Ryanair Limited v. Bravofly and Travelfusion Ltd.* at para 5.17:-

> *"…A party should not be permitted to make a bald accusation of anti competitive behavior and hope to be able to particularize it as a result of documents obtained on discovery or by reason of the results of other procedural measures. On the other hand a party should not be required to particularize such a claim in such great detail (prior to discovery), such as might well exclude it from the reasonable opportunity of obtaining material information on discovery."*

47. In *Hartside Ltd.*, Clarke J. stated at para. 5.9 that "*…a party may be required to pass a limited threshold of being able to specify a legitimate basis for their case before being given access to their opponent's relevant documentation."*

48. In my judgment, the plea that CRH/Roadstone and Kilsaran are one undertaking on the basis of "close links" between CRH and Kilsaran is no more than a bare assertion, unsupported by facts. The appellant has not satisfied the *"low threshold separating a genuine case perhaps lacking in evidence from one which was speculative and unsupported by facts"*, being the test formulated by Ryan P. in *O'Brien v. Red Flag Consulting Ltd.*

49. In my judgment, it is not open to the appellant to seek discovery to make out a case in respect of which no facts are pleaded. It is "fishing" to make out a case in support of a bare assertion rather than discovery in support of a pleaded case. The plea that such information and actions are secret, and that the appellant cannot know this information in advance of discovery, does not avail the appellant in the circumstances of this case.

50. It follows that the trial judge was correct to refuse this category of discovery and I would dismiss the appeal in relation to this category.

51. In Category 4, the appellant seeks:-

> *"All documents created between 30 June 2006 and 30 June 2011 relating to the market share and/or competitive position of competitors, including but not limited to the position of the plaintiff, the second defendant and the third defendant in the supply of ready-mix concrete in the Greater Dublin area."*

52. The trial judge criticised the breadth of the discovery sought in this category, describing it as being sought in "sweeping terms". He criticised that it was not tailored to be relevant, necessary and proportionate.

53. The appellant argues that the category goes directly to the question of dominance of the ready-mix concrete market as market share is an important *"(although not the only) factor in accessing dominance"* and says that the market share data is critical. In circumstances where the respondents have denied the market shares pleaded in the statement of claim, this category of discovery is said to be essential. It submits that the information is information which would typically be required by a competition authority of an entity that is under investigation for abuse of dominance.

54. The trial judge held that the questions of market definition and market share will be established with the assistance of expert evidence and analysis, and not by reference to the discovery documents sought in this category. He held that monthly management reports or assessment of performance against targets will not be relevant to the issue of the actual market share of Roadstone in the ready-mix concrete market. The trial judge, accordingly, concluded that this category of documents was not necessary for the court to decide upon the scope of the relevant market in the sale of concrete and the competitive position of the various actors.

55. I believe that the trial judge was correct in his approach to the pleaded case, and to the manner in which dominance and market share is established in competition proceedings, and that his decision is one which this court should be slow to overturn. I am not satisfied that the appellant has advanced any reasons why the decision should be overturned, and I would refuse the appeal in respect of this category.

56. In Category 7, the appellant seeks:-

> "(a) All documents evidencing any communications between the first or second defendant (or any person or entity related to the first or second defendant, including employees, subsidiaries) and the third defendant (or any person or entity related to the first or second defendant, including employees, subsidiaries) relating to the supply (and including documents relating to prices, proposed prices, bids and/or tenders) of ready-mix concrete in the Dublin area between 1 January 2007 and 31 December 2011, including, without prejudice to the generality of the foregoing, all correspondence, e-mails, memoranda/notes of conversations, minutes and recordings.
>
> *AND*
>
> *(b) All documents evidencing any communications between the second defendant and any competitor relating to the supply (and including documents relating to prices, proposed prices, bids and/or tenders) of ready-mix concrete in the Dublin area between 1 January 2007 and 31 December 2011, including, without prejudice to the generality of the foregoing, all correspondence, emails, memoranda/notes of conversations, minutes, recordings, mobile phone text messages, details of phone calls."*

57. The trial judge said that this was essentially dealing with communications in relation to the sale of ready-mix concrete. In relation to item (b), it seeks communications between Roadstone and "any competitor" relating to the supply of ready-mix concrete during the specified period. Item (b) is not limited to any particular tenders, contracts or customers. The trial judge concluded that, as formulated, it is a blanket category of discovery of what is commonly called "fishing".

58. In relation to item (a), it seeks discovery of communications between CRH, Roadstone and Kilsaran in a broad manner. The trial judge said that there was no pleading in the statement of claim which would justify an order for discovery in terms of this category on the basis that there were "close links" between CRH and Kilsaran. It is clear from para. 16 of the statement of claim that the appellant was seeking discovery to see if there were "close links" or breaches of competition law, and that this was not permissible and amounted to unjustified fishing. For these reasons, he refused this category.

59. In written submissions to this court the appellant argued that:-

> *"[T]he limitation of the category to communications relating only to prices ignores the fact that participants in an anti-competitive conspiracy might well avoid making reference to prices when communicating about coordination. Furthermore, the inclusion of documents covering communications with other competitors is important in circumstances where the Plaintiff and indeed the Court cannot know the extent of the anti-competitive conduct at issue and whether the Defendants communicated with other competitors."*

60. The appellant criticised the trial judge for concluding that the category of discovery was sought on the basis that there were "close links" between CRH/Roadstone and Kilsaran. The basis upon which this category was sought was that there was collusive tendering between the respondents.

61. CRH acknowledges that the category relates to the allegations of bid rigging and conspiracy made against the respondents. It points out that there is no plea in the statement of claim that any competitors, other than Kilsaran, had any involvement in the alleged bid rigging and conspiracy. Therefore, the documents requested were neither relevant, nor necessary, by reference to the pleaded case.

62. I agree with the conclusion of the trial judge that discovery of communications with other competitors, in respect of whom no anti-competitive conduct is pleaded, would be speculative and unduly burdensome. As regards the communications between the respondents, it is extraordinarily broadly drafted, and it would appear that no real effort has been made to focus the category. However, the fundamental objection to this category is that it sought with a view to establishing "close links" between CRH and Kilsaran. As I have already concluded, this contention is no more than a bare assertion and it does not satisfy the low threshold test in *Red Flag*. Accordingly, I would refuse the appeal in respect of this category of documents.

63. In Category 8, the appellant seeks:-

> *"All documents evidencing the relationship between, on the one hand, the first defendant or any person or entity related to the first defendant (including employees, subsidiaries), and, on the other, the third defendant or any person or entity related to the third defendant (including employees, subsidiaries), including, without prejudice to the generality of the foregoing, all documents relating to payments or transfers of money or other assets by the first defendant or any person or entity related to the first defendant to the third defendant or any person or entity related to the third defendant; any guarantees, letters of comfort or letters of support provided by or on behalf of the first defendant or any person or entity related to the first defendant to, or for the benefit of, the third defendant or any person or entity related to the third defendant; and all correspondence, emails, memoranda/notes of conversations, minutes, recordings, mobile phone text messages, details of phone calls."*

64. The trial judge described this as a very broad category of documentation and noted that it had no temporal limits. He criticised the request on the basis that it is not tailored to be relevant, necessary and proportionate. He said the category sought is vast. He noted that the category sought will contain a lot of irrelevant material because CRH includes Irish Cement and Kilsaran has purchased some of its supplies of cement from Irish Cement. He concluded that to order this category of discovery would be to place an entirely disproportionate obligation on CRH/Roadstone.

65. He was criticised by the appellant for his misunderstanding of "decisive influence" in competition law when he held at paras. 130-131 that a company that exercises decisive influence over another company must be the parent of that company.

66. The respondents submitted, and the trial judge agreed, that the allegations of "close links" and "decisive influence" were no more than bald assertions or mere speculation. The appellant denied this and referred to specific pleas in the statement of claim, and also to affidavit evidence filed earlier in the proceedings.

67. As I have observed above, the allegations in relation to "close links" and "decisive influence" are no more than bald assertions or mere speculation. The question of whether categories of discovery are relevant is to be assessed by reference to the pleaded case and not by reference to affidavit evidence, as the appellant sought to do. Therefore, regardless of whether the trial judge was correct in his description of "decisive influence" in competition cases, he was correct in concluding that, as pleaded in this case, the allegation is no more than speculation or bald assertion, and may not be used to justify an order for discovery *a fortiori*, which would amount to a trawl through the documents of its competitors. On this basis, I would refuse the appeal in respect of this category.

68. At Category 11, the appellant seeks:-

"All documents created between 1st January 2006 and 31 December 2011 and relating to the supply by Irish Cement Ltd. or any other company, entity or person within or related to the first defendant's group, to the third defendant or any related person or entity, of cement, including, without prejudice to the generality of the foregoing, invoices and quotations; credit notes; rebates; documents evidencing the supply of cement that was not ticketed or not invoiced."

69. The trial judge rejected this category on the basis that there was no allegation that CRH/Irish Cement is engaged in below cost selling of cement to Kilsaran and, accordingly, it was irrelevant.

70. In submissions to this court, the appellant argued that the extent to which Irish Cement provided discounts to Kilsaran in cement supplies is important to the question of "close links" between CRH and Kilsaran. If this is the basis upon which the appellant seeks this category it cannot be permitted, as the allegations in the statement of claim are so vague and speculative that they cannot properly ground an order for discovery. I would refuse the appeal in relation to this category also.

Discovery sought by the appellant against Kilsaran

71. The appellant appealed the trial judge's refusal to order discovery in terms of categories 2, 4, 7, 8 and 11 of the motion for discovery against Kilsaran. In Category 2, the appellant seeks:-

"All documents created between 30 June 2006 and 30 June 2011 relating to the market share and/or competitive position of Irish Cement, CRH, Kilsaran and/or competitors in the cement sector, including but not limited to all documents containing market shares of Irish Cement, CRH/Kilsaran and/or competitors in the cement sector and further including but not limited to marketing and sales reports, reports on existing and potential competitors, external reports, strategic plans, business forecasts and documents relating to the competitive environment in general. This category also includes but is not limited to reports made to executives, management, monthly reports, identification of targets/assessment of performance against those targets, minutes of business review meetings and other regular/one-off reports dealing with such issues."

72. The trial judge concluded that the discovery sought was far too widely drawn, and read "more like a wish-list" than a request for discovery that is tailored to be relevant, necessary and proportionate.

73. The category of discovery relates to the cement market. The appellant relied upon its plea that Kilsaran had "close links" with CRH, and that CRH exercised "decisive influence" upon Kilsaran in seeking this category of discovery. The trial judge said that for Kilsaran to be implicated on the cement market:-

"Goode Concrete would have to plead that (i) CRH owns Kilsaran, and (ii) CRH not only has the ability, but does in fact exercise decisive influence over Kilsaran. Neither of these matters is pleaded."

74. In my judgment, the trial judge was correct to refuse this category of discovery on the basis of the pleadings, even if it may not have been necessary for the appellant to plead that CRH owns Kilsaran. The pleading in para. 24 of the statement of claim is speculative, and the claim that CRH abused, and is abusing, its dominance in the cement market by its actions in the concrete market are inadequately pleaded by reason of the failure to plead or identify special circumstances as required by *Tetra Pak*.

75. In my judgment, the trial judge was correct to refuse this category of discovery and so I would reject the appeal in respect of this category.

76. In Category 4, the appellant seeks:-

"All documents created between 30 June 2006 and 30 June 2011 relating to the market share and/or competitive position of competitors, including but not limited to the position of the plaintiff, the second defendant and the third defendant in the supply of ready-mix concrete in the Greater Dublin area."

77. The trial judge rejected this category on the basis that it was too broad. He held that the discovery sought was not necessary to establish the market as defined and pleaded by the appellant. He referred to the fact that the appellant had previously submitted to the court *"a lengthy report by a well-known economist who undertakes his analysis of the relevant market definition, competitive structure and market shares without any recourse to the type of information which Goode Concrete is saying is now necessary."*

78. This category is concerned with the market share of the respondents in the ready-mix concrete market. The trial judge held that it is a matter for experts to give evidence. The types of documents sought to be captured in this category will not be relevant to this exercise. It seems to me that this is a matter where the significant margin of appreciation which an appellate court should afford to a trial judge, in particular the trial judge in charge of the Competition List of the High Court dealing with a competition law case, arises and I am not satisfied that the appellant has established a reason why this court ought to interfere with the decision of the trial judge, and so I reject this ground of appeal also.

79. In Category 7, the appellant seeks:-

"(a) All documents evidencing any communications between the first or second defendant (or any person or entity related to the first or second defendant, including employees, subsidiaries) and the third defendant (or any person or entity related to the third defendant, including employees, subsidiaries) relating to the supply (and including documents relating to prices, proposed prices, bids and/or tenders) of ready-mix concrete and/or speciality concrete products in the Dublin

area between 1 January 2007 and 31 December 2011, including, without prejudice to the generality of the foregoing, all correspondence, e-mails, memoranda/notes of conversations, minutes and recordings.

AND

(b) All documents evidencing any communications between the third defendant and any competitor relating to the supply (and including documents relating to prices, proposed prices, bids and/or tenders) of ready-mix concrete in the Dublin area between 1 January 2007 and 31 December 2011, including, without prejudice to the generality of the foregoing, all correspondence, e-mails, memoranda/notes of conversations, minutes, recordings, mobile phone text messages, details of phone calls."

80. The trial judge refused this category on the basis that item (a) goes to the issue of "close links" between CRH and Kilsaran. He held that there was nothing in the statement of claim which justified an order for discovery on the basis of "close links", and referred to the fact that, at para. 16, the appellant required discovery to see if there were "close links" and breaches of competition law. He held that this was not permitted under the rules on discovery. In relation to item (b), he noted that there was no allegation against Roadstone of bid rigging with anybody other than Kilsaran.

81. In my judgment, the decision of the trial judge in relation to Category 7 was entirely correct for the reasons he advanced. I would add that there was no allegation of any bid rigging between the Kilsaran and any other competitor (other than Roadstone). This ground of appeal likewise must be rejected.

82. In Category 8, the appellant seeks:-

"All documents evidencing the relationship between, on the one hand, the first defendant or any person or entity related to the first defendant (including employees, subsidiaries) and, on the other hand, the third defendant (or any person or entity related to the third defendant (including employees, subsidiaries), including, without prejudice to the generality of the foregoing, all documents relating to payments or transfers of money or other assets by the first defendant or any person or entity related to the first defendant to the third defendant or any person or entity related to the third defendant; any guarantees, letters of comfort or letters of support provided by or on behalf of the first defendant or any person or entity related to the first defendant to, or for the benefit of, the third defendant or any person or entity related to the third defendant; and all correspondence, emails, memoranda/notes of conversations, minutes, recordings, mobile phone text messages, details of phone call."

83. The trial judge held that this was a vastly wide category, not least because CRH includes Irish Cement and Kilsaran purchased some of its supplies of cement from Irish Cement. There was no temporal limit to the category which included all correspondence, emails,

memoranda/notes of conversations, minutes, recordings, mobile phone text messages and details of phone calls. He held it was not a request for discovery which was tailored to be relevant, necessary and proportionate and, accordingly, to order discovery in these terms would be to place an entirely disproportionate obligation upon Kilsaran.

84. I agree with the trial judge's conclusion in this regard and would refuse the appeal in respect of this category also.

85. In Category 10, the appellant seeks:-

> *"All documents created on (sic) between 1st January 2006 and 31 December 2011 relating to the supply by Irish Cement Limited or any other company, entity or person within the first defendant's group, to the third defendant (or any related person or entity) of cement, including, without prejudice to the generality of the foregoing, invoices and quotations; credit notes; rebates; documents evidencing the supply of cement that was not ticketed or not invoiced; contracts."*

The trial judge held that the only plea that could be relevant to this category of discovery was para. 24 of the statement of claim which pleaded:-

> *"The agreements and/or arrangements between CRH and Roadstone and between CRH and Kilsaran for the supply and purchase of cement are unknown to the plaintiff. Such agreements and/or arrangements may also give rise to breaches of competition law. The plaintiff reserves the right to provide particulars of such breaches following discovery having been made by the defendant."*

86. The trial judge held that this category amounted to an impermissible "fishing" exercise. Insofar as the appellant's claim related to the allegation that the respondents were part of one undertaking, the price at which they transfer cement between themselves is irrelevant for the purposes of competition law. Insofar as the claim is based upon the allegation that CRH/Roadstone are one undertaking and Kilsaran is a separate undertaking, there is no allegation that there is some illegality in terms of the price at which Irish Cement (or any other company, entity or person within the CRH group) supplied concrete to Kilsaran. Therefore, the category sought was not relevant to the pleaded case.

87. In my judgment, the trial judge was correct in his assessment and was correct to refuse this category of discovery.

Category 5 sought by the appellant against CRH/Roadstone

88. The most hotly contested categories of discovery were categories 5 and 6 as sought by the appellant respectively against CRH/Roadstone and Kilsaran. Category 5 as against CRH/Roadstone seeks:-

> *"In respect of each instance of supply by the second named defendant, in the Greater Dublin area, of ready-mix concrete, from 1 January 2007 to 30 June 2013, in respect of the jobs/tenders listed in Schedule 1 of the statement of claim and*

jobs/tenders involving supply above 1,500 cubic metres of ready-mix concrete, all documents evidencing the costs of production and supply, including all fixed and variable costs. Without prejudice to the generality of the foregoing, the requested documents include:

All documents provided by the first and/or second defendant to Dr. Francis O'Toole for the purposes of the preparation of his affidavit dated 3 December 2010;

All documents created by Dr. Francis O'Toole in relation to the analysis carried out by him as described in his affidavit dated 2 December 2010;

All documents provided by the first and/or second defendant to Dr. Pat McCloughan for purposes of the preparation of his affidavit dated 12 January 2011; and

All documents created by Dr. Pat McCloughan in relation to the analysis carried out by him as described in his affidavit dated 12 January 2011."

89. The trial judge dealt with this request in paras. 120 and 121 of his judgment:-

"*120. In formulating this category, Goode Concrete, as well as extending the temporal period in respect of which documentation is sought, also goes well beyond the specific contracts that it previously assured the court that it would be targeting. So in addition to the contracts in Schedule 1, it is looking for all contracts over a 5½ (five and one-half) year period, where the volume is over 1,500 cubic meters of ready-mix concrete. It is worth recalling too the entirely speculative nature of the claim on which the application for discovery is grounded, being a claim in effect that 'We tendered for a number of contracts. We only won some of those tenders. We think that the successful bids were below-cost bids because they would have been below-cost bids had we made them.' (And that allegation, such as it is, goes nowhere from a competition law perspective, unless some form of dominance can be established).*

121. Being grounded on what is an inherently speculative claim, there is a strong case for saying that Goode Concrete should not get discovery of Category 5 at all. However, on balance, the court considers that the most appropriate way to proceed, having regard to the pleadings and the requirements of relevance, necessity and proportionality, is to order discovery of Category 5 but to confine it (i) to the AVC for the specific contracts previously identified, the attempt to extend matters into contracts where the volume is above 1,500 cubic meters being what is commonly described as a 'fishing' exercise, and (ii) to the timeframe (01.11.2007-28.02.2011) identified by the court previously above as being generally appropriate."

90. The trial judge limited the period for discovery of documents from 1 November 2007 to 28 February 2011 on the basis that the conduct complained of in the statement of claim is from November 2007 until the date when the appellant was allegedly forced to cease trading in February 2011; and so the trial judge concluded that it was appropriate to confine discovery to this timeframe, and not to extend it beyond that period.

91. The appellant submits that the trial judge erred in restricting the category as ordered. It argues that it cannot know about every job where the respondents sold concrete below cost and that the contracts specified in the schedule of the statement of claim were those of which it had specific knowledge. It says that it should not be confined to the contracts scheduled as this amounts to barring a plaintiff in a competition law case from claiming breaches of competition law in respect of certain transactions which have been kept secret from it, even if it has specified other transactions about which it is aware. It, therefore, ought not to be confined to the contracts set out in the schedule.

92. The appellant says that the central allegation in the case concerns below cost selling, which is both selling below AVC and selling between the AVC and ATC. The cost information is critical. The discovery should not be confined to the AVC for specific contracts.

93. The appellant argues that the trial judge erred in limiting the costs information to documents evidencing AVC. This ignores the fact that predatory pricing may arise not only where prices are below AVC but also where prices are between AVC and ATC. Secondly, according to the appellant, there is no scientific or objective definition of what constitutes AVC, or the components of a party's AVC. It submits that the category as ordered "does not make sense and is incapable of been applied in an objective way." Finally, it submits that the trial judge erred in terminating the period for discovery at 28 February 2011. It submits that while the appellant went out of business in February 2011, cost and pricing information after the period is relevant as it may show that, once the appellant was eliminated, the respondents raised their prices in order to recoup the losses which they had sustained during the period of predatory pricing. The trial judge, it argues, erred in holding that recoupment only related to Category 6, or that recoupment was irrelevant because "the pricing at the time was either below-cost/predatory or not." It argues that the analysis of the trial judge fails to appreciate the eliminatory intent which may be relevant to a finding of predatory pricing, especially where the pricing is between AVC and ATC. The appellant argues that to establish an abuse of collective dominance through predatory pricing, the possibility of recouping losses may be a relevant factor in deciding whether the pricing is abusive, even though it may not be a necessary proof. It says, for example, the possibility of recoupment may, where prices are below ATC but above AVC, assist in establishing that a plan to eliminate a competitor exists. In so arguing, it makes no case as to why the period in respect of which the discovery should apply should be extended to 30 June 2013.

94. CRH/Roadstone opposes the appellant's appeal in relation to this category and cross-appealed against the decision of the trial judge to order the amended Category 5. They

argue that the trial judge held that the discovery sought amounted to a form of blanket discovery, and that it was not for the court to redraft the appellant's motion. Having stated that there was a strong case for saying that the appellant should not get discovery of the category at all, because it was grounded on an inherently speculative claim, he ought to have refused the category altogether.

95. In acting as he did, the trial judge deprived CRH/Roadstone of an opportunity to adduce evidence as to the cost of making the discovery of the reformulated category. This meant that he was unable to consider properly the proportionality of ordering discovery of the redrafted category of documents. They also argue that the trial judge failed to take account of the alternative means by which the information sought in Category 5 could be obtained by the appellant, such as interrogatories, and that he ought not to have included documents which were obviously the subject of litigation privilege in a category of discovery.

96. In relation to the cross-appeal arguments, it seems to me that this court ought to afford the decision of the trial judge a significant margin of appreciation where he decided, notwithstanding his criticisms of the category of discovery, that nonetheless it was appropriate to order limited discovery in respect of this category. He was fully aware of the argument advanced on behalf of CRH/Roadstone regarding the proportionality of the discovery sought. The essence of their argument on appeal is that, notwithstanding this evidence, the trial judge ought to have indicated the scope of the category he was contemplating ordering and invited the parties to make further submissions in relation to that category, including filing further affidavits directed towards the proportionality of the redrafted category. In my opinion, this is entirely unjustified, and it is clearly within the discretion of a trial judge to assess whether, and upon what terms, to order discovery based on the information and arguments before him at the hearing of the motion.

97. There has been no explanation at all as to how interrogatories might have availed the appellant in relation to this category of discovery, so this argument does not avail CRH/Roadstone.

98. In relation to the documents in respect of which CRH/Roadstone may assert litigation privilege, this undoubtedly falls within the margin of appreciation to be afforded to the judge in charge of the List who would be far more familiar with the details of these affidavits than this court. It is not apparent to me that there are any reasonable grounds upon which this court ought to exercise its discretion to overturn the decision of the trial judge on this point. I, therefore, would not allow the cross-appeal of CRH/Roadstone in relation to this order of the High Court.

99. In response to the appellant's appeal, CRH/Roadstone submit that the trial judge was correct in his conclusion, having regard to the pleadings, that the case made by the appellant is, in reality, a claim that they engaged in the sale of concrete below AVC. They argue that the trial judge was correct to confine the scope of the discovery to the tenders listed in the schedule of the statement of claim, as this was in accordance with the well-established principle that a party will not be permitted to obtain discovery based on

speculative pleadings. They argued that the timeframe was the correct period as this was the period in which the allegation of anti-competitive conduct related. Insofar as the appellant seeks to extend beyond 28 February 2011, in order to ascertain the movement in market prices post its cessation of trade, this is unnecessary and disproportionate. They point out that this was precisely the same argument which was rejected by the Supreme Court in Framus, both on the grounds of proportionality and on the basis that this was a matter to be addressed by expert evidence. In Framus, the Supreme Court held at paras. 54-55 that the plaintiffs:-

> *"…submitted that any documents which are ordered to be discovered should not only relate to the period during which the particular plaintiff to whom the discovery pertains was in operation, but also for one year prior to the commencement of business and one year subsequent to the cessation of business. This, it was submitted, is of particular importance in relation to the movement of prices since documents relating to the price levels and the markets in which the plaintiffs were operating prior to their entry and subsequent to their exit would be particularly revealing…*
>
> *…[T]o extend discovery so as to ascertain the movement in market prices, to which experts can often attest relates more to the seeking of information rather than discovery related to the actual anti-competitive practices alleged against the defendants."*

100. In relation to the time limits imposed by the trial judge, I am satisfied that the trial judge has applied the principles recognised correctly in Framus, and that it is within the margin of appreciation with which this court ought not to interfere. Likewise, I agree with the trial judge that the claim in relation to predatory pricing, insofar as it does not relate to the scheduled contracts, amounts to no more than a bare assertion and speculation on the part of the appellant. I am not persuaded by the submissions of the appellant that simply because they have identified certain contracts which they say evidence collusive, predatory pricing by the respondents, they should not be prevented from seeking the broader discovery they seek as by its nature the anti-competitive conduct they allege is secretive and they can have no knowledge of it. The problem with this submission is that it amounts to saying that a party who can make anti-competitive allegations in respect of certain transactions is entitled to trawl through the confidential documents of the other party, looking for evidence of further instances of breaches of competition law. In my judgment, this is seeking discovery in order to make a case and is not permissible (see *Red Flag* and *Heineken*). Accordingly, it was not appropriate to order discovery in relation to this aspect of the pleaded case.

101. I disagree with the trial judge that, as regards the contracts listed in the schedule, the case is, in reality, a case involving selling below AVC. The appellant has stated clearly in its replies to particulars that it relates to selling below ATC and not just selling below AVC. In relation to the contracts set out in the schedule, the appellant states that the reason it believes that the respondents are selling below AVC and/or ATC is because they are

selling below ***"its"*** AVC. Whether this is irrelevant, as submitted by the respondents, will be a matter for trial. However, it does not detract from the fact that the case advanced is that the selling by the respondents is below both AVC and ATC. I, therefore, would allow the appeal in respect of Category 5 to the limited extent of extending the discovery in respect of the contracts set out in the schedule to below ATC.

Category 5 sought by the appellant against Kilsaran

102. In Category 5, the appellant seeks:-

> *"In respect of each instance of supply by the third defendants, in the greater Dublin area, of ready-mix concrete, from 1 January 2007 to 30 June 2013, in respect of the jobs or tenders listed in schedule 1 of the statement of claim and jobs/tenders involving supply above 1,500 cubic metres of ready-mix concrete, all documents evidencing the costs of production and supply, including all fixed and variable costs."*

103. The trial judge said that the appellant was looking for discovery over a five-and-a-half year period, extending not just to the jobs/tenders listed in the schedule but to all jobs/tenders involving more than 1,500 cubic metres of ready-mix concrete. He said this was entirely disproportionate. He noted that CRH/Roadstone had offered a schedule of prices that they tendered for in respect of the contracts listed in the schedule of the statement of claim. Kilsaran was prepared to make a concession and agree to Category 5 (and Category 6) as sought, subject to concerns in respect of the establishment of a confidentiality ring and the provision of security for costs. This was not agreeable to the appellant. The trial judge concluded that it was disproportionate to order Kilsaran to make discovery and instead made an order on the terms as offered by CRH/Roadstone; that is, discovery from 1 November 2007 to 28 February 2011, in respect of the jobs/tenders listed in schedule 1 of the statement of claim, of all documents evidencing the third named respondent's average variable costs.

104. The appellant appealed against this limited discovery. There was no cross-appeal by Kilsaran. It follows that there is no issue between the parties as to the terms of the judgment at para. 178 and the perfected order, and the parties proceeded on the basis of the order. The appellant argued that the trial judge erred in making this order . It relied on the same grounds as it advanced in relation to Category 5 in the application for discovery against CRH/Roadstone.

105. In opposing the appeal in respect of Category 5, Kilsaran submitted that, having regard to the requirement of relevance, necessity and proportionality, and in light of the particularly speculative nature of the case pleaded against Kilsaran (*i.e.* your prices were lower than our AVC so you must be acting anti-competitively), the limitation on the discovery ordered to those specific jobs/tenders in respect of which allegations of pricing below AVC are pleaded in schedule 1, was entirely appropriate. It submitted that the case law does not permit the appellant to trawl through its documentation in search of a case which it might then plead. In certain circumstances, predatory pricing may arise when prices are between AVC and ATC, but this is not the case the appellant has pleaded. As a result, in

this category, the appellant is seeking discovery of Kilsaran's costs so as to enable it to make out a case it has not pleaded. This is not permissible and, accordingly, the trial judge was correct in so holding.

106. I agree that the discovery sought is, in effect, to enable the appellant to bring a case and not in pursuance of a pleaded case. The case as pleaded, in relation to anti-competitive activity by Kilsaran, is no more than a bare assertion, save as regards the scheduled contracts. Therefore, the trial judge was correct to award discovery confined to the contracts set out in the schedule of the statement of claim. For the reasons previously explained, I would vary the order so it is not confined to AVC, but includes ATC.

Category 6 of the discovery sought by the appellant against CRH/Roadstone

107. In Category 6, the appellant seeks:-

> *"In respect of each instance of tender and/or supply by the second defendant, in the greater Dublin area, of ready-mix concrete, from 1 January 2007 to 30 June 2013, in respect of the jobs/tenders listed in schedule 1 of the statement of claim and jobs/tenders involving supply above 1,500 cubic metres of ready-mix concrete, all documents evidencing the prices at which the second defendant tendered, offered to supply and supplied ready-mix concrete, such documents to include those which indicate all tenders in which the second defendant participated and the outcome of such tenders."*

108. The trial judge said that this category sought discovery over a five-and-a-half year period, extending not just to the jobs/tenders listed in schedule 1 of the statement of claim but to all jobs/tenders involving more than 1,500 cubic metres of ready-mix concrete, and concluded that this was entirely disproportionate. The trial judge noted that CRH/Roadstone offered to provide a schedule of the prices that they tendered for in respect of the contracts listed in the schedule of the statement of claim and the trial judge concluded that this was a proportionate approach that was consistent with the *MTV Europe v. BMG Records (UK) Ltd & Ors* (Unreported, Court of Appeal of England and Wales, 10th March, 1998) decision. The trial judge ordered that CRH/Roadstone provide the schedule of prices in respect of the contracts listed in the schedule of the statement of claim, verified by affidavit, for the period 1 November 2007 to 28 February 2011.

109. On appeal, the appellant argues that the replacement of real evidence (discovered documents) with an affidavit verifying the relevant information extracted from the documents is of immense concern. It contends that the claim concerns abusive pricing practices which, by their nature, have been kept secret, and therefore, the primary documents must be disclosed in order for the court and the parties to be able to verify what in fact occurred. The appellant also argues that the scope of the category was too narrow, both in its timeframe and the fact that jobs/tenders over 1,500 cubic metres of concrete, which were not listed in the schedule, were excluded on the same grounds as were argued in relation to Category 5.

110. CRH/Roadstone argues that the appellant had failed to identify any credible basis why the discovery ordered ought to go beyond the specific tenders listed in schedule 1 of the statement of claim, or why it ought to be extended beyond the temporal scope fixed by the trial judge. They submit that the trial judge was correct to order that they serve a schedule of figures, verified on affidavit, in respect of Category 6, rather than all the underlying documents which evidence and support those figures. They had adduced evidence before the High Court of the disproportionate nature of the category sought. If discovery was ordered for the period between 1 January 2007 and 31 December 2010 in respect of Categories 5 and 6 as sought by the appellant, this would capture 109,000 separate jobs and 425,000 deliveries during that period, amounting to 560,000 documents. This would increase to 625,000 documents if the period was extended to 20 June 2013, as was sought by the appellant. It was argued this would equate to about 2 million pages of documents which would fall within the scope of the discovery sought, with the estimated cost of making discovery to be in excess of €8,500,000. They refer to *MTV Europe v. BMG Records*, where the English Court of Appeal upheld the provision of schedules of figures rather than the underlying documents evidencing those figures, in circumstances where the request for discovery was unduly burdensome. They submitted that this approach was entirely appropriate.

111. For the reasons I have set out, I believe that the trial judge was correct to confine this category of discovery to the contracts listed in schedule 1 of the statement of claim, and to confine it to the period 1 November 2007 to 28 February 2011. The issue is whether he was also correct to refuse to order discovery of the documents, and instead to order that the information be provided verified by affidavit. It was not contested that he had the jurisdiction to make such an order. Furthermore, when considering whether the discovery sought is necessary, the court may have regard to alternative means by which a requesting party may be furnished with the necessary information. In this case, CRH/Roadstone advanced cogent evidence as to the burden of making the discovery as sought. Admittedly, this burden would be reduced considerably if the trial judge had ordered discovery of this category limited to the contracts set out in the schedule of the statement of claim, but neither the trial judge nor this court knows to what extent. What is significant is that the appellant did not address this point at all. The trial judge found an alternative means of ensuring that the appellant was furnished with the required information, while avoiding imposing a disproportionate burden on the respondents. In my judgment, the decision of the trial judge represented a very fair balancing of the need to give the appellant the information it requires, while avoiding unduly burdening the respondents. This exercise of his discretion is not one with which I would interfere.

Appeal against the orders for discovery made against the appellant

112. The appellant appeals against two categories of discovery the trial judge ordered it to make on the application of CRH/Roadstone: Categories 4 and 12. In Category 4, CRH/Roadstone seek discovery:-

> *"In respect of each instance of supply by the plaintiff, in the greater Dublin area, of ready-mix concrete in the period between 31 October 2007 to 12 November 2010,*

all documents evidencing, recording or relating to the plaintiff's costs of production and supply, including all fixed and variable costs."

113. The appellant's case is that the respondents have engaged in predatory selling and, in particular, that Roadstone and Kilsaran have sold concrete in the Dublin ready-mix concrete market below their AVC. The trial judge dealt with this category at para. 229 of the judgment as follows:-

> *"Goode Concrete has resisted discovery of this category of documentation on the basis that the issue in these proceedings is the defendants' AVC, not that of Goode Concrete. That is the key issue; however, it is Goode Concrete that has made its own AVC relevant in these proceedings by introducing it through its replies to particulars. Yet despite entreaties from the first and second-named defendants that Goode Concrete confirm that it does not intend to rely on its own AVC, Goode Concrete has not so confirmed. Subject to the requirements as to relevance, necessity and proportionality, a plaintiff will generally encounter difficulty in resisting discovery if it pleads a case, then pleads that discovery should not be ordered on the basis of what it has pleaded, yet simultaneously seeks to retain the right to proceed at trial precisely on the basis of what it has pleaded. In these proceedings such an approach could lead to a manifestly unfair situation at trial in which Mr. Peter Goode would give evidence as to what Goode Concrete's AVC was, yet the first and second-named defendants would previously have been deprived by this Court of access to relevant documents by way of discovery, all but closing off the opportunity of the first and second-named defendants effectively to cross-examine Mr Goode on such testimony and/or to call a suitable expert to give evidence. Absent confirmation to the court (and there has been no such confirmation) that Goode Concrete will not seek at trial to rely on its own AVC in the manner described above, this category of discovery is patently relevant, necessary and proportionate."*

114. The appellant argued that the trial judge's decision was based on the misconception that the appellant's costs are an issue of dispute between the parties on the pleadings in these proceedings. It characterises its comment that to the best of its knowledge and belief Roadstone does not have a lower AVC to it, as being simply "by the way."

115. CRH/Roadstone point out that the only particulars provided by the appellant in support of the allegation that the respondents engaged in below cost selling are particulars of the appellant's own AVC. In the circumstances, the contention that the appellant's own costs of production are not relevant by reference to the pleadings is unsustainable. The appellant is relying on its own AVC in support of the contention that Roadstone engaged in the below cost selling of concrete products. They submit that discovery is necessary to establish the appellant's AVC for the years 2008-2010, to establish how the appellant calculated its AVC and, in particular, whether there are differences between the manner in which the appellant and Roadstone calculated their respective AVC.

116. I am satisfied that the trial judge was correct to order discovery as he did. The sole basis upon which it was contested, that of relevance, was correctly rejected by him and I would not allow the appeal in respect of this category.

117. Category 12 is correctly characterised by the appellant as vast. It seeks *"all documents evidencing, recording or relating to the reasons why the plaintiff ceased trading as of 18 February 2011"* and then lists nineteen specific subcategories. The full category is to be found at para. 194 of the judgment of the High Court and is directed towards the reason(s) for the closure of the business of the appellant.

118. The trial judge considered how the issue arose from the pleadings. Having analysed them, he said that a central issue in dispute is whether CRH/Roadstone engaged in pricing practices that had the aim of eliminating the appellant from the market and further, whether it succeeded in so doing. He then considered the defence. At para. 34 of the defence CRH/Roadstone plead:-

> *"The first and second Defendants are strangers as to the circumstances in which the Plaintiff ceased to trade but it is denied that this occurred as of 18th February 2011. It is further denied that it was caused or contributed to by the alleged anti-competitive conduct on the part of the Defendants, or any of them. On the contrary, the Plaintiff ceased to trade in circumstances where its business was badly managed, it had a high level of debt, payments to directors in respect of salaries, pensions and rent were excessive, its cost base was uncompetitive and it had incurred significant debt on the purchase of sites for which it was unable to obtain planning permission in an attempt to secure necessary aggregate supplies."*

119. The trial judge referred to paras. 50 and 51 of the defence which clearly put in issue the reason the appellant ceased trading. CRH/ Roadstone allege that it was due to poor management, a high level of debt, an inflated cost base and low margins, excessive payments of directors' salaries, pensions and rents, and losses on the purchase of sites (for which it was unable to obtain planning permission) in an attempt to secure necessary aggregate supplied, and a failure to cut costs and take other measures in response to the very significant downturn in the construction industry. In light of this pleading, the trial judge concluded that one of the core issues that the court will have to determine in the proceedings is whether the appellant's business failed because of the alleged anti-competitive conduct of the respondents or because of the factors pleaded by CRH/Roadstone, or an element of both.

120. In response to a notice for particulars raised by the appellant, CRH/Roadstone set out detailed particulars of these pleas which are reproduced in para. 207 of the judgment of the trial judge. The trial judge said that CRH/Roadstone identified a series of factors which they say contributed to the demise of the appellant's business which show that it was under financial pressure well before the commencement of the alleged anti-competitive conduct. For the purposes of the application for discovery, he held that it was a rationally grounded plea, rooted in the evidence before the court (as opposed to speculation or a bare assertion). He referred to an expert report which Mr. Kevin Spillane,

then a Director of Corporate Finance in KPMG, produced in the context of an application for security for costs against the appellant. Mr. Spillane identified why he considered the business of the appellant to have failed, relying on the (relatively limited) information then available to him. Mr. Spillane averred in his affidavit:-

> *"I confirm that I have reviewed category 12 of the request [for discovery] and, in the context of this case, I consider that all of the information requested in the enumerated sub-categories is relevant and necessary in order for me to give my expert opinion on why the Plaintiff ceased trading."*

121. The trial judge noted that there was no replying affidavit from any expert acting for the appellant averring that the information was not required to give an informed view on the appellant's finances during the relevant time period and the reasons why it failed.

122. The trial judge carefully considered the arguments of the appellant that the category was relevant only to the question of damages, and the offer of the appellant to make discovery of its audited accounts for the years ended 31 December 2007, 2008 and 2009, and its management accounts for the period ended 31 October 2010. He also considered the argument advanced by the appellant that the category was disproportionate. He concluded that it was appropriate to order discovery in the terms sought by CRH/Roadstone.

123. At the hearing of the appeal the appellant took grave exception, in particular, to the query in para. 216 of the judgment:-

> *"What does proportionality mean in the context of a discovery application? Is it a concept with real meaning, or is it but the last refuge of a desperate person at the receiving-end of such an application?"*

124. However, having raised this debate the trial judge then went on to consider the decision in *Framus*, and the decision of Finlay Geoghegan J. in *Boehringer Ingelheim Pharma GmbH and Co. KG v. Norton (Waterford) Limited t/a Teva Pharmaceuticals Ireland*, [2016] IECA 67. At para. 216 he said:-

> *"…the court looks at how relevant the documents are, how important they are to the issues in the proceedings; on the other side the court balances time and cost. Thus, to put matters at their simplest, if there are documents that are not very relevant to a case and it is going to cost a lot of money to make discovery of them, a court will likely say that the discovery sought is disproportionate. By contrast, if discovery of certain documentation is going to cost a lot of money but the documents are very relevant, a court will likely say that that it is not disproportionate, given how important the documents are to that particular case."*

125. Thus, it seems to me, he correctly identified the principles to be applied when an issue as to the proportionality of the discovery sought is raised. The issue, therefore, is whether he applied the principles in a just and fair manner.

126. The trial judge then noted that the court had been offered "a bald averment" by the appellant that what was sought by CRH/Roadstone offended against proportionality, but that no evidence had been offered to support the assertion. He considered each of the nineteen subcategories in detail, and he concluded that Category 12 is relevant and necessary as it goes to a central issue in the proceedings. Based on the evidence and submissions before him and *"noting the want of meaningful evidence as to disproportionality"*, he saw no reason why ordering discovery of the category would offend against the requirement as to proportionality. As stated, he made the order as sought.

127. It seems to me that the conclusion of the trial judge was well within the margin of appreciation which this court ought to afford to him on an application of this kind. He considered the matter with exceptional care and in detail. Furthermore, it is clear from the decision of the Supreme Court in *Tobin* that where a party seeks to argue proportionality, the onus rests on that party to adduce evidence to establish this fact. The trial judge emphatically held that the appellant had failed to do so. I would not allow the appeal in respect of this category on the basis that there is no meaningful evidence before the court which would enable the High Court to conduct a balancing of interests, as required in Boehringer. The trial judge correctly held that the category was both relevant and necessary. Therefore, on the authorities, it was for the appellant to adduce evidence as to the cost and time involved in order that the court could assess the proportionality of the discovery sought. As the appellant failed in this regard, I would not allow the appeal in respect of this category.

The appeal against the order for discovery made in favour of Kilsaran against the appellant

128. The appellant appeals the order of the trial judge to make discovery of Category 5 of Kilsaran's request for discovery, which was in the following terms:-

> *"All documents relating to and/or referring to the plaintiff's decision to cease trading."*

129. The trial judge regarded this as the mirror to Category 12 sought by CRH/Roadstone from the appellant. It related to the core issue as to the true reason for the collapse of the appellant. The trial judge accepted, by reference to the pleadings, that the category of documentation was both relevant and necessary, and he then went on to consider the question of proportionality.

130. The trial judge noted that there was a want of meaningful evidence to enable him to assess proportionality. He referred to the averment of the solicitor for the appellant who stated *"the breadth of the discovery which is sought is entirely disproportionate."* The trial judge noted that there was no evidence as to the scale of the potential exercise involved. He had no information regarding the scope and costs of the discovery exercise, and he therefore, awarded discovery in terms of the category as drafted.

131. In submissions on appeal, the appellant repeated the arguments it made in respect of Category 12, as sought by CRH/Roadstone, in relation to Category 5, as sought by Kilsaran.

132. Kilsaran pointed to the fact that it alleged that the decision of the appellant to cease trading was taken by virtue of the impact of commercial pressures felt as a result of poor management decisions and other difficulties in the company. The documents sought are relevant both to the issue whether the appellant ceased trading by virtue of the wrongful acts of the respondents or, if the appellant is successful in its claim, as to the quantification of the damages. Kilsaran emphasised the fact that the appellant had done no more than make a bald assertion that the discovery sought was disproportionate and that this was insufficient to resist an application for discovery on the grounds of proportionality relying on my decision in *Bristol Myers Squibb Company Ono Pharmaceutical Company Limited v. Merck Sharp and Dohme Corp* [2016] IEHC 540.

133. For the reasons outlined above, I believe the trial judge was correct to hold that the discovery sought was both relevant and necessary. Furthermore, the failure by the appellant to give any indication as to the task to be undertaken if it were to comply with an order for discovery in the terms sought, means that its argument that the discovery should not be ordered on the grounds that it is disproportionate does not get off the ground. See the decision of the Supreme Court in *Tobin* and my decisions in *Lehane v. Dunne* [2016] IEHC 96 and *IBRC & INBS v. Fingleton & Ors.* [2015] IEHC 296. Accordingly, I would refuse the appeal in relation to this category of discovery.

Confidentiality ring

134. The trial judge directed that the discovery to be provided to the respondents was to be the subject of a confidentiality ring which, *inter alia*, excluded Mr. Peter Goode from accessing the documents.

135. From pp. 77 to 125 of the judgment, the trial judge considered the issue of the jurisdiction of the court to order the use of a confidentiality ring in respect of documents to be discovered, and whether it was appropriate in the circumstances of this case to make such an order. He quoted extensively from the relevant authorities and, in particular, from the decision of Kelly J. in *Koger Inc. & Anor. v. O'Donnell & Ors.* [2009] IEHC 385, where Kelly J. held:-

> *"The above case law all seems to demonstrate that the restriction which the defendants seek to place on disclosure of the material namely, only to be seen by the experts or alternatively only by the experts and the legal advisors but to deny it to even a limited number of persons in the plaintiffs' organisation is exceptional. Such restriction can be ordered but it is unusual. If such a restriction is to apply, there must be exceptional circumstances which would justify it."*

136. At para. 99 of the judgment, the trial judge concluded "*…that there is an inherent jurisdiction on the part of the court to order a confidentiality ring, should it consider that to be appropriate."* He identified, as an important factor, the fact that the proceedings are

competition law proceedings and warned that the court needed to avoid creating an unfair and undesirable situation in which a plaintiff would walk away from the proceedings with a legal loss but a commercial win because it would have gained access to what is most valuable, thereby acquiring a competitive advantage that it would never otherwise have obtained.

137. There was detailed evidence before the trial judge as to the commercial sensitivity of the documents requested. All of the respondents emphatically denied the information sought was "historic", and emphasised that it continued to be highly commercially sensitive. The trial judge quoted from the affidavit of Mr. Lenny, the solicitor for CRH/Roadstone, for six pages, pp. 111-117, in his judgment. This set out the detail of the significant damage which disclosure of the information to competitors or customers of Roadstone would potentially cause. He also addressed the issue of third party confidentiality. Mr. Lenny said that no explanation was provided why, if the documents are furnished to expert witnesses instructed by the appellant, the expert witnesses would not be in a position to review them and provide any instructions required to the appellant's legal team.

138. At para. 102 of the judgment, the trial judge noted that neither Mr. McMahon, solicitor for the appellant, nor Mr. Goode, dealt with Mr. Lenny's point that it should be sufficient for an expert to review the documents of which discovery is sought and report upon same to the appellant's solicitors, with the solicitors also being able to access the documents, but without any necessity for any officer of the appellant itself to have access to the underlying documents.

139. The trial judge also noted that, while the appellant ceased to trade in February 2011, Eircem Limited, a company of which Mr. Goode is a director, trades in the Leinster ready-mix concrete market under the name 'Goode Concrete'. Its website shows pictures of Goode Concrete trucks, and refers to Goode Concrete as a long established firm which commenced trading over fifty years ago. The trial judge said that this pointed to the legitimacy and reasonableness of the concerns raised by the respondents, which supported their argument for a confidentiality ring. The trial judge also noted that Mr. Goode had not seen fit to bring this information to the attention of the court, but was satisfied to permit counsel for the appellant to argue before the High Court that, as the appellant had ceased to trade, the information to be discovered could have no impact in the market place.

140. The trial judge decided to order that the discovery to be provided by the respondents should be the subject of a confidentiality ring order. He did so on the grounds that:-

    (1) the information to be discovered was still confidential and commercially sensitive and disclosure of the information had the potential to cause damage or prejudice to the respondents;

    (2) it was not clear why Mr. Goode required access to the documentation now to be discovered to the appellant. The trial judge held that the appellant's case was "very simple" to explain: it contends that the respondents colluded to reduce prices to a

below cost level in an anti-competitive fashion so as to drive the appellant from the market. What the experts will have to opine upon is the issue of whether the impugned costs were lowered to a below cost level. It is not something which would typically require the involvement of an aggrieved plaintiff;

(3) the point made by Mr. Lenny was not answered in the affidavits of either Mr. Goode or Mr. McMahon;

(4) there was evidence of the ongoing business of Eircem Limited with the involvement of Mr. Goode;

(5) the undertaking from Mr. Goode would be of little value to CRH/Roadstone as they would have no way of policing it;

(6) the respondents could place little or no faith in the undertaking of the insolvent shell of the appellant; and

(7) if there is a problem in relation to the operation of the confidentiality ring it would be open to the parties to return to court and apply to expand the ring, or otherwise vary the order.

141. On appeal, no further issue was taken with the jurisdiction of the court to make such an order. Likewise, the argument that the order made was impermissibly vague was not pursued.

142. The appellant argued that the trial judge was wrong in dismissing its argument that the information sought was historic and should not be protected by means of a confidentiality ring. It pointed to the negative implication of such a decision for all competition cases in the future and, indeed, in regard to the principle of open justice.

143. I am not persuaded by this argument. The practice of confidentiality clauses in competition law cases is well established. This is noted in Matthews & Malek, *Disclosure* (5th ed., Sweet & Maxwell Ltd, 2017), and Bellamy and Child, *European Community Law of Competition* (7th ed., Oxford University Press, 2013). The establishment of a confidentiality ring is standard practice in appeals before the Competition Appeals Tribunal in England, and its rules expressly provide that the tribunal may give directions for the creation of confidentiality rings. The Damages Directive (Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of Member States and of the European Union) recognises that such a procedure may be available in competition law cases. The use of such a device is clearly not an unfair device in competition litigation and does not have the chilling effect urged by the appellant.

144. Secondly, the appellant argued that the imposition of the confidentiality ring will seriously disadvantage the appellant if Mr. Goode, in particular, is excluded from the data and, therefore, unable to give instructions in relation to it. In written submissions, reference was made to the difficulty thereby occasioned to legal advisors to know whether or not

there might be grounds for an application for further and better discovery if they cannot get instructions on the discovered materials from Mr. Goode. As the trial judge pointed out, neither Mr. Goode nor Mr. McMahon in their affidavits, nor counsel in submissions adequately explained the reason the appellant would be prejudiced if Mr. Goode, as opposed to experts instructed on behalf of the appellant, was debarred from access to the material.

145. I agree with the conclusion of the trial judge that analysis of material is precisely the role to be conducted by the experts and that it is not a matter in which it is necessary, on the facts in this case, for Mr. Goode to become involved. If the material provided is apparently incomplete or inadequate, the experts acting on behalf of the appellant could so inform the solicitors and counsel acting for the appellant. I, therefore, see no merit in this argument.

146. Finally, it was argued that the trial judge was wrong to ignore, or disregard, the undertaking implied in the discovery process and the fact that Mr. Goode had averred that he fully understood that documentation discovered can only be used for the purposes of the proceedings, and had agreed to provide whatever undertaking might be required in that regard.

147. The respondents adduced evidence explaining, in detail, the commercial sensitivity of the documentation and information sought by the appellant. They also adduced evidence of the detrimental impact this would have upon the business of Roadstone, and the prejudice which disclosure of the information would cause. This includes confidential information of third parties.

148. The implied undertaking in relation to discovery of documents is given by the appellant which is an insolvent shell company at this stage, and, therefore, this does not really address the concerns of the respondent. In relation to the undertaking offered by Mr. Goode, in my judgment, the trial judge was correct to conclude that this was of little practical use as none of the respondents would have any way of policing whether or not the information would be used for commercial advantage. Furthermore, there is nothing to prevent Mr. Goode from applying in the future to be released from his undertaking for some collateral purpose.

149. I am satisfied that this is a case where the order of a confidentiality ring was appropriate and was required in order to protect the legitimate interests of the respondents in the protection of their commercially sensitive information. It was, in the words of Clarke J. (as he was then) in *Telefonica O2 Ireland Limited v. Commission for Communications Regulation* [2011] IEHC 265, a balancing of the rights of the parties in order to meet the facts of the individual case:-

> *"…so as to protect both the legitimate interests of the party seeking disclosure to ensure that all relevant materials potentially influential on the result of the case are before the court and, to the extent that it may be proportionate, the legitimate interests of the confidence asserted."*

150. I would, therefore, refuse the appeal in relation to the order of a confidentiality ring.

Conclusions

151. The trial judge correctly identified and applied the relevant principles governing discovery of documents to the four applications before him. There is no difference in the application of those principles to applications for discovery in proceedings involving allegations of anti-competitive behaviour by reason of the fact that the High Court is designated as a competition authority for the purposes of Article 5 of Council Regulation 1/2003.

152. The trial judge had jurisdiction to order that the discovered documents should be subject to a confidentiality ring, confined to the legal advisers and experts instructed on behalf of the appellant, to the exclusion of personnel of the appellant. Such a device does not prevent, or unduly hinder, a party from properly pursuing a case alleging anti-competitive conduct. The information to be discovered is confidential, both to the respondents and their customers, and commercially sensitive. Disclosure of the information has the potential to cause damage and to seriously prejudice the respondents, whereas the appellant did not satisfactorily explain why it would be prejudiced in the preparation and presentation of its case if it was subject to the limitations required by the trial judge. It was a proper exercise of his discretion to order that the discovery be handled subject to a confidentiality ring.

153. The trial judge was correct to refuse to order discovery against CRH/Roadstone in respect of Categories 2, 4, 7, 8 and 11, and against Kilsaran in respect of Categories 2, 4, 7, 8 and 10. In relation to Category 5 sought against all respondents, I would not interfere with the exercise of his discretion to award a more limited category of discovery than that sought, save that I would not confine the category to the average variable costs of the respondents, but would extend it to their average total costs. In relation to Category 6 sought against all respondents, I would not interfere with the trial judge's decision to order that the information sought be provided by way of a schedule verified on affidavit in lieu of an extremely costly and time-consuming discovery of the underlying documentation.

154. The appellant pleaded that the respondents were engaged in collusive practices and were selling ready-mix concrete at below cost by reference to the fact that the prices set out in the schedule of the statement of claim were below the appellant's own AVC. Thus, the way it presented its case brought its AVC into the proceedings. Therefore, it was appropriate to order that it make discovery in terms of Category 4 of the application by CRH/Roadstone.

155. The reason for the collapse of the business of the appellant is an issue in the proceedings; the appellant has pleaded that the respondents' alleged anti-competitive behaviour had eliminatory intent, and that they succeeded in their unlawful intent. It follows that the trial judge will have to determine the reasons for the closure of the appellant's business. It was, therefore, necessary to order that the appellant make discovery to the respondents in terms of CRH/Roadstone's Category 12, and Kilsaran's Category 5.

156. For these reasons, I would dismiss the appeals, subject to varying the order of the trial judge in relation to Category 5 of the discovery to be made by the respondents to the appellant. I will hear the parties in relation to costs.