THE HIGH COURT

2010 No. 10685P

BETWEEN:

GOODE CONCRETE

Plaintiff

– AND –

CRH PLC,

ROADSTONE WOOD LIMITED and

KILSARAN CONCRETE

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 7th September, 2017.

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1. APPLICATIONS OF GOODE CONCRETE FOR DISCOVERY FROM (1) CRH PLC AND ROADSTONE WOOD LIMITED, AND (2) KILSARAN CONCRETE

I. Overview

1. Goode Concrete has come to court making all manner of allegations against the defendants. Central among them is that since at least late-2007 CRH/Roadstone and Kilsaran have tendered, offered for sale and sold concrete at below-cost prices in Dublin. Goode Concrete claims that the pricing practices of the defendants can only be explained on the basis that there has been a breach of competition law, specifically by way of (i) collusive tendering in breach of s.4 of the Competition Act 2002/Art. 101 TFEU, (ii) agreements or concerted practices in breach of s.4/Art. 101 TFEU and/or (iii) abuse of a collective dominant position in breach of s.5 of the Competition Act 2002/Art. 102 TFEU. The various allegations made are denied by the defendants. Indeed, CRH maintains that this case springs not from a concern as to abuses of competition law but ultimately from the fact that Goode Concrete tried to get CRH to buy its entire business, and then some of its assets, and when CRH declined to buy either, these proceedings commenced. Where the truth lies between the parties as regards all of the foregoing will fall to be decided at some future stage. For now, the court is concerned solely with four motions for discovery that have issued between the parties (one against CRH/Roadstone, two against Goode Concrete, and one against Kilsaran). Standing adjourned at this time are a couple of motions for security for costs which have issued against Goode Concrete.

II. Previous Assurances

2. Complaint is made by the defendants concerning past behaviour of Goode Concrete vis-à-vis the court. It is important to emphasise that no complaint is made by the plaintiffs, and no criticism is expressed by the court, as regards any of the lawyers for Goode Concrete (counsel or solicitors). The complaint made is this. At a number of interlocutory hearings in the past, various assurances have been given to certain judges of the High Court. Thus in May, 2012, at a hearing to settle the quantum of security for costs (it having previously been decided that an order for security for costs would be made), counsel (acting on instructions) said the following to the court (Cooke J.):

"I can only suggest to the Court that the figure of €100,000 for the CRH defendants is nothing short of staggering. The idea that it could cost €100,000 to gather together and furnish the discovery sought in these proceedings, particularly where there is already a specified number of tenderers, a specified limited time period and so on, I say is nothing short of staggering. There won't be an extraordinary degree of documentation in this case. There are specific contracts and a specific time period and it's not in anybody's interest, least of all the Plaintiff's, in trying to look at irrelevant documents."

3. That was said, on instructions, to persuade the court to fix a lower sum by way of security for costs than might otherwise be the case. About seven months later, in December 2012, the matter came again before the court (Charleton J.) by way of application to re-enter the case. Notwithstanding that an appeal to the Supreme Court had been commenced by Goode Concrete (concerning the judgments of Cooke J.), Charleton J. declined to adjourn the proceedings pending the outcome of the appeal and resolved to 'case manage' them. In response to a query from Charleton J., counsel for Goode Concrete, on instructions, indicated that the discovery that Goode Concrete intended to seek would be in relation to certain specific contracts and that the central allegation was that the defendants had been selling below average variable cost (AVC), not average total cost (ATC). In relation to the allegation of selling below AVC, counsel for Goode Concrete, on instructions, said that the documentation required in relation to that would be very specific and relate to a specific time period.

4. The foregoing are clear assurances given to the court as to the scope of discovery that would be sought in the within proceedings. They were given at a time when the plaintiffs were very familiar with the proceedings that they were bringing, over a year after they had formulated and delivered their statement of claim, and at a time when they had a particular interest (1) in keeping the security for costs already ordered against them, down to the lowest possible figure, and (2) when they had an interest in getting the matter back into the Competition List and case managed by Charleton J. Yet there has since been a fundamental change on the part of Goode Concrete as to the scale of discovery that is now required, and no good explanation offered as to why this is so, or why assurances given to the court, advantageous to Goode Concrete, and doubtless previously relied upon by the court, should have proved entirely wrong.

5. Goode Concrete contends in effect that such assurances as were previously given to the court do not bind it. Of course circumstances may change, none of us can accurately predict the future, and an assurance given in the best of faith may be overtaken by events. That is the stuff of life. But when something of the like occurs, and here, as will be seen, the scale of discovery sought has utterly transformed, the court does expect the courtesy of a fulsome explanation; indeed, it is prudent that such an explanation be forthcoming if the court is not to form a view as to a party's *bona fides*. All that said, the court sees nothing more in the wider discovery that is now sought by Goode Concrete than an application (in good faith), for wider discovery than was previously anticipated (in good faith) – though it does not, of course, follow from the fact that there is good faith on the part of an applicant for discovery that such discovery as has been sought will be granted.

III. Previous Dealings

6. The court has already touched on CRH's concerns as to when and why these proceedings were commenced. CRH has also expressed concern as to the notable breadth of the discovery sought by Goode Concrete, maintaining that it wishes to seek discovery that is so costly as to create a very considerable incentive for CRH to come to some form of settlement of the within proceedings. In this regard, the court recalls the affidavit evidence of Mr McKnight, a witness for CRH, which was opened *in extenso* before the court, and some of which is recited below:

"Mr. Goode has, at various points in his affidavit, made reference to the recent dealings between the Plaintiff and CRH and/or Roadstone. Those references are, to a large extent, inaccurate or misleading and in these circumstances, and for the benefit of the Court, I wish to set out my clear recollection of those factual events on a chronological basis….

As Mr. Goode has averred, he wrote to Mr. Myles Lee, the Chief Executive Officer of CRH, on 16 April 2010 making certain allegations, and that letter was responded to by Mr. Lee by letter of 27 April 2010 in which those allegations were strenuously denied. In that letter Mr. Lee also confirmed that he had asked myself and Mr Seamus Lynch (the Managing Director of Irish Cement Limited) to meet with Mr. Goode in order to discuss concerns that he had raised in relation to the quotation that he had received from Irish Cement for the supply of cement….

In advance of that meeting, I made appropriate enquiries in relation to the issues that had been raised Mr. Goode's letter and identified the following:

(a) the Plaintiff was not a customer of Irish Cement Limited notwithstanding that previous attempts had been made (and which I had been involved in my previous role within Irish Cement Limited) to persuade the Plaintiff to become a customer. In these circumstances, the quotation provided was the appropriate list price quotation which is provided in response to any enquiry from a prospective purchaser who does not hold an existing account with Irish Cement Limited;

(b) the allegation that Roadstone had, in some way colluded with Kilsaran Concrete in relation to the Mater Hospital project was completely unfounded and untrue. The correct position is that Roadstone tendered a competitive price for that project in an attempt to be successful in the tender process and unfortunately was unsuccessful.

(c) the allegation that Irish Cement had provided financial aid (in the form of rebates paid into an offshore bank account) to the Kilsaran Group was completely unfounded and untrue as this never occurred….

I then met with Mr Tom Goode and Mr Peter Goode on the 10 May 2010 at Bewleys Hotel at Leopardstown. I was able to and did assure them that there was no substance to the allegations made in Mr. Goode's letter and I said that I would arrange for Mr. Seamus Lynch – the Managing Director of Irish Cement Limited – to contact them to discuss what price would be available if they wished to become an account customer with Irish Cement Limited. Neither Mr Tom Goode nor Mr Peter Goode took issue with this position and the response of Mr. Tom Goode was to enquire whether or not Cement Roadstone would be interested in purchasing the Plaintiff. This response surprised me but I said I would ask Mr. Frank Byrne –

the then Managing Director of Roadstone – to contact Mr. Peter Goode so that we could further consider his proposal

and the meeting concluded amicably. I subsequently confirmed this position in an e-mail that I sent to Mr. Tom Goode and Mr. Peter Goode on 13th May 2010 [which he exhibits]….

Mr. Lynch subsequently informed me that he met with Mr Tom Goode on 21 May 2010 to discuss the possible supply of cement by Irish Cement Limited to the Plaintiff. He was told by Mr Tom Goode that they were able to purchase cement from Lagan Cement at a price of €67.50 per tonne, and Mr Lynch's response was that this was an extremely competitive price and which Irish Cement Limited would not be in a position to match and the meeting concluded amicably….

I also subsequently spoke to Frank Byrne who was the Managing Director of Roadstone so that he would arrange for some of his team to carry out a review of the Plaintiff's business, which involved a co-ordinated review of its entire portfolio of operations and assets. The conclusion from that review was that this was not a business which was of interest to Roadstone as Roadstone did not need to acquire further concrete production capacity in a declining market and as there appeared in any event to be planning problems with some of the assets which might otherwise have been of interest to Roadstone….

On completion of that review, I made arrangements to attend a further meeting with the Goodes and a meeting was arranged for 18 August at the Red Cow Hotel in Dublin. I attended that meeting, as did Mr Tom Goode, Mr Peter Goode and Mr Barry Goode on behalf of the Plaintiff. At that meeting, Mr. Tom Goode stated that the Plaintiff was finding it difficult to compete at current price levels and he expressed the desire that the industry should restructure itself so that all participants should sell their products at the same advertised price and competition could then be based upon service and location….

We then addressed the purpose of the meeting which was the suggestion by the Goodes that Roadstone should purchase the Plaintiff and I informed the Goodes…that Roadstone was restructuring and closing operations due to the difficult market conditions which comprised of very little work and huge over-capacity. Mr. Barry Goode responded and asked if we would have an interest in acquiring the Plaintiff's quarry in Galway. Notwithstanding that this asset had already been reviewed by the Roadstone team, I undertook that we would look at this again and revert to them. Mr. Tom Goode then advised me that a one-month exclusivity period (which I was not aware of) had now ended and that Lagan Cement were interested in purchasing the Plaintiff's concrete operations and were due to visit their operations the next day. I then promised to revert to him in relation to the Galway quarry and the meeting concluded….

I then received a phone call that afternoon from Mr. Peter Goode. He told me that he thought that Roadstone were going to make an offer for the assets of the Plaintiff at that meeting and he was disappointed that no offer was made. He said that the original meeting had only occurred after they had written to CRH and if there was going to be no improvement in the situation then the Plaintiff would have to follow that course of action again. I emphasised that Roadstone had to focus on its objective, which was to try and deliver a profitable business in very difficult market conditions and I agreed that we would meet again within a week or two to discuss the Galway quarry and the documents that had been provided to us would be returned."

7. There are the proverbial two sides to every story and there are different versions of what was said at the above-described meetings. However, from Mr McKnight's point of view (which is but one point of view), he understand what was being said to be, in effect, 'Buy our business and if you don't, we will re-agitate a complaint of anti-competitive activity which we sent into your CEO in April.'

8. Mr McKnight continues:

"The next meeting took place on 1 September 2010 at the Red Cow Hotel and was attended by myself and my colleague, Mr Jim Mintern (who is responsible for CRH's Irish operation which includes Roadstone) and by Mr Tom Goode, Mr Peter Goode and Mr Barry Goode on behalf of the Plaintiff. The purpose of this meeting was to discuss the quarry assets of the Plaintiff and the Goodes advised us that they believed that three of their quarries should be of interest to CRH: two in Galway and one in Naul, Co. Dublin. They suggested that the Roadstone team that had already looked at these assets mustn't have understood their strategic value and it was agreed that Mr Mintern would visit those sites with Mr Peter Goode to get a better understanding of the issues involved and that a further meeting would then take place….

Mr Mintern, together with Mr Jim Farrell, current managing director of Roadstone and Mr Peter Goode then inspected those quarries as agreed on 13 September 2010. Mr Mintern subsequently advised me that when he arrived to look at the Galway quarries a blockade was in place by unpaid suppliers but they managed to gain access and to inspect them. They then travelled back towards Dublin and inspected the Naul quarry….

A further meeting then took place at The Red Cow Hotel on 30 September 2010 and the attendees were the same as the attendees at the meeting of 1 September 2010. At this meeting, we discussed in some detail the planning difficulties which existed in relation to each of the quarries and it was agreed that planning experts would be engaged and should meet in order to see if those difficulties could be resolved. We then discussed potential valuations of the quarries on the assumptions that the planning difficulties were capable of being resolved. There was a further discussion in relation to the Naul quarry as Kilsaran Concrete had a concrete plant opposite the site but they did not have a quarry. Mr Peter Goode raised the possibility of Kilsaran being interested in purchasing the quarry. This made commercial sense and I recall Mr Mintern advising Mr Peter Goode that they should talk to Kilsaran. Mr Peter Goode also raised the possibility of Roadstone and the Plaintiff entering into a joint venture in respect of The Naul quarry and that the joint venture could submit a planning application and I said that we would consider this….

Following that meeting, Mr Peter Goode sent an e-mail to Mr Mintern on 1 October 2010 [which he exhibits]….*In that e-mail, Mr Peter Goode purported to set out an agreement that had been reached at the meeting of 30 September 2010 which was at complete variance to what had occurred as he suggested that Roadstone had agreed to purchase the Gort and Ardrahan quarries, and that Roadstone had agreed to enter into a joint venture with the Plaintiff to try and secure planning permission for The Naul quarry. Mr Mintern responded by e-mail of 4 October 2010* [which he exhibits]….*In that e-mail, Mr Mintern summarised the planning difficulties in relation to each of the sites and his understanding of where the discussions had been left at the meeting and he confirmed that any indications of valuations discussed were for the purpose of providing indicative valuation ranges and that any formal offer would have to be subject to final negotiations and he confirmed he would be in further contact to arrange the next meeting. Mr. Peter Goode then responded by e-mail of 5 October 2010 in which he accepted that discussions were subject to formal agreement but he did ask if heads*

of terms could at least be agreed [which he exhibits]….

A further meeting was arranged for 15 October 2010 and that meeting was attended by myself and Mr Mintern and by Mr Tom Goode and Mr Peter Goode and the purpose of the meeting was to try to see if any further progress could be made in relation to the planning difficulties for the relevant quarries. Mr Mintern explained that we would not be able to move forward with any purchase of these assets whilst the planning difficulties remained. Mr Tom Goode was very agitated and he stood up and accused us of wasting his time and they told us that they would be writing again to the Chief Executive of CRH and the meeting concluded abruptly….

Following that meeting, Mr. Mintern then sent an e-mail to Mr Peter Goode on 18 October 2010 in which he summarised the planning difficulties which existed. He confirmed that, if those difficulties were overcome, then, we would be prepared to recommence discussions, but, that following our meeting on Friday, it appeared that the Plaintiff was no longer interested in doing so. He also explained the history of the discussions which had been taking place and made it clear that we did not accept that we had in any way misled the Goodes in relation to the discussions which had taken place. Finally, he made suggestions in relation to the return of the documents that had been provided by the Plaintiff. Mr Peter Goode responded later that day by e-mail making it clear that negotiations were at an end and accepting the offer for the return of the documents [which he exhibits]….

We had no further discussions or communications with the Goodes or the Plaintiff prior to the Plaintiff's solicitors sending a further letter to the CEO of CRH on 12 November 2010 as exhibited."

9. The proceedings were commenced a week later.

10. The above are the facts as presented to the court by the first and second-named defendants. If they are entirely or even substantially true, the court can understand why those defendants feel aggrieved as regards their being sued in these proceedings. But, with respect, this Court at this time has no idea if the facts as presented by the first and second-named defendants are to be preferred to the version of facts advanced by Goode Concrete.

IV. The Court as Competition Authority

11. A continuous refrain of Goode Concrete throughout the hearing of the within applications is that the court has been designated under our domestic law as a competition authority, with the suggestion never expressly stated but still always there that, as a consequence, the court is obliged to take on some form of investigatory role, rather than holding the scales of justice evenly between the parties. It is not entirely clear what Goode Concrete expects the court to do that is different from the situation that would present were the court not a competition authority. Even so, it is worthwhile considering this aspect of matters a little more closely. In this regard the court turns first to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (O.J.L1, 4.1.2003, 1), recitals (5)-(7) of which read as follows:

"(5) In order to ensure an effective enforcement of the Community competition rules and at the same time the respect of fundamental rights of defence, this regulation should regulate the burden of proof under Articles 81 and 82 of the Treaty. It should be for the party or the authority alleging infringement of Article 81 and Article 82 of the Treaty to prove the existence thereof to the required legal standard. It should be for the undertaking or association of undertakings invoking the benefit of a defence against the finding of an infringement to demonstrate that the required legal standard that the conditions for applying such defence are satisfied. This Regulation affects neither national rules on the standard of proof, nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of the case, provided that such rules and obligations are compatible with general principles of Community law.

(6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States should be associated more closely with their application. To this end, they should be empowered to apply Community law.

(7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full."

12. It is clear from the foregoing that Regulation 1/2003, as one would instinctively expect, leaves the choice of procedure to the national courts, provided the national courts, in the application of their national procedures, respect the principles of equivalence and effectiveness. It does not require a different set of rules to be applied by a national court in competition cases. Thus if one goes, for example, to Art. 2 *("Burden of proof"),* it provides as follows:

"In any national or Community proceedings for the application of Articles 81 and 82 of the Treaty, the burden of proving an infringement of Article 81 or of 82 of the Treaty shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) of The Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled."

13. In other words, in terms of proceedings, it is the normal adversarial rules that apply.

14. Regulation 1/2003 placed Ireland in a somewhat unusual position. The Competition Authority in this jurisdiction, by virtue of our constitutional provisions, cannot impose fines and take certain other steps required under Regulation 1/2003 so as to ensure the effective implementation of competition law at an EU and national level throughout the Union. To get over this domestic hurdle, both the courts and the Competition Authority were designated under the European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty Regulations) 2004 (S.I. No. 195 of 2004) so that they could apply the provisions of Regulation 1/2003. It is worth looking at little more closely at the consequences of that designation.

15. Under the heading *("Powers of the competition authorities of the Member States")*, Art. 5 of Regulation 1/2003 provides as follows:

"The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:

– requiring that an infringement be brought to an end,

– ordering interim measures,

– accepting commitments,

– imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part."

16. For Art. 5 to have proper effect in this jurisdiction, a court, as mentioned, had to be designated as a competition authority because the exercise of the jurisdiction under Art. 5 would be considered the administration of justice in this jurisdiction and, as such, the Competition Authority could not carry out those functions. As a result, Arts. 3 and 4(2) of the Regulations of 2004 provide, *inter alia*, as follows:

"3.(1) Each of the following, namely…(c) the High Court…is, as respects the State, designated as the competition authority for the purposes of Article 5 of the Council Regulation and the respective jurisdiction of each of those courts for the purposes of that Article is that specified in paragraph (2) of this Regulation.

(2) For the purposes of Article 5 of the Council Regulation, the functions and jurisdiction of each court mentioned in paragraph (1) of this Regulation are those specified in, and conferred on it by –

(a) the Act, and

(b) in the case of any appellate jurisdiction of it arising by virtue of the operation of any other enactment and relating to a matter arising under the Act, that other enactment.

…

4.(2) Each of the following, namely…(c) a court referred to in Regulation 3(1) of these Regulations or, as appropriate, the office of that court, is, as respects the State, designated as a competition authority for the purpose of performing any function assigned to competition authorities of Member States by Articles 11(1),[1] 11(5)[2], 27(2)[3] and 28(2)[4] of the Council Regulation and is, accordingly, empowered to do anything mentioned in any of those provisions as being performable by such an authority."

[1] Article 11(1) provides as follows:

"The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation."

[2] Article 11(5) provides as follows:

"The competition authorities of the Member States may consult the commission on any case involving the application of Community law."

[3] Article 27(2) provides as follows:

"The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, the right of access shall not extend to correspondence between the Commission and the competition authorities of the Member States, or between the latter, including documents drawn up pursuant to Articles 11 ["Cooperation between the Commission and the competition authorities of the Member States"] and 14 ["Advisory Committee"]. Nothing in this paragraph shall prevent the Commission from disclosing and using information necessary to prove an infringement."

[4] Article 28(2) provides as follows:

"Without prejudice to the exchange and to the use of information foreseen in Articles 11 ["Cooperation between the Commission and the competition authorities of the Member States"], 12 ["Exchange of information"], 14 ["Advisory Committee"], 15 ["Cooperation with national courts"] and 27 ["Hearing of the parties, complainants and others"], the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14."

17. The designation of the court as a competent authority in the just-quoted provisions does not have the result that the court is always acting as a competition authority. If that were so that would mean that in a private dispute, where a plaintiff came to court seeking injunctive relief, for, e.g., alleged anticompetitive behaviour, the court would be in the (nonsensical) position of having to comply with Art.11(4) of Regulation 1/2003, which, in addressing the issue of cooperation between the European Commission and the competition authorities of the Member States, provides as follows:

> *"No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty."*

18. Moreover, if one looks to Regulation 1/2003, it distinguishes itself between competition authorities and courts. So, for example, Art.35 of Regulation 1/2003, under the heading *"Designation of competition authorities of Member States",* provides, *inter alia*, as follows:

> *"1. The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with. The measures necessary to empower those authorities to apply those Articles shall be taken before 1 May 2004. The authorities designated may include courts.*
>
> *2. When enforcement of Community competition law is entrusted to national administrative and judicial authorities, the Member States may allocate different powers and functions to those different national authorities, whether administrative or judicial."*

19. Thus, in drafting Regulation 1/2003, there was recognition that a competition authority might also be a court. However, there is delineation in the Regulation between the powers of a court and competition authorities simpliciter. So, for example, Art. 15(2) of Regulation 1/2003 provides as follows:

> *"Member States shall forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the Treaty…without delay after the full written judgment is notified to the parties."* (Emphasis added).

20. By contrast, Art.11(4) of Regulation provides that a competition authority simpliciter must:

> "[n]*o later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission".* (Emphasis added).

21. This last-quoted provision is consistent with the general thrust of Art. 11 of Regulation 1/2003 which is concerned with the sharing of information between national competition authorities and the European Commission, with a national authority is required to step back and allow the Commission to proceed if the Commission institutes proceedings. Thus Art.11(6) provides as follows:

> *"6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority."*

22. Notably, although Art. 35(3) of Regulation 1/2003 goes on to provide that "*The effects of Article 11(6) apply to the authorities designated by the Member States including courts that exercise functions regarding the preparation and the adoption of the types of decisions foreseen in Article 5",* it also provides that "*The effects of Article 11(6) do not extend to courts insofar as they act as review courts in respect of the types of decisions foreseen in Article 5*." And, 'completing the circle', so to speak, Art. 35(4) of Regulation 1/2003 provides as follows:

> *"Notwithstanding paragraph 3, in the Member States where, for the adoption of certain types of decisions foreseen in Article 5, an authority brings an action before a judicial authority that is separate and different from the prosecuting authority and provided that the terms of this paragraph are complied with, the effects of Article 11(6) shall be limited to the authority prosecuting the case which shall withdraw its claim before the judicial authority when the Commission opens proceedings and this withdrawal shall bring the national proceedings effectively to an end."*

23. Taken together, what the foregoing means is that in Ireland, when the Competition Authority brings proceedings as a plaintiff before the High Court, those are competition law proceedings in which the court is also acting as a competition authority because it exercising its function under Article 5. It is a function which in another jurisdiction a competition authority may exercise from beginning to end. However, in Ireland, for the reasons identified previously above, the court is designated as a competition authority in order to make the final 'administration of justice-type' decisions. And in that respect the court is acting as a competition authority for the purpose of Regulation 1/2003. However, in the context of a private dispute *inter partes*, the court is acting as an ordinary court under the Constitution, and no more.

24. Even if the court is wrong in this last regard (and it does not consider that it is) and it is now acting as a competition authority, what are the implications of that as regards disclosure? Some guidance as to this issue is perhaps to be found in the so-called 'Damages Directive', *i.e.* Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (O.J. L349, 5.12.2014, 1), certain elements of which are touched upon later below. That Directive does not apply to the within proceedings because they were commenced before the date of actions in respect of which the Damages Directive, as transposed into Irish law, applies. Even so, Art.5 of the Damages Directive and the principles which are contained therein in respect of what is required, going forward, in respect of disclosure of evidence in private actions for damages as a result of a breach of competition law, are of interest. Article 5 of the Damages Directive, under the heading "*Disclosure of Evidence*" provides as follows:

> *"1. Member States shall ensure that in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States*

shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence.

…

2. Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.

3. Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

4. Member States shall ensure that national courts have the power to order the disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering the disclosure of such information, national courts have at their disposal effective measures to protect such information.

…

8. Without prejudice to paragraphs 4 and 7 and to Article 6 ["Disclosure of evidence included in the file of a competition authority"], this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence."

25. The types of factor touched upon in the above-quoted text are not so very dissimilar to the criteria which the court is applying in the within proceedings. In truth, it may be that they are, as formulated in the above-quoted text, in some ways more restrictive (in terms of the reasoned justification and the specified items of evidence which must be identified), though a more liberal national regime is safeguarded under Art. 5(8). Hence, if the court is wrong in its conclusion that it is not in the within application acting as a competition authority (and again the court does not consider that it is wrong in this regard), it does not consider, by reference to the, not here applicable but nonetheless notable, content of the Damages Directive, that there are any implications as regards disclosure for Goode Concrete that would flow from such principles; if anything it seems to be the beneficiary of a more liberal domestic regime. And, pointedly, Goode Concrete has failed to identify any practical implication, rooted in law, which arises to its benefit in this regard.

V. Are the Rules as to Discovery in Competition Law Cases Different?

26. There is some suggestion in the written submissions of Goode Concrete that in some way the ordinary domestic rules of discovery do not apply to competition law cases. (This is a point that is related but not identical to that concerning the designation of the court as a competent authority, an aspect of matters that has been addressed previously above). The court understands from the submissions at hearing that this point has effectively been dropped but, for the sake of completeness, proposes to deal with it briefly. Thus paras. 36 and 37 of the written submissions of Goode Concrete, under the heading *"Legal Principles"*, state as follows

"36. It is not entirely clear what the implications are of the State having designated the Court as a national competition authority for [the] purposes of Regulation 1/2003. However, based on provisions such as Article 11(4) and keeping in mind the duty of sincere cooperation in Article 4(3) TEU as well as Regulation 1/2003, it must be the case, as a matter of EU law, that the Court is playing a role which is more significant than the usual role which it plays of determining an inter partes dispute.

37. *For* [the] *purposes of the present application, it is submitted that the logical consequence of the role of the Court qua competition authority is that it must itself be satisfied that it has sufficient information before it so as to determine whether the breaches of competition law which are alleged (and, as described above, which have been set out in significant detail in the pleadings and in sworn evidence) have occurred. The motions before the court therefore seek the disclosure of documentation not only pursuant to Order 31, Rule 12* [of the Rules of the Superior Courts] *but also pursuant to Regulation 1/2003 and the Court's own jurisdiction."*

27. An ordinary application for discovery is made on the basis of Order 31 of the Rules of the Superior Courts, so to the extent that the motions before the court invoke Regulation 1/2003 and the Court's own jurisdiction, the notion that the court has some further role, almost of initiating a documentary investigative process through the procedure of discovery as distinct from determining an application for discovery *inter partes*, seems somehow to survive, notwithstanding the submissions made by counsel for Goode Concrete at hearing. To the extent that it does survive it is, with respect, wrong. The plaintiffs appeared initially in this regard to place some reliance on the following observation of Fennelly J. in *Ryanair v. Aer Rianta* [2003] 4 I.R. 264, 277-278:

"Competition cases have…the special feature that any documents relating to anti-competitive behaviour, whether by being party to agreements or concerted practices or protecting a dominant position, are likely to be in the possession of the party engaged in that behaviour. Anti-competitive agreements or practices will be kept secret."

28. However, in *Framus Ltd v. CRH plc* [2004] 2 I.R. 20, Murray J. made it clear, at 31, that the possibility that specific documents relevant to the issues may be unknown to a plaintiff *"is a factor to be taken into account and I put it no higher than that as part of the circumstances in deciding the appropriate kind of order for discovery to be made".* Moreover, Murray J. went on to make clear that different rules do not apply to competition cases, observing, *inter alia*, at 46-7:

> "[T]*he plaintiffs expressly acknowledge in their submissions that they were not making the case that different rules apply in relation to discovery in competition cases. That, in my view, is the correct position in law.*"

VI. Proportionality

29. The court indicated previously above that it sees nothing in the evidence before it to persuade it that the actions or motivations of Goode Concrete in bringing the within proceedings are such as to require the court to proceed with especial attentiveness, above and beyond that which it is required by binding precedent to bring, to the issue of proportionality (a concept the proper ramifications of which are considered later below). However, the court also noted that that was not to say that when it comes to assessing matters by reference to proportionality, no concerns present. Just to give an example of the breadth of discovery sought by Goode Concrete, it is worth recalling some of the observations of counsel for the first and second defendants in this regard and a related exchange between court and counsel that the court found helpful:

> "*Counsel*: [W]*e say that the Plaintiffs have utterly ignored the assurances that they gave to the court as to the proportionate approach that they would take to discovery. They…assured this court on two occasions* [that] *they would be adopting a proportionate approach. They then threw that out the window and made a very wide application by way of correspondence for discovery. They have pursued it by way of, not quite as wide, but still a very broad application, by way of the motion. We have responded to that comprehensively, saying; 'Look, this is so broad, because of what* [is] *sought, that the burden upon us, in terms of the number of documents and the costs, are going to be huge, and it is simply disproportionate the nature of these proceedings.' The figures that we put before the court were from the 1st January 2007 to the 31st December 2010. That's the four-year period and it is not the period, of course, for which the plaintiff seeks discovery. You are looking at, in terms of Categories 5 and 6, 109,000 separate jobs, 425,000 deliveries of ready-mix and specialty concrete products, 270,000 deliveries of ready-mix concrete alone, 134,000 deliveries that are above 1,500 cubic meters, (10-15 documents per delivery and 10-20 pages of documents per delivery, 6 billion pages (and without the specialty products, 4 million pages). On Categories 5 and 6, 560,000 documents if limited to ready-mix concrete alone and jobs above 1,500 cubic meters. That increases to 625,000 documents on Categories 5 and 6 if you extend the period from the 11th January 2007-30th June 2013, as sought by the Plaintiff, in other words, an increase of more than 10%. The 625,000 documents would equate to about 2 million pages and a cost of some €8.5 million in order to carry it out….*[C]*ounsel for the Plaintiff, in dealing with this, says, rather blandly: 'Well, 560,000 documents up to 625,000 documents…that's not a huge increase.' It's more, of course, than 10%, and in money terms it's nearly a million euro….and this is the attitude of the Plaintiff to it* [the increase]: *'Ah well, it's only a small increase.' 'Ah well, look at CRH, they have made a lot of money, they are a very successful company….They can afford it.'*
>
> …
>
> *Court*: *Small people will sometimes sue big people, though, and in a sense, what you are saying is 'I am a victim of my own success…*[B]*ecause I am so big, there is an awful lot to be discovered'. And the small person here is…saying 'I don't fully know the nature of the* [wrongdoing]*…so I have to be vague to a certain extent as to what I am looking for.'….* [W]*hat is the answer to those two points?*
>
> *Counsel*: *Well, I suppose, when we look at the pleadings, we will see…that the plaintiff here is essentially saying; 'I have a complaint about specific contracts' and subsequently to the court, he said 'I have a complaint about specific contracts and my discovery will be limited to specific contracts.' Well, the answer to that is let's have the delivery dockets for the specific contracts if you want to. If you want to see the average variable costs for the specific contracts, then do what you told the court on two separate occasions you would do. Anything beyond those specific contracts is purely speculative.' In fact, even in relation to the specific contracts there is really no basis for the allegation….The flip side of that* [the line of reasoning posed by the court], *if I may respectfully say so…and I pose this as a rhetorical question…*[is 'Can] *it be the case in the field of competition law that one competitor, who is simply not doing as well as other competitors in a competitive market, can bang out a statement of claim alleging predatory pricing or abuse of dominant position and on the basis of bare pleas come into Court and say…'I would like now to conduct a strip search of my competitors. I would like to see what their costs are, what their efficiencies are, how much they are getting their cement for, how much it costs them to produce the aggregates, how much they are paying their truck drivers?'*"

30. The answer to that last question, albeit that it was posed as a rhetorical question, is, it seems to the court, that (i) there has ever to be a solid basis for discovery (thus what is sought must be relevant, necessary, proportionate, not based on speculation, not so wide-ranging as to be an obstacle to the fair disposal of proceedings, not oppressive and not a tactic-of-war between the parties) and (ii) the court must look to the whole question of whether or not, in balancing the interests of the respective parties to litigation, there is a need to protect the interests of the defendants to competition law proceedings from such abuses as are referred to by counsel by imposing a 'confidentiality ring' requirement. (The court turns later below to whether or not to establish a confidentiality ring in the context of the within applications).

VII. Statement of Claim

31. These proceedings involve what is essentially a case relating to specific contracts and an allegation of below-cost selling on specific contracts which, even if established, is only unlawful if the plaintiff can establish as a precursor to that, that the three defendants are essentially one undertaking or, if not one undertaking, that they exercise collective dominance in the market for ready-mix concrete in the Greater Dublin Area. A curious feature of the pleadings is that they identify no basis for the twin allegations which would have to be brought together in order to succeed, namely (i) that there was below-cost selling (other than the bare allegation that there was because the prices are below the plaintiff's own average variable cost), and (ii) that there was sole or collective dominance. In truth, the allegations aforesaid are but asserted and discovery then sought. To demonstrate this and to determine the proper scope of discovery, it is necessary for the court to consider the pleadings. However, notwithstanding such observations as the court may make as to same, it is important to note that the court does not intend to make and does not make any observation as to the eventual outcome of the within proceedings. Turning then to the statement of claim, it states, *inter alia*, as follows:

> *"5. For* [the] *purposes of…Irish and EU competition laws, CRH and Roadstone are presumed to be part of one and the same undertaking as Roadstone is a 100% subsidiary of CRH. Similarly, Irish Cement is part of the same undertaking."*

32. This statement is fine so far as it goes: it is an acknowledged feature of competition law that if one has a 100% subsidiary undertaking, it is likely to be regarded as part of the parent undertaking, in any event absent autonomous behaviour on the part of the subsidiary. The statement of claim continues:

"The plaintiff pleads that there are close links between CRH and Kilsaran."

33. Here, Goode Concrete, with respect, departs significantly from established law. If Kilsaran is to be regarded as part of a single undertaking with CRH, then Goode Concrete has to establish that it is owned, wholly or partly, by CRH. So the reference to "*close links*" is, with respect, a vague pleading that, as will be seen later below, presents particular difficulties in the context of the discovery now sought. The statement of claim continues:

> *"Discovery and/or interrogatories will be required to establish whether CRH exercises decisive influences over Kilsaran such that CRH and Kilsaran are part of one and the same undertaking."*

34. It might be argued that interrogatories could have been relied upon in this regard, and it is a notable feature of the proceedings that the possibility of proceeding to some extent by way of interrogatories appears to have been abandoned by Goode Concrete. But be that as it may, the just-quoted text does point to a claim that seems notably speculative in nature: an allegation as to "*close links"* is made and in the very next sentence it is stated in effect that Goode Concrete does not know if this allegation holds true but intends to find out from discovery and/or interrogatories whether CRH exercises 'decisive influence' over Kilsaran (with no uptake on the interrogatories dimension of matters at this time). Again, however, there is a mis-statement as to the applicable test which is 'decisive influence + ownership' if CRH and Kilsaran are to be held to be part of one and the same undertaking.

35. The statement of claim continues:

> *"In the premises, the conduct of the defendants the subject matter of these proceedings, may constitute a violation."*

36. Although, to borrow a colloquialism, it is important not to get 'hung up' on a single verb, it seems to the court that the phrase "*may constitute a violation*" in the above-quoted text is notable. It has the effect that Goode Concrete does not plead a violation. It is saying in effect that 'There may be a violation, we don't know, but we would like to get discovery, search around and see if we can build up any sort of a case and maybe get something out of this.' That is a trend that permeates the entirety of the statement of claim.

37. Moving on, para. 6 of the statement of claim states as follows:

> *"The Plaintiff pleads in the alternative to take account of the possibility that (i) CRH/Roadstone and Kilsaran are separate undertakings and (ii) CRH/Roadstone and Kilsaran are part of one and the same undertaking. It is also necessary for the Plaintiff to make alternative claims as to whether the breaches of competition law in this case are of section 4/Article 101 or section 5/Article 102, without prejudice to the possibility that the same agreements and/or arrangements and/or conduct on the part of the defendants give rise simultaneously to breaches of section 4/Article 101 and section 5/Article 102. 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 competition rules ought to be characterised at this point in time."*

38. In reading the last-quoted paragraph of the statement of claim, the court is mindful in this regard of the observation of Fennelly J. in *Ryanair v. Aer Rianta* [2003] 4 I.R. 264, 277-278, that "*Competition cases have…the special feature that any documents relating to anti-competitive behaviour, whether by being party to agreements or concerted practices or protecting a dominant position, are likely to be in the possession of the party engaged in that behaviour. Anti-competitive agreements or practices will be kept secret."* However, in *Framus Ltd v. CRH plc* [2004] 2 I.R. 20, Murray J. made it clear, at 31, that the possibility that specific documents relevant to the issues may be unknown to a plaintiff is but "*a factor to be taken into account…in deciding the appropriate kind of order for discovery to be made*". Moreover, Murray J. went on, at 46-7, to make clear that different discovery rules do not apply to competition cases. One aspect of those rules is that so-called 'fishing expedition' are not permitted. When Goode Concrete states in its statement of claim that "*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 competition rules ought to be characterised at this point in time*" it seems to the court that Goode Concrete is upon, if it has not crossed, the threshold of seeking license for a 'fishing expedition', *i.e.* a speculative trawl of the defendants' documentation.

39. Goode Concrete then identifies the relevant markets and estimates market share with some precision. Then, at para. 16 of the statement of claim, it states as follows:

> *"The plaintiff will allege that the defendants have breached and are continuing to breach… EU and Irish competition laws. The extent to which such breaches have occurred and are continuing to occur may not be fully identifiable, at least until the plaintiff has had the opportunity to inspect the defendants' discovery. The plaintiff therefore reserves its right to advance, following discovery, further particulars of breaches of competition law on the part of the defendants".*

40. With every respect to Goode Concrete, it is difficult not to read these words as anything other than, and the court reads them to be, an assertion that the discovery process is to be used to 'fish' for other breaches.

41. At this point in the statement of claim one comes to the core of the breaches of competition law alleged in the concrete market, *viz*:

> *"17. 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 tendered, 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."*

42. The court notes in passing that no evidential basis has been put forward by Goode Concrete to support this plea of an aim to eliminate. Counsel for Goode Concrete, it is true, did open, in the course of hearing, what purports to be a transcript of a telephone conversation in which the CEO of Kilsaran said certain things and upon which Goode Concrete seeks to draw an inference as to the aim aforesaid. However, the CEO of Kilsaran is not a servant or agent of the first or second-named defendants.

43. The statement of claim continues:

> *"The Plaintiff will claim that the pricing practices of each of CRH/Roadstone and Kilsaran in concrete tenders are explicable only on the basis that the defendants 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 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 sell and/or selling concrete at below cost prices contrary to section 5 of the Competition Act 2002 and/or Article 102 TFEU."

44. In summary, the last-quoted text makes three different allegations of breaches of competition law in the concrete market. The first two assume that CRH/Roadstone, on the one part, and Kilsaran on the other part, are separate undertakings and claims that breaches of s.4 present. The third alleged breach is that of abuse of a collective dominant position, as distinct from a position of sole dominance occupied by the three defendants as a single undertaking.

45. The statement of claim continues:

> *"20. 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* [of] *concrete at below AVC, the plaintiff was forced to cease trading as of the 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."*

46. Particulars of the tenders in respect of which there has been below-cost selling are set out in Schedule 1, para. 22 of the statement of claim stating in this regard that "*These are the best particulars that the plaintiff can provide until after the defendants have made discovery*." Again, seeking discovery by reference to such a pleading seems tantamount to a request for a license to 'fish'.

47. As to breaches of competition law in the cement market, the statement of claim reads, *inter alia*, as follows:

> *"23. CRH, through Irish Cement, occupies a dominant position in the Irish cement market. By engaging, through Roadstone, in below cost selling of concrete and concrete products in the Dublin market, CRH is abusing its dominant position in the cement market in breach of section 5 of the Competition Act 2002 and/or Article 102 TFEU."*

48. As the court reads this text, the plea that is being made is that CRH has a dominant position in the Irish cement market and has abused its dominant position; however, the abusive conduct that is alleged is not abusive conduct in the market in which it is alleged to be dominant but another market altogether, being the market for concrete and concrete products in Dublin. In other words, the allegation that is made is that because of conduct in a market in which CRH is said *not* to be dominant, it is abusing its dominant position in a market in which it is dominant. That is an allegation that can succeed (as in the *Tetra Pak* case, considered later below). However, it is safe to say that it is an allegation that will rarely succeed, and would require the pleading and identification of special circumstances, which are not pleaded here.

49. Proceeding, the statement of claim reads as follows:

> *"24. 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 defendants."*

50. Notwithstanding the above-mentioned observations of Fennelly J. in *Ryanair*, it seems to the court that this paragraph speaks to the speculative nature of the claims made by Goode Concrete. It makes no allegation of abuse in relation to the selling of cement between CRH and Kilsaran. It simply asserts that the arrangements for the purchase of cement by Kilsaran from CRH are unknown to Goode. Doubtless, Goode Concrete would like to know about those arrangements; however, they are not entitled to them simply because they issue proceedings. Notably in this regard, Goode Concrete does not plead that cement is being sold at prices by Irish Cement to Kilsaran, which in themselves amount to an abuse of dominant position in the cement market. Remarkably in fact, the statement of claim makes no allegation of abuse in the cement market by Irish Cement or CRH/Irish Cement. The only allegation of abuse by CRH/Irish Cement is not in the cement market but in the ready-mix concrete market. So in essence what Goode Concrete is pleading in para. 24 is 'Here is something that we don't know about and it might be contrary to competition law but we don't plead that it is.' That, with respect, offers no sound basis for discovery.

51. Paragraph 25 of the statement of claim indicates that particulars of tenders in which Roadstone and Kilsaran have allegedly engaged in below-cost selling are set out in Schedule 1. "*These*", it states, "*are the best particulars that the plaintiff can provide until after the defendants have made discovery*." As with para.22, seeking discovery by reference to such a pleading seems tantamount to a request for a license to 'fish'.

52. The statement of claim then proceeds with some "*Further or Alternative Claims if CRH/Roadstone and Kilsaran are Part of the Same Undertaking*". In para. 26, Goode Concrete acknowledges that, if CRH/Roadstone and Kilsaran are part of the same undertaking, then s. 4 of the Competition Act 2002 and Art. 101 TFEU do not apply (and patently in that case they do not). In paras. 27 and 28, it is stated that in those premises Goode Concrete will argue that

> (i) CRH/Roadstone/Kilsaran occupy a position of single firm dominance in the ready-mix concrete market and markets for concrete product, and that single firm has abused those dominant positions by selling at below-cost prices;
>
> (ii) the CRH/Roadstone/Kilsaran undertaking occupies a dominant position in the Irish Cement market and is guilty of an abuse of that dominant position by engaging, through Roadstone and Kilsaran, in below-cost selling in the concrete and concrete products market.

53. Once again it is notable that the allegation of abuse by a single undertaking is in the concrete market, not in the cement market, and again the same particulars are given.

54. There follow pleas in relation to inducement to breach of contract, interference with contract and intentional interference with economic relations. Those are essentially a subset of the cases in Schedule 1 where Goode Contract states that it had a contract with the purchaser and lost the contract because of some actions by the defendants.

VIII. Request for Particulars and Replies to Particulars

55. Some aspects of the request for particulars and the replies thereto are worthy of scrutiny.

> Request 1(c): *"Please specify precisely what is meant by the term 'close links'"*
>
> Reply 1(c): *"The Plaintiff contends that Kilsaran is secretly controlled by CRH".*
>
> Request 1(d): *"Please specify the material facts relied on to support the contention that there are close links between CRH and Kilsaran."*
>
> Reply 1(d): *"This is a matter for evidence."*
>
> Request 1(e): *"Please specify the material facts relied on by the Plaintiff to support the contention that CRH may exercise decisive influence over Kilsaran such that CRH and Kilsaran are part of one and the same undertaking."*
>
> Reply 1(e): *"This is a matter for evidence."*

56. The court has noted above the vagueness of, and will consider in greater detail later below certain particular difficulties presented by, the term "*close links*". In Reply 1(c), Goode Concrete, to borrow a metaphor, 'pins its colours to the mast', indicating that it is the concept of control that it is concerned with in this regard. From Replies 1(d) and (e) it is clear that Goode Concrete cannot specify or identify or plead any material facts at all to support its assertion that there is secret control by Roadstone of Kilsaran.

> Request 10(d): "*Please specify the material facts relied on to support the contention that Kilsaran is part of the same undertaking as CRH/Roadstone.*
>
> Reply 10(d): *"The plaintiff claims that Kilsaran is secretly controlled by CRH. The material facts to support to this contention are a matter for evidence."*

57. Again, one can see from this that the notion of one undertaking is linked to the idea of secret control.

> Request 14(b): "*Please specify by reference to a map the geographic market referred to by the reference to 'the Dublin Concrete market."*
>
> Reply 14(b): *"The precise scope of the relevant geographic market is a matter for evidence, in particular expert evidence. Without prejudice to the foregoing, the reference to the 'Dublin concrete market' is sufficiently precise to allow the first and second named defendants to know the case they have to meet. Further, without prejudice to the foregoing, the relevant market encompasses the geographic area of approximately 25/30 radial kilometres from each plant outside the city boundaries of the M50 and the whole area inside the M50 that encircles Dublin City and a map is attached illustrating the area referred to."*

58. Reply 14(b), it seems to the court, is particularly relevant in the context of the discovery that is now sought in relation to the Dublin concrete market. Goode Concrete appears to have no difficulty in identifying what it asserts is the geographic scope of the Dublin market. It also accepts that ultimately the identification of a market, either in terms of relevant product or relevant geographic market, is a matter for expert evidence. And in any competition law case, these matters would be proved by expert evidence: they are not matters for discovery; they are proved on the basis of publicly available information and expert evidence.

IX. Some Legal Considerations

(i) The Decision in Framus.

59. The decision of the Supreme Court in *Framus Ltd v. CRH plc* [2004] 2 I.R. 20 has attracted no little attention in the within proceedings, not least though not only because in *Framus*, a case that is clearly of general importance, the plaintiffs made similar allegations against similar defendants to those appearing in the present case, and in relation to the ready-mix concrete market.

60. In his judgment in *Framus*, Murray J., writing in relation to the extensive discovery sought in those proceedings states, *inter alia*, as follows, at 30-31:

> *"As can be seen from the order of the High Court, the range of documents which the defendants were ordered to discover is very extensive. Although the category of documents to be discovered under the High Court order has been limited in various ways, such as by reference to particular customers, or contract, or regional market, or product market, they are nonetheless described in broad terms such as those relating to 'prices and terms and condition of sale including special arrangements, price rebates, multi-product purchase agreements or arrangements, credit term, discounts, bonuses, waivers, loyalty schemes, and purchase incentives'. Such a broad description of the category of documents to be discovered is understandable in the circumstances of a case of this nature, where the very nature of a plaintiff's claim gives rise to issues in respect of which specific documents relevant to those issues are peculiarly within the knowledge of the defendant and would be unknown to a plaintiff. This is the kind of situation which may arise in claims based on allegations of illicit anti-competitive agreements or practices, although it is not exclusive to such claims. Such a situation is a factor to be taken into account and I put it no higher than that as part of the circumstances in deciding the appropriate kind of order for discovery to be made."*

61. Moving on, Murray J. then deals with the issue of proportionality, observing as follows, at 38:

"It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out, the crucial question is whether discovery is necessary for "disposing fairly of the cause or matter". I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered[1] and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues."

[1] It seems to the court that the issue of cost necessarily arises as a corollary of extent and volume.

62. Continuing, Murray J. observes as follows, at 39-40:

"While I consider there is some substance in the plaintiffs' arguments that in a case of this nature, that is to say, where the wrongful activities alleged against a party are ones which by their nature are likely to be concealed, thus making it difficult for an opposing party to identify particular documents or specify categories in a limited way, it may indeed be appropriate for a court to order discovery of documents relating to anti-competitive agreements or practices which are not directly related to particular acts or conduct which a party, perhaps fortuitously, is in a position to set out in their pleadings. However, the extent of discovery must be confined to what is necessary for the fair disposal of the case and this can only be decided in the context of the actual issues in, and facts of, the case itself. I think the statements of the High Court Judge have to be read in the context of this particular case and the extensive discovery which he did in fact order. The plaintiffs complain that they were effectively put out of business by the abuse of a dominant position on the relevant markets by the defendants and in particular by their concerted action in relation to such matters as the terms and conditions of sale of the products in question to buyers of those products. The fact is that they have been in a position to plead specific contracts and projects which were the subject of these alleged anti-competitive practices and which affected their businesses. However, what the plaintiffs in effect seek in this context is access to all documents concerning all transactions (within the relevant periods for the relevant markets) because they believe that among them that they will find evidence of the anti-competitive practices of which they suspect the defendants. Apart from its speculative element, this particular application is more akin to an investigative process rather than a discovery process and perhaps more appropriate to, as the High Court Judge pointed out, the exercise of a public investigatory power by a competent authority….

While I do not exclude the possibility of granting discovery for a specified class of documents which did not relate directly to a specific event pleaded but which was nonetheless relevant to the issues, whether such an order should be made and the extent to which it would be made must depend on the particular circumstances of the case….

This is in fact what the High Court Judge did at paras. 1(1), 1(2), 2 and 3 of his order. However, it seems to me that to extend the discovery provided for in paras. 8 and 11 of the High Court order to the business activities generally of the defendants would be of marginal advantage in addition to that which will accrue to the plaintiffs on the basis of the order as it stands. Also, to extend the ambit of the order in such an open ended way as suggested by the plaintiffs, would, in my view, be so burdensome on the defendants as to be oppressive (which I consider to be a consequence of its broad investigatory nature). It also seems to me that such an extended order would be disproportionate and I am not satisfied that it is necessary for advancing the plaintiffs' case in these circumstances."

63. The present case is in even more stark relief. Here the plaintiffs have hitherto been saying, for example, that the cost of the discovery being sought in this case could not top €100k and that they are looking for discovery in relation to specific contracts. But now a much wider exercise is sought of the defendants by way of discovery which, in relation to the first and second-named defendants (and in relation to categories 5 and 6 alone) may well generate costs in the order of €8.5m, a vast sum of money for any commercial enterprise, however large, and a cost that is indicative of the investigatory, speculative and disproportionate nature of the exercise that the plaintiffs now want to carry out in relation to our business and which they doubly urge upon the court from a misguided notion as to its role as a competition authority.

64. Continuing, Murray J., at 41-2, makes the following observations of relevance to (speculative) requests for discovery of communications with customers in respect of whom no anti-competitive agreements or arrangements have been pleaded, so a point which applies to all of the contracts in this case, other than those scheduled:

"The plaintiffs also submit the trial judge should have acceded to their application to make an order for discovery in respect of all documents relating to communications between any of the first five defendants and each of a list of sixteen customers, or the associate companies of those customers or any persons on their behalf between February, 1987 and February, 1995 and which relate directly or indirectly to the purchase, sale and pricing of concrete products (except for documents relating only to quality or credit control)….

In the course of the appeal, it was submitted that such documents could provide evidence of anti-competitive conduct and also evidence of the movement of prices on the market, which would provide the basis for economic analysis allowing the plaintiffs to demonstrate, for example, that there was a differential in prices in a particular geographical market and an adjoining market without any objective justification. The plaintiffs also submitted that, in order to avoid an application for discovery which might be considered too onerous, they limited their discovery to sixteen chosen customers, whom they were aware had purchased significant volumes of concrete products in different geographic locations, some of which operated in areas where the plaintiffs did not carry on business and others in which they did….

As regards this particular ground of appeal, I would first note that the High Court Judge has ordered discovery of all documents concerning pricing and terms and conditions of sale without limit as to particular customers against the third defendant (see para. 1 of the High Court order) and discovery against all other defendants of documents concerning prices and conditions of sale in the relevant Dublin region, Dublin City. Apart from the fact that the plaintiffs were granted extensive discovery concerning prices and conditions of sale in respect of the relevant products in the relevant markets in the two respects just referred to (and it would seem inevitable that much of the other documentation discovered under other heads would also relate to prices and conditions of sale), this request for discovery is couched in extraordinarily broad terms, notwithstanding that it is confined to sixteen customers. It is sought that the defendants should discover all documents relating to all communications between any of the first five defendants and each and every of sixteen customers, plus their associated companies, plus any person who communicated on their behalf over a two year period where those communications related directly, or indirectly, to the purchase, sale or pricing of concrete

products. The only other limitation which the plaintiffs seek to put on the foregoing is that documentation or communications related to quality or credit control would be excluded. It is not at all clear what is meant by associated companies of the named customers, nor indeed how the defendants could be assumed to be in a position to identify such companies, if they exist, or the court itself, if it was called upon to enforce such an order. A reason given for choosing the customers in question is, according to the plaintiffs, that they are known to have been substantial customers for the products in question. In seeking discovery of communications between all these companies and the defendants of documents relating directly, or indirectly, to price and selling conditions in relation to all transactions between the relevant parties, it seems to me that there would inevitably be a great deal of documentation with repetitive information, whether or not it related to the issues between the parties in these proceedings….

Another feature of the application in this context is that it is sought, at least in part, with a view to carrying out a market analysis of pricing trends. I am not at all satisfied that the seeking of information for the purpose of carrying out a market analysis of such trends is an appropriate basis for an order of discovery, particularly of such a wide ranging nature. In any event, I am of the view, firstly, that price trends in a market may be the subject of expert evidence and that the range of documents sought to be discovered under this heading is so broad in its scope as to fail to comply with O. 31, r. 12(1), which requires that the motion for discovery 'specify the precise categories of documents in respect of which discovery is sought'. In certain circumstances, the court may grant discovery on a more limited basis than that sought where it considers it appropriate to do so. On the other hand, it is not for the court to re-draft an applicant's motion where it in effect amounts to a form of blanket discovery, which I consider this particular request to be. It may be appropriate to do so where a more limited category can be readily defined and it is in the interests of fairly disposing of the application. I do not consider this an appropriate case to try and fashion some limited order that might suit the plaintiffs, even if this could be done. Secondly, I am of the view that to grant the order sought under this head of the application, having regard to the discovery already granted to the plaintiffs, would be, at once, too speculative, disproportionate and unduly burdensome on the defendants. Accordingly, I do not consider this ground of appeal well founded."

65. These last-quoted paragraphs, it seems to the court, are particularly relevant to the plaintiffs' discovery applications in terms of the principles that they establish, being that discovery of communications with customers in respect of whom no anti-competitive activity has been pleaded would be speculative and unduly burdensome, that market analysis is essentially a matter for expert evidence rather than discovery, and that it is not for the court to re-draft an applicant's motion for discovery if it has been expressed in terms which are too broad.

66. Continuing, Murray J. states, at 44-46:

"It is clear that these additional particulars referred to in the plaintiffs' submissions do not relate to, and are different from, the generalised allegation referred to by the trial judge, namely that 'other cement powder users in the State decided en bloc not to purchase' from it. So far as that particular allegation goes, in my view, the High Court Judge was entirely correct in holding that it was too broad and general a statement so as to be properly susceptible to an order for discovery. The additional pleadings in the particulars referred to neither relate to, nor limit in any way, this generalised allegation….

As regards this ground of appeal, the plaintiffs submit that between them they operated in business over a combined period from 1986 to 1994. They 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. Alternatively, it was submitted that some lesser period prior to the commencement and cessation of business by the respective plaintiffs should have been included in the order for discovery….

As the High Court Judge pointed out in his judgment he was obliged 'to balance the requirement of affording the plaintiffs a sufficiently comprehensive discovery relevant [to the issues] *with avoiding an unduly wide discovery which would be oppressive to the defendants'. In my view, in determining the relevant dates for the discovery of documents, the High Court Judge exercised his discretion in the manner envisaged by Fennelly J. in his judgment, as cited above, when he stated that the court "should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of litigation". Moreover, to 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. In my view, this ground of appeal also fails."*

67. The court notes that 'generalised allegations' of the type referred to by Murray J. in the above-quoted text fairly pepper the pleadings in the within proceedings. As to temporal scope (the subject of the last two of the above-quoted paragraphs), the court notes in particular the observation of Murray J. that "[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*." That is precisely what Goode Concrete is seeking in this case. It is saying, in effect, 'In relation to the period that we are complaining of, we would also like a period before and after in order that we might see what the movement of prices was.' Murray J. considers this to be inappropriate, because it is looking for information, rather than seeking discovery related to the anti-competitive practices alleged.

68. As to the issue of discovery in relation to the control of companies, and that being too broad and general in the context of a discovery application, Murray J. observes as follows, at 46:

"On the basis of this ground of appeal the plaintiffs seek documents of the following nature:-

> *'All correspondence, memoranda of conversations or minutes of meetings during the period February, 1987 to February, 1995 inclusive between any of the first five defendants and any other parties (whether other defendants, competitors, customers, suppliers, financial institutions, shareholders of competitors, companies office, accountants or persons on their behalf, or others, concerning any of the first five defendants (or their subsidiaries or associated companies or companies controlled by them) ownership, acquisition, control (including their way of loans, loan guarantees or otherwise), of or over sources of concrete products, aggregates or special*

de-concrete products in the State.'

…According to the submissions of the plaintiffs, this relates to the acquisition or control over companies in the ready-mix concrete industry, which enabled the defendants, or some of them, to control the market in those products. In my view, this is so broad and vague a category of documents as to offend against the letter and spirit of O. 31, r. 12 of the Rules of the Superior Courts 1986. Moreover, the identification of companies owned directly, or indirectly, by the defendants, or any of them, seems to me to be a matter of information and not documentation and therefore not an appropriate subject for discovery. The plaintiffs had other procedural options available to them to elicit this information, whether by interrogatories or otherwise. This ground of appeal must also fail."

(ii) The Damages Directive.

69. The Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (O.J. L349, 5.12.2014, 1)), touched upon previously above in the context of the designation of the court as a competition authority and the consequences of same, does not apply to the within proceedings because they were commenced before the date of actions in respect of which the Damages Directive, as transposed into Irish law, applies. Even so, it seems to the court still to be of general interest because a lot of the Damages Directive merely reflects the pre-existing position in Irish law. Among the provisions of interest are the following:

– Recital 16 provides as follows:

"National courts should be able, under their strict control, especially as regards the necessity and proportionality [so, the court notes, necessity and proportionality are recognised as governing principles] *of disclosure measures, to order the disclosure of specified items* [*i.e.* not, the court notes, broad discovery] *of evidence or categories of evidence upon request of a party. It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the defendant. Where a request for disclosure aims to obtain a category of evidence, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts."*

Recital 16 represents, in effect, an encapsulation of pre-existing principles in relation to discovery. So it would be strange if a plaintiff, who commenced proceedings before the Damages Directive came into force, was found to be entitled, in a competition law case, to get wider discovery then that applies following the commencement of a regime set by a directive which is perceived to be a liberalising measure as regards the bringing of actions for damages grounded on alleged infringements of competition law.

– Recital 18 touches on the issue of confidential information and respect for confidentiality, providing as follows:

"While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation."

The foregoing reflects the pre-existing law in this jurisdiction, and indeed in the United Kingdom, with the courts, in the exercise of their inherent jurisdiction, having established things like confidentiality rings and precluded certain persons from having access to certain documents in order to protect the confidentiality of information.

– Article 5(2) reflects the recitals, so far as concerns the drawing of categories of discovery narrowly in order to protect confidential information, providing as follows:

"Member States shall ensure that national courts are able to order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification."

(iii) The Decision in Tetra Pak.

70. The court turns now to the decision of the Court of Justice in *Tetra Pak International SA v. Commission of the European Communities* (Case C-333/94P). That was a case in which Tetra Pak, an entity dominant in the aseptic packaging market, was alleged to have engaged in abusive conduct in the non-aseptic market. In its judgment, the Court of Justice looks at the issue of abuse of dominant position and whether the abusive conduct must have its effects in the market in which an undertaking is dominant, observing, *inter alia*, as follows:

"21. In its second plea, Tetra Pak principally casts doubt on the reasoning followed by the Court of First Instance in paragraph 122 of the judgment under appeal, which reads:

'It follows from all the above considerations that, in the circumstances of this case, Tetra Pak's practices on the non-aseptic markets are liable to be caught by Article 86 of the Treaty without its being necessary to establish the existence of a dominant position on those markets taken in isolation, since that undertaking's leading position on the non-aseptic markets, combined with the close associative links between those markets and the aseptic

> *markets, gave Tetra Pak freedom of conduct compared with the other economic operators on the non-aseptic markets, such as to impose on it a special responsibility under Article 86 to maintain genuine undistorted competition on those markets.'*

[Court Note: What the Court of First Instance was saying here was that Tetra Pak was dominant on the aseptic market, but not in a dominant position on the non-aseptic market; nevertheless Art.86 applied to its conduct on the non-aseptic market because there were special circumstances, in particular, the leading position that Tetra Pak had on the market on which it was not dominant, and the close associative links between those two markets.]

…

> *25. In that regard, the case-law cited by the Court of First Instance is relevant. Joined Cases 6/73 and 7/73* Commercial Solvents v *Commission [1974] ECR 223 and Case 311/84 CBEM v CLT and IPB [1985] ECR 3261 provide examples of abuses having effects on markets other than the dominated markets. In Case C-62/86* AKZO v Commission *[1991] ECR I-3359 and Case T-65/89 BPB Industries and* British Gypsum v Commission *[1993] ECR II-389, the Community judicature found certain conduct on markets other than the dominated markets and having effects on the dominated markets to be abusive. The Court of First Instance was therefore right in concluding from that case-law, at paragraph 116 of the judgment under appeal, that it must reject the applicant's arguments to the effect that the Community judicature had ruled out any possibility of Article 86 applying to an act committed by an undertaking in a dominant position on a market distinct from the dominated market.*

[Court Note: The principle identified by the Court of Justice in the last-quoted text seems quite clear, viz. the European-level courts had not ruled out the possibility that Art. 86 could apply to the actions of an undertaking that was dominant in a market distinct from the market in which its impugned actions were effected. What does that mean translated into the circumstances of the within proceedings? It means that if one accepts the hypothesis that CRH is dominant on the cement market and not on the concrete market, its conduct on the concrete market can and could be an abuse of its dominant position on the cement market, if there are special circumstances. But it would have to be a closely associated market and Goode Concrete would have to identify special circumstances. No such special circumstances are pleaded in this case. The relevant product at issue in this case is not like cartons, some aseptic and some non-aseptic: here there are quite different products where the only link is that cement is an ingredient of concrete (and not even an essential ingredient as there are, apparently, cement-substitute products, such as slag, that could be used)]."

(iv) Some General Cases on Discovery.

1. *Ryanair v. Aer Rianta*

[2003] 4 I.R. 264

71. This case has been touched upon previously above. The facts of the case were that Ryanair claimed Aer Rianta to be in breach of national and European Community law in various respects and sought voluntary discovery, followed by a motion for discovery. Aer Rianta objected to the scope of discovery, pleading, *inter alia*, that the reasons for the necessity of the discovery had not been shown. Touching on the issue of necessity, Fennelly J. observed as follows, at 276:

> *"In the great majority of cases, discovery disputes have revolved around the issue of relevancy. There are fewer cases concerning necessity. There are good reasons for this. If there are relevant documents in the possession of one party, it will normally be unfair if they are not available to the opposing party. Finlay C.J., in his judgment in* Smurfit Paribas Bank Ltd. v. A.A.B. Export Finance Ltd*. [1990] 1 I.R. 469 emphasised, at p. 477, 'the full disclosure both prior to and during the course of legal proceedings which in the interests of the common good is desirable for the purpose of ascertaining the truth and rendering justice'. The overriding interest in the proper conduct of the administration of justice will be the guiding consideration, when evaluating the necessity for discovery.*
>
> *The issue of 'necessity' for discovery has, consequently, usually been debated in cases where some other interest is involved, particularly the confidentiality of documents, especially where they involve the interests of third parties. To that extent, the arguments advanced on behalf of the defendant on this appeal, effectively that the plaintiff does not need the documents, because they have alternative means of establishing the relevant facts, has rarely arisen."*

72. Focusing momentarily on the second of the two paragraphs just quoted, it seems to the court that in a case such as this, where there are alternative means of getting information available to a plaintiff, where there are rights of third parties at play, and where, for example, confidential information and even the personal data of employees of Roadstone is at stake (in terms of wage rates, haulage contractor payments and waiting-time payments), the issue of necessity clearly arises centrally for consideration.

73. Fennelly J. emphasises the confidentiality-necessity dimension of matters again at 277, observing:

> *"The court, in exercising the broad discretion conferred upon it by O. 31, r. 12(2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation. It may have regard, of course, to alternative means of proof, which are open to the applicant. These may, no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation."*

74. The "*alternative means of proof*" to which Fennelly J. refers include interrogatories but Goode Concrete appears to have set its mind against deploying same at this time.

2. *Ryanair Ltd v. Bravofly and Travelfusion Ltd*

[2009] IEHC 41

75. These proceedings arose out of Ryanair's objection to the use of automated systems and software to extract real time flight information from Ryanair's website for the purposes of presenting it on websites facilitating flight search and booking services and run by Bravofly. Ryanair claimed that such 'screen scraping', breached its online terms and conditions, violated certain of its intellectual

property rights and involved a number of torts. Bravofly denied all of the claims and also asserted, by way of defence and counterclaim, that Ryanair was abusing a dominant position in breach of European Union and Irish competition law. Dealing with an application, *inter alia*, to strike out parts of the counterclaim, Clarke J., as he then was, observed as follows, at paras. 5.16-5.18:

> *"5.9 However, it is important to emphasise that in these proceedings the only matter that is relevant in relation to the flight market, is the alleged dominance of Ryanair in that market. Whether Ryanair has (if it be so dominant) abused that position in the flight market is not relevant because Bravofly does not operate in the flight market. While some of the underlying facts on which it might be contended that Ryanair has abused its alleged dominant position in the flight market can, in accordance with the established jurisprudence, be relied on as part of the assessment of whether it is in fact dominant in that market, it is only those underlying facts which might, arguably, go to show a sufficient level of market power to establish dominance that are relevant, and not whether those facts might also amount to an abuse.*
>
> …
>
> *5.16 The question which I have to address is as to whether the allegation deriving from that fact, in the manner in which it is particularised in para. 68 of the amended defence and counterclaim, is sufficient to properly bring such a claim. The issue seems to me to be analogous to that which I had to consider in* National Education Board v. Ryan & Ors *[2007] IEHC 428, concerning the proper pleading of a claim in fraud. While the analogy between a fraud claim and an anti-competitive activity claim is far from complete, there are not insignificant analogies. Both involve allegations which, if true, involve activity which is likely to be at least in part clandestine. A person bringing a valid claim in respect of such matters will be unlikely to be able to plead such a claim with a great degree of particularity in advance of having had the opportunity to exercise procedural measures such as discovery. On the other hand there is clear competing requirement that a party should not be able 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. A balance between those two competing requirements needs to be struck.*
>
> *5.17 As I pointed out in National Education Board it seems to me that the court is entitled to require something more than a bald claim before permitting the pleadings to close, and the plaintiff to seek discovery. However, a court should not go so far as to require an overly detailed particularisation of the claim, which would have the effect of potentially limiting the claim in a way such as would exclude from discovery material that might well be relevant to true wrongdoing. I am satisfied that an analogous position applies in an anti-competitive activity claim such as this. A party should not be permitted to make a bald accusation of anti-competitive behaviour 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.*
>
> *5.18 While it is fair to say that it would not be proper to characterize the claim made by Bravofly in para. 68 of the amended counterclaim as being merely a 'bald' claim, given that there is a reference to the relevant third party, and given that there is clearly a factual basis for the assertion that there is a contract between Ryanair and that third party (the existence of the contract is relied on by Ryanair), which gives exclusive rights to that third party in relation to the exploitation of aspects of Ryanair's website, nonetheless I am satisfied that the claim as currently formulated falls on the wrong side, from Bravofly's perspective, of the line between what it is reasonable to require of a plaintiff in terms of detail prior to discovery. In those circumstances, as noted in respect of the first category, it is not for me to be prescriptive as to the precise way in which Bravofly should formulate its claim under this heading. I will, therefore, afford Bravofly an opportunity to reformulate this aspect of the claim to include a significant amount of additional detail as to the manner in which it asserts that such a contract is anti-competitive, and what relief is said to flow from that assertion."*

76. What Clarke J. seems to be saying in the above-quoted text is, *inter alia*, that for Bravofly to be coming in by way of counterclaim and saying to Ryanair 'You have abused your dominant position on the flight market', is irrelevant because Bravofly does not operate on that market. Likewise, in the within proceedings, Goode Concrete is saying to CRH 'You are dominant on the cement market'. However, Goode Concrete does not operate on the cement market; it operates on the concrete market. Clarke J. also appears to be reluctant to countenance the notion that dominance on the flight market could yield a competition law violation on the market for electronic information that facilitates flight bookings. Obviously, the decision of the Court of Justice in *Tetra Pak* demonstrates that such cross-pollination is possible in the right circumstances; however, it needs closely associated markets to occur and the aggrieved party would need to plead and identify special circumstances (and here Goode Concrete has not done so). Notable too about Clarke J.'s solution to the case before him is that he considers it inappropriate to invade upon Bravofly's freedom of action ("[I]*t is not for me to be prescriptive as to the precise way in which Bravofly should formulate its claim").* Instead, in what, if the court might respectfully observe, is a proper deference to that freedom of action, he affords Bravofly the opportunity to reformulate the relevant aspect of its claim so as *"to include a significant amount of additional detail as to the manner in which it asserts that such a contract is anti-competitive, and what relief is said to flow from that assertion."*

3. *Hartside Limited v. Heineken Ireland Ltd*

[2010] IEHC 3

77. In these proceedings Hartside sued Heineken Ireland consequent upon what was said to have been a breach by Heineken Ireland of the terms of a joint venture agreement entered into in 1996. In the context of seeking discovery, a range of categories of documents was sought by each of the parties and a dispute as to the proper scope of discovery ensued. In the course of giving judgment, Clarke J. observed as follows, at para.5.9:

> *"5.9 Finally, I should refer to the difficulties which I had to address in both* National Education Board v. Ryan & Ors *[2007] IEHC 428 and* Moorview Developments Limited v. First Active plc *[2008] IEHC 211. Both of those cases involved allegations of fraud which are not, of course, of any relevance to this case. However, it does not seem to me that the issues raised are confined to fraud cases (indeed, I had occasion to indicate that similar principles applied in the competition field in* Ryanair v. Bravofly *[2009] IEHC 41). The overall problem is one between balancing, on the one hand, the need to facilitate a party who may have a legitimate claim but who may require access to information available only to its opponent in order to fully plead and ultimately substantiate that claim on the one hand, and the need to prevent, on the other hand, a party, by making a mere allegation, from being able to have a wide range of access to its opponent's documentation, including what may well include highly confidential documentation. The balance struck in…* Moorview, National Education Board *and* Ryanair, *leads to the conclusion 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. The need for such a 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."

78. The relevance of these observations to the within proceedings, where the greatly speculative nature of the pleadings has been identified previously above, is clear.

(v) *Confidentiality Rings*.

1. *Ambiorix Ltd v. Minister for the Environment (No. 1)*

[1992] 1 I.R. 277

79. The decision in *Ambiorix* arose from a challenge to a decision in relation to the designation of areas under the Urban Renewal Act of 1986 and a related application for discovery against the State. The Supreme Court decided that there was no absolute privilege attaching to the categories of documents in respect of which discovery was sought. Of note for the purposes of the within judgment are certain observations of Finlay C.J., at 286, *viz*:

"Furthermore, the Court has an inherent jurisdiction, I am satisfied, to take such steps as are necessary to regulate the production of documents so as to prohibit any infringement of this restriction.

In these circumstances, I am satisfied that either by a method of editing the documents which are referred to in this section of Mr. Matthews' affidavit or by restricting their inspection to lawyers engaged on behalf of the plaintiffs who would give to the Court an undertaking that they would not reveal their contents to their clients, except with special leave of the court, the commercial and financial interests of the parties who made these representations should be protected.

I would bear counsel for the plaintiffs and the defendants further on this particular issue in the hope that a simple formula could be devised between them which would give to the plaintiffs adequate information concerning the material matters contained in this particular collection of documents, and would give to the persons who wrote to the Department adequate protection of their commercial and financial interests."

80. In the above-quoted text, one finds the Chief Justice, now some quarter of a century ago, recognising: the acceptability of the principle that discovery of documents can be preconditioned on some type of confidentiality ring; that such a confidentiality ring might be confined to the lawyers, with their clients properly excluded therefrom; and that the lawyers could be required to give an undertaking that they would not reveal the contents of documents to their clients, except with special leave of the court.

81. The decision in *Ambiorix* falls to be distinguished from the decision of the Supreme Court in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60. Essentially what that later case decides concerns informant privilege, specifically that where in a criminal case an accused person seeks access to witness statements, which are not in the Book of Evidence but which potentially could be exculpatory, the accused himself is entitled to have those statements disclosed to him. Goode Concrete has sought in the within proceedings to rely on certain passages in the judgment of Carney J., in the High Court, in relation to disclosure of witness statements. However, that is a case which is very much in the criminal law sphere, and peculiar considerations arise in criminal cases, as the Supreme Court has emphasised time and again, given that a person's liberty is at stake. Moreover, one can readily imagine that in a criminal case, for example, there may be a statement from a particular person and an accused may be able to instruct his solicitor as to characteristics of that person and so assist in terms of the defence of the case. Or it could be, for example, that an undisclosed statement that the prosecution possess and which is not in the Book of Evidence might be from a person that an accused is be in a position to indicate ought to be the true suspect. So there are a variety of reasons why a criminal case would be different from a case in the civil context such as Ambiorix, even if that was distinguished in *Ambiorix*, by O'Flaherty J. at 86, merely on the basis that it was "*a very special case*" (though notably it was not stated to be *per incuriam*).

2. *Cooper Flynn v. Radio Telefís* Éireann

[2000] 3 I.R. 344

82. This was a decision concerned with discovery against a bank, and the establishment of a disclosure ring, in a case in which Ms Cooper Flynn brought a libel action against RTÉ over allegations that she had induced certain persons to engage in a scheme aimed at tax evasion. In the course of his judgment, Kelly J., as he then was, identified, at 352-3, certain principles recognised by Simon Brown L.J. in *Wallace Smith Trust Co. v. Deloitte* [1997] 1 W.L.R. 257, as also being of application in this jurisdiction, observing as follows:

"*In* Wallace Smith Trust Co. v. Deloitte *[1997] 1 W.L.R. 257, Simon Brown L. J. at p. 271 set out the basic principles governing the proper application of the equivalent English rule as follows:-*

'2. The burden lies on the party seeking inspection to show that that is necessary for the fair disposal of the action. I need not refer further to the question of 'saving costs', the other limb of r. 13(1), that not being relevant here.

3. *If no element of confidentiality (or, of course, public interest immunity - but that only becomes relevant on the cross-appeal) is asserted in the documents, routinely they will be produced for inspection without the need for a r. 13 hearing on the issue of necessity. As Lord Scarman said in* Air Canada v. Secretary of State for Trade *[1983] 2 A.C. 394 at p. 444:-*

> *'It may well be that, where there is no claim of confidentiality or public interest immunity or any objection on the ground of privilege, the courts follow a relaxed practice, allowing production on the basis of relevance. This is sensible bearing in mind the extended meaning given to relevance in* Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co. *(1882) 11 Q.B.D. 55.'*

4. *If, however, confidentiality is asserted or any other ground of objection arises, r. 13 assumes relevance and it becomes necessary to decide whether inspection is necessary for the fair disposal of the action. As Lord Scarman had earlier said in* Science Research Council v. Nassé *[1980] A.C. 1028 at p. 1089:-*

'The only complicating factor is the confidential nature of relevant documents in the possession of the

party from whom redress is sought. The production of some of these may be necessary for doing justice to the applicant's case. If production is necessary, they must be produced. The factor of confidence however militates against general orders for discovery and does impose upon the tribunal the duty of satisfying itself, by inspection if need be that justice requires disclosure.'

5. *Disclosure will be necessary if: (a) it will give 'litigious advantage' to the party seeking inspection* (Taylor v. Anderton *[1995] 1 W.L.R. 447 at p. 462 and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g. interrogatories) or from some other source (see* e.g. Dolling-Baker v. Merrett *[1990] 1 W.L.R. 1205 at p. 1214) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (see* e.g. Science Research Council v. Nassé *[1980] A.C. 1028 at p. 1076 per Lord Edmund-Davies).*

6. *If a* prima facie *case is made out for disclosure, then as several of the speeches in* Science Research Council v. Nassé *make plain, the court will first inspect the documents: (a) to ensure that inspection is indeed necessary (that very safeguard of itself making the court generally readier to accept that the threshold test for disclosure is satisfied) and (b) assuming it is, to see if the loss of confidentiality involved can be mitigated by: (i) blanking out parts of the documents, and/or (ii) limiting the disclosure to legal advisors only… Those basic principles I have sought to distil from all of the many authorities which were placed before us. Several passages in the various judgments are relevant; it would however be wearisome and, I think, ultimately unproductive to cite them …'*

I am of the opinion that these basic principles govern the proper application of the relevant rule in this jurisdiction."

83. As can be seen, Kelly J. adopts principles which indicate that if it comes to the stage of inspection one looks closely at necessity and, if necessary, blank out parts of documents and/or establish a confidentiality ring, and that is ultimately what Kelly J. did, writing at 357:

"I therefore make an order directing the bank to permit inspection by the first and second defendants of the 65 client files in an unredacted form. This will mean that the names, addresses and other details of the customers will become known but only to a limited number of persons. I propose (and indeed I am not asked to do otherwise) that the information should be made known only to the same persons as were permitted by Johnson J. Accordingly, the inspection may be carried out by:-

(1) the solicitors on record for the first and/or second defendants, their servants and/or agents;

(2) counsel retained by the first and/or second defendants;

(3) [certain in-house counsel of RTÉ]".

84. As can be seen, the confidentiality ring established by the court in Cooper Flynn embraced lawyers, both in-house and external.

3. *Koger Inc and anor v. O'Donnell and ors*

[2009] IEHC 385

85. *Koger* was a case in which there were allegations that the defendants, who were former employees of the plaintiffs, launched a software product on the back of confidential information to which they had access. In the discovery related of application that went before Kelly J., the issue of principle arising for adjudication, he said in the introductory paragraph, was "*whether an officer or officers of the plaintiffs ought to have access to material to be discovered by the defendants which contains what the defendants consider to be highly confidential information and where disclosure of it will, it is said, be highly damaging to them. The defendants contend that a successful defence of these proceedings will be a Pyrrhic victory if disclosure of the material is furnished to the plaintiffs."* When he turns to his legal analysis of the application before him, Kelly J. observes as follows:

"The general legal position which obtains in respect of disputes of this nature is summarised in Matthews & Malek on Disclosure (2007 ed.) under the heading "Exposure of the parties' trade secrets or other confidential information" as follows:-

'As with third party confidentiality, the fact that giving disclosure would involve the loss of the parties own trade secrets or confidences is no answer in itself. Indeed, since it is the parties and not even a third parties' confidence which is threatened, the position is a fortiori. But the court will more closely scrutinise disclosure sought, to ensure that it truly is material and not oppressive. Although disclosure will normally have to be given, protective limitations may be (and often are) introduced at the stage of inspection.'"

86. Kelly J. then proceeds to consider a number of cases where difficulties of the type presenting before him had previously been considered by the courts, before observing as follows:

"Thus far, all of the cases allowed disclosure albeit in a conditional form. There are cases on the other side of the line where it has been refused. One such case is Sport Universal v. ProZone Holdings Limited *[2003] EWHC 204. That was a decision of Mr. A. Mann, Q.C., sitting as a Deputy Judge of the Chancery Division in England. In that case it is alleged that the defendants, former employees of the plaintiff, had left the plaintiffs' employment and created their own rival software product which analysed players' performances at rugby. The plaintiffs alleged that they thereby infringed copyright in the plaintiffs' software product. It was said that the defendants 'Clint' product was superior to the plaintiffs' product. At the commencement of the proceedings the plaintiffs' representatives secured a delivery up of the defendants' source code on the undertaking that it would be shown only to the lawyers and the plaintiffs' expert. The code was analysed and particulars of similarity prepared. Permission was then sought to vary the undertaking so as to allow the technical director of the plaintiff to see the defendants' source code. The Judge declined to permit the plaintiffs' technical director access to the source code. He said:-*

'I start from the premise that although any bar on disclosure to a party is exceptional, this is a case in which there should be such a bar. The restrictions on disclosure were offered in an undertaking given by the claimant at the outset and it is only relatively recently that it is sought to be released from it. The claimant obviously accepts

that the defendants' source code is not material which should be freely available and disclosed to all the claimants' officers and to that extent the burden on the defendants of showing that there should be some restrictions and disclosure has in effect been automatically fulfilled. The claimant was prepared to continue with that non-disclosure regime for a significant number of months during which the action was conducted at the outset. In particular, for a period of, I think, over a year, it did not seek any release from the undertaking and was apparently content for the work of comparison of the two programmes to be carried out by its expert unassisted by Mr. Giorgi or any other employee or officer of the claimant seeing the source code himself or herself. It might have preferred a different regime, and I can quite see it might have been more convenient, but it did not press for one. I am, therefore, prepared to conclude that the source code is very sensitive information, and that there would be potential damage to the interest of the defendants if it is revealed to officers of the claimant, and that it is not absolutely necessary at this stage that the blanket restrictions on disclosure should be released, as least in terms of the proper analysis of the software.

However, that does not conclude the matter…the claimant has managed for a considerable time without the technical assistance of Mr. Giorgi and it is in the nature of this case that the claimant's case at trial will turn on the evidence of the expert and not Mr. Giorgi himself. I accept that it might be more convenient for Mr. Giorgi to assist the expert but I do not think it is necessary, even bearing in mind the proximity of the trial. As to the giving of instructions, I do not think that it is necessary at this stage for Mr. Giorgi, as opposed to perhaps a non-technical officer, to have access to the code. I do not see at present that that access is necessary.'"

87. The fate of Mr Giorgi is analogous to the issue presenting in the within proceedings as to whether Mr Peter Goode needs to have access to such documents as may be discovered. One of the curious features of this case is that Mr. Goode, who appears anxious to gain access to details in relation to the prices and costs and efficiencies of the defendants, has never adequately explained why he, as distinct from his expert, has to gain access to this information, and why (a) the expert cannot simply inform Goode Concrete's solicitor as to what the expert has found in terms of whether or not the prices at which specific contracts were tendered were below-cost at that time, and (b) why Goode Concrete's solicitors cannot then (i) get instructions from Goode Concrete on the basis of the expert's advices and conclusions, and (ii) proffer advice by reference to the expert's advices and conclusions. (If the expert considered it necessary to include in her report certain information that had not previously thereto been disclosed to Goode Concrete pursuant to such order as this Court may issue, the need for disclosure would presumably be the subject of application at that time).

88. Continuing on from the above-quoted text, Kelly J. writes as follows:

"*This case [Sport Universal] is perhaps the strongest from the defendants' point of view. The defendants did, however, call my attention to other decisions such as* Reynolds Leasing Corporation v. Carreras Rothmans Limited *(19th July, 1983) in which Falconer J., in dealing with a case concerning a patented invention for processing tobacco, restricted disclosure beyond the independent experts to the chief in-house patent counsel of the plaintiff and a member of a firm of United States patent attorneys representing the plaintiffs.*

Aldous J. in International Video Disk Corporation v. Nimbus Records Limited (No. 1) (*11th April, 1991), ordered disclosure which was confined to independent expert witnesses and two of the plaintiffs' patent counsel. The court noted that neither of them was involved in design or manufacture. Their sole task was in exploiting the plaintiffs' patent portfolio*.

In Communications Patent v. Cable Time*, the same judge on 22nd February, 1989, refused disclosure to a specialist patent agent working as a consultant for the plaintiff, noting that disclosure had already been made to lawyers, patent agents and experts. The court ordered disclosure to an employee of an associated company of the plaintiff who had responsibility for the conduct of the case but had limited technical knowledge and was not associated with the plaintiffs' research and development.*

CONCLUSIONS

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.

…

The case is a finely balanced one but I have come to the conclusion that the interests of justice require limited disclosure of the material in question. The very limited disclosure contemplated in the confidentiality agreement is not sufficient to permit of a fair trial. I propose, subject to hearing counsel, to make an order permitting disclosure to the plaintiffs' legal advisors (counsel and solicitor) and to a nominated officer of the plaintiffs under strict conditions.

These conditions will include:-

(i) An undertaking on oath from the nominated officer of the plaintiffs that the material disclosed will not be used for any purpose other than the conduct of this litigation.

(ii) That the documentation will at all times remain within the custody of the plaintiffs' solicitors who must give an undertaking to the court that they will not part company with such material or allow it to be copied in any way without the defendants consent or leave of the court. They must also undertake on oath that the material will not be used for any purpose other than the conduct of this litigation.

(iii) The access to be had by the named officer of the plaintiff to the material will have to be in the presence of the plaintiffs' solicitors.

(iv) That a record be kept of the material examined by that officer and the dates, times and duration of such examination.

(v) At the conclusion of the litigation, the material will be returned in its entirety to the defendants' solicitors."

89. The court notes the rigour of the restrictions imposed by Kelly J.

4. *Church of Scientology of California v. Department of Health and Social Security*

[1979] 1 WLR 723

90. In this case, the Church of Scientology had brought a number of libel actions against the Department of Health and Social Security and certain of its officers. The actions arose out of letters written to foreign health authorities and information given to the press concerning the activities of the plaintiffs and their treatment of mentally sick people. The defendants' list of documents referred to hospital notes and the medical records of people who were alleged to have been inexpertly treated by the plaintiffs and documents and letters from people containing information adverse to the plaintiffs. The defendants objected to the disclosure of these documents on the ground of confidentiality. The master made an order excusing inspection of the letters and documents unless (i) the plaintiffs' solicitor undertook that they would not be shown or their contents revealed to anyone but the plaintiffs' counsel and (ii) the plaintiffs undertook not to use the documents for any purpose other than the conduct of the action. In respect of the medical reports inspection was limited to a registered medical practitioner, appointed by the plaintiffs for the purpose of the actions, who had undertaken in writing not to disclose the contents thereof. The judge, on appeal, affirmed the master's order on the ground that public interest required the preservation of privacy and the protection of that confidential information. The Church appealed.

91. On the question whether the court had jurisdiction to restrict disclosure of documents which were not privileged and were required to be disclosed as being necessary for disposing fairly of the cause or matter, the Court of Appeal held that:

> (1) although a party to an action had *prima facie* an unrestricted right to inspect the other party's documents, that right was only for the purposes of the action, and, where there was a real risk of a party using matters disclosed on inspection for a collateral purpose, the court could restrict inspection under its inherent jurisdiction to prevent an abuse of the process of the court;
>
> (2) the court would place restrictions on the plaintiffs to control the manner in which the documents were disclosed to persons acting on their behalf; however, since the terms of the master's order were too restrictive, the court resolved to substitute an order in the terms agreed between the parties.

92. There are a number of passages in the judgment of Stephenson L.J., at 733-5 and 741-3, that the court has found of assistance when it comes to the issue of whether or not, and on what terms, to establish a confidentiality ring in the context of such discovery as falls to be ordered in the within proceedings, *viz*:

> *"The object of mutual discovery is to give each party before trial all documentary material of the other party so that he can consider its effect on his own case and his opponent's case, and decide how to carry on his proceedings or whether to carry them on at all. The sight of one document may lead a plaintiff to abandon his action or a defendant to throw up his defence, or it may lead a party's legal advisers to advise one of those courses but may not deter the client from pursuing his action or his defence against their advice.*
>
> *Another object is to enable each party to put before the court all relevant documentary evidence, and it may be oral evidence indicated by documents, so that justice can be done. This object is achieved by each party inspecting all documents disclosed if it wants to. Unless a party is in person, production would ordinarily be by a solicitor to a solicitor. Solicitors are a convenient receptacle or screen…for the other side's documents. Some documents' effect on litigation is better judged by legal advisers than by the parties themselves or their agents. Some documents are better valued or appreciated by experts, e.g. an accountant or an architect or a doctor. Some documents are better not seen by an individual plaintiff or a defendant, for example in infant cases. In some cases (like this) the party is a body corporate and inspection must be by the eyes of servants or agents.*
>
> *Can then an individual litigant insist that he or she sees what his or her legal advisers see? Can a litigating company insist on some servant or agent seeing what its legal advisers see? The answer, I think, must be normally yes. If a party objects to the other party inspecting except by an agent can the other party insist on personal inspection, if the party is an individual, or inspection by any particular officer or officers, or servant or agent, if the party is a corporation? Or has the court the power under the rules, or outside them by inherent jurisdiction, to deny inspection to a party and restrict it to an appropriate servant or agent approved by the court, or by the other side, or by both, for instance to its solicitors and to them only, or to its medical advisers and to them only, where (as here) the party is a body corporate?*
>
> *The authorities seem to me to show that one party can object to a particular agent appointed by the other party to inspect, and the court will uphold the objection and restrict inspection to an agent considered suitable, appropriate or approved. They also show that one party can object to the other party, whether an individual or a corporation, inspecting, and the court will uphold such objection and control disclosure in the interests of justice and fairness to both parties, and will restrict inspection to an approved agent on his undertaking not to disclose the inspected document or its contents to others, including his own principal, the party concerned himself or itself. This is established in the case of trade secrets and in the case of press informants on the authorities which I have already cited.*
>
> …
>
> [I]*n* McIvor v. Southern Health and Social Services Board *[1978] 1 W.L.R. 757. Lord Scarman, at p. 763, agreed with Lowry C.J*. [in his judgment in the Court of Appeal in Northern Ireland] *when he said*:
>
> > *'If Parliament had wished to enact provisions for discovery, limited in the ordinary case to medical advisers, it could have done so, instead of using language importing conventional discovery. It could still enact such provisions, but not, I hope, before very careful deliberation.'*
>
> *Lord Russell of Killowen, at p. 762, approved this statement by Lowry C.J.:*
>
> > *'The High Court has an inherent jurisdiction to attach conditions to most orders in the interests of justice, but I do not think that it has any jurisdiction to order disclosure to the applicant on condition that disclosure is not made to the applicant (or to his legal advisers).'*

It is I think implicit in those speeches and those quotations that conventional discovery is regarded as ordering production for inspection by a party or his legal advisers, but the question never arose in that case whether there could be production for inspection by the legal adviser but not by the party himself. The only issue was between an order for production for inspection by the party or his legal adviser on the one side and an inspection by a medical adviser on the other side. So I get no help from that case in deciding this point, although it does, I think, emphasise what is perhaps obvious that in the ordinary course inspection must be inspection by the party himself, herself or itself.

What the court is being asked to do, Mr. Hytner [counsel for the Church of Scientology] *submits, is contrary to* [the applicable rule of court]…*as no privilege is claimed. I am of opinion that, as no privilege is claimed, the court can only act contrary to the rule if compliance with the rule is unnecessary for fairly disposing of the action or if the court has inherent jurisdiction to act contrary to the rule.*

Mr. Bowsher [counsel for the defendants] *has not submitted that compliance is not necessary for the purpose of disposing fairly of the action or of saving costs, and I doubt if such a submission could be made with success. I am of opinion that Mr. Bowsher is, however, right in submitting that the court has inherent jurisdiction to prevent the abuse of its own process, or, as it is sometimes termed, 'process of law', and that that jurisdiction gives it the power which was taken by the master and by the judge in this case.*

The court has always, in my judgment, inherent jurisdiction to prevent abuse of that process, and indeed must take steps to prevent it of its own motion, as where illegality is brought to its attention. Discovery, including production of documents for inspection, is part of its process to enable an action to be carried to a just conclusion. As Lord Denning M.R. said in Riddick v. Thames Board Mills Ltd. *[1977] Q.B. 881, 896G: 'A party who seeks discovery of documents gets it on condition that he will make use of them only for the purposes of that action, and no other purpose.' To use a document produced for inspection for a collateral or ulterior purpose is a misuse against which the court will proceed for contempt or by injunction: see* Alterskye v. Scott *[1948] 1 All E. R. 469. But that proceeding may be after the abuse has taken place. The court has power to prevent or reduce the chance of such an abuse taking place by an undertaking. As it seems to me, it can do it in two ways, it can do it either by refusing an order except on an undertaking or it can do it by granting an order conditional on an undertaking being given. Which way it does it does not seem to me to matter, and seems to me a question of form rather than substance, with all respect to Mr. Hytner's argument.*

Furthermore, I do not think it matters in most cases whether the object of preventing an abuse of process is achieved or attempted to be achieved by restricting inspection to a person other than the party or only by refusing to order any inspection unless the party undertakes not to misuse the material. In most cases, an undertaking is unnecessary because it is implied, as pointed out in Alterskye's *case where an undertaking was refused. In the remainder, an undertaking by the party himself or by his counsel or solicitor may be enough; but it seems to me that there is a very small hard core of cases where the undertaking is not enough and where the court may come to the conclusion that the party cannot be trusted not to misuse the information and so abuse the process of discovery. That is really what Mr. Bowsher is maintaining in this case in support of the order under appeal; and in the form in which it is made, particularly that which relates to the hospital notes and medical reports, it seems to me that the order must be justified on that basis, or it must be revoked or modified.*

…

I hope I have now covered…all the matters which…I think have to be considered in arriving at the right order to make in this case. (1) I am satisfied that the court has inherent jurisdiction to do what it can to restrain a threatened or likely or foreseeable abuse of the process of the court by misusing the documents which are the subject of the order under appeal for a purpose other than the purposes of this action, and to do that by controlling or restricting production for inspection of documents for which privilege has not been claimed. (2) I am satisfied that on the material which we have in this case some sort of restriction ought to be imposed in the exercise of that jurisdiction. (3) I am of opinion that the restrictions which were imposed, particularly the restriction to a medical officer of the hospital notes and the medical reports, were wrong.

Faced with the possibility of the court taking that view, Mr. Hytner is prepared to submit to an order setting out certain restrictions with which Mr. Bowsher is satisfied. That absolves the court, as I see it, from upholding the master's order or from devising an order of its own if, as I think right, it can and should make an order restricting discovery in some way.

The order which I propose we should make is this: That the appeal should be allowed and for the order made by the master and affirmed by the judge, should be substituted this order:

> *'Upon the plaintiffs by their counsel expressly undertaking that upon inspection Mr. Bird, their solicitor only will attend and take one copy of each of the documents referred to in this order (hereinafter called the restricted documents) and that Mr. Bird shall keep the same confidential to himself and leading and junior counsel save in so far as he be advised in writing to the contrary by counsel. And upon the plaintiffs by their counsel undertaking that Mr. Bird will show a copy of this order to every person who is to be supplied with a copy of a restricted document or supplied with information therefrom before the supply of such copy or information with a warning that the document or information is not to be used for any purpose other than a purpose connected with this action. And upon the plaintiffs by their counsel expressly waiving legal or professional privilege in respect of any such written advice relevant to any issue that may be before the court in this consolidated action (whether raised in committal or sequestration proceedings or otherwise) as to whether they have acted wholly or partly in accordance with or contrary to such advice and undertaking to instruct any counsel who may be instructed to give such advice to keep a copy thereof and to be at liberty, in the event of any such issue arising and his being called upon by the court so to do, to lodge such copy with the court, and further to instruct him to be at liberty, should he entertain any reasonable apprehension that the plaintiffs are acting or may act otherwise than in accordance with any such advice, and should he see fit to inform counsel for the defendants of such apprehension and/or to furnish counsel for the defendants with a copy of the advice upon which such apprehension arises.*

Order, that the defendants do allow Mr. Bird, the plaintiffs' solicitor personally to inspect the documents referred to in sub-paragraphs (3) and (4) of paragraph 3 of the master's order of May 11, 1977.

Order, that the plaintiffs do make and serve a further and better list of documents verified by affidavit of the plaintiffs by their proper officer within 21 days.

Order, that the defendants be not bound to give inspection of the restricted documents except upon mutual discovery of documents generally after the service of the said further and better list of documents and the final determination of any application arising therefrom. To that I would add, after discussion with counsel.

Order, that the defendants do make and serve a further and better list of documents verified by affidavit of the defendants by the defendant Cashman within three months.

Order, that all future interlocutory applications be made to a judge who shall so far as practicable retain such matters to himself.'"

5. *MTV Europe (a firm) v. BMG Records (UK) Ltd and ors*

(Unreported, Court of Appeal of England and Wales, 10th March, 1998)

93. This was a case where the Court of Appeal considered an application to 'tighten' a confidentiality ring. It declined to do that, but it did uphold the idea of providing a schedule of prices. Certain observations of Sir John Balcombe have a particular resonance in the context of the within proceedings, *viz*:

"Very extensive discovery was requested by the defendants….The Vice-Chancellor…accepted that discovery along the lines sought by the defendants was unnecessary and unduly burdensome. He therefore ordered that in relation to most of the category of documents sought by the defendants, MTV should have the option to respond by serving schedules of figures and particulars rather than the underlying documents which evidence and support those figures and particulars.

[Court Note: The analogy in the within proceedings would be schedules of prices/costs.]

…

Categories 4 and 5 bear an asterisk, they being categories of the type where schedules can be supplied instead of documents.

…

The second issue on the appeal is, even assuming the documents are relevant, there is a discretion in the court whether or not to order disclosure. That is accepted. It is argued by MTV that one of the factors to be taken into account in the exercise of that discretion is the obligation which rest on national courts under Art 5 of the EEC Treaty to enforce Community competition rules contained in Arts 85 and 86 of the Treaty.

[Sir John then goes on to say that is it is common ground that there is such on obligation.]

…

Exactly the same applies to the third issue on the appeal. In order to understand this issue I must refer once more, and I hope for the last time, to the judgment….

'Counsel on behalf of MTV have submitted that the Confidentiality Club terms agreed as suitable for disclosure to MTVE as defendants' documents are not appropriate for MTVE's confidential documents and information. This applies particularly…to details of MTV's profitability, whether obtained via discovered documents or in statistical terms, and to licensing agreements with other licensors. I agree that these are highly confidentiality matters and appropriate 'Confidentiality Club' terms need to be designed.'"

94. Terms were suggested and a form of same approved by the Court.

6. *Ipcom GmbH & Co KG v. HTC Europe Co Ltd and ors*

[2013] EWHC 52 (Pat)

95. Ipcom affords an example from the patent law field of a case in which access to documents, upon disclosure, was restricted by Floyd J., as he then was, to external counsel. Decided in 2013, it is of interest both because it contains a useful analysis of then applicable authority in England and Wales and, under the heading "*Striking the Balance*" shows the type of factors that Floyd J. brought to bear in reaching his ultimate conclusions, including a notable willingness to accept the ability of external counsel to put matters from his mind in a way that internal management could not be expected to do. The extracts that follow are from paras.15-21 and 31-32 of the judgment:

"Principles applicable

[15] As Lord Dyson JSC said in Al Rawi v Security Service…[*2012] 1 AC 531 at [12]:*

> *'… trials are conducted on the basis of the principle of natural justice. There are a number of strands to this. A party has a right to know the case against him and evidence on which it is based. He is entitled to have the opportunity to respond to any such evidence and to any submissions made by the other side. The other side may not advance contentions or adduce evidence of which he is kept in ignorance.'*

[16] As Lord Dyson recognised at 64 there was a recognised exception to this rule:

'Similarly, where the whole object of the proceedings is to protect a commercial interest, full disclosure may not be possible if it would render the proceedings futile. This problem occurs in intellectual property proceedings. It is commonplace to deal with the issue of disclosure by establishing 'confidentiality rings' of persons who may see certain confidential material which is withheld from one or more of the parties to the litigation at least in its initial stages. Such claims by their very nature raise special problems which require exceptional solutions. I am not aware of a case in which a court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party.'

[17] The practice in intellectual property cases has been to tailor the confidentiality club or ring to meet the circumstances of the case and the stage which it has reached. In Warner-Lambert Co v Glaxo Laboratories Ltd *[1975] RPC 354 , Buckley LJ described the rationale in this way:*

'If, however, the case were one of so esoterically technical a character that even with the help of his expert advisers the party himself could really form no view of his own upon the matter in question but would be bound to act merely upon advice on the technical aspects, disclosure to him of the facts underlining the advice might serve little or no useful purpose. In such a case a court might well be justified in directing disclosure of allegedly secret material only to expert or professional agents of the party seeking discovery on terms they should not, without further order, pass on any information so obtained to the party himself or anyone else, but should merely advise him in the light of the information so obtained. Even so, if the action were to go to trial, it would seem that sooner or later the party would be bound to learn the facts, unintelligible though they might be to him, unless the very exceptional course were taken of excluding him from part of the hearing. Even where the information is of a kind the significance of which the party would himself be able to understand, it may nevertheless be just to exclude him, at any rate during the interlocutory stages of the action, from knowing it if he is a trade competitor of his opponent.'

[18] From this passage it is clear that the degree to which the party might be able to understand the document is a factor in setting the scope of inspection, as is the stage which an action has reached.

[19] In Roussel Uclaf v Imperial Chemical Industries plc *[1990] RPC 45, Aldous J said at first instance:*

'Each case has to be decided on its own facts and the broad principle must be that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as will be consistent with adequate protection of the secret. In so doing, the court will be careful not to expose a party to any unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered. However, it would be exceptional to prevent a party from access to information which would play a substantial part in the case as such would mean that the party would be unable to hear a substantial part of the case, would be unable to understand the reasons for the advice given to him and, in some cases, the reasons for the judgment. Thus what disclosure is necessary entails not only practical matters arising in the conduct of the case but also the general position that a party should know the case he has to meet, should hear matters given in evidence and understand the reasons for the judgment.'

[20] It is clear from this passage that the role which the document will play in the case is a factor which must be weighed in the balancing exercise in setting the terms of the confidentiality regime at any given point in the case.

[21] The court does not normally operate on the basis that a party will wilfully misuse information disclosed to it. But it is recognised that disclosure of information to a party who is or may become involved in collateral commercial activities may place that party in a difficult position where there was a risk of use or disclosure: see the discussion in Roussel Uclaf *supra at page 51. In that case the court took steps to ensure that the individual involved was not involved in corresponding litigation where there was no disclosure process.*

…

Striking the balance

[31] In striking the balance I have taken the following into consideration:

i) The material at issue is confidential. However its potential for use to the detriment of HTC and Nokia is not at the high end of the scale represented by secret process cases….Nevertheless, the court should not facilitate the granting of a competitive advantage to IPCom, and accordingly inflict a competitive disadvantage on HTC, Nokia and the interested parties, unless justice requires it to take such a course.

ii) It is not at the moment clear what part if any the documents which have been disclosed by Nokia and HTC will play in the proceedings. The exercise which I foresaw in the judgment I gave on the disclosure application has not yet taken place. The documents have not yet gone even to IPCom's UK lawyers let alone its external licensing and economics experts. It is entirely possible that they will reject them as not comparable, or alternatively come to the view that they are of remote or background relevance only.

iii) The litigation is still at the interim stage. Nevertheless points of a very broad brush nature have been made in the pleadings about the relevance or lack of it of Nokia's and HTC's licences, a matter on which IPCom have the right to respond.

[32] I have come to the conclusion that it would not be right to allow inspection at this stage by Mr Frohwitter or Mr Schoeller, but that it is right for Dr Sedlmaier to be allowed inspection. My reasons are:

i) The case is still at the interim stage. It is still not clear what part if any the documents will play in the case. There is no guarantee it will go to trial, as the negotiations between IPCom and Nokia show. To allow inspection by the key commercial people within IPCom could inflict wholly unnecessary harm on HTC, Nokia and the interested parties.

ii) The fact that the order may affect the interests of third parties is of importance….

iii) The confidential information, once given to Messrs Frohwitter and Schoeller cannot be unlearned by them. Whilst not inevitable, there is a real risk that it will prove of value in licensing IPCom's portfolio, and they will not in practical reality be able to avoid its use.

iv) Mr Kahlenberg is in a very similar position on the evidence to Messrs Frohwitter and Schoeller. I do not regard the compromise position as significantly different from disclosure to the internal management team.

v) Dr Sedlmaier, on the other hand is an external lawyer bound by a professional code of conduct. I accept that he is, as the evidence shows, extremely close to IPCom, and has been involved in commercial negotiations. Whilst that fact is relied on by HTC, Nokia and the interested parties to make a case for his exclusion, it shows also that, if he is included, the prejudice to IPCom is significantly mitigated. To the extent that he is involved in future negotiations he will have to shut out from his mind anything learned from the confidential documents.

vi) I do not accept that it is necessary in order to do justice, at this stage at least, for the individuals within IPCom's internal management team to conduct the free-ranging review of the disclosure documents which Mr Boon refers to in his evidence."

7. *The United Kingdom's Competition Appeal Tribunal Rules 2015*

(S.I. No. 1648 of 2015)

96. Of interest when it comes to establishing 'confidentiality rings' in the competition law context are the above-cited Rules from the United Kingdom, in the "*Case Management*" segment of which, r.19 ("*Directions*") provides as follows:

"19.–(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.

(2) The Tribunal may give directions –

…(k) for the creation of a confidentiality ring".

97. So there, in secondary legislation, one finds recognition of the importance of confidentiality rings, and here the need to establish such a ring finds justification, *inter alia*, in fact that, when it comes to Roadstone, its biggest and most vigorous competitor is Kilsaran (and *vice versa*), and neither wishes for its confidential information, e.g. in terms of customers, terms and conditions of supply, pricing, etc., to find its way into the hands of Kilsaran or indeed into the hands of Goode Concrete, which is likewise viewed by each of them as a competitor.

8. *Bellamy & Child's European Community Law of Competition (6th ed.)*

98. Finally, the court notes the following observations of the learned editors of Bellamy on Child under the heading "*Limitations on disclosure*", at 1475:

"[A]*pplications for disclosure amounting to 'fishing expeditions' will not be ordered. Disclosure in cases involving Articles 81 and 82 potentially involves a very wide range of documents. In* MTV Europe v. BMG Records [(UK) Ltd (No. 2), *judgment of 10 March 1998], the Court of Appeal upheld a decision that a very extensive request for discovery by the defendants was unduly burdensome and that the plaintiff should be permitted to serve schedules of figures rather than the underlying documents which evidenced those figures.*

…

[A]*lthough there is no rule protecting business secrets from disclosure, the commercial confidentiality of the information may influence the court in exercising its discretion as to the scope of disclosure to be ordered. If disclosure is ordered, the Court may restrict inspection of the documents to a confidentiality ring of external legal advisors, experts and, where necessary, named individuals in the parties."*

(vi) *Jurisdiction and rationale for confidentiality rings*.

99. What the foregoing case-law as to confidentiality and confidentiality rings demonstrates, *inter alia*, is that there is an inherent jurisdiction on the part of the court to order a confidentiality ring, should it consider that to be appropriate. One important factor for the court to consider in this regard, so at least it seems to this Court, is that these are competition law proceedings and in such proceedings confidentiality rings are increasingly becoming standard practice in the neighbouring jurisdiction because of the increased costs of discovery and the manner in which discovery in such proceedings is prone to being used as a commercial weapon. This Court cannot encourage a situation where defendants say to themselves: 'I'm going to have to let this trial run on, because to make a concession which could potentially end this litigation (by showing that there is nothing untoward in my costing/prices), I could put my entire business at risk'. That would yield the unfair and undesirable situation in which a plaintiff would walk away from such 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). This reality is reflected in the Damages Directive which, though not applicable in the context of the within proceedings, is nonetheless instructive, and recital 18 of which, mentioned previously above, providing, it will be recalled, as follows:

"While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation."

X. Confidentiality and Commercial Sensitivity

(i) *Certain Issues Presenting.*

100. Among the motion papers concerning Goode Concrete's motion seeking discovery from the first and second-named defendants is an affidavit of Mr McMahon, a solicitor acting for Goode Concrete, which exhibits an abundance of correspondence between the parties, too long to quote in the within judgment, concerning the discovery sought by Goode Concrete and the first and second-named defendant's concerns as to the breadth of discovery sought, the issue of commercial sensitivity, and the perceived desirability that any disclosure should be restricted to Goode Concrete's legal advisors and identified experts (with any disclosure to which the first and second-named defendants agree being agreed to on the basis that such a restriction will pertain). So, for example, the first and second-named defendants make clear that the information to be discovered includes, *inter alia*, detail as to costs, average variable costs, prices agreed with individual customers, and the margins of Roadstone and its customers – details the disclosure of which would (and the court accepts that it could) cause significant damage to the relationship between the first and second-named defendants and their customers. Just to give one example, if Customer A were ever to see that Customer B was getting a better commercial deal than Customer A, that would give rise to friction that should not be visited upon the first and second-named defendants when no wrongdoing has been established against them thus far. The documentation to be discovered would also, as was touched upon previously above, include personal information in relation to employees, including wage details and like matters.

101. Mr Lenny, a solicitor acting for the first and second-named defendants has sworn an affidavit that touches helpfully and at some length on the confidentiality and commercial sensitivity of the documentation of which discovery is sought, averring, *inter alia*, as follows:

"42. I beg to refer to paragraph 13 of Mr McMahon's affidavit, where he states that the First and Second Defendants have argued that any documents discovered should be disclosed only to a confidentiality ring, made up of lawyers and experts. Mr McMahon states that the Plaintiff rejects this argument on the basis that the information sought is historic and 'cannot be considered to be competitively sensitive'. No attempt is made, however, to engage with the detailed explanations provided by the First and Second Defendants in the correspondence exchanged in relation to the commercial sensitivity of the documents requested. For the reasons set out below, I say and believe that the information sought is not 'historic' and continues to be highly commercially sensitive.

43. At paragraph 13 of his affidavit, Mr McMahon further contends that it is essential that personnel from the Plaintiff are able to review the discovered material so that they can properly instruct their legal team. No explanation is provided as to why, if the documents are furnished to the expert witnesses instructed by the Plaintiff, they would not be in a position to review them and provide any instructions required to the Plaintiff's legal team.

44. As set out in the correspondence exchanged in relation to the Plaintiff's request for voluntary discovery, a considerable portion of the documentation sought is highly commercially sensitive and its disclosure would significantly harm the legitimate business interests of the First and Second Defendants.

45. The information in question includes information in relation to the AVC of the Second Defendant, the margins earned by the First and Second Defendant on individual projects, and the discounts and rebates agreed by the First and Second Defendants with individual customers. The disclosure of this information to competitors of the Second Defendant would give them an unfair advantage over the Second Defendant. In addition, the disclosure of this information to customers of the Second Defendant would potentially cause significant damage to the relationship the Second Defendant has built up with its customers. The information the Plaintiff is seeking would also include highly sensitive personal data relating to the Defendants' employees, such as wage costs.

46. Third party confidentiality issues also arise, insofar as the documentation requested would disclose the price at which the First and Second Defendants supplies concrete products to identified third parties. The contractors to whom concrete products were supplied will themselves have tendered for the particular project in question, and will almost certainly have earned a margin on the products supplied to them by the Second Defendant in the projects to which the tenders relate. If information is disclosed in relation to the price at which the Second Defendant supplied concrete products, therefore, this will effectively result in a situation where the margins earned by customers of the First and Second Defendant are also disclosed.

47. It is the First and Second Defendants' position, therefore, that the disclosure of any commercially sensitive documents discovered by the Second Defendant in the context of any of these proceedings should be restricted to the Plaintiff's legal advisers, and identified experts retained by the Plaintiff for the purpose of these proceedings, and that those parties should not be permitted to disclose the documents to any other party or parties, including representatives of the Plaintiff. The First and Second Defendants further require that those persons to whom the documents are to be disclosed execute an agreed form of undertaking and are not permitted to disclose the documents to any other party or parties, including any representatives of the Plaintiff.

48. Having regard to the Plaintiff's request for discovery, the categories in respect of which the First and Second Defendants intend to seek an order for limited disclosure in these terms, in the event of discovery being ordered, are the following: categories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

49. In relation to categories 1-4, the information sought in relation to the cement and ready-mix concrete markets, the market share of the First and Second Defendants, and the competition faced by the First and Second Defendants in these markets, is commercially sensitive. I say and believe and am advised that the disclosure of this information could cause significant damage to the Second Defendant's legitimate business interests.

50. Category 5 relates to the Second Defendant's AVC. In order to determine the Second Defendant's AVC at a particular point in time, it would be necessary to review the Second Defendant's books and records. These documents contain information in relation to the Second Defendant's accounts, details of the margin earned by the Second Defendant on particular projects, and details of the specific arrangements the Second Defendant has with each of its customers for discounts and rebates. As such, these documents are highly commercially sensitive and their disclosure to competitors and customers of the Second Defendant would cause significant damage to the Second Defendant's business and would be contrary to competition law. For this and other reasons, it is the First and Second Defendants' position that the request for discovery of these documents is oppressive, and that the discovery of these documents is not necessary for the fair disposal of the proceedings. In the event, however, that discovery of any of the documents sought in category 5 is ordered, it is the First and Second Defendants' position that these documents should only be disclosed subject to the terms set out above by reason of the manifest commercial sensitivity of the documents.

51. In respect of category 6, which relates to the price at which the Defendant tendered, offered to supply and supplied ready-mix concrete products, the commercial sensitivity of the documentation requested is, again, manifest. The information sought in relation to the prices at which concrete products were offered or supplied by the Second Defendant to individual customers is commercially sensitive and its disclosure would cause the First and Second Defendants significant prejudice. This information also gives rise to third party confidentiality concerns, given that its disclosure would effectively disclose the margin earned by customers of the Second Defendant on concrete products supplied by the second Defendant in respect of the projects to which the tenders relate. It is the First and Second Defendants' position, therefore, that any documents discovered in response to this category should be subject to the restrictions identified above.

52. In relation to categories 7 and 8, the information sought by the Plaintiff is also manifestly commercially sensitive given the nature of the request made.

53. Similar concerns also arise in relation to categories 10 and 11 which will involve providing commercially sensitive information concerning the pricing of supply of cement from the First Defendant to both the Second Defendant and the Third Defendant. The disclosure of such information to competitors in the marketplace would be extremely damaging to the First Defendant and would have a detrimental impact on competition in the marketplace.

54. The information requested in relation to category 12 is also manifestly commercially sensitive as it involves communications with customers of the Second Defendant and the disclosure of such commercially sensitive information would damage the Second Defendant's relationship with those customers.

55. It is not the case, as suggested…by the Plaintiff, that the information is not commercially sensitive because it is 'historic'. The construction sector in Ireland is a geographically small marketplace and, as such, the impact of the release of any commercially sensitive information can be expected to have a more profound impact than in other markets. Ireland has been characterised as a relatively low (or no) inflation economy since the collapse of the construction market. As a result, costs and prices from the period in respect of which discovery is sought remain relevant to today's market place.

56. Suppliers negotiating prices with the Second Defendant would be given a commercial advantage by knowing what prices other suppliers charge, which in turn may damage the Second Defendant's commercial interest. Similarly, on the sales side, competitors and customers of the Second Defendant would be given a commercial advantage, both directly and indirectly, if they discovered the prices charged by the Second Defendant to individual customers. Competitors could use the sales price and volume information discovered to determine the Second Defendant's pricing strategy across different markets – using variable cost information, they can then reassess their own pricing points.

57. Discovery will also disclose the material flows within the Second Defendant which, again, are likely to be still in place. Details of haulage arrangements and haulage rates etc. again have not altered materially in the intervening years.

58. Essentially, the disclosure of the documents requested would allow competitors to better understand the Second Defendant's commercial strategy, pricing structure, and cost base. I am instructed by the Second Defendant that this would be very damaging."

102. In his replying affidavit, Mr McMahon does not deal with the point that Mr Lenny makes that it should be sufficient for an expert to review the document of which discovery is sought and report upon same to Goode Concrete's solicitors, with the solicitors also being able to access the documents, but without any necessity for Goode Concrete itself to have access to the underlying documents. Nor does Mr Peter Goode, in his affidavit evidence, engage with Mr Lenny's point except to say that he has "*no difficulty in providing whatever undertaking the Court may require…to ensure that information is not passed to third parties or used for a purpose outside the proceedings."* Unfortunately, for the reasons set out hereafter, no reliance can properly be placed by the court, in the context of the within proceedings, on any such undertakings or, as a consequence of the facts described in the next section, on the implied undertaking on discovery as to the use to which discovered information may be put.

(ii) *Ongoing Business*.

103. Mr Goode avers in his affidavit evidence that "[T]*he Plaintiff would be at a serious disadvantage if personnel from Goode Concrete, including myself, were not able to review information produced on discovery."* Likewise, Mr McMahon, in his affidavit evidence, avers as follows:

> "[T]*he Plaintiff does not accept that the documents to be discovered should be subject to a confidentiality ring. Not only is the information sought historic but the fact is that Goode Concrete is now out of the market so it is difficult to see how, even if the information were current, it could have some kind of impact in the marketplace….The Plaintiff and its legal team would be at a very considerable disadvantage if personnel of the Plaintiff, in particular its MD, Peter Goode, are not permitted to review the material and provide instructions in respect of same."*

104. Unanswered in the foregoing is who these unidentified personnel are. Unclear in the foregoing is whether Goode Concrete has ceased to trade, at least in some guise. And unacknowledged in the foregoing is the fact that even if there has been a cessation of trade, Mr Peter Goode (and wider members of the Goode family experienced in the concrete sector) are at liberty to re-enter the relevant market at any stage or to act as consultants to persons who are participating in same. Clearly in that context it would be advantageous to have access to the costs, prices, margins, *etc*. of Roadstone. And there is, unfortunately, some real doubt as to the *bona fides* of Goode Concrete when it comes to the submission at hearing (a submission made on instructions; no criticism is made by

the court of any of the lawyers for Goode Concrete) that that company has exited the market altogether. In this respect, in an affidavit filed with the court in the course of the hearing of the within applications, Mr Lenny avers as follows:

> *"I make this affidavit in order to place certain information before this Honourable Court in response to the submission, made repeatedly by counsel for the Plaintiff that there is no concern in relation to the disclosure of confidential and highly sensitive documentation to the Plaintiff because 'Goode Concrete is out of the market'….The Plaintiff contends that this information could not be of any use to Mr Peter Goode, the principal of the Plaintiff, because he is 'out of the market'.* [The court notes the conflation of Mr Peter Goode with Goode Concrete in the foregoing.]. *Counsel for the Plaintiff further stated…that:*
>
> > *'Goode Concrete is no longer a competitor, it's out of business and has been since early 2011. There is no other competitor involved in the proceedings.'*
>
> *…It has been contended by counsel for the Plaintiff repeatedly that, because the Plaintiff is not a competitor of the Defendants, the only concern which can arise in relation to confidentiality relates to the potential of disclosure of this information to the marketplace by Mr Goode or the disclosure of this information at the hearing of this action. It has been suggested that the potential disclosure of the information on the marketplace can be addressed by the provision of a suitable undertaking by Mr Goode….*
>
> *I say and believe that the assertion that Goode Concrete is no longer a competitor of the Second Defendant is incorrect. In the course of the hearing, I carried out a Google search against 'Goode Concrete'. This search generated a number of results, one of which was a link to the website 'GoodeConcreteGroup.ie'….*
>
> *On clicking this link I was directed to the website of Eircem Limited, 'Independent Cement Suppliers'. However, the logo on the website is that of 'Goode Concrete Products' and the homepage of the website includes a picture of a fleet of 'Goode Concrete' trucks. I beg to refer to a printout of the contents of the website….Under the sub-heading 'About Goode Concrete', the website states that:*
>
> > *'Goode Concrete is a long established firm which commenced trading over 50 years ago.*
> >
> > *With bases in Dublin and Kildare we are ideally suited to service the needs of the construction industry throughout Leinster for readymix concrete and nationwide for cement and bagged aggregates.*
> >
> > *Having made a multimillion euro investment in the very latest in technology and plant, we are in a position to offer the ultimate in service and quality….*
> >
> > *I was most surprised by the contents of this website, given the averments that Mr McMahon in his second sworn* [affidavit] *in support of this motion…which states at paragraph 15: 'Not only is information sought historic but the fact is that Goode Concrete is now out of the market so it is difficult to see how, even if the information were current, it could have some kind of impact on the marketplace.'*
>
> *…In order to identify the person or persons behind Eircem Limited, I caused a search to be carried out in the Companies Registration Office (CRO). I beg to refer to a printout of the information returned by this CRO search….The CRO printout records that Eircem Limited was incorporated on 27th March 2012 and its principal activity is described as 'other mining and quarrying'. Peter Goode is a director of the company and Tom Goode is the company secretary. Tom Goode was also a director of the company until 1st July 2015, when he resigned as director."*

105. No convincing explanation has been offered for the foregoing. It appears that Eircem Limited, a company of which Mr Peter Goode is a director, is presently out in the market using the 'Goode Concrete' name and trading off the experience and perhaps even the goodwill attaching to same. At least two conclusions fall to be drawn from the foregoing, neither of them advantageous to Goode Concrete:

> (1) the fact that Eircem Limited is out in the market trading off Goode Concrete's name and experience, and perhaps even the goodwill arising from same, points to the legitimacy and reasonableness of the concerns raised by the defendants as to the extent and substance of the documentation which Goode Concrete has sought by way of discovery, and to the potential for same to be disclosed to, and used by, the director of a commercial rival, and perhaps even that rival itself;
>
> (2) that Mr Goode would be satisfied that the lawyers for Goode Concrete (of whom, again, the court makes no criticism) were not placed in the position that the more fulsome picture of matters now known to the court could be brought to its attention by them, and had instead to be drawn to the court's attention by the lawyers acting for the first and second-named defendants, has the unhappy result for Goode Concrete that the court is driven of necessity to the regretful conclusion that it does not consider Mr Peter Goode to be an individual on whom the court could, in the context of the within proceedings, reasonably rely when it comes to undertakings as to the use to be put to that documentation of which discovery is now sought by Goode Concrete.

106. The following related points might also be made:

> (3) the primary undertaking in these matters is always an undertaking by the plaintiff, but here, of course, the plaintiff in this case is an insolvent shell company, so there is little or no faith to be placed in any commitment that might be made on its behalf;
>
> (4) insofar as an affidavit from Mr Goode is concerned, at least two further difficulties arise additional to those touched upon above: (i) it is of no practical relevance because the first and second-named defendants have no way of policing whether or not that information would be used for commercial advantage; (ii) there is nothing to stop Mr Goode at a future stage applying to be released from his undertaking for some collateral purpose, *e.g.,* pursuit of a complaint to the CCPC about some unrelated matter, regardless of the lack of merit associated with such complaint;
>
> (5) looking at the material falling to be provided, pursuant to this judgment, by way of discovery to Goode Concrete and

looking to as to what has to be established at the trial of the within proceedings, the court does not see that Mr Goode will require access to the documentation now to be discovered to Goode Concrete, in order that he might, as has been suggested in submission, be able cogently to explain his case to an expert. Goode Concrete's case is, in truth, a very simple case to explain. It contends that the defendants colluded to reduce prices to a below-cost level in an anticompetitive fashion so as to drive Goode Concrete 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. That is something of a 'bread and butter' job for the type of expert who would be called to give testimony in this case, not something that would typically require the involvement of an aggrieved plaintiff;

(6) were it the case that some issue did arise which required greater wider disclosure, there would be nothing to prevent the parties from returning to court and saying 'The scope of the confidentiality ring makes it difficult for us to obtain the instructions which we require'. The court could then expand the confidentiality ring if and as appropriate.

(iii) *Conclusion.*

107. Having regard to (i) the afore-described facts and factors, (ii) the law as to what are generally described as 'confidentiality rings', as elsewhere considered in this judgment, and (iii) the fact that the court needs generally to be careful to ensure that litigation is not used, for example, (a) to apply commercial or economic pressure on a defendant, and/or (b) to bring pressure to bear on a defendant to settle a claim that it might not otherwise settle, for fear that commercial information is going to have to be released as part of the price of the defending proceedings, the court will order that:

(I) it is not necessary for Mr. Peter Goode, as distinct from independent expert advisors engaged by Goode Concrete, to see any material that is ordered to be discovered,

(II) such discovery as is to be ordered by the court pursuant to this judgment shall be the subject of a confidentiality ring comprising the legal advisors to Goode Concrete and such independent expert advisors as may be engaged by Goode Concrete in the pursuit and advancement of the within proceedings, subject to liberty to apply on the part of any or all of the defendants in the event that the operation of the confidentiality ring and/or the addition of any particular independent expert advisor/s to such ring is considered to present a difficulty in terms of the very confidentiality that such ring is being established to protect,

(III) all the legal advisors to Goode Concrete shall undertake to the court (i) not to disclose to any party outside the confidentiality ring the substance or tenor of any such discovered documentation aforesaid, and (ii) to respect the spirit as well as the letter of the order concerning the establishment of the confidentiality ring, and

(IV) the solicitors to Goode Concrete shall undertake that any expert to be joined to the confidentiality ring shall only be so joined where s/he has previously agreed in writing with those solicitors to treat with all such discovered documents aforesaid on like terms of confidentiality to which those solicitors are subject.

XI. The Categories of Discovery Sought against

CRH plc and Roadstone Wood Limited

(i) *Temporal Scope.*

108. Before turning to the substance of the individual categories of discovery, all of which are notably broad, the court pauses to address an issue as to temporal scope which generally arises.

109. The conduct that is complained of in the statement of claim is between November, 2007 and the date when Goode Concrete was allegedly forced to cease trading, being February, 2011. Yet when looks to the various categories of discovery, discovery for the following timeframes is sought:

Category 1: 30.06.2006-30.06.2011
Category 2: Same
Category 3: Same
Category 4: Same
Category 5: 01.01.2007-30.06.2013
Category 6: Same
Category 7: 01.01.2007-31.12.2011
Category 8: No timeframe identified
Category 9: 01.01.2006-31.12.2011
Category 10: Same
Category 11: Same
Category 12: No timeframe identified

110. There has been some attempt by the first and second-named defendants to meet Goode Concrete's desire for documentation that goes beyond the time constraints of the period November 2007-February 2011. But insofar as a recoupment argument is made, that only relates to Category 6 (in relation to price), it cannot be used as a springboard for other categories, and even in Category 6 the court does not see that recoupment is relevant: the pricing at the time was either below-cost/predatory or not. Viewed so, the court considers that the period from 01.11.2007-28.02.2011 is an adequate, proportionate and correct timeframe for all of the categories of discovery.

(ii) *Category 1*.

I. Documentation Sought.

111. Category 1, as sought, comprises the following documentation:

"All documents created between 30 June 2006 and 30 June 2011 relating to the market to which cement belongs, the products with which cement competes and the competition which Irish Cement Limited faces, 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."

II. *Observations and Conclusion*.

112. As will be seen later below, a like category of blanket discovery has been sought of Kilsaran in the separate but clearly related application for discovery brought by Goode Concrete against Kilsaran. For the reasons (*mutatis mutandis*) identified in respect of the Category 1 and 2 documentation sought of Kilsaran, this category of discovery is refused. In this regard too, the court recalls the observation of Murray J. in Framus, at 43, that:

"In certain circumstances, the court may grant discovery on a more limited basis than that sought where it considers it appropriate to do so. On the other hand, it is not for the court to re-draft an applicant's motion where it in effect amounts to a form of blanket discovery."

(iii) *Category 2.*

I. Documentation Sought.

113. Category 2, as sought, comprises the following documentation

"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 targets/assessment of performance against those targets, minutes of business review meetings and other regular/one-off reports dealing with such issues."

II. Observations.

114. A number of points arise concerning this category:

(1) it is drafted in the same blanket terms as Category 1 and is subject to similar criticism to that made by the court in this regard in respect of Category 1.

(2) the court does not see that discovery of any of the documentation in this category is necessary because the advised purpose of seeking these documents is to establish dominance by CRH in the cement market in the State. But Mr. McMahon avers in his affidavit evidence that the fact that CRH "*holds and has, at all material times, held a dominant position in the Irish cement market*" is "*I am advised by the Plaintiff…well known".* The court would but note that if that dominance is "*well-known*", it can be proved by expert testimony; indeed, this would be typical.

(3) dominance in the cement market is in any event irrelevant because the abuse that is alleged is in the concrete market, specifically below cost selling of concrete in the Dublin ready-mix market. It will be recalled in this regard that para. 23 of the statement of claim states, *inter alia*, that "*By engaging, through Roadstone, in below cost selling of concrete and concrete products in the Dublin market, CRH is abusing its dominant position in the cement market*". Recalling in this regard the decision in *Tetra Pak*, considered above, the court notes no special circumstances are pleaded or identified in this regard.

(4) to the extent that this category of discovery is grounded on para. 24 of the statement of claim, it is worth recalling the text of that claim, *viz*:

> *"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 defendants."*

As touched upon previously above, this is, with respect, a baseless plea. Having claimed that the alleged abuse is happening in a different market to where the dominance allegedly arises, Goode Concrete then pleads that it does not know what arrangements exist between the first and second-named or third-named defendants for the supply and purchase of cement, but that they "*may also give rise to breaches of competition law".* That is entirely speculative, it does not in truth involve any allegation, and it yields in the discovery context what is commonly referred to as 'fishing'.

III. Conclusion.

115. For the reasons aforesaid, discovery of Category 2 is refused.

(iv) *Categories 3 and 4*.

I. Documentation Sought.

116. Category 3 comprises the following documentation:

"All documents created between 30 June 2006 and 30 June 2011 relating to the market to which the supply of ready-mix concrete in the greater Dublin area belongs, the products with which ready-mix concrete competes and the competition which the second defendant faces 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."

117. Category 4 comprises the following documentation:

"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."

II. Observations and Conclusion.

118. As will be seen later below, like categories of discovery have been sought of Kilsaran in the separate but clearly related application for discovery brought by Goode Concrete against same. For the reasons (*mutatis mutandis*) identified in respect of the Category 3 and 4 documentation sought of Kilsaran, discovery of each of Category 3 and 4 is refused.

(v) *Category 5*.

I. Documentation Sought.

119. Category 5, as sought, comprises the following documentation:

"In respect of each instance of 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 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 purposes of presentation 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 McLoughlin for purposes of the preparation of his affidavit dated 12 January 2011; and

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

II. Observations.

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).

III. *Conclusion.*

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.

(vi) *Category 6*.

I. Documentation Sought.

122. Category 6, as sought, comprises the following documentation:

"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."

II. Observations.

123. Again, when it comes to this category of documentation, Goode Concrete is looking for discovery over a 5½ (five and one-half) year period, extending not just to the jobs/tenders listed in Schedule 1 but to all jobs/tenders involving more than 1,500 cubic metres of ready-mix concrete. That is entirely disproportionate. The first and second-named defendants have offered a schedule of the

prices that they tendered for in respect of the contracts that are listed in the schedule to the Statement of Claim. That, it seems to the court, is a proportionate approach that is consistent with the *MTV* decision.

III. Conclusion.

124. The court will order discovery of the documentation as offered by the first and second-named defendants but for the timeframe identified by the court previously above as being generally appropriate (01.11.2007-28.02.2011).

(vii) *Category 7.*

I. Documentation Sought.

125. Category 7, as sought, comprises the following documentation:

> *"(a) All documents evidencing any communications between the First or Second Defendant (or any person or entity relating to 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 relating 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, emails, 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."*

II. Observations.

126. As can be seen, Category 7 has two parts to it. It is essentially dealing with communications in relation to the sale of ready-mix concrete. Item (a) looks for communications between the first/second and third-named defendants, though it is notably broad in the manner in which it is formulated. Item (b) extends matters still further than (a) because it seeks communications not just with the third-named defendant, but between the second-named defendant "*and any competitor*" relating to the same matters and during the same stated period. So Item (b) is not limited to any particular tenders, any particular contracts, or any particular customers. As formulated, Category 7 is a blanket category of discovery or what is commonly called 'fishing'. The first and second-named defendants have made an offer of documentation in respect of Category 7. However, this has not been accepted and the category remains entirely in dispute. As will be seen later below, a like category of discovery has been sought of Kilsaran in the separate but clearly related application for discovery brought by Goode Concrete against same.

III. Conclusion.

127. For the reasons (*mutatis mutandis*) identified in respect of the Category 7 documentation sought of Kilsaran, this category of discovery is refused.

(viii) *Category 8*.

I. Documentation Sought.

128. Category 8, as sought, comprises the following documentation:

> *"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."*

II. Observations.

129. Again, the court is presented with a very broad category of documentation sought and with no temporal limitation. With regard to the text "*All documents…Third Defendant (including employees, subsidiaries)*", this would include, for example, purchases from Kilsaran, if the first and second-named defendants ran short of something and needed to make an ad hoc purchase. As to the term "*relationship*", this is a vague and undefined term. The "*close links*" referred to at para. 5 of the statement of claim is bald assertion – and the concept of "*close links*" presents the issues identified in the context of the Category 1 and 2 documentation sought of Kilsaran (as considered later below).

III. Decisive Influence.

130. Notably, the first and second-named defendants have made an offer of documentation in respect of Category 7. However, this has not been accepted and the category remains entirely in dispute. That offer comprises: all documents comprising or relating to any direct or indirect ownership by the first defendant of the third defendant, and any documents relating to any direct or indirect control by the first-named defendant of the board of directors of the third defendant, or the decisions of that board. However, Goode Concrete has indicated that what it is concerned about in this regard is "*decisive influence*". But this, with respect, is a misplaced usage of that concept. The term "*decisive influence*" is deployed in case-law in the context of being able to determine whether or not a subsidiary is truly part of the one undertaking as the parent; it is not to be used as saying that some other undertaking, which is not owned by the parent, could be part of the one undertaking, simply because the other undertaking influences decisive influence. A brief survey of some of the leading English-language textbooks on competition law shows that this is so. Thus the learned editors of

Bellamy & Child's *European Union Law of Competition* (7th ed.) observe as follows, under the heading "*Treatment of economically linked entities*", at paras. 2.024 ("*Group of companies as a single undertaking*") and 2.026 ("*Attribution to a parent company of the conduct of wholly owned subsidiaries*"):

> *"2.024…The focus of EU law on economic rather than legal identity means that a corporate group made up of a number of individual legal bodies can be treated as a single undertaking for the purposes of competition law. Undertakings have been defined by the General Court as 'economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision'. For the purpose of applying the rules on competition, the formal separation between two parties resulting from their separate legal personality is not conclusive; the decisive test is the unity of their conduct on the market. This is relevant to five issues in particular:*
>
> > *(a) the application of article 101(1) to agreements between companies in the same group;*
> >
> > *(b) whether the infringing conduct of a subsidiary company can be imputed to a parent company, usually in the context of imposing a fine;*
> >
> > *(c) the amount of turnover generated by the infringing undertaking which is used to calculate a fine;*
> >
> > *(d) which associated undertakings should be taken into account when calculating the turnover of an undertaking for the purpose of applying a turnover threshold…and*
> >
> > *(e) whether a national court has jurisdiction to hear an action for damages against companies in the same group….*
>
> *2.026…The parent company of the group can be held responsible for the infringing conduct committed by another company within the undertaking where the parent controls, that is exercises 'decisive influence' over the subsidiary."*

131. But it has to be a subsidiary first.

132. The learned authors of Whish and Bailey's *Competition Law* (8th ed), during their consideration of Art. 101(1) TFEU observe as follows, at 97, under the heading "The test of control":

> *"The test is whether the parent company can, and does in fact, exercise decisive influence over the other, with the result that the latter does not enjoy 'real autonomy' in determining its commercial policy on the market. For these purposes, it is necessary to examine all the relevant factors relating to the economic, organisation and legal links which tie the subsidiary* [so it has to be a subsidiary] *to the parent company which, will vary from case to case. These factors include the shareholding that a parent company has in its subsidiary, the composition of the board of directors, the extent to which the parent influences the policy of or issues instructions to the subsidiary and similar matters."*

133. Lastly in this regard, the court notes the following observations made in Faull and Nikpay's The *EU Law of Competition* (3rd ed.) in the course of the learned authors' consideration of Article 101(1) TFEU, at paras. 3.49-3.51:

> *"3.49 For the purposes of Article 101(1), at least two 'undertakings' must be party to an agreement. However, two or more legally separate entities may be treated as a single undertaking under the competition rules if their relationship justifies regarding them as a single economic unit….*
>
> 3.50 *In* Centrafarm [Case 15/74], *the Court of Justice held that an agreement between undertakings belonging to the same group and having the status of parent and subsidiary was not caught by Article 101(1) 'if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings. Similarly, in* Viho [Case C-73/95] *the Court of Justice held that Article 101(1) could not apply where a subsidiary did not freely determine its conduct on the market, but instead carried out the instructions given to it directly or indirectly by the parent company.*
>
> 3.51 *This logic applies to the question of the liability of parent companies for the activities of their subsidiaries. In* Akzo [Case C-97/08], *the Court of Justice held that 'the conduct of a subsidiary may be imputed to the parent company, in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.'"*

134. Bringing the foregoing to bear on the facts at hand, the law in relation to 'decisive influence' clearly has an application in relation to whether or not CRH and Irish Cement are to be regarded as part of the one undertaking and as to whether CRH and Roadstone are to be regarded as part of the one undertaking. But unless there is a shareholding by CRH or Roadstone in Kilsaran, it has no relevance, at all…and no evidence has been put before the Court of such a shareholding.

135. Continuing, the learned authors of Faull and Nikpay observe as follows, again at para. 3.51:

> *"Put differently, a subsidiary cannot be said to be acting independently where the parent company actually exercises decisive influence over its commercial policy. In such a case, 'the parent company and its subsidiary form a single economic unit and, therefore, form a single undertaking'. In that regard, it is irrelevant whether the parent company itself is engaged in an economic activity of its own, or whether it is a mere holding company."*

136. That again is a point of relevance to the within proceedings: ownership is the relevant factor.

IV. *Conclusion*.

137. The category of documentation sought is vast, not least because CRH includes Irish Cement and Kilsaran has made no secret of the fact that it purchased some of its supplies of cement from Irish Cement. There is no temporal scope to this category. It includes *"all correspondence, emails, memoranda/notes of conversations, minutes, recordings, mobile phone text messages,* [and] *details of phone calls*", making it a category of discovery that reads more like a wish-list than a request for discovery which is tailored to be

relevant, necessary and proportionate. It is impossible that all of the documentation sought would be relevant or necessary to the case as pleaded, including (as it does) all communications between employees in respect of CRH and Kilsaran. To order this category of discovery would be to place an entirely disproportionate obligation on the first and second-named defendants. For the reasons aforesaid, discovery of this category of documentation is refused.

(ix) *Category 9*.

I. Documentation Sought.

138. Category 9 comprises the following documentation:

> *"All documents created between 1st January 2006 and 31 December 2011 relating to the supply by the First Defendant, the Second Defendant or any company, entity or person within or related to the First Defendant's group, to the Third Defendant or any related person or entity, of products, including aggregates, bitumen and explosives, and including, without prejudice to the generality of the foregoing, invoices and quotations; credit notes; rebates; and documents evidencing the supply of cement that was not ticketed or not invoiced."*

II. Observations.

139. This category, to borrow a colloquialism, is but 'fishing', and on a grand scale. This case is about concrete in the Greater Dublin market, nothing else. Yet Goode Concrete wants discovery spanning a five-year period of every document relating to every single product, even down to explosives, that have been sold by any company in the CRH group to Kilsaran. Asked to justify this category of discovery, Mr McMahon has averred in his first affidavit that "*It is necessary to establish what relationship was in place between the CRH group and Kilsaran*". But, with respect, the only relationship that is legally relevant is ownership, and one establishes ownership by documents relating to ownership. In his second affidavit, Mr McMahon avers that "*I would repeat what I said in my earlier affidavit*", then adds a couple of sentences later that "*The category is also necessary because it is relevant to the claim that there are close links between CRH and Kilsaran*", a point which raises again the issue of "*close links*" considered at some length in the context of the Category 1 and 2 documentation sought of Kilsaran in the separate but related motion for discovery brought against it by Goode Concrete.

III. Conclusion.

140. For the reasons aforesaid, discovery of this category of documentation is refused.

(x) *Category 10*.

I. Documentation Sought.

141. Category 10 comprises the following documentation:

> "*All documents created on* [and?] *between 1st January 2006 and 31 December 2011 relating to the supply by Irish Cement Ltd or any other company, entity or person within the first defendant's group, to the second defendant, of cement, including invoices and quotations."*

II. Observations.

142. Category 10 essentially narrows down Category 9, save that the focus now (and, as will be seen, in Category 11) is the supply of cement, as opposed to products generally. Again, it is, to borrow a colloquialism, a 'fishing' exercise on a still-grand scale. The only plea that is any way relevant to this category of discovery appears in para. 24 of the statement of claim which, it will be recalled, claims as follows:

> *"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 defendants."*

143. Notable in the just-quoted text is that there is no allegation that there is some illegality in terms of price. Goode Concrete's entire focus in its own claim is on the notion that the first and second-named defendants are part of the one undertaking. It follows inexorably from this the price at which they transfer cement between themselves is irrelevant for the purposes of competition law. It is the cost of production, not the price of cement that is relevant.

III. Conclusion.

144. For the reasons aforesaid, discovery of this category of documentation is refused.

(xi). *Category 11*.

I. Documentation Sought.

145. Category 11, as sought, comprises the following documentation:

> *"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."*

II. Observations.

146. Category 11 again essentially narrows down Category 9, save that the focus now (as in Category 10) is the supply of cement, as opposed to products generally. And again it is irrelevant because the only abuse alleged against Irish Cement is below-cost selling of concrete in the concrete market. There is no allegation that CRH/Irish Cement is engaged in below-cost selling of cement to

Kilsaran.

III. Conclusion.

147. For the reasons aforesaid, discovery of this category of documentation is refused.

(xii) *Category 12*.

I. Documentation Sought.

148. Category 12, as sought, comprises the following documentation:

> *"(i) All documents, including documents evidencing communications between the First or Second Defendant (or any person or entity related to the First or Second defendant, including employees, subsidiaries) and John Paul Construction, relating to the supply of concrete for the project at St Vincent's Hospital as referred to at paragraph 30(i) of the statement of claim.*
>
> *(ii) All documents, including documents evidencing communications between the First or Second Defendant (or any person or entity related to the First or Second Defendant, including employees, subsidiaries) and John McCann Property and/or Castleway Developments, relating to the supply of concrete for the project at a factory in Ballycoolin, Dublin as referred to at paragraph 30(ii) of the statement of claim."*

II. Observations.

149. The court cannot but note that in a previous interlocutory injunction application that featured in the within proceedings, Goode Concrete was able to put before the court an affidavit by a distinguished economist in which that economist defined the relevant market, and gave evidence of market shares and of his opinion as to dominance. So the court struggles to see why this category of discovery is required. Be that as it may, when it comes to Category 12 there has been a degree of rapprochement between the parties concerning their dispute as to what ought to be discovered. The dispute now arising between them is this: the first and second-named defendants have proposed an amended version of this category which refers to four specified contracts and uses the same formulation in respect of each category. Thus the first and second-named defendants propose an amended category of discovery whereby they will "*make discovery of all documents evidencing communications between the second-named defendant*" and, to use the first category by way of example "*John Paul Construction up to the conclusion of the tender process relating to the supply of concrete for the project at St. Vincent's Hospital as referred to in paragraph 30 of the Statement of Claim*." Goode Concrete has reverted to indicate that it wants this category to include not just communications between the second defendant and John Paul Construction, but any person or entity related to the first and second-named defendants, as well as the first and second-named defendants (even though it was the second-named defendants who put in the tender). The first and second-named defendants have indicated that they are satisfied for this category of discovery to extend to the second-named defendants, their servants or agents (and if the first-named defendant is acting as servant or agent of the second-named defendant, then that also). However, they rightly dispute on grounds of vagueness and the need for precision in discovery, the broad term "*related to".*

III. Conclusion.

150. Having regard to the criteria of relevance, necessity and proportionality, the court will order discovery of the documentation as offered by the first and second-named defendants but for the year period identified by the court previously above as being generally appropriate (01.11.2007-28.02.2011).

XII. The Kilsaran Dimension

(i) *Overview.*

151. Before the court turns to a substantive consideration of Goode Concrete's discovery application against Kilsaran, it pauses to make a few general observations:

> (1) the case pleaded against Kilsaran is notably vague and speculative;
>
> (2) a large portion of the case pleaded against Kilsaran relates to the allegation that there are "*close links*" between CRH and Kilsaran (Statement of Claim, para. 5), a phrase in respect of which the court has made critical comment previously above and returns to later below; and
>
> (3) Kilsaran has expressed considerable concern as to the expense arising for it from the within proceedings, in circumstances where the likelihood of recovering costs from Goode Concrete appear, at best, to be small.

(ii) *The Statement of Claim*.

1. Paragraph 5.

152. The pertinent part of the statement of claim, from Kilsaran's perspective, commences at para. 5, stating as follows:

> *"…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 proceedings 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".*

153. The court has touched previously above on the mistaken usage of the notion of "*decisive influence*" in the context presenting. At this juncture, it would but note that there is, in truth, no plea against Kilsaran in the foregoing. All that presents is an allegation that there are "*close links*" between CRH and Kilsaran, without any identification of what that means (and not much more to go on when it comes to the replies to particulars). Requiring discovery of Kilsaran on foot of such a non-allegation is not allowed under the

rules of discovery. The court recalls in this regard the decision of the Supreme Court in *Carlow Kilkenny Radio Ltd v. Broadcasting Commission* [2003] 3 I.R. 528. That was an unsuccessful appeal against an order of the High Court refusing various categories of documentation of which discovery sought in the context of a judicial review application commenced by the disappointed bidders for the award of a radio broadcasting licence. In the course of his judgment in that case, Geoghegan J. made, *inter alia*, the following observations, at 534:

> "[I]*n a very careful review of…case-law* [in *Shortt v. Dublin City Council* [2003] 2 I.R. 69*], Ó Caoimh J. cites*, inter alia*, a passage from the judgment of…Bingham M.R. in…* R. v. Secretary of State for Health, *ex parte* Hackney London Borough *(Unreported, English Court of Appeal, 24th July, 1994) at p. 82:-*
>
> *'The basic approach is that discovery and production will be ordered in judicial review proceedings where they are necessary for disposing fairly of the application but not otherwise. The rules themselves provide no guidance as to when discovery should be treated as necessary for disposing fairly of an action or application, but over the years a practice has developed, the broad principles of which are clearly understood, even if the application of those principles inevitably gives rise to controversy in individual cases. It is undesirable to attempt any precise definition of the existing practice, but I think it is broadly true to say that discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to try the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other.*
>
> *In the ordinary inter partes civil action the plaintiff usually makes a series of factual averments which may well be challenged, but which are not usually sufficiently plausible to raise issues calling for discovery. 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 assertions 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 sides 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.'*

That statement of principle is easily recognisable in this jurisdiction also and would seem to represent Irish law clearly." [Emphasis added].

154. Applying the above-emphasised principle to the plea which is contained in the statement of claim as regards Kilsaran, all of the discovery application as against Kilsaran, which is based on the premise that there are "*close links*" between Kilsaran and the first and second-named defendants falls away. This is because Goode Concrete is not entitled at law to 'come in', so to speak, to Kilsaran's business and, to use a colloquialism, to 'rumble around' therein in the hope that it will stumble upon something which will give them the hope of making a case.

2. Paragraphs 15 and 16.

155. The next paragraphs of the statement of claim that are of especial application to Kilsaran are paragraphs 15 and 16 of same. These claim, inter alia, as follows:

> *"15. The plaintiff will allege that…*
>
> > *(ii) CRH/Roadstone and Kilsaran are in a position of collective dominance in the Dublin ready-mix concrete market; in the alternative, Kilsaran is part of the same undertaking as CRH/Roadstone and this undertaking holds a dominant position in the Dublin ready-mix concrete market.*
>
> *16. The plaintiff will allege that the defendants have breached and are continuing to breach the EU and Irish competition laws. The extent to which such breaches have occurred and are continuing to occur may not be fully identifiable, at least until the plaintiff has had the opportunity to inspect the defendants' discovery. The plaintiff therefore reserves its right to advance, following discovery, further particulars of breaches of competition law on the part of the defendants, if necessary by the delivery of an amended statement of claim."*

156. All this claim states, in effect, is that 'We will claim that you have done wrong, we have nothing to justify this claim, we hope that we find something useful through discovery, and if we do we may amend our statement of claim.' The judgment of Murray J. in *Framus* (considered previously above) and that of Geoghegan J. in *Carlow Kilkenny Radio* make clear that such an approach is not permissible in the context of a discovery application.

3. Paragraph 17.

157. Paragraph 17 of the statement of claim, states as follows:

> *"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 tendered, offered for sale and sold concrete at prices below cost, and in particular below average variable cost ('AVC'), in concrete tenders in the Dublin are. The aim of this practice has been to distort competition and eliminate the plaintiff as a competitor in the concrete market."*

158. In the context of this claim, counsel for Goode Concrete pointed to certain conversations which he maintained had been held with a senior officer of Kilsaran indicating an intention to eliminate Goode Concrete from the market as a result of vigorous, perhaps even ruthless, competition. Without reaching any conclusion as to the allegations made by Goode Concrete in this regard, which is not the role of this Court at this time, the court would but note that when the foregoing conversations were opened to it, it could not but recall that there is, at law, a very real difference between a formal strategy to eliminate a competitor from the market and what might be styled 'business speak' with and about one's competitors: lawful competition may be beneficial to society; it is not necessarily attractive to behold. Which category the said alleged conversations fall into will, of course, fall to be decided at the trial-stage of the within proceedings.

4. Paragraphs 18 and 19.

159. Paragraph 18 of the statement of claim continues with the following assertion:

> *"18. During this period [i.e.* the period referred to in para. 17 (quoted above)], *the 'winning' prices put forward by each of*

CRH/Roadstone and Kilsaran in concrete tenders have fallen in line with each other."

[This commonality of decline is the sole basis, according to the statement of claim, upon which the defendants have breached and are breaching competition law, Goode Concrete stating that it is only explicable if there is anticompetitive behaviour.].

"19. The plaintiff will claim that the pricing practices of each of CRH/Roadstone and Kilsaran in concrete tenders are explicable only on the basis that the defendants 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…"

[No specifics are pleaded in respect of any such collusion]."

160. There is a distinction between being required to plead specific evidence in a statement of claim and pleading a substantive basis for the claims being made. In the within case, if Goode Concrete considers (and it clearly does consider) that the defendants were engaged in anticompetitive behaviour of the type alleged in the above-quoted text, it was incumbent upon it to state how and why it believes they were engaged in anticompetitive behaviour.

5. Paragraph 24.

161. Paragraph 24 of the statement of claim states as follows:

"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 defendants."

162. The above text is concerned with breaches of competition law in the cement market. Yet Kilsaran claims that it has no presence on the cement market; because cement is a component of concrete it occasionally purchases cement from Irish Cement (a CRH subsidiary), but no more. When, in Kilsaran's request for particulars, it requested that Goode Concrete:

"identify the 'breaches of competition law' to which any such arrangement and/or agreement are alleged to give rise as referred to in paragraph 24 of the Statement of Claim",

it received the uninformative reply that:

"The breaches are those of section 4 of the Competition Act 2002 and Article 101 TFEU, if Kilsaran and CRH are separate undertakings; and breaches of section 5 and Article 102 TFEU if Kilsaran and CRH are part of one and [the] same undertaking",

a response which was further touched upon in a subsequence notice for further and better particulars issued, with the following reply then issuing from Goode Concrete:

"The Plaintiff does not accept that the matters called for have not been adequately pleaded. Very detailed particulars of the conduct giving rise to breaches of competition law have been set out in the Statement of Claim. The plaintiff repeats the remainder of its reply to paragraph 26 of the Notice for Particulars [being the last-quoted text]".

163. So, as can be seen, no good reply has been received in relation to the query raised, and no better answer was offered in the course of the hearing of the within applications. Yet discovery continues to be sought from Kilsaran in respect of its purported involvement in the cement market without any proper basis for same identifiable in the statement of claim beyond the barest of assertions.

(iii) *Notices for Particulars and Replies Received*.

164. The court has touched previously above on certain of the replies received to Kilsaran's notices for particulars. Certain other aspects of the replies received to those notices are worth touching upon, if only to give a flavour of the overall tenor of the replies received:

A.

Particulars Sought: "*1. Please provide full and detailed particulars of the alleged 'close links between CRH and Kilsaran' referred to in paragraph 5 of the Statement of Claim."*

Reply Received: "*The Plaintiff contends that Kilsaran is secretly controlled by CRH. The relevant facts cannot be particularised further at this stage given that the close links have been kept secret. The plaintiff reserves the right to add further particulars after discovery and/or delivery of interrogatories."*

B.

Particulars Sought*: "2. Please provide full and detailed particulars of the 'decisive influence' which CRH is alleged to exercise over Kilsaran."*

Reply Received: "*Please see reply 1."*

C.

Particulars Sought: *"3. Please provide full and detailed particulars of the basis for the allegation that 'CRH/Roadstone and Kilsaran are part of one and the same undertaking'."*

Reply Received: *"Please see reply 1."*

D.

Particulars Sought: *"9. Specifically please identify the basis for the identification of an 'Irish cement market' and a 'Dublin ready-mix concrete market'."*

Reply Received: *"This is a matter for evidence."*

E.

Particulars Sought: "10. Please provide full and detailed particulars of how it is alleged that the ready-mix concrete market is geographically limited to either a Dublin market or a number of sub-markets."

Reply Received: *"The precise scope of the relevant geographic market is a matter for evidence, in particular, expert evidence. Without prejudice to the foregoing, the reference to the 'Dublin concrete market' is sufficiently precise to allow the first and second named defendants to know the case they have to meet. Further, without prejudice to the foregoing, the relevant market encompasses the geographic area of approximately 25/30 radial kilometres from each plant outside the city boundaries of the M50 and the whole area inside the M50 road that encircles Dublin City. A map is attached illustrating the area referred to."*

F.

Particulars Sought: *"12. Please set out the basis for the market shares identified in paragraph 10 of the Statement of Claim."*

Reply Received*: "This is a matter for evidence. Without prejudice to the foregoing, the market shares at paragraph 10 of the statement of claim are those estimated by the plaintiff to the best of its belief, based on its knowledge of the market."*

G.

Particulars Sought: *"In relation to paragraph 17 of the Statement of Claim, please provide full and detailed particulars of how the Third Defendant is alleged to have tendered, offered for sale or sold concrete at prices below cost and in particular below average variable cost in concrete tenders in the Dublin area."*

Reply Received: *"In this paragraph, the plaintiff was referring to the years 2007 to 2011 (when the statement of claim was delivered). The plaintiff has adequately particularised the claims of below cost and below average variable cost selling, in particular in Schedule 1 of the statement of claim. The Plaintiff reserves the right to add further particulars after discovery and/or delivery of interrogatories."*

165. In truth, the entirety of the case that is pleaded against Kilsaran, as is evident from the statement of claim and the replies to particulars, is along the lines of 'We have come up with an allegation of some kind of anticompetitive behaviour. We don't have to explain to you or plead what exactly that encompasses or entails. If we discover something on discovery which allows us to form a basis for the allegation which is put out there, then we will serve an amended statement of claim and the case can run on the basis of an amended statement of claim. In the interim, we will require wholesale levels of discovery from your client in order to allow us to establish that case'. Such an approach is clearly impermissible at law, and in truth it is so clearly impermissible that Goode Concrete has seen fit to invoke Regulation 1/2003 as a basis on which the court may and must side-step, in the competition law sphere, the usual rules as to discovery. The court has already indicated above why this contention is, with respect, entirely wrong.

(iv) *Categories of Discovery Sought.*

166. As regards all of the following categories of discovery, the court reiterates the observations as to temporal scope made in the context of the application for discovery brought against the first and second-named defendants.

1. Categories 1 and 2.

I. *Documentation Sought*.

167. Categories 1 and 2, as sought, comprise the following documentation:

"Category One

All documents created between 30 June 2006 and 30 June 2001 relating to the market to which cement belongs, the products with which cement competes and the competition which Irish Cement Limited faces, 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.

Category Two

> *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."*

II. *Breadth of Discovery Sought.*

168. The court notes the usage of the phrase "*relating to"* (so the category could not be more widely drawn) and the list of documentation that follows reads more like a wish-list than a request for discovery that is tailored to be relevant, necessary and proportionate.

III. "*Close Links*".

169. Mr McMahon, in the affidavit grounding Goode Concrete's application for discovery, avers in effect that whereas Kilsaran has indicated that it is not active in the cement market at all, this ignores the "*close links*" claim in paragraph 5 of the statement of claim (as considered above). However, the term "*close links*" is not a term of law on which Goode Concrete is entitled, to use a colloquialism, to 'hang its hat' in respect of an application for discovery. For Kilsaran to be acting on the cement market, Goode Concrete would have to establish, at trial, that Kilsaran is owned by CRH and that for competition law purposes they are a single economic unit. However, the manner in which this is pleaded in the statement of claim shows, with respect, a fundamental misunderstanding of the concept of a single economic unit for competition law purposes.

170. 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, *i.e.* there is no pleading in the statement of claim which could amount to a plea that Kilsaran and CRH are a single economic unit for the purposes of the within proceedings. Accordingly, there is no basis in the pleadings for a determination that Kilsaran is part of CRH. In truth, when one looks at matters from this perspective, *i.e.* from the perhaps mechanical but nonetheless crucial perspective of how the within proceedings have been pleaded, the issue raised as to "*close links*" can be seen to have been a 'red herring'. This is because for the court at trial to find that Kilsaran was in a cement market where it is not a participant, it would have to find that Kilsaran is owned and controlled by CRH…and there is no pleading to that effect.

IV. *Conclusion.*

171. For the reasons aforesaid, discovery of each of Category 1 and 2 is refused.

2. Categories 3 and 4.

I. *Documentation Sought*.

172. Categories 3 and 4, as sought, comprise the following documentation:

"Category Three

> *All documents created between 30 June 2006 and 30 June 2011 relating to the market to which the supply of ready-mix concrete in the greater Dublin area belongs, the products with which ready-mix concrete competes and the competition which the Third Defendant faces 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.*

Category Four

> *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."*

II. *Breadth of Discovery Sought.*

173. In Categories 3 and 4 almost identical categories of documentation as are sought in Categories 1 and 2, but this time in respect of the ready-mix concrete market where Kilsaran does have a presence. Because the categories are drafted in the same sweeping terms as Categories 1 and 2, they are subject to similar criticism made by the court in this regard in respect of Category 1.

II. *The Market Definition Exercise*.

174. A further difficulty presents in ordering such discovery as is sought. Goode Concrete's contention is that the type of information referred to in the just-quoted text will be necessary for the trial court to engage in a market definition exercise. But that, with respect, is not so. The reality is that when the trial court engages in a market definition exercise it will do so with the benefit of expert economic testimony that will invoke the hypothetical monopolist test. Kilsaran's monthly management reports, or the assessment of performance against targets, or any of the myriad of such documents which are sought by Goode Concrete are neither here nor there (as demonstrated by the fact that Goode Concrete has previously submitted to the court, in the context of the within proceedings, 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). A market definition is pleaded, market shares are posited in the statement of claim, and they will be defended by expert economic analysis; they will not be defended by reference, *e.g.*, to monthly board meetings or whether specific targets for sale forecasts were met on a particular market at a particular time. That is not how the market is going to be defined and it is not how market shares are

going to be established.

IV. *Conclusion*.

175. Having regard to the foregoing, discovery of Categories 3 and 4 is refused.

3. Categories 5 and 6.

I. *Documentation Sought*.

176. Categories 5 and 6, as sought, comprise the following documentation:

"Category Five

> *In respect of each instance of supply by the Third Defendant, 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.*

Category Six

> *In respect of each instance of tender and/or supply by the Third Defendant, in the Greater Dublin area, of ready-mix concrete, from 1st 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* [Third?] *Defendant tendered, offered to supply and supplied ready-mix concrete, such documents to include those which indicate all tenders in which the Second* [Third?] *Defendant participated and the outcome of such tenders."*

II. *Observations*.

177. When it comes to these categories, Goode Concrete is looking for discovery over a 5½ (five and one-half) year period, extending not just to the jobs/tenders listed in Schedule 1 but to all jobs/tenders involving more than 1,500 cubic metres of ready-mix concrete. That is entirely disproportionate. It will be recalled that the first and second-named defendants offered a schedule of the prices that they tendered for in respect of the contracts that are listed in the schedule to the Statement of Claim. That, it seems to the court, is a proportionate approach that is consistent with the *MTV* decision. However, Kilsaran was minded, subject to concerns in respect of the establishment of a confidentiality ring and the provision of security for costs, to make a concession and agree to both of these categories, as sought. Nonetheless the category remains at this time in dispute.

III. *Conclusion.*

178. For the reasons aforesaid, the court will order discovery on the terms as offered by the first and second-named defendants. Those terms seem to it to meet best the needs of relevance, necessity and proportionality.

4. Category 7.

I. *Documentation Sought*.

179. Category 7, as sought, comprises the following documentation:

"Category Seven

> *"(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."*

II. *Observations.*

180. As regards item (a), this goes to the issue of "close links" (as considered in the context of Categories 1 and 2 above). However, as previously noted, there is no pleading as to what form those "*close links*" take or what the implications of those "*close links*" are – and it is to the pleadings that one looks, not to allegations separately contained in affidavit evidence. There is nothing in the statement of claim which justifies an order for discovery on the basis of "*close links*". In fact the statement of claim reveals, at para.16, that Goode Concrete requires discovery to see if there are "*close links*" and breaches of competition law and reserves the right to serve an amended statement of claim post-discovery. That is not permitted under the rules on discovery. It is, to use a metaphor, impermissible 'fishing'. As regards item (b), the court notes that there is no allegation against the second-named defendant of bid-rigging with anybody other than the third-named defendant. To look for material relevant to alleged or possible bid rigging with other competitors is, to use the metaphor aforesaid, 'fishing'.

III. *Conclusion.*

181. For the reasons aforesaid, discovery of Category 7 is refused.

5. Category 8.

I. *Documentation Sought*.

182. Category 8, as sought, comprises the following documentation:

> *"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."*

II. *Observations*.

183. This is a vastly wide category (not least because CRH includes Irish Cement and Kilsaran has made no secret of the fact that it purchased some of its supplies of cement from Irish Cement). There is no temporal scope on this category. It includes *"all correspondence, emails, memoranda/notes of conversations, minutes, recordings, mobile phone text messages, [and] details of phone calls",* making it another category of discovery that reads more like a wish-list than a request for discovery which is tailored to be relevant, necessary and proportionate. It is impossible that all of the documentation sought would be relevant or necessary to the case as pleaded, including (as it does) all communications between employees in respect of CRH and Kilsaran. To order this category of discovery would be to place an entirely disproportionate obligation on Kilsaran.

III. *Conclusion.*

184. For the reasons aforesaid, discovery of this category of documentation is refused.

6. Category 9.

I. *Documentation Sought*.

185. Category 9, as sought, comprises the following documentation:

> *"All documents created between 1st January 2006 and 31 December 2011 relating to the supply by the First Defendant, the Second Defendant or any company, entity or person within or related to the First Defendant's group, to the Third Defendant or any related person or entity, of products, including aggregates, bitumen and explosives, and including, without prejudice to the generality of the foregoing, invoices and quotations; credit notes; rebates; and documents evidencing the supply of cement that was not ticketed or not invoiced."*

II. *Conclusion*.

186. This category of documentation mirrors the Category 9 documentation sought by Goode Concrete of the first and second-named defendants in its separate but related application for discovery against them. For the same reasons (*mutatis mutandis*) identified in respect of that other Category 9, discovery of this category of documentation is refused.

7. Category 10.

I. *Documentation Sought*.

187. Category 10, as sought, comprises the following documentation:

> "*All documents created on* [and?] *between 1st January 2006 and 31st 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."*

II. *Observations*.

188. Category 10 essentially narrows down Category 9, save that the focus now is the supply of cement, as opposed to products generally. Again, it is, to borrow a colloquialism, a 'fishing' exercise. The only plea that is any way relevant to this category of discovery appears in para. 24 of the statement of claim which, it will be recalled, claims as follows:

> *"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 defendants."*

189. Notable in the just-quoted text is that there is no allegation that there is some illegality in terms of price. Goode Concrete's entire focus in its own claim is on the notion that the first and second-named defendants are part of the one undertaking. It follows inexorably from this the price at which they transfer cement between themselves is irrelevant for the purposes of competition law. It is the cost of production, not the price of cement that is relevant.

III. *Conclusion*.

190. For the reasons aforesaid, discovery of this category of documentation is refused.

8. Category 11.

191. This category has been agreed.

2. APPLICATION OF CRH PLC AND ROADSTONE WOOD LIMITED FOR DISCOVERY FROM GOODE CONCRETE.

XIII. Categories Sought and Agreed

192. Fifteen categories of discovery have been sought by the first and second-named defendants against Goode Concrete. Only two categories (Categories 4 and 12) are in dispute but an order is nonetheless sought as regards the other thirteen categories. The court will therefore order discovery as sought of Categories 1-3, 5-11 and 13-15.

XIV. Agreement as to Applicable Principle

193. The court does not understand there to be any difference between the parties in relation to the principles applicable, being, in essence, relevance, necessity and proportionality, with relevance falling to be determined by reference to the pleadings in the case and necessity generally falling upon a finding of relevance. At hearing, reference was made in this regard to *Ryanair v. Aer Rianta* and *Framus v. CRH plc*, both of which have been considered previously above.

XV. Category 12

(i) *Documentation Sought*.

194. Documentation Sought: *"All documents evidencing, recording or relating to the reasons why the Plaintiff ceased trading as of 18th February 2011, including but not limited to the following:*

> *(i) Minutes of board meetings and management meetings of the Plaintiff for the period 2004 to 2011 addressing this issue;*
>
> *(ii) Communications between the Plaintiff and any regulatory authority, including but not limited to, any planning authority and the Revenue Commissioners in relation to issues which led to the Plaintiff ceasing trading;*
>
> *(iii) All documents relating to breaches of loan covenants and any acts of default on any loans and all documents relating to any hire purchase or lease agreements entered into by the Plaintiff in the period between 2004 and 2011;*
>
> *(iv) Consolidated audited accounts for the Plaintiff for the years ended 31 December 2004 to 2011;*
>
> *(v) Audited accounts for the concrete business of the Plaintiff for the years ended 31 December 2004 to 2011;*
>
> *(vi) Management accounts for the Plaintiff for the consolidated entries for the years ended 31 December 2004 to 2011;*
>
> *(vii) Management accounts for the concrete business of the Plaintiff in respect of the Greater Dublin Area for the years ended 31 December 2004 to 2011;*
>
> *(viii) Management accounts for the concrete business for the Plaintiff for the years ended 31 December 2004 to 2011;*
>
> *(ix) Consolidated accounts for the Plaintiff group of operating companies prepared at a Jersey ownership company level for the years ended 31 December 2004 to 2011;*
>
> *(x) All documents relating to Goode Concrete's plants at Naas, Co Kildare, Killeen Road, County Dublin and Ballycoolin, Co Dublin, and its sand and gravel quarries at Carbury, County Kildare and Kinnegad Co Westmeath, including but not limited to documents regarding their location, permitted reserves, planning status and documents demonstrating their operational structure for the haulage of aggregates to the sites;*
>
> *(xi) All documents relating to any applications for planning permission for extraction at the Plaintiff's sites and all documents relating to compliance with same;*
>
> *(xii) All documents relating to the purchase of lands by the Plaintiff in the period between 2004 and 2011, to include but not be limited to, the investment rationale underlying such decisions to purchase the said lands and the expected reserves and planning outcome;*
>
> *(xiii) All documents evidencing the cost of producing aggregate from the Plaintiff's plants at Carbury and Kinnegad and the costs of haulage to downstream plants;*
>
> *(xiv) All documents evidencing the period of operation of the Plaintiff's plants;*
>
> *(xv) All documents evidencing or relating to the payments or benefits made by the Plaintiff to directors, or persons connected to the directors, including but not limited to, all documents in respect of salaries, pensions and rent, or any other payments whatsoever, between 1st January 2004 and 31st December 2011;*
>
> *(xvi) All documents relating to the Statement of Affairs produced on appointment of the receiver to the Plaintiff and all communications between the Receiver and the Plaintiff and/or the directors of the Plaintiff and all reports produced by the Receiver in relation to the financial position of the Plaintiff;*
>
> *(xvii) All documents relating to the costs reduction measures implemented by the Plaintiff during the period from 2008 to 2011 having regard to the collapse in the Irish construction sector;*
>
> *(xviii) All documents evidencing the ownership of each of the sites used by the Plaintiff in the operation of the Plaintiff and, where relevant, the rent paid in respect of these sites and all documents evidencing the level of reserves and the site remediation requirements at all sites owned and/or operated by the Plaintiff up to the date of the closure of the sites; and*
>
> *(xix) All documents comprising or evidencing any financial advice given to the Directors of the Plaintiff relating to the*

Plaintiff's financial position from 2005 onwards and in particular including in relation to the reasons for the financial difficulties suffered by the Plaintiff."

195. This category relates to documents that go the question of why Goode Concrete went out of business. How does that issue arise in the pleadings?

(ii) *Predatory Pricing*

1. Statement of Claim.

196. Paragraph 17 of the statement of claim, it will be recalled, claims as follows:

> *"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 tendered, 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."*

197. As can be seen from the just-quoted text, a claim is being made of predatory pricing on the part of the defendants, which predatory pricing has (as it must if it is to be predatory pricing) the aim and objective of eliminating Goode Concrete as a competitor in the market.

198. Paragraph 20 of the statement of claim then pleads as follows:

> *"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 the 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."*

199. In this text there is a clear allegation that Goode Concrete's cessation of trade is attributable to the defendants' predatory pricing. The plaintiff asserts that that is why it went out of business: it was forced out of business by below cost selling that had the intention and the effect of forcing the Plaintiff out of the market. And the last sentence pleads something that is an integral part of an allegation of predatory pricing, viz. that following the elimination of Goode Concrete from the market, the price of ready mix concrete increased significantly.

2. Notice for Particulars and Replies to Same.

200. As part of the notice for particulars raised by the first and second-named defendants, Goode Concrete was requested to "*specify the material facts relied on to support the contention that the Defendants have succeeded in their aim of eliminating the Plaintiff as a competitor in the concrete market".* To which Goode Concrete has replied as follows: *"This is a matter for evidence. Without prejudice to the foregoing, the plaintiff relies on the breaches of competition law complained of and the fact that the plaintiff was forced to cease trading*."

201. That then is the evidence relied upon and the case that has been made, viz. that the cessation of trade of Goode Concrete was and is attributable, and attributable only, to alleged breaches of competition law on the part of the Defendants.

3. Defence.

202. The allegations aforesaid are denied. Thus paras. 27 and 33 of the Defence read as follows:

> *"It is denied that, since late 2007 (or any time), the first and/or second Defendants and/or third Defendant have tendered, offered for sale or sold concrete at prices below cost, and in particular below average variable cost ('AVC') in concrete tenders in the Dublin area. It is denied that the claim of this alleged practice (which practice is denied) has been to distort competition and eliminate the Plaintiff as a competitor in the concrete market (and it is denied that the extent of this market is as particularised by the Plaintiff."*
>
> *…*
>
> *It is denied that it has been at any time the aim of the first and/or second Defendants to eliminate the Plaintiff as competitor in the alleged concrete market, and it is further denied that the first and/or second-named Defendants priced concrete at* [or] *below AVC."*

203. So, looming through the foregoing as a central issue in dispute in the within proceedings is whether the first and/or second-named defendants: engaged in pricing practices that had the aim of eliminating the plaintiff from the market; and succeeded in so doing.

(iii) *Mismanagement, High Levels of Debt, etc.*

204. A further feature of the Defence is para. 34 of which, where it is pleaded as follows:

> *"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."*

205. Apparent from this line of defence is that there is a stark conflict of fact as to the reasons why the Plaintiff ceased trading. And continuing in this vein, paras. 50 and 51 of the Defence plead as follows:

> *"50. If the Plaintiff has suffered the alleged or any loss or damage (which is denied), same was not caused or contributed to by any act or omission on the part of the first and/or second Defendants.*

51. If the Plaintiff has suffered the alleged or any loss or damage (which is denied), same was caused and/or contributed to by the acts or omissions of the Plaintiff and/or the directors and/or management of the Plaintiff in that the Plaintiff was badly managed, had a high level of debt, had an inflated cost base and low margins, made payments to directors in respect of salaries, pensions and rent that were excessive, lost significant sums of money on the purchase of sites for which it was unable to obtain planning permission in an attempt to secure necessary aggregate supplied and failed to cut costs and take other measures in response to the very significant downturn in the construction industry."

206. The foregoing are the reasons identified in the Defence as to why Goode Concrete's business failed. As a result, one of the core issues that the court is going to have to determine in the within proceedings is whether Goode Concrete's business failed because of the alleged anti-competitive conduct or because of the factors just described or, conceivably, an element of both.

(iv) *Notice for Particulars and Replies to Same.*

207. Goode Concrete served a Notice for Particulars arising from the Defence, yielding, *inter alia*, the following replies:

"☐ The Irish Construction Industry enjoyed unprecedented high levels of output in the years 2006, 2007 and even 2008….

☐ In the period between 2002 and 2006, when there was no allegation of anti-competitive activity, the operating profit of the Plaintiff dropped from a margin of 14.4% to 4.4% due to the doubling of overhead and depreciation levels and by the end of 2006, the Plaintiff's net debt had increased from 13.1 million in 2003 to 27 million.

[Court Note: The court recalls in this regard that the allegations of anti-competitive conduct are made in the proceedings are alleged to have commenced towards the end of 2007. So the just-recited facts relate to the period prior to the commencement of any alleged anti-competitive conduct and show a doubling of debt and a significant huge decrease in margin.]

☐ The decline in the Plaintiff's market share was exacerbated by its decision to close various plants which were located in poor locations (the Plaintiff closed plants in Naas, Co. Kildare, Ballycoolin, Co. Dublin in 2008 and Carbury, Co. Kildare in 2009). This left the Plaintiff with only one remaining plant, its plant at Killeen Road, Co. Dublin.

☐ With the exception of its plant at Carbury, Co. Kildare, where the reserve is largely exhausted, the Plaintiff failed to locate its plants on sites which enjoyed the cost benefit of onsite stone aggregates and was therefore at a considerable disadvantage vis-a-vis its competitors.

☐ The Plaintiff failed to have secure self-owned permitted reserves which provide a cost-effective long term source of aggregate supply and was therefore at a considerable competitive disadvantage vis-à-vis its competitors.

☐ The Plaintiff purchased sites in locations where planning permission for extraction could not be obtained. The Plaintiff was therefore bearing the debt of these investments with no return. An alternative method commonly employed in the construction industry was to purchase sites subject to planning permission for extraction being obtained. Typically these types of arrangements involved some option fee being paid but ultimately it protects the purchaser from finding itself in the adverse position in which the Plaintiff found itself.

☐ The most cost-effective method for haulage delivery is sub-contract haulage. However, the Plaintiff operated a substantial fleet of haulage trucks which they owned or leased and the trucks were driven by their employees. This cost burden increased as the market contracted further and truck utilisation factors declined.

☐ Good plant is key to efficient concrete operation. From the accounts presented for the Plaintiff, the written down value of plant and machinery at the end of 2010 was 27.8% of the cost, indicating that this plant is coming to end of life. As plant ages, reliability and utilisation factors decline whilst maintenance costs increase. Ultimately, all plant must be replaced, requiring a substantial capital investment. Based on the Plaintiff's debt levels, it is unsurprising that replacement plant could not be financed.

☐ By the end of 2006 the Plaintiff's suppliers were waiting an average of seven months for payment. The Plaintiff was dependent upon a business model that was predicated on the market remaining at peak levels to service both these high costs and its large debt. It therefore encountered serious difficulties on entering the economic downturn. These difficulties were then exacerbated by the Plaintiff's failure to reduce its fixed costs in line with the fall in volume and demand that had been experienced by the industry since late 2007. As a percentage of volume of sales, these fixed costs increase from 11% in 2003 to 38% in 2010. The return on capital employed was 4.3% in 2006, down from 15.2% in 2002 and 10.8% in 2003."

208. In the foregoing the first and second-named defendants have identified a series of factors that they say contributed to the demise of Goode Concrete's business and which show (so the first and second-named defendants claim) that Goode Concrete was under financial pressure well before the commencement of the alleged anti-competitive conduct. The court, of course, does not know how this defence will fare at the ultimate trial of action. For present purposes it suffices to note that it is a rationally grounded plea rooted in the evidence before the court. In particular in this regard, the court notes that among that evidence is an expert report to the court dated May 2011 and prepared, in the context of a previous application for security for costs in the within proceedings, by Mr Kevin Spillane, then a Director of Corporate Finance within KPMG. In his report, Mr Spillane identifies why he considers the business of Goode Concrete to have failed, relying on the (relatively limited) information then available to him (detailed later below), and does so in terms that accord with the case advanced by the first and second-named defendants, being that Goode Concrete's downfall was (in his view; this may not be accepted by the court at trial) attributable to low operating margins generated by its business in 2006 and 2007, a high level of debt contracted in 2006 and 2007, the severity of the downturn in the construction sector and the national economy post-2007, and the absence of a significant reduction in net debt in the company between 2006 and 2010. Perhaps most notable, however, for present purposes is Mr Spillane's averment in the affidavit to which his report is exhibited that *"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."* That, it seems to the court, is an averment to which some weight ought be attached: it is an expert saying that in his professional opinion certain information is relevant and necessary to his giving a fully informed expert opinion. Notably, in this regard, there is no replying affidavit from any expert acting for Goode Concrete averring that such information is not required to give an informed view on Goode Concrete's finances during the relevant time-period and the reasons why it failed as an enterprise.

(v). *Objections to Discovery.*

209. A number of arguments are made by Goode Concrete as to why it should not make discovery.

1. An issue of damages only.

210. Goode Concrete contends that (i) the question here is whether there was anti-competitive conduct and whether ensuing damages were suffered, and (ii) the question of why Goode Concrete went out of business is something that goes to the assessment of damages only. So, for example, Mr McMahon avers as follows in his affidavit evidence:

> *"Mr Lenny* [avers]*…that the cause of the Plaintiff's demise is a central issue at the heart of these proceedings. The central question in the proceedings is, in fact, whether the defendants committed the breaches of competition law and other laws alleged in the Statement of Claim. The extent to which these breaches caused the Plaintiff to cease trading would likely only be relevant, as one factor, to the assessment of damages. Certainly, the Plaintiff, in order to succeed in these proceedings and establish an entitlement to damages, is not required to show that it ceased trading on account of the breaches of competition law and other laws on the part of the Defendants. Its position is that it is entitled to damages whether or not the breaches of laws on the part of the Defendant ultimately caused it to cease trading, as for example, the breaches of competition law by the Defendants will have resulted in the Plaintiff on losing work and market share that it would otherwise have obtained and also being forced to reduce its prices to artificially low levels in order to remain in the market. Once the Defendants have made discovery and the Plaintiff has had the opportunity of reviewing the information discovered, it should be able to provide further particulars in this regard."*

211. However, it seems to the court that this is to downplay the significance of the issues raised by the first and second-named defendants. Those issues are not confined to a question of quantum and assessment of damages; rather they go to the core of the case being made by Goode Concrete, which is that the defendants engaged in predatory pricing. Predatory pricing is a practice that normally involves an undertaking selling significantly below a competitor's prices, even at no price, in order to force that competitor to lose market share or to leave the market entirely. Once an undertaking achieves what it considers to be sufficient market share, then it would typically raise its prices to monopoly levels so as to recoup the losses made during the predatory period. And the foregoing is precisely what is alleged in paras. 17 and 20 of the statement of claim (as quoted above), viz. below-cost selling to force Goode Concrete from the market and a related raising of prices once Goode Concrete was gone. Another feature of predatory pricing is that it typically involves a dominant undertaking acting in a predatory manner; however there is no reason why it could not also involve collective predatory action by a number of undertakings, whether dominant or not, acting collectively against a common competitor. And, again, that is what is alleged in this case: Goode Concrete alleges collective dominance on the part of the defendants so that they had a sufficient position of dominance to engage in predatory pricing; that is the precursor to the allegation of anti-competitive conduct. Lest there be any doubt that the foregoing is in fact the case that Goode Concrete is making, the following extracts from the written submissions of counsel for Goode Concrete make clear that this is so:

> *"12. Assuming for the moment that CRH/Roadstone and Kilsaran are separate undertakings, the conduct of the defendants would be explicable on the basis that there was an agreement between them to engage in predatory pricing with the aim of eliminating the Plaintiff from the Dublin concrete market….*
>
> 17. *The plaintiff has also supplied evidence to show that CRH/Roadstone and Kilsaran have abused their collectively held dominant position in the Dublin concrete market. The plaintiff submits that predatory pricing by firms in a position of collective dominance is an abuse of that dominant position in the same way as predatory pricing by a firm in a position of single firm dominance is an abuse. It has also been established that firms in the position of collective dominance abuse that dominant position by engaging in practices aimed at eliminating the competitor from the market (e.g. Cases T-24/93 etc.,* Compagnie Maritime Belge Transports SA v. Commission *[1986] ECR II-1201, para. 248). In respect of firms occupying a collective dominant position pricing below AVC is presumed to be an abuse whereas pricing at a level between AVC and average total cost ('ATC') is an abuse if an eliminatory intention is shown. (Case C-62/86* AKZO Chemie BV v. Commission [*1991] ECR I-3359, paras. 71-72)….In any event, there is evidence of eliminatory intent on the part of CRH/Roadstone and Kilsaran so that if any of the prices identified as being below AVC were in fact below AVC and ATC, they would still be abusive on the basis of the eliminatory intent on the part of the Defendants."*

212. It is clear from the foregoing that the question as to whether Goode Concrete was forced out of business by the anti-competitive conduct of the defendants is core to the case that is being made by Goode Concrete. And the documents that are sought by the first and second-named defendants in Category 12 go to the question of whether Goode Concrete's business did fail for the reasons alleged by Goode Concrete and/or for the detailed reasons alleged by the first and second-named defendants. Additionally, when it comes to assessing any (if any) damages that might fall to be ordered following the trial of these proceedings, the trial court would concern itself with, *inter alia*, whether Goode Concrete went out of business (a) because the defendants forced it out of business, or (b) because of its financial situation, etc., and not because of the defendants' conduct. The way in which the trial court would approach the quantification of damages would be very different depending on which (if either) of those two scenarios was found to obtain. In Scenario (a), Goode Concrete would be trading today; however, in Scenario (b) the court would be looking at a position where Goode Concrete would have gone out of business in any event but in which the court might find (and this Court, of course, has no view and makes no finding in this regard) that that cessation of business had been accelerated and/or precipitated by some form of anticompetitive conduct that is presently alleged. The outcome on damages could and likely would be significant, so again the issue of whether Goode Concrete's business did fail for the reasons alleged by Goode Concrete and/or for the detailed reasons alleged by the first and second-named defendants goes to that .

2. Goode Concrete's Offer.

213. Goode Concrete has offered to make discovery of its audited accounts for the years ended 31st December 2007, 2008 and 2009 and its management accounts for the period ended 31st October 2010. However, Mr Spillane, at para. 4 of his above-mentioned expert report, states as follows:

> *"During the course of my review I had access to the following information:*
>
> ☐ *The audited accounts of Goode Concrete for the years ended 31 December 2007, 2008 & 2009 and the company's management accounts for the period from 1 January 2010 to 31 October 2010…*
>
> ☐ *Affidavits by John O'Gorman and Peter Goode and other documentation from the proceedings;*
>
> ☐ *The audited financial statements of Readymix plc (Cemex), a direct competitor of Goode Concrete identified by Peter Goode."*

214. As can be seen from the above, among the information used by Mr Spillane to prepare his report of May, 2011 is the information that was available to the first and second-named defendants over six years ago. So the offer, properly viewed, is an offer of nothing. And not surprisingly it is an offer that has not been accepted by the first and second-named defendants, effectively because Mr Spillane, in uncontroverted evidence, has averred 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."*

3. Proportionality.

215. Goode Concrete complains that to order discovery of the documentation sought in Category 12 would offend against the requirement as to proportionality in the ordering of discovery.

216. 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? If one looks to *Framus*, that was a decision handed down not too long after the Rules of the Superior Courts had been amended, with those amendments introducing for the first time the concept of necessity. In *Framus*, it would be fair to say that the question of proportionality is dealt with under the umbrella of necessity. However, in the years since *Framus* was decided, proportionality has come to play a more distinct role in the analysis undertaken by the courts in relation to discovery application such that nowadays it is often, perhaps even more often than not, broken out separately from necessity and considered on a stand-alone basis by the deciding court. Thus while conceptually the notion of proportionality still remains within the framework of necessity, in recent years there has been, concomitant with the increasing concern manifested by the courts as to the cost and burden of discovery, a tendency in reality for the courts to treat proportionality as a separate matter for analysis and not just a matter considered under the rubric of necessity. The essence of disproportionality, in this context, is that what is being ordered is too large in comparison with something else. (Though the word 'disproportionality' obviously extends to something being too small in comparison with something else, in the courtroom context the person at the receiving-end of a discovery application seems unlikely ever to claim that not enough is being sought of it by way of discovery). But what is that 'something else' by which a claim of disproportionality falls to be construed? Finlay Geoghegan J. in *Boehringer Ingelheim Pharma GmbH and Co KG v. Norton (Waterford) Limited t/a Teva Pharmaceuticals Ireland* [2016] IECA 67, touches succinctly on this issue, at para. 45 of her judgment, when she observes that "*The proportionality between the potential advantage to Teva in obtaining these documents for use in these proceedings and the probable cost and time involved in Boehringer making discovery and taking into account the position in the UK proceedings is such that discovery of categories 2 and 3 is not necessary for the fair disposal of the proceedings*." So on one side of the scales the court looks to how relevant 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 is not disproportionate, given how important the documents are to that particular case. (And the test falls always to be applied in the particular context of a particular case, *i.e.* what the issues are, what the costs are, *etc.*, in that particular context).

217. Bringing the foregoing to the context of the within proceedings, the court notes that it has been offered a bald averment by Goode Concrete that what is being sought by the first and second-named defendants offends against proportionality. This has been coupled with the assertion by counsel for Goode Concrete in his oral submissions that, to paraphrase, 'Goode Concrete is little and is being asked for lots'. However, no evidence has been offered with which the court could properly engage when it comes to the issue of proportionality in this regard. No facts or figures have been provided in evidence to the court. Mention was made by counsel that it might be difficult to obtain documents from a receiver but no evidence has been furnished in this regard. Indeed, a feature of the within proceedings is that while Mr Goode swore a number of affidavits in relation to Goode Concrete's application for discovery, he has not sworn a single affidavit in relation to the other applications for discovery. Turning however, to address the issue of proportionality as argued by counsel for Goode Concrete in his oral submissions, the court would make the following observations (the quoted text represents each limb of Category 12).

218. *"(i) Minutes of board meetings and management meetings of the Plaintiff for the period 2004 to 2011 addressing this issue".*

> No evidence has been given to the court as to why this category of discovery is disproportionate. So there is nothing before the court to suggest how many documents are in issue.

219. *"(ii) Communications between the Plaintiff and any regulatory authority, including but not limited to, any planning authority and the Revenue Commissioners in relation to issues which led to the Plaintiff ceasing trading".*

> Again, counsel for Goode Concrete in his oral submissions contended that this category is disproportionate. However, there is nothing before the court by way of evidence in this regard. There could be any number of documents in this category, from no records to a few to a large number (and if there are a large number of records this is relevant because these are documents that go to the issues which led to Goode Concrete ceasing trade).

220. *"(iii) All documents relating to breaches of loan covenants and any acts of default on any loans and all documents relating to any hire purchase or lease agreements entered into by the Plaintiff in the period between 2004 and 2011"*

> These are documents that go directly to the financial difficulties of Goode Concrete. What the first and second-named defendants anticipate that they will find if they get discovery of these documents is that there were breaches of the loan covenants and of hire purchase agreements and acts of default long before the alleged anticompetitive conduct started.

221. *"(iv) Consolidated audited accounts for the Plaintiff for the years ended 31 December 2004 to 2011;*

> *(v) Audited accounts for the concrete business of the Plaintiff for the years ended 31 December 2004 to 2011;*
>
> *(vi) Management accounts for the Plaintiff for the consolidated entries for the years ended 31 December 2004 to 2011;*
>
> *(vii) Management accounts for the concrete business of the Plaintiff in respect of the Greater Dublin Area for the years ended 31 December 2004 to 2011;*
>
> *(viii) Management accounts for the concrete business for the Plaintiff for the years ended 31 December 2004 to 2011;*
>
> *(ix) Consolidated accounts for the Plaintiff group of operating companies prepared at a Jersey ownership company level for the years ended 31 December 2004 to 2011"*

When it came to these various accounts, counsel for Goode Concrete especially objected to the fact that the first and second-named defendants want accounts dating back to 2004, However, accounts of such vintage are relevant and necessary because the first and second-named defendants plead that the seeds of Goode Concrete's demise long pre-date the anticompetitive conduct that is alleged to have commenced in late-2007.

As to category (ix), the relevance of which was queried by Goode Concrete, this category must, with respect, be clear to Goode Concrete. It (Goode Concrete) is an unlimited company owned by Jersey companies. As a result, Mr. Spillane in his expert report has identified this sub-category of documentation as necessary for him to provide rounded expert advice in relation to the matters on which he has been asked to report and opine, the filing requirements of unlimited companies obviously being less onerous (and so the accounts filed less informative) than those of a limited company, *i.e.* the companies at the Jersey level.

222. *"(x) All documents relating to Goode Concrete's plants at Naas, Co Kildare, Killeen Road, County Dublin and Ballycoolin, Co Dublin, and its sand and gravel quarries at Carbury, County Kildare and Kinnegad Co Westmeath, including but not limited to documents regarding their location, permitted reserves, planning status and documents demonstrating their operational structure for the haulage of aggregates to the sites"*

A particular query was raised by counsel for Goode Concrete as to the relevance of sub-category (x). Again, however, it seems to the court, with respect, that the relevance of this sub-category must be clear: the first and second-named defendants have pleaded in their replies to particulars that Goode Concrete's plants were badly located and that offers a proper basis for discovery of this sub-category.

223. *"(xi) All documents relating to any applications for planning permission for extraction at the Plaintiff's sites and all documents relating to compliance with same;*

(xii) All documents relating to the purchase of lands by the Plaintiff in the period between 2004 and 2011, to include but not be limited to, the investment rationale underlying such decisions to purchase the said lands and the expected reserves and planning outcome;

(xiii) All documents evidencing the cost of producing aggregate from the Plaintiff's plants at Carbury and Kinnegad and the costs of haulage to downstream plants;

(xiv) All documents evidencing the period of operation of the Plaintiff's plants".

Again, each of these sub-categories of discovery goes to the pleadings about the (allegedly deficient) commercial management of Goode Concrete in the years immediately preceding that entity's eventual collapse.

224. *"(xv) All documents evidencing or relating to the payments or benefits made by the Plaintiff to directors, or persons connected to the directors, including but not limited to, all documents in respect of salaries, pensions and rent, or any other payments whatsoever, between 1st January 2004 and 31st December 2011"*

The need for this sub-category of documentation again derives from Mr Spillane's report. Mr. Spillane has specifically noted how while Goode Concrete's business was collapsing the directors continued to take large sums out of the business by way of salaries, pension and rental payments. The first and second-named defendants plead that one of the reasons why Goode Concrete got into financial difficulties was because as sales dropped rapidly, overheads, including salaries, *etc*., were not cut commensurately. Hence these documents are relevant and necessary and as with all these sub-categories there is no evidence before the court that to order discovery of any or all of these sub-categories would be disproportionate.

225. *"(xvi) All documents relating to the Statement of Affairs produced on appointment of the receiver to the Plaintiff and all communications between the Receiver and the Plaintiff and/or the directors of the Plaintiff and all reports produced by the Receiver in relation to the financial position of the Plaintiff;*

(xvii) All documents relating to the costs reduction measures implemented by the Plaintiff during the period from 2008 to 2011 having regard to the collapse in the Irish construction sector;

(xviii) All documents evidencing the ownership of each of the sites used by the Plaintiff in the operation of the Plaintiff and, where relevant, the rent paid in respect of these sites and all documents evidencing the level of reserves and the site remediation requirements at all sites owned and/or operated by the Plaintiff up to the date of the closure of the sites;

(xix) All documents comprising or evidencing any financial advice given to the Directors of the Plaintiff relating to the Plaintiff's financial position from 2005 onwards and in particular including in relation to the reasons for the financial difficulties suffered by the Plaintiff".

Again, each of these sub-categories of discovery goes to the pleadings about the (allegedly deficient) commercial management of Goode Concrete in the years immediately preceding that entity's eventual collapse.

(vi) *Conclusion as to Discovery of Category 12.*

226. It seems clear to the court that Category 12, for the reasons aforesaid, is relevant and necessary, going to a central issue in the proceedings. Based on the evidence and submissions before it, and noting the want of meaningful evidence as to disproportionality, the court does not see that to order this category of discovery would offend against the requirement as to proportionality. The court will therefore order discovery of Category 12 as sought.

XVI. Category 4

227. Documentation Sought: *"In respect of each instance of supply by the Plaintiff, in the Greater Dublin area, of ready-mixed 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."*

228. As with Category 12, the relevant portions of the statement of claim are paras. 17 and 20 and have been quoted above. As to the particulars of the claims in relation to below-cost pricing, pursuant to an order of Charleton J., *inter alia*, the following details were provided:

> *"The Plaintiff cannot know the average variable cost ('AVC') of the Second Named Defendant of supplying ready-mix concrete and concrete products. Discovery will be required to establish this. However, the Plaintiff does know its own costs and to its best knowledge and belief the Second-Named Defendant did not have a lower AVC to the Plaintiff at any of the material times relevant to these proceedings….*
>
> *Without prejudice to its position that the components of AVC and those of fixed costs are properly a matter for legal submission and evidence, the Plaintiff says that its own AVC includes:*
>
> *Cement*
>
> *GGBS (slag)*
>
> *Sand/Aggregates*
>
> *Wages*
>
> *Transport Costs*
>
> *Energy*
>
> *Other variable overheads including maintenance, materials testing, Admixture.*
>
> *The average variable cost to the Plaintiff of producing and supplying 35N20mm concrete in the greater Dublin area in each of the years ending March 2008, March 2009 and March 2010 across all of its supplies of concrete, was approximately as follows:*
>
> *- 2008 - €67/m3*
>
> *- 2009 - €65/m3*
>
> *- 2010 - €65/m3".*

229. It appears from the foregoing that, at this time, Goode Concrete intends to rely, perhaps *inter alia*, on its own AVC at trial to suggest that the defendants were selling below AVC because they were selling below the Goode Concrete's AVC. And certainly its counsel, in oral submission indicated that some of Goode Concrete's witnesses as to fact may want to rely on Goode Concrete's AVC history. Even so, 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. The court will therefore order discovery of Category 4 as sought.

3. APPLICATION OF KILSARAN CONCRETE FOR DISCOVERY FROM GOODE CONCRETE

XVII. Introduction

230. The notice of motion whereby Kilsaran Concrete seeks discovery of Goode Concrete comprises nine categories of discovery. Only one of these categories (Category 5) is now in dispute. It comprises the following documentation: *"All documents relating to and/or referring to the Plaintiff's decision to cease trading."*

XVIII. The Statement of Claim

231. Turning to the pleadings, the court recalls in this regard paras. 17-20 (incl.) of the statement of claim, which claim as follows:

> *"17. 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 tendered, 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.*
>
> *18. 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.*
>
> *19. The plaintiff will claim that the pricing practices of each of CRH/Roadstone and Kilsaran in concrete tenders are explicable only on the basis that the defendants 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.

20. 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 of concrete at below AVC, the plaintiff was forced to ceased 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."

232. As can be seen from the just-quoted elements of the statement of claim, Goode Concrete's claim against Kilsaran is, in essence, as follows: prices fell, they allegedly fell below Goode Concrete's AVC and Goode Concrete maintains that the only possible explanation for this is anti-competitive behaviour which had the realised aim of eliminating Goode Concrete as a competitor from the market. So it is a central and critical aspect of Goode Concrete's case that it was forced to cease trading by alleged anti-competitive activity. This allegation is expressly denied by Kilsaran in its Defence. So again one is back essentially to the core issue touched upon previously above as arising between Goode Concrete and the first and second-named defendants, viz. what was the true reason for Goode Concrete's collapse?

XIX. Relevance and Necessity

233. Ms Murdock, a solicitor acting for Kilsaran treats fulsomely with the rationale for this category of discovery in her affidavit evidence, and a related offer of discovery in respect of this category (which she maintains points to an acknowledgement by Goode Concrete of the relevance of same) averring, *inter alia*, as follows:

"13. I say that the relevance of the documents and their necessity to the fair disposal of the proceedings has been recognised by the Plaintiff in their agreement to provide discovery of the documents sought in category 5 in a limited form. The Plaintiff has agreed to furnish the Third Named Defendant with its audited accounts for the years ending 31 December 2007. 31 December 2008, 31 December 2009 and management accounts for the period ending 31 October 2010.

14. However, I say that in the Third Named Defendant's view that offer is insufficient. The Category is drafted so as to cover all documentation in the Plaintiff's power or possession which would shed light on the basis for the decision to cease trading. I say and believe and am advised that it is the Third Named Defendant's belief that the said decision was taken by virtue of the impact of commercial pressures felt as a result of management decisions and other difficulties in the Plaintiff company. However, without the documents sought the Third Named Defendant may be unable to sustain any challenge to the Plaintiff's assertion that the decision to cease trading was taken by virtue of anti-competitive pressures from other market participants as opposed to by virtue of any of the myriad of other reasons why an undertaking might decide to cease trading."

234. The court respectfully does not see that an offer of part-discovery necessarily points to any concession by the offeror that the category of documentation to which that offer relates is relevant. That would not be so very different from pointing to a settlement of litigation between parties as necessarily pointing to one or other (or both) of the settling parties accepting that they are somehow at fault. Such an offer, such a settlement, may simply be and often is a calculated step taken in the overall context of proceedings and can be informed by an array of factors, notably but not only the expense that any protraction of litigation invariably involves. However, the court accepts, by reference to the above-quoted pleadings that this category of documentation is both relevant and necessary, both as to the core issue presenting and also when it comes to damages (quantification of harm/damages being a major element of competition law proceedings, and one part of the applicable assessment, as touched upon previously above, being that the trial court must consider how the market would have developed absent any (if any) anti-competitive behaviour found by that court to present).

XX. Proportionality

235. The issue of proportionality has been raised by Goode Concrete as regards Category 5 as sought. Thus Mr McMahon, a solicitor acting for Goode Concrete has averred, *inter alia*, in his affidavit evidence that *"The contention by the Third Defendant that the cause of the demise of the Plaintiff is a central issue at the heart of the proceedings…is a mischaracterisation of the position and the breadth of the discovery which is sought is entirely disproportionate."* That, in essence, and unsupported by any evidence as to the scale of the potential exercise involved, is Goode Concrete's case as regards the issue of proportionality in this regard. Factors that seem to the court of relevance to its assessment of proportionality in this regard are the following. First, it does not seem to the court that the request is unjustifiable given the pleadings in the statement of claim, and the express denial in the Defence, as touched upon above. Second, as to the scope and cost of disclosure, these are identifiable documents which should in truth be available (and at low cost) to Goode Concrete. But if they are not available, then they are not available and cannot be discovered. As to the general desirability of not having non-specific searches, this is a very specific search, not some wide-ranging request for discovery. Finally, as to the confidentiality and commercial sensitivity of the documents requested, it has repeatedly been asserted at the hearing of the within proceedings that Goode Concrete *per se* is no longer trading, so there can be no issue in respect of the confidentiality of the company's documents.

XXI. Conclusion as to Discovery of Category 5

236. It seems clear to the court that Category 5, for the reasons aforesaid, is relevant and necessary, going to a central issue in the proceedings. Based on the evidence and submissions before it, and noting the want of meaningful evidence as to disproportionality, the court does not see that to order this category of discovery would offend against the requirement as to proportionality. The court will therefore order discovery of Category 5 as sought.