

**THE HIGH COURT
COMMERCIAL**

[2012 No. 6620 P.]

BETWEEN

JOHN CLEARY, COLIN CLEARY AND JOHN CLEARY JUNIOR TRADING AS JOHN CLEARY DEVELOPMENTS

PLAINTIFFS

AND

JOSEPH SHEEHAN

DEFENDANT

JUDGMENT of Mr. Justice Cooke delivered the 22nd day of October 2013

1. By notice of motion dated the 13th day of September 2013, the defendant in this action applies for orders which are directed at the alleged inadequacy of discovery of documents made by the plaintiffs. The application is brought on the alternative bases of an order pursuant to O. 31, r. 21 of the Rules of the Superior Courts dismissing the plaintiffs claim for want of prosecution and an order directing the plaintiffs to make further and better discovery. Although the proceedings were admitted to the Commercial List and have been the subject of a number of case management direction orders since so admitted in November 2012, no formal order for discovery of documents by the plaintiffs have been made. The extensive discovery exercise has been based upon the plaintiffs' agreement to make discovery of eleven categories of documents requested by the defendants. The case was set down for trial for a number of weeks commencing on the 8th October on the understanding that both parties were satisfied that the case was fully prepared for that purpose. It appears, however, that disputes over the adequacy of the plaintiffs' discovery exercise had not in fact been resolved, with the result that an application was made at a vacation sitting in September last to vacate the trial date and instead to hear the present motion for further discovery.

2. At the hearing of the motion, the Court has been taken through extensive exchanges of correspondence and affidavits in which the disputes between the parties over the adequacy of discovery are debated and, on the part of the defendant's solicitors, expressions of surprise, dismay and alarm at the plaintiffs' alleged failures in this regard have been expansively aired. At the request of the Court, however, counsel for the defendant prepared a paper in which the disputes now remaining between the parties have been itemised with the result that the dispute now turns upon four particular categories and in respect of each of those, particular documents or groups of documents are identified or described. The categories in question as set out in more detail below are Categories 2, 5, 7 and 11.

3. Counsel for the defendant in moving the motion has laid considerable emphasis on the fact that the discovery exercise has been based upon the plaintiffs' explicit agreement to provide the documents in the categories in question and much of the debate has turned upon the issue as to whether the outstanding discovery now demanded comes within the scope of the categories as so worded and whether the plaintiffs and their advisors have correctly construed or have misinterpreted the descriptions in the categories. (Such an agreement has of course the effect of an order by virtue of Order 31 rule 12(4)2) of the Rules of the Superior Courts.) From the point of view of the Court of course the primary legal consideration is whether the additional documentation sought to be discovered is relevant to the issues between the parties arising on the pleadings and whether the extent of the documentation either in volume or the timescales covered is proportionate to the significance of the relevant issues and the likely cost of the exercise involved in making further discovery. It is therefore necessary to describe briefly the context in which the documentation arises and its relationship to the claims and counterclaim in the action.

4. The plaintiffs' claims arise out of a project for the construction, fitting out and lease of a new private hospital at Mahon in Cork and the defendant is sued as a guarantor of an Agreement for Lease dated the 27th January, 2010, made between the plaintiffs as landlord and CMC Medical Operations Limited ("CMC"), the company for which the hospital was to be constructed and which was to occupy it as tenant. The agreement provided that if CMC failed to take the lease by a date defined in the agreement, the defendant would take the lease upon the same terms and conditions.

5. A central issue in the litigation concerns the provision for "Practical Completion" in the agreement. The date of Practical Completion was defined as being "the date the Landlord's Engineer certifies in the Certificate of Practical Completion that the works have reached Practical Completion". The notion of "practical completion" was defined as meaning that:

"...the Landlord's Works and the Fit Out Works have been practically completed in accordance with this Agreement, such that they can be taken over and used for their intended purposes and that any items of work or supply then outstanding or any defects then patent are of a trivial nature only and are such that their completion or rectification does not interfere with or interrupt such use or uses".

6. The Court was informed that as work on the building neared completion in the autumn of 2010, CMC took up some form of occupation as licensee although, it is said, it did not begin full operations as a hospital. Correspondence in relation to completion was taking place between the solicitors for the parties, namely Timothy J. Hegarty and Son on behalf of CMC and Messrs P.J. O'Driscoll and Sons on behalf of the plaintiffs. In a letter dated the 19th November, 2010, which is at the heart of the main dispute on this application for discovery, Timothy J. Hegarty and Son wrote:

"Accordingly, my clients are willing to accept Practical Completion as being achieved today, strictly on the following terms:

[1]. . .

2. All original Certificates as listed in the Fifth Schedule to the Agreement for Lease are available on the completion date – Please note that a draft booklet of certificate was furnished previously to our clients Engineer, however, we require an up to date booklet of certificates to be furnished to him within a reasonable time prior to in advance of completion so that same can be approved.

[3.]...

Our clients continue to reserve their position in respect of Practical Completion until the foregoing conditions have been satisfied."

(The two other stipulated conditions Nos. 1 and 3 are not relevant to the present issue.)

7. For reasons not immediately relevant to the present application, CMC was unable to bring the new hospital into full operation, ceased occupation (or abandoned the property according to the plaintiffs,) in March 2011 and subsequently went into liquidation. It is one of the defendant's principal contentions that, notwithstanding the purported achievement of practical completion in November 2010," landlords works" essential to practical completion were continuing after the 19th November, 2010, including, it is claimed, work relevant to the testing and commissioning of the equipment involved in the fitting out of the hospital.

8. Following upon the inability or refusal of CMC to complete the lease, efforts were made to find an alternative tenant for the hospital property. These efforts initially involved the defendant and included approaches to the proprietors of Mater Private Hospital through a company called MP Healthcare Holdings. This led to an agreement of the 16th March, 2011, between that company and the defendant together with two associates with a view to having that company negotiate with the plaintiffs to take over the interest of CMC in the project. Because the VHI had refused to approve the proposal of CMC to open a new private hospital in Cork, an alternative solution was found under which an existing private hospital at Shanakeil in Co. Cork was acquired and transferred to Mahon; its name was changed to Mater Private Cork Limited and "Heads of Agreement" dated the 21st April, 2011, were concluded between the plaintiffs under which a company to be formed by "Mater Private" was to become the new tenant of the hospital at Mahon. Subsequently the Mater Private company carried out what is referred to as a "due diligence" on the Mahon building and works were carried out to "reconfigure" it to meet its particular operational requirements.

9. According to the defendant, documents already discovered disclose that, in addition to becoming a tenant of the plaintiffs' property the arrangements between those parties involved the creation of financial and corporate structural relations between them in that the third named plaintiff became a director of the tenant company and obtained an indirect shareholding in it. As part of the transaction the plaintiffs were to provide or procure the provision of certain loans and to contribute towards the purchase of the Shanakeil hospital. The plaintiffs maintain that these financial arrangements were of no material benefit to the plaintiffs, but the defendant maintains that the arrangements are directly relevant to the quantification of the plaintiffs' claim for damages particularly having regard to the fact that the plaintiffs apparently conceded a rent free period to the new tenant.

10. It is, accordingly, in the context of that background to the dealings between the parties that the issues in the pleadings arise. In effect, the plaintiffs' claim is for damages for breach of contract and is brought against the defendant as guarantor of the CMC obligations under the Agreement for Lease. As originally advanced in the statement of claim, the particulars of special damage came to €67,136,223, being the then estimated value of the discounted cash flow from the loss of rent under the lease to CMC. Subsequently, in responding by letter of the 12th April, 2013, to a request for particularisation of the damages claim, the basis of the claim was amended to take into account the fact that the property had been let to the new tenant.

11. In the revision of the special damages claim, the total amount sought was €23,056,822.59 made up of three heads of loss as follows:-

Drop in valuation of premises: €17,650,000

Holding costs and expenses: €2,902,743

Alteration/recommissioning: €2,504,079

The figure for drop in valuation of the property was based upon the difference in two valuations of the lease as originally to be made to CMC and as subsequently made to the new tenant.

12. As already indicated, the central ground of the defence is that no liability upon the part of the defendant as guarantor arises because there was no breach of contract on the part of CMC. This is said to be so upon the basis that the obligation to complete the taking of the lease had never arisen because practical completion had not been achieved on the 19th November, 2010, or at any stage thereafter.

13. In addition to denying liability and disputing the issue of practical completion, the defendant, without prejudice, makes a counterclaim in which he asserts his entitlement under the Agreement for Lease and the guarantee to step into the shoes of CMC and to take the lease. He claims that the plaintiffs have failed and refused to grant him the lease and counterclaims for, *inter alia*, specific performance of the agreement in that regard. As mentioned further below, the viability of the latter part of the counterclaim may now have been over taken by subsequent events in that the property has been leased to the new tenant and is now occupied and operated by that company as a hospital. A question will obviously arise as to whether in those circumstances equitable relief of specific performance could be granted.

14. It will be apparent from this summary of the background to the litigation that the areas of substantive dispute between the parties at the hearing are to be directed principally to the technical and factual issue as to whether the hospital building had achieved "practical completion" on the 19th November, 2010, or thereafter and, secondly, if the plaintiffs established that there has been breach of contract giving rise to a liability under the guarantee, the basis upon which any entitlement on the part of the plaintiffs to damages will be quantified. It is in relation to the adequacy of discovery made of documentation relevant to these two areas of dispute with which the present motion is concerned. The defendant maintains that there are items outstanding in four of the original categories. Categories 2 and 5 cover documentation said to be relevant to the "practical completion" dispute. Categories 7 and 11 cover documents sought relevant to the quantification of the claim for damages and are particularly concerned with what is claimed to be the financial implications of the arrangements made by the plaintiffs to let the property to the new tenant including, it is said, the value of the benefits or advantages which will accrue to the plaintiffs from the loan and investment transactions in question and which may fall to be taken into account in calculating any loss which the plaintiffs are entitled to recover from the breach of contract on the part of CMC.

Categories 2 and 5.

15. As already mentioned, the areas remaining in dispute are confined to four of the 11 categories originally requested. Of these, Categories 2 and 5 are said to be documents relevant to the practical completion issue and Categories 7 and 11 to the damages claim. It is convenient to deal first with the two former categories taken together. The terms in which those categories were defined when originally requested and the items now said to be outstanding and discoverable have been presented to the Court as follows:

Category 2 : All documentation pertaining to referring to or evidencing works done by the Plaintiff to comply with the condition numbered 2 in the letter from the Defendant's solicitors dated 19th November 2010 (ie. "all original certificates as listed in the Fifth Schedule to the Agreement for Lease are available on the completion date - please note that a draft booklet of certificates was furnished previously to our client's Engineer however we require an up to date booklet of certificates to be furnished to him within a reasonable time prior to [and] in advance of completion so that same can be approved."

(a) What remains outstanding under this category is all documentation pertaining to referring to or evidencing the completion of the original certificates as listed in the fifth schedule to the agreement for lease. In short, documents must exist as to when all of these certificates were completed and furnished to C.M.C.

(b) This issue has already been conceded by the Plaintiffs in terms of the I.F.S. file and the relevant e-mails referring to the uploading thereof. The Plaintiffs were afforded with an opportunity of dealing with this matter by way of interrogatories in the Defendant's letter of 5th September, 2013 which said offer was, in effect, declined by the manner in which the Plaintiffs replied in their letter of 10th September, 2013.

Category 5 : All documentation pertaining to or evidencing works conducted by or on behalf of the Plaintiffs upon the premises subsequent to the 19th November 2010 up and until 14th June 2012.

(a) What is required and outstanding is all documentation relevant to this category passing from the Plaintiffs and their sub-contractors and agents namely Suir Engineering, the P.M. Group, the Project Managers, Abbey-Side and I.F.S. Group. It has only recently emerged that the Plaintiffs have not sought this material from these parties in compliance with the obligations imposed upon them.

(b) If there are further versions of the Appendices to the Signed Heads of Agreement dated 21st April, 2011 Re : Mater Private Hospital lease of 30000 Citygate, Cork, they should be discovered.

16. The Court pointed out to counsel for the defendant that the precise wording of Category 2 was possibly ambiguous in that it was open to the interpretation that the works done to comply with the requirement to furnish all the certificates listed in the Fifth Schedule referred to simply copying and furnishing the specific certificates in question, given that Category 5 seemed to request all underlying documents relating to the building, remedial, testing and commissioning work carried out on the property after 19th November 2010. The plaintiffs had seemed to assume that interpretation as they had merely made discovery of the commissioning certificates.

17. Counsel explained that the distinction intended between Categories 2 and 5 was that the former sought the documentation generated by the on-site works done by the plaintiffs, their contractors, sub-contractors and agents which had placed the Engineer in a position to purport to certify on 19th November 2010 that Practical Completion had by then been achieved. Discovery of that material was relevant to the defendant's assertion that any such works were insufficient to constitute Practical Completion. The documents within Category 5 on the other hand were relevant to the defendant's contention that works of the type required to achieve Practical Completion had in fact continued to be carried out after 19 November 2010. It was emphasised that the defendant was sued as guarantor and because CMC was in liquidation, the defendant was at the disadvantage of not himself having access to first hand evidence of such works.

18. The defendant originally sought discovery from the plaintiffs on the 18th December, 2012. On the 15th March, 2013, the third named defendant swore an affidavit of discovery as agreed. The original letter of the 18th December, 2012, had identified 10 particular categories and by a letter of the 27th February, 2013, the further 11th category was added. By letter of the 12th April, 2013, the defendant's solicitors expressed surprise that in Category 2, only one document had been listed in respect of the subcategory relating to the practical completion and final testing work. In their response to this complaint by letter of the 24th April, 2013, the plaintiffs' solicitors replied: "As the construction works were completed by mid September, the work of the construction project managers (FESP) ended on the 15th September 2010. Everything has been discovered as relates to section A". Similarly, in their query relating to the discovery made under Category 5, the defendants in their letter of the 12th April, 2013, said: "Once again, we note that there does not appear to be any documentation from the subcontractors or design team involved in the project". That was responded to in the letter of the 24th April, 2013, with the statement: "Everything has been discovered as relates to this category".

19. By letter of the 2nd May, 2013, the defendant's solicitors again requested further discovery in respect of categories 1, 2 and 6. By letter of the 8th May, 2013, the defendant's solicitors sought clarification of the request asking: "Please specify precisely what it is that was requested on the 12th April, in respect of category 2 and to which we have not responded".

20. It appears that in the interim, the defendant had sought and obtained discovery from the liquidator of CMC following which they gained access to a very large quantity of documentation. On the 4th September, 2013, the plaintiffs proffered a supplemental affidavit of discovery sworn on that date. In this affidavit the third named plaintiff referred to the fact that discovery had already been made of the certificates referred to in category 2, but "for completeness" listed "certain items of correspondence that were in the plaintiffs possession on the date of the first affidavit which relate to the IFS system under which the said certificate were uploaded". The First Schedule to that supplemental affidavit listed some 56 emails dated between the 27th August, 2010 and the 31st March, 2011 "relating to the IFS system". In respect of Category 5 of the original request, 15 emails were listed.

21. Having reviewed the third party discovery and examined the supplemental affidavit of discovery, on the 5th September, 2013, the defendant's solicitors wrote complaining that "serious issues arise in respect of the reliability and adequacy of the discovery that has been made". In relation to Category 2, amongst a number of queries and objections raised, the solicitors drew particular attention to the "Digital Project Safety File" referred to in the 5th Schedule to the Agreement for Lease and asserted that this file had obviously not been completed by the date of the last email, the 31st March, 2011, and claiming that the plaintiffs were obliged to produce all documentation pertaining to that file up to its completion. The letter then set out a series of "interrogatories pertaining to this issue".

22. By letter of the 10th September, 2013, the plaintiffs' solicitors responded. They first asserted that they believed that they had

complied with the requirement of Category 2, by making discovery of all of the commissioning certificates. It was pointed out that these had been made available to Messrs Ryan, Sheehan and Kelleher (CMC personnel) and that these individuals had accessed the material in question on numerous occasions after the 16th December, 2010. They explained that the certificates had been uploaded on to a system prepared by Integrated Facilities Solutions Limited hence the references to the "IFS system". In response to the "interrogatories" the letter claimed that the relevant commissioning certificates "were issued substantially and sufficiently on the 25th November, 2010" and had been provided on a disk in addition to being uploaded on to the IFS system on the 16th December, 2010. The Digital Project Safety File was also claimed to have issued in all material respects on the 25th November, 2010, although as at the 16th February, 2011, "certain miscellaneous items" of that file unconnected with the certificates remained to be uploaded on to the system. The letter concedes that the Digital Project Safety File was ultimately finalised on the 25th June, 2011. In relation to Category 5, the letter maintained that a full discovery had already been made.

23. On the 13th September, 2013, Messrs Shannon and O'Connor responded on behalf of the defendant. Again they contested the adequacy of the discovery made in relation to Categories 2 and 5 in particular. In respect of the disagreement over Category 2 they insisted that this was not confined to the "commissioning certificates" but extended to all "documentation that is relevant to the alleged provision of all original certification as listed in the 5th Schedule". The letter then listed 5 particular queries in relation to the adequacy or inadequacy of Category 2. In the first of these reference was made to an e-mail of the 21st September, 2010, received by the plaintiffs from their solicitors, now produced, but which had previously been the subject of a claim for privilege in which it was stated that Messrs Hegarty on behalf of CMC were seeking a complete set of documents and stating that: "A complete set of documents contained in the Digital Project Safety File . . . needs to be reviewed and approved by the tenants design team to ensure that they are in the agreed format". This, it is argued, illustrates the fact that the plaintiffs were aware of the extent and type of the documents required for practical completion.

24. In relation to Category 5, the alleged inadequacy of the discovery was sought to be illustrated by reference to particular items disclosed in the third party discovery including an email dated the 31st March, 2011, which, it was suggested, demonstrated that "the construction phase of CMC" was not yet complete and that the plaintiffs personnel were still at that date working "to get all the final outstanding construction issues resolved as soon as possible".

25. On the 30th September, 2013, after the papers for the present application for further discovery had been issued and served, a third affidavit of discovery dated the 30th September, 2013, was sworn on behalf of the plaintiffs. This affidavit conceded that privilege had been inadvertently claimed at an earlier stage in respect of three documents, but that these had subsequently been supplied to the defendants notwithstanding the fact that their relevance to Category 3 was questioned. The affidavit also made discovery of additional documents within the Category 7. In relation to Category 2, "an electronic disk containing documents which was furnished to Jason Kelleher and Pat Sheehan on the 25th November, 2010" was listed as an item formerly but no longer in the plaintiffs' possession.

26. The Court has referred in some detail to the exchanges that have taken place in this correspondence because it illustrates what appears to the Court to be an increasingly common misunderstanding on the part of legal representatives as to the obligations and entitlements that arise when discovery is ordered or agreed. It appears to be assumed that if copies of documents are voluntarily supplied, the obligation to make discovery has been discharged and that the opposite party is entitled to no more. Discovery of documents is not made or ordered for the exclusive benefit of the party which seeks it: it is a formal step in the preparation of a case for trial which places on the court record for the use and benefit of both the parties and the trial judge, a sworn statement itemising all documents which the party in question recognises as relevant to the issues in the case and identifies those in respect of which a claim to privilege of some sort is made. Whether or not the opposing party is entitled to require production of and access to documents thus listed is a distinct issue. While the voluntary supply of copies of non-privileged documents may well be a practical step in expediting trial preparations and saving time and costs, it is not an answer to complaints as to the inadequacy of discovery of the kind that have occupied extensive correspondence in the present case.

27. As already indicated, the fundamental issue between the parties in this case turns upon the question as to whether the plaintiffs can prove that "practical completion" for the purpose the contract had been accomplished as required by the definition by that term by 19th November, 2010. The defendant's contention is that "the Landlord's Works and the Fit Out Works" had not by then been practically completed and were not in a state to be "taken over and used for their intended purpose". The defendant maintains that the documentation which would have been required at that date to establish the fact of practical completion was not in fact available or complete on that date and, secondly, that documentation generated by and between the plaintiffs, their contractors, subcontractors, professional advisers and other agents after that date will demonstrate that work which would have been essential to accomplish practical completion was still continuing. On that basis the defendant is clearly entitled to discovery of the documentation within the possession or procurement of the plaintiffs which can properly be identified as having been generated by any "Landlord's Works and Fit Out Works" whether prior to or subsequent to the 19th November, 2010.

28. While much of the argumentative exchanges which have taken place in correspondence between the solicitors in relation to discovery can be seen as attributable to semantic disputes as to what was meant by or fell within the different categories, it is clear that the supplemental affidavits that have been extracted from the plaintiffs have gradually conceded that more was discoverable by reference to Categories 2 and 5 than that originally listed in the schedules to the affidavit of the 15th March, 2013. In the judgment of the Court, the defendant is entitled to require the plaintiffs to provide a final definitive affidavit of discovery in respect of Categories 2 and 5. However, in order to avoid so far as possible any further arguments or misunderstandings in relation to what is required, the Court proposes to redefine the categories and to place a time limit on the material covered by Category 5. The categories will be redefined as follows:

Category 2: All documentation generated by or referring to works carried out by or on behalf of the plaintiffs as landlord's works or works of fitting out (including works of commissioning and testing) for the purpose of achieving, certifying or otherwise vouching the "Practical Completion" of the works comprised in the Agreement for Lease at and prior to the 19th November, 2010, including all documents listed or referred to in sub-paragraph (I) of Clause 8.4 of the Agreement for Lease held by or on behalf of the plaintiffs' on that date: other than those items of documentation which have already been listed in a schedule to the affidavits of the 15th March, 2013, 4th September, 2013 and the 30th September, 2013.

Category 5: All documentation generated by or referring to any building works, any remedial works and any works of testing, commissioning or fitting of the property done between the 19th November, 2010, and the 14th June, 2012.

29. This last date is the date which the plaintiffs had already agreed in the letter of the 14th January, 2013. For the avoidance of doubt, the Court does not consider that the demand for further versions to the appendices to the Heads of Agreement dated the 21st April, 2011, is justified. If the works carried out by or on behalf of the plaintiffs under that agreement for the new tenant are relevant to the defendant's defence, it is the actual agreement in that regard which is relevant. Furthermore, that agreement was to carry out

construction works, "associated with the provision of new facilities and the alteration to existing facilities". What is at issue between the plaintiffs and the defendant in the present action is the practical completion of the particular landlord's works and fitting out works under the Agreement for Lease and whether or not those works continued after the 19th November, 2010. Having regard to the alteration in the scope of works for the new tenant and the remoteness in point of time of the actual carrying out of those works from the original Practical Completion date contended for, the Court considers that underlying documentation relating to such works are of questionable relevance and in any event disproportionate having regard to the volume of documentation already identifiable as directly relevant to the essential issue.

Categories 7 and 11.

30. The documents sought in these categories and the items now said to be outstanding have been identified by counsel for the defendant as follows:

Category 7 : All documentation pertaining to the terms upon which the Plaintiffs have now purportedly agreed to lease the premises to a third party.

(a) Upon our review of the documentation furnished, it appears the following documents are missing:-

(i) A subordination agreement between Progressive Capital Limited, Quality Health Care Group Limited and the Plaintiffs.

(ii) A loan agreement as between Quality Health Care Group Limited and Quality Health Care Shankeil Limited (now the Mater Private).

(b) In those circumstances, confirmation by way of supplemental affidavit to the effect that all documents that constitute the actual terms upon which they agreed to lease the premises to the Mater Private are discovered.

Category 11 : All documentation pertaining to referring to or evidencing the Plaintiffs' special damage claim to include (but not limited to) (i) all sums that shall allegedly accrue to the Plaintiffs pursuant to the alternative letting of the premises and (ii) all documentation pertaining to the alleged gross and net profit that would allegedly have accrued to the Plaintiffs had either CMC or the Defendant taken a lease of the premises in accordance with what is alleged by the Plaintiffs to have been their contractual entitlements.

Whilst the Defendant accepts that there may be some issues as to whether or not some documents created by advisers are, in fact, within the procurement of the Plaintiffs, any final such document actually furnished to the Plaintiffs would be within their procurement and in those circumstances, subject to the caveat referred to herein, the Defendant contends that the following discovery should be made:-

(a) professional advices obtained in respect of the financial implications of the proposed Mater transaction.

(b) all/any financial projections obtained or prepared in respect of the proposed Mater transaction.

In respect of (ii), the Plaintiffs should simply comply with this requirement. That requires them to make discovery of all/any professional advices obtained as to the gross and net profit that would have accrued had either CMC or the Defendant taken a lease of the premises.

31. The further discovery thus sought concerns documents which are exclusively relevant to the quantification of the plaintiffs' claim for damages for breach of contract and, as already indicated, are directed in particular at the possible impact which the financial arrangements with the new tenant may have in reducing the actual recoverable loss. In view of the nature and scope of the documentation now said to be outstanding under these headings, the fact that they constitute separate transactions distinct from that of Categories 2 and 5 and involve the interest of the new tenant and the possibility that claims of confidentiality will be made in respect of them, the Court proposes not to make any order on this aspect of the application at this stage.

32. Instead, the Court proposes to give a direction under O. 63A, r. 5 of the Rules of the Superior Courts that the determination of any issues relating to the quantification of the damages the plaintiffs may be held entitled to recover await the outcome of the determination of the central issue as to the alleged breach of contract. What emerges from this protracted dispute over discovery in this case is the clear impression that this case now falls into two parts the first of which has the characteristics of a building contract dispute. In the view of the Court, in these circumstances it is in the interest of the parties achieving an expeditious resolution of the claims and a saving in time and costs as well as facilitating the most economic and efficient employment of the resources of the Court, that the distinct issues relating to the accomplishment of practical completion and the alleged breach of contract be determined in the first instance. It seems to the Court to be highly probable that the evidence relevant to those issues and the witnesses, including expert witnesses, to be relied upon for the purpose will be largely different from those involved in any quantification of damages. If the defence on these issues is successful, no claim for damages will arise and further extensive discovery of documents in relation to the matters said to be outstanding will have proved unnecessary. It is only if the claim for breach of contract is upheld that any issue as to quantification of damages will arise and it seems reasonable to suppose that it may well be possible to better focus any further relevant discovery in the light of the evidence that emerges on the trial of this central issue.

33. Accordingly, the defendant's application for further discovery will be allowed in part by reference to Categories 2 and 5 as redefined above. The Court will make no order in respect of the balance of the application.