THE HIGH COURT

[2016 4209 P]

BETWEEN

OLIVIA COUGHLAN, BRIAN COUGHLAN, TOM POWER, MOYA POWER, NIAMH REYONDS, JOHN REYNOLDS, MAURICE REYNOLDS, MARIE O'MALLEY, JAMES POWER AND BRID POWER

PLAINTIFF

V.

ESB WIND DEVELOPMENT LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Creedon delivered on the 15th day of June, 2018

BACKGROUND

1. This matter concerns a motion for discovery brought by the above named plaintiffs against the defendants seeking discovery in respect of five separate categories of documentation. This motion arises from High Court plenary proceedings seeking damages for nuisance, negligence and breach of statutory duty and further, seeking various orders, declarations, damages and exemplary damages arising from the erection of eight wind turbines by the defendants which are located at Woodhouse, Tinakilly, Keereen Upper, Ballygambon, Upper Knocknamona, Aglish and Cappoquin in the County of Waterford. The defendants have lodged a defence and the plaintiffs have lodged a reply to that defence.

2. The plaintiffs are all resident in the vicinity of the Woodhouse windfarm.

3. In these plenary proceedings, the plaintiffs seek damages for, *inter alia*, nuisance and breach of duty, including breach of statutory duty suffered by them by virtue of the noise, shadow, shadow flicker, visual impact and their consequential impacts on the plaintiffs use and enjoyment of their lands and, in particular, their dwelling houses. Further, the plaintiffs seek a declaration from the High Court that the operation of the windfarm is in breach of their constitutional rights pursuant to Articles 40.3, 40.5 and 43 of Bunreacht na hÉireann. In addition, the plaintiffs seek declarations that the development of the windfarm is contrary to and in conflict with Council Directives 2011/92 EU and 92/43 EU and a declaration that the operation of the development, by the defendant, is in breach of Article 8 of the European Convention on Human Rights. The plaintiffs also seek an order restraining the defendant, its servants or agents from operating the eight wind turbines so as to create a nuisance to the plaintiffs, or any of them, and further, an order restraining the defendant from operating the wind turbines. In addition, they seek interim orders, damages, aggravated exemplary and/or punitive damages.

4. The court was informed that, in addition to these plenary proceedings, the plaintiffs have also initiated proceedings pursuant to Section 160 of the Planning and Development Act 2000, which were described as "*sister proceedings*", and which are running in parallel with these proceedings. A copy of those proceedings was not provided to the court. Section 160 of the Planning and Development Act 2000 allows an authority, or any other person, whether or not the person has an interest in the land where an unauthorised development has been, is being or is likely to be carried out or continued, to bring an application to the High Court or the Circuit Court seeking an order requiring any person to do or to cease to do anything that the court considers necessary, and specifying in the order to ensure, as appropriate, the following:

> (a) that the unauthorised development is not carried out or continued;
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> (b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development; and
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> (c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

5. It is not for this court, of course, to consider the merits or demerits of the plenary proceedings, but the court must consider them only insofar as it is necessary in order to determine whether the tests of relevance, necessity and proportionality have been met. Discovery is a critically important part of the litigation process as it allows the parties to seek to examine material relevant to the issues between the parties including material which *may* not which *must* directly or indirectly enable the applicant either to advance his own case or to damage the case of his adversary. The jurisprudence allows for a robust approach to be taken by the court, while carefully balancing the need to ensure that the procedure is not used by either side as a fishing exercise, causing unnecessary delay or expense.

6. The court understands that there has already been a significant exchange of expert affidavits between the parties as well as affidavits sworn by each individual plaintiff. The court further understands that pleadings were exchanged against a background of affidavits already sworn and that rather than the statement of claim being served around the same time as the plenary summons, it was served over five months later. In these circumstances, the defendant contends that the plaintiffs had the opportunity to carefully consider the manner in which they would plead this case.

7. The court is mindful of the separate and distinct Section 160 proceedings being pursued by the plaintiffs. A copy of these pleadings was not provided to the court. The court understands that planning permission for the windfarm in question was granted by Waterford County Council on the 25th day of May, 2005 for eight wind turbines (up to 70m in height, 4m wide at the base, with blades of up to 42m in length) and other ancillary works. The defendants further obtained planning permission on the 18th May, 2010 for eight wind turbines to modify the size of the turbine blades (from 42m in length to 45/46m in length) and for other works. The defendants contend that the windfarm was developed and is operated in substantial compliance with the planning permission granted and has not been the subject of any appeal to An Bord Pleanála or subject to a challenge by way of judicial review in accordance with Section 50 of the Planning and Development Act 2000. Nor has it been the subject of any enforcement action by the council for breach of planning permission granted. The defendants state that the windfarm is a facility of substantial public utility and the defendant relies on the defence of statutory authority and/or pre-emption. The defendants contend that any dispute in respect of compliance with planning permission is to be determined specifically in the context of the Section 160 proceedings.

LEGAL CONTEXT

8. I propose at this stage merely to summarise the relevant legal principles on discovery. They are well known and well established. It is unnecessary to outline and discuss those principles in any detail in this judgment.

9. The law of discovery is well settled and codified to some degree in the Rules of the Superior Courts, Order 31, Rule 12, which dictates that the court must be satisfied that the documents sought are relevant to the issues in the proceedings and that discovery is *necessary* for disposing fairly of the matter or for saving costs.

10. In the recent case of *O'Brien v. Red Flag Consulting Ltd & Ors* [2017] IECA 258 ("*Red Flag*"), the Court of Appeal summarised the relevant principles on discovery by reference to a significant body of case law in the area. In that case, having referred to a number of the leading cases on discovery in Ireland, including *Hannon v. Commissioners of Public Works* [2001] IEHC 59, *Framus Ltd v. CRH Plc* [2004] 2 IR 20, *Ryanair Plc v. Aer Rianta CPT* [2003] 4 IR 264 and *Hartside Ltd v. Heineken Ireland Ltd* [2010] IEHC 3, Ryan P, in delivering the judgment of the court, summarised the relevant principles as follows at para 21 of his judgment:

> *"1. The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties. [Stafford v. Revenue Commissioners].*
>
> *2. Relevance is determined by reference to the pleadings. Order 31, r. 12 specifies discovery of documents relating to any matter in question in the case. [Hannon, para. 2].*
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> *3. There is nothing in the Peruvian Guano test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly to the matter in issue between the parties in the proceedings.*
>
> *4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information. [Peruvian Guano, p. 65].*
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> *5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments. [Framus Ltd v. CRH plc [2004] 2 I.R. 20, pp. 34 – 35].*
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> *6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [Hartside Ltd v. Heineken Ireland Ltd, para. 5.9].*
>
> *7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases that their discovery is necessary for the fair disposal of those issues, the question of whether discovery is necessary for 'disposing fairly of the cause or matter' cannot be ignored. [Cooper Flynn v. Radio Telefis Eireann [2000] 3 I.R. 344].*
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> *8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [Ryanair Plc v. Aer Rianta CPT [2003] 4 I.R. 264].*
>
> *9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. [Framus, p. 38].*
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> *10. In certain circumstances, a too – wide ranging order for discovery may be an obstacle to the fair disposal of proceedings. [Independent Newspapers (Ireland) Ltd v. Murphy [2006] 3 I.R. 566, p. 572].*
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> *11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties. [Hannon, para. 4].*
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> *12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly. [McCabe v. Ireland [1999] 4 I.R. 151, p. 156]."*

11. The Irish law on discovery is based on the twin requirements of relevance and necessity. Relevance is still determined by reference to the principles outlined by Brett L.J. in the Court of Appeal in England and Wales in the *Peruvian Guano* case, (1883) 11 QBD 55. The requirement to demonstrate that the documents sought by way of discovery are necessary for disposing fairly of the case or for saving costs is a separate requirement. The relevance of a category is determined by reference to the pleadings in a particular case. If relevance is established, the documents are normally regarded as being necessary for disposing fairly of the case or for saving costs. However, that is not always the case. An example of where documents were found to be relevant but not necessary is the decision of the Supreme Court in *P.J. Carroll & Company Ltd v. Minister for Health and Children (No.3)* [2006] 3 IR 431.

12. It is also clear from the summary of the principles on discovery conveniently set out by Ryan P in Red Flag, that an excessively broad or "*too-wide ranging*" order for discovery may amount to an "*obstacle to the fair disposal of proceedings*". Further, it was emphasised that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which they are likely to advance the case of the party seeking discovery or to damage the other side's case.

13. The burden of satisfying the court with regard to these requirements lies with the applicant.

MOTION BEFORE THE COURT

14. The court is aware that a considerable amount of discovery has been agreed between the parties:

> i) The Global Category, comprising categories 1, 2, 4, 5, 7. The court notes that there is some contention as to whether "*surveys and maps*" of the land are included in this category, as is alluded to in Fitzpatrick Solicitor's letter to the defendant, dated 4th of December 2017. This matter was not opened in full before the court and accordingly the court does not deem it necessary to make a determination on this aspect.
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> ii) Category 11;
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> iii) Category 6 and Category 8;
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> iv) Category 9.1.

15. What remains to be considered by the court is a motion by the plaintiff against the defendant seeking discovery of documents

under five separate categories. The court will now turn to the motion before the court and will deal with each category in dispute in the order in which they were dealt with before the court

Category 3
16. Category 3 seeks the following:

> *"All reports and documents connected with or relating to with the design of the Woodhouse wind farm for the year 2002 to the 16th May, 2017".*

In the original letter of request dated the 10th July, 2017 this category was described as follows:

> *"All reports and documents connected with or relating to the selection of the lands for the development and the design of the Woodhouse wind farm from the year 2000 to the 16th May, 2016". (Emphasis added)*

17. As can be seen, the description of this category was changed in the notice of motion to exclude documents pertaining to the selection of the lands for development. It is also noted that the original request sought documents from the year 2000 to the 16th May, 2016, whereas in the notice of motion it appears to request documents from the year 2002 to 16th May, 2016. The court notes, from *inter partes* correspondence, that the agreed time frame for all categories is 1st January, 2002 to the 16th May, 2016.

18. Counsel for the plaintiffs acknowledged the fact that the notice of motion seeks documents pertaining to the design of the windfarm only. On his feet, he requested that the court entertain the addition to this category of documents pertaining to the selection of the lands for development, as set out in the original letter of request. The plaintiffs argue that the act of selection goes to the suitability of the land for a particular venture; while a location may be suitable for a particular development, it may not be suitable if that development is modified or upscaled. The plaintiffs contend that documents relating to the selection of the lands in question are therefore relevant and necessary to discharge the issues in the substantive case.

19. The plaintiffs set out their reason for seeking this category of documents in their original letter of request, dated 10th July, 2017, which was opened to the court.

20. The reason proffered by the plaintiffs, which the court now paraphrases, is that the defendants obtained planning permission on the 25th May, 2005 for eight wind turbines (up to 70m in height, 4m wide at the base, with blades of up to 42m in length) and other ancillary works. They further obtained planning permission on the 18th May, 2010 for eight wind turbines to modify the size of the turbine blades (from 42m in length to 45/46m in length) and for other works. It is argued that notwithstanding the requirement to carry out the development in accordance with the plans and particulars lodged, the defendant substituted a materially different design of wind rotor and turbine and unilaterally changed its operation of said windfarm from what was permitted. It is argued that the basis underlying such change is required to be disclosed to the plaintiffs.

21. The plaintiffs allege that the defendant has not complied with the planning permissions on which they seek to rely in order to ground their defence of statutory pre-emption. The question of substantial compliance is one of fact and it will be a matter for the trial judge to decide whether the defendant acted in accordance to the permissions granted. The plaintiffs argue that documents sought under this category are necessary to the disposal of the case and the question of whether or not the defendant substituted a materially different design to that which was permitted by the Council.

22. Counsel for the defendant objected to the application by the plaintiffs to re-expand this category to include selection. It was argued that it is now confined to the category as set out in the notice of motion and that it is not open to the plaintiffs to seek to expand the category and seek additional documents by way of oral application at the hearing of the motion.

23. The defendant argues that the question of the design of the windfarm is not relevant to the *operation* of the windfarm, which remains at the core of the plaintiffs' nuisance case. It is highlighted that documentation pertaining to the generation of noise and shadow flicker arising from the operation of the windfarm is catered for in the agreed categories set out above. Counsel notes that under category 3, the plaintiffs seem to be seeking additional documentation pertaining to compliance. Indeed, counsel argues, the plaintiffs' reasons for seeking this category seem to focus on whether the windfarm was constructed in a manner that was substantially different than which was permitted by way of planning permission granted. The question of substantial compliance with permissions granted is a matter of fact. The defendant asserts that documentation relating to the design of features or elements of the windfarm is not relevant to compliance; the defendant either breached the terms of their permissions or did not. Questions, it is argued, surrounding what should have been constructed and issues surrounding compliance must be assessed with reference to the planning permissions granted. The relevant, underlying planning documentation (such as the Environmental Impact Statement) and expert reports are all included on the defendant's public planning file and/or on affidavit.

24. Defence counsel argue that the category sought is significantly wider than that what is ordinarily meant by design and as such, represents a collateral attack on the planning permission granted.

25. Finally, the defendant notes that the plaintiffs have made no particular plea in relation to the specific design of the windfarm that would give rise to the necessity to discover documents in relation to it. The defendant does note that at paragraph 6 of the plaintiff's statement of claim, it is asserted that the defendant failed to have regard to the proximity of the turbines to the plaintiffs' homes and interfered with their use and enjoyment of same. However, it is argued that this does not go to the design question; rather it goes to proximity and noise. The defence state that discovery in relation to noise has already been agreed to in the settled categories. The defence say that while the plaintiffs may be interested in this category of material that nothing of that nature arises on the pleadings in the case.

Court's Finding on Category 3
26. The court refuses the application by the plaintiffs to re-expand this category to include "*selection*". The plaintiffs are confined to the category as set out in the notice of motion and it is not open to the plaintiffs to expand the category and seek additional documents by way of oral application at the hearing of the motion.

27. The court further refuses this category of discovery as described in the notice of motion as it is not satisfied that the documents sought in this category are either relevant or necessary for the fair disposal of the issues in this case, or indeed, for saving costs. The court agrees that the plaintiffs have made no particular plea in relation to the specific design of the windfarm that would give rise to the necessity to discover documents in relation to it. The court further finds that the question of the design of the windfarm is not relevant to the *operation* of the windfarm, which remains at the core of the plaintiffs' nuisance case. The question of substantial compliance with permissions granted is a matter of fact. The court notes that the underlying planning documentation, such as the

Environmental Impact Statement and relevant expert reports are all included on the defendant's public planning file or on affidavit.

Category 9.2
28. Category 9.2 is described as follows:

> *"All documents, communication and correspondence between the defendant and the Minister for Energy, Environment and Climate Change in relation to the Woodhouse Wind Farm from the 1st day of January, 2002 until the 12th day of May, 2016 when the plaintiffs issued the within proceedings."*

29. In their original letter of request the plaintiff gave its reasons for this categories as follows:

> *"Documents are relevant and necessary in order for the plaintiffs to establish the background to and the bases upon which the Woodhouse Wind Farm was developed and the extent to which the defendant was seeking in the design and implementation of the development to maximise the energy output of the development so as to secure targets and achieve an appropriate return on any investment made."*

30. The plaintiff argues that in paragraph 3 of its defence, the defendant contends that the Woodhouse windfarm is an important piece of infrastructure in the public interest and was constructed and is being operated for the wider public benefit. The defendant pleads reliance on national energy policy and the achievement of targets conforming to the Renewables Directive.

31. The plaintiffs question the above statement. Instead, they posit that the defendant was seeking, in the design and implementation of the windfarm, to maximise energy output, so as to secure targets and achieve an appropriate return on any investment made. The plaintiffs want sight of documents pertaining to Category 9.2, in order to test, for example, where (if at all) the windfarm fits into the national energy policy and whether there is indeed a public interest in said windfarm, and the infrastructure thereon, being modified in contravention of the planning permission originally granted.

32. In response, counsel for the defendant contends that the plaintiffs' allegation is a very serious one and should have been raised in the pleadings to allow the defendant the opportunity to issue a notice for particulars. However, no plea was made in relation to same anywhere in the pleadings, nor is the assertion that the windfarm was designed so as to maximise energy production /achieve an appropriate return referred to anywhere in the reply to the defence. As such, the defendant argues, it is not appropriate to provide discovery of this category.

33. Counsel for the defendant refers to paragraph 3 of the defence and indicates that this is a general plea that the windfarm meets targets placed on the State by the Directive. She says that there is no link between the plea at paragraph 3 and the category sought. The defendant makes reference to the fact that counsel for the plaintiff indicated that it was necessary to identify how the windfarm sits in the national energy policy. She says that there is no plea to that effect in the pleadings and the request for all correspondence goes far beyond what is necessary or relevant.

34. Finally, the defendant argues that the defendant does not state in paragraph 3 of the defence (or at all) that the windfarm is operated on behalf of the Minister or on behalf of the State. As such, this category of documents is seeking documents that go far beyond what is invoked in the pleadings.

Court's Finding on Category 9.2
35. The court is not satisfied that the documents sought in this category are either relevant or necessary for the fair disposal of the issues in this case or for saving costs. The court agrees with the defendants that the reason proffered by the plaintiffs that the documents are relevant and necessary in order for the plaintiffs to establish the background to and the bases upon which the Woodhouse windfarm was developed and the extent to which the defendant was seeking in the design and implementation of the development to maximise the energy output of the development so as to secure targets and achieve an appropriate return on any investment made, is not pleaded and goes far beyond what is relevant or necessary to fairly dispose of the issues in this case. The court refuses an order for discovery in this category.

Category 9.3
36. Category 9.3 is described as follows:

> *"All documents, communication and correspondence between the defendant and the Commission for Energy Regulation in relation to the Woodhouse wind farm from the 1st day of January 2002 to the 12th day of May, 2016 when the plaintiff issued the within proceedings."*

In the original letter for request, the plaintiffs set out their reasons for this category:

> *"These documents are relevant and necessary in order for the plaintiffs to establish the background to and the basis upon which the Woodhouse wind farm was developed and the extent to which the defendant was seeking in the design and implementation of the development to maximise for energy output of the development so as to secure targets and achieve an appropriate return on any investment made and in order to establish the extent to which the changes made in design and/or departure from the planning permissions granted were notified to the regulator and the extent to which any such changes were approved or authorised by said regulator or otherwise. These documents are relevant to the issues that arise from the pleadings and in particular para. 3 of the defence and the plaintiffs reply to the defence in which the plaintiffs contend that the basis for the development of the said wind farm was the maximising of electricity generation and commercial profit rather than the wider public benefit as contended for by the defendant in para. 3 of its defence. These documents are relevant to these issues which are in contention between the parties".*

37. While the defendant refuses to discover the documents in this category, they did indicate, in correspondence and before this court, that, without prejudice, they were willing to make discovery of the following documents:

> *"Authorisation to construct or reconstruct a generating station, and electricity generating licence including any amendments or revisions thereto."*

38. The plaintiffs assert that this category is relevant to the issues that arise in the proceedings, in particular paragraph 3 of the defence. The plaintiffs contend that the basis for the development of the windfarm was the maximisation of electricity generation and profit, rather than the wider public benefit (as is posited in the defence). It is argued that these documents are relevant and necessary for the plaintiffs to establish the background to and the basis upon which the windfarm was developed and the extent to

which the defendant was seeking, in the design and implementation of the development, to maximise the output of the development so as to achieve targets and achieve an appropriate return on any investment made. It is also posited that this category is required in order to ascertain the extent to which the changes made in the design (in contravention to the planning permission granted) were notified to the Commission for Energy Regulation and the extent to which any changes were approved by the regulator or otherwise.

39. The defence state that it received two licences from the Commission that regulate the manner in which electricity is generated on site. The defendant is willing to provide copies of said licences to the plaintiffs. It was argued by counsel that these are the only documents that could be relevant in this category. The Regulator, counsel highlighted, fulfils a specific function with regard to the overall regulation of the market in the State and the manner in which electricity can be generated. Issues regarding whether or not the windfarm was developed in such a way as to maximise energy output etc. would not go before the Regulator.

40. Again, the defendant notes that the plaintiffs did not submit a plea as to the windfarm being developed in order to maximise the return on investment. As such, it would be improper to permit discovery of this category.

Decision of the court in Category 9.3
41. The court is not satisfied that the documents sought in this category are either relevant or necessary for the fair disposal of the issues in this case or for saving costs. Insofar as there is commonality between the reasons offered by the plaintiff in this category and the previous category 9.2, the court refers to its decision above. With regard to the Commission for Energy Regulation the court accepts what has been asserted by the plaintiff. The court notes that certain documents have already been offered to the defendants on a "*without prejudice basis*". The court refuses an order for discovery in this category.

Category 10
42. Category 10 is described as follows:

> *"All documents showing the design of the public information procedures adopted by the defendant including a list of persons who engaged in that exercise and a list of the documents briefing them, the extent of the public consultations, a list of those who attended and the manner in which these consultations were treated and incorporated into the design process of the wind farm."*

43. In the original letter of request, the reason given by the plaintiffs for this category of documents was as follows:

> *"The documents are relevant and necessary as the defendant was required to engage with the public at the earliest possible stage and to adequately inform the public of the nature, extent and impact of the development and to reflect this engagement in the design and implementation of the wind farm development and in particular those members of the public who live proximate to the development and the plaintiff is required to establish whether the defendant complied with these obligations in the design, implementation and operation of the wind farm."*

44. At paragraph 9 of its defence, the defendant contends that the plaintiffs did not engage in the planning process and so, have acquiesced to the development for which the planning permission was granted, or alternatively that the plaintiffs have waived any right to complain about any development or use carried out by the defendant without negligence, and in accordance with the planning permission granted. The plaintiffs contend, in their reply, that they have made no such acquiescence or waiver and that the documents in this category, relating to the extent of the public consultations, are directly relevant to these issues which are in contention between the parties in this case.

45. Counsel for the plaintiffs indicated that Olivia Coughlan has averred on oath that she and her husband did participate in the public consultation process and reference was made to the affidavit of Olivia Coughlan dated 9th May, 2016, paragraphs 8 and 14. The plaintiffs contend that information pertaining to what exactly the plaintiffs were informed *of* (i.e. what was discussed with or shown to Olivia Coughlin by agents of the defendants) is critical to whether or not the plaintiffs acquiesced and indeed, what they supposedly acquiesced to. As such, it was argued that this category is relevant and necessary.

46. The defendant states that the Planning and Development Act 2000 provides for extensive consultation and public participation prior to a decision being taken under the Act. The plaintiffs do not plead that they took part in these consultations. The plaintiffs' participation, or lack thereof, in the planning process is a matter of fact. Participating in the planning process means making an objection or submission to the planning authority before the permission is granted. Therefore, it is a matter of fact that the plaintiffs did not engage in this process.

47. The defendant describes the plaintiffs' submissions as to Olivia Coughlan's engagement with the process as a non-specific allegation; she was informed by an unnamed and unidentified person that there would be no impact on her arising from the development. It is highlighted that little information has been provided to the court or to defendant concerning the identity of the individual that engaged with Olivia Coughlan. Further, no details were provided in relation to where said engagement took place or when it took place. The defendant states that the plaintiffs elected not to reflect this interaction in their pleadings, notwithstanding the fact that it is mentioned in Olivia Coughlan's affidavit. It is also noted that the allegation is not included in the statement of claim, which was delivered after Olivia Coughlan's affidavit was sworn and filed. Further, the defendant argues that if this act of engagement is being relied upon as a response to the defendant' plea of acquiescence, it might be anticipated that the assertion would be included in the plaintiff's reply to defence. Instead, at paragraph 8 of said document, where the issue of acquiescence is dealt with by the plaintiffs, no such plea is made that there were any express representations made to Olivia Coughlan, by or on the behalf of the defendant in relation to the impact on her arising from the development.

48. The defendant further contends that to order discovery in this very wide category, the court should have at least the bare minimum information in relation to the alleged engagement. As matters stand, the defence say that they do not know when, where, with whom, or in what circumstances this alleged engagement occurred, and in those circumstances, there is no justification for ordering such an extensive category of discovery.

Decision of the court in Category 10
49. The court is not satisfied that the documents sought in this category are either relevant or necessary for the fair disposal of the issues in this case or for saving costs. In particular, the court is of the view that the category sought fails to meet the test of relevance, as the engagement of Olivia Coughlan in the consultation process was not pleaded, despite this being the basis upon which the plaintiffs seek to refute the allegation of their acquiescence. Further, it has not been demonstrated to the court that it is reasonable to suppose that anything of relevance would be contained in this very widely-drawn category of documents and the court considers that there must be some degree of proportionality between the extent or volume of documents to be discovered and the degree to which the documents are likely to advance the case of the applicants or damage the case of their opponent. The court

refuses an order for discovery in this category.

Category 12
50. Category 12 is described as:

> "All documents relating to or connected with legal agreements and the consideration involved with same made between the defendant and landowners and all documents relating to or connected with the works which were carried out."

51. In the original letter of request, the reason given by the plaintiffs for seeking category is as follows:

> *"These documents are relevant and necessary as the plaintiffs request such documents to determine the defendant's precise legal interest in the land and the period for which it is intended to occupy the land and the conditions under which the occupancy is being carried out and the consideration involved. These documents are relevant and necessary to the issue of whether a perpetual injunction ought to be granted in these proceedings."*

52. The plaintiffs assert that these documents are relevant and necessary in order to ascertain the defendant's precise legal interest in the land, the period for which it is intended it will occupy the land, and the conditions under which the occupancy is being carried out. It is further contended that the category is necessary to properly consider the remedies to be granted in the substantive case; whether a perpetual injunction ought to be granted by the trial judge, for example. In order to properly consider same, the plaintiffs assert that it may be necessary to ascertain the relationship between the defendant and any other persons with an interest in the land and any obligations the defendant has to such land owners/3rd parties, with respect to the carrying out of the defendant's activities. Counsel argues that it is important to know whether the lands remain in the ownership of the original landowners and whether licences or leases have been given. It was argued that any order the court might make at the trial could affect the rights of others as well as the defendant and the court would need to know the relationship of the defendant with the locals in order to best do justice. It was submitted that this matter would be an ease of both sides.

53. With regard to the argument that it is necessary for the court to know the lifespan of the windfarm, the defendant states that details pertaining to same are governed by the planning permission and a matter of public record. Counsel indicated that there is a specific condition attached to the planning permission, which indicates that the lifespan of the windfarm will be thirty years from the date of the planning permission. This is information that all parties already have. As such, counsel argued that this request for discovery of this category is merely a fishing expedition.

54. The defendant argues that it is too early to consider final reliefs, which may or may not be granted by the trial judge in the substantive case.

55. The defendant indicates that no issue arises in these proceedings as to the defendant's interest in the land. Such a request, therefore, could only really go to the validity of the defendant being sued. The ESB does not make a claim that it is the wrong party or that it does not have any potential liability due to the nature of its legal interest in the lands.

56. The defendant characterises this request as a fishing expedition as it bears no relevance whatsoever to the issues in dispute between the parties.

Decision of the court in Category 12
57. The court is not satisfied that the documents sought in this category are either relevant or necessary for the fair disposal of the issues in this case or for saving costs. The court concurs with the reasoning put forward by the defendant in this category. The court refuses to make an order for discovery in this category.

SUMMARY OF COURT'S DECISION
58. Orders for discovery in favour of the plaintiffs are refused in all categories.