



**THE COURT OF APPEAL**

Neutral Citation Number [2022] IECA 76

**Court of Appeal Record No. 2020/79**

**Whelan J.  
Faherty J.  
Binchy J.**

**BETWEEN:**

**FIONA O'DONNELL**

**PLAINTIFF/RESPONDENT**

**- AND -**

**MICHAEL RYAN (TRADING AS THE RYBO PARTNERSHIP)**

**FIRST DEFENDANT**

**SALTAN PROPERTIES LIMITED**

**SECOND DEFENDANT/APPELLANT**

**ELK HOUSE COMPANY IRELAND LIMITED**

**ELK FERTIGHAUS AG (TRADING AS ELK BUILDING SYSTEMS)**

**MCHUGH O'COFAIGH**

**MARK O'REILLY (TRADING AS MARK O'REILLY AND ASSOCIATES)**

**MARK O'REILLY AND ASSOCIATES LIMITED**

**DEFENDANTS**

**Judgment of Ms. Justice Máire Whelan delivered on the 29th day of March 2022**

**Introduction**

1. This is an appeal from the order of the High Court of 18 December 2019, perfected on 9 March 2020, following delivery of an *ex tempore* judgment on 18 December 2019 wherein a category of discovery sought by, Saltan Properties Limited ("Saltan") was refused. Saltan was ordered to make discovery sought by the Respondent as set out in the appendices to the court order, Categories A, B, C, D, E, F and H. Costs were awarded to the Respondent and same was stayed until the determination of the proceedings.

## **Background**

2. Saltan was engaged by the first defendant to develop Riverwalk Court Apartments in Ratoath, Co. Meath ("the Development"), which consists of twenty-six apartments. It was constructed using a pre-fabricated external membrane system ("the Elk System") designed by the fourth defendant and supplied and installed by the third defendant. The first defendant engaged the fifth defendants to supply architectural services and the six and seventh defendants to supply engineering services.
3. The Development was completed in or around December 2005. Each apartment was sold with the benefit of a defects liability guarantee known as the Premier Guarantee for Ireland ("the Premier Guarantee").
4. By Lease dated 14 December 2005, the first defendant and Saltan demised an apartment to the Respondent for a term of 950 years. Subsequently, difficulties including with water ingress were encountered by purchasers including the Respondent.

## **The proceedings**

5. On 19 December 2012 the Respondent issued a plenary summons claiming damages for breach of contract, negligence, breach of duty and/or breach of statutory duty. Twenty-five other similar suits were commenced against the defendants arising from the same issues. This is one of three test cases in which the Plaintiffs are referred to as the "Master Plaintiffs".
6. The first defendant is no longer a party to the proceedings following the amendment of the statement of claim on 15 March 2019 pursuant to the order of Noonan J. of 13 March 2019.
7. Aspects of the pleadings of particular relevance to the issue of discovery include, *inter alia*, the following;

The Respondent's statement of claim was amended on 4 December 2017 pursuant to the order of Baker J. in the High Court on 29 November 2017 to insert para. 260A which pleads regarding Saltan:-

"For the avoidance of any doubt, the Plaintiff is not pursuing a claim against the Second Defendant for any loss, damage, inconvenience or expense insofar as same was insured pursuant to the Premier Guarantee Scheme policy of insurance incepted in relation to the Apartment (as particularised in the Scott Schedules appended hereto), to the extent of such insurance cover. The Plaintiff's claim against the Second Defendant is for such loss, damage, inconvenience or expense as was not insured pursuant to the said policy of insurance (as also particularised in the Scott Schedules appended hereto). For the further avoidance of doubt, the Plaintiff's claim for uninsured losses is maintained, whether or not such losses have been caused in whole or in part by insured defects."

8. Paragraph 22 of Saltan's amended defence pleads:-

"The second named Defendant makes no admission in relation to the assertion that the Apartment or the Development exhibit defects giving rise to loss, damage,

inconvenience or expense or have at any time exhibited such defects and the Plaintiff is put on strict proof thereof.”

Paragraph 38 thereof pleads:-

“Insofar as the Plaintiff is pursuing a claim for uninsured losses allegedly suffered in consequence of insured defects, such consequential losses arise from the failure on the part of the Plaintiff and her insurer to remedy the insured defects in a timely manner and are not losses for which the second named Defendant can be held responsible where it is entitled to be indemnified and/or held harmless in respect of the remediation of the underlying defects.”

**Discovery requests and responses**

9. On 12 June 2019 solicitors for the Respondent wrote to Saltan’s solicitors to request voluntary discovery of eleven categories of documents, A to K, set out more fully below.
10. Solicitors for Saltan responded on 9 July 2019, advising that Saltan was prepared to make discovery of categories A and F limited to documents generated or received prior to 31 December 2005 and declining the balance of the Respondent’s request on the grounds that the categories sought were either not necessary or not appropriate.
11. On 5 July 2019 solicitors for Saltan wrote to the Respondent’s solicitors requesting voluntary discovery of four categories of documents. In respect of Category 2, Saltan sought discovery of:-

“Correspondence (including texts and emails and group messages) passing between the Plaintiff of the one part and the Management Company [Riverwalk Court Management Company CLG] and/or the owners’ or residents’ representatives and/or other Plaintiffs in similar proceedings to these proceedings against the same Defendants of the other part, and between all of the above *inter se*, in respect of the defects in the Development, but limited to correspondence sent or received prior to the date on which these proceedings were commenced.”

Category 3 sought discovery of:-

“Correspondence (including texts and emails and group messages) passing between the Plaintiff, and between the Plaintiff’s representatives, and between the Management Company, and between the Management Company’s representatives, and between the owners’ or residents’ representatives, and between other Plaintiffs in similar proceedings to these proceedings against the same Defendants, of the one part and the aforesaid insurance company or its representatives of the other part in respect of the defects with which these proceedings are concerned, including both insured defects and uninsured defects.”

12. The Respondent’s solicitors responded by way of letter dated 21 July 2019, indicating that the Respondent was only prepared to make discovery if Saltan provided security for the costs which she would incur in so doing and, subject to that proviso, indicated that the

Respondent would make discovery in the terms of Category 1 as sought; would make discovery in the terms of Categories 2 and 4 subject to proposed amendments thereto being agreed; and, would not make discovery in the terms of Category 3.

13. The amendment to Category 2 proposed by the Respondent involved the deletion of the words "and between all of the above *inter se*,":-

"...to limit the discovery to communications between the Master Plaintiffs and the referenced third parties, it only being those communications – and not communications between third parties *inter se* to which the Master Plaintiffs were not a party – that are relevant and necessary to the Master Plaintiffs' claims, and that would be within their possession, power or procurement."

**Respondent's notice of motion**

14. On 22 July 2019, a motion issued on behalf of the Respondent seeking an order pursuant to O. 31, r. 12 directing Saltan to make discovery in eleven categories; namely, any and all documentation describing, recording or otherwise evidencing:

- A. the involvement of Saltan or any other party in relation to the design of the Development or any part thereof; the construction and/or installation of, or the selection or specification of materials used in, specified elements, (a) to (j), of the Development; and, the inspection and/or certification of the Development or any element thereof;
- B. the involvement of any party in respect of the supply or supervision of workmanship carried out on, or the supply or supervision or appraisal of workmanship actually carried out on, specified elements, 1 to 10, of the Development;
- C. whether and the extent to which specified elements, 1 to 10, of the Development were designed or constructed or installed in compliance with the Building Regulations 1997 and/or associated Technical Documents;
- D. the presence of defects in each or any of specified elements, 1 to 10, of the Development (including the date on which damage first became manifest);
- E. the occurrence of water ingress in the structure of the Development and/or the consequences thereof;
- F. that Saltan was aware that the Elk System would not be certified as compliant with Building Regulations by the Irish Agrément Board/National Standards Authority of Ireland and any attempt by Saltan, its servants or agents to bring this information to the attention of the purchasers of apartments in the Development;
- G. any failure on the part of any of the Plaintiffs to mitigate their losses;
- H. any negligence or contributory negligence on the part of the Plaintiffs, each or any of them;

- I. the insured status of any item of damage which has been identified as not being insured by the Respondent in the tables appended to the statement of claim;
  - J. the nature of losses within the contemplation of Saltan at the time of the parties entering into their contract; and,
  - K. Saltan's entitlement to be indemnified and/or held harmless in respect of uninsured loss and damage arising from insured defects.
15. This motion was grounded on the affidavit of Garrett Moore, solicitor for the Respondent, sworn on 22 July 2019. It was heard by the trial judge on 20 November 2019.

**Saltan's notice of motion for Discovery**

16. Saltan issued a notice of motion on 29 July 2019 seeking discovery against the Respondent in four categories.
17. Saltan's motion was grounded on the affidavit of Michael Nugent, solicitor for Saltan, sworn on 28 July 2019. Mr. Nugent averred that there were two features of this litigation which were unusual and which provided the context in which Saltan had requested that the Respondent make discovery. He set out this context in paras. 3 to 12 of his affidavit.
18. The first unusual feature of the litigation, Mr. Nugent averred, was that the proceedings were primarily a recovery action being maintained by an insurance company. Mr. Nugent deposed that the policy in question, the Premier Guarantee, and the Elk System were effectively marketed together. He averred that Saltan was offered a product which it could sell on to purchasers with the benefit of a robust defects' insurance product and with an effective guarantee that any defects which arose would be resolved without recourse to Saltan. He noted that the letter sent by the Respondent's solicitors on 21 July 2019 acknowledged that there was a contractual bargain between Saltan and the insurers via the quotation.
19. Mr. Nugent averred that the second unusual feature of the litigation was that the three Master Plaintiffs were chosen because their apartments are representative of the different apartments and different apartment owners within the Development. It was asserted that the consequence of this was that the Master Plaintiffs were not the individuals who had been actively involved in investigating, organising, negotiating, ventilating and coordinating issues in relation to the Development on behalf of all the apartment owners and Plaintiffs from the outset. Mr. Nugent deposed that four apartment owners, namely Patrice Thornton, Mark Fitzmaurice, Sylvia Flynn and Geraldine Smith were very active in relation to these matters from an early stage, none of whom are Master Plaintiffs. It was asserted that if discovery was confined to documents which were in the possession, power or procurement of each of the Master Plaintiffs only, documents critical to the defence of these proceedings might not be discovered.
20. In the replying affidavit of Garrett Moore, solicitor for the Respondent, sworn on 30 September 2019, it was acknowledged that Saltan had the benefit of a non-recourse clause in the Premier Guarantee quotation provided to it, a copy of which is exhibited to the

affidavit. However, it was asserted that it was not open to Saltan to make a claim for an indemnity in the within proceedings because the insurer in question is not a party to the action. Mr. Moore deposed at para. 7:-

“At the Case Management hearing conducted before this Honourable Court on the 13th day of March, 2019, the Plaintiff successfully applied for a direction that, if Saltan wished to pursue a claim for an indemnity against the insurer (which is what is now being asserted in the 28 July 2019 Grounding Affidavit), the application required to add that claim to these proceedings was to be issued by Saltan by the 8th May 2019, with a return date of the 29th May, 2019. No such application was ever issued, and in the circumstances, I say and believe that Saltan is now precluded from belatedly pursuing that claim as part of these proceedings.”

21. At para. 12 it was confirmed that, without prejudice to the rights of the three Master Plaintiffs and the Plaintiffs more generally in the 26 sets of proceedings, for the purpose of making discovery to Saltan of whichever categories were agreed or ordered, the Respondent would discover any documents relevant to those categories that were within her possession or power, within the possession or power of the other two Master Plaintiffs, and within the possession or power of Patrice Thornton, Mark Fitzmaurice, Sylvia Flynn and Geraldine Smith.
22. At para. 19 it was deposed that the Respondent was prepared to make discovery of the second category of documents sought by Saltan without the amendment proposed in the letter of 21 July 2019 *i.e.* without the deletion of “and between all of the above *inter se*”.
23. The trial judge heard both motions on 6 November 2019. The court was informed that agreement had been reached in relation to Category 2 as sought by Saltan and a document setting out the agreed categories of discovery was handed into court (see, p. 45, lines 24, 28 and 29). This document included *inter se* discovery in Category 2.

***Ex tempore judgment***

24. The trial judge delivered an *ex tempore* judgment on both two motions on 18 December 2019.
25. After outlining the nature of the Respondent’s claim and noting the fact that, since this was one of numerous Plaintiffs’ claims, it had been agreed to treat this and a number of other cases as test cases, the Plaintiffs in which were referred to as “the Master Plaintiffs”, the trial judge turned to address Saltan’s motion for discovery. The trial judge proposed to make an order for discovery in the terms of the letter of 21 July 2019 sent by the Respondent’s solicitors *i.e.* with the deletion of the words “and between all of the above *inter se*” in Category 2.
26. He noted that the matter was not ventilated “to any great extent” as to what the position is in discovery where there is a number of test cases and the Plaintiffs in those cases use, effectively, the same solicitors. He considered that:-

“...technically speaking, certain documents in respect of other Plaintiffs in respect of which discovery are not sought are in the power, possession and procurement of those solicitors as well as those documents are discoverable.” (p. 1, lines 30 to 33)

The trial judge declined to address the issue at that stage but noted that “it could well have to be addressed in other circumstances.”

27. The trial judge then turned to consider the third category of documents sought by Saltan which was “what was seriously in contention”, the operative part of which concerned the defects with which these proceedings were concerned, including insured and uninsured defects (p. 2, lines 4 to 8). The trial judge referred to the grounding affidavit of Michael Nugent, in which it was deposed that there was an insurance policy in place but that it was a term not of the policy but of the quotation that it would be on the basis of non-recourse against Saltan. It was observed that that position would erase the issues, as far as Saltan was concerned, as to what arose as regards cases where, although it was accepted that Saltan would not have liability in respect of losses compensated by the insurance company, there were certain losses which may have been covered by the policy but for which the insurance company did not actually pay out.
28. The trial judge considered that if Saltan was going to make that argument, the insurance company would have to be a party to the proceedings in order to determine it. The court further noted that this particular issue had been dealt with before. Reference was made to para. 7 of the replying affidavit of Garrett Moore of 30 September 2019 where it was noted that Saltan had never made an application to add the claim for an indemnity against the insurer as it was required to do by the direction of the court of 13 March 2019 if it wished to pursue that claim. The trial judge observed that the third category of documents was directed towards that claim and, in circumstances where the indemnifier was not sought to be joined, it was found that that was therefore effectively seeking discovery of an issue which did not arise in the proceedings.
29. Although the trial judge accepted that what claims were paid and what claims were not was “clearly” an important matter, as referred to in the grounding affidavit of Michael Nugent, he noted that, as deposed to at para. 8 of the affidavit of Garrett Moore, the division between insured and uninsured losses was particularised in detail in the Scott Schedules appended to the master statements of claim and the classification of individual items of loss could be readily assessed by reference to the relevant policy of insurance.
30. Accordingly, the trial judge refused to grant discovery of Category 3.
31. The court then turned to address the Respondent’s motion for discovery. The trial judge noted that Saltan was the contractor concerned and that it was said that the Plaintiffs purchased the apartments directly from Saltan, although the trial judge was not satisfied whether that was correct or not.
32. It was noted that the principles to be applied in the application were set out recently in the Supreme Court decision of *Tobin v. Minister for Defence* [2019] IESC 57:-

"...I might just observe that that decision of the Chief Justice re-established, I think, what would have been considered to be the traditional principles which a court should apply on application for discovery, and that is that documentation which is both relevant and necessary, and also significantly for the purpose of these applications, this application's relevance is to be established from the pleadings." (p. 3, lines 18 to 23)

The trial judge observed that, in circumstances where there is a defence which denies everything, that effectively puts more issues before the court to be decided and it follows that the more issues there are to be decided, the broader the requirement for discovery would be.

33. In relation to Category A sought by the Respondent, the trial observed:-

"It seems to me, on looking at the pleadings, I don't think it could be seriously argued that the documents sought under that heading are both relevant and necessary." (p. 4, lines 4 to 6)

On the issue of whether there should be a temporal limitation, the trial judge found that the date suggested by Saltan's solicitor, 31 December 2005, when the development was completed, was unduly restrictive insofar as much, if not all, of that documentation probably came into existence post that date. The trial judge proposed to limit Category A to 19 December 2012, the date of issue of the proceedings. He found that documentation produced closer to that date may be subject to claims of privilege but was satisfied that that was a matter to be dealt with on a further occasion.

34. He held that Category B sought by the Respondent was both relevant and necessary. He noted that Saltan's solicitors objected to making this discovery in the letter dated 9 July 2019 on the basis that:-

"If the specified elements of the Development have been defectively constructed, this will be provided by the evidence of the Plaintiffs and of the experts engaged by them who have inspected the Development. This evidence may be supplemented by the evidence of those involved in remediating the alleged defects."

The trial judge considered that this argument was a ground for making discovery sought in Category B.

35. The trial judge found that Category C was both relevant and necessary. He noted that Saltan's objection to making this category of discovery was on the basis that it was not necessary, rather than it not being relevant. In the letter of 9 July 2019 sent by Saltan's solicitors it was stated:-

"Whether the specified elements of the Development were designed and/or constructed and/or installed in compliance with Building Regulations and associated Technical Guidance Documents will be determined on the basis of evidence given by witnesses who have inspected the elements in question and whose area of expertise



encompasses the requirements of Building Regulations and associated Technical Guidance Documents.”

The trial judge stated that he had no doubt that that would be the case but held that any documentation relevant to that evidence should be the subject of discovery.

36. The trial judge determined to make an order in terms of Category D reasoning that it was both relevant and necessary.
37. He observed that Category E appeared to deal with a fundamental issue in the litigation, namely water ingress, such that the documentation was both relevant and necessary.
38. The trial judge found that Category F, relating to Saltan’s awareness that the Elk System would not be certified as compliant with building regulations and any attempts to bring this information to the attention of the purchasers, was particularly important given that the Statute of Limitations was in issue in the proceedings. The trial judge noted that Saltan was prepared to make discovery of this category provided such discovery was limited to documents generated or received prior to 31 December 2005 when the development was completed and contended that anything subsequent to that date could have no relevance to the issue to which this category was directed. The trial judge rejected that contention in circumstances where the Plaintiffs were relying on s. 71 of the Statute of Limitations of 1957 concerning fraudulent concealment. Instead, the time limitation placed on this category by the trial judge was 19 December 2012, the date of issue of the proceedings.
39. The trial judge found that negligence and/or contributory negligence was made an issue by a plea of Saltan in its defence such that any documentation under Category H dealing with negligence and contributory negligence was both relevant and necessary and, therefore, discoverable.
40. The trial judge noted that a number of categories, namely G, I, J and K, had been withdrawn by the Respondent. He further clarified that the temporal limitation of 19 December 2012 (the date of institution of the proceedings) applied also to Categories B, C, D and E.

**Notice of appeal**

41. In its notice of appeal filed 13 March 2020, Saltan contends that, in relation to its discovery application, the trial judge erred in law and in fact in:
  - i. deleting the words “and between all of the above *inter se*” from the second category of discovery sought by Saltan;
  - ii. refusing to order that discovery be made in terms of the third category of discovery sought by Saltan, specifically in:
    - a) holding that the court could not determine, for the purposes of the Respondent’s claim against Saltan, whether losses claimed by the Respondent were or were not covered by the Premier Guarantee Scheme unless the insurer

were a party to the proceedings and that it followed, on the pleadings, that this was not an issue to be determined in the proceedings;

- b) determining that the said insurer would be bound by a determination as to whether a particular loss was or was not covered by the said scheme made in these proceedings even though it is not a party to the proceedings; and,
- c) failing to address and accept Saltan's contention that communications in respect of alleged defects passing between the said insurer and any of the other parties identified in the said category would tend to identify the nature and extent of the defects, when same first became manifest and the steps taken to address them.

The written submissions to this court on behalf of Saltan and the Respondent confirm, at paras. 9 and 9, respectively, that agreement has been reached in relation to Category 2 sought by Saltan. Therefore no issue arises now regarding ground (i) above.

42. In respect of the Respondent's discovery application, Saltan contends that the trial judge erred in law and in fact in:
- i. determining that documents coming within the categories of discovery sought by the Respondent at Categories B, C, D, E and H were, subject to the temporal limitations which he imposed, relevant in the sense that term is used in the applicable jurisprudence;
  - ii. determining that discovery of documents coming within Categories B, C, D, E and H sought by the Respondent, subject to the temporal limitations which he imposed, were necessary;
  - iii. failing to engage with and accept the proposition that the disputed issues between the parties will be determined by reference to the evidence of experts and that the documents sought are not, therefore, necessary;
  - iv. failing to engage with and accept the position that the issues to which Category C is directed will be determined by reference to the evidence of experts and that discovery of same is not, therefore, necessary; and,
  - v. directing that discovery be made in the terms of Category H in circumstances where the said category amounted to a request for general discovery in respect of a plea made rather than a request for specific documents or classes of documents.
43. The Respondent opposed the appeal but did not seek to either vary the order of the High Court or substitute an order for the order made (Respondent's notice filed on 1st April 2020, para. 3).

#### **Submissions of Saltan**

##### ***i. Regarding refusal of discovery - category 3***

44. In Saltan's written submissions, it is contended that "relevance" is to be given the meaning ascribed to that term by the decision of *Compagnie Financière et Commerciale du Pacifique*

*v. Peruvian Guano Company* (1882) 11 Q.B.D. 55, as endorsed by the Supreme Court in *Tobin v. Minister for Defence*.

45. Although the parties have reached an agreement in relation to Category 2 sought by Saltan, in the course of oral submissions, its counsel submitted that the fact that the trial judge made a determination on Category 2, in circumstances where same had already been agreed by the parties, indicated that “something went awry”. It was submitted that this was relevant to the standard of review to be applied by this court.
46. Counsel for Saltan also submitted that the fact the trial judge’s approach to Saltan’s application for discovery was very restrictive, while his approach to the Respondent’s application was very generous, was a matter that this court should have regard to in reviewing the exercise of the trial judge’s discretion.
47. Saltan argued that the discovery sought in category 3 was relevant and necessary to identifying which losses were uninsured.
48. It was contended that the discovery was relevant and necessary to establish when the Respondents became aware of relevant defects, including in the context of Saltan’s plea that there had been a failure to mitigate loss.
49. Further it was contended that the discovery was relevant and necessary to enable Saltan advance its defence pursuant to the Statute of Limitations.

***ii. Regarding Saltan’s appeal against Discovery granted to the Respondent***

50. Saltan’s principal complaint in respect of the impugned categories of discovery in the order under appeal is that the trial judge did not analyse the relevance of the documents sought by reference to the test formulated by Brett L.J. in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company*.

***Category B***

51. Saltan submitted that this category either duplicates or substantially overlaps with Category A and is therefore unnecessary. Saltan submitted that this category is addressed to the involvement of any party in “the supply or supervision of workmanship carried out on” specified elements of the Development while Category A is addressed to the involvement of any party in “the execution of the works including the construction and/or installation” of the same specified elements. Such overlap or duplication was contended to be oppressive.
52. It was conceded that this category may be relevant in a general sense but it was not accepted that it was relevant in the *Peruvian Guano* sense as the documentation sought is not needed either to establish the existence of the alleged defects or to establish who is responsible for those defects. Nor, it was submitted, did this category engage any of the reasons for requiring discovery identified at paras. 7.2 to 7.4 of the judgment of Clarke C.J. in *Tobin v. Minister for Defence*.

53. It was submitted that the trial judge failed to address the arguments in relation to relevance and necessity in his determination.

**Category C**

54. It was submitted that the Respondent's complaint that the Development as constructed was not in compliance with building regulations and/or technical guidance documents would be based on the accounts of professionals and other personnel involved in the investigation and remediation of the defects in question. Saltan submitted that this category of documents would not assist in the determination of these issues and was not, therefore, relevant and that the trial judge did not address the question of how the documentation sought might assist the Respondent or harm the defendants.

**Category D**

55. Saltan referred to para. 22 of its amended defence where it put the Respondent on strict proof of any alleged defects present in the construction of the Development. It was submitted that, in the context of these proceedings, where the alleged defects have been intensively investigated and have been remediated and where the existence of same is not denied, documents discovered in this category will not assist the Respondent nor will they harm the defendants and, as such, are not relevant in the *Peruvian Guano* sense.
56. It was submitted that the trial judge's decision on this category did not analyse the questions of relevance or necessity.

**Category E**

57. It was submitted that the occurrence of water ingress is a defect which comes within Category D and it is not appropriate that discovery of this discrete category of documents be ordered for this reason alone. It was submitted that this category unnecessarily complicates the task of making discovery and is oppressive. The relevance of this category in the *Peruvian Guano* sense was disputed on similar grounds to those outlined in relation to Category D, above.
58. It was submitted that the trial judge's decision on this category did not analyse the question of relevance nor did it address the relationship between the categories sought.

**Category H**

59. It was submitted that this category was a request for general discovery based on a misunderstanding of a particular plea in Saltan's defence. Saltan contended that it had been clarified in replies to particulars that Saltan was reserving the right to argue that the Respondent had failed to mitigate her loss on the basis of the Respondent's own evidence in relation to the discovery of defects and the manner in which they were addressed.
60. Saltan contended that the trial judge's ruling on this category failed to engage with the specifics of Saltan's plea and gave the court's *imprimatur* to a request for discovery which does not identify the documents of which discovery is sought but, instead, seeks documents which are relevant to a plea made. It was submitted that such a request would not comply with O. 31, r. 12(6) RSC.

## **Submissions of the Respondent**

### **(i) Opposing Saltan's discovery appeal - Category 3**

61. The Respondent noted that this category is directed to para. 38 of Saltan's amended defence. It was submitted that the non-recourse clause in the quotation provided by the insurer to Saltan does not provide an indemnity to Saltan in respect of losses covered by the Premier Guarantee, but rather prevents the insurer from recovering payments which it has made from Saltan. It was emphasised that the non-recourse clause cannot bind the Respondent and she is entitled to pursue Saltan for uninsured losses. Therefore, it was submitted, the only evidence relevant to Saltan's reliance on the non-recourse clause is whether as a matter of fact, monies were paid out by the insurer under the policy with respect to defects the subject-matter of these proceedings and the documentation comprised within Category 3 is not relevant to this issue.
62. It was submitted that post-contractual conduct cannot be used to interpret a contract and it follows that the materials sought by Saltan would not be admissible to assist its case in any event. Reliance was placed on *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583 in this regard.
63. In respect of Saltan's claim that the insurer had not paid out where it ought to have done and its purported claim for an indemnity from the insurer, it was submitted, in reliance on *In re Mount Carmel Medical Group (South Dublin) Ltd. (in liquidation)* [2015] IEHC 450, [2015] 1 I.R. 671, that Saltan was required to secure a *legitimus contradictor* as it was seeking a binding declaration of right and this could only be the insurer. Reliance was placed on the decision in *James Nelson & Sons Ltd. v. Nelson Line (Liverpool) Ltd.* [1906] 2 K.B. 217 in support of the contention that a subrogated insurer is not a party to subrogated proceedings.
64. The Respondent noted that the defences of mitigation of loss and the Statute of Limitations were not given as reasons for the relevance of Category 3 in Saltan's request for voluntary discovery of 5 July 2019. Instead, these reasons were given for Category 2 and therefore, it was submitted, mitigation and Statute issues were already catered for by Category 2, discovery of which has been agreed to. It was further submitted that insurance-related communications as were passed by the Development's management company or its representatives into the Respondent's possession will already be discoverable under agreed Category 2. The Respondent contended that documents constituting the earliest record of defects and damage in the Development would also be included in Category 1.

### **(ii) Opposing appeal against Discovery order made in favour of Respondent**

65. The Respondent submitted that the documentation which the Respondent seeks to have discovered could not be rendered "irrelevant" within the meaning of the case law merely because the issues to which it pertains will also be the subject-matter of expert evidence at trial. The Respondent submitted that relevance is established by reference to the pleadings, not by reference to other evidence which might or might not be given at trial. In addition, it was contended that the discovery sought may help to ensure the honest presentation of the case, or to reduce the amount of evidence heard at trial by affording the parties an opportunity to decide beforehand which issues of fact can reasonably be

contested and which cannot *per* Clarke C.J. at paras. 7.3 to 7.5 of *Tobin v. Minister for Defence*.

66. The Respondent referred to the factors which a court must consider when determining whether the presumption of necessity has been rebutted, as set out at para. 7.16 of *Tobin*. Reference was made to the onus on Saltan to establish that there would be a real problem in being required to make discovery *per* para. 7.19 of *Tobin*. It was contended that the prior to the hearing in the High Court, Saltan never suggested that the discovery sought by the Respondent was particularly burdensome. The Respondent submitted that mere assertion in this regard was not sufficient and if Saltan objected to making discovery on the grounds of being unduly burdensome, that is a question of fact which must be substantiated by evidence. Reliance was placed on *Halpin v. National Museum of Ireland* [2019] IECA 57 at para. 26 and *Irish Bank Resolution Corporation v. Fingleton* [2015] IEHC 296 in this regard.
67. The Respondent noted that Saltan did not file any replying affidavit to the Respondent's application for discovery and Saltan's 9 July 2019 letter of response to the Respondent's request for discovery did not include the suggestion that the discovery sought would be particularly burdensome. Therefore, it was submitted, there was no evidence before the High Court on which it could have concluded that ordering the discovery sought by the Respondent would impose a substantial burden on Saltan, or that such a burden would be disproportionately onerous.
68. The Respondent contended that if the discovery sought by the Respondent appears to be wide-ranging, this is a consequence of the fact that every significant issue in her claim against Saltan is placed in issue in its defence.
69. It was further submitted that Saltan failed to adduce evidence of the extent to which it might reasonably be expected that any of the contested documentation whose discovery is sought would play a reasonably important role in the proper resolution of the proceedings in order to rebut the presumption of necessity. The Respondent noted that there was no evidence before the High Court as to the depth or breadth of expert investigation of the Development, or as to whether the parties' experts were satisfied that inspection had yielded all of the relevant and necessary information.
70. In response to Saltan's contention that the issues in this case will be determined by reference to the evidence of experts, the Respondent submitted that the primary facts upon which an expert's opinion is based must be proved by admissible evidence so it is not sufficient to call an expert to give evidence without also adducing evidence, including documentary evidence, of the underlying facts. Reliance was placed on *R.T. v. V.P. (orse. V.T.)* [1990] 1 I.R. 545 at p. 551 in that regard. The Respondent further contended, in reliance on *O'Leary v. Mercy University Hospital Cork Ltd.* [2019] IESC 48 at para. 25, that in order to properly discharge her duties as an expert, an expert is required to state the facts on which her expert opinion is based and to consider all of the relevant documentation and information to ascertain if this impacts on her opinion.

71. The Respondent submitted that, while expert inspection and expert evidence will be important in this case, employing them where discovered documentation might have sufficed would be likely to increase costs, rather than reduce them.

**Category B**

72. The Respondent submitted that Saltan failed to rebut the presumption of this category's necessity.

**Category C**

73. It was contended that neither Saltan's response to the Respondent's letter seeking voluntary discovery, nor its submissions before the High Court, argued that documentation encompassed by Category C was not relevant and it cannot now argue the appeal on this ground, having failed to do so before the High Court.

**Category D**

74. It was submitted that the fact that Saltan had merely placed the Respondent on proof of the existence of defects, rather than denying them, does not render discovery unnecessary. The Respondent contended that she is still required to discharge the burden of proof in that regard and the discovery sought will assist her in doing so. Therefore, it was submitted, Category D is relevant and necessary.
75. It was submitted that Saltan's objection on grounds of relevance was not made before the High Court by way of submission or in its letter of response to the request for voluntary discovery so it is not open to Saltan to make such argument on appeal.

**Category E**

76. The Respondent disputed that this category duplicates Category D. It was submitted that Category D is directed towards the presence of defects, whereas this category is concerned with the consequences of certain defects being present *i.e.* water ingress.

**Category H**

77. The Respondent contended that contributory negligence is an issue in the proceedings and she is entitled to discovery of documents relevant to it. It was submitted that if Saltan has no evidence to substantiate its plea, the Respondent is entitled to have that position confirmed on affidavit.

**The standard of review by this court**

78. It is long established that an appellate court should be very slow to interfere with an order made in the exercise of its discretion by a lower court unless it is clear that the discretion has not been exercised within the parameters which constitute the reasonable exercise of that discretion. The measure of that discretion was considered by Lynch J. in *Martin v. Moy Contractors Ltd.* [1999] IESC 26, [1999] 2 JIC 1101 an application to dismiss for want of prosecution, where he stated at p. 13:-

"Provided that the High Court decision is within the limits of reasonable discretion this court should not interfere with it. In this case the learned President gave a reasoned judgment and his reasoning is clearly valid. His decision naturally follows

from such reasoning and is also therefore clearly valid. There is, accordingly, no basis on which this court should interfere with the judgment..."

79. Where the High Court has applied the appropriate legal principles and properly explained how, in its view, the application of those principles leads to the result arrived at in granting or refusing each category of discovery this Court will be slow to interfere with its decision. The High Court is entitled to some margin of appreciation and some material error of assessment will normally have to be demonstrated before this Court will intervene.
80. The agreed test to be applied is predicated on the entitlement of a party to discovery of documents containing information which may "either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary" – *per* Brett LJ. in *Compagnie Financière du Pacifique v. Peruvian Guano*. Discovery is a procedural device designed to promote fairness in litigation by making relevant documents equally available to the parties to the action.
81. Ryan J. in this court in *O'Brien v. Red Flag Consulting Ltd & Others* [2017] IECA 258 distilled from the authorities the following principles:-

"21. ...

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]
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*, page 65]
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 IR 20, page 34-35]
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 whether discovery is necessary



for “disposing fairly of the cause or matter” cannot be ignored [*Cooper Flynn v Radio Telefís Éireann* [2000] 3 IR 344]

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 IR 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*, page 38]
  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 IR 566, page 572]
  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]
  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 IR 151, page 156]”
82. The Supreme Court in *Waterford Credit Union v. J. & E. Davy* [2020] IESC 9 considered, *inter alia*, a question as to the Court’s jurisdiction to review the decision made by a lower court regarding discoverability and analysed the balancing exercise to be undertaken and the approach to be adopted when an interlocutory order such as discovery is appealed. Of note are the following observations;

“It should first be said that many of the issues which potentially arise on a discovery application involve questions of degree. While there may well be categories of documents where the court is satisfied that the documents in question could not be relevant or, at the other end of the scale, would be manifestly relevant, nonetheless there are many points in between those two extremes. All judges have experience of the fact that, of the documents discovered, many are not actually deployed at the trial because they turn out to be of little value to the resolution of the issues. However, the problem is that, without sight of the documents in advance, it can be very hard to tell exactly how relevant a document is likely to be. In such cases a first instance court must exercise a degree of judgment as to the likelihood of any document or documents being relevant, and must factor that into its overall conclusion.” (para. 6.1)

“...Likewise, a court considering whether the disclosure of relevant documents may nonetheless not be necessary having regard to the principle of proportionality, may also have to make a judgment call, on the basis of whatever materials may be before

the court, both as to the degree of relevance of the documents in question and the burden which their disclosure might be likely to place on the requested party.” (para. 6.2)

“... when a first instance court exercises a judgment of that type, it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court. Clearly, if the appellate court takes the view that documents whose discovery had been ordered were not relevant at all, then it should have little difficulty in overturning an order which directed that they be discovered. A similar approach should be adopted where clearly relevant and necessary documents were refused. However, the fact that the appellate court takes a somewhat different view from the trial court as to the degree of relevance should not lead to the overturning of the decision of the trial court unless the appellate court considers that the trial judge's assessment of the weight to be attached to relevance was clearly wrong and, as a result, he or she made an order which was outside the range of any order which could reasonably have been made.” (para. 6.3)

83. The Supreme Court in *Tobin v. Minister for Defence* [2019] IESC 57, emphasised the critical importance of the discovery process in ensuring a fair result in civil proceedings whilst also noting that in certain instances where documentation is voluminous or involves significant expense it risks defeating rather than enhancing access to justice.

84. In *Tobin*, Clarke C.J. observed regarding the requirement to establish relevance;

“6.1 It is clear from the terms of O. 31, r. 12 of the Rules of the Superior Courts, as amended, and the case law on discovery in this jurisdiction, that a court hearing an application for discovery will only order a party to make discovery if it is satisfied that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs. In addition, in an effort to limit the burdens, costs and delays incurred by orders for discovery in modern practice, two further considerations have sometimes been proposed; one being that of proportionality and the other being the suggestion that alternative, more efficient methods of disclosure should first be pursued.

6.2 The established definition of the test of relevance is to be found in the principles outlined in the judgment of Brett LJ in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano* (1882) 11 Q.B.D. 55 (“*Peruvian Guano*”) ...”

He further observed that;

“7.15 ... the starting point has to remain a consideration of what is “relevant”. If it cannot be demonstrated that documents are relevant, then there could be no basis for requiring that they be discovered.”

"7.22 ... the overall approach, both in letters of request and responses thereto and in applications before the Court, should be that it is for the requesting party to establish the relevance of the documents whose discovery is sought but it is for the requested party to establish, whether by facts or argument, that discovery is not necessary even though the documents sought have been shown to be relevant."

7.25 ... Relevance is, as has been pointed out, determined by reference to the pleadings. Importantly, therefore, the scope of the issues which arise for the trial and which, thus, inform the extent of the documentation which may be considered relevant, is determined by the way in which the parties choose to plead their case. A Plaintiff can hardly be heard to complain that they are required to make overbroad discovery if the reason for the scope of the discovery sought is because of a "kitchen sink" approach to pleading the case."

**Decision regarding appeal against discovery granted to the Respondent**

85. I am satisfied that Saltan has not established a valid basis whereby this court could interfere with the order for discovery made by the trial judge on foot of the Respondent's motion filed on the 22 July 2019.
86. The onus rests on any party who wishes to resist the discovery of relevant documents to advance, by evidence and argument, the basis on which it is contended that ordering the discovery sought would be disproportionate. The arguments of Saltan do not support this contention. The analysis of the Respondent's application was careful. Relevance was established satisfactorily. The fact that expert evidence will be called at trial is not dispositive *per se* of the relevance of the documentation sought. Indeed the documentation may well be of assistance to experts and ensure the accuracy of their evidence. There was no or no sufficient evidence that any category of discovery ordered would place a disproportionate or unduly onerous burden on Saltan. The presumption of necessity which arose was not rebutted by Saltan. The approach of the trial judge was generous but was not in any case outside the range of judgment calls open to the court of first instance.
87. This court might well have arrived at a different decision were the Respondent's Motion for discovery of July 2019 be decided *de novo*. However, that is not the correct approach. Decisions such as *Tobin* and *Waterford Credit Union* make clear that where, as here, there was evidence before the trial judge on which he was entitled to rely and did rely to satisfy himself that the discovery granted was both relevant and necessary and the ensuing order was within the range of decisions reasonably open to the deciding court then an appellate court should not generally interfere with same.
88. I am satisfied that the Discovery order made in favour of the Respondent, in light of the pleadings, the reasoning of the trial judge and the clear evidence both as to relevance and necessity ought not be interfered with in any respect.

**Decision regarding discovery refused to Saltan Category 3**

89. The starting point must be an analysis of the pleadings. This is a claim which has evolved and changed over time. I note that the statement of claim was delivered initially on 20 July 2016, an amended statement of claim was delivered on 27 February 2017, a re-amended

statement of claim was delivered on 4 December 2017, a re-, re-amended statement of claim was delivered on 21 February 2018 and a re-, re-, re-amended, statement of claim was delivered on 15 March 2019. Of relevance is para. 260A of the laterally amended statement of claim which materially alters and modifies earlier claims. It confirms that the Respondent's pleaded claim is confined to uninsured losses, whether or not such losses have been caused in whole or in part by insured defects.

90. Saltan is potentially confronted thus with claims in damages for losses contended to arise from uninsured defects as well as losses arising from hybrid causality some part whereof is asserted to be an uninsured defect. There is force in Saltan's argument that establishing whether or not a particular loss claimed by the Respondent is uninsured and thereby not covered by the terms of the Premier Guarantee is an essential proof and the onus in respect thereof lies on the Respondent. Having considered the pleadings in their entirety, I find Saltan's argument of persuasive value where it argued that:-

"The dividing line between insured losses and uninsured losses is in controversy between the Plaintiff/the Insurers and Saltan. There is a further issue in relation to whether losses suffered in consequence of an admittedly insured defect are to be considered as insured losses or uninsured losses. These issues mean that the Court will be required to inquire into the claims which were notified to the Insurers and the manner in which the Insurers responded to the same." (para. 12 of Saltan's submissions)

91. Para. 38 of Saltan's amended defence is relevant and it will be a matter for the trial judge to determine any contention pleaded or advanced by Saltan regarding, *inter alia*, the precise legal effect, import and legal relevance (if any) of the non-recourse clause in the quotation as well as subrogation. It is claimed not to provide any indemnity to Saltan in respect of losses covered by the Premier Guarantee. Rather, the Respondent argues, it prevents the insurer from recovering from Saltan payments which it has made. Even if the Respondent's arguments are correct it still potentially remains open to Saltan to advance contentions as regards what should constitute "uninsured losses" in the context of these proceedings. It is the issues as pleaded rather than any view as to their merits that informs the assessment of relevance.
92. This court refrains from expressing any view on the prospects of success for Saltan's contentions which are pursued in the context of an action *in personam*. It will be for the trial judge to determine the disputes between the parties in all respects, including subrogation, in the context of the pleadings in light the evidence and the applicable law with the benefit of comprehensive legal argument. It would be an unduly narrow approach, potentially usurpative of the trial-judge's function risking an injustice to Saltan, to deal with Saltan's Category 3 discovery application on the basis that, as the Respondent contends, the only evidence relevant to Saltan's reliance on the non-recourse clause is whether as a matter of fact, monies were paid out by the insurer under the policy with respect to defects the subject-matter of these proceedings and the documentation comprised within Category 3 is not relevant to this issue. Relevance is determined by reference to the pleadings.

93. I find that the decision in *Whitworth Street Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] A.C. 583 is of limited relevance – being directed primarily as it was to the circumstance where the parties had made no express choice of law in a building contract.
94. The issue of relevance is a question of degree. Saltan has identified by its pleadings that there is a real “likelihood”, in the sense considered by Clarke C.J. in *Waterford Credit Union v. J. & E. Davy*, that the Category 3 documents sought will clearly be relevant and necessary in each of the ways contended for by Saltan to enable points specifically raised in the Defence as it now stands to be properly pursued. I am satisfied that Saltan is not required to secure a *legitimus contradictor* as it does not seek a binding declaration of right against the Insurance Company. The trial judge was led into error in coming to the view as he did that the insurance company would have to be a party to the proceedings for Saltan to pursue the claims towards Category 3 is directed.
95. The Respondent’s complaint that the defences of mitigation of loss and the Statute of Limitations were not given as reasons for the relevance of Category 3 in Saltan’s request for voluntary discovery of 5 July 2019 is an unduly narrow stance. The argument that insurance-related communications will already be discoverable under agreed Category 2 is not dispositive of the matter since the ambit of Category 2 is potentially distinct. The Respondent’s contention that documents constituting the earliest record of defects and damage in the Development would also be included in Category 1 is not satisfactory either. I find this approach unduly narrow and risks visiting an injustice on Saltan. In light of the pleadings the documents in Category 3 have been shown to be relevant, the ambit of documentation being discovered under other categories will not necessarily be co-extensive and I am satisfied that Saltan has shown the relevance of this category for the specific reasons identified by it and in light of the pleadings.
96. Secondly, a further significant and real issue in the litigation is that Saltan has clearly pleaded that the Respondent/insurer have failed to mitigate their loss by dealing with defects in a timely manner. Saltan expressly pleads failure to mitigate at paragraph 39 of its Defence. The submissions and arguments advanced, viewed in light of the pleadings, persuasively demonstrate that Category 3 documents are relevant to Saltan’s defence in this regard as they have a genuine prospect of helping to establish not only the date a notified defect became manifest to a Plaintiff/the Respondent but also, and critically, the nature and extent of that defect at the time of first notification by the Respondent to the insurers. The information sought will have the likelihood of establishing what was done in each instance to remedy the notified defect and when such works (if any) were carried out. This is of central relevance to Saltan’s defence.
97. In the instant case the Statement of Claim, in its current iteration, runs to 63 pages or so, over 260 paragraphs. Thus, the scope of the pleadings is extensive notwithstanding that para. 260A now seeks to clarify, belatedly, that the Respondent does not make a claim against Saltan for, *inter alia*, any loss which was insured against under a Premier Guarantee Scheme policy of insurance.

98. That plea has at its heart an issue which will fall to the trial judge to determine, namely, whether and to what extent (if at all) in light of the facts and the law in any given contested instance any alleged loss, damage, inconvenience or expense claimed by the Respondent can it credibly argued by Saltan to constitute an insured loss notwithstanding that for any reason the Respondent has not recovered for same under the aforesaid policy. Category 3 documentation is in my view demonstrably both relevant and necessary, as defined by Tobin, in that regard to enable Saltan fairly meet the claim.
99. I am further satisfied that Saltan has demonstrated in their Defence and have advanced cogent arguments in their written submissions and oral arguments that Category 3 discovery sought which, *inter alia*, is relevant to assist in establishing the reasons for any delay in remedying notified defects, whether such delay could have been avoided and the extent to which the defects and the damage suffered in consequence thereof were exacerbated as a result of a failure to remedy same in a timely manner are all relevant to its pleaded claim. Saltan has demonstrated that the said discovery is necessary to achieve a fair resolution of this litigation between the parties.
100. Thirdly, I am satisfied that Saltan is correct in its submissions that Category 3 documents are relevant to the Statute of Limitations defence pleaded by Saltan. It is expressly pleaded at paras. 2 and 36 of Saltan's defence. Saltan argued persuasively that correspondence with the insurer will disclose precisely when defects were actually noticed and the nature, extent and severity of same at the time they were first observed, thereby providing potentially evidence to Saltan from which the date on which such defects first became manifest may be inferred.
101. Saltan argued persuasively that the trial judge failed to address the latter two reasons advanced by it for the relevance of Category 3 documents. The trial judge did not address the argument that the insurer was, *de facto*, the Plaintiff in all 26 actions even though it was not named in the titles thereto. That contention does not appear to be denied by the Respondent. It is understandable that Saltan has concerns that "something went awry" in this application, particularly since there is a clear error disclosed in the judgment regarding Category 2 where the order made is far more restrictive than what was agreed between the parties – to the detriment of Saltan.
102. The trial judge erred in assessing the weight to be attached to the relevance of the documents sought, he also fell into error in considering that Saltan was required to secure a *legitimus contradictor*. He did not give adequate consideration to the relevance of the documentation in the context of, *inter alia*, pleas of failure to mitigate and the Statute of Limitations which are key issues for determination at the trial of this action. Likewise, at this stage Saltan cannot be closed down in relation to the contentions it wishes to advance as to what are to constitute "uninsured" risks and losses for the purposes of this litigation.
103. I am satisfied that Saltan is correct in contending that the trial judge's determination that it would be necessary to join the insurer as a party to the proceedings in order to determine the insurance cover point was an erroneous assumption as stated above. In light of the pleadings it was erroneous to reach that conclusion insofar as it was predicated on the

implicit basis that these proceedings comprise an action in rem as opposed to an action *in personam*.

104. It was submitted by counsel for Saltan that the court's decision on the extent of insurance cover would only be binding as between the parties, unless the insurer is to be regarded as a party because it has exercised its rights of subrogation. These are issues for the trial judge in light of the pleadings. Category 3 discovery, in my view, stands the prospect of conferring a litigious advantage on Saltan and there is no evidence that the information sought is otherwise available to it or that such discovery would be oppressive. The documents sought in Category 3 satisfy the principles in Order 31, r. 12 of the rules of the Superior Courts is self-evidently relevant and necessary, in light of the pleadings.
105. As is clear from the *Tobin* decision of the Supreme Court, once the relevance of the discovery sought is established then the burden shifted to the Respondent to demonstrate that the discovery as sought was not necessary. The Respondent has not demonstrated that in this case for all of the reasons above stated. I am satisfied that Saltan has demonstrated that the said documentation is necessary for the fair disposition of the proceedings.
106. This resulted in the High Court erroneously refusing the application for discovery under Category 3 notwithstanding that that category fell within the range of discovery order that was required to be made in this instance as being demonstrably both relevant and necessary. In meeting the extensive claims pleaded against it, Saltan is entitled to discovery in the terms sought in Category 3. Such discovery is to be made up to the 19 December 2012.

### **Conclusions**

107. I am satisfied that the fair resolution of the within proceedings requires the Respondent to make discovery to Saltan of the documents sought in Category 3 all of which are both relevant and necessary to the proper disposal of this action. Such discovery will enhance the prospects of justice being done between these parties.
108. The Order for discovery of 18 December 2019 made in the Saltan Motion of 29 July 2019 will therefore be amended to include Category 3 thereof. The said discovery to be by Affidavit on or before 31 July 2022 with Fiona O'Donnell to be the deponent.

### **Costs**

109. Costs were awarded to the Respondent in the High Court and the said order was stayed until the determination of the proceedings. The proper allocation of costs in the circumstances requires that the said order be set aside. Each side should bear their own Costs of the High Court motions for Discovery in the circumstances. Saltan has succeeded in its appeal against the refusal of Discovery in respect of Category 3. It has failed in respect of its appeal against the order for Discovery made in favour of the Respondent. The latter was entirely successful in resisting any variation to the terms of the Discovery order made in its favour by the High Court. It appears that the time taken in argument of each aspect was broadly equivalent. In the circumstances, the respondent is entitled to an order for the costs of this appeal to be adjudicated in default of agreement said costs to be stayed

pending determination of the proceedings with an order over in favour of Saltan to the extent of one half only of its costs of this appeal same to be adjudicated in default of agreement said costs to be stayed pending determination of the proceedings.

110. If either party contends for a different order submissions within 21 days from date of delivery of this judgment, no longer than 2,000 in either case, to be filed in the Court of Appeal Office and delivered to the other side. Replying submissions to be filed and within a like period of time thereafter. The Court of Appeal will thereafter provide a date for a costs hearing as required.
111. **Faherty and Binchy JJ. concur with the above judgment.**