

## THE HIGH COURT

[2017 No. 110124 P.]

BETWEEN

KELLAND HOMES LIMITED

PLAINTIFF

AND

BALLYTHERM LIMITED

CLONDALKIN BUILDERS PROVIDERS LIMITED

JAMES McMAHON (DUBLIN) LIMITED

COVESTRO BV

DEFENDANTS

**JUDGMENT of Mr. Justice Quinn delivered on the 31st day of January, 2019.**

1. This judgment relates to contested applications for further and better discovery and for supplemental discovery in which the disputes are between the defendants.
2. Elder Heath is a residential development at Kiltipper, Tallaght, Dublin 24 which will comprise a total of 370 homes when completed.
3. The plaintiff is the developer of Elder Heath. In or about September, 2016 the plaintiff became aware that some of the houses were experiencing settlement or sinking of ground floor slabs in the houses causing the floors to sink below the level of the skirting boards. The plaintiff claims that the settlement was caused as a result of defective floor insulation panels produced by the first named defendant ("The Ballytherm insulation"). In particular, it is claimed that the insulation panels shrank causing voids to form beneath the floor slabs. When these proceedings commenced the problem had been revealed in 58 houses.
4. Some of the houses were already occupied, and the plaintiff undertook a remediation scheme involving at least the following.
  1. Breaking the ground floor slabs in the dwelling houses.
  2. Taking up and replacing the insulation.
  3. Reconstructing the ground floor slab.
  4. Reinstating the floor covering.
  5. Temporary rehousing of residents.
  6. Compensation to residents.
5. The Plaintiff claims that the remediation programme has put it to the following direct cost.

		Per House	Total
(a)	Cost of remedial works:	€28,253.00	€1,638,647.00
(b)	Compensation to homeowners:	€3,000.00	€174,000.00
(c)	Costs of moving residence and providing temporary accommodation, storage and associated expenses:		€349,914.00

6. These amounts were estimates as at the time of the commencement of the proceedings on 10th November 2017 and brought the total cost to the plaintiff of the remediation programme to an amount in the order of €2.2 million. The plaintiff says that its costs and losses are continuing having regard to the cost of expert reports and supervision, diversion of resources and time to address concerns held by residents whose properties have been purchased from the plaintiff and reputational damage and lost house sales.
7. The plaintiff claims that in March, 2017 the First Defendant agreed to meet the cost of the remediation programme and seeks an order for specific performance of that agreement. In the alternative, the Plaintiff claims against all the defendants damages for negligence, breach of duty, including breach of statutory duty, nuisance, breach of warranty and breach of contract.
8. The Second and Third Named Defendants are suppliers of building products to the construction industry. They sold the Ballytherm insulation to the Plaintiff.
9. The Fourth Defendant is a Dutch company, which supplied to the First Defendant a pre-mixed foam system used by the First Defendant in the manufacture of the insulation panels. A component of the foam system is a chemical referred to as polyol. Prior to 2014 the polyol was Chemical PIR3003. During 2014 it was replaced by Chemical PIR3009. The First Defendant claims that if the insulation panels produced were defective this was caused by defects in polyol PIR3009 for which the Fourth Defendant is liable.

**Claims against the Fourth Defendant**

10. All the defendants deny liability. Each of the First, Second and Third Defendants has served a Notice of Indemnity and Contribution on the Fourth Defendant. The Notice contains particulars of their claims against the Fourth Defendant which are of central importance in determining the issues now before the court. The First Defendant says that since 2005 the Fourth Defendant and its predecessors in title have supplied the First Defendant with its pre-mixed foam system which included the supply of a polyol (PIR) in batches. It also provided technical advice and knowhow, including laboratory testing and assistance with the setting of the First Defendant's production line, and the provision of same on an ongoing basis.

11. The First Defendant says that it expressly made known to the Fourth Defendant and the Fourth Defendant knew the business in which the First Defendant was engaged and the purpose for which the pre-mixed foam system, including the PIR, was required.

12. The First Defendant pleads that the Fourth Defendant represented to it that it was one of the top system houses in Europe and that the pre-mixed foam system it offered to provide including the PIR was suitable for use in the manufacture of the Ballytherm insulation and was of merchantable quality and fit for purpose. Between 2005 and June, 2015 the First Defendant paid the total sum of €77,757,044.00 to the First Defendant for the purchase of pre-mixed foam systems including PIR. It is said that throughout the relationship the Fourth Defendant carried out testing on the polyol supplied and the insulation boards manufactured by the First Defendant using the system supplied by the Fourth Defendant.

13. The First Defendant claims that the Fourth Defendant always refused to disclose the composition of the batches of PIR supplied by it on the basis that this a trade secret and constituted commercially sensitive information.

14. The Fourth Defendant carried out testing for BBA Agrément approval on behalf of the First Defendant and was aware that these tests and the information provided in relation to the composition of the raw materials including the PIR would be relied on by the persons to whom the Ballytherm insulation was supplied including the Second and Third Defendants and the Plaintiff.

15. It is said that in respect of each consignment of polyol delivered to the First Defendant, the Fourth Defendant produced a certificate of conformity confirming that the polyol had passed the Fourth Defendant's internal quality control.

16. The First Defendant claims that in late 2013 the Fourth Defendant suggested that the polyol manufactured and supplied should be changed from "PIR3003" to "PIR3009". The First Defendant claims that the reason for this change given by the Fourth Defendant was the unavailability of one of the raw materials used in the manufacture of PIR3003. The First Defendant says that the Fourth Defendant also informed it that the price of PIR3009 would be lower although it transpired that the reduction in price it says was insignificant. This version of events is denied by the fourth defendant.

17. The First Defendant says that as part of the discussion for a move from PIR3003 to PIR3009, a representative of the Fourth Defendant travelled to the premises of the First Defendant to conduct initial testing and trials with the new PIR3009 and to advise on the adjustments and settings for the polyol on the First Defendants production line. The first delivery of PIR3009 was made on 16th December, 2013 but it was not until November 2014 that First Defendant commenced the use of PIR3009 in the panels.

18. PIR3009 was used in the production of panels from November, 2014 to February, 2016 and in February, 2016 it was replaced by "PIR3003 (new)".

19. The First Defendant claims that any shrinkage of the Ballytherm insulation which has occurred was caused by one or a combination of the following in relation to the batches of chemical PIR3009 delivered and used:

- (a) The doubling of the water content,
- (b) A lack or low levels of surfactant and
- (c) The failure to include a nucleating agent.

20. The First, Second and Third Defendants claim that the Fourth Defendant knew or ought to have known that the batches of PIR3009 were defective and that the defects were such that there was a significant risk that the Ballytherm insulation manufactured using it would be defective, and that the insulation manufactured using batches of chemical PIR3009 was incapable of functioning as insulation underneath the ground floor slabs of properties, including the residential properties the subject of the proceedings without causing damage to and/or creating the potential for damage to the properties in question.

### **Procedural history**

21. The sequence of events in the procedural history is relevant to the determination of the discovery motions now before the Court.

22. The proceedings were commenced by a plenary summons issued on 10th November, 2017 and a statement of claim was delivered on the same day.

23. On 9th February, 2018 a defence was delivered on behalf of the First, Second and Third Defendants (all of whom are represented by the same solicitors and counsel). It is a full defence rejecting the plaintiff's claims. The defence also refers to the proposed claim of the First Defendant against the Fourth Defendant and to its intention to serve a notice of indemnity and contribution.

24. The first, second and third defendants plead that the Fourth Defendant knew or ought to have known that PIR3009 was being used in the Ballytherm insulation and installed in buildings including dwelling houses. It is pleaded that the Fourth Defendant owed a duty of care to the First Defendant and to persons to whom the First Defendant supplied the Ballytherm insulation, including the Second and Third Defendants, and the Plaintiff.

25. The Fourth Defendant delivered its defence on 9th February. Again, it is a full denial of the plaintiff's claims and it denies that the components supplied by it caused or contributed to the failure of the insulation and that it is guilty of negligence, breach of duty or other wrong doing.

26. On 23rd March, 2018 a reply to the defence for the first, second and third defendants was delivered by the plaintiff.

27. On 12th April, 2018 the First, Second and Third Defendants issued a request for voluntary discovery to the Fourth Defendant. Following certain exchanges of correspondence between the parties, the First, Second and Third Defendants issued a motion for discovery against the Fourth Defendant, returnable before the court on 14th May, 2018.

28. On 14th May, 2018, the matter was adjourned until 30 July, 2018 to facilitate a mediation, which occurred but was unsuccessful.

29. On 23rd July, 2018 the notice of indemnity and contribution was served by each of the first, second and third defendants on the fourth defendant.

30. On 30th July, 2018 an order was made by consent that the Fourth Defendant make discovery on oath of five categories of documents (see paragraph 68).

31. The order provided for discovery to be exchanged on 15th October, 2018. An extension to this was subsequently granted to 26th October, 2018.

32. The parties exchanged affidavits of discovery on 26th October, 2018, followed by USB keys containing the documents discovered.

### **Further Discovery Motions**

33. On 6th November, 2018, Messrs Good & Murray Smith, solicitors for the First Defendant wrote to Messrs Kennedys, solicitors for the Fourth Defendant, making a request for voluntary discovery arising out of the pleas contained in the notice of indemnity and contribution.

34. No response having been received a further letter was issued on 13th November, 2018 following up this request.

35. Also, on 13th November, 2018 the Messrs. Good and Murray Smith wrote to Messrs. Kennedys identifying what they described as certain deficiencies in the affidavit of discovery sworn on behalf of the Fourth Defendant, by Mr. Schaefer.

36. On 28th November, 2018 two separate motions regarding discovery were issued before this court returnable for 3rd December, 2018 as follows:

1. A motion requiring the Fourth Defendant to make further and better discovery issued on behalf of the first, second and third defendants.
2. A motion by the First Defendant for orders requiring the Fourth Defendant to make supplemental discovery arising from the pleas contained in the notice of indemnity and contribution.

37. The first of these motions seeks orders directing the Fourth Defendant to make further and better discovery of documents falling within the categories of discovery ordered by the court on 30th July, 2018, or in the alternative orders striking out the fourth defendant's defence for failure to make proper discovery, and if necessary inspection of document the subject of the confidentiality order etc. This motion is in substance a complaint as to the adequacy of the discovery made by the Fourth Defendant pursuant to the order of the court made on 30th July, 2018.

38. The motions were heard together on 21st December, 2018.

39. Before turning to the applications separately, it is appropriate to consider a number of fundamental submissions which were made at the hearing and which apply, to different degrees, to each of the applications.

### **General Discovery**

40. The Fourth Defendant submits that the orders sought are out of line with the approach now approved by the courts in recent decisions which reflect concerns that in many cases the scale and breadth of discovery has become so oppressive and disproportionate that it has become an obstacle to the proper progression and determination of proceedings and it submits that the courts have for some time recognised this difficulty and have adopted a number of measures to curtail such excesses.

41. It is submitted that the court has in a number of cases made more limited orders as regards categories of discovery such that excessively broad orders are no longer granted.

42. Reference has been made to recent decisions in which the court has considered whether alternative less burdensome and costly procedures should be availed of, such as interrogatories or notices to admit facts, in the first instance and will only make orders for discovery where such methods have been exhausted.

43. The Fourth Defendant submits that this is a relatively simple case concerning liability for defective products. It says that this is not a complex matter and the further discovery sought is now disproportionate for such a matter.

44. As regards the motion for further and better discovery the categories to be discovered are the subject of a consent order made on 30th July, 2018. Therefore, the categories of the discovery are not before the court for re-opening on this application. The court is concerned only with the question of whether the Fourth Defendant has complied with its discovery obligations pursuant to the order already made. Whilst that is separate from the question of categories, the court should still be informed in considering the application by the overall approach to discovery taken in recent case law.

45. On the motion for supplemental discovery the Fourth Defendant makes an additional submission to the effect that having regard to the procedural history of the case, and the timing of the request for supplemental discovery the motion for supplemental discovery should be ruled out as a matter of principle. I shall return to that submission later.

46. The Fourth Defendant is correct in describing the approach now of the courts as one of questioning whether discovery is both relevant, necessary and proportionate. The question of whether other less burdensome and costly processes have been exhausted is now also a part of this test (see *Anglo Irish Bank Corporation v Brown* [2011] IEHC 140 and *Dunnes Stores v McCann* [2018] IEHC 123). The position was strongly put by Hogan J. in *Tobin v. Minister for Defence, Ireland and the Attorney General* [2018] IECA 230, where he said

"... contemporary case-law demonstrates that it is thus necessary for this Court to ensure that the discovery does not potentially overwhelm the action or impose unreasonable burdens on the parties."

47. Hogan J. quoted from the decision of the Supreme Court in *Framus Ltd. & Ors v. C.R.H. plc & Ors* [2004] IESC 25 in which there was stressed the necessity for proportionality, and the decision in *P.J. Carroll & Co. Ltd v. Minister for Health and Children* [2005] IESC 26 which highlighted the fact that the criterion of necessity is as important as that of relevance.

48. Hogan J. referred also to the decision of Barniville J in *Dunnes Stores v. Paul McCann* [2018] IEHC and of Kelly J. in *Anglo Irish Bank Corporation Ltd v. Brown* [2011] IEHC 140 in which there was much focus on the requirement, before discovery would be ordered to establish that information now sought by way of discovery is not otherwise available, such as by way of interrogatories. Hogan J. noted that the process of asking interrogatories had been simplified in the context of the Commercial Court by Order 63A, Rule 9 – 13 of the Rules of the Superior Courts firstly by dispensing with the necessity for leave of the court and secondly by simplifying the form in which questions could be posed.

49. In concluding Hogan J. summarised by stating as follows:

"Such is the extent of the crisis facing our legal system by reason of the burdens imposed by discovery requests, that it now behoves the judiciary to re-calibrate and adjust that practice by insisting that in cases where the discovery sought is likely to be extensive, no such order should be made unless all other avenues are exhausted and these have been shown to be inadequate."

50. Having said this there will be cases where the requirement for discovery and full performance of the obligations deriving from agreements or orders to make discovery are the only method of ensuring that at trial the court has available to it for the proper determination of the matters at issue in the proceedings all documents and material which are relevant and necessary. Nor has it been submitted that the fundamentals of discovery no longer apply, including the test enunciated by Brett LJ in *The Compagnie Financière Et Commerciale Du Pacifique v The Peruvian Guano Company* (1882) 11 Q.B.D. 55. Those fundamentals were summarised by Ryan P. in *O'Brien v Red Flag Consulting Ltd* [2017] IECA 258 as follows:

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]

51. This court will respectfully now add to Ryan P's summary the requirement to show that there is not a more expedient and less costly method of obtaining the same information, which has been exhausted, such as interrogatories or a notice to admit facts. [See *Anglo Irish Bank Corporation v Brown and Dunnes Stores v McCann* op cit].

52. The Fourth Defendant's counsel, Mr. Fanning, referred very briefly to the test of considering whether the required information can be gleaned by delivery of interrogatories. Counsel did not however refer the court to any of the particular categories in which he was suggesting that this would be more appropriate and the discussion of categories sought of supplemental discovery did not include submissions on this test for each category. Whilst it is clear from the judgments of Barniville J. and Hogan J. that such an analysis should be undertaken, it is questionable whether the court can be expected on every such application, of its own motion, to apply that test to each and every category where no submissions have been made on the categories. However, when considering the motion for supplemental discovery I shall take this test into account.

### **Making Discovery**

53. In *Thema International Fund PLC v HSBC Institutional Trust Services (Irl) & Ors* [2012] 3 IR 528 Clarke J considered in detail the practice associated with compliance with discovery orders in substantial commercial cases. Whilst that was a case of particularly large proportions, the court's consideration of the process is informative. Clarke J. endorsed the systematic approach to discovery adopted in the case by certain of the parties. He described what has been referred to as an "iterative" process for the compilation of materials for discovery in a series of stages being retrieval, uploading and duplication, search and review and the obligations to adopt a thorough approach to the identification of data subjects and the use of search terms in electronic discovery.

54. Clarke J. considered the potential adverse consequences for a party who does not take reasonable steps, even in advance of the terms of discovery being fixed either by agreement or by court order, to put itself in a position where it can comply with the obligations of discovery arising in an expeditious way. He indicated therefore that he would expect parties generally to make progress on the initial stages, namely retrieval and uploading and "deduplicating" even before the categories have been agreed. As to the approach to identifying appropriate key search terms, he stated as follows:

"It is important to recall that the obligation on a party making discovery is to disclose, insofar as it may be reasonably

possible, all documents which come within the categories agreed or directed by the court. However, the courts have always accepted that there is some risk, particularly in large discovery, that there will be an innocent failure to disclose documents which may be relevant. Clearly, where documents emerge which should have been, but were not, disclosed, the court needs to assess the reason for the failure to disclose. It seems to me that where a party adopts a reasonable approach to the search of a large universe of documents by means of key words and the like, then it is unlikely that that party would suffer any adverse consequences if it were to transpire that, notwithstanding its best efforts, some documents fell through the net. It should, of course, be noted that the assumption in that last statement is that the party acted reasonably and used its best efforts. A clever use of key words which might raise a suspicion that same were deliberately designed to minimise the risk of damaging documents being selected might, of course, lead to the court reaching entirely different conclusions."

Clarke J. continued:

"It needs to be recalled that there is, in reality, a balancing exercise involved here. The whole reason for a search, of the type with which I am concerned, is that the most time consuming and costly part of the process is the physical review of the remaining documents (that is those remaining after the selection process) by trained lawyers on a document by document basis. Clearly the selection process will not have achieved its end if it does not significantly reduce the number of documents that need to be subjected to that costly direct review. If too many documents remain for review which turn out not to need to be discovered (so called false positives), then the cost and time of discovery will unnecessarily be lengthened. The whole point of narrowing the universe by means of key word searches is to reduce the number of documents that require direct personal review. If the key words are too wide, then the selection process will not do that job. If the key words are too narrow (or, perhaps, deliberately or inappropriately skewed), then same is likely to enhance the risk of false negatives. Some reasonable balance has to be achieved between those two ends. Provided that a party acts bona fide, and that the approach to the use of search tools is along the lines which I have described, it does not seem to me that a party should face criticism or adverse consequences if it should transpire that, despite those best efforts, some documents slipped through the net. In addition, I should note, in that context, that if truly key documents were to slip through the net that might, of itself, lead to real questions as to whether anyone could reasonably have believed that the methodology was right in the first place."

55. These observations will be of some importance when we consider the motion for further and better discovery, in which extensive criticism has been made by the First, Second and Third Defendants of the choice of key search terms by the fourth defendant.

#### **Supplemental discovery – preliminary objection**

56. In relation to the motion for supplemental discovery counsel for the Fourth Defendant has urged the court to rule the application out of order as a matter of principle. Counsel referred to the procedural history and to the timetable first directed for the case in December 2017, in which no reference was made to the prospect of delivering a notice of indemnity and contribution.

57. Counsel referred to the defence delivered on 9th February, 2018 in which the First, Second and Third Defendants referred to their intention to seek indemnity and contribution. It is submitted that when the order for discovery was made in the proceedings on 30th July, 2018 the notice of indemnity and contribution had already been served and there was no good reason why any of the First, Second and Third Defendants should not at that time have identified any categories of documents of discovery which would have been relevant to the matter of indemnity and contribution.

58. Counsel referred to the revised directions timetable approved on 16th October, 2018 and indicated that the letter on 6th November, 2018 requesting new categories of discovery was a new substantive discovery request which was a radical departure from what this court anticipated when the matter was mentioned either in July 2018 or October 2018.

59. Counsel submitted that this is in effect a second substantive discovery request, which is sought to be justified by reference to the service of a notice of indemnity and contribution when in reality the concept of indemnity and contribution was referenced as early as the delivery of the defence in February 2018 and could have been advanced by the First Defendant before the categories of discovery were agreed and approved by the order of the court made on 30th July.

60. Counsel has also referred to the fact that the trial of the matter is listed for 30th April, 2019, that date having been fixed when the matter was before the court in July 2018. Counsel submitted that if further categories of discovery are to be ordered on this motion this will inevitably have the effect of delaying the trial.

61. This court has a measure of sympathy for the objection made as it would be an unfair anomaly if a defendant, who under the Rules of the Superior Courts, may serve a notice of indemnity and contribution at any time prior to trial, could then make a very late and new discovery request on the back of having served the notice of indemnity and contribution and be permitted to do so however late in the proceedings or however close to trial such a request was made. If this were correct it could be open to abuse, at least, as a form of delaying tactic and the court should be vigilant to restrain such abuse. This having been said, there is a balance to be struck, and if there is a risk that at trial the parties and the court will be deprived of access to documents or material which are relevant and necessary for the determination of the issue in the case, the court should consider the discovery request against the tests considered earlier in this judgment.

62. In assessing the balance, the court must also consider whether injustice may be caused to the plaintiff as a consequence of such disputes between defendants. At the hearing of these applications the plaintiff's counsel informed the court that the plaintiff was anxious to hold the trial date. However, he did not substantively support or oppose the applications before the court.

63. Reference was also made to the fact that very shortly after the commencement of these proceedings the Fourth Defendant commenced a proceeding in the Dutch Courts seeking:

(1) A declaration that the Dutch courts have jurisdiction to hear and determine the dispute between Ballytherm and Covestro; and

(2) A declaratory judgment that Covestro is not liable to Ballytherm and that Ballytherm cannot successfully bring any claims against Covestro.

64. At an early stage of these proceedings the Fourth Defendant indicated an intention to bring a motion challenging the jurisdiction of the Irish courts to hear and determine the claim the subject of the notice of indemnity and contribution.

65. The First Defendant says that it was only October 2018 that it became apparent that despite the assertions that the Irish court did not have jurisdiction, the Fourth Defendant did not in fact intend to issue a motion seeking to challenge the jurisdiction of the Irish courts to deal with those issues. No such motion has ever issued, and the matter of indemnity and contribution will fall to be determined at the trial of this action.

66. The Fourth Defendant submits that in so far as it is suggested that the threat of a motion to challenge jurisdiction is relied on to justify any delay in bringing the motion for supplemental discovery, this is no more than a "fig leaf".

67. In circumstances where no motion to challenge jurisdiction ever issued and where no provision for such was made in the directions ordered and amended from time to time, I agree with the Fourth Defendant that this issue of itself would not be a justification for the timing of this motion.

68. The trial is listed for hearing for six weeks commencing 30th April, 2018. Directions have been approved by the court which provide for the delivery of the defendant's witness statements at 25th January, 2018 (recently extended to 1st February, 2019), for the plaintiff to deliver legal submissions by 22nd February, 2019 and the defendants to deliver legal submissions by 22nd March, 2019. If any of the orders now sought are made there will be a necessity to revisit that timetable and the parties will need to consider whether speedy compliance with such orders could enable the trial to proceed on schedule. The plaintiff must, of course, be heard on any relevant application.

69. Having considered the submissions and the affidavits and informed by the modern approach to the necessity and scope of discovery, I am not persuaded to rule out the motion for supplemental discovery at this stage of the proceedings and I shall now turn to the merits of the individual applications.

#### **Further and Better Discovery**

70. This is the motion issued by the First, Second and Third Named Defendants directing the Fourth Defendant to make further and better discovery of all the documents in its power, possession or procurement which fall within the categories of discovery ordered by Haughton J. on 30th July, 2018.

71. The reliefs sought are as follows:

1. An order directing the Fourth Defendant to make further and better discovery upon oath of all of the documents in the power, possession or procurement of the plaintiffs which fall within the categories of discovery ordered by Haughton J. on 30th July, 2018.
2. In the alternative and without prejudice to the foregoing, an order pursuant to O.31, r. 21 of the Rules of the Superior Courts striking out the fourth defendant's defence delivered on the 9th February, 2018 for failure to make proper discovery in accordance with the order of Haughton J. dated 30th July, 2018.
3. If necessary an order for inspection of the documents the subject of the confidentiality order appended to the order dated 30th July, 2018.
4. In the alternative and without prejudice to the foregoing, an order pursuant to O. 31 r. 12 (2) (c) that the documents be provided electronically in the searchable or "native" form in which they are held by the party ordered to make discovery."

72. The application is grounded on an affidavit sworn by the solicitor for the First, Second and Third Defendants Mr. John Durcan on 27th November, 2018. Before the court also is a replying affidavit sworn on behalf of the Fourth Defendant by Mr. Hugh Francis Kennedy dated 12th December, 2018 and a second affidavit of Mr. Durcan sworn 17th December, 2018.

73. The outstanding issues between the parties have been the subject of correspondence before and after the issue of the motion and there appears to be "rolling" controversy in relation to some aspects of the application which was ongoing even at the time when this motion was heard.

74. The Fourth Defendant has already identified and confirmed that it will deliver a supplemental affidavit of discovery addressing certain matters. By this judgment I shall direct a number of additional matters to be addressed in that affidavit. I shall not make general orders in the terms of the notice of motion but shall address this matter under the categories of complaint identified in the affidavits before the court.

75. On 30th July, 2018 Haughton J. made an order on consent that the Fourth Defendant make discovery on oath of the following categories of documents:

#### **"Category 1:**

All documents created between 1 August 2013 and 31 December 2016 evidencing, recording or relating to:

- (a) the change from Chemical PIR 3003 to Chemical PIR 3009;
- (b) price quotations, order confirmations, invoices and delivery dockets relating to the supply of PIR 3009 to the First Named Defendant; and
- (c) the change from Chemical PIR 3009 to Chemical PIR 3003 (new).

#### **Category 2:**

All documents created between 1 August 2013 and 31 December 2016 evidencing or recording the production of individual batches of Chemical PIR 3009 to be supplied to the First Named Defendant to include –

- A copy of the Supplier Specification for all batches of Chemical PIR 3009 supplied to the First Named Defendant;
- Copies of any revisions made to the Supply Specifications for all batches of Chemical PIR 3009 supplied to the First Named Defendant;

- If not already in the Supply Specification or Certificate of Analysis, the following information in relation to each batch of Chemical PIR 3009 supplied: average functionality, equivalent weight, viscosity, molar mass, density, OH number (excluding water), OH number (including water), acide number, pour point, specific gravity.
- Specification tolerances for all batches of Chemical PIR 3009 supplied to the First Named Defendant;
- Ratios of specifications in the make-up of all batches of Chemical PIR 3009 supplied to the First Named Defendant;
- In house quality control checks carried out on the individual batches of Chemical PIR 3009 during production;
- The calibration records for all equipment used to manufacture or test individual batches of Chemical PIR 3009 during production; and
- Records of any non-conformances of individual batches of Chemical PIR 3009 or raw materials used in its production.

**Category 3:**

All documents evidencing, recording or relating to the composition of Chemical PIR 3003, Chemical PIR 3009 and Chemical PIR 3003 (new) supplied by the Fourth Named Defendant for use in the manufacture of the Ballytherm insulation.

**Category 4:**

Withdrawn

**Category 5:**

All documents evidencing, recording or relating to all testing carried out by the Fourth Named Defendant on the Chemical PIR 3009 supplied to the First Defendant, including but not limited to:

- (a) the testing of each batch of Chemical PIR 3009 supplied to the First Named Defendant by or on behalf of the Fourth Named Defendant prior to delivery to the First Named Defendant;
- (b) the testing and trials carried out by the Fourth Named Defendant at the premises of the First Named Defendant on the Chemical PIR 3009 supplied to the First Named Defendant;
- (c) the testing carried out by the Fourth Named Defendant of the prototype boards manufactured by the First Named Defendant during the initial trials of the Chemical PIR 3009;
- (d) the testing carried out by the Fourth Named Defendant following the notification of the alleged defect in Chemical PIR to determine the cause of same up to the date of the commencement of these proceedings.

**Category 6:**

All documents evidencing or recording any other complaints received by the Fourth Named Defendant or claims made against the Fourth Named Defendant by any party (other than the First Named Defendant) to whom the Fourth Named Defendant supplied Chemical PIR 3009."

76. On 26th October, 2018 the parties exchanged affidavits of discovery.

77. The fourth defendant's affidavit of discovery was sworn on 24th October, 2018 by its managing director Mr. Frank Schaefer.

78. Mr. Schaefer's affidavit contains a number of the standard averments for an affidavit of discovery, and addresses particular matters such as the temporal limit of 10th November, 2017 which had been agreed between the parties. Mr. Schaefer also referred to certain redactions which had been made in respect of what he described as highly commercially sensitive information which he said was not related to or relevant to the proceedings or the categories of discovery agreed.

79. In relation to the subject of document retention and destruction of documents/deletion of emails Mr. Schaefer made the following averments:

"6. I say that Covestro B.V. is part of a wider group of companies all of which operate under an Automated Information Life Cycle Group Regulation which automatically deletes employee emails after a period of two years unless the employee specifically transfers emails to a System of Record. Employees are instructed to transfer files that they want to retain to this System of Record.

7. I say that a 'litigation hold' has been in place in Covestro B.V. since 12th December, 2017.

12. The fourth named defendant did have but no longer has in its possession, power, or procurement the documentation relating to the matters in dispute in these proceedings, which are listed in the second schedule."

The second schedule describes its contents as "None".

80. The "Automated Information Life Cycle Group Regulation" is exhibited in the affidavits and as the application of this "Regulation" has been the subject of some controversy it is important to refer to it in some detail with relevant extracts. The Regulation is headed "Automated Information Life Cycle - Group Regulation No. 2045 – effective April 1, 2012." It provides that the Bayer group (of which the Fourth Defendant is a member) is introducing what it describes as "Life Cycle Management" in all their legal entities. It provides as follows:

"1. Retention and automation deletion methods will be implemented for the Microsoft Outlook and SharePoint platforms, as

well as for the Legacy platform for all Lotus Notes emails and hereinafter will be referred to as the Automated Information Life Cycle.

The Automated Information Life Cycle is intended to make it easier for users to retain, organise and retrieve documents which for business or legal reasons should be retained and more easily distinguish information that should not be retained. This will allow the automated disposal of a large quantity of documents and emails which are not required to be retained for business or legal purposes.

The Automated Information Life Cycle methodology must meet business needs as well as comply with all applicable laws, existing Bayer document preservation policies and applicable directives and procedures, which will not be affected or superseded by the introduction of the Automated Information Life Cycle."

The Regulation provides that all users must actively manage their emails and documents consistent with business and legal requirements and decide for each document or set of documents whether or not the documents need to be retained or can be disposed of key elements are described in para. 3.1 as follows:

"Subject to local laws and regulations, the email system (Microsoft Outlook) is not considered a System of Record. Rather email is a form of communication and the Microsoft Outlook email system is a means of sending and receiving those communications. Email received or sent which would be considered a record for business or legal purposes should not be retained in the email system. The preferred method of retention for email messages that meet the definition of records is a form of system of record. The respective email and/or its attachments should be moved to the system of record. The email and/or its attachments must be kept in its original format.

If no applicable formal system of record is in place the email should be moved to SharePoint collaboration site thereby assigning an adequate retention setting. In case such a site does not yet exist, latest with the rollout of PWP every organisation and unit has to ensure that a suitable SharePoint for retention is made available.

If no action is taken on email messages within Microsoft Outlook, email messages remaining in the email inbox folder will be deleted after sixty days and in other Outlook folders after a maximum period of two years. Only email messages which must be kept longer than two years under local business or legal requirements should be retained outside of the email system."

81. Under the heading "SharePoint" there is a description of the availability of different classification depending on the required retention period. It states as follows:

"In general the class "short term" with the retention period of two years is the default setting. The class "long term" with a retention period of twelve years must be used whenever required legally or businesswise."

The SharePoint system is intended for use for managing documents with retention durations of up to twelve years.

82. The Regulation then contains a paragraph headed "Legal Holds":

"Bayer is required to retain documents which might be relevant to a pending or threatened legal action or investigation, even if such documents could otherwise be deleted pursuant to the Automated Information Life Cycle process. Each Bayer entity must have procedures in place to prevent destruction of these documents. Users that are responsive to a legal hold will have the Automated Information Life Cycle suspended. Additionally, the law department may separately collect some or all of the emails and documents from employees who are believed to have responsive documents. Users must not intentionally delete any documents which might be relevant to a legal action or investigation."

### **Litigation hold and deletion of documents**

83. The First, Second and Third Defendants complain that the Fourth Defendant only put a litigation hold in place on 12th December, 2017 when they believe that it was aware that it was likely that litigation would be commenced at a much earlier date. In particular, they say that a Mr. Rouwen, a representative of Covestro B.V. travelled to Ballytherm on 2nd September, 2016 to discuss problems which were emerging with the Ballytherm insulations and it is said that it was specifically mentioned at that meeting the possibility that Chemical PIR3009 was the cause of the problems. It is said also that on the 8th February, 2017 Ballytherm put Covestro B.V. on notice that a letter of claim had been received from Kelland Homes and that this was connected to the product delivered by Covestro B.V. It is said that on 26th July, 2017 Mr. Tony Goldsbury, Ballytherm's insurance agent and loss adjuster contacted a Mr. Uitham of Covestro B.V. requesting an address "for the purpose of the litigation and the service of the litigation papers".

84. On 11th August, 2017 Mr. Goldsbury informed Covestro's insurance representative that Ballytherm required "preservation of physical and other evidence in the possession, custody or procurement of Bayer/Covestro B.V. and which may have a bearing on the claims. On 16th August, 2017 Covestro's insurance representative informed Mr. Goldsbury in reply that he had asked Covestro B.V. "to preserve relevant documents in their possession concerning the characteristics of Bayer PIR3009".

85. The proceedings were commenced by plenary summons issued on 10th November, 2017.

86. The First, Second and Third Defendants say that the effect of establishing a litigation hold on 12th December, 2017 was that material predating December 2015 could have been deleted. It was during the course of 2013 that discussions first took place regarding the replacement of PIR3003 with PIR3009 and on 6th November, 2014 Ballytherm commenced using PIR3009 in its product.

87. The Fourth Defendant says that the question of litigation hold and document retention is not an appropriate matter to raise in the context of discovery. This is incorrect in that the retention of documents forms part of the discovery obligations of a party at least from the point in time when litigation is in contemplation. In this case the litigation hold was implemented on 12th December, 2017, thirteen days after these proceedings were served.

88. It is clear that by the time the litigation hold was put in place Covestro B.V. knew or ought to have known that legal proceedings were pending or contemplated in relation to this matter. At the very latest the correspondence between the loss adjusters in August 2017 made this clear. It is arguable that Covestro B.V. were under an obligation to action a litigation hold even earlier such as in February 2017 or in September 2016.



89. This court has not held a hearing to determine the date by which Covestro B.V. had such knowledge of the existence of a legal claim against it to be under an obligation to implement a litigation hold. However, in circumstances where that date cannot be as late as 12th December, 2017, I shall direct that the fourth named defendant make an affidavit, not by its solicitor, addressing this question and describing the actions, if any, it took to preserve manual, electronic and other records from the time it became so aware.

90. Contrary to the averment in paragraph 6 of Mr. Schaefer's affidavit, the existence of the "Regulation", having regard to its terms, cannot be justification for the destruction of emails more than two years old. Accordingly, he should expand on how the policies referred to in the Regulation were applied in so far as is relevant to this case.

91. This affidavit should be also clarify the contents of paragraph 12 and the second schedule to the affidavit first sworn by Mr. Schaefer which clearly is incomplete, having regard to some of the references made to hand written notes which were not retained. There may be more such issues and Mr. Schaefer will no doubt be fully advised before swearing the affidavit.

92. In circumstances where documents have been destroyed or deleted, whether by inadvertence or wilfully then unless they or copies can somehow be retrieved from any source, they cannot simply be "revived" and now produced. Equally, it may not be possible to provide a detailed schedule of such documents as envisaged by the second schedule to the form of the affidavit of discovery. However, enquiries should be made and a more expansive paragraph 12 and second schedule should be made addressing these questions. Ultimately it will then be a matter for the trial judge to make his evaluation of the relevance of this information and the First, Second and Third Defendants have already indicated that it is their intention to invite the court to draw inferences.

93. Mr. Kennedy avers in his affidavit that he has been instructed by Covestro B.V. that its exchanger servers are as hosted externally at Microsoft. He also says that he has been advised that once an email is deleted under the Automated Information Life Cycle it is not possible to retrieve it.

94. The First, Second and Third Defendants complain that they have not been told whether any efforts were made through Microsoft to retrieve deleted emails. At the time of the application this point remained unresolved and that the supplemental affidavit should address this question specifically.

#### **Failure to discover documents.**

95. The First Defendant claims that from its review of the Covestro B.V. discovery a significant amount of documentation has not been discovered. It is not possible for the court on this application to undertake a granular examination as to each and every document or type of document which the First, Second and Third Defendants say has not been discovered. However, in para. 40 of Mr. Durcan's affidavit he identifies what he describes as examples and I have considered a number of those.

96. The First, Second and Third Defendants complain that Covestro B.V. has furnished no documents relating to "the development" of PIR3009. Covestro B.V. claim that they have complied with the order by discovering documents evidencing recording or relating to the "composition" of 3009. This reduces itself to a matter of construction of the discovery order made on 30th July, 2018, and in particular, Category 3 which requires production of documents relating to the "composition" of the chemical. The First, Second and Third Defendants say that documents relating to the "development" of the chemical must fall within this category. I have concluded that there is no justification for expanding the meaning of the word "composition" to include documents relating to the "development" of the polyol.

97. The First, Second and Third Defendants complain that no notes relating to certain visits to Ballytherm by Mr. Groot Rouwen have been discovered. The First Defendant says that it knows that Mr. Rouwen maintained hard copy notes. This also raises the question of hard copy documents generally, and it is said by the First, Second and Third Defendants that the discovery appears to have been limited only to electronic records.

98. Covestro B.V. say that notes of meetings at Ballytherm and certain other hard copy material, were transferred into electronic form after the conclusion of the visit and were then destroyed.

99. Insofar as hard copy notes existed they clearly should have been discovered. If Covestro B.V. say that they existed, but no longer exist that should have been addressed in the second schedule.

100. The First, Second and Third Defendants protest that no documents have been produced relating to variations between batches of PIR3009 supplied. It is said that Category 2, provides for "copy of any revisions made to the Supply Specifications for all batches of chemical PIR3009 supplied to the first named defendant", and for detailed information in relation to each batch supplied. If this information has been discovered, it is difficult to see how the First, Second and Third Defendants would not then be in a position to identify variations. Therefore, this complaint is not well founded.

101. The First, Second and Third Defendants complain that no documents were discovered concerning calibration records for the equipment used to manufacture or test individual batches of PIR3009 during production. The Fourth Defendant has confirmed it will address this in a further affidavit.

102. The First, Second and Third Defendants complain that no documentation relating to "in house quality control checks carried out on individual batches of PIR3009 or its raw materials" were discovered. Mr. Kennedy avers that a close examination of the relevant schedules would show that such documents are, in fact, included. In reply, the First Defendant says that having regard to the numbers of personnel at Covestro B.V. engaged in and described as "QC colleagues", they question whether all such documents have been discovered. However, this cannot be taken any further than the defendants' own assertion that all such material has been included.

103. The First, Second and Third Defendants complain that the discovery contains no records relating to an incident which occurred in late 2016, when it was discovered that some of the chemical polyol provided to Ballytherm was missing a necessary stabiliser and had to be returned to Covestro B.V. This arose during or immediately following a visit by Mr. Rouwen to the Ballytherm premises. When pressed as to which categories this related to, the First, Second and Third Defendants referred to Categories 2 and 4 (meaning 5) in the order for discovery. Category 5(b) namely "the testing and trials carried out by the fourth named defendant at the premises of the first named defendant...". Whilst the existence of a particular incident is not necessarily contemplated by the order itself, it is clear that if this arose during or from "a testing or trial" of the First Defendant's premises it would fall within this paragraph. The Fourth Defendant ought therefore to explain why no records of this incident were discovered.

104. The First, Second and Third Defendants complain that no documents have been discovered in relation to Category 5 (meaning 6)

in the order which relates to "complaints received by the fourth named defendant or claims made against the fourth named defendant by any party to whom the fourth named defendant supplied chemical PIR3009". Mr. Kennedy avers that it is correct that no such documentation has been discovered in relation to this category "as no documents were responsive to this category".

105. Mr. Durcan says that this must be incorrect because elsewhere evidence has been discovered of an entity named Swisspor which had issues with products supplied by Covestro B.V.

106. Insofar as Mr. Kennedy states that no documentation under this category was responsive to the category, it is not for this Court to second guess his averment. However, this has the appearance of a classic instance where the Fourth Defendant may have adopted an overly strict approach to the reliance on keywords in the electronic searches, such as "complaint", "claim", or "defect". The use of keywords in electronic searches is an efficient method of assembling documents to be furnished on discovery. However, it is not a substitute for a consideration as to whether there are any documents in the category generally. In this regard, the deponent ought to have considered whether Covestro B.V. received any complaints from any party. If the defendants maintain that position, even by reference to or explaining the nature of the communications with Swisspor, it should be addressed in the supplemental affidavit of discovery.

#### **Data Subjects**

107. The First, Second and Third Defendants say that the adequacy of the discovery is undermined by what it describes as uncertainty regarding the range of data subjects against whom searches were carried out. In doing so, they provided a list of the data subjects who according to the First, Second and Third Defendants ought to have been the subject of review. In his replying affidavit Mr. Kennedy states that Covestro has included the relevant data subjects for the purposes of the discovery but is considering the name of the persons identified by the first, second and third defendants and will include these if it transpires that they ought to have been captured by the exercise but have not been. He says that Covestro has not refused to include any data subject and is merely carrying out its own inquiries as to the necessity of same. At the time of the hearing the Fourth Defendant had not confirmed whether the persons on the list provided by the First, Second and Third Defendants were all the subject of the review. Whether the First, Second and Third Defendants are correct in making their list is a separate issue, but the Fourth Defendant's list of data subjects should be furnished in the supplemental affidavit.

#### **Password Protected Documents**

108. Originally, Covestro B.V. claimed that it was unable to access certain password protected documents. In Mr. Kennedy's affidavit, he states that "the same were only very recently accessed by Covestro's e-discovery platform provider" and that a supplemental affidavit of discovery will be delivered in this regard.

#### **Privilege Documents**

109. An issue arose between the parties as to the manner in which privilege documents were described in the affidavit of Mr. Schaefer. It appears that a revised privilege schedule has since been produced and Covestro B.V. has agreed to include it in the supplemental discovery.

#### **Covestro's Discovery Exercise**

110. The First, Second and Third Defendants complain that Covestro B.V. has indicated that only 469,994 files were uploaded to any discovery platform and that after keywords and search terms were applied, just six thousand documents were reviewed. It is said that by contrast, Ballytherm, which is a much smaller organisation, reviewed and discovered significantly more documents and ultimately reviewed approximately thirty thousand and discovered over ten thousand documents. They say that this is a "clear indication that overly narrow search terms were used during Covestro's discovery exercise". I am not persuaded that a mere exercise of comparing the numbers of documents searched, reviewed and ultimately discovered by the parties is of itself a basis on which to find that there has not been an adequate or full discovery exercise undertaken.

111. The First, Second and Third Defendants then point to a particular number of emails which they say had not been discovered but which they have seen. Whilst Covestro B.V. say that this means clearly that the First, Second and Third Defendants are in possession of those relevant documents, the First, Second and Third Defendants protest that this is indicative of a failure to make complete discovery.

112. The Fourth Defendant in its correspondence and replying affidavit then identifies the initial keyword searches which were applied. It states that once the data identified in those keywords was extracted and uploaded to the review platform "EY used additional keyword searches to narrow the volume of data for review" and they list the keyword searches which were applied by EY. The First, Second and Third Defendants complain that the keywords used are overly restrictive and deficient in a number of respects which they describe in the affidavit of Mr. Durcan.

113. The First, Second and Third Defendants complain that in identifying the keywords in the context of narrowing the field of documents for review, this exercise was left to the fourth named defendant's e-discovery platform provider EY, with no input from Covestro itself or from its solicitors. It is submitted that there does not appear, from an examination of the keyword search terms used to have been any effort made to identify the words against the categories of documents provided for in the order for discovery.

114. The Fourth Defendant states that deciding on the key search terms was a particularly complex exercise and state that Kennedys participated in conference calls with the client and EY at the start of the discovery process to identify all data sources and consider the discovery categories and decide key search terms. Mr. Kennedy states that he and a colleague from his firm Kennedys also travelled to Covestro's offices in the Netherlands to advise the client on its discovery obligations and to consider how data was stored to ensure all data sources were considered. The First, Second and Third Defendants say that on examination of the list of keywords applied to the search described in the affidavit of Mr. Kennedy and an examination of that order for discovery made on 30th July, 2018, it is noteworthy that some of the words and phrases used in the order are absent from the list of search terms, notably the word 'test'. Also absent are the words 'quality', 'quality control', 'batch', 'analysis', 'certificate of analysis', 'calibration', 'ratio', 'tolerance'.

115. In the context of this application and having regard to the submissions made at the hearing, it is not practical for this Court to embark on a prescriptive description of what further keywords should have been used and the First, Second and Third Defendants do not provide a list of such terms, save to protest that they do not believe that an adequate set of such terms was provided and they submit that this calls into question the reliability of the entire exercise. In these circumstances, the court is not in a position to make a prescriptive order. However, I am persuaded that in the particular circumstance of this case, a number of search terms necessary to capture documents relevant to the categories ordered to be discovered, such as the terms mentioned in paragraph 114 above were omitted. I shall therefore direct that the First, Second and Third Defendants provide to the Fourth Defendant a list identifying keyword searches which they say were omitted. If agreement cannot be reached on the additional search terms, the court can hear

the parties further. Once this is resolved, whether by agreement or further order, the Fourth Defendant should swear a second affidavit of discovery attesting to the result of its further searches and review of documents thereby sourced, with necessary schedules.

116. Proportionality is critical in this process and if the list provided is excessive, the court will not direct that the Fourth Defendant comply. The court expects that this exchange can occur in a very short timeframe.

117. I do not envisage this court having to revisit the substance of the further discovery at another interlocutory hearing or “micro-managing” the next stage of the process. Once the process hereby directed has been implemented it should be possible to progress to trial.

118. This case is a classic illustration of what can occur where the parties do not reach agreement in advance of making discovery as to the range of data subjects and the search terms to be applied.

119. Covestro B.V. say that the appropriate time to assess the suitability of keywords would have been at the outset of the discovery process when the categories of discovery are being agreed or ordered. That is correct but where a party making discovery does not seek agreement or propose to the other party lists of data subjects and keywords, it risks a challenge to the manner in which it has selected from lists. See Clarke J. in *Thema International Fund PLC v HSBC Institutional Trust Services (Irl) & Ors* [2012] 3 IR 528. Therefore, the best method by which any party making discovery can avoid allegations of the type made in this case is to propose lists of data subjects and keywords at the very outset. Should the other party receiving the discovery not engage then that failure will inform decisions as to who bears the responsibility for any subsequent issues. It is regrettable that no agreement on these matters appears to have been made in this case.

#### **Documents not in Native Format**

120. Controversy surrounding the availability of discovered documents in native format appears to have been resolved and requires no determination from the court at this point.

#### **Formatting of Schedule**

121. A controversy around the numbering sequence and the schedule to the affidavit of discovery appears to have been resolved and requires no determination by this Court at this time.

#### **Dutch Language**

122. The First, Second and Third Defendants complain that they have not received confirmation that Covestro took steps to ensure that keywords were performed in Dutch and English, due to the fact that both languages are used in the business of Covestro B.V. and appear in its documents.

123. Covestro say that all of the keywords used were translated and applied in Dutch language also. That should be the end of the matter except that it is elsewhere submitted by the First, Second and Third Defendants that this is not simply a matter of translating words, which does not mean that all Dutch appropriate phrases or colloquialisms were used. Although the challenge again is essentially to the methodology, it is not open to this Court on this application to adjudicate on whether further or other Dutch phrases ought to have been used.

#### **Document Specific Issues**

124. The First, Second and Third Defendants refer to fifteen separate issues which they say arise from specific documents discovered by Covestro. These are a range of different issues and I shall not adjudicate on each and every one of them. Ultimately, it may be a matter for the trial judge to reach conclusions arising from the points raised by the First, Second and Third Defendants. This having been said, the following particular points arise.

125. Certain redactions have been made from a number of the documents on the basis, according to Mr. Schaefer, that they contain price information which is highly commercially sensitive. They say also that the price information is not relevant and has, therefore, been redacted. Certain other technical information relating to the composition of the polyols is discovered but expressly stated to be subject to a particular confidentiality order of the Court and the giving of certain undertakings.

126. On the face of the order for discovery, it is not readily apparent that pricing information which would otherwise be confidential for commercial reasons would need to be included. However, it is said by the First, Second and Third Defendants that they could be relevant to the change from chemical PIR3003 to chemical PIR3009, which, in turn, would be relevant to category 1A.

127. The general rule and implied undertaking that material provided in discovery can only be utilised by the recipient for the purposes of the proceedings themselves applies to the pricing information, and it has never been the rule that price sensitive or commercially sensitive information otherwise relevant to the matter at issue in the proceedings would not be discoverable. This being the case, I shall direct that the redactions complained of and which are relevant to price information be reversed.

128. A number of the attachments to emails which have been discovered have been excluded on the basis that they are not relevant. The Fourth Defendant says that where an email is relevant but not its attachments, it is entitled to exclude the non-relevant attachments in the discovery and where some, but not all attachments, are found to be relevant they have been included together with the covering email for the purpose of context. However, they insist that attachments which are wholly irrelevant should be excluded from the discovery.

129. The general approach taken to attachments to emails that an attachment is regarded as part of the email. However, if the deponent is satisfied, having obtained the appropriate legal advice, that the contents of an attachment are wholly irrelevant, they may be excluded. In Mr. Durcan’s second affidavit, he has identified a small number of particular attachments which he states must, be relevant because of the description of the attachment, which include in some cases references to “PIR3010” and “PIR3009”. Having regard to the particular items to which he has referred, I shall direct that the supplemental affidavit of discovery address, in particular, the question of those particular attachments. The number of these is limited.

#### **Motion for supplemental discovery.**

130. On 28th November, 2018 the First Defendant issued a motion seeking orders compelling the Fourth Defendant to make discovery of eight categories of documents, having requested voluntary discovery by letter by letter dated 6th November, 2018.

131. The First Defendant claims that these categories of discovery arise out of the pleas contained in the notice of indemnity and contribution which had been served on 23rd July, 2018. It asserts that discovery of documents within these categories is relevant

and necessary for the determination of issues arising on that notice.

132. The application is grounded on an affidavit sworn by Mr. John Durcan 27th November, 2018. The application was opposed and there is before the court a replying affidavit on behalf of the Fourth Defendant sworn by Mr. Hugh Francis Kennedy on 12th December, 2018 and a second affidavit of Mr. Durcan sworn 17th December, 2018.

133. In the grounding affidavit Mr. Durcan recites the history of the proceedings and the procedural history. Reference is made to the service of the notice of indemnity on the afternoon of 23rd July, 2018. That was the day on which the motion for directions in the proceedings was before the court and the trial date of 30th April, 2019 was fixed.

134. When the motion for discovery by the First, Second and Third Named Defendants against the Fourth Named Defendant was first issued it was returnable for 9th May, 2018. It was adjourned from time to time and ultimately stood adjourned to 30th July, 2018 when the initial discovery order was made by consent ("First Discovery").

135. The Fourth Named Defendant complains that having served notice of indemnity and contribution on 23rd July, 2018 and having agreed the categories of discovery for the purpose of an order which was made on consent on 30th July, 2018 on the basis that such affidavits of discovery would be exchanged in October, 2018 and having exchanged those affidavits on 26th October, 2018, the request made on 6th November, 2018 is in reality to make a second and more expansive request for eight additional categories of discovery over and above those which were agreed and ordered on 30th July 2018.

136. The Fourth Defendant says that the request is oppressive and is an exercise in overburdening the court and overburdening the Fourth Defendant "perhaps with the intent of delaying the trial date". It is said that this could cost as much again as the original discovery and will lead to a waste of time and expense.

137. The Fourth Defendant says that the First Defendant had clearly decided to serve its notice of indemnity and contribution when the categories of initial discovery were in the course of being agreed and therefore this request should have been made within the original timetable directed by the court. Thus, any supplemental discovery relevant to the issues arising on the notice of indemnity and contribution could have been absorbed to a certain degree within the initial discovery exercise.

138. It is submitted that it is unprecedented for a party to make a fresh request for voluntary discovery simply on the basis that it had served a notice of indemnity and contribution. It is submitted that the First Defendant cannot now rely on the service of that notice of indemnity and contribution to justify what is in effect a second substantive discovery request.

139. The First Defendant says that it had, when applying for the original discovery, put the Fourth Defendant on notice that it would be serving a notice of indemnity and contribution and reserved its position regarding such further discovery as may be required pursuant to that notice. They point out that the Fourth Defendant never protested that it would object to such a cause of action.

140. The First Defendant says also that it is not unprecedented for further, and even new discovery to be sought even at a late stage in litigation. They say that this can arise from matters of different types, including disclosures in the original discovery or where counsel advising on proofs identifies additional matters in respect of which discovery is required even at a late stage. There is some force in this submission, but such cases should be distinguished from a case such as this where the new request for discovery is being made pursuant to actions by the party now seeking the additional discovery and not as a result of other events outside its control.

141. The First Defendant says also that since the Fourth Defendant has already been required to upload a universe of documents to a discovery platform if supplemental discovery is ordered it is now only a matter of applying certain additional keywords to identify the material to be reviewed in the context of the supplemental discovery. They say this noting that there are still certain unresolved issues in relation to the original discovery and they submit that since parts of the original discovery will inevitably have to be revisited compliance with an order for supplemental discovery will not be as burdensome or oppressive as the Fourth Defendant claims.

142. The Rules of the Superior Courts do not contain any time limits for the service of the notice of indemnity and contribution. Nor do they prohibit, where justified, requests for supplemental or additional discovery possible even at a late stage or an advance stage of proceedings. The court will generally be slow to make orders for new categories of discovery where the parties have already agreed the categories of discovery, a consent order has been made and the discovery affidavits and documents have been exchanged. However, in circumstances where the new categories are identified which properly relate to matters which will be at issue between the defendants following the service of the notice of indemnity and contribution, it seems to this Court that whilst some of the Fourth Defendants' arguments have certain force, they need to be considered in the context of the overriding requirement of justice that at the trial the parties and the court should have access to any documents and material which are relevant and necessary for the proper determination of the issues between the parties. This mandate would be frustrated if the First Defendant were now precluded from obtaining discovery of such categories of documents as are relevant and necessary, subject to the question of proportionality and the question of alternative methods.

143. There is no requirement under the Rules of the Superior Courts to deliver a defence to a notice of indemnity and contribution, such as would arise if third party proceedings are issued. This could present an issue as to identification of what precisely are the matters in issue as between the defendants for the purpose of determining which categories of discovery should be ordered. In this case however the notice of indemnity and contribution is notably well particularised. Not only do the First, Second and Third Defendants seek indemnity and contribution from the Fourth Named Defendant and damages, but the notice particularises the relationship between the parties, the history of the supply of polyol product by the Fourth Defendant and of the provision of technical advice and knowhow. It also contains detailed particulars of representations alleged to have been made by the Fourth Defendant to the First Defendant in reliance on which the polyol was sourced from the Fourth Defendant.

144. In its defence the First Defendant pleads that in the event that the insulation panels produced by it shrank this was caused by defects in the chemical PIR3009 supplied by the Fourth Named Defendant.

145. In its defence the Fourth Named Defendant pleads that if the Plaintiff has suffered the alleged or any losses same has been caused by the negligence and/or breach of contract and/or breach of duty on the part of the First, Second and Third Defendants and/or their servants or agents. This paragraph in the Fourth Named Defendant's defence is the height of the pleadings as between the defendants. No notice of indemnity and contribution has been served by the Fourth Defendant.

146. I have concluded that having regard to the detailed particulars contained in the notice of indemnity and contribution and the defence delivered by the Fourth Defendant, it is possible to identify the matters which will be in issue to a sufficient degree such as to enable the court to determine which categories of discovery should be ordered.

147. During the hearing it was acknowledged that it may be possible, in relation to certain of the categories to provide for discovery on the basis that supplemental discovery will only include those documents or materials which have not already been discovered under categories in the First Discovery. There was some brief discussion as to which of the categories this can affect. I do not propose to distinguish the categories for this purpose but will direct that in relation to all of the categories ordered this proviso should apply.

148. The Fourth Defendant submitted also that a number of the matters the subject of these requests could be avoided in terms of discovery and dealt with by other procedures, such as interrogatories. Counsel did not refer the court to any particular aspects of the discovery sought in respect of which this could be said.

149. It is very clear from recent judgments of this court and of the Court of Appeal discussed at paragraphs 46 – 48 of this judgment that if there is a more expedient procedure, such as interrogatories, for establishing certain matters which will avoid the necessity for costly and cumbersome discovery that such procedures should be availed of. In the absence of submissions as to which categories might be avoided by use of other means, it is difficult for the court to now embark on its own exercise of identifying which elements of the discovery could better be addressed in such a fashion. Having said this, the court will take this consideration into account when deciding on the relevant categories.

150. The Fourth Defendant has also argued that a number of the categories of discovery now sought could be said to have arisen from the pleadings which were before the court even when the request for initial discovery was made and that it would not be appropriate for the court on this application to order supplemental discovery unless the relevant category can be said to derive exclusively from issues which arise from the service of the notice of indemnity and contribution. I do not believe that, if the relevant category can be said to arise at all from the notice of indemnity and contribution, such overlap would necessarily be a bar to ordering the supplemental discovery. Furthermore, insofar as it could be said by the Fourth Defendant that there are overlaps with the original discovery, that is if anything in aid of the Fourth Defendant and the incremental task and associated costs of complying ought not to be oppressive or disproportionate.

151. If these applications had been made later or closer to the trial date the court would be reluctant to grant any of the orders sought. However, there is a necessity to balance the objections made by the Fourth Defendant against the overriding requirement to ensure that material which is necessary for establishing all the facts relevant and necessary for the determination of the issues in the case have been discovered and are available to the court at trial. In the circumstances I have concluded that it is appropriate to make orders for supplemental discovery and I shall now turn to the categories sought in the notice of motion.

## **152. Category 1**

*"All documents evidencing or recording the representations made by the Fourth Defendant to the First Defendant in relation to the expertise of the fourth defendant, the complete premixed foam system it offered to supply to the First Defendant and the purposes for which it was suitable."*

It is not disputed that this category is relevant, having regard to the fact that the notice of indemnity alleges that representations were made by the Fourth Defendant to the First Defendant with a view to inducing the Fourth Defendant to enter into the contract to acquire the premixed foam system offered by the Fourth Defendant. The Fourth Defendant submits firstly that the category is disproportionate, particularly in the absence of a temporal limit, and secondly that documents which evidence or record representations made to the First Defendant ought by definition to be already in the possession of the First Defendant. The fact that some or all of the relevant documents might already be in the possession of a party seeking the discovery would never be a bar to making full discovery of documents which evidence the alleged representations, which of course could include internal records of the Fourth Defendant.

153. In relation to proportionality, it has been said that the relationship between the parties goes back to the year 2005. Since the allegation is that even the original contractual arrangements were entered into in reliance on the relevant representations, this could require the Fourth Defendant to make discovery of documents extending back that far to the inception of this relationship. There is some force in the suggestion by the First Defendant that this would be relevant to the case as pleaded in the notice of indemnity. If discovery were to be ordered of this category it would be limited to the time when the switch from Chemical PIR3003 to Chemical PIR3009 was proposed.

154. Having regard to the specific allegations made in the notice of indemnity and contribution regarding representations it seems to me that this is an issue in respect of which it ought to be possible to formulate and deliver interrogatories or a notice to admit. Accordingly, I refuse the order sought at this time.

## **155. Category 2**

*"All documents evidencing or recording the contractual relationship between the First Defendant and the Fourth Defendant and the services the Fourth Defendant agreed to provide to the First Defendant."*

The Fourth Defendant again appears to acknowledge that documents in this category are relevant to the proceedings. It submits that it is difficult to accept that this request for discovery could not have been made at a much earlier stage in the proceedings and questions how this category could only have assumed relevance on foot of the service of the notice of indemnity and contribution. The First Defendant submits that the Fourth Defendant does not identify what issue in the original pleadings, otherwise than on the notice of indemnity, to which this category could be relevant.

156. If the same logic as applied to Category 1 were to apply, this would require discovery of documents and material from the inception of the relationship in 2005. This would be disproportionate, and I shall apply the same temporal limit, namely the date, I believe to be during 2013, when Chemical PIR3009 was first proposed to replace Chemical PIR3003.

## **157. Category 3**

*"All documents recording or evidencing any quality control in respect of the raw materials used in the manufacture of PIR 3009, including but not limited to testing carried out by the Fourth Defendant on the raw materials and the Technical Data Sheets Specification and Certification of Analysis for each of the raw materials."*

The Fourth Defendant accepts that certain elements of this category, notably Technical Data Sheets and Certificates of Analysis may be relevant. Its principle objection under this heading is that this request should have been made when the First Defendant was

formulating its original request for discovery and it submits that this category cannot only have assumed relevance on foot of the service of the notice of indemnity and contribution. In particular reference is made to categories 2, 3 and 5 of the First Discovery.

158. If anything, this should mean that documents relating to quality control and evidence of quality control will already have been identified by the Fourth Defendant in the course of making the First Discovery. Again, whilst there is a degree of overlap with the original categories, this category is clearly relevant to the issues arising from the notice of indemnity and contribution.

159. No question of a temporal limit arises because this category is expressly limited to the manufacture of PIR 3009 in respect of which the first delivery to the First Defendant occurred in December, 2013 and it was not until later in 2014 that the First Defendant commenced using that chemical.

#### **160. Category 4**

*"All documents recording or evidencing the advice and guidance provided by the Fourth Defendant to the First Defendant in relation to the manufacture of insulation and the technical assistance provided by the Fourth Defendant to the First Defendant."*

The Fourth Defendant submits that this category is disproportionately broad, that the request for discovery could have been made at a much earlier stage in the proceedings, and that it cannot be said that this category has only assumed relevance on the foot of the service of notice of indemnity and contribution.

161. The First Defendant claims that over the entire period of the relationship the Fourth Defendant refused to reveal confidential information regarding the make-up of the polyol chemicals and therefore that the First Defendant was dependent on the Fourth Defendant not only for the supply of the chemicals, but also for technical advice, know-how and laboratory assistance in setting up the production line and support and assistance on an ongoing basis. These claims arise in the Notice of Indemnity and the category is relevant and necessary.

162. It could be said on reading the formulation of this category that it would extend back to the inception of the relationship in 2005 and there is some force in that argument. However, this would be disproportionate, and I shall order discovery of the category subject again to the temporal limit of 2013.

#### **163. Category 5(a) and (b)**

*"(a) all documents evidencing, recording or relating to the testing carried out by the Fourth Defendant for BBA approval on behalf of the First Defendant.*

*(b) all documents evidencing or recording the information provided by the Fourth Defendant to the First Defendant in relation to the composition of chemical PIR 3009 for the purpose of maintaining BBA Agrément Approval."*

The Fourth Defendant objects that this category is excessively broad and unnecessary. It also suggests that it should not be permitted in circumstances where a category covering the same material or subject was withdrawn when the discovery terms were being agreed in July, 2018. The category which was the subject of the withdrawal was as follows: "all documents evidencing, recording or relating to the knowledge of Covestro of the use to which chemical PIR3009 was to be put by Ballytherm". It is clear on a closer consideration of these categories that there is not an overlap between this category sought and the category which was withdrawn. On the contrary this category is specific to material which has a relevance the BBA approval.

164. Mr. Durcan avers that BBA approval was only obtained on a limited number of occasions and it is said therefore that it ought to be possible for the Fourth Defendant to identify those relevant occasions and the material which was relevant to the testing conducted undertaken for this purpose. This averment is not being contradicted and it is clear that the category is well defined and not excessively broad. Accordingly, I shall order discovery of the documents in this category.

#### **165. Category 6**

*"All documents evidencing, recording or relating to any knowledge or suspicion on the part of the Fourth Defendant that chemical PIR3009, or any component thereof was defective and/or that chemical PIR3009 was not suitable for use in the manufacture of the Ballytherm insulation."*

The Fourth Defendant complains that the terms of this category are oppressive, unnecessary and amount to a fishing expedition on the part of the First Defendant.

166. In the notice of indemnity, it is alleged that the Fourth Defendant knew or ought to have known that batches of chemical PIR3009 were defective and/or were not fit for purpose and/or were not of merchantable quality and that the Fourth Defendant knew or ought to have known that those defects were such that there was a significant risk that the Ballytherm insulation using it would be defective and was incapable of functioning as insulation underneath the ground floor slabs of properties. It is also claimed that the Fourth Defendant failed to warn the First Defendant of this risk.

167. It seems to me that questions concerning the state of the Fourth Defendant's knowledge of the fitness and suitability of the chemicals delivered and whether any warning of risk was given are capable of being resolved by interrogatories and accordingly, I refuse discovery under this category.

#### **168. Category 7**

*"All documents evidencing, recording or relating to the cause and nature of the defects in chemical PIR3009."*

The Fourth Defendant claims that this category is excessively broad and unnecessary and amounts to fishing and says that it is covered by Categories 5 and 6 in the First Discovery, which are as follows:

"Category 5":

*"All documents evidencing, recording or relating to all testing carried out by the Fourth Named Defendant on the Chemical PIR 3009 supplied to the First Defendant, including but not limited to:*

*(a) the testing of each batch of Chemical PIR 3009 supplied to the First Named Defendant by or on behalf of the Fourth Named Defendant prior to delivery to the First Named Defendant;*

*(b) the testing and trials carried out by the Fourth Named Defendant at the premises of the First Named Defendant on the Chemical PIR 3009 supplied to the First Named Defendant;*

*(c) the testing carried out by the Fourth Named Defendant of the prototype boards manufactured by the First Named Defendant during the initial trials of the Chemical PIR 3009;*

*(d) the testing carried out by the Fourth Named Defendant following the notification of the alleged defect in Chemical PIR to determine the cause of same up to the date of the commencement of these proceedings.*

"Category 6":

*All documents evidencing or recording any other complaints received by the Fourth Named Defendant or claims made against the Fourth Named Defendant by any party (other than the First Named Defendant) to whom the Fourth Named Defendant supplied Chemical PIR 3009."*

169. It is arguable that the category of which discovery is now sought is wider than the original category and not limited to evidence of specific test results. However, it seems to this court that if full discovery has been or will be made under the original Category 5, the relevant test results under Category 5 ought to include sufficient information as to the cause and nature of the defects. Therefore, no order will be made on this motion for this category.

#### **170. Category 8**

*"All documents evidencing or recording the Fourth Defendant's sample retention policy and all documents relating to the retention and/or destruction of samples of chemical PIR3009."*

The Fourth Defendant states that it is willing to produce a copy of its sample retention policy, but objects to making discovery of all documents relating to the retention and/or destruction of samples.

171. The First Defendant claims that the Fourth Defendant failed to preserve certain batches of PIR3009 even after the time at which it was first notified of the complaints giving rise to these proceedings.

172. It is specifically pleaded in the notice of indemnity and contribution that the Fourth Defendant is "in breach of its stated policy of retaining samples for twelve months, failed to preserve samples of batches of PIR3009 supplied to the first named defendant thereby destroying/failing to make available those samples for testing". The notice goes on to indicate that the First Defendant will invite the court to draw adverse inferences on this basis. In my view this category is relevant and necessary for the determination of the issues.

173. I summarise below the orders I shall make on the two motions.

#### **First, Second and Third Defendants' Motion for Further & Better Discovery**

174.

(1) I shall direct that Mr Schaefer swear a second affidavit addressing:

- a. The matter of the litigation hold and document retention policies and describing the actions, if any, the Fourth Defendant took to preserve manual, electronic and other records from the time when it had knowledge of the existence of a potential legal claim against it. [See paragraphs 89 and 90 of this judgment].
- b. The affidavit should correct and expand on paragraph 12 and the Second Schedule of Mr Schaefer's first affidavit. [See paragraph 91 of this judgement].
- c. The affidavit describes efforts made through Microsoft to retrieve deleted emails. [See paragraphs 93 and 94 of this judgment].
- d. Paragraph 12 and the Second Schedule should also address the matter of hand-written notes and other hard copy documents. [See paragraphs 91, 92, 98 and 98 of this judgment].
- e. The affidavit should address the question of records of the incident referred to in paragraph 103 of this judgment.
- f. The affidavit should confirm the position regarding complaints, whether from Swisspor or otherwise. [See paragraphs 104 to 106 of this judgment].
- g. The affidavit should confirm the identity of data subjects searched against. [See paragraph 107 of this judgement].

(2) The First, Second and Third Defendants to deliver a list of search terms they claim were omitted. In the absence of agreement on this list, the matter can be re-entered before the court for determination. Thereafter, the Fourth Defendant to make supplemental discovery, taking account of its review of documents having applied the revised list of search terms. [See paragraph 115 of this judgment].

(3) The redaction of price information should be reversed in the documents referred to at paragraphs 125 to 127.

(4) The attachments to doc no. 0000003369 should be discovered or further explained. [See paragraphs 128 and 129].

### **Third Defendant's Motion for Supplemental Discovery**

175. The Fourth Defendant to make discovery of the following categories sought:

(1) Category 1

This category is refused.

(2) Category 2

All documents evidencing or recording the contractual relationship between the First Defendant and the Fourth Defendant and the services the Fourth Defendant agreed to provide to the First Defendant, limited to documents which came into existence at or after a time commencing when the transition from PIR3003 to PIR3009 was first proposed.

(3) Category 3

All documents recording or evidencing any quality control in respect of the raw materials used in the manufacture of PIR 3009, including but not limited to testing carried out by the Fourth Defendant on the raw materials and the Technical Data Sheets Specification and Certification of Analysis for each of the raw materials.

(4) Category 4

All documents recording or evidencing the advice and guidance provided by the Fourth Defendant to the First Defendant in relation to the manufacture of insulation and the technical assistance provided by the Fourth Defendant to the First Defendant. This category is limited to documents which came into existence at or after a time commencing when the transition from PIR3003 to PIR3009 was first proposed.

(5) Category 5(a) and (b)

(a) all documents evidencing, recording or relating to the testing carried out by the Fourth Defendant for BBA approval on behalf of the First Defendant.

(b) all documents evidencing or recording the information provided by the Fourth Defendant to the First Defendant in relation to the composition of chemical PIR 3009 for the purpose of maintaining BBA Agrément Approval.

(6) Category 6

This category is refused.

(7) Category 7

This category is refused.

(8) Category 8

All documents evidencing or recording the Fourth Defendant's sample retention policy and all documents relating to the retention and/or destruction of samples of chemical PIR3009.