Neutral Citation Number [2010] IEHC 33

THE HIGH COURT
COMMERCIAL

2007 4691 P

BETWEEN
HANSFIELD DEVELOPMENTS, VIKING CONSTRUCTION, MENOLLY PROPERTIES AND MENOLLY HOMES

PLAINTIFFS

AND
IRISH ASPHALT LIMITED, LAGAN HOLDINGS LIMITED, LAGAN CONSTRUCTION LIMITED
AND
BY ORDER
LAGAN CEMENT GROUP LIMITED (FORMERLY LAGAN HOLDINGS LIMITED)
AND
BY ORDER
LINSTOCK LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Gilligan delivered on the 12th day of February, 2010

PART II

1. The motion as brought on the plaintiffs' behalf seeks, *inter alia*, orders directing the defendants to swear additional affidavits of discovery, provide detailed and precise explanations in respect of various issues raised on the plaintiffs' behalf, an order permitting the inspection of certain specified documents and further, or in the alternative, an order striking out the defendants' defence.
2. The Court is conscious of the position of some 400 home owners from the Drynam, Myrtle and Beaupark estates in North County Dublin who have instituted legal proceedings against the plaintiffs in respect of alleged defects in houses which they purchased from the plaintiffs and that the plaintiffs in turn have joined the defendants in these proceedings as third parties in the home owners proceedings.
3. Accordingly, having regard to the position of the home owners and bearing in mind the reliance placed by Mr. O'Neill on the first and fifth named defendants' behalf in respect of the written submissions as submitted to the Court, I propose to attach to this judgment by way of a schedule the plaintiffs' written submissions, the first and fifth named defendants' written submissions, and the second, third and fourth named defendants' written submissions. I propose to include in this opening section of the judgment the submissions of Mr. Breslin on behalf of the second, third and fourth named defendants as made to the Court.
4. The procedural background from the plaintiffs' perspective, being the moving party to this motion, is well set out in the plaintiffs' written submissions and can be summarised as follows:-

The motion before the Court was issued on 16 February 2009 following an exchange of correspondence in relation to deficiencies in the Defendants' discovery. The reliefs sought in the motion include, in particular:

(i) an Order directing the Defendants to swear Affidavits which, *inter alia*:

(a) discover each and every document within the categories of documents which the Defendants agreed to discover and/or were directed to discover by Order of the Court dated 14 April 2008 which had not hitherto been discovered by the Defendants, including the documents specified in paragraphs (a)(i)(1) – (9) of the motion;
(b) discover each and every document which constitutes, records, refers to and/or evidences minutes or records of Board and/or Management meetings of the Defendants, or any of them or any of their respective servants or agents, during the period from 1 January 1999 to date;
(c) provide a detailed and precise explanation for, *inter alia*, the issues raised in the Affidavit grounding the Plaintiffs' application including (but not limited to) the methodology / approach adopted by or on behalf of the Defendants when determining whether documents were discoverable herein.

(ii) an Order permitting inspection of certain specified documents; and

(iii) further, or in the alternative, an Order striking out each of the Defendants' pleadings, including, in particular, the Defences and Amended Defences.

The Plaintiffs' application is grounded upon an Affidavit sworn by Gerard Butler on 16 February 2009. A replying Affidavit on behalf of the First Defendant (only) was sworn by Peter Lennon on 20 February 2009 (the "*First Affidavit of Mr. Lennon*"). At the case management hearing on that date, the Court stated that "*the court would have a concern that all relevant documentation under the various headings has now been discovered*"; that "*the Court [required] a confirmatory affidavit that all relevant material has been discovered*"; and that "*the bottom line is that all relevant documentation under the various headings must be discovered.*"

The First Affidavit of Mr. Lennon was replied to in an Affidavit sworn by Gerard Butler on 23 February 2009 (the "*Second Affidavit of Mr. Butler*"). After the commencement of the Opening on behalf of the Plaintiffs on 23 February 2009, Lennon Heather furnished BCM Hanby Wallace with a Sixth Supplemental Affidavit of Discovery which was sworn by Terry Lagan for and on behalf of the First Defendant on that date. In the afternoon of 23 February 2009, Lennon Heather forwarded to BCM Hanby Wallace a disk containing the documents discovered in that Affidavit of Discovery (including, *inter alia*, minutes of management meetings of Irish Asphalt Limited). A Confirmatory Affidavit on behalf of the Defendants was also sworn by Terry Lagan on 23 February 2009.

In his Confirmatory Affidavit, Mr. Lagan stated that he swore the Affidavit "*to confirm that [he had] made full discovery of all relevant documentation under the categories of discovery which the Defendants agreed to discover and/or were directed to discover by Order of Judge Charleton made on the 14th April 2008*". Mr. Lagan further stated that he had "*received comprehensive legal advice from [his] solicitors, Messrs. Lennon Heather, as to the relevance of documentation under the categories of discovery in the Defendant's possession, power and procurement and [understood] that the Defendants must have made discovery of each and every document in the categories of documents which the Defendants agreed to discover and/or were directed to discover by the Order of the 14th April 2008*". Mr. Lagan further stated that he had "*been advised on, and [understood] the gravity of, any*

failure by the Defendants to make full discovery of all relevant documentation under the categories of discovery" and that he was "*fully appraised of the reliefs sought by the Plaintiffs pursuant to their Notice of Motion dated 16th February 2009 including an Order striking out each of the Defendants' pleadings herein, in particular the Defences and Amended Defences*". Mr. Lagan further "*confirm[ed] that discovery has now been made of all documents relevant to the categories of discovery which the First Named Defendant agreed to discover and/or were directed to discover pursuant to the Order of this Court dated 14th April 2008*."

Having regard to the Confirmatory Affidavit of Terry Lagan, the Plaintiffs decided not to move a formal application to strike out the Defendants' Defence on 25 February 2009 and, instead, to proceed with the hearing of the proceedings, with the motion being left live during the currency of the trial. The Court was informed of that decision at the hearing on 24 February 2009. At that hearing, the Defendants confirmed their agreement to the position in that regard and indicated that a replying Affidavit to the (Second) Affidavit of Gerard Butler would be furnished "*so that it will be in if the discovery application should subsequently be heard*".

On 27 February 2009, Mr. Lennon swore an Affidavit in response to the Second Affidavit of Mr. Butler (the "*Second Affidavit of Mr. Lennon*"). In that Affidavit, Mr. Lennon stated, *inter alia*, that *"[i]t was during the weekend of the 21st and 22nd February 2009 that Mr Lagan conducted a final extensive review to ensure that he was absolutely satisfied to confirm by way of a confirmatory affidavit that he had made available and discovered all relevant documentation"*. Mr. Lennon added that *"[t]he First Named Defendant has already made clear on affidavit that all documents in its possession, power and procurement have been discovered in accordance with rules*" and that "*[t]his ha[d] now been confirmed in a 'confirmatory' affidavit".*

On 13 March 2009, the Defendants were directed by the Court to give up-to-date information in relation to the complaints which they received in respect of the infill from the Bay Lane quarry and, specifically, details of all such complaints during the period from July 2006 to date. On 13 March 2009, Counsel for the Defendants acknowledged that the Court was correct in observing that the witness statement of Mr. Lagan only addressed the issue of complaints "*up until July '06*" and undertook that they "*will be brought up to date*".

Under cover of a letter dated 20 March 2009, Lennon Heather furnished certain information and documentation in purported compliance with the said direction and undertaking given on behalf of their clients. In a replying letter dated 10 April 2009, BCM Hanby Wallace observed that Lennon Heather and their clients had manifestly failed to comply with their obligations in that regard. In their replying letter dated 17 April 2009, Lennon Heather disputed that there was any such failure and professed themselves to be "*astounded*" by the statements of BCM Hanby Wallace to the contrary. Lennon Heather stated that "*all documents relating to complaints up to the date of discovery July 2008 were discovered*" and that they "*have now provided [BCM Hanby Wallace] with all the material which [they] agreed to give in Court on 13 March 2009*."

Under cover of a letter dated 16 June 2009, BCM Hanby Wallace furnished to Lennon Heather documentation concerning, *inter alia*, surveying and testing of the lands that became the Bay Lane quarry which was voluntarily furnished to the Plaintiffs by BMA Geoservices Limited ("*BMA*") and which had not been discovered by the Defendants. A non-party discovery motion in respect of BMA-related documentation was subsequently issued on behalf of the Plaintiffs. That application was grounded upon an Affidavit sworn by Mona Costelloe which exhibited (at exhibit "MC5") the BMA documents that had been furnished voluntarily to the Plaintiffs. At the hearing of that application on 28 July 2009, the Defendants' position in respect of that documentation was that it related to a different site and their position was summarised thus: "*either it's not relevant and not within the scope of the discovery or not within [the Defendants'] possession, power or procurement*." For reasons which are set out below, it is respectfully submitted that the position adopted by the Defendants was clearly wrong. Furthermore, the BMA documents clearly demonstrate that there are further documents which ought have been discovered by the Defendants (and this question is dealt with in greater detail below).

At the case management hearing on 31 July, 2009, the court was informed that the Plaintiffs had concerns about the adequacy of the Defendants' discovery and that a letter was in the course of preparation to the Defendants' solicitors. In a subsequent letter dated 11 August 2009 to the Defendants' solicitors, BCM Hanby Wallace stated that it was clear that, notwithstanding the Confirmatory Affidavit sworn by Mr. Lagan on 23 February, 2009, there was ongoing failure by the Defendants to comply with their discovery obligations. BCM Hanby Wallace informed the Defendants' solicitors that, in the circumstances, they would be re-entering the motion seeking, *inter alia*, an Order striking out the Defendants' Defence as soon as practicable. In the interim, BCM Hanby Wallace requested the Defendants' solicitors:

(i) To address each of the issues identified in the letter; and

(ii) To confirm that a proper search for the documents within the ambit of the categories of documents which the Defendants were required to discover had been undertaken;

(iii) To furnish copies of: (a) all documents which the Defendants were required to discover but had hitherto failed or refused to discover; and (b) all documents over which the Defendants made erroneous claims of privilege; and

(iv) To furnish an Affidavit which, *inter alia*, discovers all of the documents which the Defendants were required to discover but which they had hitherto failed or refused to discover.

BCM Hanby Wallace added that the necessity for the foregoing was further underlined by the position of the Defendants in respect of the documentation exhibited to the Affidavit grounding the Plaintiffs' non-party discovery application which was heard on 28 July 2009. BCM Hanby Wallace stated that the documents and survey test results exhibited to the Affidavit of Mona Costelloe clearly relate to the Bay Lane site and the representations to the contrary which were made on behalf of the Defendants to the Court were seriously and incomprehensively incorrect. The details of the Plaintiffs' position in that regard were set out in the letter dated 11 August 2009.

In a replying letter dated 13 August 2009, the Defendants' solicitors indicated that they regarded the Plaintiffs' solicitors' letter of 11 August, 2009 as a gross abuse of process and that they would not be dealing with any of the substantive issues arising out of the letter dated 11 August 2009 until they had completed the exercise they were carrying out in respect of the additional discovery made by the Plaintiffs. In a replying letter dated 19 August 2009, BCM Hanby Wallace observed, *inter alia*, that it was "*particularly striking that the Defendants are not in a position to explain why they failed to discover, inter alia, the BMA documents which it was necessary for the Plaintiffs to obtain by way of non-party discovery or to provide an assurance that other similarly critical documents were not excluded from the Defendants' discovery*".

On 8 September, 2009, the Court gave liberty to re-enter the Plaintiffs' motion filed in February 2009 on the basis that it would be heard at or after the hearing of the Defendants' motion.

At that hearing, the Defendants (through their counsel) intimated for the first time that they wished, notwithstanding the letter of 13 August, to respond in a substantive way to the letter of 11 August from BCM Hanby Wallace. At that hearing, the Plaintiffs (through their counsel) also indicated that a further letter would be sent on the following day raising further issues in relation to the adequacy of the Defendants' discovery. Accordingly, BCM Hanby Wallace sent a further letter in relation to the ongoing failure or refusal of the Defendants to comply with their discovery obligations on 9 September 2009. That letter highlighted, in particular, the failure or refusal of the Defendants to discover all relevant documents concerning: (i) the Geoffrey Walton practice; (ii) minutes of meetings; and (iii) Celtest. On the same date (9 September 2009), Gerard Butler swore a further Affidavit in support of the Plaintiffs' motion issued on 16 February 2009 (the "*Third Affidavit of Mr. Butler*").

The Defendants' solicitors replied to the correspondence dated 11 August 2009 and 9 September 2009 by letter dated 5 October 2009. An Affidavit was sworn by Peter Lennon on behalf of the First Defendant on that date (the "*Third Affidavit of Mr. Lennon*"). In the letter of 5 October, 2009, the Defendants' solicitors indicated that the Defendants had certain additional documents which they would discover "*if necessary"* after the conclusion of their motion to strike out the Plaintiffs' claim. However, after the matter was mentioned to the court at a case management hearing on 9 October, 2009, the Defendants agreed to deliver a further Affidavit of Discovery. A Seventh Supplemental Affidavit of Discovery of Terry Lagan was sworn on 16 October, 2009 but this Affidavit was sworn on behalf of the First Defendant only.

Gerard Butler swore a further Affidavit in support of the Plaintiffs' application on 20 October 2009 (the "*Fourth Affidavit of Mr. Butler*"). An Affidavit was sworn by Padraig Peters on the same date. A Supplemental Affidavit was sworn by Mr. Butler on 21 October 2009 (the "*Fifth Affidavit of Mr. Butler*").

On 2 November 2009, Terry Lagan swore an Affidavit on behalf of the First and Fifth Defendants. On 9 November 2009, Declan Canavan swore an Affidavit on behalf of the Second, Third and Fourth Defendants in which he indicated in very general terms that after a weekend's search, he did not believe that there are any further relevant documents held by the Second, Third and Fourth Defendants.

The issues which arise

The issues which arise relate to a number of discrete topics (which have been highlighted in the correspondence and the affidavits before the court) as follows:-

(a) The failure of the Defendants to make discovery of the BMA Geoservices documents;

(b) The failure of the Defendants to make discovery of all relevant test reports and results of Celtest;

(c) The Defendants' failure to make discovery of documents relating to Geoffrey Walton;

(d) A similar failure on the part of the Defendants in relation to documents of TMS Environmental;

(e) A further failure on the part of the Defendants to make discovery of documents relating to Frank Benson & Partners/Tom Phillips & Associates;

(f) The failure of the Defendants to make discovery of cone penetrometer tests undertaken by Scott Wilson Limited;

(g) The failure of the Defendants to make full and adequate discovery of electronically stored documents and the ongoing failure of the Defendants to provide any explanation of the manner in which such documents were searched for and identified for the purposes of complying with their discovery obligations;

(h) The First Defendant's failure to make discovery of copies of original infill invoices;

(i) The Defendants' failure to make discovery of documents in relation to similar complaints to those advanced by the Plaintiffs in these proceedings;

(j) The failure of the Defendants to make discovery of communications between them and purchasers of material from the Bay Lane Quarry;

(k) The ongoing failure of the Defendants to make discovery of diaries of relevant personnel;

(l) The wrongful assertion by the Defendants of privilege over documents which, from their description in the affidavits of discovery sworn on behalf of the Defendants, are manifestly not privileged;

(m) The ongoing failure of the Defendants to make discovery of all relevant minutes notwithstanding the undertaking given by Mr. Lagan on their behalf that all minutes would be made available.

The plaintiffs submit to the court in the course of their submissions the necessity to measure the defendants' responses to entirely legitimate inquiries and queries about their discovery. The fact that there are demonstrable and admitted deficiencies in the defendants discovery to date, the fact that the plaintiffs are in a position to identify documents which ought to have been, but have not been discovered, the fact that the plaintiffs have raised genuine and well founded concerns that there are other documents captured by the discovery categories which have not been produced, the abject failure of the defendants to engage with or address those concerns by reference to anything other than generality and the refusal of the defendants to undertake to make proper discovery demonstrates that this is an appropriate case in which to strike out the defendants' defence.

The plaintiffs conclude their written submissions of 30th November 2009 by suggesting there are three types of ongoing default by the defendants. These are that there are documents which ought to have been discovered previously but which have only been discovered at a very late stage; that there are documents which clearly exist (or which did exist) which ought to have been discovered; and that there is a credible basis for believing that other documents exist which have not yet been discovered.

5. The first and fifth named defendants in their written submissions contend that most, if not all, of the issues raised by the plaintiffs in their correspondence of the 11th August and 9th September, 2009, and which now form the subject matter of this application, could have been raised much earlier. The failure of the plaintiffs to raise these as issues confirms the defendants' suspicion that this is, in fact, a retaliatory motion rather than a motion of real substance based on a genuine grievance about the adequacy of the

defendants' discovery.
The defendants contend that nowhere in any of the six affidavits (as sworn at the time of furnishing of the first and fifth named defendants' written submissions) sworn by the plaintiffs is there any evidence that the plaintiffs have been prejudiced by any default of discovery on the part of the defendants. There is simply no evidence from the plaintiffs before the Court that they have been prejudiced by the alleged non-performance of discovery by the defendants, let alone irreparably prejudiced which the plaintiffs contend is the correct test for a strike out. Consequently, there is no stateable basis upon which the plaintiffs can seek to have the defendants' defence struck out on grounds of irreparable prejudice.
The first and fifth named defendants contend that the basis for the plaintiffs' application appears to be an allegation that there is an ongoing and deliberate failure by the defendants to make discovery as ordered by the Court. The affidavits sworn and correspondence issued on behalf of the defendants provide a thorough and coherent account of the discovery made and provide full replies to the 13 issues identified by the plaintiffs in this application.
The first and fifth named defendants contend that the defence herein should not be struck out.
6. In their written submissions to the Court the second, third and fourth named defendants categorically reject the assertion that they have not responded to the discovery issues raised by the plaintiffs, that they have not made full discovery and that they have adopted a highly evasive approach to their discovery obligations. The second, third and fourth named defendants contend that any assertion that they have engaged in a conscious attempt to evade their discovery obligations is wholly without merit and the Northern Ireland companies reject the assertion that there are demonstrable and admitted deficiencies in their discovery. They contend that they have carried out a reasonable search and that there is no basis for an order striking out the second, third and fourth defendants' defence.
7. Mr. Breslin on behalf of the second, third and fourth named defendants adopts Mr. O'Callaghan's submissions insofar as they relate to the context, background and motivation for the plaintiffs' motion, and insofar as they address issues which are relevant to the second, third and fourth named defendants. He contends that the criticisms advanced by the plaintiffs in respect of the second, third and fourth named defendants' discovery is vastly overblown and that the test is not met for a further order for discovery and still less do the plaintiffs meet the very high test which applies in his submission if the Court were to strike out the second, third and fourth named defendants' defence. However, Mr. Breslin also emphatically points out to the Court that, if the Court is of the view that there are any deficiencies in the second, third and fourth named defendants' discovery, then his clients stand ready and willing to address whatever deficiencies the Court might consider are present.
Mr. Breslin refers to any correspondence addressed to "the Lagan Group" and contends that this does not mean that the document was received by every company in the Lagan Group. He submits that the Lagan Group is used by the plaintiffs as a generic description, but the second, third and fourth named defendants are separate legal entities. The Bay Lane Quarry is owned by Linstock Limited and operated by Irish Asphalt Limited.
Mr. Breslin refers to the facsimile from Michael Gill of BMA to the Geoffrey Walton Practice as dated the 16th May, 2000. The document was CC'd to Lagan Cement Limited by post and this company is a subsidiary of Lagan Cement Group Limited. Lagan Cement Limited is the immediate parent company for a cement factory based in Kinnegad, Co. Meath, and at the time Prof. Walton was working at that site and the communication was directed to him so that it would have been physically received by him at the site.
Mr. Breslin refers to the fact that the plaintiffs did not see fit to serve a notice to cross-examine any of the deponents and he regards this as astonishing in the context of the plaintiffs' submission that the defendants were engaged in conduct sufficient to justify their pleadings being struck out.
Mr. Breslin refers to the fact that of the thirteen issues which arise, the vast bulk of complaints relate to technical matters and technical evidence as between the plaintiffs and Irish Asphalt and concern the quality of the quarry material and associated issues.
As regards the Celtest issue, the affidavit of Mr. Canavan as sworn in July, 2008 on behalf of the second, third and fourth named defendants, does refer to a number of Celtest results but these are in a privileged section and all relate to documents which are dated from 2007 onwards and no challenge has been made to this claim of privilege.
As regards the issue of minutes of meetings, Mr. Breslin submits that there is no evidence that there are any documents within the second, third and fourth named defendants' power or possession which have not been discovered.
As regards the electronic discovery, the Court has the benefit of the second affidavit of Mr. Canavan as sworn in November, 2009 in which Mr. Canavan says that he reviewed the Northern Ireland companies' electronic files over a weekend and there are no further documents to be discovered and accordingly, in Mr. Breslin's submission the plaintiffs have not met the test for establishing that it is a proper case for further and better discovery, still less a proper case for striking out the defendants' pleadings.
Mr. Breslin referred to the legal principles as set out in *Lyell v. Kennedy* [1884] 27 Ch. D. 1., *Jones v. Monte Video Gas Company* (1885) 5 Q.B.D. 556, *Lonrho v. Shell Petroleum Co. Ltd.* [1980] 1 W.L.R. 627 and *Johnston v. Church of Scientology* [2001] 1 I.R. 682.
Mr. Breslin also refers to Chapter 12 "Further and Better Discovery" in Abrahamson *et al*, 'Discovery and Disclosure', published in 2007.
Mr. Breslin submits that the Court will only look behind an affidavit of discovery in very limited circumstances, that in order to do so, the Court would have to have a reasonable suspicion that there are other documents requiring to be discovered or that the deponent has misunderstood his obligations, and only then can the Court order further and better discovery. Furthermore, the Court cannot come to such a conclusion on the basis of "a contentious affidavit", but only on the evidence that is before the Court. Furthermore, Mr. Breslin submits that "the fact that documents are within the power or possession of a company's subsidiary does not mean that they are within the power or possession of that company itself". Mr. Breslin relies on the judgment of Denham J. in *Johnston* wherein she stated at p. 701 that subject to rare exceptions:-

> "A party is only obliged to disclose documents in his possession, custody or power."

She went on to say at p. 703 that:-

> "A document is in the power of a party when that party has an enforceable legal right to obtain the document."

8. I do not consider it necessary in the particular circumstances of this application to review the various affidavits as filed on the basis that the relevant extracts from the affidavits have been extensively referred to by counsel for the respective parties in their submissions to the Court which I have taken into account.
9. As is apparent from the submissions 13 issues arise, and I will deal with each separately.

Issue I - BMA Geoservices Documents
The plaintiffs complaints can be categorised as follows:-

> 1. The initial refusal of the defendants to recognise that the documents as obtained from Mr. Bernard Murphy of BMA Geoservices and enumerated 27 – 63 referred to the Bay Lane Quarry.
> 2. The failure by the defendants to discover these documents.
> 3. The issue as raised by the plaintiffs that the documents concerned constitute the missing link in showing why the land at Bay Lane was unsuitable for quarrying as described in the first named defendants managements minutes of the 25th November, 1996.

In the defendants' original discovery some 64 documents emanating from BMA Geoservices and associated companies were discovered and accordingly, were considered relevant.
The plaintiffs make the case that the documents enumerated 27 – 63 were suppressed by Mr. Lagan, that it was clear that they related to the Bay Lane Quarry and were generated as a result of investigations that were carried out in respect of the Bay Lane Quarry by Mr. Murphy/BMA Geoservices. Further, the plaintiff submits that the documents are of relevance on the basis that the geophysical information as contained therein is suggestive of a deep overburden and a poor quality rock overlying an argillaceous rock in the area of the Bay Lane Quarry as investigated. It is submitted that the documentation would have been of relevance to the evidence of Dr. Maher, Dr. Stroegen, Dr. Donnelly and Dr. Hawkins, and also appears relevant to the evidence that Mr. Lagan himself will adduce before the Court. Particular reference is made on the plaintiffs behalf to the minutes of the management meeting of Irish Asphalt and Lagan Asphalt Limited as held at Ballycoolin on the 25th November, 1996, wherein it is recorded that "the 33 acres behind Minimix which were purchased in the name of Lindstock Limited, - These lands are unsuitable for quarrying and are currently being rented to a farmer. J. G. suggested that we hold on to the lands for the moment as the price for land has decreased". The plaintiffs submit that the information as obtained by the first named defendants from BMA Geoservices confirms that the rock was of poor quality and unsuitable for quarrying.
Mr. O'Callaghan on behalf of the first and fifth named defendants refers to the fact that the invoice of the 18th December, 1995, to Mr. John Gallagher of the Lagan Group does not refer to Bay Lane, that the graphs as contained in the documentation refer to Hollywoodrath, that the maps indicate there being two sites and that the defendants were confused and this was at a time when they were struggling to deal with the thousands of documents that had recently been discovered by the plaintiffs.
Mr. O'Callaghan further refers to the affidavit of Mr. Murphy as sworn on the 14th August, 2009, which demonstrates that he was referring to the site as Hollywoodrath and that in the first schedule of 76 documents as discovered by Mr. Murphy, there are numerous references to Bay Lane and in this regard Mr. O'Callaghan accepts that there is no dispute with the plaintiffs as regards these documents which were discovered, and that the only documents in dispute are those as enumerated 27 – 63.
Mr. O'Callaghan further refers to the letter from Malcomson Law, the solicitors representing Mr. Murphy, as dated the 11th August, 2009, and as forwarded to the plaintiffs solicitors in which the solicitors emphasise that Bay Lane was previously referred to as Hollywoodrath, and Mr. O'Callaghan relies on this letter to show that there was a degree of confusion. Mr. O'Callaghan accepts that Bernard Murphy & Associates were retained by the Lagan Group, but indicated to the Court that Mr. Lagan had forgotten about this and had also forgotten that Bay Lane was previously referred to as Hollywoodrath. Furthermore, any contact on behalf of the first and fifth named defendants had been through Mr. John Gallagher, who now no longer worked for the defendant companies.
The first and fifth named defendants' explanation to the Court for the matters arising is that there was no reason for them to claim that the documents did not relate to Bay Lane other than that there was an honest misunderstanding on the part of the first and fifth named defendants as they never received them. It is now accepted that this failure to identify the documents as relating to Bay Lane Quarry was a mistake, but one which is subject to the proviso that the documents in any event were never in the power, possession or procurement of the first or fifth named defendants, and it is submitted to the Court that this aspect is covered by the general averment of Mr. Lagan in his affidavit of the 16th October, 2009, and in particular, para.10 thereof which states:-

> "According to the best of my knowledge, information and belief I have not now and never had in my possession, custody or power or in the possession, custody or power of my solicitor or agent or in the possession, custody or power of any other person or persons on my behalf any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing or any copy of or any extract from any such document or any other document whatsoever relating to the matters in question in this suit or any of them or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the first schedule hereto."

As regards the contention raised by the plaintiffs that the documents concerned constitute the missing link when taken in conjunction with the first named defendants managements minutes of the 25th November, 1996, the defendants in effect say that there is no basis to this contention by reason of the fact that none of the plaintiffs experts have sworn an affidavit to corroborate the geological conclusion, and Mr. Lagan has disputed the contention in particular in his affidavit as sworn on the 2nd November, 2009, wherein at para. 14 thereof he states:-

> "The plaintiffs seek to attach importance to the contents of this report. The plaintiffs insinuate that their experts believe that the geophysical information contained in the report gives some indication that the Bay Lane Quarry site was an unsuitable location for quarrying. I say that this report, in fact, supports what our experts' findings were at the time and that the results were typical for rock found in the Dublin area."

The defendants contend that the plaintiffs now have the relevant documentation and no issue of prejudice arises, and even if it did, any such issues can be clarified by the recall of the plaintiffs' witnesses.
It is clear that the plaintiffs met with Mr. Murphy of BMA Geoservices on or about Friday, 22nd May, 2009, and shortly thereafter received the documentation as enumerated 27 – 63 from him. Subsequently on the 16th June, 2009, the plaintiffs solicitors wrote to the defendants solicitors providing copies of the documentation as obtained from Mr. Murphy which included an invoice of the 18th December, 1995, from B.J. Murphy & Associates to Mr. John Gallagher of the Lagan Group relating to a geological desk study – various locations and geophysical surveying – Mulhuddart, in the amount of IR£1,324.94, together with a number of investigative charts and maps. These documents were included in exhibit MC5 in the affidavit of Ms. Costello as sworn for the purpose of the non-party discovery application, and in her affidavit she very clearly sets out why the documentation must relate to the Bay Lane Quarry. Furthermore, the affidavit of Mr. Murphy as sworn on the 14th August, 2009, clearly states that the nature of the work as carried out by Geotechnics Ireland Limited was a preliminary investigation of the Bay Lane Quarry, previously referred to as Hollywoodrath site until in or about 1995. Mr. Murphy avers that in 2000, an entity called the Geoffrey Walton Practice was appointed to investigate the Bay Lane Quarry and neither he nor any of his associated companies had any further dealings with the quarry or any involvement with the work done by the Geoffrey Walton Practice.

Conclusion
The documentation as received initially from Mr. Murphy of BMA Geoservices being the same documentation as furnished to the defendants' solicitors on 16th June 2009 related to the Bay Lane Quarry as Mr. Lagan now accepts. Any conceivable doubt harboured in this regard would be quashed by the specific layout of the site as defined on the maps, by the specific reference to the site containing 33.5 acres, to the words "Bay Lane" running along underneath the site, and further by reason of the fact that there is no reference anywhere to there being any other similar site of 33.5 acres in the immediate vicinity of the Bay Lane Quarry.
In my view, Mr. Lagan at all material times was, or ought to have been aware, on any reasonable examination of the documents that they related to the Bay Lane Quarry. I take the view that Mr. Lagan when presented with the documentation by his solicitors sought to avoid accepting that the documentation involved herein and as enumerated 27 – 63 referred to the Bay Lane Quarry.
Mr. Lagan further makes the case that he never received the documentation enumerated 27 – 63 which includes the invoice of 18th December, 1995, and the maps and drawings as previously referred to herein. I do not accept on the balance of probabilities that Mr. John Gallagher of the Lagan Group did not receive the invoice of the 18th December, 1995, and the results of the work as carried out

by Mr. Murphy and his associated companies. It is evident from the affidavits of Mr. Lagan as sworn in these proceedings and in dealing with BMA Geoservices documents that he goes to great lengths to clarify what occurred by way of explanation including the reference to the role of Mr. Peter O'Connor. He makes specific references to the invoice of the 18th December, 1995, and further makes reference at paragraph 14 of his affidavit to the fact of the plaintiffs seeking to attach such importance to the contents of the report and that, in fact, the contents of the report support the defendants' experts findings on the geological aspect.
Nowhere does Mr. Lagan even attempt to suggest the simplest and most straightforward explanation, if it be the true position, that neither he nor the first or fifth named defendants nor John Gallagher nor the "Lagan Group" ever received the documentation. If this contention was being maintained, there were any number of lines of inquiries that could have been advanced by Mr. Lagan or on his behalf to clarify the position, one being payment, or presumably on Mr. Lagan's version non-payment of the invoice, but this aspect is not canvassed at all before the Court.
I do not accept that the general *proforma* averment in the affidavit of Mr. Lagan of the 2nd November, 2009, that he has no other documents in his power, possession or control relating to the matters in issue covers or gives a basis for Mr. Lagan to advance the case that he never received the documentation as enumerated 27 – 63 at all. In any event the documents were within his power as BMA Geoservices had been retained to carry out the work undertaken on behalf of the 'Lagan Group'.
In my view the documents as enumerated 27 – 63 are of relevance to the issues in dispute between the parties to these proceedings in particular, are of relevance to the evidence of Dr. Maher, Dr. Strogen, Dr. Donnelly and Dr. Hawkins, all of whom have already given evidence to the Court and were left in a void without the benefit of the information contained in the documentation which has now been discovered. I have no doubt but that Mr. Lagan himself will have to deal with this aspect, either in examination or cross-examination, when he comes to give evidence. I am not in a position at this point in time to indicate any view as regards the plaintiffs' contention of a connection between the contents of the documentation and the conclusion drawn at the management meeting of the 25th November, 1996.
Accordingly, I am satisfied that the documents in issue on this aspect are of relevance to the issues in dispute between the parties. I am further satisfied that the documents clearly relate to the Bay Lane Quarry and further, that there were on the balance of probabilities received by Mr. John Gallagher of the "Lagan Group". I am satisfied that these documents ought to have been discovered and that the defendants' failure to discover them represents a deficiency in their discovery in respect of which no acceptable explanation is forthcoming to the Court.
I have a concern as regards the content of para. 14 of the affidavit of Mr. Lagan as sworn on the 2nd November, 2009. In my view, the last sentence is plain in making reference to the report in fact supporting what "our experts' findings were at the time", and that the results were typical for rock found in the Dublin area. The words "at the time" on any reading of the sentence have to be taken as a reference back to the time of the report which is under discussion and which is 1995. No other experts' findings in respect of the Bay Lane Quarry as of 1995, have been identified and discovered. Mr. O'Callaghan on his clients' instructions made reference to the expert being Mr. Peter O'Connor and that his opinion had been proffered recently.
I consider that, following compliance with the Court's directions, no issue of irreparable prejudice occurs and the issues that arise are capable of being dealt with by the recall of a number of the plaintiffs' witnesses. I form the view on the basis of the circumstances as reviewed herein and the conclusions arrived at that there is a reasonable suspicion that there may be further relevant documentation to be discovered by the defendants and accordingly, I direct that further affidavits be sworn by Mr. Lagan on behalf of the first and fifth named defendants and Mr. Canavan on behalf of the second, third and fourth named defendants clarifying what further efforts have been made to ensure that all relevant documentation pertaining to any type of investigation that was carried out at the Bay Lane Quarry from the date of purchase of the quarry by Linstock Limited up to the date of the completion of the planning application in June, 2001 have been discovered and identifying any further documentation that exists, discovering same, and discovering any relevant documentation which was but is no longer in the possession, power or procurement of any of the defendants.

Issue II - Celtest Documentation

On behalf of the plaintiffs Mr. McDonald notes that on 5th March 2009 the Court sought a complete picture of all the testing from the beginning. The Court directed that that complete picture should be put to Dr. Maher. However, it was not until the letter of 5th October 2009 that the plaintiffs were told there were additional Celtest reports that had not been discovered. Mr. McDonald submits that the explanation given for this non-discovery before now is manifestly inadequate. Some of the test results made available on 5th October relate to tests that were carried out specifically for pyrite testing and are so described. The defendants suggest that these are merely part of the ordinary suite of tests carried out by Celtest on their behalf annually, and that through administrative error these highly relevant results were not previously discovered. However, the plaintiffs, in their letter seeking voluntary discovery, sought discovery of all tests relating to the aggregate and specifically sought results relating to pyrite. It appears this was the only time when the defendants carried out testing for pyrite before the proceedings commenced. It does not make sense that the defendants would not have recalled the carrying out of these tests in June 2007 when they considered the discovery request made in March 2008 and made discovery in June 2008 and on the many later occasions when they made further discovery, including further discovery of Celtest reports. These were significant tests whose results would not have pleased the defendants, because they showed high levels of sulphur which when equated to pyrite, showed very high levels of pyrite. At that time the defendants were legally represented and they claimed privilege over many documents of June 2007, including emails between Celtest and the defendants at the time these tests were being undertaken and at the time when their results were presumably reported to the defendants.
The documents presented in October 2009 relating to the suite of tests performed in June 2007 are electronic copies of certificates. Mr. McDonald queries what happened to the originals and whether Celtest were asked to withhold them and to leave them on their electronic database.
On 4th March 2009 the Court also stated that it would be helpful to put to Dr. Maher the testing that the defendants say was carried out. The Court also noted the need for clarity as regards tests that allegedly were carried out but of which no record was being made available. In addition, on 11th March 2009 the Court sought a clear picture of all the tests that were carried out from the time of the purchase of the quarry. The Court stated that even if there were no results available, it wished to know what tests the defendants say were carried out and that would give Dr. Maher the opportunity to comment on those tests. In addition, the Court went on to express a wish to have Dr. Maher's views on all the tests. Dr. Maher was later recalled to deal with that matter on cross-examination, but the test results put to him were incomplete: others which have recently become available are highly material and were not discovered.
Mr. McDonald submits that the Celtest results fall within a number of categories in the request for discovery. Mr. McDonald wonders how it came to be in particular that the test results of June 2007 were not discovered, notwithstanding that they were directed particularly toward the identification of pyrite. BCM in their letter of 11th August 2009 state that it is clear that the defendants have not discovered all discoverable documents that passed between them and Celtest. BCM state that no letters between Celtest (with whom the defendants have had a business relationship since at least 2000) and the defendants have been discovered. Only 56 emails between Celtest and the defendants have been discovered, 43 sent in 2007 and 13 sent in 2008, with privilege being claimed over 54 of the 56. In addition, BCM state that only eight faxes/fax cover sheets between Celtest and the defendants have been discovered, and that they merely cover the period from May 2007 to January 2008. Mr. McDonald notes that Mr. Lagan discovered three additional Celtest reports in his affidavit of 23rd February 2009.
The BCM letter of 9th September 2009 refers to the letter of 11th August and states that there are only seven test results for 2000, all of which are dated 6th October 2000 and do not mention Bay Lane. The letter states that Mr. Lagan has averred that the results

relate to Bay Lane. It also observes that no communication has been discovered between Celtest and the defendants relating to the testing performed in October 2000. The letter states that only two results for 2003 have been discovered, both of which are dated 14th November 2003 and note the client as 'Baylane'. However, details including the name of source and the sampling location are not stated, and no communication between Celtest and the defendants has been discovered requesting that testing resume after a break of three years. For 2004 the letter notes that only test results for February have been discovered and that no communication between Celtest and the defendants explaining this lacuna has been discovered. For 2005 the letter states that only 12 results, which date from three months, have been discovered and notes a lack of communication explaining why this testing was only carried out during those months. For 2006 test results for two months were discovered and the letter notes the lack of communication in this regard.

It also states that the defendants discovered 22 invoices relating to test results. In many cases the invoices list a number of tests which relate or may relate to Bay Lane. Numerous test results which relate or may relate to Bay Lane, in respect of which invoices were issued, have not been discovered. An appendix to the letter identifies invoices which list results which have not been discovered. The letter requests in the case of each such test that its result be discovered or confirmation that its does not fall within any of the discovery categories. The first invoice in the appendix lists 35 results, 11 of which are marked 'BQ', which would be an appropriate acronym for Bay Lane quarry. One of the results listed in the invoice and marked 'BQ' is a 10% fines value test and has not been discovered. An invoice of 1st April 2005 refers to 'Duleek, Baylane, Rossmore' and contains 12 results which have not been discovered. The 12 are individually listed but the defendants' response is a global one which does not address the detail of the letter in any material respect. Another invoice, dated 16th August 2005, contains a PSV test result which has not been discovered. In respect of a further invoice, dated 30th May 2007, it is noted that a small number of the results referred to have been discovered but most have not. The letter states that a number of the results have been grouped together and the defendants have discovered one of the results in the group but not others. The undiscovered test results are listed.

Mr. McDonald attaches particular importance to an invoice dated 26th July 2007, not long before the proceedings were instituted and less than a year before the affidavit of discovery of 30th June 2008. The job reference of this invoice, unlike all of the others, is 'Investigations into Pyrites and related testing'. This invoice identifies a significant number of tests, most of which still have not been discovered. It may be that they do not apply to Bay Lane. Mr. McDonald points to a number of the invoices referred to in the letter. He notes that, in the invoice of 30th May 2007, a different address to that stated in earlier invoices is given for Celtest. The invoice of 30th May 2007 gives the job reference 'Aggregate Testing'. There is nothing to point directly to Bay Lane, nor to exclude it, but the invoice is addressed to Irish Asphalt, the owner of Bay Lane. The job reference in the invoice of 26th July 2007 is noted above, and the defendants seek to resile from it on affidavit. Mr. McDonald submits that it is unlikely to be wrong as it is a contemporaneous document from an independent laboratory. After the list of tests there is a handwritten statement which reads: 'Ok for payment. Charge to Baylane. S. Cassidy". The date given next to this is August 2007.

The tests carried out on this occasion are quite different to the tests carried out before. They relate to such matters as total sulphur. Evidence has been given that one of the ways to identify the presence of pyrite is to carry out total sulphur tests. Mr. McDonald refers to a number of other invoices. In respect of these there is nothing directly pointing to Bay Lane, but they are addressed to Irish Asphalt, and some of them refer to aggregate testing and some refer to 'various sites'. One of the sites owned by the first defendant is Bay Lane.

The Lennon Heather letter of 5th October states that all correspondence between Celtest and the first defendant in the possession or power of the first defendant has been discovered. To ensure complete discovery was made, the first defendant searched all of its paper records and digital archives to ensure all such documentation in the possession or power of the first defendant was discovered. Mr. McDonald notes that this paragraph refers only to the first defendant. The letter states that there was an ongoing process with Celtest to ensure as far as reasonably possible that it produced all documentation relevant to the discovery categories. Mr. McDonald submits, however, that there could hardly have been a more relevant test than the one relating to the investigation into pyrite and related matters, which was not carried out long ago. There were a significant number of emails between Mr. Geraint Evans of Celtest and Mr. Cassidy when these tests were being carried out. Mr. McDonald submits that the likelihood is that these emails were dealing with the tests that were then being carried out and discussing the results of those tests. The timing clearly points to a relationship between the emails and the tests and it is difficult to suggest otherwise.

The letter of 5th October states that from 2003 onwards Celtest were used by the first defendant to carry out annual physical testing on materials. These tests were carried out more frequently from May 2007 onwards. The commercial relationship between the first defendant and Celtest was however at all times on an *ad hoc* basis. There was no retainer or ongoing contract. Material for testing was simply bagged and sent to Celtest with an accompanying phone call to give instructions as to the required tests. The material was identified by writing on the bag or a label attached to it. Mr. McDonald submits that, although it is not the most significant issue in this context, if there was a bag or a label with writing on it, it should have been discovered.

The letter refers to a further check for all correspondence between Celtest and the first defendant and states that there are no additional such documents. It also states that a sample of material was sent to Celtest for a full suite of tests on an annual basis at the beginning of each year between 2003 and 2007. However, recalling the appendix to the BCM letter, Mr. McDonald submits that the tests seem to have been carried out on a fairly sporadic basis, and some of the tests were carried out as late as November in the year.

The letter states from May 2007 onwards testing was carried out on a much more frequent/monthly basis by Celtest, frequently on two or sometimes three samples. The letter notes the appendix to the letter of 9th September and states that the exercise performed therein has resulted in the plaintiffs querying the fact that invoices exist in respect of 634 tests which have allegedly not been discovered by the first defendant. In light of this exercise the first defendant has rechecked all of its own test records from Celtest. A further cross-check of records retained by Celtest in relation to the first defendant was also performed by Celtest. The letter states that 591 of the 634 queries relate to test material that is not from Bay Lane and these results are therefore not discoverable. Mr. McDonald notes that specific queries were raised as to individual test results referred to in identified invoices. He submits that the defendants should deal with each of these tests individually and explain why individually they say they do not relate to Bay Lane. The tests are carried out on behalf of Irish Asphalt, the owner of Bay Lane. Some of them refer to 'BQ', some refer to Bay Lane itself, some give other indications that they refer to Bay Lane.

As to the remaining 43 results, it is said that 11 were discovered subject to a claim of privilege. Mr. McDonald submits that the Court was not told privilege was being claimed over any Celtest reports when what was put to Dr. Maher was purportedly all of the tests of the material from Bay Lane performed on the defendants' behalf. Mr. O'Callaghan, on behalf of the first and fifth named defendants, submits that they discovered some 1,200 Celtest results, so it would not have been feasible to put every one of them to Dr. Maher. Mr. McDonald responds that the Court was not told that a selection of results was being put to Dr. Maher. He submits that the Court made it clear, in the passages noted previously herein, that it expected the defendants to put all the Celtest results for the Bay Lane material to Dr. Maher.

The letter of 5th October also lists seven of the 43 invoice test results and states that these are administrative errors on the part of Celtest. Either the invoice was issued in error and no actual test was carried out or the reference number on the invoice does not match the test result reference number and accordingly the result has been discovered. An individual explanation is given for each of these. Mr. McDonald submits that such an explanation should also have been given for the 591 invoices mentioned above. A further result, which may or may not be from Bay Lane, relates to the Elliott litigation and is privileged. It was received late in 2008 but the defendants accept that it is discoverable and discover it subject to a claim of privilege.

The letter states that this leaves 24 results relating to Bay Lane material which are discoverable and have not been discovered.

These were not discovered because they were not in the possession of the first defendant when it swore the affidavit of discovery. Mr. McDonald submits that this is extraordinary having regard to the nature of the results, given that Celtest were asked to carry out a pyrite investigation. Mr. McDonald wonders why the first defendant did not have those results.
The letter of 5th October states that discovery of all test result documents in the first defendant's possession when the affidavit was sworn was made and this has been reconfirmed. However, when the cross-check based on invoice references referred to above was carried out, 24 additional results came to light. These 24 results were in the possession of Celtest and had been invoiced to the first defendant, but the first defendant was not in possession of these tests until Celtest furnished recently further copies of the results to the first defendant. The letter states that these are appended to the letter and will now be discovered. The letter re-emphasises that test results have only just come into their possession and provides the following explanation for this. 20 of the 24 results fall into one batch of tests carried out on three samples from Bay Lane in June 2007. The samples were collected on 5th, 7th and 8th June 2007. A suite of 20 tests was carried out on these three samples. The first defendant did not have any of the results from this June 2007 batch when the affidavit of discovery was sworn. The first defendant did not realise this batch of results was missing from its files. Test results for May 2007 and subsequent months were discovered. The defendants have made extensive efforts to procure from Celtest all relevant rest results and this omission arose from an administrative error on Celtest's part. Mr. McDonald notes that the nature of that administrative error is not explained.
The letter also states that a possible reason this batch was missing from the first defendant's records may have been that at this time the person responsible for collecting and sending the samples to Celtest and for testing and for receiving and archiving the results left the first defendant's employment and his role was taken over. Mr. McDonald submits that this explanation is difficult to credit. The idea of archiving results of this kind is unbelievable, and it cannot properly explain why these results were not identified in the previous affidavit of discovery. In addition, the person responsible for receiving and archiving is not identified. However, Mr. Cassidy is identified in all of the invoices and was emailing Celtest at this time in June/July 2007. It does not make sense that in those circumstances these results were missed or were archived in the wrong place. Mr. McDonald also queries, if there was a problem with archiving results, what other archives were not searched.
The letter states that two of the 24 results were from the January 2004 and January 2007 annual suites of tests. These two were not in the first defendant's possession when discovery was made. All of the other tests from each suite of tests were discovered. The first defendant does not know why one test from each of these suites was not with the rest of its records. Mr. McDonald submits that this raises similar questions to those just noted. The letter states that the problem appears to have arisen from an administrative error on the part of Celtest. It states that the remaining two results were from the July 2007 and October 2007 suites. These two results were not in the possession of the first defendant when it made discovery. All of the other results from each suite were discovered. The first defendant does not know why one test from each of these suites was not with the rest of its records. Mr. McDonald submits again similar questions arise. The letter states that, again, the problem appears to have arisen from administrative error on the part of Celtest.
Mr. McDonald submits that, in his affidavit of 5th October 2009, Mr. Lennon appears to blame the plaintiffs for the earlier non-discovery. Mr. Lennon refers to the queries raised in the letters of 11th August and 9th September and states that extensive queries of a very similar nature were raised in the plaintiffs' letter of 29th September 2008 and were addressed in a letter of 13th October 2008 and an affidavit of Mr. Lagan dated 19th November 2008. These matters all formed part of a compromise reached between the parties in December 2008. Mr. McDonald submits that the plaintiffs never agreed that the defendants could fall short of their discovery obligations. The compromise of December 2008 was simply an agreement that both sides would make further and better discovery at that stage. If the defendants are correct here, they have no right to query anything relating to the plaintiffs' discovery. This point makes no sense.
Mr. Lennon, astonishingly in Mr. McDonald's submission, avers that the enquiries based on the Celtest invoices could have been raised before December 2008. Notwithstanding that, the defendants engaged with the queries raised. Mr. Lagan's affidavit of 19th November 2008 is not quite consistent with what is stated in the letter of 5th October. He avers that when samples were sent to third party laboratories, such as Celtest, a sample certificate may or may not have been generated to go with the samples. Mr. McDonald submits that Mr. Lagan is not saying there was only a bag or a label, in some cases a sampling certificate was generated. Mr. Lagan avers that if a certificate is generated this is evident on the laboratory test report. Copies of these certificates were not retained by Irish Asphalt.
Mr. McDonald refers to his statement on 17th December 2008 that three motions for discovery could be resolved by both sides putting in additional affidavits of discovery dealing with a series of matters agreed between the parties. He submits that no-one could characterise that as a compromise which allowed either side not to make complete discovery. What was intended was that both parties would deal with the queries raised and make additional discovery. The issue of test reports was specifically raised in February 2009. Mr. Butler's affidavit of 16th February 2009 refers to Celtest results dated October 2000 which the plaintiffs saw for the first time in September 2008 and which were only discovered in October 2008.`
In his affidavit of 20th October 2009 Mr. Butler avers that a significant number of new Celtest documents have now been discovered in Mr. Lagan's supplemental affidavit. Mr. Butler believes that were it not for the plaintiffs' queries this additional discovery would not have been made. In explaining how the matter came to be raised by the plaintiffs he refers to correspondence. In relation to the assertion that 591 of the 634 results raised by the plaintiffs do not relate to Bay Lane, Mr. Butler avers that he believes the defendants should have by reference to the results referred to on each invoice the site to which the results relate to allow the plaintiffs to confirm that the tests are not discoverable. Further, he does not understand the basis of the claim for privilege over test results. The defendants have made available some Celtest results. Mr. Butler does not know how the defendants can choose to make some Celtest results available but not others. He also refers to his understanding that all of the defendants' test results were to be put to Dr. Maher.
Mr. Butler refers to the explanation given in respect of the 20 test results from June 2007. He believes it is clear that this suite of tests has nothing to do with monthly testing. Having regard to the nature of these tests he believes it is likely that they were carried out for the specific purposes of the litigation. Mr. McDonald submits that it is quite clear the tests were carried out for the purposes of the litigation in view of the test reports themselves and the description on the invoice. Mr. Butler avers that he believes it is inconceivable that the defendants could have overlooked not receiving these results from Celtest. This is clearly a special and unique suite of tests that was clearly planned and executed. In the circumstances, Mr. Butler believes the explanation given is not credible.
The testing is reported as having been performed on Clause 804 granular material. The defendants stated that they ceased producing Clause 804 at Bay Lane in November 2006. They have never provided an explanation or documentation relating to that decision. Mr. McDonald notes that the Clause 804 description is used even though these results relate to samples taken in June 2007. Mr. Butler avers that for all of these reasons he believes the results of these tests would certainly have been used in the evidence of the plaintiffs' experts, in particular Dr. Maher. The fact that the results show the material exceeded the total sulphur and acid soluble sulphate levels specified in European standard EN13242 since 2003 is also significant. These results show that, in addition to the failure of the flakiness index test in February 2007, the material failed an entire suite of chemical testing in June 2007.
The first of the reports made available in October 2009 is not one of the June 2007 suite but is a 10% fines test dated 23rd February 2004. Despite this date, the address on the report is that which Celtest appear to have used only since 2007. Mr. McDonald refers to a number of test reports, also dated 23rd February 2004, which are signed by Geraint Evans, were put to Dr. Maher and which bear the earlier address for Celtest. Other test results dated March 2005 and March 2006 also bear the pre-2007 address, but the 10% fines test of February 2004 provided in October 2009 bears the post-2007 address and is on different headed notepaper. This discrepancy is unexplained. In addition, the 24 newly furnished test reports are signed pp Geraint Evans, unlike the way in which the

others are signed, and the signature is illegible.
Dr. Maher in his report sets out the requirements for Clause 804 as of May 2004. Among these are maximum 1% total sulphur and maximum 0.2% acid soluble sulphate. Later in his report Dr. Maher deals with the Golder chemical testing programme. That programme confirmed original pyrite contents typically in the range of 1.1 to 5.2%. Dr. Maher states that the European standard uses total sulphur contents of 1%, equivalent pyrite of about 1.9% as a threshold. Mr. McDonald submits that this ratio, to the effect that 1% sulphur equals 1.9% equivalent original pyrite, should be borne in mind in the context of the June 2007 results. He refers to the first report of 28th June 2007 stating that its test requirements are to determine the total sulphur content of an aggregate sample in accordance with a given standard. No such test report was put to Dr. Maher. Mr. McDonald notes from the report that Mr. Cassidy placed the order. The sample was taken on 5th June 2007 and is described as '804 Granular Material', which is relevant to Mr. Butler's point about the cessation of Clause 804 production. The total sulphur content is 1.88%, which is almost double the maximum permitted for Clause 804. Applying the ratio just referred to, this results in a figure of 3.51% original pyrite. That is a high figure which would surely have set off alarm bells, but these are the results which were somehow overlooked or archived away where the defendants could no longer find them. Mr. McDonald submits that that makes no sense.
A further sample was taken on 8th June 2007 and is again described as Clause 804 material. The sulphur content is 1.71%. There are also water soluble sulphate tests, water soluble sulphur content tests performed using a different method and acid soluble sulphur content tests. As to the first of the acid soluble sulphur tests, the sample was taken on 5th June 2007 and is again described as Clause 804 material. The result of 0.12% acid soluble sulphate content is below the 0.2% maximum for Clause 804. The next such test shows a result of 0.09%, while the following test has a result of 0.06%, both of which exceed the maximum figure permitted. Three further tests for total sulphur content, done in accordance with a different test method to those noted above, give results of 1.83%, 1.44% and 1.88% respectively for total sulphur. There are also three tests dealing with oxidisable sulphides. Such tests have not been addressed in evidence. Mr. O'Callaghan submits that many tests on oxidisable sulphide were discovered previously.
There are also three acid soluble sulphate tests performed by a different method to the acid soluble sulphur tests noted above. Their results are 0.25%, 0.31% and 0.24% respectively. There is also a 10% fines test, in addition to a petrographic examination of a sample from Drynam.
This suite of tests makes it clear that there are concerns as to acid soluble sulphate results and as to total sulphur results, yet it is said that these test results were somehow missed in June 2008 and on every occasion when discovery was made since then, even though test results were the subject of challenges in late 2008 and February 2009. It seems very strange that these reports were not picked up. At this time in 2007 there was a lot of contact, as the privilege schedule of the defendants' affidavit of discovery makes clear, between Mr. Cassidy and Mr. Geraint Evans, who normally signs these test reports but did not sign test reports on this occasion. They are signed on his behalf and printed on paper which seems to suggest an electronic source. Mr. McDonald cites examples from the privilege schedule and submits that it is quite clear that at the time these tests were being performed there was a great deal of activity on the part of the defendants in relation to gathering expert evidence and dealing with experts. Based on these documents the defendants' explanation fails to explain what happened in relation to these highly material test reports. Mr. McDonald refers to a number of emails passing between Mr. Evans and Mr. Cassidy in June and July 2007 and submits that this shows beyond doubt that at this time the first defendant was clearly concerned about its position. That is why these tests were carried out, but despite the level of concern which must have existed at that time, the defendants say they did not know these results were not discovered.
Mr. Butler notes in his affidavit of 20th October 2009 that two out of 24 test results referred to in invoices were not previously discovered, one from January 2004 and the other from January 2007. He notes the explanation furnished in the Lennon Heather letter in relation to these two. He states that the one for flakiness index has a result of 40, whereas the Clause 804 maximum is 35. Mr. Butler believes this result is highly material to Dr. Maher's evidence. The Golder report notes that the NRA quality control requirements for Clause 804 require one flakiness index test per week. Now it appears that the first time such a test was carried out the material failed the test. Mr. Butler avers that, in the circumstances, the 'administrative error' explanation appears particularly surprising. It is hardly a coincidence that the result that was omitted from this suite of tests was the one that failed the Clause 804 specification.
Mr. Butler then refers to another instance where two out of 24 results were not previously discovered, one from July 2007 and the other from October 2007. He notes the explanation furnished in the Lennon Heather letter in relation to these two. He avers that the July 2007 result gives a 10% fines value of 110kN for a sample taken in that month, which fails the Clause 804 requirement of 130kN. Mr. Butler believes it is incorrect to attribute the October 2007 test report to 'October suites of monthly tests'. This report does not relate to material taken from Bay Lane directly. It is a petrographic report for a sample from 3 Drynam Square. The test report is dated 15th November 2007 and the sample is described as 'black mudstone 100%'. It is described as having surface coatings of 'dust/mud'. The petrographic description is given as 'dark, calcareous shale, most likely very organic rich. Very fine quartz grains are visible'. This report is significant because another Celtest report for 3 Drynam Square also bears the same date, the same laboratory reference number, the same date of sampling, the same date received in the laboratory and the same date of start of test. However, only this latter report was provided previously on discovery. It describes the material as 'fresh limestone with some sandstone'. The reference number for this report indicates that it was issued after the report now discovered and suggests that it was issued in December 2007. Mr. Butler believes this is significant because at this time, in late 2007/early 2008, the defendants were seeking to assert that the material supplied from Bay Lane was limestone rather than mudstone. In this regard he refers to Prof. Ballivy's report and the Appendix B of the STATS report.
Mr. McDonald submits that because the defendants were making that case at the time, they had a clear incentive to be concerned about the 'black mudstone 100% description'. It seems odd that the report about which the defendants are likely to have been concerned was not discovered and the other was.
Mr. McDonald refers to passages referring to limestone in Prof. Ballivy's report and to a passage from Appendix B of the STATS report stating, *inter alia*, that most published or reported cases of pyrite-related heave have involved shale or mudstone host rocks, whereas the fill in question is primarily a dense limestone. Clearly therefore the defendants would have been very upset to find any description of the infill in any of the houses supplied by Bay Lane described as mudstone.
Mr. McDonald refers to the Celtest report dated 15th November 2007 and received from the defendants on 5th October 2009. It is on the more up-to-date headed paper. It refers to Mr. Cassidy and states the test requirements as 'Petrographical examination of aggregate sample' in accordance with the relevant British standard. The report indicates that the sample is mudstone and gives the other details outlined above in respect of this report. This report is not signed by Geraint Evans but is signed pp Geraint Evans. It is this report that would have undermined the case the defendants were making at the time and it is this report that was not discovered. The report that was discovered has a different test report number and the client reference number is given as 3 Drynam Square, but Mr. McDonald notes the similarities between the two reports as detailed previously herein. The report is signed by Mr. Evans and refers to the sample as crushed limestone, having limestone as its major constituent and sandstone as a trace element.
Mr. McDonald submits that it seems to be too much of a coincidence that, with two reports of the same date and with several other details in common, the crushed limestone report was discovered and the mudstone report was overlooked. This raises serious questions about the defendants' attitude to their discovery obligations.
Mr. McDonald submits that the defendants have discovered 1,185 test reports over which no privilege has been claimed. They have discovered 226 or 227 over which privilege has been claimed. Of the 1,185, 48 are in respect of samples taken from Bay Lane in the period 2000 to 2006. For 2007 to 2008 there are 546 reports for samples taken from Bay Lane; 10 where the sample source is simply described as 'quarry'; 573 in respect of samples taken from houses in the estates; and eight in respect of sample sources described as 'unknown'. Mr. McDonald does not consider that it was envisaged that test reports for samples from houses would be put to Dr.

Maher, but submits that the transcript suggests that it was envisaged that the reports relating to the quarry would be put to him. He does not consider that anyone realised the sheer number of them for the period 2007 to 2008. It appears as if no test reports after 2006 were put to Dr. Maher, although counsel for the defendants is noted as saying he believes he has gone through the testing from the opening of the quarry up until 2006, 2007. Mr. McDonald submits that even if there were practical reasons for stopping at 2006 it is odd that the fact of total sulphur tests having been carried out in 2007 was not put to Dr. Maher and that at least some selection of tests for 2007 and subsequent years was not put to him. Again, the missing suite of tests for June 2007 is the only suite labelled pyrite investigation, which makes it impossible to understand how, of all of the suites of tests on this material, this is the one not discovered in 2008.

Returning to the test report of 15th November 2007 discovered in October 2009, the report refers to the material sampled as having surface coatings of dust/mud. The report also states that, when judged against the criteria given in BRE Digest 330, the sample may be classified as being of high reactivity. Mr. McDonald submits that the reference to high reactivity would cause concern to any quarry operator. The report concludes with a statement that the testing was carried out by Celtest's accredited sub-contract laboratory. The other test report of the same date, purportedly in relation to the same sample, gives no indication that it was done by a subcontractor. In contrast to the other report, this one indicates 'None' under the heading 'Coatings/Encrustations'. It also states that based on UK experience, limestone aggregates are typically classified as having potentially low alkali-silica reactivity in accordance with BRE Digest 330. Mr. McDonald submits that this may be a very careful choice of language, but if it is intended to refer to this sample it seems odd in view of the opposite conclusion of the subcontractor in the other report.

Dr. Maher expressed surprise at the fact that many of the Celtest reports appeared to give results more consistent with limestone than mudstone. Mr. McDonald refers to passages from Dr. Maher's evidence in this regard and submits that the material discovered in October 2009 would have been of assistance to him when he came to review the material for the purposes of preparing a report to the Court in December 2008 and when he was giving evidence. At the very least the material now discovered is relevant to Dr. Maher's evidence. It should have been available to him so that he could have given full evidence in relation to this aspect of the case. Mr. Lagan, in his affidavit of 2nd November 2009, avers that the plaintiffs are correct in saying that this petrographic test was not part of the October suite of monthly tests. However, all of the details for both samples are identical other than the result. Mr. McDonald notes that Mr. Lagan does not say that the samples were identical, though this may not have been intentional. Mr. Lagan avers that Celtest have explained that they were not confident with the result and accordingly directed a retest by another subcontractor lab. However, Mr. McDonald submits, as to which test was carried out by a subcontractor and which by Celtest, the reports indicate the opposite of what Mr. Lagan suggests. It is the mudstone report that was carried out by a subcontractor, while the limestone report does not suggest that it was performed by a subcontractor and is signed by Mr. Evans.

In the circumstances, Mr. Lagan's explanation is lacking and does not explain the diametrically opposed conclusions purportedly for the same sample. In addition, it was not until the plaintiffs received the defendants' expert' reports in February 2009 that those experts were acknowledging that the material was mudstone. Many unanswered questions arise in relation to these two reports and they raise very serious concerns about the adequacy of the defendants' discovery. In addition, Celtest's procedures in respect of the retention of reports have not been explained. It seems clear that the reports presented in October must have been printed from electronic records. Mr. Lagan in his affidavit describes receiving copies of Celtest reports, which would suggest that original reports were copied, but a careful look at the documents reveals that these are not copies of original results but printed copies from electronically stored versions of the results. The Court is not told what other records are available electronically within Celtest. We do not know what other relevant information Celtest may have on their electronic records and captured by the discovery request, because the request covers not just the results but all documents relating to them. Mr. Lagan appears to suggest on affidavit that documents relating to results are not covered although the results themselves are.

The plaintiffs know nothing about how matters are recorded by Celtest or the nature of the records they hold, and nothing about the defendants' records relating to their dealings with Celtest, other than a number of emails over which privilege has been claimed. The defendants suggest that they telephone Celtest and the sample is sent without any documentary records being retained by the defendants. That seems strange as the purpose of obtaining reports from an independent laboratory is presumably to establish a form of quality control. To operate this system in such an amateur, casual way seems to defeat the purpose.

In his affidavit of 16th October 2009, Mr. Lagan avers that 591 of the 634 results referred to by BCM in their letter of 11th August 2009 related to material from sites other than Bay Lane and are therefore not discoverable. 11 of the remaining 43 were discovered but privilege was claimed. Seven of the remaining 32 were incorrectly referenced on the invoice: either the test did not take place or the reference on the discovered report does not match the reference on the invoice. One of the remaining 25 was received in late 2008 and related to separate proceedings. It did not indicate it was from Bay Lane. They therefore failed to realise it was potentially discoverable. Mr. Lagan then discovers it and claims privilege over it. He avers that the remaining 24 were not discovered previously due to administrative errors on Celtest's behalf in some instances and on Irish Asphalt's behalf in others. He then discovers them. Mr. McDonald submits that he does not identify which instances and does not explain, identify or provide a date for the administrative errors. Again this seems to be part of the self-assessment approach Mr. Lagan has adopted toward this entire application, whereby he assesses his own conduct and provides no basis on which the Court can assess whether or not his self-assessed conclusion stands up.

The Lennon Heather letter of 5th October refers to administrative errors on Celtest's part but only a possibility of an error on the first defendant's part, which possibility appears to become a fact in Mr. Lagan's affidavit of 16th October, yet this fact is not explained. In this regard Mr. McDonald refers to a passage, detailed previously herein, from the letter of 5th October referring to 20 of the 24 results.

Mr. Lagan provides further details in his affidavit of 2nd November 2009 in response to Mr. Butler's affidavit, but the response is entirely inadequate. Mr. Lagan confirms that there were no other communications between Celtest and the first defendant, whether by fax, email or letter falling within the terms of the discovery order which have not already been discovered. He confirms that the first defendant has carried out exhaustive searches of its own records and liaised closely with Celtest to ensure that all test results have been discovered. Mr. McDonald submits that this is a further instance of self-assessment, with no details of the searches being given to enable the Court to reach its own conclusion as to whether or not the search was exhaustive. Mr. Lagan avers that he is advised that the plaintiffs are not entitled, in impugning the first defendant's discovery, simply to express surprise at the sparsity of correspondence and demand a narrative explanation. However, Mr. McDonald submits that the detailed questions raised in the letters of 11th August and 9th September demanded a detailed response.

Mr. Lagan goes on to aver that nevertheless the nature of Celtest testing of infill materials from Bay Lane was occasional only and generated little or no correspondence before the advent of this litigation. He avers that he has discussed this with Mr. Cassidy who has had responsibility in recent times for dealings with Celtest.

There was no retainer or ongoing contract with Celtest. The Bay Lane material was simply bagged and dispatched to Celtest for testing from time to time. Mr. McDonald submits that the phrase "from time to time" seems to be at odds with the suggestion in the letter of 5th October that at the beginning of each year Celtest was asked to carry out tests of samples from Bay Lane. Mr. Lagan avers that the type of testing was similar on each occasion. Writing on the bag or an affixed label would identify the material. An accompanying telephone call would be made. Having carried out testing, Celtest sent the results and accompanying invoices back to the first defendant. Mr. McDonald notes that there is no mention of sampling certificates here, whereas in his affidavit of 19th November 2008, as noted above, Mr. Lagan stated that a sample certificate may or may not have been generated and that if a sampling certificate had been generated then this is evident on the laboratory test report from the third party laboratory.

In his affidavit of 2nd November 2009 Mr. Lagan avers that the plaintiffs describe as "extraordinary" that there would have been no

email or fax communication between the first defendant and Celtest in the period between 2000 and 2006. He avers that such a conclusion goes well beyond the parameters of the discovery. Mr. McDonald submits that this is the sentence he was referring to earlier as suggesting that documents relating to results are not covered although the results themselves are. He submits that the parameters of the discovery are very clear, covering all documents relating to testing. Clearly any communications which passed between the first defendant and Celtest must have related to testing because that is what Celtest were doing. Mr. Lagan avers that whether any communications existed during this period is a point quite apart from what communications existed during this period relevant to the defendants' discovery obligations. The reason why communication between the first defendant and Celtest in relation to Bay Lane has increased markedly since 2007 is because of the increased testing regime in place arising from this litigation. However, Mr. McDonald submits that we know that the monthly testing regime seems to have been put in place before this litigation commenced.

Mr. Lagan avers that the plaintiffs draw attention to the fact that there are fewer results for 2000, 2003, 2004, 2005 and 2006. He is advised that the plaintiffs are not entitled to trawl for evidence to ground an application based on a perceived failure to make discovery simply by expressing surprise at quantities of documents and to demand an explanation for the perceived absence of documents. However, Mr. McDonald submits that this was not a simple demand but a rational, logical and well set out request which identified the basis for the concerns relating to Celtest. In addition, it actually resulted in the defendants providing further discovery. Mr. Lagan then avers that nevertheless the increased levels of testing after these dates are due to the advent of the litigation. The plaintiffs refer to 22 invoices, but the vast majority of the tests in the invoices did not relate to Bay Lane, so these results were outside the scope of the discovery order. Mr. McDonald submits that this is a blanket response rather than a response dealing with each of the individual results.

Mr. McDonald refers to an invoice dated 23rd October 2007 which bears the job reference 'Various Quarries'. Handwriting at the bottom of the invoice reads 'Charge to Baylane. Copy to Baylane Insurance file.' This is seen on a number of these invoices. There is an invoice dated 21st November 2007 which bears the job reference 'Material Testing'. Handwriting at the bottom of the invoice reads 'Baylane Insurance File.' A further invoice, dated 21st December 2007, also refers to 'Baylane insurance file' in handwriting. Mr. O'Callaghan notes in respect of this latter invoice that it says '£1,800' after 'Baylane insurance file', and that the only test on this invoice with that price is the Canadian Expansion Test, which has been discovered subject to a claim of privilege. Mr. McDonald responds that the plaintiffs' complaint is that Mr. Lagan, who should be giving this evidence, has not done so. He may have a complete explanation for each of these invoices among the number he asserts do not relate to Bay Lane, but it is for him to explain that on affidavit. Mr. O'Callaghan submits that the Canadian Expansion Test in question is listed in the letter of 5th October as one of the 11 results over which privilege was claimed out of the 43 results. That is contained in the letter in response to BCM raising queries in respect of this matter by letter. Mr. McDonald submits that sufficiently serious questions arise that demand a detailed explanation from Mr. Lagan on oath. He submits that the Court should at the very least require a detailed explanation from Mr. Lagan and a number of other personnel within the Lagan companies explaining how documents which appear on their face to be relevant have not been discovered.

An invoice dated 22nd January 2008 contains two tests which are circled at the bottom of the page, and handwriting below reads 'Chargeable to LA Langford', followed by 'Rest chargeable to Baylane Insurance file'. An invoice of 31st January 2008 bears handwriting that reads 'Baylane Insurance. Pass to Niall Pritchard for approval.' There is also a code on this invoice which appears to relate to Bay Lane. There is also a handwritten reference to the 'Baylane insurance file' on an invoice of 25th March 2008. The code just referred to appears again in handwriting on an invoice of 14th February 2008 and Bay Lane is also referred to in handwriting. The same code appears on an invoice dated 9th April 2008. Mr. McDonald submits that in those circumstances there is sufficient material before the Court to place an onus on the defendants to explain themselves at the very least and to provide a detailed explanation on an item by item basis.

In his affidavit of 2nd November 2009 Mr. Lagan avers that the plaintiffs complain of the lack of "evidence in relation to the steps" taken to "check the position in relation to Celtest correspondence and to test materials." He confirms that Mr. Cassidy has made comprehensive and detailed searches of all of the first defendant's records in relation to all Celtest documentation. This has involved trawling through the first defendant's hard copy and soft copy records. Mr. McDonald queries what that involved. It is part of a pattern of self-assessment by Mr. Lagan. It does not provide the basic evidence the Court must have if it is to form a conclusion as to whether comprehensive and detailed searches have been carried out.

Mr. Lagan avers that in addition Mr. Cassidy has been in frequent contact with Celtest directly to ensure that complete discovery has been made. The result of these searches and enquiries is that the first and fifth defendants confirm that there are no relevant Bay Lane sample test results in the possession of the first or fifth defendant or Celtest which have not been discovered. The second, third and fourth defendants have made their own affidavit of discovery. Mr. Lagan also confirms that at all times Bay Lane quarry was solely within the operational control of the first defendant. Mr. McDonald submits that this does not reveal the nature of the contact with Celtest or any details of the nature of record keeping by Celtest. There is nothing about the nature, extent or dates of the enquiries made by anyone on behalf of the first defendant with Celtest. In relation to the assertion that Bay Lane was within the first defendant's operational control, Mr. Lagan does not say that all the Northern Irish companies have no documents. He is simply suggesting that because Bay Lane was solely within the first defendant's operational control it is unlikely that the other defendants have documents. Mr. McDonald queries whether this is so when Mr. Kevin Lagan, a director of the Northern Irish companies, was a regular attendee at management meetings of Irish Asphalt and Lagan Asphalt. In addition, there was a flurry of activity in June 2007 regarding experts, including Celtest. Mr. McDonald wonders if it is really the case that the other defendants, through Mr. Kevin Lagan, had no access to information of the kind in the Celtest reports which appear to have caused such consternation in June 2007. Mr. McDonald submits that it does not make sense. Mr. Lagan uses careful language, providing no assurance that the other defendants have no such documents. In addition, Mr. Canavan's affidavit on behalf of the other defendants is in the most general terms and does not address the individual subjects raised by BCM.

In his affidavit of 2nd November 2009 Mr. Lagan notes Mr. Butler's averment that the defendants should have identified by reference to the test results on each invoice the site to which the results relate. Mr. Lagan avers that he confirms that 591 of the 634 results in relation to which queries have been raised arise from non-Bay Lane material. Mr. McDonald submits that the Court is again asked to accept Mr. Lagan's self-assessed confirmation. Mr. Lagan avers that the Bay Lane quarry was only a very small element of the first defendant's business. There were many other quarries and asphalt plants that required to be tested at the material times. However, none of these other results are relevant. Mr. McDonald notes in this regard the very many invoices with references to Bay Lane and the account number which seems to coincide with the Bay Lane insurance file.

Mr. Lagan refers to the suite of 20 tests on samples taken from Bay Lane in June 2007 which were not discovered until October 2009. He avers that the first defendant did not have these June 2007 tests in its possession when it initially discovery. Celtest recently furnished fresh copies of these results. Mr. McDonald submits that this suggests that originals existed. He wonders what became of the originals if they existed. He also submits that the flurry of activity in June and July 2007 suggests that there was at least concern about what was emerging from Celtest. He submits that it is a possibility, in light of the unsatisfactory explanation and the way in which these reports were withheld until pressed very strongly by BCM, that the defendants may have asked Celtest not to generate test reports because it did not suit their purpose to do so.

Mr. Lagan avers that the first defendant sought and obtained copies of the 24 test results directly from Celtest when it was first alerted to the possibility of their existence by Celtest. Mr. McDonald submits that to suggest that it is the task of the plaintiffs to alert the defendants to the possibility of the existence of documents is to subvert the discovery process. It is for the defendants to identify and discover the relevant documents and these documents are highly material.

Mr. Lagan avers that it is important to note that the first defendant had increased the frequency of its testing significantly after May 2007. These additional results were discovered by the first defendant as soon as it became aware of their existence. Mr. McDonald submits that it makes no sense for the defendants to say they only became aware of the existence of these results when the plaintiffs alerted them to their existence. These results were directed towards a pyrite investigation, were the subject of considerable discussion in June 2007 and pyrite investigations were specifically raised in the letter of 10th March 2008.
Mr. Lagan avers that it is entirely incorrect to say that the testing in June 2007 was "special and unique" or that it had "nothing to do with monthly testing". Mr. Cassidy advised him that the testing and results were broadly similar. The scope of testing was similar and the results were consistent with previous and subsequent testing around this time, all of which results had been previously discovered. Accordingly, the June 2007 results are in no way remarkable. Mr. McDonald submits that even apart from the invoices other documents show that these results were remarkable, because they were directed towards, for example, total sulphur content.
Mr. McDonald refers to a passage from the cross-examination of Dr. Maher and notes that counsel for the defendants stated that the tests carried out in Wales included tests of water soluble sulphate, acid soluble sulphate, particle size distribution, plastic and liquid limit, Los Angeles abrasion, 10% fines, magnesium sulphate soundness, magnesium blue, particle density and water absorption, optimum moisture content/maximum dry density relationship and moisture content. There is no mention of total sulphur tests, although Mr. McDonald notes that counsel used the word 'included'. However, there is no mention of total sulphur testing in Mr. Cassidy's witness statement either. In addition, Mr. Cassidy states that from 2005 onwards Irish Asphalt implemented a computer system to electronically record all results being conducted in-house. From a review of those records the following tests were carried out and the following results were achieved for 2005 and 2006. He provides a table in this regard but the table does not none of the tests he lists relates to total sulphur.
Mr. Cassidy's statement in this regard is also relevant in relation to the issue of the defendants' e-discovery.
Mr. Cassidy goes on to refer to testing by Celtest having been carried out in January/February 2004, 2005, 2006 and 2007 and monthly or more frequently from May 2007. However, the Court is not told that in 2007 a number of very important tests, that is to say total sulphur tests, were carried out. This is why Mr. McDonald submits that Mr. Lagan's averment that the scope of testing in June 2007 was similar and the June 2007 results are in no way remarkable is wrong.
Mr. O'Callaghan submits that the defendants discovered 18 total sulphur tests in the original discovery, three of which date from June 2007. Mr. McDonald responds that the complaint does not concern the number of total sulphur tests given to the plaintiffs but the explanation as to why the pyrite investigation tests performed in June 2007 were not discovered. The defendants suggest that these were mundane tests and that they did not notice that they were not discovered. Mr. McDonald submits that that is unbelievable in view of the timing and the alarm bells the results must have sounded. This case is known as the pyrite case, yet the one set of tests that was not discovered was the set of pyrite investigation tests. It does not make sense unless the defendants were trying to withhold these reports from the Court.
In addition, Mr. Cassidy's statement seems to suggest that tests were being carried out in January and February of each year, yet the BCM letter notes tests in later months in 2005 and 2006. Leaving aside the quality control issue mentioned previously herein, one might possibly understand why there might be little documentation if these tests were done annually and everyone knew they would occur at the same time each year and knew what had to be done. Here tests were done in different months in different years, so surely a written communication must have been sent to explain what tests to carry out and to explain the timing. The defendants did not engage on this issue in response to BCM.
Mr. Lagan notes in his affidavit of 2nd November 2009 that the plaintiffs point out that the testing carried out is reported to have been performed on Clause 804. He confirms that the first defendant ceased producing Clause 804 at Bay Lane from November 2006. Mr. Cassidy has advised him that the sample referred to was erroneously termed Clause 804. It was in fact 1.5" down. This was an understandable mistake as historically it would have been samples of Clause 804 which were sent to Celtest. Mr. Lagan also avers that there was no material difference in the results of the sample tested in June 2007 and the results from May 2007 and the months after June 2007. Mr. McDonald submits that that averment is astonishing.
Mr. Lagan avers that accordingly the assertion that the results of these tests would have been used in the evidence of the plaintiffs' experts is not credible. The assertion that the material exceeded the total sulphur and acid soluble sulphate levels specified in EN13242 and that the material failed is incorrect and misleading. These are not pass/fail tests but rather a matter of categorising levels. EN13242 provides categories for the specifier to choose from. He then gives the categories for total sulphur and acid soluble sulphate. He avers that testing for these properties is only done when required by the specifier, and the plaintiffs never requested what, if any, category to apply. However, Mr. McDonald submits that the results themselves speak volumes in the context of these proceedings.
Mr. Lagan avers that the plaintiffs are incorrect in attributing such importance to the flakiness index result of February 2007. In addition, that result is not the first flakiness index result to be discovered. He rejects the assertion that the result that was omitted from this suite of tests was the one that failed the Clause 804 specification. The sample certificate for the missing sample was discovered and it stated that a flakiness test was to be carried out. This is wholly inconsistent with an attempt to suppress the result. He also rejects the averment of Mr. Butler as to the significance of the July 2007 10% fines result. This was a sample of 3" down, so the claim that the test fails the Clause 804 specification is incorrect. In addition, even if the sample was Clause 804 the NRA specification had changed from specifying 10% fines to specifying Los Angeles abrasion. More generally, the plaintiffs have quoted different standards at different times to suggest non-compliance wherever possible. However, Mr. McDonald submits that the significance of that result for the plaintiffs has to be seen in light of Dr. Maher's evidence. Dr. Maher regarded the 10% fines test as being much more useful than the Los Angeles abrasion value test as an indicator of quality, so this evidence would clearly have assisted Dr. Maher in his evidence.
Mr. Lagan avers that the plaintiffs are incorrect in asserting that there was a "catalogue of administrative errors". The first defendant has discovered all of the suites of annual testing from 2000 to date and the more frequent testing from May 2007 onwards. Each suite incorporated up to 12 separate tests. Two individual tests from the annual suites, two individual tests from the monthly suites and the monthly suite of 20 tests from June 2007 were not in the possession of the first defendant when the initial affidavit of discovery was made. As soon as they were uncovered, they were discovered. The first defendant has discovered all sample certificates that exist. However, the first defendant has confirmed that the routine practice was for the sample bag to be marked with the sample information only and that no sample certificate would be prepared. Mr. McDonald contrasts this with the averment concerning sample certificates in the affidavit of Mr. Lagan dated 19th November 2008, as detailed previously herein.
In his November 2009 affidavit Mr. Lagan avers that results for 2000 and 2003 clearly state that no sampling certificates were received by Celtest. Celtest have stated that this is a common occurrence. This is also common practice for the plaintiffs. For example, Geotesting have also sent samples to other laboratories without sample certificates.
Mr. McDonald submits that, unlike the affidavit of 16th October 2009, which referred to administrative errors on the part of Celtest and the first defendant as the reason for the failure to discover the 24 results, the affidavit of 2nd November 2009 does not mention administrative errors. In addition, unlike the affidavit of 16th October, the letter of 5th October refers to administrative errors on Celtest's part and a possible error on the part of the first defendant. In those circumstances the defendants have not put forward appropriate evidence to explain how highly material records of results of tests carried out in June 2007 as part of a pyrite investigation were not put before the Court.
Mr. McDonald refers to passages from Mr. Lagan's confirmatory affidavit of 23rd February 2009, in which he avers that he understands the gravity of any failure to make full discovery and confirms that discovery has now been made of all documents relevant to the discovery categories. Mr. McDonald submits that on the hearing of the present motion the Court has seen evidence of evasion and

utter inadequacies concerning the explanation as to why these highly material documents were not discovered. Test results were part of the application in February 2009, yet Mr. Lagan purported to suggest on affidavit that all relevant test reports had been discovered. There was also a clear incentive for the defendants not to discover these particular documents.
On behalf of the first and fifth named defendants Mr. O'Callaghan submits that the defendants have discovered 1,186 Celtest test results, in addition to 165 other Celtest documents such as 22 invoices, 56 emails and 46 certificates. Most of the 1,186 results post-date the emergence of the pyrite issue around the beginning of 2007. Before 2007 pyrite was not an issue for the defendants or any other quarry owner on the island of Ireland. That together with this litigation is the reason why the testing increased significantly from 2007 onwards.
Mr. O'Callaghan submits that the Court did not want 1,186 results to be put to Dr. Maher but wanted to have put to Dr. Maher results at the time the quarry was opened and up until the end of 2006. In this regard Mr. O'Callaghan refers to passages from the transcript of 5th March 2009. He submits that this must also have been the plaintiffs' interpretation of what the Court was seeking because when the defendants put the number of results to Dr. Maher no objection was raised. It would not have been feasible to put all 1,186 results to Dr. Maher.
Mr. Butler's affidavit and Mr. McDonald's submissions suggest that the first defendant deliberately withheld 24 crucial results because they were helpful to the plaintiffs and damaging to the defendants. That is a very, very serious charge. All 24 were discovered in October 2009.
An invoice dated 30th April 2008 refers to 42 Celtest tests, all of which were discovered in 2008. Mr. O'Callaghan notes references to water soluble sulphate, acid soluble sulphate and total sulphur content in this invoice. The tests in this invoice were discovered in full because they all relate exclusively to Bay Lane. An invoice dated 12th April 2008 sets out two groups of 21 tests, all of which have been discovered because they relate to Bay Lane and they contain such tests as acid soluble sulphate, total sulphur, water soluble sulphate and total potential sulphate. An invoice dated 25th March 2008 sets out 52 tests, all of which have been discovered. Again there are references to total sulphur content, oxidisable sulphides, total potential sulphate, water soluble sulphate and acid soluble sulphate. An invoice of 22nd October 2007 refers to 30 tests, all of which have been discovered. Oxidisable sulphides, water soluble sulphate and total sulphur content are among them. An invoice of 5th April 2007 refers to Kinsealy House, another term for Drynam. The invoice sets out four tests; plasticity index, PSD, XRD and petrographic. All four have been discovered.
An invoice of 5th April 2007 refers to nine tests, all of which have been discovered. The type of testing is consistent with the others. It includes methylene blue, plasticity index, sulphate content, sulphate content aqueous, XRD, petrographic and PSD. An invoice dated 28th February 2007 lists two tests, PSD and Atterberg Limit, both of which have been discovered. The plaintiffs make no complaint regarding these seven invoices. Mr. O'Callaghan highlights the fact that there is an exclusive reference at times on these invoices to the job reference being Bay Lane.
An invoice of 10th February 2004 shows test results for four sources, one of which is Bay Lane. None of the tests relating to the other three have been discovered, and this is for the reason identified by Mr. Lagan, namely that 591 of the 634 results queried by the plaintiffs do not relate to Bay Lane. The only test on this invoice which relates to Bay Lane and was not discovered in 2008 is the 10% fines test. The letter of 5th October provides an explanation, as set out previously herein, for the failure to discover this result. Mr. O'Callaghan refers to Mr. Lagan's averments, detailed above, in his affidavit of 16th October 2009 giving a breakdown of the figures concerning the 634 queries and stating that 24 results were not discovered previously due to administrative errors. Mr. O'Callaghan refers to the averment in Mr. Lagan's affidavit of 2nd November 2009, as set out above, relating to the first defendant's acknowledgment that the 24 results in question were not previously discovered. It is submitted that the letter of 5th October and these two affidavits provide an explanation as to why the 10% fines test from February 2004 was not discovered.
An invoice dated 1st April 2005 bears the job reference 'Duleek, Baylane, Rossmore', three quarries of the first defendant. Only five of the tests invoiced here relate to Bay Lane and they were discovered. Although it may not have been dealt with in as verbose a manner as the plaintiffs seek, it has been dealt with on oath by the averment of Mr. Lagan that the vast majority of the queries relate to material not from Bay Lane. The same explanation applies to a test from an invoice of 16th August 2005 that was not discovered. Mr. Lagan's averment to the effect that 591 of the 634 queries do not relate to Bay Lane material does not deal with the invoices individually but it is a concise and clear averment. The earlier invoices in respect of which no complaint is made exclusively refer to Bay Lane. The ones Mr. O'Callaghan is referring to do not refer exclusively to Bay Lane.
An invoice dated 30th May 2007 refers to the flakiness index test referred to above which was not discovered in 2008 and should have been. Mr. O'Callaghan refers to the explanation, as set out above, which is contained in the letter of 5th October in respect of this test. However, the vast majority of the results queried in respect of that invoice need not be discovered because they do not relate to Bay Lane. The invoice of 26th July bearing the job reference 'Investigation into Pyrites and related testing' has given rise to most difficulty concerning this issue. However, 52 of the results identified in this invoice have been discovered, including a number of total sulphur results. There are others mentioned in this invoice which were not discovered because they do not relate to Bay Lane. There are also 20 that should have been discovered in 2008 but were not. Mr. O'Callaghan submits however that among the 52 that were discovered are nine total sulphur tests, 10 acid soluble sulphate tests and 10 water soluble sulphate tests. Therefore the contention that the defendants were deliberately withholding results of those types does not stand up to scrutiny. There is no basis for suggesting that there was a deliberate decision to withhold the 20 results concerned. Mr. O'Callaghan refers to the explanation given in the letter of 5th October in respect of these 20 results. He also refers to the averment of Mr. Lagan in his affidavit of 2nd November that the first defendant did not have these 20 tests when it initially made discovery and Celtest recently furnished fresh copies of these results. Mr. O'Callaghan also refers to further averments of Mr. Lagan relating to all 24 of the results.
An invoice dated 23rd October 2007 bears the job reference 'Various Quarries' and refers to a range of tests, 15 of which were discovered. The reason why the others have not been is apparent from the job reference, but even if it were not so apparent, Mr. Lagan avers that 591 of the queries do not relate to Bay Lane. However, this invoice does contain a 10% fines value result that should have been discovered and the explanation for the failure to discover it is given in the letter of 5th October as set out previously herein. Mr. O'Callaghan submits that Mr. Lagan's affidavits also provide an explanation for the failure to discover this result.
An invoice of 21st November 2007 identifies 22 tests, 19 of which have been discovered. There were a number of errors in this invoice. They were explained in the letter of 5th October, which states that seven of the results invoiced are administrative errors on the part of Celtest, so that either no test was carried out or there was a mistake in the reference number and the result was already discovered. Once these explanations are taken into account, there are only three results referred to in this invoice that have not been discovered. The explanation for this is that these three do not relate to Bay Lane.
The results of all of the tests listed in an invoice dated 21st December 2007 have now been discovered, although there is an error in the number given for one of the tests which, again, is explained in the letter of 5th October. The invoice also refers to a petrographic analysis which had not been discovered. The explanation for this is also provided in the letter of 5th October, as set out previously herein. There is another invoice dated 21st December 2007, only one test from which has been discovered. The reason for this is that the others do not relate to Bay Lane. 'Baylane' appears in handwriting beside the reference to this test on the invoice and does not appear beside any of the others. Additional handwriting on the invoice reads 'Baylane insurance file £1,800' and, beneath that, 'Remainder charge to IA Cork', which presumably refers to Irish Asphalt Cork. Privilege has been claimed over the discovered test from this invoice.
Mr. O'Callaghan submits that sixteen of the tests referred to in an invoice dated 22nd January 2008 have been discovered. The others mentioned on this invoice have not been discovered because they do not relate to Bay Lane material. The same reason applies to those of the tests listed in an invoice of 31st January 2008 which have not been discovered, although 37 of the tests referred to in that invoice have been discovered. All but one of the tests identified in an invoice dated 25th March 2008 have been discovered. Mr.

O'Callaghan notes a handwritten reference to houses in this invoice and submits that this must indicate that these tests were performed on material from the houses. All of the tests referred to in an invoice dated 14th February 2008 were discovered, although there is an error in the reference number on the invoice in respect of an oxidisable sulphate test. An invoice dated 9th April 2008 bears the job reference 'Various Sites'. It refers to sulphate content total, sulphate content aqueous, total sulphur, XRD including pyrite, water soluble sulphate, oxidisable sulphides, total potential sulphate and acid soluble sulphate tests, and the invoice runs to 16 pages. Every test identified in this invoice was discovered, with the exception of one which was not discovered because it related to another premises in another case. The letter of 5th October provides the explanation, as set out above, relating to the Elliott litigation. This test document was discovered in October 2009 subject to a claim of privilege.

Mr. O'Callaghan refers again to the explanations provided. The defendants did not have the 24 results in question due to an administrative error. When they received the letter from BCM they contacted Celtest, a review was conducted and as a result of that review Celtest produced the 24 results in question.

The plaintiffs complain, not on affidavit but in correspondence and submissions, in relation to some of the invoices, which include test results not relating to Bay Lane, contain the handwritten phrase 'Copy to Baylane insurance file'. Mr. O'Callaghan submits that his clients have a policy of insurance which extends beyond the Bay Lane quarry. That is why those references are on some of the invoices. They do not mean that every test within those invoices is a test on Bay Lane material.

Mr. O'Callaghan submits that a comparison between the 24 results discovered in October and those discovered in 2008 reveals that there is no substance to the charge that the 24 were deliberately withheld because they were damaging to the defence and helpful to the plaintiffs' case. He submits that for the plaintiffs' theory to stand up these 24 results must all be bad as the defendants would have no reason to hold back good results. In addition, these 24 results must contain information more damaging on the plaintiffs' analysis than what had already been discovered as the defendants would have no reason to discover worse results than the ones they withheld.

Two 10% fines results were not discovered until 16th October 2009. The first is dated 23rd February 2004. That test was done on an aggregate type and nominal size of 14mm. The result for 10% fines value (soaked) is 130kN. That figure does not fail any test and the plaintiffs do not seek to suggest it assists them or damages the defence. There would be no reason to withhold that result. The second test is dated 23rd August 2007 and the aggregate type and nominal size is 3" down. The result is 110kN. Mr. Butler avers in relation to this result that it fails the Clause 804 requirement of 130kN. However, the suggestion that it fails is wrong because the sample tested is 3" down rather than Clause 804. There is therefore no reason to withhold this result. In addition, a number of 10% fines results discovered in 2008 have results of 130kN, like the first 10% fines result just referred to. Mr. O'Callaghan also refers to a result for a sample of 1.5" down of 110kN, the same figure as the second 10% fines result just referred to. On the plaintiffs' analysis this fails, so it would never have been discovered. There is also a result of 100kN and another of 80kN which were discovered in 2008.

Mr. O'Callaghan refers to two total sulphur results from among the 24 results which were not discovered until October 2009. In both cases the material is described as Clause 804 but in fact it is 1.5" down. Mr. McDonald submits that it is extraordinary that the ones that were not discovered are the ones that specifically refer to Clause 804, while other test reports referring to 1.5" down, 2.5" down or 3" down were discovered. In this regard Mr. McDonald notes that it was put to the plaintiffs' experts that there is no product description for such products, whereas Clause 804 has specifications, including a limit of 1% for total sulphur content. He submits that it is impossible to accept Mr. Lagan's averment that what he refers to as a mistaken reference to Clause 804 is an understandable mistake because historically it would have been samples of Clause 804 that were sent to Celtest for testing. This is because it is clear from the booklet put forward by Mr. O'Callaghan that many of the results that pre-date June 2007 are described as 1.5" down or 3" down. Very few of them are described as Clause 804. Mr. McDonald submits that this booklet therefore causes even more serious concern than that outlined in opening the motion, because it suggests that the results relating to Clause 804, the product with a measurable standard, are the ones withheld.

Mr. O'Callaghan disputes the contention that this booklet can cause surprise as the plaintiffs have had all of these results since 2008, with the exception of the 24 in question. He also submits that Mr. McDonald emphasised the sulphur content results not because the material is Clause 804, 1.5" down or 3" down, but because they say it shows material with a high sulphur content and that if the sulphur content is multiplied by 1.9 the resulting figure is the pyrite content. However, Mr. McDonald submits that what he said in this regard was by reference to the summary of the Clause 804 requirements in the Golder report.

The two total sulphur results referred to above are 1.88% and 1.71% respectively. However, in 2008 the defendants discovered a result of 2% total sulphur for a sample of 1.5" down. Mr. O'Callaghan refers to a range of samples with total sulphur values from 0.27% to 2.38% which were discovered in 2008.

Mr. O'Callaghan refers to three water soluble sulphate results which were not discovered until October 2009. The plaintiffs make no criticism in respect of these and could not do so because they do not fail any specification. Mr. O'Callaghan wonders why the defendants would withhold these and refers to a number of water soluble sulphate results discovered in 2008 which are higher than these three. Mr. O'Callaghan notes the results of three water soluble sulphate tests done by a different method which were not discovered in 2008. The plaintiffs do not suggest that these results constitute failures, nor do they suggest that they would have been deliberately withheld to benefit the defendants. In 2008 the defendants discovered a number of results for water soluble sulphate that are higher than the three in question.

Three acid soluble sulphate results were discovered in October 2009. Mr. McDonald submitted that the first, 0.12%, was below the 0.2% maximum for Clause 804 but that the second, at 0.09%, was more than four times that threshold figure. Mr. O'Callaghan submits that Mr. McDonald was in error in that the figure is 0.09 rather than 0.9. Mr. McDonald also submitted that the third result, 0.06%, was three times the maximum permitted. However, Mr. O'Callaghan submits that again this figure and the other two in fact pass the specification. These tests should refer to 1.5" down rather than Clause 804, but even if the reference to Clause 804 were correct it does not make sense to suggest that the defendants would deliberately withhold results which on Mr. McDonald's appraisal of the test pass it. Mr. O'Callaghan refers to a variety of results for acid soluble sulphate discovered in 2008, three of which exceed the 0.2% threshold put forward by Mr. McDonald.

Three results for total sulphur content discovered in October 2009 were obtained by a different method to the other total sulphur content results discovered at the same time and mentioned above. Mr. O'Callaghan refers to an excerpt from Mr. McDonald's submissions relating to the former category and notes that he did not mention therein anything about Clause 804 or 1.5" down. The plaintiffs are emphasising that sulphur content is important because it is indicative of pyrite. The three tests in question reveal total sulphur content of 1.83%, 1.44% and 1.88% and total potential sulphate content of 5.5%, 4.32% and 5.64% respectively. Mr. O'Callaghan refers to a number of tests discovered in 2008, some of which have similar results and four of which have higher results than those allegedly withheld. Three results for oxidisable sulphides were discovered in October 2009. The plaintiffs have not criticised their content and they do not fail any specification. Mr. O'Callaghan refers to a number of results for oxidisable sulphides discovered in 2008, six of which are higher than one of the results allegedly withheld and four of which are higher than any of the results allegedly withheld.

Three further results discovered in October 2009 are for acid soluble sulphate. There is a limit of 0.2% for Clause 804 in respect of this type of test. The three results are 0.25%, 0.31% and 0.24%. However, again the Clause 804 description here is a mistake and it should be 1.5" down as Mr. Lagan avers. Nine of the test results discovered in 2008 for acid soluble sulphate exceed all of the results alleged to have been withheld.

Mr. O'Callaghan goes on to refer to the flakiness index test dated 19th February 2007. It is described as being on Clause 804 and the distinction between Clause 804 and 1.5" down is relevant in respect of this test because Clause 804 has a limit of 35. The result of this test is 40, which is a failing result. Again however, this test cannot have been on Clause 804 as the first defendant has stated on

affidavit that it ceased producing it in November 2006. In any event however, a flakiness index result discovered in 2008 which also refers to Clause 804, although the defendants also say this is a mistaken reference, shows a result of 38, which is also a failing result if the material is Clause 804.
Mr. McDonald submits that the June 2007 suite of tests concerns samples taken on three different days in June 2007. Each of these samples is described as Clause 804. Mr. McDonald queries why of all the tests carried out that suite in the context of a pyrite investigation was not discovered. The Court is asked to accept a very general averment from Mr. Lagan that the sample was misdescribed, although there were a number of samples sent to Celtest at the time. Mr. Lagan does not go through each of these samples and explain why they were misdescribed. Mr. McDonald queries why an expert laboratory would misdescribe the material on 20 different test reports by reference to samples taken on three different days. He submits that it does not stand up. He also submits that even if the material was 1.5" down it remains very difficult to understand how out of all of the results discovered there are 20 dating from June 2007 relating to a pyrite investigation that were not discovered. Clearly there was concern at that time regarding the results the defendants were getting. Mr. McDonald refers to exchanges of correspondence taking place at that time. The significance of the reports is what they say, not whether they are correct. They refer on their face to Clause 804. Were it not for detective work on the part of the plaintiffs they might not have identified that these reports are produced from electronic records of Celtest. Mr. Lagan uses a strange turn of phrase, referring to fresh copies having been obtained from Celtest. Mr. McDonald queries what became of the originals of these reports and who read and discussed them.
Mr. O'Callaghan submits that the plaintiffs' case is changing. The relevance of sulphur testing in this case is what they explained to the Court, that is to say because it helps to determine pyrite. That is why Mr. O'Callaghan submits that in respect of very many of these tests it does not matter whether the material is 3" down or Clause 804.
Mr. O'Callaghan refers to explanations provided for the failure to discover the suite of 20 tests. Mr. McDonald responds that that explains possibly how the documents were found now but does not explain what became of the originals and the previous copies that existed. Mr. O'Callaghan submits that Mr. Lagan avers in his affidavit of 16th October 2009 that he has no other relevant documents.
The plaintiffs complain that the 10% fines test report of 23rd February 2004 is printed on the recent headed notepaper. By way of explanation Mr. O'Callaghan refers to the affidavit of 2nd November, in which Mr. Lagan avers that the first defendant sought and obtained copies of these 24 results directly from Celtest when it was first alerted to the possibility of their existence by the plaintiffs. The letter of 5th October explains the failure to discover this 10% fines test as outlined above and states that Celtest only recently furnished it to the first defendant arising out of the invoice cross-check exercise. The letter of 5th October also provides an explanation in relation to the suite of 20 tests as outlined above and states that the results of these tests have only recently been furnished by Celtest. Mr. O'Callaghan submits that these explanations identify why the test of 23rd February 2004 was printed off on Celtest's recent headed notepaper.
The plaintiffs contend that the defendants arranged for a damaging petrographic result to be retested and withheld the damaging result. Mr. O'Callaghan submits that unlike many of the other tests a petrographic examination is subjective. He submits that Mr. Shrimer, one of the plaintiffs' experts, confirmed in evidence that it is a subjective test. Mr. O'Callaghan notes the results, outlined previously herein, of the petrographic examination dated 15th November 2007 which states that the sample is mudstone. A test report dated 29th October 2007, discovered in 2008, refers to a sample of mixed natural gravel. This report concludes that the mineral or rock type is mudstone and states that the colour is black. The report states 'The particle shape is angular, sub-angular.' In the document allegedly withheld the material is termed black mudstone and the particle shape is described as angular. Like the allegedly withheld report, the report discovered in 2008 describes the surface texture as smooth and states that the surface coatings are dust and mud. The petrographic description in the report discovered in 2008 refers to occasionally laminated calcareous organic rich shale and occasional quartz grains. The petrographic description in the report discovered in October 2009 refers to dark calcareous shale most likely very organic rich, very fine quartz grains. In the report discovered in 2008 the mudstone is described as constituting 75% of the material examined. There is a comment that "When judged against the criteria given in BRE Digest 330, sample reference 1 may be classified as being of high reactivity." Mr. O'Callaghan queries why this result was discovered if the plaintiffs' theory is correct. However, Mr. McDonald submits that his submission was not that there were not other test reports referring to mudstone but that the sample was given diametrically opposed descriptions in two different reports.
Mr. O'Callaghan refers to the other test report of 15th November 2007, which refers to the sample as a crushed limestone, having limestone as its major constituent and sandstone as a trace constituent. This report states that based on UK experience limestone aggregates are typically classified as having potentially low alkali-silica reactivity in accordance with BRE Digest 330. However, a full high-power microscopical examination of a representative portion of the aggregate is recommended in order to clarify the alkali-silica reactivity potential of the sample, as siliceous limestones have been found within the UK and may have a different classification. Mr. O'Callaghan submits that an XRD test on this sample was provided to the plaintiffs. He submits that the XRD test is the scientifically detailed test to determine the nature and content of the sample. The XRD report for this sample refers to illite and mica of 20.4%, the quartz content being 36.3% and the calcite content being 26.6%. Something cannot be called a limestone unless it is above 50% calcite, therefore this XRD report, which the plaintiffs had, reveals that the sample is not limestone. In addition, Mr. O'Callaghan refers to the explanation given by Mr. Lagan on affidavit in respect of the retesting of this sample, as set out previously herein. Mr. O'Callaghan acknowledges that, unlike the mudstone report dated 15th November 2007, the report referring to the material as limestone does not refer to the test having been carried out by a subcontractor. However, Mr. O'Callaghan submits that it was, and that it was carried out by STATS, who were retained by Celtest before being engaged by the defendants in this litigation.
The plaintiffs also engaged Celtest for testing. One such test report states that no certificate of sampling was received. Mr. O'Callaghan submits that the plaintiffs have criticised the defendants for the absence of sampling certificates in many of the reports discovered, but the same criticism should be applied to them. This test report also contains the same signature, which is not from Mr. Evans, in respect of which the plaintiffs also levelled a criticism.
With regard to the criticism relating to an absence of correspondence, Mr. O'Callaghan refers to the response, detailed above, contained in the letter of 5th October, and to the response, also set out previously hererin, of Mr. Lagan in his affidavit of 2nd November.
Mr. O'Callaghan also refers to the submission of Mr. McDonald that the report classifying a sample as mudstone and as being highly reactive would have been of considerable benefit to Dr. Maher when he was giving evidence. Mr. O'Callaghan submits that the issue of prejudice is superficial for the plaintiffs. They suggest that there may be prejudice due to witnesses not having documents, but they do not state on affidavit that they have been prejudiced by the failure to discover these documents earlier. That applies to all of the issues raised by the plaintiffs.
Mr. O'Callaghan notes that he made an error in respect of one of the total sulphur results referred to above which he said had been discovered. It has not been discovered because no such test took place. Celtest have provided that information and the defendants have asked them from written confirmation of this. He also notes a Lennon Heather letter of 17th December 2009 containing a table responding to the plaintiffs' 634 queries in a more digestible format. He notes that the plaintiffs have acknowledged that 69 of the 634 tests referred to in their letter had been discovered previously. Finally, Mr. O'Callaghan submits that the issues about Celtest documentation could have been raised much earlier.
Mr. Murray, in reply, submits that the Celtest documents are among a number of categories of documents which are critical to the central question of what the defendants did to investigate the suitability of the quarry before releasing product from it and what their understanding was of the properties of the product. This is important not only in the context of the merits of the case but also in viewing the nature and extent of the deficiency in discovery, because the critical question is not the number but the quality of documents omitted.

Mr. Murray submits that in respect of a number of categories, including the 24 Celtest reports, the defendants had these documents in their possession but did not discover them. In addition, in relation to all of the categories of documents the defendants agreed to discover, they agreed to discover not only documents in their possession but also in their power or procurement. It is quite clear from the material before the Court that they have failed to comply with that obligation.
In addition, it must have been clear to the defendants that there is no averment before the Court that they never received the 24 Celtest reports.
In relation to the pyrite investigation reports from Celtest, having regard to their significance, the defendants, in attempting to explain why these documents were not discovered, should first have found out whether they had ever received them. That is critical because the answer informs the reason why the documents were not discovered. If they received them the error is at the Lagan end, if they did not it is an error on the part of Celtest. Even if the defendants never got the documents it would appear that they paid for them. They were all ticked off in the invoices in a way suggestive of someone checking to see if they were there. These tests were directed for a particular purpose and it is difficult to understand why the person who commissioned and paid for them did not notice that they were never received.
Mr. Murray refers to the passage, set out above, from the letter of 5th October concerning the failure to discover the 24 Celtest test results. He submits that the language therein may be flexible enough to allow the defendants to say they never received the reports. However, this is not clearly said, and it would be expected that it would be said. The letter states that these results have only recently come into their possession. However, this is not necessarily inconsistent with the defendants having had them at some earlier stage. They then re-emphasise that test results have only just come into their possession.
Mr. Murray refers to the response in the letter of 5th October concerning the June 2007 suite of tests. Again the same language is used, in that it is said that the first defendant did not have any of the results from this suite in its possession when the affidavit of discovery was sworn. The letter states that they have only recently been furnished by Celtest. The first defendant did not know or realise that this batch of results was missing from its files. Mr. Murray submits that this is again perhaps suggestive of never having received them, and the letter then refers to the understanding that an administrative error on Celtest's part caused the omission. However, this explanation is very difficult to understand in light of the reference to the changeover in relation to the person responsible for receiving and archiving results from Celtest.
Mr. Murray notes that Mr. O'Callaghan went through the invoices identifying which tests were and were not on Bay Lane material, but it would have been much simpler if this had been done in a schedule or exhibit to an affidavit so that that information was readily to hand and could be tested and considered outside the Court.
Mr. Murray refers to Mr. Lagan's breakdown of the figures in respect of the 634 queries, as set out previously herein, but notes there remains the fundamental problem that it is unknown whether the defendants are saying they received the reports or not. We do not know what errors were made and by whom. The language in Mr. Lagan's affidavit suggests different errors, by Celtest for some documents and by Lagan for others, but it is not sufficiently clear.
In his affidavit of 2nd November Mr. Lagan states that the first defendant did not have the June 2007 tests in its possession when discovery was initially made. Mr. McDonald submits that this is carefully sculpted language. Mr. Lagan avers that Celtest recently furnished fresh copies of these results. Mr. Murray submits that this seems to suggest that other copies had previously been provided. He also notes Mr. Lagan's averments relating to the Clause 804 description which he avers was erroneous. Mr. Lagan avers that Mr. Cassidy says that the sample the plaintiffs refer to was erroneously described as Clause 804. Mr. Murray queries how Mr. Cassidy knows how the samples were described, because they were described by Lagan on the label on the bag. Mr. Murray also notes the reference here to 'the sample'. The plaintiffs have counted 18 samples picked up on three separate days that are referenced in these reports.
The averment that the first defendant did not have the documents in its possession when the affidavit of discovery was sworn is not relevant to the discovery obligation. The first defendant is obliged to discover the reports if they existed, and had documents that showed they existed. The first defendant should have discovered them if Celtest had them. Mr. Murray queries whether they approached Celtest in 2008. If they did not there is a serious deficiency and it is hard to believe this deficiency is not replicated elsewhere. If they did, either Celtest did not send them when the work was done or Celtest sent them and they were lost, and did not send them when asked for them in 2008. The paucity of explanation is critical. A variety of questions arise and would have been raised earlier had there been a second schedule in the affidavit of discovery alerting the plaintiffs to them.
Mr. O'Callaghan submitted that the defendants had discovered a great deal of other material, but these were test results referring to Clause 804 and a number demonstrated that they had failed the tests. Mr. O'Callaghan wonders why the documents would be withheld in light of what was discovered, but the June 2007 suite are described on their face as investigations into pyrite and related testing. There were 82 tests on the invoice in question, only 20 of which described themselves as being on Clause 804, and it was those 20 which were not discovered. In addition, the suite of 20 included eight which failed to meet the Clause 804 requirements for total sulphur and acid soluble sulphate. These are the earliest results from the defendants that show Celtest reports for Clause 804 falling below the standard. In addition, these 20 results were issued by Celtest on two separate dates, 28th June and 3rd July, and there were other results issued on 28th June that were in the first defendant's possession and were discovered.
The defendants say they ceased producing Clause 804 in November 2006, but Dr. Strogen gave evidence that he saw a stockpile of Clause 804 after that time. Mr. Murray wonders how someone in Lagan described 18 samples taken in June 2007 as Clause 804 when they had not been producing it for eight months. There are also invoices which post-date November 2006 for the product. In any event, the point is what the documents say, because that is relevant in respect of why they were not discovered and what use the plaintiffs would have made of them had they been discovered.
There is also an arresting paucity of email correspondence involving Celtest, and very few faxes. Mr. Murray queries what the detailed and proper explanation for that is. He also wonders what has become of the bags and labels brought into being for the purposes of the operational steps taken before the material was sent for testing. They existed and should at least appear in the second schedule to the affidavit of discovery.

Conclusion

There has been a failure on the part of the defendants to discover documentation relating to Celtest and falling within the discovery categories. I regard the situation pertaining to the discovery of the Celtest documentation as unsatisfactory and as representing a serious deficiency in the defendants' discovery process. The documents recently discovered are relevant to the issues in dispute between the parties and were at all times at least in the possession of Celtest, who were agents retained by the first named defendant. If it were not for the persistence of the plaintiffs' solicitors, these documents may well never have come to light and been available to the Court. It is unclear as to whether or not all reasonable inquiries were made by the defendants of Celtest in 2008 as regards any relevant documentation in their possession. An unresolved issue arises as to whether or not all test results were paid for. A number of issues fall to be considered in relation to Celtest documentation. There is an allegation that 24 results were withheld deliberately because they were damaging to the defendants' case and supportive of the plaintiffs' claims. This allegation draws support from a number of factors put forward by the plaintiffs, including the fact that the June 2007 suite of tests is described as an 'Investigation into Pyrites and related testing'. However, the Court accepts that some of these results do not fail any test, while in respect of others, results which are even more damaging to the defendants' case were discovered in 2008. In respect of the flakiness index test with a result of 40, it has not been suggested that a worse result was discovered in 2008. However, it appears that a result of 38, which is also a failing result from the perspective of the Clause 804 limit of 35, was discovered. In addition, explanations for the failure to discover the 24 test results have been provided in the Lennon Heather letter of 5th October and in the affidavits of

Mr. Lagan. In all the circumstances the Court is not satisfied that the defendants are guilty of deliberately withholding the discoverable documents relating to the 24 test results.
In respect of these tests the plaintiffs point out that the suite of 20 tests which cause them greatest concern are on material described as Clause 804, which is the product to which a range of specifications are applicable. It has been stated on affidavit that that is a misdescription, but Mr. Lagan stated this only in relation to 'the sample', whereas a number of samples were involved. Accordingly, this explanation cannot be taken as extending to all of the samples concerned.
From the plaintiffs' perspective the most important consideration in relation to the significance of the test results is the extent to which they reveal that the samples tested are amenable to pyritic heave. Tests in respect of matters such as sulphur content are no less significant when they relate to material that is not Clause 804 insofar as susceptibility to pyritic heave is concerned.
A related issue concerns the suggestion that the 24 test results are not the originals but have been printed from an electronic source. The 10% fines test report dated 23rd February 2004 is printed on more modern headed notepaper which has been in use at Celtest since 2007. Accordingly it is clear that the original of this report has not been discovered. In addition Mr. Lagan refers to "fresh copies" of the 20 results from the June 2007 suite of tests having been furnished. It was submitted on behalf of the plaintiffs that the 20 test results from this suite are printed on paper which seems to suggest an electronic source. Mr. Lagan's reference to fresh copies having been furnished does seem to suggest that copies had previously been furnished, and that the "fresh copies" furnished were not the originals.
There is also an allegation that the defendants arranged to have a petrographic result retested in order to obtain a more acceptable result. Mr. Lagan avers that this retest on the same sample was carried out because Celtest were not confident with the original result, which identified the material as a mudstone. Another report was discovered in 2008 identifying a mixed natural gravel sample as mudstone and referring to high reactivity. An XRD test was also discovered in 2008 indicating, in respect of the sample to which the test reports dated 15th November 2007 relate, a composition inconsistent with this sample being characterised as a limestone. The report referring to the material in this sample as limestone was also discovered so there is a conflict between the conclusions in these two documents, although it is said that the petrographic test is the more subjective in nature. Clearly however, irrespective of the level of confidence in the report of 15th November 2007 indicating that the material was a mudstone, it should have been discovered, and the Court does not consider that there is any acceptable explanation as to why it was not discovered.
There is also a complaint that the defendants were directed to put all the Celtest results to Dr. Maher and did not do so. It was submitted on behalf of the defendants that they had understood that only the results from the time of the opening of the quarry up until the end of 2006 were to be put to Dr. Maher. These results were put to him and no objection was raised on behalf of the plaintiffs at the time. However, the Court did express a wish to have a full picture of the testing from the opening of the quarry. Nevertheless it is true that it would not have been feasible to put 1,185 or 1,186 results, whichever may be the correct figure, to Dr. Maher. In any event the results have now been discovered to the plaintiffs and this issue can be addressed in the evidence to be given by the plaintiffs' geological experts when they are recalled.
It is at first surprising that so little correspondence has been discovered in relation to Celtest. However, an explanation has been provided in this regard and the submissions made do not justify the Court in looking behind Mr. Lagan's averments in that regard. It seems reasonable to conclude that the test reports and the results they contained were the matters of primary concern to the defendants. It is not implausible that ancillary matters such as communicating with Celtest to give directions as to the tests to be undertaken would take place by telephone notwithstanding that there is some written correspondence between the first defendant and Celtest. Accordingly, I am not satisfied that there has been a failure to make discovery in relation to correspondence with Celtest.
On the basis of the circumstances as reviewed herein and the conclusions arrived at, there is a reasonable suspicion that there may be further relevant documentation to be discovered by the defendants and accordingly, I direct that Mr. Lagan on behalf of the first and fifth named defendants and Mr. Canavan on behalf of the second, third and fourth named defendants swear further affidavits clarifying by way of a full and detailed explanation the situation pertaining to the misdescription of Clause 804 samples, which explanation should address all of the samples taken on the 5th, 7th and 8th days of June, 2007, which were the subject of the suite of 20 test results. In addition, Mr. Lagan and Mr. Canavan should address what has become of the originals of the 24 test reports and, in particular, whether the defendants at any stage had these documents, or copies thereof, in their possession, power or procurement prior to the furnishing of copies from Celtest immediately prior to the discovery of the 16th October, 2009. I direct Mr. Lagan and Mr. Canavan, in compliance with their discovery obligations, to consult with Celtest in order to ascertain whether there are or were previously any further documents in the possession, power or procurement of any of the defendants relevant in any way to the issues in these proceedings, and to discover any such documents. On the basis of compliance with the Court's directions in this regard, I consider that no issue of irreparable prejudice occurs and the issues that have arisen herein are capable of being dealt with by the recall of the relevant plaintiffs' witnesses.

Issue III – Dynamic Cone Penetrometer Tests Documentation
This aspect centres on two particular documents from Scott Wilson Limited and derives out of the assessment of asphalt materials incorporating Bay Lane aggregate. One report was discovered in July, 2008 and a further version in November, 2008. There was an attachment dated June, 2008 which incorporated the results of the cone penetrometer tests as carried out in June, 2008, and this document was not originally discovered.
Subsequently, the report and the relevant attachment were discovered in February, 2009. By way of an explanation the defendants solicitors as of the 5th October, 2009, indicate that the relevant penetrometer test reports only came into their possession after the discovery cut off date of the 30th June, 2008, and that accordingly, they fell outside the ambit of discovery. The plaintiffs contend that the fact of non-discovery of the relevant documents until February, 2009 and the attitude as taken by the defendants raises concerns as to whether or not there were other test results which may not have been actually in their physical possession.
Mr. O'Callaghan on behalf of the first named defendants emphasises that the relevant test results do not concern the testing of Bay Lane Quarry material, but are reports of the sub-base and not on the quarry material. Mr. O'Callaghan also emphasises that the documents are not discoverable because they post date the relevant discovery cut off date of the 30th June, 2008. As regards the cut off date, Mr. O'Callaghan submits that the essential aspect is that the documents, not the test, were generated after the cut off date of the 30th June, 2008.
As regards the plaintiffs' concerns that there may be other tests which the defendants experts may have carried out and which have not been discovered, Mr. O'Callaghan relies on the averment of Mr. Lagan that the first named defendant conducted a further review with respect to the queries as raised and that there are no other documents within the first named defendant's possession or power which are relevant to the matters in dispute in these proceedings.

Conclusion
I take the view that the test results are an integral part of the Scott Wilson reports, and the defendants at some point in time had to take a view that the content thereof was relevant to the issues in these proceedings, because on the 24th February, 2009, the defendants' solicitors provided the relevant reports to the plaintiffs. Having done so, I take the view that it was then incumbent on the defendants to also furnish the test results. It is in my view in any event clear from the evidence of Dr. Maher that dynamic cone penetrometer tests on the natural soil are of relevance to the issues in these proceedings. The failure to make discovery initially of these documents constitutes a significant deficiency in the defendants' discovery process. In any event, the relevant documentation was handed over on the 24th February, 2009, and Mr. Lagan on behalf of the first and fifth named defendants, has averred on oath

that there are no other test results. No case of irreparable prejudice is quite correctly advanced concerning this matter, and I do not consider that any further steps are necessary under this heading.

Issue IV – Complaints in relation to Material from Bay Lane

Mr. McDonald on behalf of the plaintiffs submits that in March, 2009 counsel for the defendants agreed to give the Court and the plaintiffs all complaints received in relation to the Bay Lane product between July 2006 and March 2009. A number of documents were provided to BCM with a letter dated 20th March 2009. These include a letter from LM Developments dated 3rd March 2008. This letter was discovered, but a number of reports referred to therein were not.

There is a report of CPM Engineering concerning wall cracking in an office block, the premises of Independent Express Cargo in Northwest Business Park in Ballycoolin, County Dublin. The report refers to visual surveys, and to monitoring over an eight month period revealing, *inter alia*, heaving of the slab in two places. It notes a worsening of cracking during this period. The report notes that this cracking is only evident at ground floor level and states that there are a number of factors that may have caused these cracks to occur. Five factors are identified, the fifth of which is pyritic heave. The report details some of the conclusions contained in a draft geotechnical report from IGSL and goes on to conclude that the defects are the result of heave. The report then refers to the works required to remedy this problem, including the removal and replacement of the fill. The IGSL report details a number of conclusions emerging from examinations undertaken and states that the geotechnical testing shows the fill beneath the slab is outside the NRA limits for sub-base granular fill. It notes, *inter alia*, the presence of pyrite.

These reports date from November 2007 and are referred to in the letter of 3rd March 2008. They are highly relevant to the issues in the case and to Dr. Maher's evidence. They were particularly relevant to the part of his cross-examination in which it was put to him that he had jumped on the HomeBond bandwagon in respect of floor heave without doing a proper examination himself. The reports reveal independent experts reaching the same conclusions in 2007 to those reached by Dr. Maher at that time, and in respect of a different kind of property. This material is also relevant to the evidence Mr. Forde will give.

In addition, in March 2009, after the conclusion of Dr. Maher's evidence, Lennon Heather furnished a letter of 4th July 2008 from Euromist Developments Ltd. to Lagan Asphalt. The letter encloses a letter dated 11th June 2008 from Duggan Brothers (Contractors) Ltd. to Euromist regarding a meeting attended by Mr. Ciarán Reilly of Lagan Asphalt at the Centre for the Sick in Cabra. The letter of 4th July 2008 asks Mr. Reilly to respond as being the supplier of substructure fill. The plaintiffs received the enclosed Duggan Brothers letter in March 2009, at the same time as the letter of 4th July 2008. This letter refers to a meeting attended by Irish Asphalt representatives where uplift of the ground floor slab was being discussed. Its significance is that it relates to a non-residential development where the same kind of problem arose. Mr. McDonald submits that this is significant not only in relation to Dr. Maher's cross-examination in the sense identified above, but also regarding the workmanship allegations made by the defendants. He contends that here we see independent evidence of similar problems in quite different circumstances, an industrial premises and a centre for the sick. In both instances there is uplift of the slab. These instances of floor uplift where the defendants' infill was supplied are hardly a coincidence. There may well be many other instances where it was supplied and where similar problems have arisen in quite different circumstances. The letter states that the writer's opinion is that problems causing distress to the building appear to have been caused by uplift of the ground floor slab on grade. Here we see another third party professional reaching a view as to problems caused by the defendants' infill.

By letter dated 11th August 2009 BCM noted the report on the Northwest Business Park received from Lennon Heather in April 2009 which had not been discovered and sought discovery of that report and all reports within the discovery categories which had not yet been discovered. The letter also notes the furnishing of the letter of 4th July 2008 and notes that attached to that letter was the letter of 11th June 2008 from Duggan Brothers. BCM request the discovery of that letter. In response, Lennon Heather state that the Northwest Business Park report was sent to the plaintiffs in April 2009 by letter from Lennon Heather with an explanation for the failure to discover it initially. The report was an attachment to a letter which was discovered on summation but, as an attachment, the report was omitted from uploading through inadvertence. Mr. McDonald submits that it is difficult to see how it could have been omitted through inadvertence given the nature of the allegations therein and given that they coincide precisely with the kind of allegations the plaintiffs make.

In relation to the Duggan Brothers letter, Lennon Heather state that as the letter to which it was attached post-dated the date of discovery it was presumed that the attachment was not required to be discovered. Lennon Heather accept that this was a mistaken interpretation of the correct principle and that the letter should have been discovered. They apologise for this but state that the plaintiffs have had this document since March 2009 and that, as the plaintiffs have sought inspection of it, they will discover it at the conclusion of the plaintiffs' motion, if necessary. Mr. McDonald draws attention to this attitude that the defendants could await the outcome of their motion before making additional discovery even where there was an admitted failure to make discovery. In addition, Mr. McDonald wonders whether the mistaken principle applied in relation to the Duggan Brothers letter was also applied in relation to other documents which pre-date the cut-off point but are referred to in letters which post-date that point.

Mr. Lennon refers in his affidavit of 5th October 2009 to the plaintiffs' complaint that test results and a report furnished between February and April 2009 were not discovered. The plaintiffs raised this complaint in the letter of 11th August 2009 and Mr. Lennon avers that this concern was not raised when these documents were furnished. However, in a letter dated 10th April 2009 BCM note that the Duggan Brothers letter is clearly discoverable. Even though that was pointed out in that letter, it was not remedied at that time.

In his affidavit of 16th October 2009 Mr. Lagan discovers the report on the Northwest Business Park and gives the explanation given by Lennon Heather and detailed above for the failure to discover it. However, he gives no assurance as to any other occasions when similar omissions may have been made. Mr. McDonald notes in this regard the unanswered letter from BCM dated October 2009 dealing with attachments. In respect of the Duggan Brothers letter, Mr. Lagan provides the explanation given by Lennon Heather and detailed above for the failure to discover it and apologises for the mistake. He then discovers both that letter and the letter of 4th July 2008 which enclosed it.

Mr. Butler, in his affidavit of 20th October 2009, states that he believes the reports would have been of considerable assistance to the plaintiffs' experts had they been discovered in July 2008, both as to their examination-in-chief and cross-examination. He gives examples of their relevance in relation to Mr. Forde and Dr. Maher. Mr. Butler also refers to the Duggan Brothers letter, which he believes clearly falls within categories 19 and 29 of the request for discovery dated 10th March 2008. He notes that the defendants did not dispute this in the Lennon Heather letter of 17th April 2009. Mr. Butler avers that the Duggan Brothers letter would have been of use to Dr. Maher and Mr. Forde for the same reason as the CPM report. He states that this raises a concern as to whether the defendants have or had similar documents in their possession, power or procurement. Mr. McDonald submits that this is a further concern given the approach the defendants appear to take to the effect that they are not obliged to discover documents which they once had in their possession but no longer have.

Mr. Lagan, in his affidavit of 2nd November 2009, notes that the plaintiffs have had the three documents in question since March/April 2009 and that they were individually brought to the plaintiffs' attention at that time. He goes on to note the omission to discover these reports and their subsequent furnishing and later discovery. He avers that as soon as the first defendant learned of their omission in April 2009 they were furnished. Mr. McDonald wonders what other documents have suffered the same fate.

Mr. Lagan avers that the complaint letter summarised the findings of the report. It recorded that the damage was being attributed to heaving of the slab and that the authors of the attached report were alleging that this was caused by high pyrite levels. No queries were raised about this letter or the report. Based on the summary of these reports' conclusions related in the discovered letter, the plaintiffs were in a position to apprise their experts that conclusions as to pyrite causation were being formed at other sites. Mr.

Lagan also avers that, as it appears Dr. Maher was unaware of the contents of this letter when he formed his views, it does not detract from the bandwagon thesis.
Mr. Lagan avers that Mr. Forde can adequately address in evidence the relevance he attributes to these reports and what amendments he would have made to his report in light of them. He also avers that the complaint regarding the Duggan Brothers letter is a stale one, as the letter was provided in March 2009 and the plaintiffs only now raise the issue. However, Mr. McDonald submits that this is not so in view of the letter of 10th April 2009 noted above. Mr. Lagan avers that the explanation for the mistaken interpretation of the discovery obligation was amply addressed in the letter of 5th October. However, the question of whether any other documents were subject to the same misapplication of the relevant principle is never dealt with on affidavit.
Mr. O'Callaghan on behalf of the first and fifth named defendants submits that the CPM and IGSL report is in fact one report, the latter being an appendix to the former. They are authored separately but discovered as one document. The Lennon Heather letter dated 17th April 2009 draws attention to the failure to discover the reports and they are enclosed with this letter. The plaintiffs did not ask the first defendant to discover the reports until August 2009. The letter of 10th April 2009 stated that documents were clearly discoverable, but that was in respect of the Euromist letter rather than the reports. It is important to note that the letter accompanying the reports was discovered.
Mr. O'Callaghan refers to a number of averments and statements in correspondence set out above in respect of the reports and submits that a very detailed explanation has been provided as to why they were not discovered earlier. He further submits that the plaintiffs had access to the LM Developments letter dated 3rd March 2008, which details extensive damage to the inside of the Independent Express Cargo unit. The letter states that the client has commissioned a report from CPM, and IGSL, a copy of which is enclosed. Mr. O'Callaghan quotes from the letter and submits that the fundamental detail of the report is contained therein.
Mr. McDonald submitted that it was difficult to see how reports like the CPM and IGSL report could have been omitted through inadvertence given the nature of the allegations. However, the IGSL report which he accords such significance was discovered in 2008, not by the defendants but by the plaintiffs. This makes a mockery of the evidence put before the Court which suggests that the IGSL report would have been used in Dr. Maher's evidence. Mr. O'Callaghan queries how the plaintiffs obtained this report. It has been presented as an independent report corroborating Dr. Maher's findings, but there are a number of annotations on the version of the report discovered by the plaintiffs. These annotations should be explained by the plaintiffs. In addition, some portions of the report are highlighted.
The draft report discovered by the plaintiffs is identical to the one discovered by the defendants, save for the highlighting and handwriting. There is no highlighting or handwriting in the one discovered by the defendants. The defendants' concern is that this is not an independent report, that it is part of the bandwagon referred to by Mr. O'Neill. Mr. O'Callaghan details in this regard a number of examples of manuscript writing next to passages in the report.
Mr. O'Callaghan refers to the passage from the BCM letter of 11th August in which they refer to the failure to discover the Duggan Brothers letter. He also refers to the responses contained in the Lennon Heather letter of 5th October and Mr. Lagan's affidavit of 16th October, detailed above. Mr. Lagan also suggests in his affidavit of 2nd November 2009 that the complaint in respect of the Duggan Brothers letter is stale, as outlined above. Mr. O'Callaghan notes, by way of explanation rather than as an excuse, that the letter of 4th July 2008 enclosing the Duggan Brothers letter only reached the first defendant on or after that date, by which stage its first affidavit of discovery had been sworn. Mr. O'Callaghan submits that the explanation which has been repeated on affidavit and in the letter of 5th October 2009 as to why the letter was not discovered is because it was received on or after 4th July 2008, after the cut-off point, and a mistaken assessment was made that the letter attached must also emanate from that date. In addition, the first defendant is, in a sense, giving the plaintiffs the benefit of the argument as it is arguable that the first defendant did not have to discover it.
The first defendant categorically says that there are no other reports indicating complaints about Bay Lane material which it has not provided on discovery. Mr. Lagan avers in his affidavit of 16th October 2009 that according to the best of his knowledge and belief he has not now and never had in his possession, custody or power or in the possession, custody or power of his solicitor or agent or in the possession, custody or power of any other person on his behalf any document relating to the matters in question in this case save those set forth in the first schedule to that affidavit.
Mr. Breslin, on behalf of the second, third and fourth defendants, submits that there is no evidence upon which the Court could form a suspicion that there are further documents falling within the discovery categories in their possession. The evidence is that the quarry was operated by the first defendant and owned by the fifth defendant. An inevitable consequence of that will be that the bulk of the discovery issues are between the plaintiffs and the first defendant. The Euromist and LM Developments complaints are among a number of issues which are not of direct relevance to the second, third and fourth defendants.
Mr. McDonald, following investigations on the plaintiffs' side, concedes that the IGSL report was discovered by the plaintiffs in October 2008. It is also referred to in a table of the Golder report. The plaintiffs do not continue to maintain any claim of prejudice in respect of the IGSL report. However, the CPM report was not discovered by the plaintiffs. Mr. McDonald also clarifies that all of the handwriting on the copy of the IGSL report discovered by them is Mr. Forde's. Mr. Forde also believes the highlighting on that copy of the report is his, although he is not absolutely certain of this. The IGSL report came into Mr. Forde's possession in early November 2007. It came into his possession because LM Developments was a subcontractor of Park Developments in relation to Northwest Business Park. DBFL have done work for Park Developments for over 20 years. Park Developments knew that Mr. Forde and DBFL were involved on behalf of Menolly in relation to the investigation in 2007 of Drynam and Beaupark. Park Developments had received the report by IGSL and asked Mr. Forde as a favour to look at it.
Mr. Forde was puzzled by some aspects of the report and telephoned its author to ask questions about it. The author answered those questions and Mr. Forde telephoned Park Developments and told them he believed the problem described in the report was the same problem Menolly had. In April 2008 he was approached by LM Developments. He understood that they were going to ask him to become involved at that time in relation to their investigation of the problems at Northwest Business Park. At that time he was provided with the CPM report and the IGSL report and understood that DBFL might be engaged at that time to assist in relation to the matter, though this did not in fact occur. However, in July 2009 DBFL were retained by Park Developments in relation to about 20 units in the business park which are encountering problems with floor heave and related problems. DBFL are now retained but not in relation to the unit described in the LM Developments letter and in the IGSL and CPM reports. When Mr. Butler swore his affidavit of 20th October 2009 it was not adverted to that the IGSL report had not been discovered by the plaintiffs. The plaintiffs' experts believed they could not make use of the CPM or IGSL reports in their evidence unless they had been discovered by the defendants. Dr. Maher and Mr. Forde will deal with this in their evidence. In the circumstances, the plaintiffs do not rely on any prejudice. Mr. O'Callaghan responds that despite the submission that the experts believed they could not use these reports, the IGSL report was expressly referred to in Dr. Maher's report.
Mr. O'Moore, on behalf of the plaintiffs, notes that on 20th December 2009 the plaintiffs received three affidavits relating to the defendants' discovery. Two of these, sworn by Mr. Lennon and Mr. Lagan respectively, give rise to issues relating to complaints from third parties.
Mr. O'Callaghan apologises for the delay in furnishing these affidavits and provides an explanation for the delay. The effect of the three affidavits is that they recognise that a number of documents that were not discovered require to be discovered. The affidavits of Mr. Lennon and Mr. Lagan state that a further affidavit of discovery will be sworn. The documents exhibited to a large extent in the affidavits are documents which it is now recognised come within two of the agreed discovery categories. These are category 4, which covers documents relating to testing carried out from 4th August 2000 to the date of making discovery, and category 19, which covers documents such as complaints provided by a variety of third parties relating to the quality of the products from Bay

Lane. The matter came to light by letter dated 14th December 2009 from BCM to Lennon Heather attaching 22 documents sent by James Elliott Construction Ltd. to the plaintiffs. To a significant extent those documents relate to the preparation and organisation of testing at the Ballymun Regeneration Centre and a housing development called Sillogue. In respect of the former Elliott has instituted proceedings against the first defendant. In respect of the latter there are no proceedings in being.
The vast majority of the documents which were not discovered and which they recognise should have been discovered were furnished by them to their solicitors, whether A&L Goodbody or Lennon Heather, and as a result of errors by Lennon Heather those documents were not reviewed and were not discovered.
Mr. Lennon exhibits those of the Elliott letters that were discovered in July 2008. The first of these discovered letters concerns Sillogue and Ballymun Regeneration and attaches a letter from Ballymun Regeneration Co. Ltd. The letter states that it would clearly be much cheaper to act now than to wait for the inevitable heave to occur in the floors due to the pyrite present. The attached letter sets out in detail the complaints of Ballymun Regeneration Co. Ltd. to Elliott, noting pyrite and sulphur values in excess of benchmark values in all samples tested, with one exception where the hardcore was apparently supplied from a different source. This letter states that the levels reported are substantially higher than levels obtained elsewhere where heave has already occurred. The letter states that there is consequently a high risk of heave occurring in the slabs of Sillogue 4 within two to 10 years.
A further 22 documents are exhibited, all of which the defendants sent to Lennon Heather on 13th October 2008 on foot of queries raised by the plaintiffs as to the original affidavit of discovery. It is apparent from this that the error in this section was not caused by the defendants and that they were prepared and willing to make discovery. Only five of these 22 were discovered in the affidavit dated 31st October 2008. Mr. Lennon avers it appears from a recent investigation that this happened because the person whose responsibility it was to print these documents did not realise that there were further attachments to the email in question which would have become visible had that person scrolled down the attachments section.
Of the five documents discovered in October 2008, the first is a letter from Elliott to Irish Asphalt and the second over which privilege was claimed. In response to a query raised on 11th August 2009 regarding a number of documents concerning the Elliott litigation, the defendants stated that it was discovered in error but now recognise that it is discoverable and not privileged. The claim to privilege is no longer being maintained. The second is a letter from Elliott to the Ballymun Regeneration Centre, in respect of which the same sequence of events occurred. This letter refers to a letter from Irish Asphalt seeking drawings and specifications from the Ballymun Regeneration Centre. It is discoverable because it relates to testing that was taking place at that time. The next discovered document is a letter from Irish Asphalt to Mr. Cassidy. Privilege was wrongly claimed over it and, in response to queries raised by the plaintiffs on 11th August, the defendants said they would wave privilege. This document is on summation. The same sequence of events applies to the next discovered document, a letter from Elliott to Irish Asphalt.
The others are discoverable and will be discovered. For example, a letter of 5th November 2007 attaches a letter regarding slab cracking and differential movement in places and expresses the view that it is highly likely that there is pyrite in the hardcore and this is causing the problem. One of the documents is a duplicate of a letter referred to above which was discovered in October 2008 and over which privilege was initially wrongly claimed, but which is now on summation. Mr. O'Callaghan also refers to a letter from Irish Asphalt to Elliott which was discovered on 23rd February 2009.
The 22 documents sent by Elliott to the plaintiffs comprise 14 letters and eight emails. 11 of the 14 letters had been sent by the defendants to Lennon Heather on 13th October 2008. Six of the eight emails were sent to Lennon Heather.
One of the emails furnished by the plaintiffs is from Mr. Lagan to Elliott. It repeats a request for test results concerning the Ballymun Regeneration Centre and requests access for sampling purposes. Discovery category 4 covers all documents relating to testing, which is why documents such as this which may be of limited importance to the plaintiffs are discoverable. This email was discovered in July 2008 subject to a claim of privilege, which was challenged on 11th August 2009. The defendants then said they were discovered in error but now recognise that they remain discoverable and will be produced for inspection. Every document over which privilege was claimed and challenged and which the defendants subsequently said had been discovered in error will be produced to the plaintiffs.
In respect of the emails relating to Elliott received by Lennon Heather but not previously discovered, Mr. Lennon avers that since the letter from BCM of 14th December 2009, Lennon Heather has conducted a further check of all its Elliott files to see whether there were further documents which were not previously discovered. He avers at para. 25 of his affidavit that it appears from this search that 12 emails, primarily privileged, were received by Lennon Heather which were not discovered due to error, primarily an error on his part.
Mr. O'Callaghan refers to an email from Elliott to Mr. Lagan discovered in July 2008 subject to a claim of privilege. When this claim of privilege was challenged the defendants said it had been discovered in error but now recognise that it is discoverable and have produced it for inspection. Mr. O'Callaghan notes a further email which was on the Lennon Heather file and should have been reviewed. The explanation for the omission to review it is given at para. 25 of Mr. Lennon's affidavit. This email is from Mr. Lagan to Elliott and seeks to arrange a meeting to set up an agreed testing and monitoring regime. Again, this email is relevant because it relates to testing. A further email from Mr. Lagan to Elliott enquires whether authority had been sought to forward all consultants' reports. This email was not given to Lennon Heather by the first defendant. At para. 17 of his affidavit Mr. Lagan explains this. He apologises for failing to discover two emails which he did not send on. He avers that he overlooked them when reviewing his email account. He states that he furnished Lennon Heather with the other emails in the string. He cannot recall why he did not furnish these two emails but suspects that he must not have seen them when checking his email account.
Mr. O'Callaghan refers to a further email from Mr. Lagan to Elliott, which refers to the earlier emails concerning a meeting and the issue of permission to release reports as to the causes of the alleged defects. Again, this email is discoverable as it comes within the testing parameters. It is one of the documents that was discovered subject to a claim of privilege which was challenged, it was asserted that the document had been discovered in error, the privilege claim is no longer maintained and the email is available for inspection. Mr. O'Callaghan refers to another email that was not given to Lennon by the first defendant. The email is from Mr. Lagan to Mr. Patrick Elliott and merely thanks him. The explanation for the error in relation to this email is that stated at paras. 16 and 17 of Mr. Lagan's affidavit. Mr. O'Callaghan submits that the insignificance of the email supports an innocent explanation for this matter.
Turning to the letters, again 11 of the 14 letters furnished by BCM were given to Lennon Heather on 13th October 2008. One of the three that were not is the cover sheet of a fax dated 14th November 2007 from Mr. Cassidy to Mr. Patrick Elliott concerning Ballymun. It states that it attaches a letter that was also sent by post. The letter was given to Lennon Heather in October 2008 and the cover sheet was given to that firm on 11th November 2008. Mr. Lennon explains this matter at para. 19 of his affidavit, where states that Mr. Cassidy was asked by Lennon Heather's James Elliott team to bring in all relevant documentation for the purpose of preparing discovery in the Elliott litigation. These documents were produced to the firm on 11th November 2008. A copy was made and the original was retained by Lennon Heather, but a cross-check was not carried out by the Hansfield team, who were unaware of its delivery. He avers that had they been, the three further letters concerned would have been discovered by Lennon Heather.
The second of the three letters is from Mr. Lagan to Elliott regarding Sillogue and Ballymun. In this letter, which is dated 21st November 2007, Mr. Lagan refers to Mr. Patrick Elliott's letter of the previous day and states that he will respond as soon as possible. He also seeks clarification of whether Sillogue 4 is the same as Sillogue Road, Ballymun. The letter of 20th November 2007 referred to in this letter by Mr. Lagan was one of those given to Lennon Heather on 13th October 2008. Mr. Lagan explains why the letter of 21st November 2007 was not given in his affidavit, in which he apologises on the first defendant's behalf for not retrieving these three documents when they were specifically requested by Lennon Heather. Mr. Lagan avers that Mr. Cassidy has indicated to him that this was through an innocent oversight on his part.
The third letter, which is dated 2nd April 2008, is from Irish Asphalt to Mr. Patrick Elliott. It acknowledges receipt of a letter of the previous day and states that for Irish Asphalt to deal with this it urgently needs the report prepared by Moylan's and any report by

ARUP on the same subject matter.
Mr. O'Callaghan refers to a letter from Moylan's to Elliott dated 17th December 2007. Mr. Cassidy gave this to Lennon Heather on 11th November 2008 and Mr. Lennon explains why it was not discovered at para. 19 of his affidavit, as outlined above.
Mr. O'Callaghan also refers to four emails which the first defendant did not send to Lennon Heather and which have come to light as a result of the review commenced on foot of the documentation coming from Elliott to the plaintiffs and ultimately to Lennon Heather. The first email is from Moylan's to Mr. Patrick Elliott and is copied to a number of people, including Mr. Cassidy. It concerns the Ballymun Centre and attaches the letter from Moylan's noted above as one which the first defendant gave to Lennon Heather on 11th November 2008. There is also an email from Mr. Patrick Elliott to Mr. Lagan stating that they will be replacing the hardcore under one house plot and that this is a trial run to establish some costings. In regard to Mr. Lagan's suggestion of monitoring the floor levels it states that they are establishing level surveys in a number of plots, which are identified. It states that they must carry out these tests as they are in possession and contractually bound to complete in a given timeframe. The last email is also from Mr. Patrick Elliott to Mr. Lagan. It attaches a list of slabs selected for testing, and refers to sampling and monitoring. All four of the emails concerned here will be discovered because they relate to testing.
Mr. Lagan avers that due to emails being overlooked he rechecked again, with Mr. Cassidy's assistance, emails which relate to Elliott to ensure that all emails in the first defendant's possession regarding Elliott had been furnished to Lennon Heather. Four further emails came to light from this review. They are the emails just addressed above. Mr. Lagan avers that it appears that these emails were overlooked due to when his and Mr. Cassidy's email accounts were checked.
Mr. Lagan exhibits 44 documents which were not sent to Lennon Heather but which the defendants presumed had been sent to that firm by A&L Goodbody. He avers that due to a breakdown of communications between the two firms all documents relating to the Elliott litigation on the A&L Goodbody file were not transferred to Lennon Heather. It appears there were a number of emails and one letter which were not given to Lennon Heather and there are a number of draft letters. Mr. Lagan is advised that the emails and drafts are privileged and therefore cannot be exhibited, but he exhibits a schedule of the A&L Goodbody emails and letters. He avers that these documents will now be discovered. The defendants only became aware of these documents on receipt of the A&L Goodbody file. Privilege will be claimed over them because they relate to communications between the first defendant and its solicitors.
There is a letter from D. O'Kane Excavations Ltd., a civil engineering firm, to Mr. Lagan dated 30th August 2007. Mr. O'Kane states in the letter that after receipt of a letter, which is attached, from a client regarding stone infill and aggregates used on its sites, they request a letter of indemnity for any claims regarding any damage to works they carried out on four sites where they have used the first defendant's material. That document should have been discovered as it is a complaint from a customer. It was sent to A&L Goodbody on 30th August 2007. Mr. Lagan notes this and states that he has not since considered this letter as no further issue arose with D. O'Kane Excavations in its wake. He avers that the first defendant keeps a file relating to complaints and this letter was not on the file when it was checked and recently rechecked following queries from the plaintiffs. He avers that he had forgotten about the existence of this letter until it was shown to him when the A&L Goodbody file was furnished a number of days before he swore his affidavit. He states that the document will now be discovered.
Mr. O'Callaghan concedes that this is an important document that should have been discovered. He notes that Mr. Murray may suggest that the failure to discover it indicates some level of evasiveness on the first defendant's part, but he emphasises that the letter was sent to its then solicitors on 30th August 2007, which was the day the letter was received. He submits that such an action does not reveal a desire to be evasive.
Reference is made to para. 25 of Mr. Lennon's affidavit, outlined above, regarding 12 emails, primarily privileged, which were not discovered. Mr. Lennon states that all of these emails were received by his firm before 30th June 2008 and should have been redirected by him to a specific email address set up to capture all relevant emails related to this litigation and other pyrite related matters. He avers that on a number of occasions this was not done, resulting in these emails not being reviewed for discovery purposes. These 12 emails are distinct from the 44 in the A&L Goodbody file. Mr. Lennon provides a schedule of the 12 emails and attached to it are a number of emails over which privilege is not being claimed.
Mr. O'Callaghan submits that the failure to discover this documentation was not primarily the first defendant's fault. A number of emails and letters were not furnished by the first defendant to Lennon Heather on 13th October 2008, but some of those that were not were sent on 11th November 2008. Very few were not sent at all, and explanations have been provided in respect of them. The discoverability of the documents is not disputed, but most of them, with the exception of the O'Kane letter, relate to testing and setting up dates for testing. They also relate to matters of which the plaintiffs are fully aware, because Dr. Maher referred in his report, which was delivered in December 2008, to the fact that there was an issue regarding the Sillogue site in Ballymun and he indicated that the source of the infill was Bay Lane. In respect of the slightly separate Ballymun Regeneration Centre, that issue has been before the courts on many occasions, has been reported in the press and is listed for hearing in February 2010. The plaintiffs are using the services of Dr. Maher and, it appears, Dr. Hawkins in respect of that matter. Nevertheless, the documents should have been discovered and will be discovered.
Mr. Murray in reply submits that the issues raised by the late production of these documents and the explanations given in the most recent affidavits go far beyond the issue of discovery in relation to complaints. They confirm in a worrying way a number of issues identified by the plaintiffs in this motion. No-one could have doubted that the documents that had to be produced in relation to the categories of discovery opened by Mr. O'Callaghan extended beyond Menolly or this case. The first defendant must have known at all times that they were required to discover documents relating to other customers and complaints from other customers.
The BCM letter dated 11th August 2009 noted the paucity of documents regarding third party complaints. This issue concerning third party complaints had been raised before and had resulted in further documents in October 2008. The response to the letter of 11th August 2009 was that all documents within the categories in question had been discovered. Through the intervention of a third party the plaintiffs received documents which it is acknowledged should have been discovered. The explanations underline the difficulties as to whether proper searches were made for documents when discovery was being made, the plaintiffs' concern that when they raised legitimate queries no steps were taken to investigate whether the documents they said should exist actually existed, and concerns relating to electronic discovery and attachments.
Mr. Lennon avers that in December 2007 a meeting was held between representatives of A&L Goodbody and Lennon Heather for the purpose of transferring files to the latter. Mr. Lennon attended the meeting. His recollection of the meeting is that documentation beyond matters relating to these proceedings was to be furnished, for example documents relating to other complaints about pyrite, including any documentation relating to the Elliott matter. He had presumed from the meeting that all documents relating to the Elliott matter were being transferred by A&L Goodbody. However, when the documents were furnished to Lennon Heather in January he did not specifically seek confirmation that all documents beyond those relating to these proceedings had been furnished. Mr. Murray submits that obviously what should have been sought from A&L Goodbody was all documents relating to Bay Lane, including Elliott and anyone else. Even if that had been sought, confirmation should have been obtained that those documents had been furnished. That did not happen. Mr. Lennon avers that he did not become aware of the omission in this regard until he made enquiries following receipt of the BCM letter of 14th December 2009. Mr. Murray submits that they did not revert to A&L Goodbody when they were making discovery, or in October 2008 when specific queries were raised about these specific documents. They did not revert to A&L Goodbody in August 2009 when a specific was raised about the paucity of documents in this category. Without resort to A&L Goodbody therefore, the affidavit of discovery was sworn, the October 2008 documents were furnished and the clear assertions were made in October 2009 that there were no further documents in this category.
Mr. Lennon avers that his firm has engaged closely with A&L Goodbody and Maples and Calder in recent days to ensure all documents

have been furnished. He also avers that the discovery process before June 2008 involved a consultative process between the first defendant and Lennon Heather. However, the focus of the documentary retrieval was in the main based on documents relating to these proceedings. Mr. Murray questions why that was the focus having regard to the scope of the discovery. Mr. Lennon avers that while there were documents discovered relating to other customers, his firm did not specifically query the first defendant as to correspondence and communications with Elliott regarding ongoing investigations and testing taking place in relation to that litigation. He avers that, apart from invoices, delivery dockets and order forms, the June 2008 discovery contained only two letters relating to the Elliott litigation. These letters had been passed to Lennon Heather by the first defendant as part of its policy to transfer all such correspondence to its solicitors as and when it came in. In those circumstances these documents were on the files of Lennon Heather when it came to making discovery. He avers that his firm did not specifically interrogate the first defendant as to further correspondence with Elliott arising out of complaints or relating to investigations. He apologises for this omission. The plaintiffs' concern is that Lennon Heather did not revert to A&L Goodbody or ask their own client to address its attention to this category of documents. Mr. Murray submits that presumably, when Mr. Lennon refers to not asking for documents about Elliott, they were not interrogated about complaints from any third parties.

Mr. Lennon goes on to aver that in October 2008 his firm, arising out of further queries from the plaintiffs, asked the first defendant about any further documentation as to testing and investigations relating to Elliott. He refers to the 22 documents received from Mr. Cassidy on 13th October 2008 and explains the error in printing, as detailed above. Mr. Murray submits that these documents were held and maintained electronically in Lennon Heather since then and yet were overlooked, not only in October 2008 but presumably when, in March 2009, the Court sought details of complaints, someone looked to see what they had. Presumably also before they asserted in a categorical way on 5th October 2009 that there were no further documents in this category someone also checked, yet these documents were repeatedly overlooked.

In addition, claims to privilege were made which were patently unsustainable because the claims were asserted over documents which had been sent to third parties. It was later asserted that the documents were not relevant, but they are patently relevant and patently fall within the discovery categories. Mr. Murray wonders how we can have confidence in the discovery made by the defendants when they were seemingly not interrogated about a category of discovery, namely complaints. He also questions how we can have such confidence when privilege is claimed over documents that are patently not privileged and when some of the documents are said not to be relevant when they are self-evidently so.

Mr. Lennon avers that of the 14 2007 letters attached to the BCM letter of 14th December, all but three were sent to his firm on 13th October 2008. He identifies those 11 and the three that were not sent. Mr. Murray submits that the mistake in relation to these three was on the part of the first defendant, with not all of the relevant documents being handed over in October 2008 when the issue about the absence of complaint documents was raised.

Mr. Lennon notes that five of these letters were on the A&L Goodbody file furnished to Lennon Heather on 16th December. Mr. Murray submits that they did not approach A&L Goodbody or interrogate their clients, and the Lagan defendants swore affidavits of discovery, but this tranche of documentation was not discovered. In addition, Lennon Heather did not check within their firm for the documents. Mr. Murray refers in this regard to the passage outlined above from Mr. Lennon's affidavit in which he notes the furnishing of documents by Mr. Cassidy on 11th November 2008 and the fact that the Hansfield team did not carry out a cross-check with the Elliott team. Mr. Murray submits that Lennon Heather knew the Elliott documents were captured by the discovery request and were acting in the Elliott litigation. Those documents were likely to come within the discovery categories in this case but it appears no-one checked.

Mr. Lennon then addresses the 2008 emails. This again raises the issue of electronic discovery. These emails are listed and the third and fourth emails on that list, although sent from Mr. Lagan to Mr. Elliott, were both copied to Mr. Lennon and Mr. Pritchard. Mr. Lennon avers that four of these emails were discovered in July 2008 subject to a mistaken claim of privilege as it was believed they related to investigations in contemplation of litigation. He notes the challenge to the claim of privilege and the response of Lennon Heather to the effect that they were discovered in error as they appeared not to pertain to the issues in this case. He avers that, having considered the matter further, it is recognised that they should be discovered and they will be produced for inspection. He apologises for the error. He also accepts that all other documents listed as having been discovered in error should be produced for inspection. He later refers to the further check carried out by Lennon Heather of all its Elliott files since the BCM letter of 14th December and notes that 12 emails, primarily privileged, came to light as a result of this. He states that the error in this regard was primarily his and notes, as set out above, that he should have sent them to a specific email address after receiving them. Mr. Murray submits that this reveals for the first time, even though the plaintiffs have been seeking since August to learn how the defendants dealt with their electronic discovery, that seemingly there was a special email address to which emails were directed and presumably what was contained at that address was then reviewed for discovery purposes. That procedure makes sense, except that it seems that if an email was never sent to that address it was never reviewed. Consequently, if this understanding is correct, anything not sent to that address was never discovered. This underscores the plaintiffs' concern about the absence of any clear statement from the defendants concerning the methodology applied to electronic discovery.

Mr. Lennon avers that he will produce the documents stated to be discovered in error which relate to the Elliott litigation. He avers that they were stated to be discovered in error in circumstances where they related to arrangements for testing, sampling and remedial work in Ballymun and appeared not to pertain to the issues in this case. He notes that it is now accepted that the documents were relevant.

Mr. Lennon exhibits documents said to have been discovered in 2008. BCM have been unable to identify the numbers for these documents and seek the numbers to assist in confirming that these documents were discovered then. Leaving that aside, some of the communications that were not discovered were of very real relevance, extending beyond mere administrative arrangements for setting up testing or summary records of complaints. There is a letter from Mr. Elliott to Irish Asphalt noting the ground floor slab cracking and differential movement evident in places and stating that he thinks it highly likely that there is pyrite in the hardcore. He goes on to state that if testing proves pyrite or another problem with the hardcore is the problem they will seek the costs of repairing the floors. Attached to that letter is a letter from Ballymun Regeneration which records the views of expert engineers noting the reoccurrence of extensive cracking in plasterboard lining and other defects, including cracking in the ground floor slab and significant cracking and differential movement around its perimeter, which is particularly noticeable in the external door openings with floor slab differences of approximately 5mm being noted along the crack fault line. Mr. Murray wonders how the existence of that document could have been overlooked and the fact that it was not discovered could have passed unnoticed by everyone. He also wonders how privileged documents and documents the plaintiffs had been told were discovered in error could possibly have been thought not to be within and relevant to the discovery categories.

Mr. Lagan avers that in 2007 the first defendant was being advised by A&L Goodbody. As a general practice the first defendant, particularly himself and Mr. Cassidy, would transfer all correspondence and documents to A&L Goodbody which related to claims arising out of supply of hardcore from the first defendant. He avers that this included documents relating to claims which were made by Elliott. In or around December 2007 he instructed A&L Goodbody to transfer all files relating to these matters to the insurer's solicitors. Before making discovery, the first defendant engaged with Lennon Heather to retrieve all relevant documents so they could be reviewed before the deadline. The focus of that retrieval process was primarily on the Menolly matters and neither Mr. Lagan nor Mr. Cassidy was particularly conscious of retrieving documents relating to correspondence with Elliott which they considered a separate matter. Mr. Murray questions whether they knew what documents they were required to discover, and whether they swore affidavits of discovery purporting to comply with agreements and orders without knowing that the categories extended beyond Menolly matters.

Mr. Lagan avers that his recollection is that Lennon Heather did not specifically query the absence of such documentation. Insofar as he can recollect the first defendant only retrieved documents regarding the supply of material to Elliott but did not retrieve other types of documents such as complaints and documents relating to arrangements for testing. Mr. Murray queries how that distinction was drawn. Mr. Lagan apologises for this error which arose from a misunderstanding of the extent of the discovery categories. However, this error was later brought to the first defendant's attention by Lennon Heather and was addressed in October 2008. The plaintiffs are concerned as to what other discovery categories they were under the same misapprehension about. He questions whether there are others who made complaints who were similarly excluded from their consideration of what had to be produced.
Mr. Lagan avers that Lennon Heather asked Mr. Cassidy in October 2008 to check for documents relating to Elliott and in particular documents relating to complaints. Mr. Murray wonders whether they were asked to look for complaints from other persons. Mr. Lagan notes the email sent by Mr. Cassidy attaching 22 documents in response, and that these documents relate either to complaints from Elliott or arrangements for testing and investigations. He apologises for the omission of three of the letters furnished to the plaintiffs by Elliott, noting that they were specifically requested by Lennon Heather. He states that this occurred through an innocent oversight by Mr. Cassidy when he undertook an exercise to collate all the Elliott documentation relating to complaints. Mr. Murray submits that having regard to the history which has been uncovered of the defendants' discovery a fuller explanation might have been tendered here. In relation to the documents Mr. Cassidy gave to Lennon Heather on 11th November 2008, Mr. Murray queries how, when Lennon Heather is not a large firm, documents can be brought in for discovery in one case without there being any cross-referencing or communication between the recipients. Mr. Lagan notes that there were three further documents in the material brought in by Mr. Cassidy in November 2008 which he had not furnished in October 2008 because he had overlooked them. Mr. Murray submits that presumably he did not draw to the attention of the Hansfield team in Lennon Heather the fact that there were documents that he had not given in October 2008.
Mr. Lagan identifies the two emails in the group of eight sent by Elliott to the plaintiffs which had not been sent to Lennon Heather in October 2008, which he overlooked when reviewing his email account. Mr. Murray queries what criteria Mr. Lagan applied in identifying documents that would be produced for review and how these two emails were not produced. As outlined above, Mr. Lagan avers that as a result of overlooking these he rechecked again, with Mr. Cassidy's assistance emails which relate to Elliott to ensure that all mails in the first defendant's possession regarding Elliott had been furnished to Lennon Heather. Four further emails emerged from this review. Mr. Murray queries whether a review was conducted to see if anyone other than Elliott had made complaints. Mr. Lagan goes on to refer to the documentation from A&L Goodbody which it was presumed had been transferred to Lennon Heather. Mr. Murray wonders whether Mr. Lagan and his team saw documents that they knew were relevant and discoverable but concluded that there was no problem because Lennon Heather would have received the file from A&L Goodbody, without anyone checking with anyone else whether this had occurred. Mr. Murray submits that at some point someone in Mr. Lennon's team must have realised that they had not received the Elliott file from A&L Goodbody, and at some point someone in the latter firm must have realised that they were not instructed in the Elliott litigation.
Mr. Murray refers to Mr. Lagan's averments, detailed above, in respect of the D. O'Kane letter, and submits that it would appear to be a letter received by Mr. Lagan and produced not because he realised when he was addressing these issues that he had received it, but because A&L Goodbody had it. This is the document which gives rise to the greatest concern of all of the documents when they are considered individually. Mr. Murray queries how a discovery of complaints overlooked a complaint made and agitated on behalf of a significant customer. He outlines the contents of the letter, set out above, and queries the location of the letter attached to it regarding stone fill and aggregates used on sites. He asks whether that attached letter was ever replied to and whether Mr. Lagan met its author and, if so, whether a note was taken of the meeting. He queries whether any other documents were generated in that connection. This is the plaintiffs' only lead arising from this regarding complaints from parties other than Elliott. It is addressed in a most unsatisfactory manner.
Mr. Murray submits that there has been a breathtaking accumulation of errors on behalf of the defendants and their advisors in relation to this matter. All of these tie into basis systemic errors in the manner in which the defendants conducted their discovery, which leaves the plaintiffs unable to have confidence that proper discovery has been or will be made. In addition, the affidavits do not indicate whether there may have been other complaints, documentary evidence of which is no longer available today.
Mr. O'Callaghan submits that Dr. Maher gave evidence in respect of Ballymun and indicated that they were involved and were given access to tests.

Conclusion
There is here a significant deficiency in the discovery of the first and fifth named defendants which has arisen as a result of inadequate and deficient procedures adopted, and which fell short of the standard necessarily required by the Court.
The CPM and IGSL reports attached to the LM Developments letter of 3rd March 2008 are significant in that they indicate the views of other experts to the effect that similar defects which have arisen elsewhere in different types of development are attributable to pyritic heave. However, the letter referring to these reports was discovered in 2008. It refers to the reports and gives a synopsis of the conclusions reached. In addition, it has emerged that the plaintiffs had the IGSL report and discovered it themselves, and they accordingly no longer maintain any claim of prejudice in respect of it. It was not referred to by Dr. Maher in his cross-examination despite the suggestion that it would have assisted him in that regard. In any event, the letter which had been discovered placed the plaintiffs in a position to advise their experts that conclusions had been formed as to pyrite causation elsewhere. While this would not carry the same weight as the detailed analysis contained in the reports, it must also be borne in mind that they do not relate to the estates the subject matter of these proceedings and so, although they may be of probative value in establishing causation in this case, they do not purport to determine the cause of the damage in these estates. In addition, Dr. Maher will be recalled and can be invited to express his views in relation to the reports at that stage.
Mr. Forde had both the IGSL report and the CPM report. Even if the plaintiffs' experts were labouring under a misunderstanding to the effect that they could not use the reports because they had not been discovered by the defendants, this misunderstanding was not attributable to the defendants. In addition, although he has given evidence on a number of site visits, Mr. Forde has yet to begin his evidence in Court. Dr. Maher can also refer to the reports when he is recalled. It must be noted that the reports were provided by the defendants in April, albeit that they were not discovered until October 2009.
Similar considerations apply in relation to the Duggan Brothers letter, provided in March and discovered in October 2009, in that it too indicates a view being expressed as to pyrite causation. However, there is also a further concern in relation to this letter because of the misapplication of principle identified previously herein whereby this letter was overlooked because it was attached to a letter which post-dated the discovery. It is not stated on affidavit following an investigation that the same misapplication of principle has not occurred elsewhere. An affidavit should be sworn addressing this question.
The unfounded claims of privilege in respect of some of the documents are a cause for concern, particularly since, when these claims were challenged, it was stated that the documents were not relevant, yet later the defendants came to accept that the documents were discoverable and not privileged. Mr. Lennon has provided an explanation. The errors in this regard should not have occurred. However, a number of the documents in question, while falling within the discovery categories, are not of real assistance to the plaintiffs in that they refer merely to arrangements for testing, sampling and monitoring. There are also significant documents, most notably the O'Kane letter described above, which should have been discovered. However, this letter was given to A&L Goodbody in 2007 and it was presumed that they had transferred all documents to Lennon Heather. As appears from what has been submitted to the Court, many of the catalogue of errors that occurred in relation to discovery regarding complaints were attributable to errors on the part of the first and fifth named defendants' solicitors. That is not to say, however, that none of the errors were attributable to

the first and fifth named defendants, and this is conceded by Mr. Lagan in his affidavit. It is disturbing, for example, that a recheck revealed four emails even though an earlier recheck had already been performed. There has to be at least a suspicion that all relevant documents may not have been discovered.
The Court considers that the appropriate course is to direct further searches for documents relating to complaints, within the first and fifth named defendants, and within the remaining 'Lagan group' defendants. Further searches for such documents should also be carried out within Lennon Heather, particularly with a view to locating documents not sent to the designated email address for discovery. The respective affidavits will need to explain the procedures of investigation carried out and the results thereof. Lennon Heather should engage fully with A&L Goodbody to confirm that all discoverable documentation that came into their possession has been passed over to them. The question of documentation which may have fallen victim to the same misapplication of principle as that which occurred in respect of the Duggan Brothers letter needs to be re-examined and clarified. In addition, the issue of complaints from persons or entities other than Elliott should be addressed. The respective affidavits should schedule any discoverable documents relating to complaints which are or were previously in the possession, power or procurement of any of the defendants. Following compliance with the Court's directions I consider that there is no irreparable prejudice on this issue and the matters arising can be dealt with in evidence.

Issue V – Geoffrey Walton Documentation

Prof. Geoffrey Walton appears to have been the lead geologist advising the first named defendants in the preparation of the EIS Report in support of the planning application for the Bay Lane Quarry. The role of Prof. Walton has been touched on extensively in the evidence already tendered to the Court. Counsel for the defendants has indicated that Prof. Walton will not be attending as a witness at the trial herein. The plaintiffs' solicitors have attempted to make contact with Prof. Walton to ascertain if he would be available to meet with them with a view to giving evidence at the trial but the defendants' solicitors have raised objection to this course of action indicating that Prof. Walton is a Consultant, presently retained by the defendants.
Mr. McDonald on the plaintiffs' behalf relies extensively on the fact that initially a relatively few documents were discovered relating to Prof. Walton and his practice. Following correspondence of September 2008 and averments contained in an affidavit as sworn by Mr. Butler, Solicitor for the plaintiffs on 10th November, 2008, in support of a motion as brought by the plaintiffs at that time, Mr. Lagan swore a second supplemental affidavit in which 1,707 Geoffrey Walton documents were discovered and reference was made to two CD's of documentation furnished which initially could not be opened but which were subsequently printed off on 24th November, 2008, and 498 additional Geoffrey Walton documents were forwarded to the plaintiffs' solicitors. A small number of documents were subsequently discovered by the defendants in their third supplemental affidavit of discovery as sworn on 5th December, 2008.
The particular set of circumstances herein gives rise to two distinct issues, firstly whether the documentation discovered by the defendants clarifies as to whether or not the Whitemountain Quarries tests as carried out prior to the submission of the EIS Report were furnished to Professor Walton and secondly whether, as the plaintiffs contend, a series of correspondence discovered indicates that there had to be subsequent correspondence and in fact none has been discovered.
Mr. McDonald on the plaintiffs' behalf complains that for Mr. Lagan, in his affidavit of 2nd November, 2009, to merely repeat that all relevant documentation procured from Geoffrey Walton has previously been discovered and that there are simply no additional documents, is an unsatisfactory situation and in his submission manifestly incorrect having regard to the additional discovery which arose out of the BMA material relating to the Geoffrey Walton Practice.
In essence, Mr. O'Callaghan on the first and fifth named defendants' behalf relies on the averment of Mr. Lagan in the affidavit of 2nd November, 2009 at para. 43 when he states that all relevant documentation procured from Prof. Walton has previously been discovered and there simply are no additional documents.
In respect of the two specific documents identified from the BMA discovery, Mr. O'Callaghan relies again on Mr. Lagan's averment that the two documents did not emanate from Prof. Walton and came from another non-party to these proceedings and it is a possibility that the fax cover letters to these enclosures were not retained. Further, Mr. Lagan avers that prior to the non-party discovery process the first named defendant certainly had no record or knowledge of these two communications.
Mr. O'Callaghan urges upon the Court that the plaintiffs' complaints are general to the effect that there must be more documents and it is hard to believe that there are not more.
In respect of the nine documents as referred to which, in the plaintiffs' submission, indicate that there would have been replies thereto, Mr. O'Callaghan simply says there are no replies and that the plaintiffs are mistaken in their contention.
Mr. Lagan, in his witness statement, at para. 32 specifically refers to the position of Prof. Walton and states that he was charged with the task of carrying out a geological assessment of the rock and its suitability. He says that he was not intimately familiar with the work carried out by Prof. Walton in this regard but he knew him to be highly professional in the work he carried out. He was aware that he carried out site investigation work in or around September 1999 involving bore hole and trial pit testing. He says that it was always his understanding with Prof. Walton that if there was any issue in respect of the quality or suitability of the rock, he would have been informed. This would have either through Prof. Walton or John Gallagher. He never received any indication from either that there was a particular problem in relation to the quality of rock. Furthermore, he says he was not aware of any difficulties encountered in relation to testing or test results. In his view, neither Prof. Walton nor John Gallagher had any concerns in this regard. He had worked with Prof. Walton on many previous projects and as far as he was concerned, he was perfectly satisfied with the quality of rock and that it was suitable for the purposes required. If this was not the case, there is no doubt in Mr. Lagan's mind that he would have been informed of same.
Further in his witness statement, Mr. Lagan states that from documentation subsequently provided to him, he is now aware that there was some delay in getting certain results to Prof. Walton. He says he was not aware of this at the time. Further, Mr. Lagan states that this was not a major issue as Prof. Walton was obviously confident to stand by the planning application based on test results which came in from Whitemountain Quarries on 10th June, 2000 and further the test results that came in from Celtest in October, 2000. Mr. Lagan states that he has no reason at all to believe that Prof. Walton had any serious concerns in respect of the suitability of the rock and he categorically states that no concerns were ever raised with him or to the best of his knowledge with the other relevant personnel in the first named defendant company.

Conclusion
In my view, the defendants were at all times under a duty to engage in a process with the Geoffrey Walton Practice to ensure as far as reasonably possible that all documentation relevant to the categories of discovery has been discovered. In the first named defendant's response of the 5th October, 2009, to the plaintiffs' solicitors' correspondence, specific reference is made to the fact that the defendants have made all reasonable efforts to procure all documents relevant to the categories of discovery which are in their power and which are in the possession of those parties.
The first named defendant failed in its obligation in respect of the original discovery which was followed by the discovery of an additional 1,707 Geoffrey Walton documents and which in turn was followed by the discovery of an additional 498 Geoffrey Walton documents. The Court bears in mind Mr. Lagan's statement that Prof. Walton goes about his work in a highly professional manner. The Court is entitled to draw the inference that there would be nothing slipshod about Prof. Walton's records. The Court has a reasonably founded suspicion that full discovery may not have been made herein.
Geoffrey Walton was the geologist involved in the preparation of the EIS Report. In this regard, the period between 1st January 2000 and the completion of the planning process in June 2001 is of significance.

In my view, it is necessary for Mr. Lagan to confirm on oath, after having discussed the issue with Prof. Walton in his personal capacity and on behalf of the Geoffrey Walton Practice, as to whether or not there are any further documents not already discovered which are or were previously in the possession, power or procurement of the first and fifth named defendants relating to any tests, and in particular any Whitemountain Quarries tests, relevant to Bay Lane obtained by them between 1st January 2000 and 30th June 2001, and to discover any such documents.
I further take the view that in respect of the nine documents as outlined by Mr. McDonald in court it is appropriate that Mr. Lagan swears a further affidavit clarifying the position as regards any replies to each of the nine documents having first discussed the situation with the author of each document and with the recipient of each document and if such a course of action is not possible setting out on affidavit why it is not possible to do so and clarifying as to whether or not there was any reply to each of the nine documents, and if so discovering such documentation. Following compliance with the Court's directions I do not consider that any irreparable prejudice arises in relation to this matter.

Issue VI - TMS Environment Documentation
TMS Environment were retained by the defendants to carry out certain work in relation to the Bay Lane Quarry prior to the application for planning permission in 2000, and since that time have been involved in the ongoing environmental monitoring of the Bay Lane Quarry.
Certain documentation relating to TMS Environment was discovered initially, but subsequently on 10th February 2009 Mr. Lagan swore a fifth supplemental affidavit of discovery in relation to further TMS documents which had been "overlooked" during the collation of documents for discovery. Subsequently on 23rd February 2009 Mr. Lagan swore a further affidavit of discovery which disclosed a further significant number of TMS documents. It was explained that Dr. Imelda Shanahan had carried out a further review following which she became aware of certain documents within three folders which had been overlooked.
In the letter of the 11th August, 2009, BCM Hanby Wallace, solicitors for the plaintiffs, alleged a number of obvious gaps in the discovery made in relation to TMS documents. Significantly Mr. Ian Byrne of TMS sent an email of 6th May 2005 to Dr. Shanahan in which it was indicated that in the event of monitoring results for the Bay Lane Quarry exceeding limit values, Terry Lagan was to be copied with all correspondence. Subsequent to that email there were on the basis of the plaintiffs' submission 30 occasions on which the sulphate levels were exceeded, yet there is no communication disclosed with either the relevant site contact or Mr. Lagan.
Mr. McDonald on the plaintiffs' behalf outlined alleged obvious gaps in relation to faxes and other communications passing between the defendants and TMS. He also referred to the defendants relying on the fact of TMS being an independent entity and the reference by the defendants' solicitors to an ongoing process with TMS to ensure as far as reasonably possible that all documentation of relevance was produced. Mr. McDonald also relies on the involvement of the Lagan Group and the affidavit of Declan Canavan sworn on behalf of the second to fourth named defendants making no reference to the particular documents in question or to the queries as raised in the plaintiffs' solicitors' letter of the 11th August, 2009. Mr. McDonald relies on the fact that the defendants' various affidavits are sworn in general terms and do not deal with the particular issues that he maintains arise in respect of the TMS Environment documentation.
Mr. O'Callaghan on the first and fifth named defendants' behalf in essence relies on what he says are two clear and unambiguous averments as made by Mr. Lagan on affidavit to the Court confirming that the first defendant has searched all of its paper and electronic records, and that a cross check with TMS Environment was carried out to ensure complete discovery of all relevant records and the second averment being that Mr. Lagan confirms that a thorough search of all the defendants' paper and electronic records has been carried out and that TMS were written to seeking discovery of their relevant records.
As regards the allegation that there were a number of examples of sulphate exceedances in the water testing carried out at Bay Lane, Mr. O'Callaghan says that this is an issue that the plaintiffs can legitimately raise when Dr. Imelda Shanahan comes to give evidence, and it is also an issue that can be raised with Mr. Lagan and further, Mr. O'Callaghan suggest that the issue of further correspondence not being copied to Terry Lagan in respect of the alleged exceedances of sulphate can also be raised.
As regards the dearth of faxes passing between the first named defendant and TMS, Mr. O'Callaghan refers to the fact that most of the correspondence in respect of the EIS report and the planning application went through Geoffrey Walton, TMS, Frank Benson and at certain times with the first named defendant being copied in respect of certain documentation.
In essence, Mr. O'Callaghan submits that to allege that there is simply a dearth of correspondence does not give rise to a legitimate concern that there are documents missing.
As regards the delay in discovering the documents as raised by Dr. Shanahan, Mr. O'Callaghan refers to the averment of Mr. Lagan to the effect that on the occasion of Dr. Shanahan raising the additional material and bringing them to the attention of the first named defendant, the documentation was discovered. Mr. O'Callaghan refers to the TMS documentation being a stale issue and in conclusion submits that what is occurring is a presumption by the plaintiffs that certain documents exist which the first named defendant says on affidavit, do not exist. The evidence for the plaintiffs' allegation is based on an interpretation and speculation that further documents would have been generated.

Conclusion
The first named defendant's initial discovery was deficient and no satisfactory explanation is offered as to the late discovery of the documents in Dr. Imelda Shanahan's possession. No detailed explanation is furnished on this particular topic as to the extent of the inquiries that were made with Dr. Shanahan and whether or not such inquiries should have been sufficient to alert Dr. Shanahan to the existence of the documents located in three folders.
I do not consider that the submissions on behalf of the first and fifth named defendants satisfactorily explain why there is no documentation passing between TMS and the first named defendant as regards exceedances in limit values as the communication of the 6th May, 2005, could not be clearer in stating that should results exceed limit values, Mr. Lagan must be copied on all correspondence with the site contact. A case is made out that there was exceedance on at least thirty occasions within the discovery window period and it does not appear that the exceedances are being disputed. Accordingly, the position is that the only one exceedance in limit values as communicated to Terry Lagan has been discovered and there were no other exceedances of the limit values or there were exceedances of the limit values and they were copied to Terry Lagan and should form part of a second schedule or there were exceedances and they were not copied to Terry Lagan in breach of the direction from Mr. Byrne, Senior Environmental Consultant.
In respect of emails passing between the defendants and TMS, it does appear to the Court unlikely that there was an email of the 21st April, 2005, from Ian Byrne of TMS to Ciara Cassidy of Irish Asphalt Limited and then no subsequent email for a period of three years, and this fact gives rise to at least a suspicion that there are documents of relevance which have not been discovered.
In the Court's view it is necessary for Mr. Lagan on behalf of the first and fifth named defendants and Mr. Canavan on behalf of the second, third and fourth named defendants to clarify by way of affidavit the situation pertaining to there being no further email communication between the defendants and TMS for the three year period after the email of the 21st April, 2005, and to clarify the situation as regards exceedances in limit values and the procedure that was put in place by Ian Byrne of TMS, and if there were exceedances what has happened to the copy documentation, if the procedures in place were complied with and to further clarify the position of faxes which have not already been discovered as passing between the defendants and TMS and in particular, the queries as raised at subpara. 7(v) to (viii) of the plaintiffs' solicitors' letter of the 11th August, 2009. Any documentation which arises from the inquiries directed should be discovered. Following compliance with the Court's directions I do not consider that there is any irreparable prejudice to the plaintiffs in connection with this issue.

Issue VII - Documents relating to Frank Benson & Partners and Tom Phillips & Associates

Mr. McDonald on the plaintiffs' behalf refers to the fact that this issue raises similar problems to the TMS situation. Frank Benson & Partners/Tom Phillips & Associates were a firm of planning consultants originally retained in relation to the planning application by the defendants in respect of Bay Lane. Mr. McDonald refers to the fact that amongst the BMA documents discovered was a fax from Frank Benson & Partners to Bernard Murphy & Associates of the 26th January, 2000, and while the document itself is not of any great significance, it does expose the fact that further documents exist, which have not been discovered to date. Other documents also emerged from the BMA material, and Mr. McDonald submits that adequacy of the discovery of the defendants in respect of this aspect is very seriously called into question.

Mr. McDonald referred to the queries as raised in the plaintiffs' solicitors' letter of the 11th August, 2009, and to the fact that the only Frank Benson & Partners email discovered from a Frank Benson & Partners email account is an internal email. Twenty-four other emails involving Frank Benson & Partners were discovered, but these derive from non-Frank Benson & Partners email accounts. The single email discovered from the Frank Benson & Partners email account, is not in digital format and Mr. McDonald submits that this raises the issue of not only there being only one email, but that it is not in digital form. Mr. McDonald outlines a variety of queries that are raised in respect of the issues arising and refers to the defendants' response to the effect that to ensure complete discovery was made the first defendant searched all of its own paper records and digital archives to ensure all such documentation in the possession or power of the first defendant was discovered. The defendants also say that Frank Benson & Partners/Tom Phillips & Associates are independent entities engaged to carry out work with respect to the Bay Lane Quarry, but in this regard Mr. McDonald refers to the ongoing relationship with the firm and to the fact that Gavin Lawlor of that firm is a witness on behalf of the defendants. Mr. McDonald outlines that no satisfactory replies have been received to the issues raised in the plaintiffs' solicitors' letter. Reference is made to the fact that Mr. Lagan has averred to the fact that no documents beyond those already discovered exist and refers to the responsibility of the defendants to deal not only with documents which currently exist, but also documents which formerly existed but no longer exist.

In essence, Mr. McDonald submits that the defendants have made no attempt to engage with the detail of the plaintiffs' solicitors' letter of 11th August 2009 and no attempt is made to deal with documents which formerly existed, and it is submitted that there has been a clear failure on the part of the defendants to make discovery, and this represents a continuing breach and continuing failure on the part of the defendants.

Mr. O'Callaghan on the first and fifth named defendants' behalf, while dealing with each of the assertions as raised by Mr. McDonald, in essence, submits that the complaints raised by the plaintiffs are very vague and very general, they do not specify the basis on which they assert that there should be other communications and there is no specific document which the plaintiffs identify as giving rise to a legitimate concern that there are other documents not discovered. In effect, what the plaintiffs do is to express surprise at the situation that arises.

In relation to the particular issue of the Frank Benson documents which the plaintiffs received on discovery from BMA and which were not discovered by the defendants, Mr. O'Callaghan refers to the letter from Frank Benson to Bernard Murphy & Associates dated 26th January 2000 concerning the Bay Lane Quarry and in particular, the content thereof which reads as follows:-

"Dear Michael

> Please find attached two location maps for the above reference project. The site itself is 33.5 hectares and is located on Baylane. From the M50 take the N2 north and turn left at the very first cross junction that you come to. Continue along and take the next right (it is situated on a sharp turn to the left and looks very insignificant). That is Baylane and the site is along that road. There will most likely be horses in it. Please let me know if you have any problems with the location maps."

Mr. O'Callaghan poses the question as to whether or not the letter can have any real relevance.

In conclusion on this issue, Mr. O'Callaghan refers to the various averments of Mr. Lagan that, in effect, everything that can be done to procure discovery has been done and that Frank Benson & Partners/Tom Phillips & Associates have co-operated with the first named defendant in a lengthy process to obtain all relevant documentation held by them, but with the proviso that they are not controlled by the first named defendant.

Conclusion

There has been a deficiency in the defendants' discovery in respect of the documentation in this section. The Court requires an explanation from Mr. Lagan having discussed the issue with Gavin Lawlor of Tom Phillips & Associates as to why the letter of the 26th January, 2000, was not discovered initially and further, what direct communication led into the letter of the 26th January, 2000, and was there any reply thereto.

I take the view that because other documentation has come to light in non-party discovery which was not discovered by Frank Benson & Partners and Tom Phillips & Associates, it is appropriate that Mr. Lagan further engages with Tom Phillips & Associates so as to clarify the steps that were taken by the defendants and Tom Phillips & Associates to ensure that all relevant emails have been discovered, that all communications between the 7th October, 1999, and the 19th October, 2000, between Frank Benson & Partners and the defendants have been discovered, that all communications between Frank Benson & Partners and the Geoffrey Walton Practice have been discovered, to ensure that all communications between Tom Phillips & Associates and TMS, and all communications between Tom Phillips & Associates and the Geoffrey Walton Practice have been discovered and that all communications between 2002 and 2008 between Tom Phillips & Associates and Fingal County Council and all communications since 2003 between Tom Phillips & Associates and the defendants have been discovered.

Further the defendants are to communicate with Sarah Lovegrove of Frank Benson & Partners, John Gallagher and Michael Killeen of Meath County Council to clarify the issue pertaining to the minutes of the meeting of the 8th November, 1999, together with the minutes of any other project meetings relevant to the Bay Lane Quarry. All these matters are to be clarified on affidavit by Mr. Lagan on behalf of the first and fifth named defendants.

Following compliance with the Court's directions I do not consider that there is any irreparable prejudice to the plaintiffs in connection with this issue.

Issue VIII – Diaries

The issue relating to diaries was raised in the plaintiffs' solicitors' letter of the 11th August, 2009, at para. 50 and particular reference was made to a Mr. Pádraig Peters. The plaintiffs, in fact, were already aware that Mr. Peters had kept a diary both in the sense of maintaining a diary and of retaining it, rather than destroying it. An issue arose in the course of submissions relating to a payment of €2,000 by the plaintiffs to Mr. Peters for travelling expenses, and it is appropriate that I state that I do not consider at this point in time that any such payment has any relevance to the issue of discovery. The plaintiffs' solicitors raised the issue that in respect of various employees including Mr. Peters no diary had been discovered, and asking that such diaries now be discovered.

Mr. McDonald on the plaintiffs' behalf refers to the response as received wherein it was indicated that the first defendant had made discovery of all relevant diaries and confirmed of other individuals as named including Mr. Peters, that they had no diaries or extracts existing that ought to have been discovered. Furthermore, it was indicated that several of the individuals did maintain appointment diaries during the relevant years but it was confirmed that any such diaries have long since been destroyed at the end of the relevant

years in the normal course of events. Furthermore the contents of any such appointment diaries do not fall within the terms of any of the categories of discovery.
Mr. McDonald submits that the response on behalf of the defendants causes a number of serious concerns, principally because the plaintiffs having made contact with Mr. Peters were aware that he had diaries in his possession and this caused Mr. Lagan to admit that, in fact, the defendants had not made contact with Mr. Peters and offers an explanation that Mr. Peters had rejected Sean Cassidy's efforts to make contact with him.
Mr. McDonald queried the defendants practice of destroying dairies at the end of the relevant years and reference is made to an entry in the diary of Mr. Ciarán Reilly for the year 2008 which records an instruction to go through a 2007 diary.
Furthermore, Mr. McDonald contends that it is difficult to understand how a statement could be made that diaries fell outside the terms of any of the categories of discovery unless the content of the diaries had been considered.
Mr. McDonald refers to Mr. Lagan's affidavit of 2nd November 2009 wherein he confirms that it was not the practice to preserve diaries and that Mr. Reilly's diary was listed in the second schedule as it was no longer in existence at the time the discovery obligation arose.
Mr. McDonald submits that the generalised statement of Mr. Lagan raises more questions than it answers.
Mr. O'Callaghan in reply refers to the affidavit of Mr. Lagan wherein he sets out at considerable length the background to Mr. Peters, that he is no longer an employee of the first defendant having ceased work in July, 2007, that he has personal diaries in his own possession, that this practice of keeping diaries is at odds with the general practice of individuals in the first named defendant's employment, and that in the ordinary course of events diaries are destroyed at year end. Mr. O'Callaghan also submits that Mr. Peters's attitude of non-communication with his former employer emerged more or less contemporaneously with the payment of a large cash sum of €2,000 by way of expenses to him by the plaintiffs.
Mr. O'Callaghan acknowledges however that it should not have been stated that the defendants had received confirmation from everyone on the list as regards the position pertaining to diaries because they had no confirmation from Mr. Peters.
Mr. O'Callaghan emphasises that it was the practice to destroy diaries at year end and refers to the affidavit of Brendan O'Byrne sworn on the plaintiffs' behalf on the 21st October, 2009, wherein reference is made to Mr. Ross Senior and Mr. Ross Junior having a practice of destroying duplicate documents.
I note from Mr. McDonald's submission that it is not proposed to call Mr. Peters as a witness at the trial of the action herein.

Conclusion

It was quite properly conceded on behalf of the first and fifth named defendants that it should not have been stated that they had received confirmation from everyone on the relevant list concerning the position pertaining to diaries when, in fact, they had no confirmation from Mr. Peters. The first named defendant had to know when instructing their solicitors that they had not in fact made contact with Mr. Peters as regards his diaries. The situation that has arisen in this regard does little to inspire confidence in the first named defendant's approach to their discovery obligations. The alleged practice by the defendants of destroying dairies at the end of the relevant years does not coincide with the entry in the diary of Mr. Ciarán Reilly for the year 2008, which records an instruction to go through a 2007 diary. It is difficult to understand how a statement could be made that dairies fell outside the terms of any of the categories of discovery unless the content of the diaries had first been considered. These observations made, however, it appears to be clear following from Mr. Lagan's sworn testimony that there are now no longer any diaries available as in the ordinary course of events they are destroyed at year end, and in these circumstances I do not consider that the issue in relation to the diaries can be taken any further. I do not consider that any purpose would be served by Mr. Ciarán Reilly swearing a further affidavit, and in my view the matter is best left over to be dealt with during the course of the evidence. I do not consider that there is any irreparable prejudice to the plaintiffs in respect of this issue.

Issue IX - E-Discovery

Mr. McDonald on behalf of the plaintiffs submits that concerns regarding e-discovery arise in relation to a number of the issues raised in this motion, including Celtest documents. A number of reports from June 2007 were apparently stored electronically on Celtest's database. The plaintiffs did not receive copies of these until October 2009. No explanation was given as to why these documents were stored electronically in this way or what type of electronic storage arrangements were in place. It is not known whether hard copies of these reports were ever printed or whether hard copies were distributed, for example to the defendants' experts. Given the level of activity in June 2009 it would have been expected that copies of these reports would have been distributed widely at that time but no evidence has been given that that happened.
In addition, Mr. Lagan refers in his affidavit of 30th October 2008 to invoices being printed off from the first defendant's computer recorded system. The fact that this was considered sufficient instead of the production of the originals, which may contain handwritten notes which may be relevant, is telling in relation to the first defendant's understanding of its discovery obligations. Mr. Lagan's averments show that the defendants have a computer database, and it must be significantly complete if they could generate copies of all of the invoices they issued from it.
The BCM letter of 11th August 2009 notes that the defendants discovered 11,191 emails and privilege was claimed over 11,090 of them. Mr. McDonald submits that the fact that such a small proportion is not subject to a claim of privilege is staggering. The letter seeks discovery of all discoverable electronic documents which the defendants have not yet discovered. The letter goes on to note that 2,835 of the discovered emails were created in 2007 and 8,271 in 2008, while only 82 were created between 2000 and 2006; 63 in 2000, four in 2001, six in 2002, none in 2003, five in 2004, three in 2005 and one in 2006. Mr. McDonald submits that, in light of the number of different parties the first defendant was dealing with in relation to Bay Lane during that period, it is impossible to accept that this is the total number of emails that passed relevant to the Bay Lane quarry and relevant to the very large number of categories in the BCM letter of 10th March 2008.
BCM also note that only three emails from the Geoffrey Walton Practice (GWP) have been discovered, all of which are of the same date and addressed to Ms. Sinead Dempsey. No emails from the defendants to GWP have been discovered. In addition, only four emails between the defendants and TMS have been discovered, all subject to a claim of privilege. Mr. McDonald submits that this is impossible to understand.
BCM also note that no emails authored by Mr. Michael Lagan, and only six emails received by him, have been discovered. In addition, only one email authored by Mr. Kevin Lagan and four emails received by him have been discovered. In this regard Mr. McDonald notes that Mr. Kevin Lagan attended many of the management meetings. Only 33 emails by Mr. Terry Lagan and only 627 emails received by him have been discovered. In the letter of 11th August BCM state that the plaintiffs are entitled to full discovery and/or an explanation as to why so few documents have been discovered. The response in the Lennon Heather letter in relation to e-discovery is that the defendant performed a complete search of its digital archive, including email accounts, and that all relevant email correspondence falling within the discovery categories has been discovered. However, Mr. McDonald submits, no explanation is given as to how only 101 emails have been discovered apart from the privileged emails. The response does not reveal what kind of search was carried out, which email accounts have been looked at, who determined what was relevant as to the email correspondence, or which email correspondence was looked at. This is an inadequate response to the detail of the query raised by BCM.
Mr. Lennon's affidavit of 5th October 2009 describes the detailed query regarding discovery of emails as a general query. He avers

that the perceived gaps in this regard existed in 2008 and the plaintiffs could have raised this query sooner. He states that the defendants have nonetheless addressed these issues. Mr. McDonald questions where in the letter of the same date the defendants addressed these issues, and submits that it is wrong to suggest that this query could have been raised sooner, as the BMA discovery clearly points to documents which should be there which the defendants should have discovered. It does not make sense to say that in seven years of operations there are only 101 emails over which privilege has not been claimed. The claim of privilege arises in relation to emails created in 2007 and 2008, when the defendants say litigation was contemplated. There is no claim of privilege for earlier years, but again there are few emails discovered for those years.

In his affidavit of 20th October 2009 Mr. Butler outlines the number of emails discovered for each of the years 2000 to 2008, with none having been discovered in 2003. He goes on to note that BCM sought clarification of the meaning of the term 'digital archives'. By letter dated 14th October 2009 Lennon Heather state that their discovery team has used that phrase in a non fully technical way. They accept that digital archiving is a form of the transfer of hard copy and soft copy communications into digital format where in that digital format they can be stored digitally at the site of the author or off site. The letter states that the defendants have carried out a search of all their hard and soft copy records to ensure that all documentation in their possession or power has been discovered. Mr. McDonald queries how the search was performed, what hard copy records were looked for and where they were found. Similarly, he wonders how the defendants identified what soft copy records they had and where they are stored. He notes other questions that arise in this connection in relation to emails. None of this is explained. A general conclusion is given without any information to substantiate it. We are not told how the defendants identified what records to look at or what kind of search was performed.

The Lennon Heather letter of 14th October states that if the BCM letter of 13th October querying the use of the phrase 'digital archive' was intended to enquire whether their clients had a digital archive at their premises or elsewhere, that is not the case. The Lennon Heather letter also states that when the defendants performed a complete search of their electronic records as referred to in the letter of 5th October, it included all email accounts and all relevant email correspondence that fell within the categories of discovery that have already been discovered. However, Mr. McDonald queries whose email accounts the letter is referring to, and whether every email in those accounts was looked at. He queries what is meant by relevant email correspondence and how it was searched for.

The Lennon Heather letter states that 'electronic records' may be a more correct term than 'digital archives' for what the defendants have or have had since they commenced operations.

Mr. Butler complains in his affidavit of 20th October 2009 in relation to the brevity of the defendants' responses concerning its electronic discovery. He avers that even if it is accepted that none of the defendants has a digital archive, a proposition not confirmed on affidavit by an officer of the defendants, the defendants have not put forward the information necessary to enable the Court and the plaintiffs to assess the veracity of the assertion that the defendants have complied in full with their electronic discovery obligations. No information is given as to the manner in which the defendants purported to comply with these obligations. The search terms, if any, used by the defendants to interrogate their e-discovery are not provided. Mr. Butler also notes the dearth of emails for the period 2000 to 2006, a period of obvious significance in this case, and the absence of an explanation in this regard. He avers that the absence of explanation, and what he terms "hollow assertions" to the effect that the defendants have discovered all electronically discoverable documents, reinforces the plaintiffs' view that they have not done so and never will.

Mr. Butler also rejects the suggestion that the plaintiffs could have raised the issues in relation to this matter previously. BCM raised various issues as to the inadequacy of the defendants' e-discovery on a number of occasions and assurances were provided in that regard. In addition, Mr. Lagan swore a confirmatory affidavit of discovery on 23rd February 2009. That affidavit necessarily entailed confirmation that the defendants had complied in full with their e-discovery obligations. The veracity of that confirmation was undermined by the issues which arose subsequently, in particular after the plaintiffs learned of the failure to discover all discoverable BMA documentation.

A letter from BCM dated 23rd October 2009 states that no attachments to the 11,090 privileged emails have been scheduled, so that there may be thousands of relevant documents of whose existence the plaintiffs are unaware. The letter seeks confirmation that none of the emails listed as privileged had attachments and seeking discovery of all the attachments to these emails if they did have attachments. The letter also seeks explanations as to why five non-privileged emails were discovered without their attachments and asks for those attachments to be provided. The letter seeks a response on or before 29th October 2009. No response has yet been received.

Mr. Lagan's affidavit of 16th October 2009 does not deal with e-discovery. In his affidavit of 2nd November 2009 he avers that the concerns regarding a perceived dearth of email traffic are misplaced. He confirms that the first defendant has carried out a search of all of its electronic records and Mr. Lagan is satisfied that no other records exist. Mr. McDonald submits that he does not deal with documents which existed but no longer exist. In addition, he does not indicate what kind of search was performed. He describes the concerns about the dearth of emails as constituting speculation without merit. He avers that the quarrying business is a very low-tech, outdoor business. However, Mr. McDonald submits, we know that there are computer records sufficient to allow the defendants to print off every invoice they issued to the plaintiffs. Mr. Cassidy's statement indicates that there were computer records begun in 2003 by the first defendant of all testing carried out by themselves regarding Bay Lane. In addition, Mr. Lagan's November affidavit reveals that there must have been email accounts going back to 2000. It is therefore wrong to suggest that the first defendant operates a low tech business, yet Mr. Lagan seems to be saying that computer records are not something the first defendant is likely to have.

Mr. Lagan avers that the quarrying end of the business operates on an extremely basic business model and did not generate email traffic of any volume or significance before the threat of these proceedings. Many of the employees or sub-contractors of the first defendant who were directly responsible for the day-to-day operation of the Bay Lane quarry or similar businesses would not have had any call to utilise electronic communications such as email. He avers that at the material times email was not widely used by members of the first defendant's staff, in particular operational employees. Informal methods of communication were preferred. Mr. McDonald submits that this shows that email was used because Mr. Lagan avers that it was not widely used. In addition, he only asserts that it was not widely used by members of the staff but does not deal with people such as himself, a director of the company. We know from consideration of the TMS issue that TMS were to copy Mr. Lagan himself on any occasion when the sulphate levels, for example, were exceeded. This affidavit therefore only tells the Court a very small part of the story.

Mr. Lagan avers that insofar as there is more email traffic at or before the opening of the quarry in 2000 which falls off considerably thereafter, this is simply because the pre-opening phase of any quarry required a greater degree of management level participation. Thereafter, once a quarry is up-and-running, it requires minimal management intervention. This is particularly so when, as with Bay Lane, the production functions were outsourced to a third party operator. He avers that it is entirely unsurprising that email traffic increased very considerably after the emergence of allegations regarding pyrite and subsequent litigation in 2006 and thereafter. Mr. McDonald queries the reference to 2006 as the pyrite issues emerged in 2007.

As noted above, Mr. Lagan refers in his November affidavit to a search of all the first defendant's electronic records having been carried out. However, counsel for the first and fifth defendants previously stated that they did not use electronic searching but rather looked at the documents. Counsel also stated that the defendants had not used key words but had looked at each of the documents. Mr. Lagan does not say this. Whether or not the search was complete he does not give details of what the complete search comprised. He does not say which documents were looked at and does not indicate, as the above noted submissions of counsel for the defendants seemed to suggest, that the defendants are saying that they looked at every hard and soft copy document that they had to determine what was relevant. Mr. McDonald wonders how Mr. Lagan organised a search, what it involved and what documents

were examined in the course of it. He also queries what decisions were made during the search, what sources of documents were identified and looked at, and how was the process of identification carried out. He submits that these basic questions have not been addressed and arise very strikingly in view of the dearth of emails prior to 2007.
Very serious questions also remain to be answered as to what the second, third and fourth defendants did. In his affidavit of 9th November 2009 Mr. Canavan states that he has considered Mr. Butler's affidavit of 20th October 2009 and has carefully reviewed the correspondence from BCM dated 11th August and 9th September. He avers that on the advice of Lennon Heather he spent the weekend of 30th October to 1st November 2009 carrying out enquiries and reviewing the paper and electronic files of the Northern Ireland companies to ascertain whether they have in their possession, power or procurement any further documentation. Mr. McDonald highlights the reference to the weekend and queries which enquiries and which paper and electronic files Mr. Canavan is referring to. He also notes the use of the word 'have' in relation to documents in their possession, power or procurement. Mr. Canavan also avers that he contacted specific employees of the Northern Ireland companies to ascertain if they had relevant further documentation. Mr. McDonald questions which employees he is referring to. Mr. Canavan avers that he found no further documentation coming within the discovery categories which are referred to in the BCM correspondence or Mr. Butler's affidavit. Mr. McDonald submits that every question he raised as to Mr. Lagan's affidavit applies equally to Mr. Canavan's. Again, the Northern Ireland companies do not attempt to deal with documents they formerly had in their possession or power. No search seems to have been undertaken with that in mind.
The evidence shows that the e-discovery of all of the defendants is lacking. The Court has not been given the full picture and cannot assess whether full electronic discovery has been made because of the entirely general and unsatisfactory way in which the defendants have purported to deal with it. Serious issues were raised in the letter of 11th August and that letter identified a proper basis but those issues were not responded to on behalf of the defendants. Basic information is withheld from the Court even in December 2009, four months after these issues were originally raised.
Mr. O'Callaghan, on behalf of the first and fifth defendants, submits that Mr. McDonald, in referring to the first defendant having a computer database on which it kept its invoices, is conflating two separate issues. E-discovery relates to the discovery and search for relevant documents stored within electronically stored information. Computer databases which store invoices are different. Every company is going to have such a database, but the issue here is the extent to which electronically stored information and emails have been discovered.
In relation to the alleged dearth of emails, Mr. O'Callaghan refers to a table indicating the number of faxes and letters discovered by the first defendant for the each year from 2000 to 2006. There are 249 faxes and 147 letters for 2000; 65 faxes and 72 letters for 2001; 37 faxes and 55 letters for 2002; seven faxes and 41 letters for 2003; seven faxes and 12 letters for 2004; nine faxes and 10 letters for 2005; and four faxes and nine letters for 2006. Mr. O'Callaghan submits that this reveals that most documents were created in respect of Bay Lane quarry at the time it was applying planning permission in 2000. This is also something that has been stated on affidavit. The table also shows, considering that 101 emails were discovered for the years 2000 to 2006, that the first defendant predominantly communicated with people through fax and letter rather than email. It is clear from documentation relating to Geoffrey Walton and to TMS and Frank Benson that many individuals who used email in 2000 did not use email when communicating with the first defendant. When Geoffrey Walton was sending a fax to the first defendant that fax would contain a reference to it being copied by email to others such as TMS and Frank Benson.
Mr. O'Callaghan refers to the response, outlined previously herein, contained in the Lennon Heather letter of 5th October responding to the query regarding e-discovery. He also refers to the passage, detailed above, in the letter of 14th October from Lennon Heather dealing with the use of the phrase 'digital archives'. In addition, he cites the portion set out above from Mr. Lagan's affidavit of 2nd November 2009 concerning e-discovery. Mr. O'Callaghan submits that the averment that the email traffic falls off considerably after the opening of the quarry in 2000 because the pre-opening phase requires more management participation is supported by the table of faxes and letters. In respect of faxes and letters there was a considerable amount of communication in 2000 and it fell off considerably thereafter.
The plaintiffs complain that the first defendant has not indicated what type of search was used to check its emails. However, Mr. O'Callaghan submits that while the first defendant has not provided an excessively lengthy explanation, a succinct and comprehensible explanation has been provided. In this regard he cites the relevant passage, detailed previously herein, of the letter of 5th October. In addition, he submits that the letter of 14th October explaining the use of the phrase 'digital archives' gives a more detailed explanation, outlined above, as to the nature of the search performed. Emphasis is placed on the statement in the letter that the defendants carried out a search of all of their hard and soft copy records to ensure that all documentation in their possession or power has been discovered. Mr. O'Callaghan submits that this paragraph does not state that the defendants were using search terms but states that they searched all of their soft copy records. He also refers to a further passage, outlined above, regarding email accounts and email correspondence. In addition, refers to Mr. Lagan's affidavit of 2nd November 2009 wherein he states that the first defendant carried out a search of all of its electronic records, and that he is satisfied that no other records exist.
Mr. O'Callaghan submits that part of the reason why this is an issue in the present motion is because of the e-discovery issues relating to the plaintiffs' discovery. However, the extent of the e-discovery the plaintiffs had to search through and the relevance of documents in that e-discovery is considerably greater than what would be the case for the first defendant, because only part of its business relates to this particular quarry. The plaintiffs, on the other hand, obviously have a considerable amount of e-discovery documentation. The relevance of their e-discovery would be much broader considering the nature of the allegations in the defence. Mr. O'Callaghan submits that there is no basis for the suggestion that there is a large body of electronic documents within the first defendant which have not been searched. They have stated on affidavit that they have been searched and they have no further documents to discover.
In addition, the complaints about e-discovery and the absence of emails could have been raised in February 2009.
Mr. Murray, in reply, submits that the plaintiffs have provided a complete explanation of what they did in relation to e-discovery. The plaintiffs' points about the paucity of electronic documents relate not only to emails but to any documents stored electronically. Mr. Murray highlights some of the figures set out above in relation to the discovery of emails. The issue cuts across a range of categories with which the plaintiffs have a difficulty. The figures are explained in a summary and unsatisfactory manner by a very general assertion that the quarrying business is low-tech and outdoor. That misses the point. Some of them were using email, some of their agents were using it and they have referred on affidavit to their electronically maintained email database, so electronic information is there.
Mr. Murray submits that an exercise in explaining how a party's e-discovery has been carried out involves identifying the people who would have documents, the computers on which those documents are likely to be found, the people who were sending emails and those who were receiving emails. It involves identifying whether electronic information was backed up and, if so, where, and identifying the server if computers were networked and there was a server. The sources of likely discoverable information are identified and then reviewed. This issue of reviewing them is the key deficiency in the explanations given. Mr. Murray identifies a number of ways in which such a review could be carried out. Between locating where the electronic material is and deciding which of it to discover, you decide how you will review it. We still do not know how the defendants reviewed their e-discovery. Particularly in view of the defendants' complaints relating to the plaintiffs' methodology, the plaintiffs do not understand why this is not explained. Mr. Murray queries whether the Court can conclude that the defendants have complied with the requirements contained in the Servient document they put forward, whatever the status of that document.
Mr. Murray refers to the response relating to e-discovery in the Lennon Heather letter of 5th October. However, he wonders what the search entailed. They may have looked at every piece of information they have maintained electronically, which would resolve any

complaint, but they do not say that and it is highly unlikely. They must have applied a rule to identify what material they would review to determine what was relevant.
Mr. Murray cites passages from the Lennon Heather letter of 14th October. He notes the statement that they have carried out a search of all their hard and soft copy records but wonders what the search was and what criteria were used. In relation to Mr. Lagan's affidavit of 2nd November, we are again expected to accept very general, non-descriptive averments as to what the defendants did.
Mr. O'Callaghan stated that the only part of his clients' business related to the Bay Lane quarry. That does not mean that there is only one source to look at for e-discovery. The categories of discovery extend across potential locations of electronic information other than the Bay Lane computer or Ms. Cassidy's or Mr. Lagan's computer. This perhaps underscores that absent a very clear statement as to what search was applied, it is impossible to be confident, having regard to the particular events that have occurred in this discovery, that complete discovery was made. That obligation extends beyond the defendants and includes their agents, including Bensons', Geoffrey Walton, TMS and A&L Goodbody. Mr. Murray wonders what searches were undertaken to ensure that complete e-discovery was made.
Mr. Murray refers to the BCM letter of 23rd October outlined above in relation to attachments to emails. A response was sought by 29th October and the plaintiffs do not understand why it has not been responded to. This letter accentuates the plaintiffs' concerns regarding the information provided about this issue. Mr. Murray also refers to the Mr. Canavan's affidavit of 9th November. He highlights the fact that Mr. Canavan refers to having spent a weekend carrying out enquiries and reviewing files. He submits that Mr. Canavan's explanation of what has been done is unacceptable in view of the number and significance of the issues raised and in view of the relationship between the companies according to themselves. Two or three days were spent by one person reviewing unspecified paper and electronic files. The affidavit does not say he looked at anyone's personal computers, laptops or stored electronic information. Mr. Canavan does not state the identity of the employees he spoke to or what documents they were asked to look for.
Mr. O'Moore refers to the issue concerning attachments identified in the letter of 23rd October and requests a response to that letter and a scheduling of the attachments before the challenge to privilege is heard by McKechnie J. Mr. O'Neill states that the exercise is a monumental one but it will be done by 15th January 2010. Mr. O'Moore is agreeable to that date.

Conclusion
It has been submitted that the small number of non-privileged emails in comparison to the number of privileged emails is striking, but it is not for the Court on this motion to determine the propriety of the privilege asserted. The fact that only 82 of the 11,191 emails relate to the period from 2000 to 2006 is surprising. However, an explanation has been provided on affidavit to the effect that the increased email activity for 2007 and thereafter is attributable to the raising of the pyrite issue and subsequent litigation. In addition, a considerable number of letters and faxes have been discovered for the relevant period. It would appear from the figures detailed above that communication was predominantly by these means rather than by email. Mr. Lagan avers that email was not widely used during the relevant period but does not deny that it was used. However, the paucity of email traffic for the period 2000 to 2006 is not inconsistent with this, and some emails have been discovered for the period, albeit only a small number. In addition, the decrease in the number of emails after 2000 is consistent with the situation in relation to letters and faxes, and an explanation concerning the level of management involvement after the opening of a quarry has been provided for this. Accordingly, the Court is not satisfied that there has been a failure in regard to the discovery of emails.
In relation to e-discovery generally, the plaintiffs have submitted that there is a lack of detail in the explanations given and that in such circumstances it is not possible to be confident that full discovery has been made. However, Lennon Heather have provided assurances in relation to the completeness of the e-discovery. In addition, Mr. Lagan has averred that the first defendant has carried out a search of all of the first defendant's electronic records and he is satisfied that no other records exist. There is no basis on which the Court might look behind that averment, save in relation to minutes, in respect of which such a basis does appear. This issue is addressed below herein. Accordingly, the Court is not satisfied that there has been a failure in respect of e-discovery.

Issue X - Invoices
Mr. McDonald on behalf of the plaintiffs submits that the defendants made discovery of invoices by reference to copies produced from their electronic records. This would never have come to light had Mr. Butler, the plaintiffs' solicitor, not noticed that invoices for early years going back to 2003 bore an SGS certification logo. In addition, the defendants discovered their invoices in general terms. Their invoices have never been individually listed in the affidavit of discovery. Because of the issue that now arises as a consequence of the defendants' decision the plaintiffs say it behoves the defendants now to list each individual invoice so that there can be no doubt about what invoices existed. It is fairly straightforward and the defendants are resisting doing it. Keane CJ in *Flood v. Lawlor* [2002] 3 I.R. 67 identified the importance of individually listing documents in a schedule to an affidavit of discovery.
A letter from BCM dated 11th August 2009 notes the discovery of invoices which Mr. Lagan admitted in affidavits of 30th October and 22nd December 2008 had been printed off on 2008 invoice paper. Original authentic invoices were made available for inspection in December 2008. By letter of January 2009 BCM asked the defendants to remove the inauthentic invoices from the summation database and upload the authentic ones or at the very least a sample thereof. BCM sought the removal of the invoices bearing the SGS logo on the front and current terms and conditions on the reverse where inappropriate to the date of the invoice.
The terms and conditions are important in view of the defence being advanced, and clearly it is the relevant terms and conditions which were attached to any original invoice that should be discovered.
The letter of 11th August 2009 notes that it was confirmed on the defendants' behalf that the original invoices were being scanned onto summation. They were provided in a separate summation case. They were not discovered and the plaintiffs had no reason to believe any invoices other than a correct copy of the originals which should have been uploaded onto summation in July 2008 had been given to them. Mr. Lagan had averred in his affidavit of 30th October 2008 that "[t]he invoices produced to date are not originals, but are replications of the originals generated from our computer database". The plaintiffs were therefore very surprised to find that the summation case furnished in January 2009 contains invoices not previously furnished or discovered, including 14 invoices to FS Developments, 12 of which record deliveries to Drynam and Beaupark. The said invoices have not yet been discovered by the defendants.
In his affidavit of 30th October 2008, Mr. Lagan refers to the gargantuan task to produce the originals and states that consequently the invoices produced to date are replications of the originals. He states that they are identical to the originals save that the current headed paper now in use contains an SGS logo, which only began to appear on invoices from 2005.
As an illustration, Mr. McDonald compared an original hard copy invoice to its electronic reproduction. Both bear the same date, invoice number, account number and site reference ("Deliver Kinsealy"). However, while the original carries NSAI certification, the electronic version carries an SGS logo, and an UKAS logo which is a form of UK accreditation. In addition, this version does not give the name FS Developments, and the address is also different.
Lennon Heather, in dealing with the 14 FS Developments invoices not previously discovered, stated that they were discovered. However, the plaintiffs would not have been aware of that because the name FS Developments was not on them. FS Developments was the contractor responsible for building the roads in Drynam and possibly also Beaupark, so it would have been of importance for the plaintiffs to know that these invoices were addressed to FS Developments. The Lennon Heather letter acknowledges that the recipient name was missing and states that this was due to an administrative error that occurred prior to the discovery process commencing, but this error is not explained. Lennon Heather identify where these invoices are to be found on summation and state

that the invoices were repeated from the initial discovery in the summation case "Defendants' Omnibus" and again in the summation case "Defendants' Sales Invoices". They accept in their letter that two invoices are not properly accounted for, one having been discovered in the former of these summation cases but not the latter, the other having been included in the latter but not the former. They state that it is suggested that in a manual operation involving several thousand invoices, these two were missed due to human error. Lennon Heather go on to say that it is not possible to delete the soft copy invoices once the discovery case on summation goes live.
However, this does not deal with the request to list each of the invoices that had been discovered. Had the defendants done what they should have done at the beginning by discovering the originals, this would not have happened. The plaintiffs would have seen the name FS Developments on the relevant invoices.
In his affidavit of 5th October 2009 Mr. Lennon notes that the plaintiffs stated that they were very surprised to find apparent discrepancies with respect to invoices appearing on a special summation case in January 2009. He avers that it is hard to understand how this could be a particular concern for the plaintiffs as no attempt was made to raise the issue previously.
In his affidavit of 20th October 2009 Mr. Butler avers that it is clear that the defendants have not made adequate discovery of relevant invoices. He refers to BCM's letter of 11th August seeking discovery of all invoices falling within the discovery categories and not yet discovered. He refers to Mr. Lennon's reply in relation to the 14 FS Developments invoices but states that Mr. Lennon failed to confirm that the defendants would discover all of the invoices not yet discovered including those in the "Defendants' Sales Invoices" database which comprises 3,276 invoices. Mr. Lennon notes that purported copies were discovered but were not in fact copies of the originals, and that the "Sales Invoices" database which contained copies of original invoices was furnished to BCM in January 2009 but the originals in this database were not discovered.
In July 2008, infill delivery invoices were scheduled by reference to particular periods from January 2003 to December 2006. The individual invoices were not scheduled. Purported invoices were furnished on DVD in July 2008 and were loaded onto summation. All of them, regardless of date, contained an SGS logo despite the fact that there was no evidence of SGS certification before 2005. BCM noted during an inspection in September 2008 that all of the purported invoices produced to them had terms and conditions appropriate to 2007/2008 on the reverse. The reverse side of these documents had not been scanned by the defendants when provided on DVD. By letter of 29th September 2008 BCM noted the UKAS/SGS issue and the fact that the invoices provided by the defendants differed from the invoices actually furnished to the plaintiffs and which the plaintiffs had discovered to the defendants. The BCM letter stated that it appeared that the defendants had not provided copies of the originals but had printed off copies of them on their 2008 headed invoice paper. The terms and conditions issue was also noted in the letter.
In a letter dated 13th October 2009 Lennon Heather stated that the first defendant was accredited with NSAI up to 2005 and became accredited with SGS in May 2005. The invoices discovered were print-offs from the defendants' system and as such were printed on current headed paper which incorporates the SGS logo. When the invoices were generated the SGS logo would not have appeared on them. The letter adds that all originals are now available for inspection to certify that this logo was not on the originals. A letter from BCM dated 17th October 2008 expressed a wish to inspect the originals and requested that the matter would be addressed at length in the supplemental affidavit to be sworn on behalf of the defendants. Mr. Butler then refers to Mr. Lagan's response in his affidavit of 30th October 2008, detailed above.
In his affidavit of 10th November 2008 Mr. Butler stated regarding discovery category 8 that the issues raised had been dealt with and nothing further appeared to arise. However, it became evident from an inspection of original invoices at the offices of Lennon Heather in December 2008 that none of the originals dated prior to late 2007 had terms and conditions on the reverse. BCM wrote to Lennon Heather in December 2008 noting this revelation and stating that the defendants were deeply concerned about this development in circumstances where the invoices furnished to them in discovery in July 2008 dated as far back as 2003 had terms and conditions on the reverse.
Mr. McDonald refers to an invoice with conditions attached, including condition 11, a purported limitation of liability clause. Since the defendants are relying on this limitation of liability clause, it would be of advantage to them to prove that the terms and conditions on their invoices as delivered to the plaintiffs contained a limitation of liability clause. In fact there were no terms and conditions on the reverse of the invoices during the relevant period from 2003 to 2006 when product was being delivered to the plaintiffs. Mr. McDonald submits that this identifies an incentive for the defendants to do what they did in July 2008 rather than set about what Mr. Lagan described as the gargantuan task of identifying and producing the originals.
The plaintiffs have discovered, in their more recent discovery, a credit note and an invoice with earlier terms and conditions on the reverse. The limitation of liability clause in these earlier terms and conditions is in a less advantageous form to the defendants than clause 11. The earlier clause limits the liability to the cost of replacing the infill. It is significant that that credit note and invoice have not been discovered by the defendants, because if they had used their database to print off all relevant invoices and all relevant credit notes as they contend when they originally made the discovery in July 2008 this invoice and credit note would surely also have been printed off at that time. These two documents are from the latter half of 2004. That identifies a significant additional issue that arises regarding the adequacy of the defendants' electronic discovery.
In his affidavit of 22nd December 2008 Mr. Lagan refers to his affidavit dated 30th October 2008 and states that the invoices were printed on the 2008 headed paper and consequently any amendments to the headed paper would have been reflected on the invoice. He states that he then went on to clarify the position regarding the SGS logo as this was on the face of the invoice and the defendants believed the plaintiffs were seeking discovery of these documents on the basis of the relevance of the data on the face of the invoice. He avers that all invoices generated by the defendants were furnished through discovery to identify their customer and the products ordered, as such the date on the face of the invoice being the relevant information. The printing of the terms and conditions on the reverse side has been a practice since approximately September 2007. He states that this has not prejudiced the plaintiffs. They were already aware of the first defendant's position as to where the conditions on which it relies are to be found. The plaintiffs' Notice for Particulars of February 2008 asks the defendants to state where the conditions are to be found. In their Replies, the defendants state that they are to be found on the back of the original quote and subsequent price notifications, and that the delivery docket furnished to the plaintiffs with the delivery of quarry material states "This material is sold subject to the terms and conditions available on request". Mr. Lagan avers that in any event the plaintiffs would have been furnished with a copy of the original invoice and delivery docket at the time of supply of the product, so they could easily ascertain whether the terms and conditions were on the originals.
Mr. Butler avers that it became apparent that the defendants had neither discovered the originals inspected on 5th December 2008 nor included them in the "Defendants' Omnibus" database. Following further correspondence, Lennon Heather furnished a "Defendants' Sales Invoice" database which was uploaded onto the BCM server on 2nd February 2009. It became apparent from a review of this database that it contained 14 FS Developments invoices. No such invoices could be located in the Omnibus case. Mr. Butler refers to the response from Lennon Heather regarding these 14 invoices. Mr. Butler states that the problem lies in the defendants' failure to discover the original invoices. In these circumstances and having regard to the issues regarding the BMA documentation, it was clearly necessary to require the defendants to discover and correctly schedule all of the originals which they were required to discover. The defendants' latest position regarding invoices, as set out in the Lennon Heather letter of 5th October 2009, reinforces the significance of the ongoing failure of the defendants. Mr. Butler avers that the matter has not been remedied in Mr. Lagan's seventh supplemental affidavit dated 16th October 2009.
In his affidavit of 2nd November 2009 Mr. Lagan states that it is quite incorrect to say that the first defendant has not made adequate discovery of all relevant invoices. Mr. Butler's criticisms amount to a rehearsal of matters raised and dealt with in late 2008. The persisting complaints are of form over substance and no prejudice can be attributed to them. Mr. Lagan further avers that the

plaintiffs are well aware since October 2008 that all of the invoices were initially discovered by re-printing soft copies on current headed notepaper and it is these which were scheduled to the original discovery affidavit and scanned onto summation, where they are located in the "Defendants' Omnibus" database. He states that on 30th October 2008 he explained that the first defendant initially believed reprinted copies of the soft copy originals would suffice. He also explained that these were identical in every way to the originals, save that the earlier headed paper would have been used for the hard copy version. Inspection of the originals was offered and availed of.
Mr. McDonald points to an invoice to which he referred earlier, noting that in the version provided in 2009 the addressee is given as FS Developments Ltd. and an accompanying address is stated. Again, the name FS Developments Ltd. does not appear on the electronic version, and an entirely different address in another part of Dublin is given. The difference between the two versions has never been explained and Mr. Lagan would have us believe that they are the same. The plaintiffs contend that this must be dealt with by having all of the originals scheduled to an affidavit of discovery.
Mr. Lagan avers that these original hard copy invoices were subsequently scanned and uploaded onto summation and were uploaded onto BCM's server on 2nd February 2009. This drew no comment until August 2009 when the plaintiffs sought material to sustain what he believes is a retaliatory motion to distract from their own default of discovery.
Mr. McDonald does not believe the issues raised in this motion could be said to raise no significant concerns as to the defendants' discovery. However, this appears to be Mr. Lagan's attitude as to the deficiencies in their discovery, that they are concerns imagined to distract attention from the plaintiffs' default.
Mr. Lagan avers that the plaintiffs now object that a fresh affidavit of discovery, which was never sought, scheduling all the same dates and details as correlate to the invoices discovered in July 2008, was not sworn in respect of the contents of the "Sales Invoices" database whose only difference is the notepaper on which the invoices are printed. Mr. Lagan avers that, contrary to Mr. Butler's assertion, confusion relating to 14 FS Developments invoices is not attributable to the distinction between the soft and hard copy invoices. He states that Lennon Heather explained that on 5th October 2009 that these documents were discovered from the outset, albeit that the recipient name was omitted and schedules due to a data entry error. In all cases the first line of the company's registered address occupied the place where the entry for recipient should have been. This error has nothing to do with the decision to print off soft copy versions rather than retrieve originals from scattered locations.
Mr. McDonald submits that Mr. Butler is plainly wrong in suggesting that Mr. Butler's averment is incorrect. This problem would not have arisen had the defendants discovered the originals from the outset as they should have done. They were required to deliver the originals, not soft copies or print-offs. Those originals have never been scheduled to an affidavit of discovery. The plaintiffs are in a very unsatisfactory position. For instance, there are 14 FS Developments invoices that have never been scheduled to the affidavit of discovery and described by reference to their true addressee, the relevant details relating to the originals of these invoices are not in the defendants' discovery. The response from Lennon Heather simply says that certain unnamed invoices are the same as these FS Developments invoices. That should be dealt with on affidavit. All the plaintiffs seek is a schedule of the original invoices. If the defendants were agreeable, that would be the end of the issue.
Mr. O'Callaghan on behalf of the first and fifth defendants submits that the extent of the complaint now made in relation to invoices is that the plaintiffs want a schedule discovering the originals, but when the issue was first raised on 11th August 2009 the complaints were broader. Some of the complaints were resolved by the defendants.
The defendants say that the reference to the 14 FS Developments invoices was first a complaint first raised on 11th August 2009 and that the other issues about the inadequacy of the invoices and the manner in which they were discovered were old complaints.
Mr. O'Callaghan refers to the portion of the letter from Lennon Heather dated 5th October 2009 relating to the 14 invoices. As noted above, this letter also states that it is not possible for the first defendant to delete the earlier soft copy invoices.
Because the defendants provided the answers to the FS Developments issue, the plaintiffs now return to an old grievance the defendants believed they had left behind. Mr. O'Callaghan refers to the paragraph of Mr. Lagan's affidavit of 30th October 2009 referring to the defendants' belief that printed invoices from the computer system would suffice; stating that it would have been a gargantuan task to provide all the invoices; and noting the use of current headed paper and the SGS logo thereon. Again, the originals were later inspected and following further queries from the plaintiffs the affidavit of 22nd December 2008 was sworn. Mr. O'Callaghan refers to the portion of that affidavit dealt with above in which Mr. Lagan clarifies the position in relation to invoices. The plaintiffs' motion was issued subsequent to the swearing of that affidavit but the plaintiffs did not pursue the invoices issue further until the letter of 11th August 2009. Mr. O'Callaghan also refers to the response of Mr. Lagan to the invoices complaint in his affidavit of 2nd November 2009 set out above.
Counsel also clarifies, while acknowledging that it is not on affidavit, that the reason for the change in the address referred to by Mr. McDonald is that FS Developments moved to another address.
It is submitted that this issue gives the Court an overview of many of the complaints in this application. This complaint was raised and dealt with in 2008. The plaintiffs appeared to be satisfied with the solution provided by the defendants and raised no suggestion of a complaint from the commencement of the trial on 23rd February until 11th August 2009. The defendants say they are now putting up straw men to seek to point out some default in the defendants' discovery. If the Court directs that a schedule be sworn, the defendants would have no difficulty with that and would of course abide by the Court's order. However, in light of what has happened and in light of the plaintiffs' acceptance of the current situation and the fact that they have inspected the originals, the defendants say the complaint is a stale one manufactured to bolster this application. The plaintiffs inspected the original invoices on 5th December 2008 and can inspect them again. If the Court directs that a schedule should be compiled, the original copy invoices will be the ones that will be scheduled, because the original would have gone to the plaintiffs in the first place.
Mr. McDonald notes that it is not only invoices sent to the plaintiffs, but also invoices sent to third parties, including FS Developments. Again, the defendants received a summation database in January 2009 with references to these FS Developments invoices for the first time. They have never been dealt with on discovery.
Mr. O'Callaghan is unsure whether copy original invoices will be copies of the originals as sent to purchasers. He refers to the issue regarding terms and conditions and notes that the plaintiffs accept that they received some terms and conditions. Mr. McDonald notes that what the plaintiffs have acknowledged is that they received one invoice significantly after the beginning of the works with terms and conditions on the back. They also received a credit note with terms and conditions on the back. There is also an issue relating to documents stating that the delivery is subject to terms and conditions which are available.
The defendants submit that it is not as though they refused to provide a schedule for months due to a request from the plaintiffs. The plaintiffs reignite this request on 11th August and seek to justify that on the basis of the FS Developments invoices. Again, the defendants say this is part of the manufacture of issues for this application.
On behalf of the second, third and fourth defendants, Mr. Breslin submits that the invoices are Irish Asphalt invoices and have nothing to do with the Northern Ireland companies.

Conclusion
The defendants failed to fulfil their discovery obligations in respect of invoices. They provided electronic copies which differed from the originals in relation to SGS certification, the presence of terms and conditions on the reverse and, in the case of a number of the invoices, the absence of the recipient's name in the electronic version. Mr. Lagan has offered explanations on affidavit for the discrepancies and the original invoices have been made available for inspection. Nevertheless, as Mr. McDonald pointed out, the discrepancies would not have come to light but for the detective work carried out by the plaintiffs' solicitors. In addition, although Mr. Lagan referred to the use of current headed notepaper in his affidavit of 30th October 2008, he also stated that the copy invoices

were identical in every way to the originals save for the SGS certification. In view of the terms and conditions issue, this was not the case. He explains in his affidavit of 22nd December 2008 that the defendants believed that the plaintiffs were interested in the data on the face of the invoice, whereas he avers that the terms and conditions were on the back of invoices printed on current headed paper. He also avers that the true position in this regard would have been easily ascertainable as the plaintiffs had the originals and the Replies to Particulars stated the documents on which the terms and conditions were to be found. This goes some way toward addressing the matter, but it does not warrant the earlier averment that the electronic versions were identical to the originals save as regards the SGS logo, and the reference to current headed paper in the affidavit of October 2008 does not cure the inaccuracy as it does not address the discrepancy this gave rise to regarding terms and conditions. Not only were the original and electronic versions not identical, but they differed in a potentially important respect, in that the terms and conditions are relied upon by the defendants in these proceedings as limiting the extent of any liability that may attach to them. The plaintiffs could have been led into error by the incorrect averment.
The plaintiffs have now seen the originals. Although they remain dissatisfied with the discovery of invoices, the issue does not appear to be a major one. The discrepancies have been cleared up and the plaintiffs do not appear to have been prejudiced by the failure to discover the originals at the appropriate time. However, the plaintiffs seek a schedule specifically discovering each individual original invoice. The defendants have stated through their counsel that they would have no difficulty with compiling a schedule if the Court so directs, although they would be original copy invoices as the plaintiffs would have received those of the originals which were sent to them in the first place. Counsel for the plaintiffs accepted that if the defendants agreed to provide a schedule that would be the end of the matter in relation to invoices. Accordingly, the Court will direct that a schedule specifically discovering each individual original invoice, or a true copy of same where the original is not within the possession, power or procurement of the defendants, is to be sworn on behalf of the defendants.

Issue XI – Correspondence with Purchasers of Material from the Bay Lane Quarry
This issue arises out of a letter written in July, 2007 to customers of Irish Asphalt Limited in which it was stated, *inter alia*, as follows:-

> "Pyrite is present in one of our quarries located at Baylane, County Dublin. We wish to clarify to you that due to the expansive properties of pyrite under certain conditions materials containing pyrite should not be used in the following circumstances;
>
> 1. As underfloor infill in any building whether residential or otherwise; or
> 2. Within 500mm of any concrete or steel structure."

Mr. McDonald on the plaintiffs' behalf refers to the affidavit of Mr. Butler of the 20th October, 2009, wherein he refers extensively to the 88 significant customers of the defendants quarry and that in circumstances where stone aggregate is routinely used as underfloor infill and often within 500mm of concrete or steel structures, the content of the first named defendants letter would have been expected to have caused consternation amongst purchasers of the material and that a flurry of correspondence would have ensued, and Mr. McDonald submits that this is a very fair comment and he considers that any builder who received a letter of this nature would undoubtedly be very concerned if he had, in fact, used the infill for either of the two purposes that he's now told the infill cannot be used for.
Mr. McDonald further refers to the fact that the extent of the documentation which ought to have been discovered by the defendants is further underlined by the fact that of the 88 principal customers of the quarry identified by the plaintiffs, a review of the defendants discovery to date indicates that a version of the July, 2007 letter issued to at least 45 of the first named defendant's customers of the Bay Lane Quarry. Notwithstanding this situation until the swearing of the seventh supplemental affidavit of Mr. Lagan on the 16th October, 2009, the defendants discovery did not reveal a single letter, fax, email or any other form of correspondence from any of the aforesaid companies in direct response to the July, 2007 letter. In the seventh supplemental affidavit of discovery, Mr. Lagan discovers in the first schedule first part a single instance of a direct response to the defendants July, 2007 letter from Patrick Elliott of James Elliott Construction addressed to Sean Cassidy and copied to Terry Lagan dated the 28th August, 2008.
Mr. McDonald refers to this fact being disturbing as this is the only instance of a direct response to the defendants letter of July, 2007 present in the defendants discovery.
Mr. McDonald refers extensively to averments of Mr. Butler surrounding the discovery issues, concluding with the view that the defendants have not and will not discover all of the relevant documentation with regard to replies to the letter of July, 2007. Mr. McDonald refers to the response of Mr. Lagan wherein he states that the plaintiffs persist with their claim that not all complaints from purchasers of Bay Lane Quarry material have been discovered, notwithstanding his averment that the first named's position has been entirely consistent, and that all complaints from purchasers of material from Bay Lane Quarry relevant to the categories of discovery have been discovered. Mr. Lagan says it is an invidious exercise to be asked to explain a negative, namely the absence of replies from third parties. Mr. McDonald also refers to the fact that Mr. Lagan avers that it has to be borne in mind that the letter in issue substantially post-dated the initial Homebond correspondence which would have raised the pyrite issue within the construction industry, and that the letter that was sent out on behalf of the Bay Lane Quarry was a proforma circular letter sent to all customers. Mr. McDonald concludes by submitting to the Court that the letter plainly was important and would have sent shockwaves to anybody who received it, in particular anyone who had used this material for either of the purposes mentioned in the letter during the preceding period.
Mr. O'Callaghan on behalf of the first named defendant relies on the facts that the plaintiffs advance no evidence of default in persisting with their claim that not all complaints from purchases of Bay Lane Quarry material have been discovered. He refers to the fact that most of the Bay Lane customers do not have any complaints arising from the quarry material, that the letter of July, 2007 considerably post-dated a letter which had already been sent out by Homebond which raised concerns about the quarry material from the Bay Lane Quarry with the quarry's existing customers. Mr. O'Callaghan refers to the affidavit of discovery of the 16th October, 2009, in which at para. 10 it is emphasised that there are no further documents relevant to the issues in dispute within the first named defendant's possession, and that if the plaintiffs believe there are further documents and they have a basis for saying so, there is nothing to stop them seeking non party discovery against the customers of the Bay Lane Quarry.

Conclusion
I take the view that this aspect has trespassed into the issues in the case. The plaintiffs on the one hand say that the content of the letter of July, 2007 should have elicited shock and consternation from customers who purchased aggregate and used it as infill or within 500mm of concrete or steel structures, and the first named defendant says effectively this is not so and there are no documents other than those which have already been discovered.
The plaintiffs do not satisfy me that there is a basis for a contention that there are in existence other documents in reply to the letter of July, 2007 and I take the view that this aspect is best left over to be dealt with in evidence.

Issue XII - Minutes of Meetings
Mr. McDonald on the plaintiffs' behalf submits that the question of minutes arises across a range of categories in the letter of voluntary discovery dated 10th March 2008. A letter from the plaintiffs' solicitors dated 29th September 2008 identifies deficiencies

which they believed at the time existed in the defendants' discovery. The letter refers to, *inter alia*, category 10, which includes all documents (including various types of minutes together with the diaries of the quarry managers and operators at Bay Lane) relevant to the defendants' decisions as to the products to be produced at Bay Lane, the process by which they were to be produced and the marketing of these products to customers.
The plaintiffs' solicitors note that no board or management minutes have been discovered under this category. The reply to this letter from Lennon Heather dated 13th October 2008 states that no such documentation is or has been in existence as far as the first defendant is aware.
The plaintiffs received a number of minutes attached to the witness statement of Ciara Cassidy. The plaintiffs were taken aback by this having regard to the response in the Lennon Heather letter of 13th October 2008. The plaintiffs received the witness statements in February 2009, which was the first time they were made aware of any minutes. Ms. Cassidy says in her witness statement that management meetings have been held from 1991 to date. She states that Charlie Jenkins took the minutes from 1991 until November 1994. In the earlier years management meetings were attended by Mr. Terry Lagan, Mr. John Gallagher, Mr. Liam Smyth, Miss Ciara Cassidy and Mr. Charlie Jenkins. They would also be attended by Mr. Kevin Lagan. Mr. Jenkins attended until November 1996. Mr. Seán McCann, the group financial director, started attending in July 2002. Mr. Michael Lagan has been attending the management meetings instead of Mr. Kevin Lagan since October 2004. Ms. Cassidy states that she was in charge of taking the minutes of meetings held in relation to the first defendant. During those meetings she took a note of the attendees and of all that was said in relation to issues which arose at the meetings. The form of these meetings and the form of the minutes taken was very similar. Ms. Cassidy's handwritten notes of the meetings were later typed up.
A letter from BCM dated 11th February 2009 quotes from minutes of a July 2001 board meeting attached to Ms. Cassidy's statement and states that the minutes of this meeting clearly fall within categories 9 and 10 but were not discovered prior to delivery of the statement. The letter adds that the defendants did not discover any board or management minutes before delivery of the statements. The letter notes the earlier response of Lennon Heather set out above and notes that throughout the reply to BCM's letter of September 2008, where reference is made to 11 categories in within whose ambit the plaintiffs would have expected to see minutes of meetings, the same response was given to the effect that no such documentation is or has been in existence as far as the first defendant is aware. The letter of 11th February 2009 goes on to say that it is manifest that the defendants consider that they can select the documents they wish to rely on, discover them whenever it suits them and refuse to discover and suppress certain documents which they are required to discover. The plaintiffs' solicitors note that Ms. Cassidy attached copies of minutes only for five dates in 2001 only, and the defendants discovered no others. The letter states that it is manifest that other meetings were held, noting that Ms. Cassidy states that management meetings have been held from 1991 to date.
Mr. McDonald submits that the response from Lennon Heather is eye-opening because it identifies that the defendants themselves were taking decisions in relation to the relevance of minutes. Lennon Heather state that the July 2001 minutes do not fall within category 9, which relates to "the process" by which products were manufactured and the machines and plant used by the defendants to produce products from Bay Lane. The clear wording of this category refers to the process and the use by the defendants of machinery and plant. The meeting of July 2001 predates the opening of the quarry. Mr. Lagan indicated as a general proposition the machinery required to produce Clause 804, but he did not indicate in the minutes either the machinery or plant that was to be used for Bay Lane products. However, Lennon Heather state that from a further reading of Category 10 it is arguable that the reference to the type of machinery that might be used to produce Clause 804 indirectly falls within Category 10. Lennon Heather consider it more likely that the comment was a general one rather than a decision as to the production or marketing of the product but express a willingness to discover this minute in ease of the plaintiffs and to avoid an unnecessary dispute. They add that the comment was a very minor part of the minute and it was not plain to their client that it directly fell within Category 10.
The letter from Lennon Heather states that their clients in the course of carrying out the discovery in this particular process carried out an evaluation as to whether or not the minutes of management meetings of the first defendant required to be discovered at all. They concluded that the documents did not fall within the categories of discovery to which BCM referred. They did not suppress documents which they were required to discover. Mr. McDonald notes the reference to their clients carrying out the evaluation referred to.
The letter expresses the view that the tone of the plaintiffs' solicitors letter is inappropriate having regard to failures on the plaintiffs' part relating to site diaries.
The letter adds that Lennon Heather have now carried out a thorough investigation and examination of all management minutes of the first defendant and are satisfied that none of the minutes of the management group of the first defendant are documents which fall within any of the categories of voluntary discovery agreed to. Mr. McDonald emphasises this passage because Ms. Cassidy said there were meetings going back to 1991. It is submitted that anyone reading this letter would have read it as suggesting that Lennon Heather now had all management minutes going back to 1991, had reviewed them all and concluded that none of the minutes of the management group of the first defendant fall within any of the categories of voluntary discovery agreed. However, the first defendant is now alleging that there are no minutes for some years between 1999 and 2005.
In his affidavit of 16th February 2009 Mr. Butler refers to the defendants' view that category 9 did not encompass the minute of the meeting on 2nd July 2001 referred to above. He avers that this raises very serious questions about the manner in which the defendants determined whether documents were discoverable. Mr. Butler refers to the relevant passage from the minute in question and states that he cannot understand how it could credibly be asserted that it does not fall within category 9. In these circumstances, he avers, there must be other documents which were likewise wrongly excluded from the defendants' discovery. He states that, regarding management meetings, the defendants appear to have determined whether documents were discoverable and do not appear to have been advised or assisted by a legal representative in that regard. They go on to quote from the Lennon Heather letter and state that it appears from this that the defendants alone determined the discoverability of documents, or at least certain documents including significant ones, and that only since receipt of the BCM letter of 11th February did Lennon Heather examine the documents at issue to determine their discoverability. Mr. McDonald submits that this cannot be doubted in view of the response from Lennon Heather. They only received the minutes after BCM's complaint.
Mr. Butler avers that if this is so it raises very serious questions relating to the defendants' discovery. He adds that in response to the various requests for discovery of minutes of meetings Lennon Heather stated that no such documentation is or has been in existence as far as the first defendant is aware. These responses gave the impression that no minutes existed at all. On the defendants' analysis, despite the ambit of the 36 discovery categories, not one minute fell within any of these categories.
In response, Mr. Lennon avers that the issue relating to the minute of 2nd July 2001 is now moot as Lennon Heather have produced it and indicated that it arguably falls within category 10. This minute was not previously discovered as the relevant comment is an isolated comment in one paragraph in a 19 paragraph document. Mr. McDonald states, however, that we have seen from the letter of 11th February that Lennon Heather did not see these documents prior to the making of the affidavit of discovery, so the reason advanced here for its non-discovery does not tell the full story. In addition, if any comment in a document is relevant it should be discovered. Mr. Lennon reiterates his firm's view as to why the minute did not fall within category 9. He adds that the plaintiffs' concern was triggered by minutes attached to Ms. Cassidy's witness statement, but states that the reason these minutes only relate to 2001 is because they were attached to refute the possible evidence of Mr. Gallagher, whose statement says that a meeting took place shortly after the grant of planning permission at which concerns were expressed as to the quality of the rock. However, Mr. McDonald notes, other minutes going back to 1996 were produced on the second day of the trial, including a minute referring to the unsuitability of the Bay Lane site for quarrying, which is clearly a document falling within at least the first two discovery categories.
Mr. Lennon avers that the rules of discovery and the obligations of his client were fully set out and explained to the first defendant as

and when the requests for voluntary discovery were made. The categories of discovery are voluminous and the plaintiffs' reasoning for the categories sought is extensive. The first defendant accepts that in hindsight perhaps the methodology they chose for dealing with the discovery was not exemplary and it may have been preferable to have given Lennon Heather all documents and for that firm to have determined discoverability. The firm was not furnished with the minutes of the management groups of the first defendant until after Mr. Gallagher's witness summary had been served. The first defendant now accepts that these minutes should have been furnished sooner.

Mr. Lennon avers that he reviewed all minutes of all management meetings and apart from what is set out in that affidavit he maintains the view that these minutes are not relevant to the discovery categories. However, Mr. McDonald submits that even now the plaintiffs do not have all the minutes of all the management meetings, and a year's records of meetings dating from 2005 were only produced in October 2009.

Two types of minutes are kept; those described as management meetings and those described as Lagan/Irish Asphalt meetings. Of the former variety the plaintiffs have minutes for February and November 1996; July 1997; September 1998; October 1999; May, August, September, October and December 2000; January, April, May, July, August, September, and two from November 2001; March, May, July, August, September, November and December 2002; the complete year for 2003 save February and December; January, February, April, May, June, August, October and November 2004; January, February, April, June, October and November 2005; February, April and May 2006; May, July and September 2007; and February, April, September and November 2008.

Of the latter variety the plaintiffs have no minutes for the years 1996 to 2004. When they sent their letter in August 2009 they had none for 2005 but had March, April, June, July, August, September, October and December 2006. For 2007 they had every month save January. For 2008 they had up to June, the discovery cut-off point. Following the letter sent in August 2009, the plaintiffs have a number of other minutes, produced in October, of this latter variety. These comprise a series of minutes from 2005 and one minute from 2006. The plaintiffs also received five 'contract manager meeting' minutes in October 2009.

Mr. McDonald contends that leaving aside the contract manager meetings, what is clear from looking at the minutes of both sets of meetings is that they appear to have taken place on a monthly basis and each time a meeting was held the minutes of the previous meeting were approved. After the minutes were drawn up they were copied to all attendees and also sometimes to others. The meetings were attended very frequently by the same personnel and Mr. Terry Lagan was a very frequent attendee of both types of meetings. Therefore, a range of people, including company directors such as Mr. Lagan, obtained copies of these minutes, yet Mr. Lagan avers in his affidavit of 2nd November 2009 that minutes, for example, for 2004 do not exist, notwithstanding that minutes for January 2005 refer to the previous meeting, which must have been in 2004. In addition, the minutes for January 2005 record the number of meetings that are going to take place in 2005. No doubt the minutes for January 2004 would show the same thing.

Mr. Lagan's position that no minutes exist for 2004 or previous years in relation to Lagan/Irish Asphalt meetings is an astonishing position for a company director to take. The Companies Act, 1990, requires a company director to ensure that the company's records correctly record all of its transactions. These were clearly a very important part of its transactions. A director must be in a position to account for his tenure as a director and to explain the company's transactions if required to do so by a liquidator or by a Court. Mr. Lagan tells the Court on oath that these minutes do not exist. This is the untenable position he puts before the Court after the plaintiffs have put the evidence before him clearly identifying that there must be other minutes out there. That a company director asks the Court to believe something of this kind is a very serious aspect of this application. He states in his affidavit of 2nd November

> "I confirm that a full and thorough search of the first defendant's records for all minutes both "Irish Asphalt Management Minutes" and "Contract Managers' Meeting Minutes" minutes has been undertaken. I confirm that to my knowledge and belief there are no other minutes which remain to be discovered."

This cannot be correct. Mr. Lagan goes on to state that following receipt of the letters of 11th August and 9th September he spoke with Mr. Brian McManus and all other attendees of the contract managers' meetings. He carefully confines what he says here to those meetings. The explanation he gives is entirely at variance with what is stated in previous letters and affidavits, which was that independent of the review Mr. McManus came in and produced the minutes and Mr. Lagan did not know they existed. He now avers that he went to Mr. McManus and made an enquiry of him. The original response from Lennon Heather stated that Mr. McManus came across these minutes during spring cleaning unrelated to the enquiry from BCM.

In dealing with contract managers' meetings, Mr. Lagan avers that given the antiquity and relative insignificance of these meetings the first defendant would not have expected them to be retained and was not aware of the existence of additional copies of these minutes before checking with Mr. McManus. However, Mr. McDonald submits that whether or not they were relatively insignificant, it is the other meetings that are the main concern, and only five of the minutes produced in October 2009 relate to meetings of this type, while 18 relate to Lagan/Irish Asphalt management meetings. The so-called additional copies are copies of minutes which were never previously discovered. They are minutes of meetings which Mr. Lagan must have known took place as he attended all of these 23 meetings. He knew the procedure whereby minutes were taken of all these meetings and distributed to all attendees and sometimes additional people, but he asks the Court to believe that this is the position. This raises very serious issues in relation to the defendants' understanding and compliance with their discovery obligations and equally serious issues regarding the adequacy of the discovery which has been made and the completely inadequate explanations given regarding this and other issues.

In his affidavit of 23rd February 2009 Mr. Lagan avers that solicitors for the first defendant conducted a further review of all minutes of all management meetings. When this passage is read in conjunction with Ms. Cassidy's statement and Mr. Kevin Lagan's statement, clearly the impression was being given that all minutes of all management meetings had been looked at. Ms. Cassidy's statement reveals that meetings went back as far as 1991 and that minutes were made of all meetings.

Mr. Lagan avers that resulting from this review it was accepted that nine sets of minutes from the management meetings and four sets of minutes from the Lagan/Irish Asphalt management meetings should have been discovered. Mr. McDonald notes in relation to the figure of nine that the figure given by Mr. Lennon, who avers that he personally conducted a review of all of the minutes, is six. The significance of the three minutes that make up the difference between these figures, and it is suggested that these were identified following the review by the defendants' solicitors, is that they are the minutes that refer to the unsuitability of the site for quarrying. These three minutes were not in fact part of the review undertaken by Mr. Lennon. They were included in this affidavit as though they were part of the same set of minutes produced on 20th February 2009, slipped into this affidavit, without any attention being drawn to them, on the opening day of the trial. In this affidavit Mr. Lagan goes on to state that in the interests of moving matters forward a decision has been taken to furnish a copy of minutes of all meetings, and that these are listed in the First Schedule, Part 1. In a confirmatory affidavit of the same date, Mr. Lagan confirms that discovery has been made of all documents relevant to the categories which the first defendant agreed to discover and/or was directed to discover by order of the Court dated 14th April 2008.

Mr. McDonald notes Mr. O'Moore's submissions on 24th February 2009 relating to the production on 23rd February of the three minutes as previously referred to herein referring to the unsuitability of the site for quarrying. He submits that Mr. O'Moore's words ring more strikingly today now that we know that the BMA material pre-dated these meetings.

In an affidavit of 27th February 2009, Mr. Lennon explains that since the swearing of his previous affidavit, which was sworn after what was described as his review of all the management minutes, Lennon Heather were furnished with the three minutes in question on the morning of 23rd February just before the trial commenced. In contrast, Mr. Lagan in his affidavit avers that the nine minutes were identified following the review undertaken by Lennon Heather. Mr. Lennon notes that the three minutes were immediately included in the affidavit of discovery dated 23rd February 2009. Mr. Lennon states that Mr. Lagan instructed him that through an

oversight he had not previously located these minutes but found them during an extensive review carried out during the weekend of 21st and 22nd February 2009.
Mr. McDonald submits that it is remarkable that these three documents clearly bear on the issues in the case. They were produced at a very late stage after the plaintiffs had been told that all minutes had been looked at. They were then produced in a very deceptive way that does not draw any attention to them and does not explain that they are additional to the minutes provided on 20th February. They are clearly of enormous forensic utility. A pattern is seen not only in this instance but also in relation to the BMA materials and also in relation to the Celtest test reports the plaintiffs were given for the first time in October 2009, the only test reports designated to relate to pyrite investigation. There is a sequence of serious withholding of significant documents.
In the letter from BCM dated 9th September 2009 the two varieties of minutes are noted and it is noted that different persons attended the meetings, although the documentation shows that Mr. Lagan and Ms. Cassidy attended both sets of meetings. The letter provides a table detailing the minutes discovered and indicating the months for which no minutes had been discovered. In light of Ms. Cassidy's statement about meetings going back to 1991 and minutes for all meetings, the table tells a startling story of missing minutes. The second table, which is for Lagan/Irish Asphalt minutes, reveals that there are none prior to 2006. Four months are missing in 2006 and one in 2007, while 2008 appears to be complete as it runs up to June 2008, the relevant date for discovery. The BCM letter notes that the first set of Lagan/Irish Asphalt minutes discovered note that minutes of the previous meeting were reviewed, therefore there are clearly earlier Lagan/Irish Asphalt minutes despite Mr. Lagan's averment that the plaintiffs have been furnished with all minutes. The letter goes on to require the defendants to make full and proper discovery of all minutes which exist or did exist captured by the agreed discovery and to confirm that a complete search has been conducted for same. It is noted that the copies of the Lagan/Irish Asphalt minutes discovered state that they were saved on Ms. Cassidy's computer in a number of places. The letter states some of these. These references appear on the minutes received on 20th February 2009 but not on other minutes the plaintiffs received. The letter states that confirmation is required that Ms. Cassidy saved the minutes of these meetings on her computer and that this computer and that of any other person to whom minutes were circulated have been fully searched for the Irish Asphalt Ltd. minutes.
The response from Lennon Heather dated 5th October 2009 states that independent of the further review instigated in response to the plaintiffs' letters, Mr. McManus uncovered further minutes in the course of spring cleaning his house. The letter goes on to indicate that in the view of Lennon Heather these minutes do not come under the discovery categories but notes the first defendant's commitment to furnish all minutes irrespective of relevance and adds that the first defendant has agreed to furnish these additional minutes. However, Mr. McDonald submits, there was not just a commitment to furnish all the minutes, there was a sworn averment that all of the minutes had been furnished. The letter adds that for completeness a further check of all attendees at meetings was carried out to confirm whether or not they retained any agendas or minutes of meetings of the first defendant and no other agendas or minutes, other than those previously discovered or furnished with the letter of 5th October, are in the first defendant's possession or power. However, Mr. McDonald submits that this is difficult to accept in view of what Ms. Cassidy says in her statement as referred to above.
In his affidavit of 5th October 2009 Mr. Lennon states that the plaintiffs have raised fresh concerns relating to minutes and that the defendants have engaged with these queries and re-examined their discovery, but that material giving rise to the concern has been present for some time. However, as noted above, 23 minutes were produced in October 2009. In his affidavit of 2nd November 2009 Mr. Lagan states that independent of the review Mr. McManus furnished minutes which, unbeknown to himself and the first defendant, he had in his possession.
Mr. McManus was promoted to the position of regional manager of the Lagan group in 2003. That calls into play the other defendants. Mr. McManus states that as regional manager his function spans several Lagan Group companies but that he has been primarily involved with Irish Asphalt and Lagan Asphalt over the last decade. He has overall responsibility for two blacktop depots and three quarries, including Bay Lane. If in fact he came across these documents while spring cleaning his home, that raises very serious issues. Mr. McManus is in a senior position and must be aware of the issues that arise. This also serious issues relating to Mr. Lagan and his averments in February 2009, when he suggested that all minutes had been reviewed. Mr. McDonald wonders whether Mr. Lagan made any enquiries at that time of other attendees, one of whom was Mr. McManus. It does not make any sense to suggest that, independent of the review Mr. Lagan carried out, Mr. McManus found these minutes and brought them to Mr. Lagan's attention. When Mr. Lagan realises it does not make any sense, he changes his story. Mr. Butler says in his affidavit of 20th October 2009 that the references to the additional 23 minutes being uncovered through Mr. McManus's spring cleaning are disturbing. Mr. Butler notes that the defendants have not indicated when Mr. McManus allegedly uncovered these minutes, why he was the only person with a copy of them if that is the case, and whether the plaintiffs would have learned anything about their existence if the issues concerning discovery of minutes had not been raised in the BCM letter of 9th September.
Mr. Butler sets out a table identifying gaps that remain after the receipt of the additional 23 minutes in October 2009. None of them were of the Irish Asphalt Ltd. variety of minutes, but some were Lagan/Irish Asphalt minutes. Apart from February 2006, all of the minutes of this type received in October 2009 relate to 2005, after BCM had pointed to the fact that the first minute of this kind previously discovered was from March 2006 and referred to the minutes of the previous meeting. The same issue arises again from the minutes produced in October 2009, as Mr. Butler points out that the minute dated 17th January 2005 recorded that the minutes of the previous meeting were reviewed. Mr. Butler notes that it is therefore clear that other Lagan/Irish Asphalt minutes exist and still have not been furnished.
No explanation has been given to the Court as to why the minutes begin on 17th January 2005. Previous years were of crucial significance because the planning application and permission, the EIS, the An Bord Pleanála decision and the opening of the quarry all came before January 2005.
Looking at the previous table, which relates to Irish Asphalt Ltd. minutes, there are none for July 2000 when the EIS was finalised, and none for June 2001 when planning permission was granted. There are none for June 2002 when An Bord Pleanála gave the final grant of planning permission, and again there are no Lagan/Irish Asphalt minutes for any of these years despite the constant references to all minutes having been reviewed in the affidavits of February 2009.
Mr. Butler points to a statement in the Lagan/Irish Asphalt minutes of 21st March 2005 that Mr. Cassidy stated that an external audit would take place in April 2005. This is directly relevant to an issue identified in the discovery request going back to March 2008, the question of quality control. Mr. Butler then notes a document that was discovered in July 2008 referring to the "decision to withdraw Duleek and Bay Lane at the forthcoming audit". This raises significant questions in the quality control area. Mr. Butler also refers to further entries in the minutes which are relevant to the discovery categories. He goes on to aver that no assurance has been given that Ms. Cassidy saved the minutes she took of each Lagan/Irish Asphalt management meeting to her computer. He notes that all of the Lagan/Irish Asphalt management meeting minutes furnished on 20th February 2009 and discovered on 23rd February 2009 have a computer reference on the bottom of the page but no such reference appears on the copies of minutes of this variety furnished with the letter of 5th October 2009. He avers that the format is identical to those discovered in February 2009. Ms. Cassidy is listed as an attendee of each of the meetings for which minutes were produced in October 2009 and she confirmed in her statement that she took the minutes of management meetings for Irish Asphalt Ltd. The plaintiffs would have expected the 23 minutes to have been saved on her computer like the other Lagan/Irish Asphalt minutes.
Mr. Butler also avers that no assurance has been given that Ms. Cassidy's computer and that of any other person to whom minutes would have been circulated have been fully searched for missing Irish Asphalt Ltd. minutes and that the information to assess the validity of any such assurances has not been given to the Court. These concerns are reinforced by the reference to "digital archives" and not abated by the apparent retraction of that term. In addition, Mr. Butler goes on to note that although the present motion was

directed to each of the defendants no confirmation akin to the assurances of Mr. Lennon and Mr. Lagan on behalf of the first defendant in February 2009 has been provided on behalf of the second, third and fourth defendants that minutes of all management meetings have been furnished to the plaintiffs. However, he avers, the Lagan/Irish Asphalt minutes refer to meetings between the first defendant and Lagan. He states that representatives of the second, third and fourth defendants were present at the Lagan/Irish Asphalt meetings according to the minutes and, in the circumstances, it must be assumed that those representatives have a copy of minutes and may have minutes that the plaintiffs do not.

The five contract managers meeting minutes all relate to 2004. Each of these meetings was attended by Mr. Lagan and Ms. Cassidy. These minutes do not refer to the minutes of previous meetings. The contract managers meeting minutes may well have been a lot more informal than the other two varieties of minutes. That is of some significance in view of what Mr. Lagan says in his affidavit, because it is this type of minutes he speaks of there although only five of these have been produced and no explanation has been given as to what happened at these meetings.

Mr. McDonald refers to the statement in the Lagan/Irish Asphalt minute of 17th January 2005 that the minutes of the previous meeting were reviewed and there were no amendments. He wonders what the purpose of reviewing the minutes and determining whether any amendments should be made was unless the intention was to retain the minutes as an accurate record of what was transacted at the previous meeting. That must have been the intention and that is the purpose of keeping minutes. They serve as a record to allow people to see what decisions were made within the company at a given time. Every director is required under the Companies Act, 1990, to ensure that there are records available of the company's transactions. The minute of 17th January 2005 also shows that this meeting forms part of a series of meetings which were to take place throughout the year, with the dates of meetings for 2005 stated in the minute, prescribing a meeting for each month in the year. Clearly therefore there was a formal system of having meetings and recording them in minutes. The end of the January 2005 minute indicates that it is circulated to the attendees, who include Mr. Lagan and Ms. Cassidy, and to Mr. Cassidy and Mr. Doyle, yet Mr. Lagan is telling the Court that no other minutes exist. He himself clearly got copies of all of these minutes.

The minute of 21st March 2005 refers, as noted above, to Mr. Cassidy's statement that an external audit would take place in April 2005. The last page of the minute states "CC: Attendees", one of whom was Mr. Lagan. Mr. McDonald refers to other minutes which state "CC: Attendees". There was clearly a system in place whereby meetings were held, minutes were made, reviewed, and circulated to all attendees, including Mr. Lagan.

Returning to Mr. Lagan's affidavit of 2nd November 2009, he states, as noted above:

> "I confirm that a full and thorough search of the first defendant's records for all minutes both "Irish Asphalt Management Minutes" and "Contract Managers' Meeting Minutes" minutes has been undertaken. I confirm that to my knowledge and belief there are no other minutes which remain to be discovered."

In light of what the Court has seen, Mr. McDonald wonders how Mr. Lagan can confirm to the Court that to his knowledge and belief there are no other minutes still to be discovered. This assertion is plainly incorrect as it is quite clear that there was a system in place, that he was a regular attendee at these meetings, that he received copies of the minutes and that he discussed the minutes at the next meeting. In addition, Mr. Lagan changes his story in relation to Mr. McManus, saying that after receipt of the plaintiffs' letters he spoke with Mr. McManus and all other attendees of the contracts managers meetings in relation to the possible existence of minutes of these meetings in their personal records. He is now saying that after receipt of the letters, not independent of the review, he spoke to Mr. McManus. This is quite different to what he says in his affidavit of 16th October 2009. In addition, Mr. McDonald wonders why he confines himself in this paragraph to the contract managers meetings, minutes of which appear to have been kept on a less formal basis than the other two varieties of meetings. He studiously avoids dealing with the Lagan/Irish Asphalt minutes, which he and the other attendees were also copied with. 18 of the 23 minutes discovered in October 2009 were of this type, and all but one of those 18 were for 2005 notwithstanding that the plaintiffs were previously told there were none of that type prior to 2006.

As noted above, Mr. Lagan avers that given the antiquity and relative insignificance of the contract managers' meetings, the first defendant would not have expected them to be retained and at no time before checking with Mr. McManus was the first defendant aware of the existence of additional copies of these minutes. Mr. McDonald submits that it is impossible to stand over that averment because of the systematic way in which these minutes were kept and in which meetings were held.

Mr. Lagan goes on to state that the reason the additional minutes from Mr. McManus were not discovered in February 2009 was that the first defendant, having searched its own records, was not aware of the existence of these minutes. Mr. McDonald wonders how this can be true. BCM drew attention to the fact that the March 2006 minute referred to the minutes of a previous meeting. In addition, Mr. Lagan is aware of the holding of these meetings and of the fact that they are held on a systematic basis, and he attended these meetings. How then can Mr. Lagan tell the Court that the first defendant was not aware of the existence of these minutes?

He goes on to confirm that all minutes, both Irish Asphalt management minutes and contract managers meeting minutes, have now been discovered by the first defendant. This is clearly wrong as we have the obvious gaps, and this paragraph does not deal with the Lagan/Irish Asphalt minutes. Mr. Lagan also states that the first defendant confirms that there are no other minutes in the possession or power of the first or fifth defendant. That cannot be accepted. Mr. Lagan should have fully explained how it is that these minutes no longer exist, if that is the case. It is impossible to understand that minutes of any meeting recorded in this formal way would not be retained for the reasons mentioned above.

Mr. Lagan notes that the plaintiffs query whether contract manager meetings existed for Bay Lane. He confirms that the first defendant never produced the kind of minutes in respect of Bay Lane which the plaintiffs speculate may have been created. The quarrying business was very much the junior partner of the asphalt business.

However, Mr. McDonald submits, it is not speculation but is based on the defendants' own records. It is clear from those records that the minutes must exist. Mr. Lagan avers that he has again confirmed with Ms. Cassidy that all minutes in the power or possession of the first defendant have been discovered. There are no other existing minutes which have not been discovered. Mr. McDonald queries what is meant by the phrase "no other existing minutes". Mr. Lagan avers that before April 2008 the first defendant did not retain soft copies of any minutes created beyond the date of the subsequent meeting because Ms. Cassidy used a single word document as a template and overwrote each new minute onto the previous one. Mr. McDonald submits that this is difficult to understand as minutes of this kind do not take up much space on a computer.

Mr. Lagan avers that a hard copy of the minute was kept, which has been produced. However, Mr. McDonald submits that it has not been produced. Mr. Lagan notes the reference in the minute of 17th January 2005 to the minutes of the previous meeting and avers that there are no such other minutes in existence which have been retained by the first defendant or the dates for which any of its staff can reliably recall. This is impossible to accept because what was said in the January 2005 minute was that the attendees, including Mr. Lagan, looked at and approved the minutes of the previous meeting without amendments. Mr. Lagan goes on to note the suggestion that the minutes of 21st March 2005 were discovered on foot of the first defendant's undertaking to discover all minutes rather than on foot of the obligation to make discovery of documents pursuant to categories 8 and 11 of the discovery order. The first defendant disputes that this is the case. He avers that Mr. Cassidy confirms that the reference in the minutes to an external audit refers to the asphalt plant end of the business rather than the quarries. However, Mr. McDonald notes that Bay Lane is what is mentioned and Bay Lane is the quarry. He wonders how one can accept anything Mr. Lagan says on affidavit.

Mr. Lagan avers that, even if the plaintiffs' interpretation of the scope of the discovery order is correct, the relevant documents have

been discovered and no prejudice arises. However, they were discovered and produced in October 2009 and the documents clearly show that the plaintiffs still do not have all of the minutes.
Mr. Lagan notes that the plaintiffs protest that no explanation has been given for missing minutes other than that meetings were cancelled. He avers that this is the case. Meetings were regularly cancelled at this time. Where agendas suggest scheduling of subsequent meetings they offer no reliable indicator that such meetings subsequently occurred. The lower frequency of minutes in earlier years is due to the fact that the business operated on a much smaller scale and more informally, with resort rarely being had to formal management meetings. However, Mr. McDonald submits, we have seen the 2005 minutes and the way in which they carefully identify that meetings will take place on a monthly basis. If Mr. Lagan is contending that, in each of the gaps we have seen in the tables in the BCM letter and the affidavit of Mr. Butler, no meeting was held in those months, he should explain on a month-by-month basis why there was no meeting held in that particular month. He should also explain how it is that there was no meeting before 17th January 2005, given the reference in the minute of that meeting to minutes of the previous meeting.
In relation to a meeting with Aer Rianta, Mr. Lagan is not aware that anyone who would have attended that meeting would have been accustomed to generating minutes. To his and Ms. Cassidy's knowledge there was no minute of that meeting. He notes the reference in Mr. Butler's affidavit of 20th October 2009 to the computer file references at the base of some minutes but reiterates the explanation concerning the over-writing of electronic copies of minutes. He also confirms that Ms. Cassidy's computer and all other computers in the first defendant have been fully searched for any minutes of meetings which may exist. He confirms that there are no minutes in the first defendant's computer records which have not already been discovered and that there are no hard copies of minutes in existence. However, Mr. McDonald wonders what happened to them if that is so. A lot of them were created at the time because they were circulated to all attendees. For the reasons noted above, they must have been created with the intention of being retained. In addition, while it is suggested that all of the computers have been searched, the Court is not told of such matters as which computers were searched, what those computers normally retain and whether the hard drive of the computers was searched.
Mr. McDonald points to the final paragraph of the affidavit of 2nd November 2009, as it touches on the plaintiffs' concern that some of these minutes may be in the possession of the other defendants. This paragraph states that this affidavit is sworn on behalf of the first and fifth defendants, and that the second, third and fourth defendants have sworn their own affidavit of discovery which Mr. Lagan believes they stand over. Mr. McDonald submits that that is obviously very carefully chosen language, but it does not tell the Court what happened to minutes that were sent to, for example, Mr. Kevin Lagan and subsequently to Mr. Michael Lagan, both of whom are directors of the other defendants. The affidavit of Mr. Canavan dated 9th November 2009 on behalf of the second, third and fourth defendants does not specifically deal with minutes, it deals with everything at a very general level.
The witness statement of Mr. McCann indicates that he is the Group Finance Director of the five separate Lagan Company groups, one of which is Lagan Holdings Ltd., Mr. McCann's employer. He states that he has been Group Finance Director since 2001 and that he attended most of the management meetings of Irish Asphalt from the commencement of his employment with Lagan Holdings onwards. He states that Mr. Kevin Lagan, Mr. Terry Lagan and Ms. Cassidy attended all or virtually all of those management meetings. Again, Mr. McDonald notes, all attendees were copied with the minutes, so there are minutes to be found within the other defendants.
Mr. Jenkins says in his statement that he is the former financial controller and later financial director of the Lagan Group, having held the latter position until his resignation in 2002. He also acted in the role of company secretary of companies in the Lagan Group until his resignation therefrom (apart from one company) in 2008 to provide for an orderly succession. He states that his role in relation to the first defendant was financial controller and financial director. His involvement with the first defendant largely involved attending "management meetings". He states that Mr. Gallagher would have been an attendee of those meetings, which would often, but not always, include Mr. Kevin Lagan, Mr. Terry Lagan, Ms. Cassidy, Mr. McCann and himself, during their respective periods of employment.
The plaintiffs do not have the minutes in respect of five months in 2001, including June 2001 when planning permission was obtained. Mr. Kevin Lagan says in his statement that he has looked at the minutes of the meetings during 2001 and while he does not specifically recall the details of each meeting he would generally recall attending those meetings and he knows that no issue in respect of the rock at Bay Lane was raised. He confirms that at those meetings generally the attendees were Mr. Terry Lagan, Mr. Gallagher, Mr. Jenkins on certain occasions, and Ms. Cassidy. He recalls that Ms. Cassidy always recorded the minutes of the meeting and she would generally be at those meetings. He states that if any issue concerning the quality of the rock at Bay Lane had been raised at those meetings it would definitely have been referred to in the minutes.
It is significant that Mr. Kevin Lagan attended meetings and confirms that Ms. Cassidy always recorded the minutes. Mr. McDonald submits that there are undoubtedly a significant number of minutes which remain to be discovered. There are no minutes in the discovery made by the second, third and fourth defendants. The evidence clearly shows that there are further minutes in existence. More importantly from the point of view of this application, the evidence Mr. Lagan has put before the Court is without doubt deceptive. He changed his story in relation to Mr. McManus. There are also plainly deceptive averments that no other minutes exist. Mr. Lagan also focuses on the minutes of contract managers' meetings, studiously avoiding having to deal with the Lagan/Irish Asphalt minutes, even though the vast majority of the minutes produced in October 2009 were Lagan/Irish Asphalt minutes. This shows very clearly that the defendants have contempt for their discovery obligations and in those circumstances this is an appropriate case for the Court to strike out the defendants' defence.
Mr. O'Callaghan on behalf of the first and fifth named defendants submits that there is no statutory requirement to keep minutes of every meeting. Section 202 of the 1990 Act requires a company to keep proper books of account that correctly record the transactions of a company so as to determine its financial position. Those books are fully in order.
The plaintiffs raised complaints in relation to minutes in their letter of 9th September 2009. The letter contains two tables indicating minutes received. The defendants say the purpose of the first table, which relates to Irish Asphalt Ltd. minutes, is to give the impression that there is a vast number of minutes which have not been discovered. The defendants submit that what that table indicates is that meetings of the first defendant's management committee were infrequent. Equally, the impression sought to be given by the second table, which relates to Lagan/Irish Asphalt minutes, is that many minutes have not been discovered. The correct interpretation of this table is that there were no such minutes from 1996 up until the end of 2004. Mr. O'Callaghan refers to a number of passages outlined above from the affidavit of Mr. Lagan dated 2nd November 2009 dealing with the question of minutes. The plaintiffs find it difficult to understand that no board meetings took place in April, June and July 2000 as the period from April to July was a particularly important period in the preparation of the EIS. However, this is a generalised complaint. One can reach the plaintiffs' interpretation that it is difficult to understand if looking at the tables as they are presented, but based on Mr. Lagan's evidence it is apparent that meetings were not frequent and occurred irregularly.
The plaintiffs complain that many of the minutes, particularly the Lagan/Irish Asphalt minutes, begin with a reference to the minutes of the previous meeting. Looking at the 18 minutes of this type discovered in October 2009, the plaintiffs are right in stating that the minute of 17th January 2005 states that the minutes of the previous meeting were reviewed and there were no amendments. The same statement is in all of the minutes. However, Mr. Lagan avers that he has confirmed with Ms. Cassidy that all minutes in the power or possession of the first defendant have been discovered and that there are no other existing minutes which have not been discovered. Again, Mr. Lagan notes the reference in the minute of 17th January 2005 to the minutes of a previous meeting, but the first defendant confirms that there are no such other minutes in existence which have been retained by the first defendant or the dates for which any of its staff can reliably recall. Mr. O'Callaghan submits that the defendants do not believe there were meetings and believe the minute is incorrect insofar as it refers to a previous meeting. Mr. O'Callaghan points to a number of features common

to various minutes and submits that these commonalities confirm what Ms. Cassidy says was the manner in which she kept the minutes. Mr. O'Callaghan acknowledges that the document says it is circulated, and that if it had been circulated and they no longer had it, it would have to be discovered in a second schedule. They do not have a recollection of that, but if the Court requires them to swear a second schedule, it will be done. Mr. O'Callaghan understands the reason why minutes have not been discovered in a second schedule is because they do not believe they received the minutes. It is submitted that it is probably the case that an expert could retrieve previous minutes on the computer, but Mr. O'Callaghan doubts the necessity of that because, certainly for 2005, we already have the management meeting minutes. Ms. Cassidy will give evidence and the defendants will be able to cross-examine her on the situation regarding minutes.

Mr. O'Callaghan submits that they have searched the computers to the best of their ability and when minutes come to hand they are provided. The minutes provided are only peripherally related to Bay Lane. The first defendant gave a commitment to furnish all minutes irrespective of their discoverability, which is why these minutes are being furnished. Virtually all of the minutes furnished in October 2009 contained very few references to Bay Lane.

It is accepted that the management meeting minutes indicate on their face that they were circulated to attendees, but the first defendant does not recall that. It appears from the decision in *Flood v. Lawlor* [2002] 3 I.R. 67, that the courts recognise that in some respects it is not possible for persons to recall everything they previously had and list it in a second schedule. In *Flood* the Court held that in respect of non-privileged documents formerly in the possession or power of a party, strict compliance with the format envisaged by the RSC would be burdensome and in some cases virtually impossible. Where relevant correspondence has been destroyed and no copies preserved, it might not be possible for a party to do more than indicate the general nature of the correspondence and what had become of it. The rules as to discovery of documents no longer in a party's possession or power should not be construed in a manner which is unduly burdensome or impracticable. Where it has not been shown unduly burdensome or impracticable the obligation remains on the party making discovery to comply precisely with the format envisaged by the Rules. Mr. O'Callaghan submits that this reasoning applies here, as it would be very difficult for the first defendant to swear an affidavit setting out minutes which it previously had or which it thought it had previously had but which it no longer has.

A further issue raised by the plaintiffs concerns agendas for Irish Asphalt Ltd. meetings for six dates which have been discovered, but in respect of which dates no minutes have been discovered. However, the letter from Lennon Heather dated 5th October 2009 states that an agenda for the next meeting was typed up immediately after each meeting. Each agenda was a soft copy amendment of the previous agenda. In addition, meetings were frequently cancelled, postponed or amalgamated. Accordingly, an agenda stating that a meeting would take place is not probative of whether it did in fact take place.

Mr. O'Callaghan also refers in this regard to Mr. Lagan's averments, outlined above, concerning cancellation of meetings. In addition, the plaintiffs complain of missing minutes for two dates which are referred to in earlier minutes. However, in these two instances the meeting referred to in the earlier minutes was subsequently cancelled. Again, Mr. Lagan avers that meetings were regularly cancelled at this time, and he goes on to refer to the fact that there were far fewer staff operating from a small number of premises and resort was rarely had to formal management meetings.

The plaintiffs also note that there are no Irish Asphalt minutes of the meeting with Aer Rianta on 11th July 1996, nor are there any minutes around this or any time in which this meeting is discussed. Mr. O'Callaghan refers to the response of Mr. Lagan detailed above in relation to this meeting and submits that it provides a complete answer to this complaint. The plaintiffs also complain in their letter of 9th September 2009 of a lack of minutes regarding Bay Lane with reference to issues of planning and testing compared to other quarries. Of the eight references to testing and/or test results between 18th August 2000 and 14th November 2001, none relate to Bay Lane. However, Mr. Lagan avers in his affidavit of 2nd November that, as regards the focus of the contract managers' meetings, the split between asphalt and aggregates elements of the of these meetings was of the order of 95:5, with references to the quarrying businesses, let alone Bay Lane itself, in these minutes being fleeting and insubstantial.

It is submitted that a review of the minutes discovered by the first defendant reveals that Bay Lane was not a significant part of those minutes. The vast majority of the business conducted at meetings related to asphalt and the references to Bay Lane were fleeting, as is apparent even from the minute of 26th November 1996 referring to Bay Lane not being suitable for quarrying.

The letter of 9th September 2009 also refers to the electronic file references on some of the minutes and requires the defendants to make full and proper discovery and to confirm that certain searches have been performed. In this regard Mr. O'Callaghan refers to Mr. Lagan's averment concerning the overwriting of electronic copies of minutes.

In relation to the issue as to the minutes produced by Mr. McManus, which were discovered by the first defendant in October 2009, Mr. O'Callaghan refers to the spring cleaning explanation detailed above provided in the Lennon Heather letter of 5th October. Lennon Heather apologise for this on the first defendant's behalf. However, they note that these minutes refer to matters which do not relate to Bay Lane, save for a small number of references which in Lennon Heather's view do not come within the discovery categories. These references relate to short statements on output levels and targets of Bay Lane. There is also a reference to an incident with an employee on the weighbridge at Bay Lane. However, the letter states that the first defendant agreed to furnish these minutes in line with its commitment to furnish all minutes irrespective of their relevance. The letter also notes that a further check of all attendees at meetings was carried out to confirm whether or not they retained any agendas or minutes from meetings of the first defendant. It is confirmed that no other agendas or minutes (other than previously discovered or now furnished with the letter of 5th October) are in the possession or power of the first defendant. Mr. O'Callaghan submits that very many, if not most, of the 23 minutes produced by Mr. McManus contain no reference to Bay Lane.

No minutes were discovered in either schedule in the original discovery. The defendants have now provided 45 Lagan/Irish Asphalt management meeting minutes, 56 Irish Asphalt management meeting minutes and five contract manager minutes. These figures include the 23 produced in October 2009, while the others were furnished in February 2009.

In his affidavit of 16th October 2009 Mr. Lagan avers that Mr. McManus found the 23 minutes in question and, independent of the review, furnished those minutes to Mr. Lagan. He adds that although he is advised that the minutes do not fall within any of the discovery categories he discovers them in line with the undertaking to furnish all minutes. Mr. O'Callaghan refers to the passage already referred to from Mr. Lagan's affidavit of 2nd November 2009 dealing with how the minutes produced by Mr. McManus came to light. The plaintiffs contend that there is a contradiction between the spring cleaning explanation in the letter of 5th October and what Mr. Lagan says in para. 74 of his affidavit of 2nd November in this regard. They say that in para. 74 he says that it seems to be consequent on the first defendant contacting him on foot of the plaintiffs' queries. However, at para. 74 Mr. Lagan states that he confirms that subsequent to the receipt of the plaintiffs' letters he spoke with Mr. McManus. He does not say "consequent upon", but rather "subsequent to". Whether Mr. McManus found the minutes during a spring cleaning or whether he found them after the first defendant had contacted him, the important point is that he furnished them to the first defendant and they were sent on to the plaintiffs and discovered, even though they are not discoverable as most of them do not refer to Bay Lane.

The plaintiffs present the situation as though very many minutes are being withheld. That is not the case. There was a haphazard system in respect of meetings and keeping of minutes. That has been explained on affidavit and in Ms. Cassidy's statement. However, the first defendant has furnished a significant number of minutes, including minutes referring to the Bay Lane site not being suitable for quarrying. The plaintiffs view that as meaning that the first defendant knew because of the BMA documentation that this land could not be used for quarrying. If the first defendant were seeking to hold back minutes, they would surely have kept back that minute.

In addition, many of these meetings were attended by Mr. Gallagher, who will give evidence on behalf of the plaintiffs. He will be able to assist them as to the frequency of meetings and whether or not minutes were circulated to him.

It is accepted that the minutes produced by Mr. McManus were unknown to the plaintiffs in February 2009, but the other issues they

raise regarding the minutes could have been raised earlier. This is not to say that the plaintiffs are precluded from raising these issues now, but the delay issue is raised for the Court to consider it when exercising its discretionary power.
It is submitted that the delay of the plaintiffs in pursuing some the matters raised in this motion with any vigour until the defendants' motion was initiated indicates a lack of strength in many of the complaints they make.
Mr. Breslin on behalf of the second, third and fourth named defendants submits that there is no factual basis for asserting that his clients' affidavit of discovery is incomplete in respect of minutes. The Court has seen minutes of meetings by Irish Asphalt. These are meetings of the first defendant and there is no evidence that there are any documents in the power or possession of these three defendants which have not been discovered.
Mr. Murray in reply submits that documents such as the minutes are critical documents to the central question of what the defendants did to investigate the suitability of the quarry before releasing its product, what they knew about the unsuitability of the product they released and what their understanding was of the product they ultimately released. This is important not only in the context of the merits of the case but also in viewing the nature and extent of the deficiency in discovery.
The first defendant has never said it will make full discovery. It has not acknowledged that the plaintiffs are correct about the second schedule and the minutes. It has not said they must have been in the company's possession at some stage because they are the company's minutes and it will now make full discovery.
In relation to the defendants' failures in discovery generally, the careful and repeated statement has been made that further affidavits will be filed if the Court so requires. That is not the point. The defendants have been presented with clear and in some respects indisputable omissions in their discovery and have not told the Court that they will now finally make proper discovery. That is the most important point because it is the critical consideration insofar as the remedy the Court should grant is concerned.
The plaintiffs were told emphatically throughout 2008 that there were no minutes, and then when Ms. Cassidy had to respond to Mr. Gallagher she exhibited minutes. The defendants then purported to make discovery of all their minutes, but 23 more later emerged and two versions of events were given to explain this. There remain huge gaps in these documents. When the plaintiffs raised various issues, a series of extraordinary facts were asserted, including the astonishing suggestion about minutes being overwritten. The minutes issue did not come out of the blue in August 2009, but was something in relation to which BCM had been reverting to Lennon Heather repeatedly.
Mr. Murray refers to passages outlined above dealing with the Mr. McManus issue from the Lennon Heather letter dated 5th October 2009. This issue raises the question whether Mr. McManus was ever asked if he had minutes of the meetings. Mr. Murray wonders why, if he was asked, he did not provide them, as Mr. Lagan's affidavit of 2nd November 2009 suggests that they were in Mr. McManus's personal files. If he was not asked, were any of the attendees asked either when discovery was being made or in February when discovery of minutes was being made. Mr. Murray refers to the passage outlined above from Mr. Lagan's affidavit of 16th October 2009 reflecting what is stated in the letter of 5th October as to the production of minutes by Mr. McManus. Paragraph 74 of Mr. Lagan's affidavit of 2nd November provides the other explanation already outlined for this issue. This explanation makes no reference to Mr. McManus's independent searches and instead Mr. Lagan's response places this firmly in the context of a response to the plaintiffs' letters. In addition, Mr. Lagan avers that the first defendant was unaware of the existence of these minutes, but the first defendant, as a company, acts through its agents, and Mr. Lagan attended many of the meetings in respect of which minutes have now been discovered. 18 of the minutes produced by Mr. McManus were of Lagan/Irish Asphalt meetings. Mr. Murray wonders how the first defendant was unaware of the existence of minutes of meetings of itself.
Mr. Lagan states in his November 2009 affidavit that although soft copies were overwritten, a hard copy of the minute was kept. Mr. O'Callaghan's understanding was that the reason why the first defendant had not discovered in a second schedule minutes it previously had was because they did not believe they had them. However, there is an acknowledgment by Mr. Lagan, and by Ms. Cassidy in her statement, that hard copy minutes were kept. These were the company minutes, so of course it had them. Each minute begins by saying that the minutes of the previous meeting were reviewed, so there is an indisputable deficiency in the discovery in relation to the second schedule. In relation to soft copy minutes, the position is more astonishing. Mr. McDonald referred previously to a number of minutes bearing a computer reference suggesting that they are to be found on a server. Having regard to the extraordinary sequence of events regarding the discovery of minutes, the Court is entitled to be told what the defendants have done to find these minutes. This entails a number of obvious questions, including whether there is any mechanism by which they can be retrieved and whether steps have been taken to do so. In addition, Ms. Cassidy explains in her statement what she did in bringing the minutes into being. She does not say in that statement what she did in relation to overwriting soft copy minutes.
In relation to Mr. Lagan's response to the reference in the minute of 17th January 2005, outlined above, to the minutes of the previous meeting, Mr. Murray emphasises that what Mr. Lagan says is that *there are* no such other minutes in existence which have been retained by the first defendant or the dates for which any of its staff can reliably recall. Mr. O'Callaghan said in relation to this that they do not believe there were Lagan/Irish Asphalt meetings preceding this date and that they believe the reference in this minute to a previous meeting is incorrect. That is not stated on affidavit. Mr. Murray wonders how it can be that Ms. Cassidy gives the impression in her statement that she produces careful administrative records but started off a set of minutes with a reference to a fictional meeting that never took place, and how the explanation offered by Mr. O'Callaghan can be accepted without an affidavit from Ms. Cassidy to the same effect. Mr. Murray notes that the plaintiffs were previously told, when they had later minutes beginning with the same statement, that there were no further documents, yet the plaintiffs then received further minutes.
Mr. Lagan avers that the first defendant was unaware of the 23 minutes referred to above until they were furnished by Mr. McManus. However, Mr. Murray queries the suggestion of a body corporate being unaware of minutes that have been brought into being of itself. These meetings were attended by Mr. Lagan and their minutes copied to him. It is unclear exactly what the defendants have done to ensure compliance with their obligation in relation to this, but they should have identified all attendees and their diaries, ascertained whether there was a record of when meetings were held and asked all attendees if they had any minutes. They should have asked all attendees if they recalled when the meetings took place and interrogated any computer which was likely to contain that information. Even now the Court can have no confidence that that has been done. As regards contact with attendees, what Mr. Lagan is addressing at paras. 74 to 76 of his November affidavit is the minutes of the contractor managers' meetings. We do not know that attendees of the other meetings have all been contacted to ascertain if they had such documents. Those attendees include officers of the second, third and fourth defendants.
Mr. O'Callaghan submitted that Bay Lane is referred to only infrequently in the minutes. However, of 59 sets of Irish Asphalt minutes discovered, 37 refer to Bay Lane. Of 25 sets of Lagan/Irish Asphalt minutes discovered, 10 refer to it. Of the 18 minutes of this latter variety discovered in October 2009, nine refer to it. The documents in this area are of very real importance in the context of the issues in this case.
Finally, minutes are kept so that there is a documentary trail of decision-making. This ensures that if any issue arises for the directors they can point to consideration in line with company law of their obligations. It is very difficult to understand how, although this is not stated as clearly on affidavit as it was in submissions, in relation to minutes, in some cases relatively recently, the first defendant does not have hard copies, does not know where to find them, cannot get them from the people to whom they were sent and does not have electronic copies because they were overwritten. This is such an astonishing proposition for entities trading on this scale as to in itself require unequivocal evidence.

Conclusion
The Court is particularly concerned by the handling of the aspect of the discovery of various management meetings, both of the first named defendant and those described as Lagan/Irish Asphalt meetings. It is apparent that the first named defendant was very

significantly involved in, if not wholly responsible for, determining whether minutes relating to the issues that arise were discoverable. There can be no question of the defendants not being aware of management meetings and the Lagan/Irish Asphalt meetings. In the Court's view, no satisfactory explanation is given as to how an averment could be made on the defendants' behalf that there was no documentation to be discovered in respect of these meetings. The meetings on their face appear to have taken place on a monthly basis and each time a meeting was held the minutes of the previous meeting were approved. After the minutes were drawn up they were copied to all those in attendance and sometimes to other persons. The meetings were attended very frequently by the same personnel, including Mr. Terry Lagan.

The Court has a particular difficulty in respect of minutes for the period in and around 2001. Mr. Kevin Lagan says in his statement that he looked at the minutes of the meetings during 2001 and while he does not specifically recall the details of each meeting, he would generally recall attending those meetings and he knows no issue in respect of the rock at Bay Lane was raised. He confirms the personnel who generally attended those meetings and that Ms. Cassidy always recorded the minutes. All of this is stated against a background where Mr. Terry Lagan initially took the view that there were no minutes to be discovered, and indeed, it is accepted that none were listed in the original discovery. The discovery of three minutes which could potentially be of importance to the plaintiffs' case on the opening day of the trial is a serious cause for concern, as are the assurances given in respect of the discovery of minutes which subsequently proved to be incorrect.

The plaintiffs submitted that there are obvious gaps in the discovery of minutes pre-2005. However, Mr. Lagan has outlined on affidavit that meetings were previously infrequent as there were fewer staff operating from a small number of premises. In addition, he avers that some meetings were cancelled, postponed or amalgamated. Accordingly, some of the gaps may be apparent rather than real. Nevertheless, the Court is of the view that there appear to be Lagan/Irish Asphalt minutes preceding 17th January 2005. The minute for this date refers on its face to the minutes of a previous meeting. While that sentence may be *pro forma* in light of its presence in the other minutes, that does not establish that it is incorrect. Mr. Lagan avers that there are no previous minutes in existence but does not suggest that they never existed, and the suggestion that his staff cannot reliably recall the dates of such meetings adds nothing of assistance on the point. It may be that these minutes do not fall within any of the discovery categories, and in this motion the Court is concerned with failings in respect of discovery rather than any default on the undertaking to furnish all minutes. However, as that undertaking has been given it appears appropriate to direct further searches for minutes and the furnishing of any minutes found which have not yet been furnished. It also appears appropriate to direct the swearing of an affidavit of discovery in respect of any minutes which it emerges are or were previously in the possession, power or procurement of the first defendant. In this regard the Court notes the submissions in relation to the decision in *Flood v. Lawlor*. However, the Court does not consider that it is unduly burdensome to order the swearing of a second schedule on behalf of the first defendant in respect of minutes which, as the plaintiffs submitted, were brought into being in respect of the first defendant and copied to a number of its officers. It must surely be possible to ascertain what has become of documents which have such an importance in the life of a company. In this regard the Court notes the averment of Mr. Lagan to the effect that, while electronic copies were overwritten, hard copies were kept.

The 23 minutes discovered in October 2009 were furnished pursuant to the first defendant's undertaking irrespective of whether they were in fact discoverable. The plaintiffs contend that a number of these are discoverable. In any event however, those of the 23 minutes which refer to Bay Lane do not, in view of the brief description above of such of their content as is relevant to the quarry, appear to have such a bearing on the issues arising in this case that the plaintiffs are irreparably prejudiced by the failure to discover them at an earlier stage.

It is also necessary to address the suggestion that Mr. Lagan changed his story in relation to the minutes produced by Mr. McManus. In his affidavit of 16th October 2009 Mr. Lagan states that, independent of the review undertaken, Mr. McManus furnished him with the 23 minutes. Paragraph 74 of his affidavit of 2nd November 2009 addresses only the five contract managers' meetings. As Mr. O'Callaghan notes, para. 74 states that Mr. McManus furnished these minutes subsequent to the receipt of the plaintiffs' letters rather than consequent upon their receipt. To this extent it is not necessarily inconsistent with what Mr. Lagan previously averred. However, para. 74 suggests that Mr. McManus was the one approached, rather than having come forward himself as the affidavit of 16th October appears to suggest. Paragraph 74 of the November affidavit states that after receiving the plaintiffs' letters Mr. Lagan spoke with Mr. McManus and all other attendees of the contract managers' meetings, and refers to "checking with" Mr. McManus. This suggests that the production of the minutes was connected with the receipt of the letters and that Mr. McManus was approached rather than coming forward independent of the review. If the earlier explanation is correct therefore, the affidavit of 2nd November is incorrect in this regard. The statement that the minutes were in Mr. McManus's personal files also appears difficult to reconcile with the statement in the letter from Lennon Heather that these minutes emerged in the course of spring cleaning.

In the Court's view, there has been a serious deficiency on the defendants' part in relation to the discovery of minutes of management meetings, both of the first named defendant and of Lagan/Irish Asphalt. The Court takes the view that it is entitled to come to a conclusion, as it does, that it has a reasonable suspicion as regards whether or not all relevant minutes of meetings have been discovered.

It appears that the proper course is to direct that further searches for minutes should be undertaken by each of the defendants. While the Court appreciates that the minutes are those of the first defendant, some were copied to Mr. Kevin Lagan and thereafter to Mr. Michael Lagan, both of whom are directors of the other defendants. Accordingly, the direction of the Court is to apply to all of the defendants. The Court directs that a further affidavit should be sworn clarifying all steps now taken to ascertain if any other minutes exist or did exist at one time; describing the efforts and results of the appropriate expert retained to retrieve overwritten soft copies of minutes on Ms. Cassidy's computer or any other computer which contains or did contain such minutes; and discovering any further discoverable documentation, including a second schedule of such documentation that was but is no longer in the possession, power or procurement of any of the defendants. Following compliance with the Court's directions I do not consider that there is any irreparable prejudice to the plaintiffs in connection with this issue.

Issue XIII – Privilege

An issue as to privilege arose arising from para. 56 of the plaintiffs' solicitors' letter of the 11th August, 2009, in respect of the defendants having claimed privilege over a significant number of documents which they discovered. A schedule was attached of examples of certain documents over which privilege was claimed. Mr. McDonald in his submissions on behalf of the plaintiffs accepted that in the ordinary way if one wanted to challenge a claim to privilege, the appropriate route was by way of a motion before a judge other than the trial judge. In the particular circumstances of this case, however, Mr. McDonald indicated that he was not asking the Court to look at the documents, but simply the description of the documents and to decide the issue as to privilege on this basis. Mr. O'Callaghan on the first and fifth named defendants' behalf contended that there was no motion before the Court seeking to challenge the claim to privilege which had been made by the defendants. He took the view that if the plaintiffs were serious about challenging the claim of privilege, a motion should have been brought.

I take the view despite having heard lengthy submissions that the appropriate course of action in respect of the claim of privilege, and in respect of the matters referred to at para. 56 of the plaintiffs' solicitors' letter of the 11th August, 2009, is to refer the matter to a separate judge and arrangements have been made in this regard and accordingly, I make no finding on this issue.

OVERALL CONCLUSION

10. As regards the discovery as made by the defendants the legal principles as set out in my overall conclusion in Part I relating to the defendants' motion to dismiss the plaintiffs' action for failure to comply with their discovery obligations apply equally in respect of

this motion.
11. The defendants raise an issue of delay on the part of the plaintiffs in not having raised the various issues referred to earlier, and contend that the failure of the plaintiffs to raise these as issues confirms the defendants' suspicion that this is, in fact, a retaliatory motion rather than a motion of real substance based on a genuine grievance about the adequacy of the defendants' discovery. I do not consider that there is any undue delay, but in any event Mr. O'Callaghan on behalf of the first and fifth named defendants indicated to the Court that he was not raising the issue of delay in order to suggest that the plaintiffs were precluded by lapse of time from raising their complaints, but rather as an indication of a lack of strength in many of the complaints arising in this motion. I reject the contention of a lack of strength in the complaints of the plaintiffs as raised herein.
12. As is apparent from the various conclusions I have arrived at following consideration of each of the issues, there are deficiencies in the discovery as made by the defendants herein. I do accept however that there was a much more significant input by the first and fifth named defendants to the discovery process as compared to that of the second, third and fourth named defendants, but nevertheless their input is sufficient to warrant the conclusions arrived at herein.
13. Many of the deficiencies have been brought to light by the tenacity demonstrated by the plaintiffs' solicitors. While there may be little comparison in bulk terms between the extent of the deficiency in the plaintiffs' discovery and that of the defendants' discovery, there is nevertheless in the Court's view a demonstration on the defendants' part of little respect for, and understanding of, the importance of the function that was being carried out by way of discovery as part of the judicial process. There was an obligation on the defendants to engage in the discovery process, and the plaintiffs' solicitors by way of correspondence adequately demonstrated grounds for believing that there were deficiencies in the defendants' discovery.
14. The Court takes the view that the deficiencies demonstrated by the defendants in respect of their discovery are significant in the manner in which they arise. Examples are, not only the failure to discover the BMA Geoservices documentation in the first place when it was within the power of the defendants but the failure to accept when the documentation was presented to the defendants by the plaintiffs' solicitors that it related to the Bay Lane Quarry representing a deliberate attempt to avoid accepting that the documentation was relevant, followed by the embarkation on a plan of subterfuge to convince, not only their own solicitors, but also the plaintiffs that the documents were not relevant when clearly they were. There is the failure to discover the unique Celtest suite of tests relevant to Bay Lane that specifically referred to 'Investigation into Pyrites and related testing' and the failure to discover the duplicate test report describing a sample from the quarry as 'Black mudstone 100%', both of which documents have to be considered as relevant. There is the further failure to provide for the Court and the plaintiffs details of all the complaints received in relation to the Bay Lane product between July 2006 and March 2009 and the necessity for the Court to refer Mr. Lagan back to Prof. Walton to further clarify as to whether or not there are any documents that are not already discovered. Further, there is the coming to light by way of non-party discovery of documentation not discovered by Frank Benson & Partners and Tom Phillips & Associates, giving rise to the necessity to require further clarification. There is the statement made on instructions in respect of the diaries issue that the first named defendant had made contact with a number of individuals as named and had confirmation from these individuals that they had no other diaries or extracts existing that ought to have been discovered when the first and fifth named defendants knew, or ought reasonably to have known, that such a statement was untrue. There is further the unsatisfactory position pertaining to minutes of meetings and the manner in which some of those minutes have only recently come to hand, all of which instances contribute to a sense of unease on the part of the Court as regards the defendants' discovery in respect of the issues raised herein.
15. In the particular circumstances that arise herein there is, in my view, a failure by the defendants to conscientiously and diligently deal with the task of assembling the relevant documents for discovery and in the giving of instructions to their solicitors for the purpose of fulfilling their discovery obligations. There is, in my view, a failure by the defendants in the duty of care which they owed to the Court, the judicial process and the plaintiffs in the preparation of and the discovery as made by the defendants. The actions of the defendants in my view in the particular circumstances that arise can be characterised as blameworthy to a significant extent. I am satisfied that the defendants' discovery failed to achieve the standard that is necessarily required by the Court.
16. I note the assurances given on the defendants' behalf that they will abide by any direction of the Court as regards ongoing discovery. I note the process of ongoing discovery that has taken place on the defendants' behalf, and in all the circumstances I take the view that the directions which have been given in respect of the several issues that arise will bring about a situation whereby if complied with, the defendants will have made full discovery.
17. I have an in-depth knowledge of the evidence tendered to the Court to date over some 50 days and the issues that arise in this case. I am conscious that in the evidence tendered to date most of the time has been spent on the geological aspect, save for the evidence of Dr. Maher, the evidence of Mr. Forde and Mr. Sutton as tendered on the various site visits and the evidence of the two homeowners. The lead construction expert witness for the plaintiffs has not yet commenced to give his evidence in Court. In real terms, the aspect of the construction evidence is hardly underway and I have little doubt that once started it will take several months to conclude between the parties.
18. The plaintiffs have had possession now of the updated discovery documentation for a considerable period of time which, in my view, is more than ample to have enabled the plaintiffs and their expert witnesses to digest its content and significance, and they have had ample time to consider the implications arising therefrom with regard to the conduct of these proceedings.
19. Accordingly, I come to a conclusion that the defendants were guilty of negligence in failing to comply with their obligations in the preparation of and the furnishing to the Court and the plaintiffs of their discovery pursuant to the agreement as reached with the plaintiffs and that as a result thereof, having regard to the further discovery as made by the defendants, and subject to compliance with the Court's directions, the plaintiffs will not suffer any irreparable prejudice.
20. In my view, the appropriate course to adopt in the circumstances of the present case is to bring about a situation where after some 50 days of evidence the defendants will have complied with their discovery obligations and the various witnesses as appropriate can be recalled to deal with the additional documentation now to hand. I believe that the interests of justice will be served between the parties by adopting this course of action and thereby enabling the case to proceed to a conclusion to be decided on the evidence adduced before the Court. I reach this conclusion in the exercise of my discretion and on the basis that in the particular circumstances that arise on this motion there are not exceptional circumstances and, in my view, it remains possible to have a fair trial as the plaintiffs have not suffered and will not suffer irreparable prejudice for the reasons stated previously herein. In my view, there is not in the circumstances of this motion any basis for contending that the defendants should be deprived of the judgment seat without a determination of the issues and there is not, in my view, a basis for contending that the future conduct of these proceedings once the Court's directions have been complied with would be unsatisfactory.
21. I, therefore, decline to accede to the plaintiffs' application to strike out the defendants' defence for failure to comply with their discovery obligations.

SCHEDULE

IV. Written submissions as furnished to the Court on behalf of the plaintiffs.

V. Written submissions as furnished to the Court on behalf of the first and fifth named defendants.

VI. Written submissions as furnished to the Court on behalf of the second, third and fourth named defendants.

SCHEDULE
PART II

IV. OUTLINE SUBMISSIONS AS FURNISHED TO THE COURT ON BEHALF OF THE PLAINTIFFS.
AND

OUTLINE SUPPLEMENTAL SUBMISSIONS TO THE COURT ON BEHALF OF THE PLAINTIFFS.

THE HIGH COURT
COMMERCIAL

2007 / 4691P

Between:

HANSFIELD DEVELOPMENTS, VIKING CONSTRUCTION, MENOLLY PROPERTIES AND MENOLLY HOMES

Plaintiffs

and

IRISH ASPHALT LIMITED, LAGAN HOLDINGS LIMITED, LAGAN CONSTRUCTION LIMITED and by Order LAGAN CEMENT GROUP LIMITED (formerly Lagan Holdings Limited) and by Order LINSTOCK LIMITED

Defendants

OUTLINE SUBMISSIONS ON BEHALF OF THE PLAINTIFFS IN RESPECT OF MOTION ISSUED ON 16 FEBRUARY 2009

BCM Hanby Wallace
Solicitors for the Plaintiffs
88 Harcourt Street
Dublin 2

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INTRODUCTION

1. These outline submissions are filed in support of the application for the reliefs claimed in the motion issued herein on behalf of the Plaintiffs on 16 February 2009. It is emphasised that these submissions are of an outline nature only. As indicated to the Court previously, the Plaintiffs intend to supplement these submissions in the replying submissions which the Plaintiffs will deliver in response to the Defendants' submissions in support of the Defendants' application against the Plaintiffs. It is therefore

proposed in these outline submissions to deal primarily with the legal principles to be applied on an application of this kind, and to address the relevant facts in the submissions to be delivered in response to the Defendants' motion.

II THE LEGAL PRINCIPLES

2. The jurisdiction to make an Order striking out proceedings for failure to make discovery derives from Order 31, Rule 21, of the Rules of the Superior Courts. Order 31, Rule 21 provides as follows:

> *"If any party fails to comply with an order to answer interrogatories over discovery or inspection of documents, he shall be liable to attachment. He shall also, if a Plaintiff, be liable to have his action dismissed for want of prosecution, and if a Defendant, to have his Defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court for an order to that effect and an order may be made accordingly."*

3. The extremity of the circumstance which must be established before an Order pursuant to Order 31, Rule 21 will or can be made is evident from all of the Irish authorities. In this context, it is appropriate to refer to the decisions in Mercantile Credit Co. of Ireland v. Heelan, [1998] 1 IR 81. It should be noted that although this case is reported in [1998] 1 IR 81, the judgment of the Supreme Court was delivered on 14 February 1995. Murphy v. Donohoe Ltd., [1996] 1 IR 123. W. v. W., Unreported, Supreme Court, 25 November 1999. Johnston v. Church of Scientology [2001] 1 IR 682. and Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance plc. [2008] IEHC 114.

(i) Mercantile Credit Company of Ireland v. Heelan

4. In Mercantile Credit Co. of Ireland v. Heelan, [1998] 1 IR 81. the Supreme Court allowed an appeal against an Order of the High Court striking out the Defence of the second and fourth defendants for failure to comply with their discovery obligations. The Court (*per* Hamilton C.J. O'Flaherty and Denham JJ. concurring.) referred to Order 31, Rule 21 of the Rules of the Superior Courts and continued as follows:

> *"The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order of discovery is discretionary and not obligatory, and **should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving discovery**, and not where the omission or neglect to comply with the order is not a culpable one, for instance if it is due to loss of memory or illness."* Emphasis added.

5. Hamilton C.J. further stated that an order *"should only be made where there is wilful default or negligence on the part of a defendant and then only upon application to the court for an order to that end."* In this context, it should be noted that, while the reference to "*wilful default*" is consistent with the preceding statement of principle – that the power "*should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving discovery"* – the reference to "*negligence*" is not. Moreover, a "*negligence*" standard is at variance with the principles articulated in the subsequent authorities (which are addressed below). In this context, see, in particular, the judgment of Barrington J. (with which Hamilton C.J. agreed) in Murphy v. Donohoe Ltd. [1996] 1 IR 123. See also Johnston v. Church of Scientology [2001] 1 IR 682 wherein the Supreme Court reaffirmed the following statement of the law by Barrington J. in Murphy v. Donohoe Ltd.: *'undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's **wilful refusal** to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and **such cases will be extreme cases**.'"*

6. Hamilton C.J. also stated that *"[t]he powers of the court to secure compliance with the rules and orders of the Court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."* Hamilton C.J. emphasized that *"[s]triking out a defence is a very serious matter because the effect of such order is to deprive a defendant of such defences to a plaintiff's claim as would be open to him"*. Having regard to the nature of the plaintiff's claim, Hamilton C.J. stated that "*it was particularly extreme in this case*". Hamilton C.J. continued as follows:

> *"Though the second named Defendant had undoubtedly been in delay in complying with various orders of discovery, and in general prolonging the proceedings because of changes of solicitors and other matters, the interests of justice appear to require that he be afforded an opportunity of raising the defences available to him to controvert the Plaintiff's claim in these proceedings.*
>
> *The proceedings complained of before the High Court were, in my opinion, and from a consideration of the orders made by the learned trial judge unsatisfactory."*

(ii) Murphy v. Donohoe Ltd.

7. Murphy v. Donohoe Ltd. [1996] 1 IR 123. involved a claim arising from an explosion which occurred in a car manufactured by one of the defendants and in which the plaintiff had been injured. The second and fifth defendants had been ordered to discover complaints received by them in relation to fires which occurred in the model of the car at issue between specified dates and which were reported to the second defendant and the parent company worldwide. It was acknowledged by the said defendants that they had failed to make discovery of certain documents and complaints within their possession or power and of which they ought to have known, including documents relating to two other incidents involving this vehicle in circumstances where those incidents had actually occasioned the institution of legal proceedings against the manufacturer in the State. On the basis of Order 31, Rule 21 of the Rules of the Superior Courts, the High Court ordered, *inter alia*, that: (i) the Defence of the second and fifth defendants against the plaintiff's claim be struck out; and (ii) the claim for indemnity and contribution and Defences of the second and fifth defendants against the first, third, fourth and sixth defendants be struck out. The Supreme Court allowed an appeal against that Order. Before addressing the decision of the Supreme Court, it is appropriate to refer to the legal principles set out in the judgment of the High Court, from which the Supreme Court expressly did not demur. Barrington J. (who delivered the judgment of the Court) addressed the statement of the law by Johnson J. as follows:

> *"Nor can this Court criticise the trial judge's statement of the law. The problem arises with his application of the law to the circumstances of the present case."*

8. Johnson J. referred to the judgment of the English High Court Millet J., as he then was. in Logicrose Limited v. Southend United Football Club Limited, *The Times*, 5 March 1988. including, in particular, the following passages upon which the second and fifth defendants relied:

"Deliberate disobedience of a peremptory Order for Discovery is no doubt a contempt and, if proved in accordance with the criminal standard of proof, may, in theory at least, be visited with a fine or imprisonment. But to debar the offender from all further part in the proceedings and to give judgment against him accordingly is not an appropriate response by the Court to contempt.
[…]
It is indisputable that there has been very poor and late discovery on the part of the Plaintiffs. The documents on Kidd, Rapinets Doc file ought to have been disclosed in the Plaintiffs list of documents. Manifestly the discovery that was given by the Plaintiffs is open to severe criticism but that does not call for the dismissal of the action.
[…]
But I ought to add this, I would in any event have refused to accede to this application once the missing document had been produced. The object of Order 24, Rule 16 is not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the Court (see Husbands of Marchwood Limited v Drummond Walker Developments Limited [1975] 2 All ER 30.*).* ***The deliberate and successful suppression of a material document is a serious abuse of the process of the Court*** *and may well merit the exclusion of the offender from all participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe, but if the threat of such exclusion produces the missing document then the object of Order 24, Rule 16, is achieved. In my judgment an action ought to be dismissed or the defence struck out, as the case may be, only in the most exceptional circumstances once the missing document has been produced and then only if despite its production there remains a real risk that justice cannot be done.*

This might well be the case, for example, if it is no longer possible to remedy the consequences of the document's suppression despite its production, perhaps because a material witness who could have dealt with the document had died in the meantime, or where despite the production of the document there was reason to believe that other documents had been destroyed or remained concealed. But I do not think that it would have been right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct could render the further conduct of proceedings unsatisfactory. The Court must always guard against the temptation of allowing its indignation to lead to a miscarriage of justice."

In my judgment there is no risk of injustice if I allow the trial to continue. I, therefore, dismiss the application. There remains the question of costs."

9. In distinguishing the facts in Logicrose from those in the Murphy case, Johnson J. noted that, in Logicrose, the Court clearly held as follows:

"(1) that the deponent was not guilty of any ***deliberate attempt to frustrate the order of the Court*** *but that it was done through inadvertence on his part;*

(2) that the actual document which was the subject of the discovery was in fact discovered and produced in Court, and;

(3) that it was possible that fair procedures were carried on thereafter

and Mr Justice Millet's decision that a fair trial could proceed." Emphasis added.

10. In contrast, Johnson J. concluded that the second defendant had failed to disclose the existence of a number of cases which it must have known about and that no steps whatsoever had been taken to circularize the dealers and agents of the second defendant in Ireland for the purpose of ascertaining whether or not they had any documents relating to any fires or complaints of fires in motor cars. As regards the fifth defendant, Johnson J. noted, *inter alia*, that *"they did not give any clear evidence regarding what documents they ever did have, what the nature of those documents were and in all demonstrated […] an allusiveness, an unwillingness to be pinned down as to what documents precisely they may have had or may not have had or what they might get when inquiries were made".* Johnson J. stated that his conclusions as to whether or not to strike out the defences had to be *"governed by whether or not […] if allowed, the Defendants would make a fair and honest effort to comply with any further Order of the Court"*. In the particular circumstances of the case, Johnson J. concluded that the Court *"could not rely on them to fulfil and carry out honestly the requirements which are imposed on them by order of the Court and as they are representatives of the two Defendants, [it had] no option but to strike out the defence."* Accordingly, the High Court struck out the defences of the second and fifth defendants.

11. The Supreme Court allowed an appeal against that decision. However, as noted above, the Court expressly refrained from criticizing the statement of the law by the Trial Judge. Barrington J. (who delivered the judgment of the Court) addressed the statement of the law by Johnson J. as follows:

"Nor can this Court criticise the trial judge's statement of the law. The problem arises with his application of the law to the circumstances of the present case." The Court considered that the problem related to *the application of the law* by the High Court to the circumstances of the case.

12. In addressing Order 31, Rule 21 of the Rules of the Superior Courts, the Supreme Court (*per* Barrington J. Hamilton C.J. and O'Flaherty J. concurring.) stated as follows:

"Order 31, Rule 21, exists to ensure that parties to litigation comply with Orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of Justice by ensuring compliance with the Orders of the Court.

Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's ***wilful refusal*** *to comply with an Order for Discovery. In such cases, it may be necessary to dismiss the plaintiffs' claim or to strike out the defendants' defence. But such cases will be* ***extreme cases****. As Chief Justice Hamilton put it in Mercantile Credit Company v. Heelan* 1 IR 81.*:*

> *'The powers of the Court to secure compliance with the Rules and Orders of the Court relating to discovery should not be exercised so as to punish a party for failure to comply with an Order for Discovery within the time limited by the Order.'*
>
> *Undoubtedly the trial Judge took the view that the present was an extreme case. As he saw it he had given the second and fifth named defendants many opportunities to mend their hand and they had failed to make a proper and candid discovery. As the learned trial Judge put the matter at page 14 of his judgment:*
>
> > *'I have had the opportunity of watching the Defendant's deponents in the witness box for a number of days and I have come to the conclusion that I could not rely on them to fulfil and carry out honestly the requirements which are imposed on them by order of the Court and as they are representatives of the two Defendants, I have no option but to strike out the defence.'"* Pages 13 – 14 of the judgment.

13. However, the Court considered that there were three matters to which the High Court had not attached significant weight:

> *"Firstly, the key order in the present case is the order of the High Court (Lynch J.) dated 8th March 1994, as the order of the High Court (Johnson J.) dated 10th May 1994 is merely an order for further and better discovery pursuant to the first order. Unfortunately, the meaning of this first order is not altogether clear. Secondly, the legal advisers of the second and fifth named Defendants placed a restrictive interpretation on the order of Lynch J. Johnson J., it is true, referred to this interpretation as "little short of casuistry" but this is not really the point. The real point is that if the Defendants were acting on advice from independent legal advisers who were prepared to stand over their advice in Court this, in itself, was a fact which mitigated the default of the Defendants even in the event of the Trial Judge holding that the advice was wrong.*
>
> *The third factor was that the Defendants declared themselves ready to make a further and better discovery. This factor together with the other two factors should have saved them from the ultimate of having their Defence struck out."*

14. It is clear from the decision of the Supreme Court in Murphy v. Donohoe that nothing short of deliberate conduct on the part of the defaulter will suffice to persuade a court that the drastic step of dismissing an action / striking out a Defence should be taken. In this context, see also Delaney and McGrath *Civil Procedure in the Superior Courts* (2nd Ed.) at para. 10-103. It establishes that such an Order is granted reluctantly and only where the breach is deliberate and has seriously prejudiced a fair trial. See Abrahamson and ors *Discovery and Disclosure* (2007) at para. 11-13. This reflects the position in England, where the authorities make it clear that it is wrong in principle, and a wrong exercise of discretion, to strike out a claim for breach of a non-peremptory order unless the default has already made a fair trial impossible as it is apparent that the defaulting party has no intention of complying. See Matthews and Malek *Disclosure* (Thompson, 3rd ed., 2007) at para. 13.09. In particular, the English and Irish cases have been cited by Matthews and Malek as establishing the following proposition:

> *"An action ought to be dismissed or the defence struck out only in the most exceptional circumstances once the missing disclosure has been provided and then only if despite its production there remains a real risk that justice cannot be done*." Matthews and Malek, op cit, at para. 13.13.

15. Murphy v. Donohue is of importance not merely in identifying the nature of the exceptional default which must be established before proceedings will be dismissed or a Defence will be struck out for failure to make discovery, but also the importance to be attached to advice provided by legal advisors, and the concern of the Court not to exercise its punitive jurisdiction against a litigant who makes discovery in accordance with such advice. See Delaney and McGrath *Civil Procedure in the Superior Courts* (2nd Ed.) para. 10-97. In this context, the decision of the English Court of Appeal in Triolacan v. Medway Power Drives Ltd. [1991] TLR 461. also merits note. In that case, Nourse L.J. Stocker and Woolf LJJ concurring. stated that, *"in approaching an application to dismiss an action on the ground of non-compliance with an order for specific discovery, the court must give the benefit of any doubt over the construction of the order to the party whose action it is sought to have dismissed."* Although it was "*perfectly clear*" that the various affidavits sworn on behalf of the plaintiff, "*neither singly nor cumulatively, constitute[d] due compliance with paragraph (d) of [the discovery order]*", the Court concluded that it should exercise its discretion in favour of the plaintiff. In "*all of the circumstances of the case"* and *"in the expectation that [the Court would] to some extent be able to compensate the defendant in any order [that may be made] as to costs*", the Court allowed the appeal against the Order dismissing the plaintiff's claim for failure to comply with an Order for discovery and permitted the action to proceed subject to the plaintiff making and filing an affidavit which constitutes a due compliance with paragraph 1(d) of the discovery order.

(iii) W. v. W.

16. In W. v. W., Unreported, Supreme Court, 25 November 1999. the Supreme Court addressed the principles concerning applications for strike out the pleading of a party who has failed to comply with its discovery obligations in the following terms:

> *"The rules of the Superior Courts have recently been amended to avoid for the future the worse excesses of the past and with other aspects of case management should eliminate the delays associated with that remedy. What is now required is that the party seeking discovery should indicate the documents or class of documents which are required. It is only in the event of allegations of refusal to furnish information that motions need be brought to the Court.*
> *When the failure to make proper discovery is **deliberate**, this is perjury. The courts have the remedy to strike out the pleading of the perjuring party. Unfortunately, this remedy is seldom granted because, in my view, too great a leniency is given to persons in default. It is one thing to indulge in a bona fide legal dispute as to whether or not any particular document is relevant and should therefore be discovered. It is a totally different thing to delay **deliberately** in furnishing discovery or in **concealing deliberately** documents which are known to be relevant […] It is this latter behaviour for which there should be an adequate sanction.*
> *[…]*
> *Solicitors should advise their clients as to their obligations in relation to making full disclosure and, if necessary, the Court should not be slow to make a solicitor personally liable for costs thrown away by unnecessary and unreasonable recalcitrant behaviour apparently on behalf of their clients. This applies*

equally to the solicitor whose client is seeking the information as to the solicitor whose client is refusing it." Emphasis added.

(iv) Johnston v. Church of Scientology

17. In Johnston v. Church of Scientology, [2001] 1 IR 682. the Supreme Court had to consider, *inter alia*, an appeal against a decision of the High Court which rejected an application on behalf of the defendants to strike out the plaintiff's claim because of what was alleged to be a failure to comply with an order for discovery previously made. The Supreme Court dismissed that appeal. The Court (*per* Keane C.J. Murphy and Murray JJ. concurring.) first noted the discovery order at issue:

> *"The order for discovery made in the High Court which led to the defendants bringing this motion which was unsuccessful in the High Court was an order made by consent. While it was made by consent there is not the slightest doubt and there can be hardly any controversy that it was an order made in an extremely wide ranging form. It was made in a form which embraced an enormous number of categories of different documents set out in the schedule to the notice of motion on which it was based. It should have been obvious from the very nature of the notice of motion and the schedule to the notice of motion that in respect of many aspects the plaintiff might well be saying that I simply had not got these documents or I have only very limited documents because it is enormously wide ranging and requires the plaintiff effectively to discover documents relating to her personal life, to her business life, to her social life and it covers a huge quantity of correspondence between a vast number of people. It covers documents relating to other religious movements and I am only just indicating parts of it. It includes all medical and counselling records on a huge range of matters, all records, notes in relation to any abortions obtained by the plaintiff because the defendants were apparently aware that she had had two abortions, medical records, notes, referrals and similarly correspondence relating to at least the last five years of all diaries maintained by the plaintiff and so on."* Emphasis added.

18. Keane C.J. stated that *"when the trial judge came to deal with the notice of motion requiring that the plaintiff's claim should be struck out because of failure to comply with this order for discovery he quite rightly in my view approached the case on the basis that it was an extraordinarily wide ranging order for discovery and in applying the principles that he did and correctly […] he quite rightly took into account the nature of the order of discovery made".* Emphasis added.

19. Keane C.J. continued as follows:

> *"The court has a jurisdiction and there is no issue about this, to strike out proceedings or to strike out a defence filed by a defendant where it is satisfied that the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result and of course that may also arise where it appears from the affidavit that some particular documents or some category of documents have been in fact destroyed by the party concerned, whether innocently or whether deliberately in order to interfere with the further conduct of the case."* Emphasis added.

20. Keane C.J. stated that *"[t]here is no doubt that the courts enjoy such a jurisdiction but the law is stated as follows by Mr Justice Barrington speaking for this court in the case of Murphy v. Donohoe Limited in which he said:*

> *'undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's **wilful refusal** to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and **such cases will be extreme cases**.'"* Emphasis added.

21. Referring to Mercantile Credit Company v. Heelan, Keane C.J. stated that *"the powers of the courts to secure compliance with the Rules and Orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order".*

22. In applying those principles to the first of the categories of documents at issue, Keane C.J. stated as follows:

> *"There are documents relating to these two abortions that she had. She has not said that she has declined to produce them because they are not relevant although it must be said that their relevance to the issues in this case appear to me to be very limited insofar as they arise at all. But she says she has not got any such documents and we are in no position to say in this court that there were any such documents."*

23. As regards the second of the categories of documents at issue, Keane C.J. stated as follows:

> *"Similarly in relation to the whole matter of financial records, which covers the next four items in this schedule the plaintiff has made voluminous discovery and in fact at one stage it appeared to be indicated that she was in a sense 'overdoing the discovery', and producing material which could not possibly be relevant. She has undoubtedly disclosed a very considerable number of financial statements and she says that this is all that she has. When a plaintiff deposes to that effect this court has repeatedly said that is a compliance with an order for discovery. It may come as a surprise and the other party may well say, well I think he/she must have other documents, they may say that, but if the plaintiff says on oath that he or she has not got the documents then that is a compliance with the order for discovery and the person can have no complaint. If, of course, the affidavit of discovery shows that the party making it misunderstands what they are supposed to produce or if it is clear from the very terms of the affidavit that there are other documents which are still not being discovered, that is a different matter and the court may have to make an order for further and better discovery because of the manner in which the plaintiff has approached it. Here the plaintiff has disclosed a considerable volume of business matters and she says that is all she has and that in my view is the end of that matter."*

24. As regards diaries the subject of the discovery order, Keane C.J. stated as follows:

> *"She also says that she had personal diaries but she discarded them at the end of each year as that particular year came to an end and that she simply does not have them any more and what she has*

not got, she cannot produce. I do not in any way equate this to the situations which arose in English decisions to which we were referred by Mr Trainor, the authority and the common sense and the good law of which I would not for a moment dispute, but which related to documents which in each case were crucial to the action concerned and which were no longer in existence or which in one instance were brought to light as a result of the motion being brought to strike out the proceedings or the defence because of the failure to produce them. This is a wholly different situation. If the business diaries which it is alleged she should have produced or the personal diaries which it is alleged she wrongfully disposed of contained any material relevant to this case and relevant to these proceedings that would be one situation but nobody is in a position to say one way or the other that it would have advanced the plaintiff's case on the one hand or advance the defendants' case on the other hand to the slightest degree. The fact is that the plaintiff has said "these diaries are gone" and it must be taken by implication that the plaintiff was at the end of the day only obliged to disclose material which is relevant and that applies even in an extraordinarily wide ranging order for discovery as was made by consent in the present case. That is where the matter stands similarly in relation to the transcript of a speech which the plaintiff is said to have given at some meeting or lecture or discussion that took place in Clonliffe College, the defendants apparently have a transcript of that speech. It is very difficult to see how their case is advanced in the slightest degree by having any further documents in relation to it or indeed whether any such documents exist at all."

25. Keane C.J. stated that the defendants were "*asking for a very extreme remedy of striking out the entire proceedings of the plaintiff because of what was alleged to be inadequate discovery"*. Keane C.J. stated that, *"for the reasons [he] indicated and applying […] perfect and correct principles the High Court judge declined to accede to that application".* Accordingly, the Court *"dismiss[ed] the appeal on that aspect and affirm[ed] the order of the High Court."*

(v) <u>Geaney v. Elan Corporation plc</u>

26. In <u>Geaney v. Elan Corporation plc</u>, Unreported, High Court (Kelly J.), 13 April 2005. the High Court (Kelly J.) had to consider an application to strike out the Defendant's Defence and Counterclaim because of the Defendant's failure to comply with an Order for discovery. Kelly J. noted that Order 31, Rule 21 of the Rules of the Superior Courts "*provide for what is to occur in circumstances where a party fails to comply with a Discovery Order*" and continued as follows:

> "*That rule provides that the person who is in such default shall be liable to attachment that is to say to attachment and committal to prison. He should also, if a Plaintiff, be liable to have his action dismissed for want of prosecution and, if a Defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended."*

27. Kelly J. observed that there "*isn't the slightest doubt but that the Court does have power to strike out a defendant's defence and counterclaim for failure to comply with its discovery obligations*". However, Kelly J. stated that the circumstances in which that power can be exercised are governed by the decision of the Supreme Court in <u>Mercantile Credit Company of Ireland Ltd. v. Heelan</u>. [1998] 1 IR 81. Having referred to that decision, Kelly J. stated that he was "*quite dissatisfied*" with the way in which the discovery obligations of Elan Corporation plc had been met and that their approach was "*seriously substandard*". Nevertheless, he refrained from striking out the defendants Defence at that juncture. Instead, Kelly J. decided to avail of the second alternative relief sought, namely, an Order for further and better discovery. In giving directions in that regard, Kelly J. emphasized that he expected strict compliance with them and that "*any failure to comply to the letter and to the spirit of the Order that [he made] will have the most serious consequences for the Defendant*". In addition and, in order "*to indicate the Court's displeasure at the way in which the Defendant ha[d] [failed to discharge] its obligations*", Kelly J. lifted the stay on the costs order of the contested discovery application and he made an Order for the costs of the application to strike out / for further and better discovery against the defendant, to include all reserved costs and to be taxed on a solicitor and client basis.

(vi) <u>Dunnes Stores v. Irish Life</u>

28. In <u>Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance plc</u>, [2008] IEHC 114. the High Court (Clarke J.) had to consider allegations of a failure to comply with discovery obligations in the context of an application for declarations that the defendant ("*Irish Life*") had unreasonably withheld its consent to a request for change of use of a property by the plaintiff ("*Dunnes*"). In addressing the background to the discovery issues, Clarke J. stated as follows:

> *"3.1 There had been a significant exchange of correspondence in advance of the commencement of the hearing before me in which, it is fair to say, Dunnes made complaint that the discovery furnished on behalf of the landlords was inadequate. It was, of course, clear that Dunnes had sought, in the proceedings, to question the true motive for the refusal of consent. In the course of the hearing and in particular during the cross examination of witnesses called on behalf of the landlords, it became clear that there seemed to be a significant volume of additional documentation which was relevant to the issues which had arisen between the parties (i.e. the landlords "vision and image") and which had not been discovered. In those circumstances the case was adjourned, with the landlords being given a further opportunity to make proper discovery. A significant volume of additional documentation was revealed by that further discovery process.*
>
> *3.2 There can be little doubt that at least some of the documentation concerned is of significance for the issues which I have to try. It does have to be recorded that it is very regrettable indeed that a major public company of the standing of Irish Life, and a significant businessman such as Mr. O'Reilly should have been guilty of a very significant failure to deal properly with their obligations to the court in respect of discovery."*

29. Clarke J. continued as follows:

> *"3.3 It has often been said that discovery relies to a large degree on trust. This is true. Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligations of the parties concerning disclosure of documents. <u>The book then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. It is, of course, the case that mistakes can and do happen. Such mistakes can range from the entirely innocent and understandable to those which might be characterised as blameworthy to a greater or lesser extent. At the other extreme are cases where there has been **a deliberate failure to disclose material information**.</u> At a*

minimum it is manifestly clear, on all of the evidence, that those involved in making discovery on behalf of the landlords in this case did not take and act upon proper legal advice as to their obligations in relation to discovery. It is, of course, the case that individuals themselves may not fully understand either their overall obligations in relation to discovery, may not be able to properly address questions of relevance which may arise as to whether documents should properly be included, and most certainly may not be able to deal with legal issues, such as privilege, which may arise. However, the obligation on such parties, in those circumstances, is to take proper legal advice and to act upon it. It is again particularly regrettable that major organisations such as the landlords, who have ample resources available to them and had also access to the best of legal advice, should have failed to take the elementary step of ensuring that they knew what their obligations were and of taking advice in respect of any questions of difficulty that might arise.

3.4 I must, therefore, conclude that, at a minimum, there was a very serious failure on the part both of Irish Life and of Mr. O'Reilly to comply with their disclosure obligations to the court. Both were in significant breach of the trust that was placed on them to deal with discovery in a fair and proper manner. There is no doubt but that amongst the consequences of that failure was that these proceedings were significantly lengthened. However for the purposes of this judgment it is important that I emphasise what, if any, consequences for the case itself (as opposed to issues relating to the costs of the proceedings) can properly flow from the failure to make proper discovery." Emphasis added.

30. In addressing the consequences of a failure to comply with a discovery order, Clarke J. stated as follows:

"3.5 I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.

3.6 It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place that ***the failure concerned was designed for the purposes of not giving access to the other side to relevant information*** *and where it would be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the courts decision on the merits of the case. I should point out that Dunnes invite me to draw such an inference in this case. It is said that I should conclude that there was an attempt to prevent certain information becoming available to Dunnes. It is said that an appropriate inference to draw from that fact (if it be so found) is that the landlords were attempting to disguise their true motivation. On that basis it is suggested that I should reach certain conclusions about the true reasons for refusal of consent to which it will be necessary to refer in due course.*

3.7 I do, however, wish to emphasise that I fully accept the submission made by counsel on behalf of the landlords to the effect that it would not be proper for me to allow the discovery issues to influence the decision on the case unless I were satisfied (which he strongly urged I should not be) that it was appropriate to draw inferences of the type suggested on behalf of Dunnes. As counsel put it, his clients 'had not helped themselves' by the way in which discovery had been dealt with. However, it was urged that I should conclude that the failure to deal properly with discovery was due to a failure to understand what was required in discovery (admittedly a culpable failure deriving from not having taken and acted upon proper legal advice) which should not give rise to any proper inference in relation to the underlying facts. This is an issue to which I will have to return in the context of the disputed facts. However having identified the discovery issues which arose, it is appropriate to now turn to the legal basis for the challenge mounted by Dunnes to the refusal of consent." Emphasis added.

31. Ultimately, Clarke J. held that Dunnes were entitled to the declarations sought. In so concluding, Clarke J. had regard to his findings in relation to the failure of Irish Life to comply with its discovery obligations as follows:

"Having considered all of the evidence I have come to the conclusion that the failure to make adequate discovery can not be put down to inadvertence or even negligence. The documents not discovered are too recent and too important to have been accidentally overlooked. While the explanation given by Mr. Martin under cross examination concerning the difficulty of locating all of relevant email strings may go some way towards placing a small number of the omissions into the inadvertent category, that explanation falls far short of providing a full explanation, even in respect of emails, but most particularly in respect of other documentation. It is also clear that much of the documentation which was omitted from the original discovery would, at a minimum, have at least afforded ammunition to the Dunnes side to suggest that at least part of the true reason for the refusal of consent was interlinked with a desire on the part of Mr. O'Reilly's organisation to obtain possession of some or all of Dunnes 1.

9.5 In those circumstances I am driven to the conclusion that the relevant documents were ***deliberately suppressed*** *with a view to minimising the extent to which Dunnes would be able to provide a factual basis for the suggestion that a desire to obtain possession of Dunnes 1 was at least a significant element of the consideration given to the user question by those involved in Mr. O'Reilly's organisation."* Emphasis added.

(vii) Artisan Scaffolding Company v. Antique Hypermarket Limited

32. The decision of the Court of Appeal in Artisan Scaffolding Company v Antique Hypermarket Limited Unreported, 10 February 1993. also merits note. In that case, the Court allowed an appeal against a decision striking out the Defence and Counterclaim of the first defendant and the Defence of the second defendant on the basis of an alleged breach of an unless order in relation to discovery. Rose L.J. explained his reasoning as follows:

"But the question which has to be answered is whether the recorder, on the material which was before him, was entitled to take the course which he did. In my judgment, he was not. It seems to me that there was not before him material sufficient to establish that there had been a failure to comply with the peremptory order. Much of the material suggested that there had been a significant attempt to comply with the peremptory order. Furthermore, his finding that the second defendant had complied with the order seems to me to strike at the heart of his order that the second defendants' defence should be struck out. One sympathises, as I have said, with the plaintiffs and with the position of the learned recorder, before whom it may be no reference was made to the authorities which are before this court; but, whether authorities were cited to him or not, it does appear from the judgment that he did not consider the aspect of whether or not the defendants, even if they had not complied with the peremptory order, had been contumelious. In my judgment, had he considered the material before him, he could not have reached the conclusion which he did, and it does not seem to me that the material which has subsequently come to light in affidavit form and which is before this court would justify this court in approaching the material considerations with a different result."

33. Similarly, Waite L.J. stated as follows:

"The judge clearly proceeded upon the basis that any non-compliance with an unless order will have the automatic consequence of disqualifying the party in breach from any further part in the litigation (subject to the court's powers of adjournment which in this instance he declined to exercise). The authorities show that he was wrong to make that assumption. There is in every case an enquiry to be made as to the degree of contumely involved in the default, the scale of the breach, what excuse there may or may not be for it, whether it can be remedied, how far the opposing party has been prejudiced by it, and any other matter relevant to the very wide discretion conferred on the courts by Order 24, rule 16 to make whatever order the justice of the case may in its particular circumstances require -- see In re Jokai Tea Holdings Limited. [1992] 1 WLR at 1196.

The judge's duty in that regard does not appear to have been referred to in any submission addressed to him at the hearing, and to that extent his omission to make that essential enquiry may be understandable. Nevertheless, it was a serious omission, making it impossible, in my view, for his order to be sustained." Emphasis added.

34. Bingham M.R. agreed that the Court had erred in the respects identified by Rose and Waite LJJ and stated that *"it is necessary to remember that it is the interests of both parties and not just one to which this court must have regard"*. Bingham M.R. stated that *"[t]he course of events in the court below leaves the defendants […] with a legitimate complaint and they are entitled to feel that justice was not seen to be done".*

III SUMMARY OF THE LEGAL PRINCIPLES

35. Having regard to the authorities surveyed above, the principles governing the exercise of the jurisdiction to strike out a Defence consequent upon a failure to comply with discovery obligations can be summarised as follows The same principles also apply to the jurisdiction to dismiss an action.:

36. First, as the Supreme Court stated in Murphy v. Donohoe Ltd., [1996] 1 IR 123. *"Order 31, Rule 21, exists to ensure that parties to litigation comply with Orders for discovery*"; Murphy v. Donohoe Ltd. [1996] 1 IR 123. *"[i]t does not exist to punish a defaulter but to facilitate the administration of Justice by ensuring compliance with the Orders of the Court*". *Ibid.* Similarly, in Mercantile Credit Co. of Ireland v. Heelan, [1998] 1 IR 81. the Supreme Court stated that *"[t]he powers of the court to secure compliance with the rules and orders of the Court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."* Thus, *"[t]he Court must always guard against the temptation of allowing its indignation to lead to a miscarriage of justice*". See Murphy v. Donohoe Ltd. [1996] 1 IR 123 and Logicrose Limited v. Southend United Football Club Limited *The Times*, 5 March 1988. As the High Court (Clarke J.) stated in Dunnes Stores (Ilac Centre) Ltd v. Irish Life Assurance plc.: [2008] IEHC 114.

"a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned."

37. Secondly, an Order pursuant to Order 31, Rule 21 is *"a very extreme remedy" Per* Keane C.J. in Johnston v. Church of Scientology [2001] 1 IR 682, Murphy and Murray JJ. concurring. and should not be granted unless, *inter alia*, the Court is satisfied that there has been a deliberate and on-going failure or refusal to comply with a party's discovery obligations. Thus, in Mercantile Credit Co. of Ireland v. Heelan, [1998] 1 IR 81. the Supreme Court (*per* Hamilton C.J.) stated that the jurisdiction *"should not be exercised unless the court is satisfied that the defendant is **endeavouring to avoid giving discovery**"*. Emphasis added. Similarly, in Murphy v. Donohoe Ltd, [1996] 1 IR 123. Barrington J. (with whose judgment Hamilton C.J. and O'Flaherty J. agreed) stated as follows:

*"undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's **wilful refusal** to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and **such cases will be extreme cases**.'"* Emphasis added.

38. Similarly, in W. v. W., Unreported, Supreme Court, 25 November 1999. the Supreme Court stated that *"[w]hen the failure to make proper discovery is **deliberate**, this is perjury"* Emphasis added. and that *"[t]he courts have the remedy to strike out the pleading of the perjuring party"*. The Court observed that *"[i]t is one thing to indulge in a bona fide legal dispute as to whether or not any particular document is relevant and should therefore be discovered"* but that *"[i]t is a totally different thing to delay **deliberately** in furnishing discovery or in **concealing deliberately** documents which are known to be relevant"*. Emphasis added. The Court stated that *"[i]t is this latter behaviour for which there should be an adequate sanction".*

39. In Johnston v. Church of Scientology, [2001] 1 IR 682. the Supreme Court reiterated that the courts undoubtedly had jurisdiction to strike out proceedings or to strike out a defence where the extent of the non-compliance with the court's order is such that it is not possible to have a fair trial as a result. However, the Court emphasised that the law in that regard was as stated by the Supreme Court in the following passage from the judgment of Barrington J. in Murphy v. Donohoe Ltd.: [1996] 1 IR 123.

> "*undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's* ***wilful refusal to comply with an order for discovery****. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendants' defence and* ***such cases will be extreme cases****.'"* Emphasis added.

40. The English authorities are to similar effect. As Matthews and Malek observe:

> *"Such an order will generally be made only where there has been a deliberate and continuing refusal to provide disclosure or where the default has made the fair trial of an action impossible. Such an order may be made where the default relied on is not in giving no disclosure, but in giving insufficient disclosure."* Matthews and Malek *Disclosure* (Thompson, 3rd ed., 2007) at para 13.07. (Emphasis added).

41. Thirdly, it is clear from the foregoing that a *negligent* failure to discharge one's discovery obligations does not entail the level of "*wilful"* default which is a necessary pre-condition for the exercise of the jurisdiction pursuant to Order 31, Rule 21. Insofar as Hamilton C.J. referred to "*negligence*" in Mercantile Credit Co. of Ireland v. Heelan, [1998] 1 IR 81. it must be read in the context of the preceding statement of principle that the power "*should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving discovery"* Emphasis added. and, more particularly, the subsequent decisions of the Supreme Court in Murphy v. Donohoe Ltd., [1996] 1 IR 123. W. v. W. Unreported, Supreme Court, 25 November 1999. and Johnston v. Church of Scientology [2001] 1 IR 682. (each of which is noted above) which make it clear that *deliberate / wilful* conduct is required.

42. Fourthly, "*if the threat of […] exclusion [of an offender from all participation in the trial] produces the missing document then the object of Order 31, Rule 21, is achieved*". See Murphy v. Donohoe Ltd. [1996] 1 IR 123 and Logicrose Limited v. Southend United Football Club Limited *The Times*, 5 March 1988. Thus, "*an action ought to be dismissed or the defence struck out, as the case may be, only in the most exceptional circumstances once the missing document has been produced and then only if despite its production there remains a real risk that justice cannot be done." Ibid*. This might well be the case, for example, "*if it is no longer possible to remedy the consequences of the document's suppression despite its production, perhaps because a material witness who could have dealt with the document had died in the meantime, or where despite the production of the document there was reason to believe that other documents had been destroyed or remained concealed*". *Ibid*.

43. Fifthly, "*in approaching an application to dismiss an action on the ground of non-compliance with an order for specific discovery, the court must give the benefit of any doubt over the construction of the order to the party whose action it is sought to have dismissed."* Triolacan v. Medway Power Drives Ltd. [1991] TLR 461. Thus, in reversing the decision of the High Court to strike out the Defence in Murphy v. Donohoe Ltd, [1996] 1 IR 123. the Supreme Court had regard to, *inter alia*, the fact that "*the meaning of [the] first order [was] not altogether clear*".

44. Sixthly and related to the foregoing, insofar as a party failed to discover particular documents on the basis of legal advice that they were not discoverable, that mitigates the default of the party, even if the legal advice was incorrect. Thus, in Murphy v. Donohoe Ltd., [1996] 1 IR 123. the Supreme Court had regard to, *inter alia*, the fact that "*the legal advisers of the second and fifth named Defendants [had] placed a restrictive interpretation on the [discovery] order*". Insofar as the High Court considered that this interpretation was "*little short of casuistry*", the Supreme Court observed that "*this is not really the point*". The Court explained that *"[t]he real point is that if the Defendants were acting on advice from independent legal advisers who were prepared to stand over their advice in Court this, in itself, was a fact which mitigated the default of the Defendants even in the event of the Trial Judge holding that the advice was wrong."*

45. Seventhly, in assessing whether to grant an Order pursuant to Order 31, Rule 21, it is also necessary to consider whether the party in default is willing to comply with its discovery obligations and to make further and better discovery. In Murphy v. Donohoe Ltd, [1996] 1 IR 123. the third factor underlying the decision of the Supreme Court to reverse the decision of the High Court to strike out the Defence was the fact that "*the Defendants declared themselves ready to make a further and better discovery*".

46. Eighthly, it is also necessary to have regard to the nature and extent of the order for discovery with which the party has allegedly failed to comply. In Johnston v. Church of Scientology, [2001] 1 IR 682. the Supreme Court (per Keane C.J.) observed that *"[t]he order for discovery made in the High Court which led to the defendants bringing this motion […] was an order made by consent".* The Court further noted that *"[w]hile it was made by consent there is not the slightest doubt and there can be hardly any controversy that it was an order made in an extremely wide ranging form"* and that *"[i]t was made in a form which embraced an enormous number of categories of different documents"*. Emphasis added. Keane C.J. stated that *"when the trial judge came to deal with the notice of motion requiring that the plaintiff's claim should be struck out because of failure to comply with this order for discovery he quite rightly in my view approached the case on the basis that it was an extraordinarily wide ranging order for discovery and in applying the principles that he did and correctly, in my opinion, he quite rightly took into account the nature of the order of discovery made".* Emphasis added.

47. Ninthly, *"[t]here is in every case an enquiry to be made as to the degree of contumely involved in the default, the scale of the breach, what excuse there may or may not be for it, whether it can be remedied, how far the opposing party has been prejudiced by it, and any other matter relevant to the very wide discretion conferred on the courts by [the Rules]"*. Artisan Scaffolding Company v Antique Hypermarket Limited Unreported, 10 February 1993 (*per* Waite L.J.). It is also "*necessary to remember that it is the interests of both parties and not just one to which this court must have regard"*. *Ibid* (*per* Bingham M.R.).

48. Finally, the Court's jurisdiction should be exercised in the light of the right of access to Court guaranteed both by the Constitution and the European Convention on Human Rights. In this context, the following passage from Matthews and Malek merits note:

> *"In deciding whether or not to strike out a statement of case for failure to make proper disclosure, the*

court may be required to consider whether a strike out order is a proportionate step to take in that it may have the result of depriving the defaulting party from pursuing or defending a claim in court. Such a requirement may be derived both from the overriding objective and Article 6.1 of the European Convention on Human Rights. First, the new procedural code embodied in the CPR is subject to the overriding objective of enabling the court to deal with cases justly, including dealing with cases in ways which are proportionate. Secondly, Art. 6.1 of the European Convention on Human Rights embodies the 'right to a court' of which the right of access, that is, the right to institute proceedings before a court, constitutes one aspect. This is not an absolute right and restrictions on this right are permissible where there is a reasonable relationship of proportionality between the means employed and a legitimate aim sought to be achieved. Legitimate aims no doubt include ensuring court orders are obeyed and that proper disclosure is made to ensure a fair trial." Matthews and Malek *Disclosure* (Thompson, 3rd ed., 2007) at para. 13.17.

IV CONCLUSION

49. Having regard to the legal principles outlined above (which will be supplemented in due course) and the evidence before the Court, it is respectfully submitted that the Court should grant the reliefs sought in the motion issued herein on behalf of the Plaintiffs on 16 February 2009 and re-entered in September 2009.

27 October 2009

DOUGLAS CLARKE
PAUL COUGHLAN
BRIAN MURRAY
DENIS MCDONALD
BRIAN O'MOORE

THE HIGH COURT

COMMERCIAL
2007 No. 4691P

BETWEEN

HANSFIELD DEVELOPMENTS,
VIKING CONSTRUCTION,
MENOLLY PROPERTIES and
MENOLLY HOMES

Plaintiffs

--and-
IRISH ASPHALT LIMITED,
LAGAN HOLDINGS LIMITED
AND BY ORDER
LAGAN CEMENT GROUP LIMITED
(FORMERLY LAGAN HOLDINGS LIMITED)
AND BY FURTHER ORDER
LINSTOCK LIMITED

Defendants

OUTLINE SUPPLEMENTAL SUBMISSIONS
OF THE PLAINTIFFS IN SUPPORT OF THEIR
MOTION TO STRIKE OUT THE DEFENDANTS' DEFENCE

Introduction

1. The relevant legal principles governing a motion of this kind have already been set out in the Plaintiffs' preliminary submissions dated 27th October 2009. That consideration of the legal principles is briefly supplemented here, reference being made in the next section to authorities addressing the proper approach of the Court where, following an application to dismiss proceedings consequent upon a failure to make discovery, a party fails to provide any proper response to legitimate queries raised as to the discovery which has been made. However, the focus of these submissions is upon the evidence before the court, and the reasons why the Plaintiffs submit that this is an appropriate case in which to strike out the defence of the Defendants for

failure to make adequate discovery.
2. In this context, the Plaintiffs submit that the evidence before the court establishes the following:-
(a) First, that even now, the Defendants have not made full discovery;
(b) Secondly, that the late discovery of documents by the Defendants has prejudiced the Plaintiffs in a material way in circumstances where documents recently disclosed are highly material to evidence already given by the Plaintiffs' experts;
(c) Thirdly, the evidence before the court clearly establishes that the Defendants have adopted a highly evasive approach to their discovery obligations. There has been a conscious attempt to evade their discovery obligations which (it is respectfully submitted) should be treated by the court as tantamount to a refusal to provide discovery.

Additional Legal Considerations :

3. The evidence demonstrating a failure on the part of the Defendants to comply with their discovery obligations is dealt with in more detail below. Before turning to the detail of these deficiencies in the discovery (which will, in due course, be amplified by oral argument), it is helpful to place the factual analysis which follows, in its proper legal context.
4. Thus, it will (the Plaintiffs believe) be obvious from what follows in this submission that first, categories of documents exist (or did exist) which the Defendants have discovered at a late stage without the provision of any proper explanation, second, that there are clear and identified documents which the Plaintiffs can establish exist, which are relevant and which have not yet been discovered, and third that there is an overwhelming likelihood that there are further documents which the Defendants ought to have, but have not, discovered. These various categories will be elaborated upon shortly, and are summarised in the concluding part of this submission.
5. The Defendants attitude to the various queries that have been raised by the Plaintiffs in respect of these omissions in discovery has been characterised by, first a dismissive posture when confronted with genuine queries arising from the Defendants' discovery, second by a refusal to engage in any meaningful way with the concerns identified by the Plaintiffs and third, by a refusal to undertake proper searches for further documents, notwithstanding the overwhelming evidence of deficiency in the discovery to date. These three features of the affidavit evidence and correspondence from the Defendants defines the proper approach to be adopted by the Court in resolving this application.
6. Thus, while the Plaintiffs accept and underscore in their submissions that the circumstances must be extreme before the Court will strike out proceedings for failure to make discovery, a critical feature of those cases in which it has been decided that an application of this kind should fail notwithstanding evident deficiency in the Respondent's discovery, has been that the Respondents to such motions have manifested an intention to make further and better discovery (*see* Murphy v. Donohue [1996] 1 IR at 143). In this application no such intention has ever been manifested. As already noted that feature of the Defendants' approach falls to be considered in the light of the consideration that (a) there are documents which ought to have been discovered which have been discovered at a late stage, (b) there are documents which clearly exist which ought to have been discovered, (c) that there is a credible basis for believing that other documents exist or that they did at one time exist, and (d) that there is a point blank refusal by the Defendants (i) to properly explain, (ii) to acknowledge, or (iii) to make any further proper attempt to search for discoverable documents
7. The Court will be well familiar with the usual approach adopted by litigants, and the Court, where queries are raised in respect of a party's discovery. Usually, those queries are responded to by the party whose discovery is alleged to be deficient, and the Court thereupon adjudicates upon whether there is a basis for believing that relevant documents have not been discovered, or whether the moving party has failed to displace the usual assumption that the averments by the deponent of an affidavit of discovery that he or she has no further documents to discover, are correct. Generally, this situation – where there are grounds for suspecting that additional discovery remains outstanding – is addressed by the making of an order for further and better discovery.
8. As more fully explained in the course of this submission, the Defendants have not adopted this usual approach. Instead, they have dismissed the significant and clearly expressed concerns of the Plaintiffs, and resorted to bald and general averments where apparent deficiencies in the discovery have been identified. This stands in stark contrast to the painstaking explanations tendered by the Plaintiffs in respect of their discovery. It is certainly not an approach which evidences an intention to make *cooperation, communication and transparency the cornerstones of the discovery process*. Defendants submissions of 29 October 2009 para 293.
9. The Defendants themselves adopt the position that the provisions of the Commercial Court Rules impose extensive obligations of co-operation :*parties must be under an implicit duty to co-operate with the same spirit of inter party cooperation in this jurisdiction as is expressly stipulated in England* ; Defendants submissions of 29 October 2009 para. 309. *co-operation must be ... a cornerstone of the trial process in this jurisdiction*. Id para. 311 *The Defendants adopt the submission that the duty to cooperate exists in the context of all litigation but is particularly heightened in the context of the Commercial Court*. Id. Para. 285.
10. The Plaintiffs will ask the Court in the course of their submissions to measure the Defendants' responses to entirely legitimate enquires and queries about their discovery, against this standard. The fact that there are demonstrable and admitted deficiencies in the Defendants' discovery to date, the fact that the Plaintiffs are in a position to identify documents which ought to have been but have not been discovered, the fact that the Plaintiffs have raised genuine and well founded concerns that there are other documents captured by the discovery categories which have not been produced, the abject failure of the Defendants to engage with or address those concerns by reference to anything other than generality, and the refusal of the Defendants to undertake to make proper discovery, demonstrates that this is an appropriate case in which to strike out the Defendants' Defence.

Procedural history of the motion before the court :

11. The motion before the Court was issued on 16 February 2009 following an exchange of correspondence in relation to deficiencies in the Defendants' discovery. See the letters dated 11 February 2009 and 13 February 2009 from BCM Hanby Wallace to Lennon Heather (exhibits "GWB4" and "GWB5" to the Affidavit sworn by Gerard Butler on 16 February 2009 (Tabs 6 and 7 of Folder 1)). The reliefs sought in the motion include, in particular:
(i) an Order directing the Defendants to swear Affidavits which, *inter alia*:
(a) discover each and every document within the categories of documents which the Defendants agreed to discover and/or were directed to discover by Order of the Court dated 14 April 2008 which had not hitherto been discovered by the Defendants, including the documents specified in paragraphs (a)(i)(1) – (9) of the motion;
(b) discover each and every document which constitutes, records, refers to and/or evidences minutes or records of Board and/or Management meetings of the Defendants, or any of them or any of their respective servants or agents, during the period from 1 January 1999 to date;
(c) provide a detailed and precise explanation for, *inter alia*, the issues raised in the Affidavit grounding the Plaintiffs' application including (but not limited to) the methodology / approach adopted by or on behalf of the Defendants when determining whether documents were discoverable herein.
(ii) an Order permitting inspection of certain specified documents; and
(iii) further, or in the alternative, an Order striking out each of the Defendants' pleadings, including, in particular, the Defences and Amended Defences.

12. The Plaintiffs' application was grounded upon an Affidavit sworn by Gerard Butler on 16 February 2009. Tab 2 of Folder 1. A replying Affidavit on behalf of the First Defendant (only) was sworn by Peter Lennon on 20 February 2009 (the "*First Affidavit of Mr. Lennon*"). Tab 8 of Folder 1. At the case management hearing on that date, the Court stated that "*the court would have a concern that all relevant documentation under the various headings has now been discovered*"; that "*the Court [required] a confirmatory affidavit that all relevant material has been discovered*"; and that "*the bottom line is that all relevant documentation under the various headings must be discovered*."
13. The First Affidavit of Mr. Lennon was replied to in an Affidavit sworn by Gerard Butler on 23 February 2009 (the "*Second Affidavit of Mr. Butler*"). Tab 9 of Folder 1. After the commencement of the Opening on behalf of the Plaintiffs on 23 February 2009, Lennon Heather furnished BCM Hanby Wallace with a Sixth Supplemental Affidavit of Discovery which was sworn by Terry Lagan for and on behalf of the First Defendant on that date. Tab 13 of Folder 1. In the afternoon of 23 February 2009, Lennon Heather forwarded to BCM Hanby Wallace a disk containing the documents discovered in that Affidavit of Discovery (including, *inter alia*, minutes of management meetings of Irish Asphalt Limited). A Confirmatory Affidavit on behalf of the Defendants was also sworn by Terry Lagan on 23 February 2009. Tab 14 of Folder 1.
14. In his Confirmatory Affidavit, Mr. Lagan stated that he swore the Affidavit "*to confirm that [he had] made full discovery of all relevant documentation under the categories of discovery which the Defendants agreed to discover and/or were directed to discover by Order of Judge Charleton made on the 14th April 2008*". Mr. Lagan further stated that he had "*received comprehensive legal advice from [his] solicitors, Messrs. Lennon Heather, as to the relevance of documentation under the categories of discovery in the Defendant's possession, power and procurement and [understood] that the Defendants must have made discovery of each and every document in the categories of documents which the Defendants agreed to discover and/or were directed to discover by the Order of the 14th April 2008*". Mr. Lagan further stated that he had "*been advised on, and [understood] the gravity of, any failure by the Defendants to make full discovery of all relevant documentation under the categories of discovery*" and that he was "*fully appraised of the reliefs sought by the Plaintiffs pursuant to their Notice of Motion dated 16th February 2009 including an Order striking out each of the Defendants' pleadings herein, in particular the Defences and Amended Defences*". Mr. Lagan further "*confirm[ed] that discovery has now been made of all documents relevant to the categories of discovery which the First Named Defendant agreed to discover and/or were directed to discover pursuant to the Order of this Court dated 14th April 2008*."
15. Having regard to the Confirmatory Affidavit of Terry Lagan, the Plaintiffs decided not to move a formal application to strike out the Defendants' Defence on 25 February 2009 and, instead, to proceed with the hearing of the proceedings, with the motion being left live during the currency of the trial. The Court was informed of that decision at the hearing on 24 February 2009. At that hearing, the Defendants confirmed their agreement to the position in that regard Page 54 of the transcript for the hearing on 24 February 2009 (exhibit "GWB1" to the Affidavit sworn by Gerard Butler on 9 September 2009; Tab 20 of Folder 1). and indicated that a replying Affidavit to the (Second) Affidavit of Gerard Butler would be furnished "*so that it will be in if the discovery application should subsequently be heard*". *Ibid*.
16. On 27 February 2009, Mr. Lennon swore an Affidavit in response to the Second Affidavit of Mr. Butler (the "*Second Affidavit of Mr. Lennon*"). Tab 15 of Folder 1. In that Affidavit, Mr. Lennon stated, *inter alia*, that "*[i]t was during the weekend of the 21st and 22nd February 2009 that Mr Lagan conducted a final extensive review to ensure that he was absolutely satisfied to confirm by way of a confirmatory affidavit that he had made available and discovered all relevant documentation"*. Mr. Lennon added that "*[t]he First Named Defendant has already made clear on affidavit that all documents in its possession, power and procurement have been discovered in accordance with rules*" and that "*[t]his ha[d] now been confirmed in a 'confirmatory' affidavit".*
17. On 13 March 2009, the Defendants were directed by the Court to give up-to-date information in relation to the complaints which they received in respect of the infill from the Bay Lane quarry and, specifically, details of all such complaints during the period from July 2006 to date. On 13 March 2009, Counsel for the Defendants acknowledged that the Court was correct in observing that the witness statement of Mr. Lagan only addressed the issue of complaints "*up until July '06*" and undertook that they "*will be brought up to date*".
18. Under cover of a letter dated 20 March 2009, Lennon Heather furnished certain information and documentation in purported compliance with the said direction and undertaking given on behalf of their clients. In a replying letter dated 10 April 2009, BCM Hanby Wallace observed that Lennon Heather and their clients had manifestly failed to comply with their obligations in that regard. In their replying letter dated 17 April 2009, Lennon Heather disputed that there was any such failure and professed themselves to be "*astounded*" by the statements of BCM Hanby Wallace to the contrary. Lennon Heather stated that "*all documents relating to complaints up to the date of discovery July 2008 were discovered*" and that they "*have now provided [BCM Hanby Wallace] with all the material which [they] agreed to give in Court on 13 March 2009*."
19. Under cover of a letter dated 16 June 2009, BCM Hanby Wallace furnished to Lennon Heather documentation concerning, *inter alia*, surveying and testing of the lands that became the Bay Lane quarry which was voluntarily furnished to the Plaintiffs by BMA Geoservices Limited ("*BMA*") and which had not been discovered by the Defendants. A non-party discovery motion in respect of BMA-related documentation was subsequently issued on behalf of the Plaintiffs. That application was grounded upon an Affidavit sworn by Mona Costelloe which exhibited (at exhibit "MC5") the BMA documents that had been furnished voluntarily to the Plaintiffs. At the hearing of that application on 28 July 2009, the Defendants' position in respect of that documentation was that it related to a different site and their position was summarised thus: "*either it's not relevant and not within the scope of the discovery or not within [the Defendants'] possession, power or procurement*." For reasons which are set out below, it is respectfully submitted that the position adopted by the Defendants was clearly wrong. Furthermore, the BMA documents clearly demonstrate that there are further documents which ought have been discovered by the Defendants (and this question is dealt with in greater detail below).
20. At the case management hearing on 31 July, 2009, the court was informed that the Plaintiffs had concerns about the adequacy of the Defendants' discovery and that a letter was in the course of preparation to the Defendants' solicitors. In a subsequent letter dated 11 August 2009 to the Defendants' solicitors, Exhibit "GWB2" to the Affidavit sworn by Gerard Butler on 9 September 2009; Tab 21 of Folder 1. BCM Hanby Wallace stated that it was clear that, notwithstanding the Confirmatory Affidavit sworn by Mr. Lagan on 23 February, 2009, there was ongoing failure by the Defendants to comply with their discovery obligations. BCM Hanby Wallace informed the Defendants' solicitors that, in the circumstances, they would be re-entering the motion seeking, *inter alia*, an Order striking out the Defendants' Defence as soon as practicable. In the interim, BCM Hanby Wallace requested the Defendants' solicitors:
(i) To address each of the issues identified in the letter; and
(ii) To confirm that a proper search for the documents within the ambit of the categories of documents which the Defendants were required to discover had been undertaken;
(iii) To furnish copies of: (a) all documents which the Defendants were required to discover but had hitherto failed or refused to discover; and (b) all documents over which the Defendants made erroneous claims of privilege; and
(iv) To furnish an Affidavit which, *inter alia*, discovers all of the documents which the Defendants were required to discover but which they had hitherto failed or refused to discover.
21. BCM Hanby Wallace added that the necessity for the foregoing was further underlined by the position of the Defendants in respect of the documentation exhibited to the Affidavit grounding the Plaintiffs' non-party discovery application which was

heard on 28 July 2009. BCM Hanby Wallace stated that the documents and survey test results exhibited to the Affidavit of Mona Costelloe clearly relate to the Bay Lane site and the representations to the contrary which were made on behalf of the Defendants to the Court were seriously and incomprehensively incorrect. The details of the Plaintiffs' position in that regard were set out in the letter dated 11 August 2009.
22. In a replying letter dated 13 August 2009, Exhibit "GWB3" to the Affidavit sworn by Gerard Butler on 9 September 2009; Tab 22 of Folder 1 the Defendants' solicitors indicated that they regarded the Plaintiffs' solicitors' letter of 11 August, 2009 as a gross abuse of process and that they would not be dealing with any of the substantive issues arising out of the letter dated 11 August 2009 until they had completed the exercise they were carrying out in respect of the additional discovery made by the Plaintiffs. In a replying letter dated 19 August 2009, BCM Hanby Wallace observed, *inter alia*, that it was "*particularly striking that the Defendants are not in a position to explain why they failed to discover, inter alia, the BMA documents which it was necessary for the Plaintiffs to obtain by way of non-party discovery or to provide an assurance that other similarly critical documents were not excluded from the Defendants' discovery*". Exhibit "GWB4" to the Affidavit sworn by Gerard Butler on 9 September 2009; Tab 23 of Folder 1.
23. On 8 September, 2009, the court gave liberty to re-enter the Plaintiffs' motion filed in February 2009 on the basis that it would be heard at or after the hearing of the Defendants' motion. At that hearing, the Defendants (through their counsel) intimated for the first time that they wished, notwithstanding the letter of 13 August, to respond in a substantive way to the letter of 11 August from BCM Hanby Wallace. At that hearing, the Plaintiffs (through their counsel) also indicated that a further letter would be sent on the following day raising further issues in relation to the adequacy of the Defendants' discovery. Accordingly, BCM Hanby Wallace sent a further letter in relation to the ongoing failure or refusal of the Defendants to comply with their discovery obligations on 9 September 2009. Exhibit "GWB5" to the Affidavit sworn by Gerard Butler on 9 September 2009; Tab 24 of Folder 1 That letter highlighted, in particular, the failure or refusal of the Defendants to discover all relevant documents concerning: (i) the Geoffrey Walton practice; (ii) minutes of meetings; and (iii) Celtest. On the same date (9 September 2009), Gerard Butler swore a further Affidavit in support of the Plaintiffs' motion issued on 16 February 2009 (the "*Third Affidavit of Mr. Butler*"). Tab 19 of Folder 1.
24. The Defendants' solicitors replied to the correspondence dated 11 August 2009 and 9 September 2009 by letter dated 5 October 2009. An Affidavit was sworn by Peter Lennon on behalf of the First Defendant on that date (the "*Third Affidavit of Mr. Lennon*"). Tab 25 of Folder 1 Continued. In the letter of 5 October, 2009, the Defendants' solicitors indicated that the Defendants had certain additional documents which they would discover *"if necessary"* after the conclusion of their motion to strike out the Plaintiffs' claim. However, after the matter was mentioned to the court at a case management hearing on 9 October, 2009, the Defendants agreed to deliver a further Affidavit of Discovery. A Seventh Supplemental Affidavit of Discovery of Terry Lagan was sworn on 16 October, 2009 but this Affidavit was sworn on behalf of the First Defendant only. Tab 36 of Folder 1 Continued.
25. Gerard Butler swore a further Affidavit in support of the Plaintiffs' application on 20 October 2009 (the "*Fourth Affidavit of Mr. Butler*"). Tab 38 of Folder 4. An Affidavit was sworn by Padraig Peters on the same date. Tab 44 of Folder 1 Continued. A Supplemental Affidavit was sworn by Mr. Butler on 21 October 2009 (the "*Fifth Affidavit of Mr. Butler*"). Tab 45 of Folder 1 Continued.
26. On 2 November 2009, Terry Lagan swore an Affidavit on behalf of the First and Fifth Defendants. Tab 47 of Folder 1 Continued. On 9 November 2009, Declan Canavan belatedly swore an Affidavit on behalf of the Second, Third and Fourth Defendants in which he indicated in very general terms that after a weekend's search, he did not believe that there are any further relevant documents held by the Second, Third and Fourth Defendants. Tab 48 of Folder 1 Continued.

The issues which arise

27. The issues which arise relate to a number of discrete topics (which have been highlighted in the correspondence and the affidavits before the court) as follows:-
(a) The failure of the Plaintiffs to make discovery of the BMA Geoservices documents;
(b) The failure of the Plaintiffs to make discovery of all relevant test reports and results of Celtest;
(c) The Defendants' failure to make discovery of documents relating to Geoffrey Walton;
(d) A similar failure on the part of the Defendants in relation to documents of TMS Environmental;
(e) A further failure on the part of the Defendants to make discovery of documents relating to Frank Benson & Partners/Tom Phillips & Associates;
(f) The failure of the Defendants to make discovery of cone penetrometer tests undertaken by Scott Wilson Limited;
(g) The failure of the Defendants to make full and adequate discovery of electronically stored documents and the ongoing failure of the Defendants to provide any explanation of the manner in which such documents were searched for and identified for the purposes of complying with their discovery obligations;
(h) The First Defendant's failure to make discovery of copies of original infill invoices;
(i) The Defendants' failure to make discovery of documents in relation to similar complaints to those advanced by the Plaintiffs in these proceedings;
(j) The failure of the Defendants to make discovery of communications between them and purchasers of material from the Bay Lane Quarry;
(k) The ongoing failure of the Defendants to make discovery of diaries of relevant personnel;
(l) The wrongful assertion by the Defendants of privilege over documents which, from their description in the affidavits of discovery sworn on behalf of the Defendants, are manifestly not privileged;
(m) The ongoing failure of the Defendants to make discovery of all relevant minutes notwithstanding the undertaking given by Mr. Lagan on their behalf that all minutes would be made available.
28. Each of these topics will now be dealt with in turn.

BMA Geoservices

29. It has been an important part of the Plaintiffs' case that the Bay Lane Quarry was not suitable for the extraction of materials for use as infill and that the Defendants provided misleading and inaccurate information to the Planning Authorities when applying for planning permission for quarry use. It will be recalled that the Defendants described the material in the quarry as *"limestone"* and as a *"high quality aggregate"*. In addition, the Plaintiffs have questioned the adequacy of the assessment carried out by the Defendants of the suitability of the Bay Lane lands for quarrying. These issues were addressed in the reports and evidence of four of the Plaintiffs' witnesses, namely:-
(a) Dr. Michael Maher;
(b) Dr. Peter Strogen;
(c) Dr. Rob Donnelly; and
(d) Dr. Brian Hawkins.
30. Categories 1 and 2 of the Plaintiffs' request for voluntary discovery dated 10 March, 2008 clearly covered any documents relating to any investigations or testing carried out on the Bay Lane lands as to their suitability to be developed as a quarry.
31. As described in the affidavit of Mona Costelloe sworn on 23 July, 2009 At Folder 4A, Tab 4E of the plaintiffs' motion papers., the Plaintiffs became aware in May 2009 that BMA Geoservices Limited or associated companies carried out investigations of the

lands that became the Bay Lane Quarry during the course of 1995. Initially, BMA made certain documentation available to the Plaintiffs voluntarily, and this was copied to the Defendants' solicitors on 16 June, 2009 At Folder 4A, Tab 4C.. Subsequently, a formal application was made to the court for non-party discovery against BMA, and this application was heard by the court on 28 July, 2009. As previously noted, that application was grounded on the affidavit of Ms. Costelloe. The exhibits to her affidavit are important. They comprise the same booklet of documents as were provided to the Defendants' solicitors on 16 June, 2009. These documents are comprised in Exhibit "MC5" to Ms. Costelloe's affidavit Which can be found at Folder 4A, Tab 4E.. Exhibit "MC5" contains a map of a property which is clearly the Bay Lane site. A number of testing points are marked on this map by reference to, for example, *"WS3"*, *"WS4"* and *"WS5"*. Other pages of Exhibit "MC5" contain the relevant test results for those marked testing sites. It is therefore an easy matter to correlate these test results to the testing points on the map.

32. Notwithstanding the material comprised in Exhibit "MC5", the Defendants on the hearing of the application on 28 July, 2009 instructed their counsel to make a submission to the court that the survey test results did not relate to the Bay Lane Quarry at all, but to a site called the Hollywood Rath Quarry Site 2. It was also submitted that the material did not appear to be encompassed by any of the discovery obligations. It is submitted that both of these contentions were manifestly without foundation. The material comprised in Exhibit "MC5" clearly referred to the Bay Lane site albeit that some of the material was labelled *"Hollywood Rath"*, rather than *"Bay Lane"*. Furthermore, it is quite clear that the results of testing of the Bay Lane site fall within categories 1 and 2 of the request for discovery dated 10 March, 2008.

33. The Plaintiffs were very concerned by the attitude adopted by the Defendants and on 11 August, 2009, BCM Hanby Wallace wrote to the Defendants' solicitors outlining in great detail why the materials comprised in Exhibit "MC5" related to the Bay Lane site. In particular, the letter explained the maps (which were unmistakably of the Bay Lane site) and the interrelationship between the test results and the maps. That letter can be found at Folder 1, Tab 21.

34. Subsequently, on 14 August, 2009, Mr. Bernard Murphy swore an affidavit of discovery on behalf of BMA in which he confirmed that his company had done preliminary investigations on the Bay Lane Quarry *"previously referred to ....as Hollywood Rath site up to in or about 1995"*. See paragraph 3 of Mr. Murphy's affidavit which appears at Folder 4A, Tab 6.

35. Notwithstanding this very clear evidence, the Defendants initially refused to engage in any meaningful way with the detailed queries raised by BCM Hanby Wallace and until very recently, continued to persist in contending that the material related to Hollywood Rath and not to Bay Lane. The initial response is contained in a letter from the Defendants' solicitors dated 13 August, 2009 At Folder 4A, Tab 2. in which the Defendants said that they regarded the letter of 11 August, 2009 as a *"gross abuse of process"* and they also said that *"we will clearly not be dealing with any substantive matters arising out of this correspondence until we have completed our exercise in relation to your clients' clear unambiguous and accepted failure to make proper discovery in this case"*.

36. Ultimately, after the matter was mentioned to the Court in September, the Defendants provided a substantive response by a letter dated 5 October, 2009 See Folder 1, Tab 26. from their solicitors in which they continued to maintain that the material related to Hollywood Rath and not to Bay Lane. At the same time, an affidavit was sworn on behalf of the Defendants by Mr. Lennon in which he swore at paragraph 23 that the *"Defendants have engaged with these new queries and have re-examined their own discovery to ensure that it is compliant with its discovery obligations"*.

37. By any standard, the attitude taken by the Defendants at this stage was startling. The evidence placed before them together with the careful explanations provided by BCM Hanby Wallace were simply ignored and the Defendants continued to maintain the wholly unsustainable position that the material did not relate to Bay Lane. It is submitted that this is clear evidence of the Defendants' evasiveness insofar as their discovery obligations are concerned. In this context, while the approach of the Defendants appears to be that this is a matter for the First Defendant rather than for the Defendants generally, it is submitted that this cannot be correct. Some of the material discovered by BMA was addressed to *"the Lagan Group"*. For example, the invoice issued by BMA at the conclusion of their work in 1995 was addressed to Mr. John Gallagher *"the Lagan Group"*. See Folder 4A, Tab 8.

38. In a replying affidavit on 20 October, 2009, Mr. Butler on behalf of the Plaintiffs reiterated on oath the matters dealt with in the BCM Hanby Wallace letter of 11 August, 2009, and on 2 November, 2009 a responding affidavit was received from Mr. Terry Lagan on behalf of the First Defendant At Folder 1 (continued), Tab 47. in which he acknowledged for the first time (almost 5 months after the papers comprised in Exhibit "MC5" were originally furnished to the Defendants on 16 June, 2009) that the BMA materials related to Bay Lane. However, notwithstanding this belated admission on the part of Mr. Lagan, neither the First Defendant nor any of the other Defendants has made any additional discovery in relation to the BMA materials. This is so notwithstanding that a seventh supplemental affidavit of discovery At Folder 1 (continued), Tab 36. (i.e. an eighth affidavit of discovery or a ninth affidavit if one includes the confirmatory affidavit sworn by Mr. Lagan on 23 February, 2009). This latest affidavit of discovery by Mr. Lagan on behalf of the First Defendant makes no mention whatever of the BMA materials. It provides no details of any search undertaken for any of the BMA materials, and although it is clear that these materials must have been in the possession of some or all of the Defendants – at least at one stage – the materials are not dealt with in the second schedule to the affidavit. In the circumstances, it is submitted that there is a clear failure on the part of the Defendants to make discovery in relation to the BMA materials which has not been remedied as of the date of hearing of this motion. Nor have the Defendants given any intimation that they propose to seek to remedy this clear failure on their part. Insofar as the remaining Defendants are concerned, there is an affidavit of Declan Canavan sworn on 9 November, 2009 (Tab 48 of Folder 1 Continued) but it does not deal with the BMA materials at all. Their attitude is, as it has been from the outset, one of contemptuous dismissal of the Plaintiffs' well grounded concerns.

39. It is submitted that the BMA materials are clearly highly relevant. It is the Plaintiffs' case (and this has been confirmed by the Plaintiffs' experts See paragraph 22 of Mr. Butler's affidavit sworn on 20 October, 2009 at Folder 4.) that the geophysical information contained in Exhibit "MC5" suggests the presence of a deep overburden and/or a very heavily weathered/poor quality rock overlying an argillaceous rock unit beneath the areas of the site investigated. This averment is not controverted by the Defendants. That material is therefore highly relevant to the evidence which has been given by Dr. Maher, Dr. Strogen, Dr. Donnelly and Dr. Hawkins. It is also material to the evidence which Mr. Lagan proposes to put before the court as set out in his witness statement and it tellingly (so the Plaintiffs submit) demonstrates that his proposed evidence is plainly erroneous.

40. While the material is of relevance to many different aspects of the evidence given by the Plaintiffs' experts to date, it is sufficient for these purposes to refer to one example. It will be recalled, for example, that Dr. Donnelly was cross-examined on the basis that the material in Bay Lane was of a high quality. It would clearly have been of assistance to Dr. Donnelly in answering that line of cross-examination that tests carried out on behalf of the Defendants themselves had suggested poor quality rock and that this was known to the Defendants before the EIS submitted with the planning application, and before commercial development of the Bay Lane site took place. The BMA material would also have supported the evidence given by Mr. Donnelly that the Bay Lane quarry included argillaceous rocks – something that was strongly contested with him on behalf of the Defendants during his cross-examination.

Celtest

41. The court will already be familiar with the Celtest test reports. The court will also recall that it made clear during the course of the hearing that all of the Celtest reports and other reports of testing undertaken in respect of Bay Lane aggregate should be put to Dr. Maher in cross-examination.

42. Such documents are clearly within the ambit of the request for discovery made on 10 March, 2008. They fall within a

number of different categories including category 2, category 4, category 6, and category 18. In the BCM Hanby Wallace letter dated 11 August, 2009, attention was drawn to a number of deficiencies in the discovery made by the Defendants of documents that passed between the Defendants and Celtest. These are set out at pp 6-7 of the letter of 11 August, 2009. As previously noted in respect of the BMA materials, the initial response from the Defendants in August 2009 was to refuse to engage with these queries. However, on 5 October, 2009, the Defendants' solicitors indicated that to ensure complete discovery was made, *"the First Defendant searched all of its own paper records and digital archives to ensure all such documentation in the possession or power of the First Defendant was discovered"*. The letter revealed that, in fact, there were additional Celtest documents which ought have been discovered. The letter indicated that further discovery would be made *"if necessary"* after the conclusion of the hearing of the Defendants' motions. Notwithstanding the production of additional Celtest documents at this stage, the Defendants have sought to suggest that the Plaintiffs have no entitlement to raise any queries in relation to testing because – as is contended in the affidavit of Mr. Lennon sworn on 5 October, 2009 - the queries raised by BCM Hanby Wallace in their letter dated 11 August, 2009 were similar to those which had been raised on behalf of the Plaintiffs in September 2008 and which *"all formed part of the compromise reached between the parties in December 2008"*.

43. It is not understood how the Defendants can suggest that this excuses or explains the non-discovery of the Celtest documents. The compromise reached between the parties in December 2008 was simply an agreement that both parties would swear further affidavits of discovery dealing with the queries which each side had. The Plaintiffs did not agree as part of that compromise to permit the Defendants to withhold discovery of Celtest documents. The simple fact is that it has now emerged that - unknown to the Plaintiffs - there were additional Celtest documents which the Defendants clearly ought have discovered in December 2008 but failed to do so.

44. After the matter was mentioned to the court on 9 October, 2009, the Defendants, through their counsel, agreed to put in a further affidavit of discovery dealing (inter alia) with the Celtest documents. Such an affidavit was sworn on 16 October, 2009. In paragraph 5 of that affidavit, Mr. Lagan purports to give an explanation as to why the test results now discovered by the Defendants were not discovered previously. Mr. Lagan's seventh supplemental affidavit of discovery can be found at Folder 1 (continued), Tab 36. The explanation given by him is demonstrably unsatisfactory. Part of his explanation is:

> *"The remaining 24 test results were not discovered previously due to administrative errors on Celtest Limited's behalf in some instances and on Irish Asphalt Limited's in others and I now wish to discover them"*.

Although Mr. Lagan swore a further affidavit on 2 November, 2009 Folder 1 (continued) , Tab 47., he does not amplify the *"explanation"* given in the affidavit of discovery in any way. The court is therefore left without any explanation as to what form of *"administrative"* error occurred either on Celtest's part or on the Defendants' part. This is particularly serious given that on 23 February, 2009, Mr. Lagan purported to confirm on oath in a separate affidavit (sworn expressly for the purpose of demonstrating that complete discovery had been made) that all such documents had been discovered. That affidavit was sworn following a challenge by the Plaintiffs to the adequacy of the Defendants' discovery of (*inter* alia) test results.

45. For the reasons advanced in the letter of 11 August, 2009 and in paragraphs 24-36 of Mr. Butler's affidavit sworn on 20 October, 2009, it is submitted that the discovery made by the Defendants of the Celtest correspondence and other documents is manifestly incomplete. Apart from the incomplete nature of the discovery made, there are also a number of other features that give rise to concern as follows:-

(a) Among the documents discovered by the Defendants in October is a Celtest report in respect of a flakiness index test result for 19 February, 2007 which is important. It shows a value of 40 while the Clause 804 limit (as explained by Dr. Maher in his evidence) is a maximum of 35. This would obviously have been of relevance to the evidence given by Dr. Maher who gave extensive evidence not only of the Clause 804 tests undertaken by Golders but also dealt under cross-examination with all of the other Celtest reports. The fact that this was a report which failed the flakiness index test would clearly have been highly material to the evidence given by Dr. Maher both in chief and on cross-examination. Secondly, it is difficult to understand how this test result could have been missed due to an *"administrative error"*. It appears that this test result was the very first time that a flakiness index test was carried out. It must surely have been of concern to the Defendants that the material failed the test. Other test results for February 2007 were previously discovered in July 2008 with Docids 0054-0013, 0055-0363, S2-0007-0004, 0054-0019, 0054-0017, 0054-0009, 0054-0007, 0054-0010 This was the only one which failed the Clause 804 specification in February 2007. This is particularly significant because the Defendants were at that time in dispute with a number of customers as to whether the Baylane aggregate complied with the NRA Specification for Road Works;

(b) Secondly, the test report (reference 110584) dated 15 November, 2007 in respect of a sample taken from 3 Drynam Square in October 2007 is highly material because the sample material is there described as *"black mudstone 100%"*. This was at a time when the Defendants were seeking to suggest that the Bay Lane material was limestone. This is clear from the technical report of Professor Ballivy dated 7 January, 2008 and from Appendix B to the STATS report. See Book 4A, Tab 14. A significant question is raised in this context because there is also another Celtest report for the same property dated 15 November, 2007 (No. STR117049) which describes the material assessed as *"fresh limestone with some sandstone"*. This raises obvious questions which will require to be explored in due course when the hearing of the action resumes. Suffice to say for present purposes that this test report (which was not discovered previously but which clearly ought to have been discovered), happens to be one that is out of kilter with the case which the Defendants sought to make at the time it was brought into existence. The failure to discover it previously therefore is therefore significant;

(c) Thirdly, the test reports which have now been produced in the new discovery raise other questions. Although bearing different dates over a number of years, they all appear to be signed by the same individual on behalf of G.L. Evans, and they also have other indications which suggest that they were created recently. This raises questions as to whether these reports were electronically produced and if so, whether there are other electronically held records of Celtest which ought be discovered at this stage. As the letter of 11 August, 2009 and the affidavit of 20 October, 2009 make clear, there are a significant gaps in the discovery made of Celtest documents. If it is possible to generate electronic test reports of the kind recently discovered by the Defendants, it must surely be possible to generate hard copy documents of other electronic documents which must surely exist?;

(d) Fourthly, there are still obvious gaps in the Celtest reports which have been discovered to date;

(e) Furthermore, if it is the case that test results have been recreated from electronic records, then this calls into question the *"explanation"* which has been given by the Defendants for the failure to make discovery of these documents. It will be recalled that Mr. Lagan has explained that there was an *"administrative error"* partly on the part of Celtest and partly on behalf of Irish Asphalt Limited but he has provided no detail at all as to what this involves.

Geoffrey Walton

46. The role of the Geoffrey Walton practice in relation to the preparation of the EIS in support of the planning application for the Bay Lane Quarry has already been dealt with extensively in the evidence given by the Plaintiffs' witnesses including, in particular, Dr. Maher and Dr. Donnelly. When the Defendants originally made discovery, very few documents relating to the Geoffrey Walton practice were produced. On 29 September, 2008, BCM Hanby Wallace wrote to the Defendants' solicitors drawing attention to this fact. See Folder 2, Tab 23. This was pursued further in an affidavit of Mr. Butler sworn on 10

November, 2008 in support of a motion brought by the Plaintiffs at that time. As a consequence of that application, Mr. Lagan swore a second supplemental affidavit of discovery in which 1,707 Geoffrey Walton documents were scheduled and in which he said that there were two CDs of documentation furnished to the Defendants by the Geoffrey Walton practice) which could not be opened. The documents on these two CDS were subsequently printed by the Geoffrey Walton practice. A DVD containing 498 additional Geoffrey Walton Documents was subsequently sent to BCM Hanby Wallace on 24 November 2008. . After an exchange of correspondence those documents were subsequently discovered by the Defendants in the **third supplemental affidavit of discovery sworn on 5 December 2008** However, the additional discovery made by the Defendants at that time did not deal with the specific queries raised by the Plaintiffs in the preceding September. In particular, none of the documentation discovered by the Defendants showed that the test results carried out by White Mountain Quarries had been supplied to Professor Walton notwithstanding that the draft EIS had been prepared by him on the basis that these figures would be inserted into the final version of the EIS and notwithstanding that he had sought these figures in a number of letters which have been included in the Defendants' discovery. This was therefore pursued in Mr. Butler's affidavit sworn on 16 February, 2009 in support of the present motion. At Folder 1, Tab 2 of the books. (See paragraphs 69-79 of that affidavit).

47. The response from the Defendants was surprising. For instance, in an affidavit sworn on 27 February, 2009 by Mr. Lennon, Folder 1, Tab 15. Mr. Lennon contended that *"the Plaintiffs have provided no basis for their assertion that there are outstanding documents under this heading"* and that *"the first named Defendant has already made clear on affidavit that all documents in its possession , power and procurement have been discovered in accordance with rules. This has now been confirmed in a "confirmatory" affidavit"*. It is difficult to understand how that averment could be made given the fact that the documents discovered include no response to Professor Walton's letters and given that there are no documents discovered showing that the test results were passed to him.

48. Moreover, the recent discovery made by BMA demonstrates that in fact, there are other documents relating to Bay Lane which passed between BMA and the Geoffrey Walton practice. These include a fax dated 16 May, 2000 and a fax dated 8 June, 2000 Folder 4C, Tab 26.. It is therefore clear that there are additional documents which have not been produced by the Defendants to date and the Defendants have failed to explain what efforts they have made to identify these documents and any further documents held by them (including any communication made to Professor Walton of the White Mountain test results).

49. The issue as to whether these test results were provided to Professor Walton is an issue that still requires to be resolved in the case. The Defendants have not accepted as a fact that Professor Walton was not given the 2000 results. Nor have the Defendants accepted as a fact that Professor Walton was not told that the Bay Lane material was going to be used as infill. See, for example, Day 31, pp 71-72. In the circumstances, the Plaintiffs are particularly concerned to ensure that full and complete discovery is made by the Defendants as to whether these communications now exist or ever did exist.

50. Following the discovery of the BMA materials in August 2009, BCM Hanby Wallace wrote again to the Defendants' solicitors on 9 September, 2009 Folder 1, Tab 24. in which they dealt with the Defendants' failures in relation to the discovery of Geoffrey Walton materials in considerable detail at pp 2-4. The Defendants' response of 5 October, 2009 in the letter from Lennon Heather suggested that the First Defendant searched all of its own *"paper records and digital archives"* to ensure all such documentation relating to the Geoffrey Walton practice was discovered. The letters stated that:-

> *"The Geoffrey Walton practice is an independent entity engaged by the First Named Defendant to carry out work with respect to the Bay Lane Quarry. The First Named Defendant specifically sought all documentation in their possession relating to all the work they carried out for the Bay Lane Quarry including all correspondence such as that now queried by the Plaintiffs. In this regard, there was an ongoing process with the Geoffrey Walton practice to ensure, as far as reasonably possible, that it produced all documentation relating to the categories of discovery. The Defendants has (sic) made all reasonable efforts to procure all those documents relevant to the categories of discovery which are in its power and which are in the possession of these parties"*.

However, no detail whatever has been provided by the Defendants of what steps were actually taken by them either to search their own records, or to seek documents from the Geoffrey Walton practice. The Defendants have not even explained whether the contents of the detailed letter sent by BCM Hanby Wallace on 9 September, 2009 was made available to Professor Walton. The affidavit sworn by Mr. Lennon on 5 October, 2009 does not take the matter any further. The seventh supplemental affidavit of discovery of Terry Lagan does not deal with the matter. In Mr. Lagan's subsequent affidavit of 2 November, 2009, he merely repeats that all relevant documentation procured from Geoffrey Walton has previously been discovered and he says *"there simply are no additional documents"*. However, this is manifestly incorrect in light of the additional discovery made by BMA. With regard to these two documents, he merely says *"it is a possibility that the fax cover letters to these enclosures were not retained"*. This is manifestly unsatisfactory and incomplete.

51. The failure of the Defendants to engage on this issue creates a particular difficulty for the Plaintiffs. The Plaintiffs have previously sought to make contact with Dr. Walton with a view to having him called as a witness to these proceedings, but the Defendants have objected contending that Dr. Walton is a *"consultant"* to the Defendants. Yet, no consultancy agreement is listed in the Defendants' discovery. The Defendants appear to be intent on creating a situation where, on the one hand, Dr. Walton is not called to give evidence at the trial, and on the other hand they are clearly doing everything to avoid making further discovery of documents relating to Dr. Walton.

TMS Environmental

52. TMS Environmental carried out work in relation to the Bay Lane Quarry prior to the application for planning permission in 2000, and since then, they have been involved in the ongoing environmental monitoring of the Bay Lane Quarry. See the witness statement of Imelda Shanahan. This work falls within categories 2, 3, 4 and 8 of the request for discovery dated 10 March, 2008.

53. On 10 February, 2009, Mr. Terry Lagan swore a fifth supplemental affidavit of discovery in relation to certain TMS documents which had been *"overlooked"* during the collation of documents for discovery. This was followed shortly thereafter by the sixth supplemental affidavit of discovery of Mr. Lagan sworn on 23 February, 2009 Folder 1, Tab 13. which disclosed significantly more TMS documents. In paragraph 6 of that affidavit, Mr. Lagan explained that Dr. Shanahan had carried out a further review following which she became aware of documents contained within three folders *"which had been overlooked"*.

54. In a letter dated 11 August, 2009 from BCM Hanby Wallace to the Defendants' solicitors, a number of obvious gaps in the discovery made in relation to TMS documents were identified. For instance, the Defendants have discovered only five e-mails between them and TMS employees. Of those five e-mails, privilege has been claimed over all except one which is addressed to ciarac@lagandublin.com. This is significant because on 6 May, 2005, Mr. Ian Byrne of TMS sent an e-mail to Ms. Shanahan and others in which he said that in the event that monitoring results for (inter alia) the Bay Lane Quarry should exceed limit values, *"Terry Lagan must be copied on all correspondence with the site contact"*. Subsequent to that e-mail in May 2005, there were 30 occasions on which the sulphate levels in the trade effluent licence in respect of Bay Lane were exceeded. See Tab 10 to the report of Dr. Rob Donnelly which forms part of his evidence in chief. Yet, none of the communications to the *"site contact"* in relation to those breaches of limits and none of the copies of those contacts to Mr. Lagan have been discovered.

55. There are similar obvious gaps in relation to faxes and other communications passing between the Defendants and TMS.

These are described in the letter of 11 August, 2009 and will be dealt with in the oral argument on the hearing of the motion.
56. In the letter dated 5 October, 2009 from the Defendants' solicitors, it was contended that all e-mails and faxes and other correspondence and documents between *"the First Defendant"* and TMS *"have already been discovered"*. The letter indicates that to *"ensure complete discovery was made, the First Defendant searched all of its own paper records and digital archives to ensure that all such documentation in the possession or power of the First Defendant was discovered"*. It was also suggested that TMS was an *"independent entity"* and that there was an *"ongoing process with these entities to ensure, so far as reasonably possible, these parties produced all documentation relevant to the categories of discovery. The First Named Defendant has made all reasonable efforts to procure all those documents relevant to the categories of discovery which are in its power and which are in the possession of these parties"*.
57. It will be noted that this letter does not engage with the specific queries raised by BCM Hanby Wallace in their letter of 11 August, 2009. It will also be noted that no explanation whatever is given of the nature of the search carried out by the First Defendant or the nature of the enquiries made by the First Defendant with TMS. Likewise, the letter gives no information at all in relation to the remaining Defendants. Regrettably, the affidavit of Mr. Lennon sworn on 5 October, 2009 takes the matter no further. It contends that these queries could have been raised by the Plaintiffs in the period September/December 2008. This is plainly incorrect in circumstances where most of the TMS documents were not discovered until 2009 during the currency of the present motion. It is also unsatisfactory that none of the other Defendants has dealt with the specific queries raised by BCM Hanby Wallace notwithstanding that, as Mr. Butler observes in paragraph 70 of his affidavit sworn on 20 October, 2009, some of the TMS documents in the discovery made to date are addressed to *"Lagan"*. Notwithstanding this, the affidavit of Declan Canavan sworn on behalf of the other Defendants makes no reference at all to these documents or to the queries raised in the letter of 11 August. A further affidavit was sworn by Mr. Lagan on 2 November, 2009 on behalf of the First Defendant See Folder 1 (continued), Tab 47. in which he said at paragraph 47:-

> *"I can confirm that the First Defendant has searched all of its paper and electronic records and that a cross-check with TMS Environment was carried out to ensure complete discovery of all records"*.

Again, at paragraph 49, he says:-

> *"I again confirm that a thorough search of all of the First Defendant's paper and electronic records has been carried out and that TMS were written to seeking discovery of their relevant records"*.

Again, this affidavit is in extraordinarily general terms. It does not provide any detail of the nature of the searches carried out, and in particular, it does not address the specific queries raised in the letter of 11 August, 2009. Thus, notwithstanding that more than three months have now passed since the letter of 11 August, 2009, the Defendants have failed to engage with the specific (and it is submitted very reasonable) questions raised in the letter of 11 August. The generalised averments made on behalf of the Defendants are to be contrasted with the detailed explanations given on behalf of the Plaintiffs in the affidavit sworn in response to the Defendants' motion.

Frank Benson & Partners/Tom Phillips & Associates

58. Very similar issues arise here as in relation to TMS. These firms acted on behalf of the Defendants in relation to the planning application and Mr. Gavin Lawlor originally of Frank Benson & Partners and now of Tom Phillips & Associates is one of the Defendants' witnesses. The relevant categories of discovery are categories 2, 3, 4 and 5 of the letter of 10 March, 2008.
59. In their letter dated 11 August, 2009, BCM Hanby Wallace drew attention to a number of obvious gaps in the discovery made (including e-mails and faxes). For example, only one e-mail was discovered from the e-mail account of Mr. Gavin Lawlor. Notwithstanding the detailed questions raised by the Plaintiffs in the BCM Hanby Wallace letter of 11 August, 2009, the response from the Defendants' solicitors on 5 October, 2009 was in identical terms to the response in relation to TMS. Likewise, the affidavit of Mr. Lennon sworn on the same date was in identical terms. It was also contended that the queries raised were similar to those which had been raised in the period September-December 2008, and it appears to be suggested that even if they were not, they ought have been raised at that time. However, this ignores the fact that the additional discovery made by BMA in July 2009 has identified additional documents originating from Frank Benson & Partners including an e-mail from BMA to Mr. Gavin Lawlor See Folder 4C, Tab 30.. This clearly calls into question the averment made by Terry Lagan in his fourth supplemental affidavit of discovery sworn on 22 December, 2008 where he said at paragraph 7:-

> *"On 29 October, 2008, a full and entire copy of all digital data held on the server of* [Tom Phillips & Associates] *which included digital data of* [Frank Benson & Partners] *was provided to my solicitors. Three hard copy files were also supplied and these documents form part of the documents discovered in the first part of the first schedule of the second supplemental affidavit of discovery"*.

60. It also demonstrates that what is said by Mr. Lagan in his most recent affidavit sworn on 2 November, 2009 is clearly incorrect where he said at paragraph 50:-

> *"I confirm that a search of all of the First Defendants' paper and electronic records has been carried out and that Frank Benson & Partners were written to seeking discovery of their relevant records.* ***No documents beyond those already discovered exist***". Emphasis added.

61. Again, it is clear that the Defendants have failed to make adequate discovery. In addition, the approach which the Defendants have taken is clearly evasive. Again, they have failed to respond to specific queries other than with general averments (which are demonstrably incorrect).

Cone penetrometer tests

62. On 24 February, 2009, the Defendants' solicitors provided two reports from Scott Wilson Limited to the Plaintiffs. See the Lennon Heather letter at Book C, Tab 15. These reports related to the assessment of asphalt materials incorporating Bay Lane aggregate. One of the reports is dated 30 November, 2008; the other is dated 24 February, 2009. However, attached to them was an appendix (Appendix B) which contained the results of cone penetrometer tests dated June 2008. Such a document created in June 2008 is clearly within the ambit of documents to be discovered by the parties.
63. The Plaintiffs acknowledge that these reports were provided to them in February 2009 but say these reports ought clearly have been discovered by the Defendants along with any other relevant reports of the same date (i.e. reports created prior to 1 July, 2008 when the Defendants' first affidavit of discovery was sworn). This was accordingly raised in the letter of 11 August, 2009. In the response from the Defendants' solicitors dated 5 October, 2009, the case is made that the relevant penetrometer test reports came into the possession of the First Defendant after the *"cut-off date of 30th June, 2008"*, and that they accordingly fall outside the ambit of discovery. Notably, this approach is inconsistent with the approach taken by the Defendants in respect of the complaints from customers (dealt with below).
64. As Mr. Butler states in paragraph 41 of his affidavit sworn on 20 October, 2009, the attitude taken by the Defendants (namely that they were only obliged to make discovery of documents in their physical possession as of 30 June, 2008) raises concerns as to whether or not there were other test results not in their physical possession as of that date (but which were within their power as of that date) which have not been discovered by the Defendants. This averment on Mr. Butler's behalf has never been answered by any of the Defendants. It is not dealt with in the subsequent affidavit sworn by Terry Lagan on 2 November, 2009 or Declan Canavan.

Electronic discovery

65. In the letter of 11 August, 2009, BCM Hanby Wallace drew attention to the fact that there are very significant gaps in respect of the Defendants' electronic discovery. The letter identifies that while the Defendants have discovered 11,191 e-mails, they have claimed privilege over 11,090 of those e-mails. In addition, the majority of the discovered e-mails related to the years 2007 and 2008; 2,835 were created in 2007 and 8,271 were created in 2008. In stark contrast, only 82 e-mails were discovered in respect of the period from 2000 to 2006 (63 of those were created in 2000, 4 in 2001, 6 in 2002, 5 in 2004, 3 in 2005 and 1 in 2006). No e-mails from 2003 have been discovered.
66. The response from the Defendants' solicitors on 5 October, 2009 failed to engage with the specific queries that were raised in the letter of 11 August. At paragraph 9 of the letter of 5 October, 2009, the Defendants' solicitors simply stated that *"the Defendant (sic) performed a complete search of its digital archive, including e-mail accounts. All relevant e-mail correspondence that fall within the categories of discovery have already been discovered"*.
67. The affidavit of Mr. Lennon sworn on 5 October, 2009 takes the matter no further. In paragraph 17, he contends that the Plaintiffs have raised a *"general query in relation to the extent to which all e-mails have been discovered"* and that *"the perceived gaps the Plaintiffs point to in this regard were there in 2008 and there is no reason why this query could not have been raised sooner"*. He then adds *"notwithstanding this, the Defendants have addressed these issues"*. However, it is respectfully submitted that this last sentence is clearly wrong. The specific issues raised in the letter of 11 August, 2009 were not addressed on 5 October, 2009 and they have not been addressed since then.
68. In response to a request from BCM Hanby Wallace as to what was meant by the term *"digital archives"*, the Defendants' solicitors responded by letter dated 14 October, 2009 saying:-

> *"Whilst we accept that the phrase "digital archives" is used perhaps erroneously, we wish to confirm, that as has been set out in extenso by the Defendants where it is the case, they have carried out a search of all of their hard and soft copy records to ensure that all documentation in their possession or power has been discovered .....*
>
> *....When the Defendants performed a complete search as referred to ....of their electronic records it included all e-mail accounts and all relevant e-mail correspondence that fell within the categories of discovery that have indeed already been discovered"*.

It is submitted that this is plainly unsatisfactory. It does not provide a response to the detailed queries raised in the BCM Hanby Wallace letter of 11 August, 2009. Furthermore, it does not explain in any way how this search was carried out. It does not identify what electronic records were examined. It does not identify what e-mail accounts were looked at. It does not identify how the Defendants determined what documents the Defendants decided to search and it provides no details as to the nature of the search carried out.
69. In Mr. Lagan's more recent affidavit of 2 November, 2009, Mr. Lagan contends that the concerns which the Plaintiffs have raised are *"speculative"*, and that *"such speculation is without merit or substance"*. It is contended that the Plaintiffs *"failed to appreciate that the quarrying business is a very low-tech outdoor business"*. That appears to suggest that e-mail is a very *"high tech"* form of communication which it clearly is not. The Defendant companies clearly used computers and if they used computers it would be unthinkable that they did not also use e-mail. In the same affidavit, Mr. Lagan purports to confirm that the *"First Defendant has carried out a search of all of the First Defendant's electronic records and I am satisfied that no other records exist"*. Again, the specific queries raised by the Plaintiffs have been met with a generalised response which provides no detail as to how this search was conducted or as to what electronic records were examined or as to how the Defendants identified which electronic records to look at. Furthermore, it fails to take account of the material in the TMS discovery which suggests that Mr. Lagan was, for example, to be copied with communications which were to be generated on every occasion when the limits of the environmental licence were breached. It also fails to take account of the additional electronic documents that were discovered by BMA. Importantly, it also fails to take account of the fact that the directors of the First Defendant are also on the board of some of the other Defendants and therefore it would be inappropriate to look solely at the electronic records of the First Defendant. It would also be necessary to search the electronic records of the other Defendants.
70. The contention made by Mr. Lagan is also unsubstantiated in any way. Mr. Lagan does not provide any details of the persons within the First Defendant or the other Defendants who had e-mail accounts and the extent to which those e-mail accounts were used in the period prior to 2008. Furthermore, given the fact that there is a significant geographic spread between the different premises of the Defendants, and also the persons with whom they are dealing, it is particularly difficult to understand why e-mail would not have been utilised on a regular basis as the most convenient mode of communication.
71. The affidavit sworn by Mr. Canavan on behalf of the remaining Defendants is also plainly unsatisfactory. In paragraph 4 of his affidavit, Mr. Canavan suggests that in the course of a single weekend, he personally carried out enquiries and reviewed the paper and electronic files of each of the Northern Irish companies and that he contacted *"specific"* but unidentified employees and that he found no further documentation. Again, the generalised averments on behalf of the Defendants are to be contrasted with the detailed averments made on behalf of the Plaintiffs in response to the Defendants' motion.

Invoices

72. The Defendants have never produced a schedule setting out each of the individual invoices discovered by them. In a schedule furnished on 17 July, 2008, invoices were simply described by reference to particular periods. They were not individually identified.
73. Furthermore, in the original discovery made on behalf of the Defendants, the invoices discovered were not the hard copy invoices but instead were computerised copies. In paragraph 10 of the supplemental affidavit of discovery sworn by Mr. Terry Lagan on 30 October, 2008, Mr. Lagan explains that:-

> *"...when collating the documentation required for the purposes of inspection and exchange, the first named Defendant was of the belief that printed invoices from the computer recorded system of the first named Defendant would suffice for the purposes of providing the invoices. As the original invoices for all Irish Asphalt quarries and asphalt plants are held at our offices in Ballycoolin, it would have been a gargantuan task to produce all the original invoices. Consequently, the invoices produced to date are not the originals, but are replications of the originals generated from our computer database ..."*.

That averment raises significant concerns. It confirms that when making discovery in 2008, the Defendants did not look at original documents, but instead pressed a button on a computer to generate what they contend are copies of the originals. I say and believe that this is manifestly not in compliance with the Defendants' discovery obligations.
74. By letter dated 19 January, 2009, BCM Hanby Wallace requested the Defendants to remove the computer generated invoices from the summation database and upload the authentic originals. In a letter dated 26 January, 2009, it was confirmed on behalf of the Defendants that the original invoices were being scanned onto summation. They were provided in a separate summation case. When this was examined by the Plaintiffs, they identified that invoices not previously furnished were included, namely 14 invoices addressed to FS Developments, 12 of which record deliveries to works at the Drynam and Beau Park Estates. In their letter of 11 August, 2009, BCM Hanby Wallace drew attention to the fact that these 14 invoices have not yet been discovered in any affidavit sworn on behalf of the Defendants.

75. In reply on 5 October, 2009, the Defendants' solicitors indicated that the 14 FS Developments invoices *"were discovered by the First Defendant albeit that when discovered initially, the recipient name was omitted from the invoices due to an administrative error that occurred prior to the discovery process commencing"*. The letter included a table which identified where the Defendants contended the invoices were to be found on summation. The letter accepted that there was an error made in relation to two invoices which were not *"properly accounted for"*.
76. In response, Mr. Butler in paragraphs 96-109 of his affidavit sworn on 20 October, 2009, deals with the question of invoices in some detail and suggests that the most appropriate way to deal with the matter is for the Defendants to discover and correctly schedule all of the original invoices which they were required to discover. Mr. Butler also explained that were it not for the fact that the printed invoices provided in the initial discovery contained material which was not referable to years when the original invoices were issued, the Plaintiffs would never have known of the Defendants' decision to utilise computer generated documents in place of the originals. This decision by the Defendants was never explained in the original affidavit of discovery.
77. Furthermore, in light of the inadequacies in the Defendants' discovery outlined above and below, the averment made by Mr. Lagan in his affidavit sworn in October 2008 that the Defendants chose not to retrieve original documents in June 2008 takes on special significance. It raises the legitimate question as to what other documents may exist in the *"scattered locations"* or *"storage facilities"* the Defendants decided not to search at that time. The Defendants have not said on affidavit (or in correspondence) that subsequent to Mr. Lagan's affidavit of October 2008, these *"scattered locations"* and *"storage facilities"* have been physically searched.

Complaints from customers

78. Complaints from customers are within categories 19 and 29 of the request for discovery dated 10 March, 2008. In addition, on Day 13 (11 March, 2009), the Defendants undertook to provide details of complaints up to date. Subsequently, on 20 March, 2009, the Defendants provided a copy of a letter dated 4 July, 2008 from Mr. Tom McWilliams of Euromist Developments to Lagan Asphalt Limited in relation to the Centre for the Sick in Cabra. However, attached to that letter was a letter from Duggan Brothers (Contractors) Limited to John Neary of Euromist which was dated 11 June, 2008 (and therefore within the original period of discovery) that was never discovered by the Defendants. This was pointed out by the Plaintiffs to the Defendants in their replying letter of 10 April 2009. In addition, on 17 April, 2009, Lennon Heather sent the Plaintiffs a copy of a report dated 13 November, 2007 from CPM Engineering Limited in relation to cracking at North West Business Park which again was never discovered by the Defendants. Both of these issues were identified at p 9 of the Appendix to the letter dated 11 August, 2009 from BCM Hanby Wallace to the Defendants' solicitors.
79. In their response on 5 October, 2009, the Defendants' solicitors indicated that the report in relation to North West Business Park had been *"omitted from uploading onto summation through inadvertence*. *As soon as the error was realised, it was rectified by sending the report to the Plaintiffs and the Plaintiffs have been in possession of it since it was sent to them by Lennon Heather on 17 April, 2009"*. With regard to the letter from Duggan Brothers to Euromist, Lennon Heather accepted that this was discoverable and that it ought have been discovered once it came into the possession of the First Defendant. They apologised for the error but stated that *"we will be discovering the said letter at the conclusion of your motion* ***if necessary****"*. Emphasis added.
80. When the matter was before the court on 9 October, 2009, concern was expressed on behalf of the Plaintiffs that the Defendants were only prepared to swear a supplemental affidavit of discovery *"if necessary"*. In response, counsel for the Defendants very properly accepted that a supplemental affidavit of discovery should be filed and on 16 October, 2009, the seventh supplemental affidavit of discovery was sworn by Mr. Terry Lagan. That affidavit made discovery of the documents described above. With regard to the report, Mr. Lagan stated that it had been *"inadvertently omitted from being scanned onto summation"*. With regard to the letter from Duggan Brothers, Mr. Lagan said that the complaint was *"mistakenly not discovered*. *I accept that this was due to a mistake in interpretation of the correct principle of discovery and apologise for same".* Mr. Lagan added that he did not believe that the Plaintiffs had been prejudiced by not having these documents previously. However, with respect, it is submitted that the Plaintiffs have undoubtedly suffered prejudice. It will be recalled that Dr. Maher was cross-examined at length on the basis that he had simply adopted the HomeBond explanation of the problem encountered at Drynam, Beaupark and Myrtle, and that he had jumped to conclusions in attributing the cause of the damage to floor heave. The material now discovered by the Defendants would clearly have been of considerable benefit to Dr. Maher in dealing with this line of cross-examination. He would have been in a position to point to the fact that the descriptions of damage at the other premises (as described in the documents identified above) was clearly similar to the damage seen by him at the three estates. The fact that similar conclusions were reached by different engineers and different geotechnical experts in relation to other construction projects would clearly have provided support for Dr. Maher and he could have referred to it in his answers to the line of cross-examination pursued on behalf of the Defendants.
81. In response to this complaint of prejudice, Mr. Terry Lagan in his affidavit sworn on 2 November, 2009 makes a significant concession (which appears to be wholly at odds with the case which the Defendants seek to make on their own motion against the Plaintiffs). At paragraph 41 of his affidavit, Mr. Lagan says:-

> *"...Dr. Maher now has the benefit of this additional report and he is already scheduled to be recalled should the trial resume, or in the event of a re-trial, no prejudice results. Similarly, Paul Forde is yet to give his evidence and can adequately address in his evidence the relevance he attributes to these reports and what amendments he would have made to his expert report in light of them"*.

Correspondence with purchasers

82. These documents are covered by categories 7, 17, 19 and 21 of the letter from BCM Hanby Wallace dated 10 March, 2008 and the Order of Mr. Justice Charlton dated 14 April, 2008.
83. In paragraphs 60-61 of his witness statement delivered in January 2009, Mr. Terry Lagan drew attention to a letter written to Drumloe Properties Limited which was stated to be a standard response to be issued to the Defendants' *"current customers"* and also to certain builders.
84. In the letter dated 11 August, 2009 from BCM Hanby Wallace, attention was drawn to the fact that none of these letters had ever been discovered. In response, in his affidavit sworn on 5 October, 2009, Mr. Lennon contends that this was a matter that was queried in September 2008 and not pursued at that time. However, in the seventh supplemental affidavit of discovery of Terry Lagan sworn on 16 October, 2009, the Defendants discovered a single instance of a direct response to this letter of July 2007, namely a letter from Patrick Elliott of James Elliott Construction addressed to Sean Cassidy and copied to Mr. Terry Lagan dated 28 August, 2007. As Mr. Butler observes in paragraph 114 of his affidavit sworn on 20 October, 2009 *"it is particularly disquieting that this document only now appears in the first schedule first part of the Defendants' affidavits of discovery at this late stage. Against this background, I say and believe that the repeated assertions of Mr. Lennon and Mr. Lagan that the Defendants have complied with their discovery obligations only serve to underline that, even if given a further opportunity to remedy the manifest breaches in that regard, the Defendants will fail to avail of that opportunity and they will not discover .....the documents which they are required to discover"*.
85. The complaint by Mr. Lennon that this is an issue that was raised in 2008 and not pursued at that time is incorrect. In fact, the pursuit of discoverable correspondence between the Defendants and their customers is something that was identified in Mr. Butler's affidavit of 16 February, 2009 grounding the present motion. In that affidavit, Mr. Butler explains that the Plaintiffs only learned of the existence of certain correspondence (27 letters issued to prospective customers in early 2003) because Mr.

Lagan had attached to his witness statement a list of addresses and a copy of a draft letter to issue to the persons named on that list. Given that at that time, a number of affidavits and supplemental affidavits of discovery had been sworn by Mr. Terry Lagan (each of them confirming that full and complete discovery had been made), it was disturbing that Mr. Lagan should refer to material in his witness statement which had not previously been discovered by the Defendants.
86. While the Defendants swore a subsequent affidavit of discovery on 23 February, 2009 dealing with the letters identified in Mr. Lagan's witness statement, it is disquieting that no further copies of the letter of July 2007 have been discovered, and the Defendants have not explained how many other letters of that kind originally existed or to whom they were sent and, as previously identified, it is disturbing that the Defendants have discovered only one response to the letter. It is also plainly a matter of serious concern that Mr. Lagan could swear an affidavit on 23 February 2009 that all relevant documents have been discovered when, as the latest discovery makes clear, there was at least one response to the July 2007 letter which had not been discovered.

Diaries

87. In their letter dated 11 August, 2009, BCM Hanby Wallace drew attention to the fact that although a number of CVs of employees had been discovered, no diaries had been discovered by 14 of the Defendants' personnel including Mr. Terry Lagan and Mr. Sean Cassidy. The first person identified on that list was Mr. Padraig Peters. In response, the Defendants' solicitors in their letter of 5 October, 2009, indicated that *"**the First Defendant has made discovery of all relevant diaries. Confirmations that no other diaries or extracts of same exist that ought to have been discovered have been made by each of the individuals named by the Plaintiffs**. Several of the individuals did maintain appointment diaries during the relevant years. However, it has been confirmed that any such diaries have long since been destroyed at the end of the relevant years in the normal course of events. Furthermore, the contents of any such appointments diary do not fall within the terms of any of the categories of discovery"*. Emphasis added.
88. This response on behalf of the Defendants causes a number of very serious concerns:-
(a) First, it is clearly incorrect to say that the First Defendant had received confirmation from each of the individuals named by the Plaintiffs. Mr. Padraig Peters (who it is acknowledged has been paid money by the Plaintiffs) has sworn an affidavit confirming that he maintained diaries and that neither the Defendants nor any solicitor on their behalf made contact with him since the cessation of his employment in July 2007 to ask whether he maintained a diary during his period of employment. In response to Mr. Peters' affidavit, Mr. Lagan in his affidavit sworn on 2 November, 2009 (at paragraph 55) has offered a new explanation as to the non-production of Mr. Peters' diary but this explanation is at variance with the explanation given 4 weeks previously in the letter of 5 October. He has now admitted that the Defendants did not make contact with Mr. Peters. He has contended that this is because Mr. Peters rejected Sean Cassidy's efforts to make contact with him. However, the fact remains that this explanation is entirely at odds with what was stated in the Defendants' solicitors' letter of 5 October, 2009;
(b) Secondly, it is difficult to understand how it can be said that the Defendants have a practice of destroying diaries at the end of the relevant years. This practice was clearly not applied in the case of Mr. Peters. Furthermore, it is inconsistent with statements made in the diary of Mr. Ciaran Reilly for the year 2008 (which was furnished in a supplemental affidavit of discovery sworn in November 2008). As explained by Mr. Butler in paragraph 83 of his affidavit sworn on 20 October, 2009, there is an entry in Mr. Reilly's diary for 3 April, 2008 in which he records an instruction to go through a 2007 diary. There is also a reference to *"everyone and anyone"* who discussed pyrite. The fact that such an instruction was given in April 2008 clearly demonstrates that it cannot have been the Defendants' practice to destroy all diaries at the end of each calendar year. That instruction could not have been given if that was the Defendants' practice. Furthermore, this demonstrates that as of April 2008 (one month after the request for discovery had been made), 2007 diaries must still have existed. It was therefore quite inappropriate and manifestly contrary to the Defendants' discovery obligations to direct or permit that any diaries should be destroyed thereafter. This is something which has never been explained by the Defendants. It raises very serious concerns in relation to their attitude to their discovery obligations;
(c) Thirdly, it is difficult to understand how any statement could have been made in the letter of 5 October, 2009 that diaries did not fall within the terms of any of the categories of discovery. Such a statement could only be made if diaries had been read and assessed prior to their destruction. It has never been explained whether this occurred and, if so, who carried out this exercise.
89. Notwithstanding the manifest inconsistency in the Defendants' approach, the Defendants in Mr. Lagan's affidavit of 2 November, 2009 persist in maintaining that it was not the practice to preserve diaries. At paragraph 61 of his affidavit, Mr. Lagan states that:-

> *"The Plaintiffs speculate that Mr. Reilly's 2007 diary continued to be in existence up to April 2008. I confirm that it was not the practice to preserve the diaries and that this diary is properly listed in the second schedule as it was no longer in existence at the time the discovery obligations arose"*.

This generalised statement raises more questions than it answers. Mr. Lagan provides no details as to when Mr. Reilly's 2007 diary was destroyed. He provides no explanation as to how Mr. Reilly himself could have believed in April 2008 that 2007 diaries still existed if his own diary had already been destroyed in accordance with the purported practice of the Defendants. It is respectfully submitted that the Defendants have manifestly failed to explain themselves, and that at the very least, an affidavit should be sworn by Mr. Ciaran Reilly explaining what happened.

Privilege

90. In the letter dated 11 August, 2009 from BCM Hanby Wallace, the Defendants' attention is drawn to the fact that the descriptions which have been given of many of the documents in the privilege section do not substantiate a claim to privilege. The following are examples:-
(a) A letter dated 28 August, 2007 from James Elliott Construction to Sean Cassidy (copied to Terry Lagan);
(b) A letter dated 22 November, 2007 from Irish Asphalt Limited to James Elliott Construction;
(c) A letter dated 27 March, 2008 from the Defendants' solicitors to the Commercial Court Registrar;
(d) A letter dated 11 March, 2008 from the Defendants' solicitors to Irish Times Training;
(e) A letter dated 31 August, 2007 from Menolly Homes to anonymous.
91. In response, on 5 October, 2009, the Defendants' solicitors indicated that they stood over the claims of privilege in respect of all documents with the exception of three over which privilege was mistakenly claimed. In addition, it was suggested that a number of documents were discovered in error. It was also suggested that the challenge made by the Plaintiffs was *"belated"*. The same point is made in the affidavit of Mr. Peter Lennon sworn on 5 October, 2009 in which it is stated that the *"fresh challenge ....is clearly out of time"* but that notwithstanding this, *"the Defendant (sic) has specifically looked at the queries raised and have responded fully ..."*.
92. The position now taken by the Defendants in respect of privilege is confirmed in the seventh supplemental affidavit of discovery sworn by Terry Lagan on 16 October, 2009 with the notable exception that the three documents which the Defendants concede were the subject of an erroneous claim of privilege are not listed in the first part of the first schedule to that affidavit.
93. It is submitted that the court does not need to look at the documents to know that a great number of them are not

properly the subject of a claim to privilege. For instance, the Defendants have claimed privilege over 29 communications with home owners. In their response to the queries raised on behalf of the Plaintiffs, the Defendants have asserted that communications with home owners in respect of *"preparation for testing and investigations carried out for the purposes of this litigation"* are privileged. It is submitted that this highlights a very fundamental misunderstanding of the circumstances in which privilege can properly be claimed over documents. The Defendants have also claimed privilege in respect of correspondence with An Bord Pleanala and Dublin City Council and have sought to justify the claim for privilege on the basis that they were discovered in error. Manifestly, such communications are not privileged. The nature of the error has not been disclosed and, in the circumstances, it is submitted that these documents must be produced.

94. Furthermore, insofar as privilege is claimed over test results, it is not understood how this can be maintained. Clearly, the Defendants should put all of their material in respect of test results before the court. For instance, the court was given to understand that all test results in relation to the Bay Lane material were put to Dr. Maher in cross-examination. Furthermore, in January 2008, the parties agreed to exchange all data generated in the course of testing of samples taken from the dwellings on the three estates.

95. With regard to the Irish Times, the Defendants have sought to justify a claim of privilege in respect of e-mails from Joe O'Connor of the Irish Times to the Defendants on the basis that they *"contain spreadsheet material"* compiled in preparation for litigation. However, if privilege ever attached to such documents, privilege must surely have been waived as a consequence of the transmission of these documents to a third party.

Minutes

96. Minutes of the Defendants are relevant to categories 8, 9, 10, 11, 14 and 18 of the categories of documents which the Defendants agreed to discover by the letter dated 25 March 2008 from Lennon Heather.. Notwithstanding this, the Plaintiffs have been pursuing the Defendants in relation to minutes over a sustained period. By letter dated 29 September 2008, BCM Hanby Wallace highlighted the fact that board and management minutes had not been discovered by the Defendants. Notwithstanding that correspondence and the position of the Defendants as set out in the replying letter dated 13 October 2008 from Lennon Heather, minutes of meetings which had never been discovered were attached to the witness statement on behalf of the Defendants of Ciara Cassidy delivered on 2 February 2009.. The production of these minutes with Ms. Cassidy's witness statement led to the BCM Hanby Wallace letter of 11 February, 2009. Folder 1, Tab 6. In that letter, BCM Hanby Wallace noted that, in their letter dated 13 October 2008, Lennon Heather stated that *"no such documentation is or has been in existence as far as the First Named Defendant is aware*." BCM Hanby Wallace further stated as follows:

> *"Furthermore, it is manifest that your clients consider that they can select the documents which they wish to rely upon, discover them whenever it suits them and refuse to discover and suppress certain documents which they are required to discover. In that regard, we note, inter alia, that Ciara Cassidy has attached copies of minutes for the following dates only: 02 July 2009; 24 August 2001; 28 September 2001; 01 November 2001; and 14 November 2001. No other minutes of meetings are attached to her statement. More importantly, no other minutes have been discovered by your clients. It is manifest that other meetings were held. Indeed, in paragraph 5 of her witness statement, Ms. Cassidy states that 'management meetings have been held from 1991 to date."*

97. A response was received from the Defendants' solicitors on 12 February, 2009 in which it was contended that:-

> *"We have now carried out a thorough investigation and examination of all management minutes of the first named Defendant and we are satisfied that none of the minutes of the management group of the first named Defendant are documents which fall within any of the categories of voluntary discovery agreed to"*.

98. In Mr. Butler's affidavit sworn on 16 February, 2009 (at pages 26-31), Folder 1, Tab 2. Mr. Butler explains the relevance of the minutes which have been belatedly produced.

99. In his affidavit in response sworn on 20 February, 2009, Mr. Lennon makes a worrying concession in paragraph 11 of his affidavit where he says that the minutes of the management group of the First Defendant were never furnished to his firm until after the witness summary of John Gallagher had been served on behalf of the Plaintiffs. Mr. Lennon in his affidavit goes on to contend that the minutes of the management meetings are not relevant but that nonetheless, he has been instructed by the First Defendant to hand over to the Plaintiffs a booklet of all of the management meeting minutes. Thereafter, on 23 February, 2009, Mr. Lagan swore a sixth supplemental affidavit of discovery Folder 1, Tab 13. in which the First Defendant made discovery in which he acknowledged that following the affidavit of Mr. Butler sworn on 16 February, 2009, a review was conducted of all minutes of management meetings and it was accepted that 13 sets of management minutes should have been discovered. On the same day, Mr. Lagan also swore a confirmatory affidavit in which he confirmed that discovery had now been made of all documents relevant to the categories of discovery which the First Defendant agreed to discover and/or were directed to discover pursuant to the Order of the court dated 14 April, 2008. Notwithstanding this confirmatory affidavit, it is clear from recent events that there were additional documents which ought have been discovered by the Defendants.

100. On 27 February, 2009, Folder 1, Tab 15. Mr. Peter Lennon swore a further affidavit indicating that on 23 February, 2009, he had been handed three further minutes relating to Bay Lane and that on review of these minutes, *"it was recognised that they should have been discovered"*. It was explained that these were included in the affidavit of discovery sworn by Mr. Terry Lagan dated 23 February, 2009. Mr. Lennon also said in the same affidavit that he was instructed by Mr. Lagan that *"through an oversight, he had not located these minutes on the previous occasions he had searched for documentation. It was during the weekend of the 21st and 22nd February, 2009 that Mr. Lagan conducted a final extensive review to ensure that he was absolutely satisfied to confirm by way of a confirmatory affidavit that he had made available and discovered all relevant documentation"*.

101. In the same affidavit, Mr. Lennon repeated an averment previously made that other minutes of management meetings *"do not exist"*. This is notwithstanding that some of the minutes which have been produced refer to other meetings. Mr. Lennon's response in paragraph 29 was that *"the meetings themselves did not in fact take place on those dates"*. No further explanation was given.

102. In their letter dated 9 September, 2009, BCM Hanby Wallace identified significant gaps in the minutes of management meetings which took place. In this context, it should be explained that there were two types of management minutes – one which appeared to relate to Irish Asphalt Limited and other minutes relate to Lagan/Irish Asphalt Limited. The BCM Hanby Wallace letter identifies very significant gaps in the minutes of the meetings of both types. It also identifies that in certain cases, agendas have been discovered but no minutes, and it identifies that copies of the Lagan/Irish Asphalt minutes which were discovered were saved on the computer of Ciara Cassidy in a number of places, and BCM Hanby Wallace query whether if Ms. Cassidy's computer and that of any other person to whom minutes would have been circulated have been fully searched.

103. The response from Lennon Heather dated 5 October, 2009 is startling. It identifies that *"independent of the further review of documents instigated in response to the Plaintiffs' letters"*, an employee of the First Defendant, Mr. Brian McMahon, *"in the course of spring cleaning his house"* uncovered further minutes which he had *"in his personal possession"*. It is contended that these minutes do not come under the categories of discovery, but it is noted that given the previous commitment of the First Defendant to furnish all minutes, the First Defendant had agreed to furnish these additional minutes *"in the interests of*

transparency" and *"in keeping with that commitment"*.
104. The affidavit of Mr. Lennon sworn on 5 October, 2009 indicated that the Defendants *"have no difficulty in responding to genuine concerns which the Plaintiffs may wish to raise. The Defendants have engaged with these new queries and have re-examined their own discovery to ensure that it is compliant with its discovery obligations.* ***However, the concerns here are raised in circumstances where material giving rise to the concern has been present for some time****"*. Emphasis added. It is difficult to understand how this last statement can be made in circumstances where additional minutes are now being made available notwithstanding the averments made by Mr. Lagan in his sixth supplemental affidavit of discovery and confirmatory affidavit both sworn on 23 February, 2009. The additional minutes are then discovered in the seventh supplemental affidavit of discovery sworn on 16 October, 2009 in which Mr. Lagan states in paragraph 8:-

> *"Independent of our review, an employee of the first named Defendant furnished me with further minutes which unbeknown to himself and the first named Defendant he had in his possession and has now found. I am advised by Lennon Heather that these minutes are not discoverable under any of the categories of discovery. However, in light of paragraph 11 of my affidavit of discovery dated 23 February, 2009, in which I averred to furnishing all minutes, I now discover these minutes listed in the first schedule, part 1"*.

105. However, notwithstanding the discovery of the minutes produced by Mr. McManus, the Defendants have not engaged with the very specific queries raised by BCM Hanby Wallace in their letter of 9 September, 2009.
106. The Plaintiffs' concerns in relation to the Defendants' approach insofar as minutes are concerned is set out in detail in paragraphs 146-174 of Mr. Butler's affidavit sworn on 20 October, 2009. As Mr. Butler explains, it is particularly disturbing that the minutes which have been produced (both in February and in October 2009) have been furnished after the Defendants have maintained that no such documents existed. Furthermore, the Defendants have clearly failed to provide any detailed information to explain in a credible manner the failure to discover numerous sets of minutes. With regard to the latest minutes produced in October 2009, it is noteworthy that Mr. Brian McManus is clearly a person with significant responsibility. He is a chartered engineer and has been called as a witness on behalf of the Defendants. Since 2003, he has been the regional manager of the Lagan Group. It is impossible to accept that he would not have been aware of the significance of the minutes produced in October 2009. Yet no explanation is given as to how Mr. McManus – notwithstanding his relatively senior position and the fact that he is to be called as a witness on behalf of the Defendants – did not appreciate the importance of these minutes. Likewise, it is impossible to accept that, when the Defendants made additional discovery in February 2009 of minutes, they did not check with all attendees of the meetings to ascertain whether they had retained minutes of meetings themselves. This is particularly difficult to understand in circumstances where the Plaintiffs had identified gaps in the minutes which were produced at that time. No proper or complete explanation is given as to the circumstances in which Mr. McManus informed the Defendants that he had these minutes. In this context, it is difficult to accept that it was purely co-incidental that Mr. McManus should carry out a *"spring cleaning"* after the Plaintiffs had intimated an intention to raise further questions as to the adequacy of the Defendants' discovery. Moreover, it also has to be said that this explanation appears inconsistent with what is said in the subsequent Affidavit sworn by Mr Lagan on 2 November 2009. In addition, while paragraph 83 of Mr. Lagan's affidavit sworn on 2 November, 2009 suggests that the minutes were brought to the Defendants' attention in August 2009, it is difficult to understand why in those circumstances they were not brought to the attention of the Plaintiffs until almost a month after receipt of the BCM Hanby Wallace letter of 9 September, 2009. Nor is any explanation given as to how Mr. McManus appears to be the only person with copies of these minutes. Having regard to the obligations of every limited company under Section 202 of the Companies Act, 1990, each of the Defendant companies must surely have retained copies of all minutes of management meetings held by them. While Section 202 would not apply to Northern Irish companies, it is respectfully submitted that similar obligations arise under the law of Northern Ireland. It is a basic requirement of company law that proper books should be kept which correctly record and explain the transactions of the company.
107. Notwithstanding this, Mr. Lagan in his affidavit on 2 November, 2009 persists in maintaining that a *"full and thorough search of the first Defendant's records"* has been undertaken and that he confirms that *"all available minutes have been furnished"* and that there are *"no other minutes which remain to be discovered"*. However, Mr. Lagan does not explain what became of minutes of meetings which have to date not been discovered. Nor has he answered any of the other questions raised by Mr. Butler. Mr. Lagan contends that no one other than Mr. McManus retained personal copies of minutes and that given their *"relevant insignificance"*, the First Defendant would not have expected them to be retained. However, Mr. Lagan does not explain why the First Defendant did not itself retain copies of these minutes. He maintains, however, at paragraph 78 that the First Defendant *"did not at any time produce the kind of minutes in respect of the Bay Lane Quarry which the Plaintiffs speculate may have been created at some stage"*. However, there is no element of speculation in the Plaintiffs' contentions; minutes were clearly kept of meetings of this kind and it is simply inexplicable why there are not minutes available in respect of each such meeting. Furthermore, Mr. Lagan's explanation appears to be inconsistent with what he says in paragraph 79 of his affidavit where he confirms that a hard copy of each minute was kept.
108. It is submitted that the explanations which have been given by Mr. Lagan in his affidavit of 2 November, 2009 are unsatisfactory and do not properly explain either the absence of minutes of meetings or the failure of the Defendants to make discovery of such minutes.
109. The position of the other Defendants is equally unsatisfactory. Although Mr. Canavan has sworn an affidavit on their behalf, he has not dealt with the question of minutes at all, but simply relies on the generic averments made by him in paragraphs 4 and 5 of his affidavit (to which reference has already been made above).

Conclusion

110. At the beginning of this submission, three specific categories of default on the part of the Defendants in connection with their discovery obligations were identified. As evident from what is set out above, the scale of default by the Defendants is significant. Without prejudice to such further oral submissions may be made at the hearing of this motion, it may be helpful to conclude with a sample of these defaults.

(a) there are documents which ought to have been discovered previously but which have only been discovered at a very late stage

111. Three very important categories of documents have been belatedly discovered by the Defendants. The first are the minutes discovered at the commencement of the trial in February; these were a significant category of documents discovery of which had been sought from the Defendants for some time, and the relevance of which is heightened by the discovery of the BMA material.
112. The second comprise the additional Celtest results. These documents were produced on foot of an affidavit of October 9 2009. The reason for the failure to discover these documents earlier is unsatisfactory and conspicuously lacking in any proper detail. Even then as referenced above there is every reason to believe that not all these documents have been discovered.
113. The third comprise documents relating to TMS Environmental produced in two affidavits of discovery dated 10 February and 23 February 2009, neither of which proffered detailed explanation for earlier non discovery of the documents in question. Once again, there are credible reasons for believing that an inadequate search has been made for these documents.

114. These categories of documents are not merely tangentially caught by the provisions of the agreed discovery categories. These are documents which go to the very heart of the Plaintiffs' claim and the issues in the action. The paucity of the explanations tendered for the non discovery earlier of these documents present the most fundamental questions as to the adequacy of the discovery which has been made. The very fact that such critical documents were not produced, and the inability or unwillingness of the Defendants to provide clear detailed and coherent explanations for the non discovery of these documents suggests both a serious and fundamental deficiency in the discovery as originally made, and an inability or refusal, to acknowledge the significance of that failure.
115. In and of themselves, the late discovery of these documents when combined with the explanations (or absence thereof) for their late discovery, and the real prospect (particularly in connection with the Celtest material) that there are other similar documents, present a basis for exercising the Court's strike out jurisdiction. This is particularly the case if – as again explained above – the test results most recently discovered were in fact recreated from electronic records, thereby calling into question the reason that has been given for non discovery of these documents.

(b) there are documents which clearly exist (or which did exist) which ought to have been discovered

116. The present application extends beyond the late discovery of important documents and failure to properly explain their omission from the original discovery. There are in fact categories of documents which clearly exist and have not yet been discovered. In circumstances where the Defendants refuse to make any further discovery, this is not merely symptomatic of a dismissive attitude to the Defendants' discovery, but presents a real basis on which the Court must now consider exercising its jurisdiction to strike out.
117. There are many examples of this outlined above. Thus, it is clear from the affidavits exchanged in connection with this motion that the highly relevant BMA documents were once in the possession of the Defendants, and the real prospect exists that they still are in the possession of the Defendants. That fact notwithstanding, it would appear from the affidavits delivered by the Defendants that no attempt has been made by the Defendants to undertake any search for any of the BMA materials, and the materials are not dealt with in the second schedule to the affidavit.
118. BMA is related to the issue of Geoffrey Walton, in respect of which the Defendants have raised consistent concerns. The production of the BMA material demonstrates the incorrectness of earlier averments by or on behalf of the Defendants to the effect that all Geoffrey Walton documents had been discovered. No attempt has been made to properly explain why the documents dated 16 May 2000 and 8 June 2000 were not previously discovered.
119. As with Geoffrey Walton, the BMA discovery discloses additional documents to Gavin Lawlor, originally of Frank Benson and now of Tom Phillips and Associates. Once again, these have not been discovered, and no proper explanation tendered as to why this is the case.
120. The affidavits also disclose discoverable documents, the failure to discover which appears to be attributable to a misunderstanding of the Defendants obligations. The cone penetrometer test of June 2008 was discoverable, and the reason given for the failure to discover it – that it did not come into the possession of the Defendants on that date (as opposed to documents created before the discovery cut off date, and yet within the power of the Defendants on that date) is simply unsustainable.
121. On their own, the demonstrable existence of discoverable documents that have not been discovered, and the absence of any proper explanation for their non discovery provides – when combined with the failure of the Defendants to undertake to make any further discovery – a basis in itself for exercising the Court's jurisdiction to strike out the Defendants defence. When combined with the factors outlined at (a) above, that case is coercive.

(c) that there is a credible basis for believing that other documents exist which have not yet been discovered

122. What is of even greater concern, however, is the fact that the evidence demonstrates that the Defendants are in possession of other discoverable documents.
123. Thus, as has already been explained above, there are real grounds for concern that there remain outstanding Celtest and TMS documents. There is cause for the greatest of concern as to the extent to which electronic discovery has been properly addressed. The Defendants have discovered a miniscule number of e-mails between 2000 and 2007. While the Plaintiffs have provided a clear and comprehensive account of the steps taken by them to identify relevant electronic documents for the purposes of their discovery, the Defendants have not provided any such information, beyond reciting that they have undertaken a *complete search* of the Defendants *digital archive*. However, notwithstanding being afforded the opportunity to do so in correspondence, the Defendants have failed to explain what searches they have carried out. Thus, the Plaintiffs and the Court are placed in the situation that it is known that a tiny number of electronic documents have been discovered by the Defendants, but that no information of any kind has been provided by the Defendants as to how this has come about, and no comfort has been given to the Plaintiffs that full discovery has been made by the Defendants.
124. While one response of the Defendants to the concerns raised by the Plaintiffs in relation to the issue of electronic discovery has been to assert that the Defendants are a *low tech* business, the manner in which invoices have been discovered would suggest that this may not be an entirely accurate description of the situation. Here, an even more striking irregularity in the Defendants' discovery is disclosed; documents were not *discovered* by the Defendants but were instead *created* for the purposes of discovery. The original documents were not discovered, and seemingly not even consulted by the Defendants.
125. These are not isolated instances of apparent omission of relevant documents from discovery. It is very difficult to accept that the Defendants received only one response to the letter sent by them to a large number of customers in July 2007. It is also impossible to accept the Defendants' stated position in relation to diaries. That position is plainly inconsistent with the direction given to Mr. Ciaran Reilly in April 2008 (one month after the request for discovery had been made) as recorded in Mr. Reilly's 2008 diary. When one adds to the equation the inappropriately dismissive approach of the Defendants to the Plaintiffs' legitimate concerns and also the unsustainable claims for privilege asserted, the only possible conclusion that can be drawn is that the Defendants have not only very clearly sought to evade their discovery obligations but they have shown complete contempt for those obligations. In the circumstances, it is submitted that this is an appropriate case for the Court to strike out the Defendants' defences.

30 November 2009
Douglas Clarke
Paul Coughlan
Brian Murray
Denis McDonald
Brian O'Moore

SCHEDULE
PART II

V. FIRST AND FIFTH DEFENDANTS' SUBMISSIONS ON PLAINTIFFS' MOTION TO STRIKE OUT DEFENCE

THE HIGH COURT
COMMERCIAL

Record No: 2007/4691P

BETWEEN/

HANSFIELD DEVELOPMENTS, VIKING CONSTRUCTION, MENOLLY PROPERTIES AND MENOLLY HOMES

PLAINTIFFS

AND

IRISH ASPHALT LIMITED, LAGAN HOLDINGS LIMITED AND LAGAN CONSTRUCTION LIMITED

DEFENDANTS

FIRST AND FIFTH DEFENDANTS' SUBMISSIONS ON PLAINTIFFS' MOTION TO STRIKE OUT DEFENCE

Preliminary
On 8th September, 2009 the plaintiffs requested this Honourable Court:-

> *"to re-enter the motion that the Court will recall was listed for hearing at the commencement of the hearing, that is to say our motion to strike out the Defendants' Defence for failure to make discovery."* Day 60, page 3, line 26

This request was acceded to by this Honourable Court Day 60, page 10, line 5 and consequently the motion issued on 16th February, 2009 Motion papers Book 1 Tab 1 has come on for hearing.
The evidence upon which this application will be determined is set out hereunder:-
i. The affidavit of Gerard Butler of 16th February, 2009 Motion papers Book 1 Tab 2;
ii. The affidavit of Peter Lennon of 20th February, 2009 Motion papers Book 1 Tab 8;
iii. The second affidavit of Gerard Butler of 23rd February, 2009 Motion papers Book 1 Tab 9;
iv. The sixth supplemental affidavit of discovery of Terry Lagan of 23rd

February, 2009 Motion papers Book 1 Tab 13;

v. The confirmatory affidavit of Terry Lagan of 23rd February, 2009 Motion papers Book 1 Tab 14;
vi. The affidavit of Peter Lennon of 27th February, 2009 Motion papers Book 1 Tab 15;
vii. The affidavit of Gerard Butler of 9th September, 2009 Motion papers Book 1 Tab 19;
viii. The affidavit of Peter Lennon of 5th October, 2009 Motion papers Book 2 Tab 25;

ix. The seventh supplemental affidavit of discovery of Terry Lagan of 16th October, 2009 Motion papers Book 2 Tab 36;
x. The supplemental affidavit of Gerard Butler of 20th October, 2009 Motion papers Book 2 Tab 38;
xi. The affidavit of Padraig Peters of 20th October, 2009 Motion papers Book 2 Tab 44;
xii. The supplemental affidavit of Gerard Butler of 21st October, 2009 Motion papers Book 2 Tab 45;
xiii. The affidavit of Terry Lagan of 2nd November, 2009 Motion papers Book 2 Tab 47.

The Motion before this Honourable Court
The application before this Honourable Court seeks, inter alia, an order striking out the defendants' defence for failure to comply with their discovery obligations. The last line of the plaintiffs' submissions delivered on 30th November, 2009 reemphasises that the relief sought by the plaintiffs is the striking out of the defendants' defence. When this motion was issued there were ten specific areas of alleged deficiencies in the defendants' discovery that were criticised by the plaintiffs. Each of these criticisms were responded to by the first and fifth Defendants ("the defendants") in the affidavit of Peter Lennon of 20th February, 2009 and further discovery was made in the sixth supplemental affidavit of discovery of Terry Lagan sworn on 23rd February, 2009.
The motion was mentioned before this Honourable Court on Friday 20th February, 2009 and at that hearing this Honourable Court directed that a confirmatory affidavit should be sworn by the defendants to the effect that all relevant material has been discovered. The court directed that that affidavit be sworn by Monday
23rd February, 2009, the date of the commencement of the hearing of the trial.
That confirmatory affidavit was subsequently sworn by Terry Lagan on 23rd
February, 2009 Motion papers Book 1 Tab 14. On the day the trial commenced, 23rd February, 2009, the plaintiffs requested the court to leave over the discovery motion until the following Wednesday since a further affidavit of discovery had been served upon

the plaintiffs by the defendants on 23rd February, 2009 Sixth Supplemental Affidavit of Discovery of Terry Lagan of 23 February 2009, Motion papers Book 1
Tab 13. On the following day, 24th February, 2009, the plaintiffs informed the court that the plaintiffs':-

> *"preference is not to move a formal application tomorrow to strike out but just to keep the motion alive during… the trial".* Book 1, Tab 21

Nothing further was heard from the plaintiffs in respect of any alleged deficiencies in the defendants' discovery until the end of July 2009. On 30th July,
2009 the plaintiffs informed this Honourable Court that:-

> *"We will be sending a letter to Mr. O'Neill's [the defendants'] solicitors on Tuesday of next week about their own discovery."* Day 2, page 54, line 12

That letter was subsequently sent by the plaintiffs' solicitors on 11th August, 2009.

The Alleged Deficiencies in the Defendants' Discovery

The plaintiffs' complaints about the defendants' discovery are contained in the following:-

> i. The letter from the plaintiffs' solicitors to the defendants' solicitors dated 11th August, 2009 Motion papers Book 1 Tab 21;
> ii. The letter from the plaintiffs' solicitors to the defendants' solicitors dated 9th September, 2009 Motion papers Book 1 Tab 24;
> iii. The affidavit of Gerard Butler of 9th September, 2009 Motion papers Book 1 Tab 19;

iv. The supplemental affidavit of Gerard Butler of 20th October, 2009 Motion papers Book 2 Tab 38.
The defendants' responses to the complaints made by the plaintiffs in respect of the defendants' alleged deficiencies in discovery are set out in the following documents:-
i. The affidavit of Peter Lennon of 5th October, 2009 Motion papers Book 2 Tab 25;
ii. The letter from the defendants' solicitors to plaintiffs' solicitors of 5th

> October, 2009 Motion papers Book 3 Tab 26;
> iii. The seventh supplemental affidavit of discovery of Terry Lagan of 16th October, 2009 Motion papers Book 2 Tab 36;
> iv. The affidavit of Terry Lagan of 2nd November, 2009 Motion papers Book 2 Tab 47.

In total, there are 13 issues raised by the plaintiffs in respect of the defendants' discovery and these can be identified under the following categories:-
i. Bernard Murphy Documents;
ii. Celtest Documents;
iii. Dynamic Cone Penetrometer Tests;
iv. Complaints about Bay Lane Quarry Produce;
v. Correspondence with Geoffrey Walton;
vi. TMS Environment Documentation;
vii. Frank Benson/Tom Phillips Documentation;
viii. Diaries;
ix. E Discovery;
x. Invoices;
xi. Purchasers of Material from Bay Lane;
xii. Minutes of Meetings; and
xiii. Questions about Claims of Privilege made.
It is proposed hereunder to identify the issues in respect of each of the aforesaid alleged deficiencies and to outline the defendants' response:

i. Bernard Murphy Documents

> The plaintiffs' complaint is that discovery they received from Bernard Murphy by way of third party discovery should have been discovered by the defendants. On 22 May 2009 the plaintiffs' solicitors met Mr. Bernard Murphy and, arising from that meeting, a file of papers was furnished by Mr. Murphy to the plaintiffs. These papers furnished by Bernard Murphy to the plaintiffs refer to work conducted on a location described as "Hollywoodrath". This file of papers was furnished by the plaintiffs' solicitors to the defendants' solicitors on 16th June, 2009 Motion papers Book 4A Tab 4D. The file of papers was sent in the context of the plaintiffs' application for non-party discovery against Mr. Murphy and some of his related companies, such as Geotechnics Ireland Limited and BMA Geoservices Limited. In the original discovery of the defendants some 64 documents emanating from Bernard Murphy and/or his companies had been discovered. The further documents furnished by the plaintiffs from the file of Mr. Murphy to the defendants on 16 June 2009 were not in that discovery.
> When the Motion for non-party discovery against Bernard Murphy and his companies was heard by this Honourable Court on 28th July, 2009 the plaintiffs referred to the documents they had already received from Mr. Murphy and noted that these "*previously hadn't been discovered*" See transcript of 28 July 2009 (Day 58), page 3, line 25. When these documents were furnished to the defendants by the plaintiffs it was the defendants' initial view, as represented by counsel to the court on 28th July, 2009, on foot of instructions received, that the new material furnished by Bernard Murphy was not relevant since it related to a separate location, namely Hollywoodrath. The reason for this confusion can be explained by reference to paragraph 3 of Mr. Murphy's affidavit of discovery of 14th August, 2009 Motion papers Book 4A Tab 6 where he states at paragraph 3:-
>
> > *"By way of background, I say that so far as I can recall Geotechnics Ireland Limited did some preliminary investigations on the Bay Lane Quarry <u>previously referred to by Geotechnics Ireland Limited and/or BMA Geoservices Limited at Hollywoodrath site</u> up to in or about 1995 and thereafter a further report was delivered in 2000."* (Emphasis Added)
>
> Having reviewed the documentation in greater detail, the defendants accepted that, notwithstanding the fact that the report conducted by Bernard Murphy is on a location called "Hollywoodrath", there are references within it to the Bay Lane Quarry. As was stated by the defendants in the letter from their solicitors dated 5th October, 2009 to the plaintiffs' solicitors:-
>
> > *"The first named defendant accepts that there appear to be references to the Bay Lane Quarry site*

contained within the body of the BMA Geoservices Limited report on the Hollywoodrath site. These references to the Bay Lane Quarry site are clearly out of context in a report on the Hollywoodrath site. The Hollywoodrath and Bay Lane Quarry sites are completely separate. The first named defendant was unaware at the time of making discovery that BMA Geoservices Limited had a report which contained references to the Bay Lane Quarry. Mr. Gallagher, as you are acutely aware, left the services of the first named defendant before this litigation commenced and therefore at the time discovery was made, the first named defendant was not aware that BMA Geoservices carried out any site investigation work with respect to Bay Lane back in 1995." Motion papers Book 2 Tab 26 page 2

In light of the confusion created by the reference to Hollywoodrath, the first defendant's files and records have been re-checked for any records of a desktop survey or report in relation to the Bay Lane Quarry having been carried out by BMA Geoservices Limited. By letter dated 5th October, 2009 the solicitors for the defendants informed the solicitors for the plaintiffs of the following:-

"In light of this information, the first defendant's files and records were re-checked for any records of a desktop survey or report in relation to the Bay Lane Quarry having been carried out by BMA Geoservices Limited. All documents in respect of the Bay Lane Quarry created by BMA Geoservices Limited which are within the possession of the first defendant were previously discovered by the first defendant. Sixty four documents in respect of the Bay Lane Quarry created by BMA Geoservices Limited were discovered. The first defendant has no other documents within its power or possession emanating from BMA Geoservices Limited with regard to the Bay Lane site".

Further, the affidavit of Peter Lennon of 5th October, 2009 that exhibits this letter states in respect of the Bernard Murphy document that:-

"The defendants have engaged with these new queries and have re-examined their own discovery to ensure that it is compliant with its discovery obligations." Motion papers Book 2 Tab 1 paragraph 23

Consequently, the defendants submit that there is no further outstanding issue in respect of the Bernard Murphy documentation. The defendants have discovered all such documentation within its power or possession. The new documents received from Mr. Bernard Murphy are not in the defendants' power or possession. In any event, the plaintiffs have had them since shortly after 22nd May, 2009.

ii. Celtest Documents

In their letter of 11th August, 2009 the plaintiffs' solicitors asserted that there were deficiencies within the defendants' discovery of Celtest documentation since the defendants discovered no letters, only 56 emails and only 8 faxes passing between the defendants and Celtest Motion papers Book 1 Tab 21. By further letter dated 9th September, 2009, from the plaintiffs' to the defendants' solicitors, the plaintiffs raised queries in respect of test results provided by Celtest from 2000, 2003, 2004, 2005 and 2006. In support of their request the plaintiffs conducted an appraisal of 22 invoices furnished by Celtest in respect of test results Motion papers Book 1 Tab 24. By reply dated 5th October, 2009 the defendants confirmed that all emails, faxes and other correspondence between the first defendant and Celtest had already been discovered. The letter also stated:-

"To ensure complete discovery was made, the first defendant searched all of its own paper records and digital archives to ensure all such documentation in the possession or power of the first defendant was discovered." Motion papers Book 2 Tab 26

An explanation was furnished in this letter in respect of the documentation produced in respect of Celtest's testing on behalf of the defendants:-

"The commercial relationship between the first defendant and Celtest was however at all times on an ad hoc basis. There was no retainer or ongoing contract. Material for testing was simply bagged and sent to Celtest with an accompanying phone call to give instructions in relation to the tests that were required to be carried out. The material was identified either by way of writing on the bag or a label attached to the bag. Having carried out testing, Celtest sent the test results and accompanying invoices back to the first defendant. A further check for all email/fax or other correspondence between the first defendant and Celtest has again been carried out to ensure that all documentation has in fact been discovered. There are no additional such documents."

This is confirmed on Affidavit by Mr. Terry Lagan:-

"…the nature of Celtest testing of infill materials from the Bay Lane Quarry was occasional only and generated little or no correspondence, prior to the advent of this litigation. I have discussed this with Sean Cassidy who has had responsibility in recent times for dealing with Celtest. There was no retainer or ongoing contract with Celtest. The Bay Lane material was simply bagged and dispatched to Celtest for testing from time to time, which type of testing was similar on each occasion. Writing on the bag or on a fixed label would be used to identify the material. An accompanying telephone call would be made. Having carried out testing, Celtest sent the test results and accompanying invoices back to the first defendant." Paragraph 16 of Affidavit of Terry Lagan, Motion papers Book 2 Tab 47

The plaintiffs also questioned the number of test results discovered based upon their appraisal of invoices furnished by Celtest to the defendants. They queried the fact that invoices existed in respect of 634 tests and they questioned why all these tests have not all been discovered. Arising from this query, the First defendant re-checked all of its own test records from Celtest. A further cross-check of records retained by Celtest in relation to the first defendant was also performed by Celtest. The fact and detail of the re-checking carried out by the first defendant is referred to in the letter from the defendants' solicitors to the plaintiffs' solicitors dated 5th October, 2009 See paragraph 30 of the said letter at Motion papers Book 2 Tab 26. Further, at paragraph 19 of his Affidavit of 2nd November, 2009, Mr. Lagan on behalf of the defendants makes the following averment:-

"I confirm that Sean Cassidy of the first defendant has made comprehensive and detailed searches of all of the first defendants' records in relation to all Celtest documentation. This has involved trawling through the first defendants' hard copy and soft copy records. In addition Sean Cassidy, on behalf of the first defendant, has been in frequent contact with Celtest directly in order to ensure that complete discovery has been made. The results of these searches and enquiries is that the first and fifth defendants confirm that there are no relevant Bay Lane sample test results in the possession of the first or fifth defendants or Celtest which have not been discovered." Motion papers Book 2 Tab 47

The overwhelming majority of the queries raised by the plaintiffs, namely 591 out of 634, concern test material that does not originate in Bay Lane but is from a non Bay Lane site. Accordingly, all of these tests are entirely outside the scope of any discovery orders made in these proceedings. That leaves 43 test results which require to be accounted for.

In correspondence and on affidavit it has been explained that 11 of these 43 test results have been discovered but privilege has been claimed over them. 7 of the 43 invoices issued by Celtest constituted administrative errors on their part. Either the invoice was issued in error by Celtest and no actual test was carried out or, alternatively, the reference number on the invoice does not match the test results reference number and accordingly the test results had already been discovered. One test result relates to separate proceedings entitled *James Elliott Construction Limited v. Irish Asphalt Limited* Record No. 4767P/2008. It is relevant since it relates to a test on Bay Lane material. Consequently, it has been discovered in the seventh supplemental affidavit of discovery of Terry Lagan of 16th October, 2009. A claim of privilege has been made in respect of this test result since it was prepared for separate proceedings.

This leaves 24 test results which relate to Bay Lane material which are encompassed by the discovery order and which were not previously discovered. Since the re-entry of this motion these have now been discovered in the seventh supplemental affidavit of discovery of Terry Lagan of 16th October, 2009 Motion papers Book 2 Tab 36. The reason for the non-discovery of these test results was that they were not in the possession of the defendants at the time of swearing of their affidavits of discovery. When the crosschecking based on the invoice references was carried out 24 additional test results came to light. These 24 test results were in the possession of Celtest and had been invoiced to the first defendant, but the first defendant was not in possession of these tests until Celtest furnished recently further copies of the test results to the first defendant. Once the test results came into the defendants' possession they were discovered. All Celtest tests have now been discovered. The tests which have recently been discovered were consistent with previous and subsequent testing, as has been attested to by Mr. Lagan at paragraph 24 of his affidavit of 2nd November, 2009 Motion papers Book 2 Tab 47.

iii. Dynamic Cone Penetromer Tests

The plaintiffs' complaint is that the defendants have failed to discover Dynamic Cone Penetromer Test results of June 2008. These tests results were furnished to the plaintiffs' solicitors in a letter from the defendants' solicitors dated 24th February, 2009. They have not been discovered by the defendants because these test results relate to the assessment of Asphalt materials. As has been sworn by Mr. Lagan at paragraph 34 of his affidavit of 2nd November, 2009:-

> *"The reference to "incorporating Bay Lane quarry aggregates" is a reference to aggregates which are constituent components of Asphalt. It does not refer to the granular sub-base material on which the Asphalt was placed. The sub-base material was not sourced from the Bay Lane quarry. As part of the overall assessment, Scott Wilson tested the exposed sub-base upon which the Asphalt materials were laid; this comprised a Dynamic Cone Penetrometer survey on a lightweight deflectometer survey. However as this sub-base material was not Bay Lane Quarry aggregates, these results are entirely irrelevant and therefore would not have been discoverable."* Motion papers Book 2 Tab 47

These tests have not been discovered since they are not relevant and relate to non Bay Lane aggregates. They do not come within the terms of any discovery category since they do not relate to Bay Lane infill but relate to aggregates which are constituent components of Asphalt. In any event, they were given to the plaintiffs' solicitors in February 2009 in what was believed to be necessary in order for compliance with the January 2008 protocol.

iv. Complaints about Bay Lane Quarry Produce

The plaintiffs' complaint under this category centres on 3 documents:-

a. A CPM Engineering Report of 13th November, 2007;

b. An IGSL draft Geotechnical report of October 2007; and

c. A letter dated 4th July, 2008 from Tom McWilliams of Euromist Developments Limited to Kieran Reilly of Lagan Asphalt Limited and an attached letter from Duggan Brothers (Contractors) to John Neery of Euromist dated 11th June, 2008.

Documents (a) and (b) were furnished by the defendants' solicitors to the plaintiffs' solicitors by letter dated 17th April, 2009. In that letter the defendants' solicitors stated:-

> *"It has recently come to our attention that an attachment to a letter of complaint already discovered at Doc ID 0039-0031/61-63 was inadvertently omitted and not put up on summation. We now enclose document: (c) LM Developments – North West Business Park – CPM Engineering Limited Report dated 13/11/2007 entitled "Wall cracking in Office Block" and IGSL Draft Geotechnical Report dated October 2007 – enclosed with letter dated 03/03/03 which has been discovered in July 2008."* Motion papers Book 4C Tab 22

Consequently, these reports have been in the possession of the plaintiffs since 17th April, 2009. The report had not been discovered but is now discovered in the seventh supplemental affidavit of Terry Lagan sworn on 16th October, 2009 as Document No. 53. Motion papers Book 2 Tab 36

In respect of document (c) these have now been discovered as documents 51 and 52 in Terry Lagan's seventh supplemental affidavit of discovery of 16th October, 2009. In that affidavit he provides the following explanation and apology for their non-discovery:-

> *"By letter dated 4 July 2008 and attachment therein, Euromist Developments Limited furnished the First Named Defendant with a letter of complaint from Duggan Brothers (Contractors) Limited dated 11th June 2008. As the letter addressed to the first named defendant post dated the discovery, the attached complaint from Duggan Brothers (Contractors) Limited was mistakenly not discovered. I accept that this was due to a mistaken interpretation of the correct principle of discovery and apologise for same. I now discover both letters as listed in First Schedule, Part I."*

v. Correspondence with Geoffrey Walton

The plaintiffs make a general complaint about the absence of documentation pertaining to Geoffrey Walton. These issues are set out in Section 1 of the letter from the plaintiffs' solicitors to the defendants' solicitors dated 9th September, 2009. In making these general complaints the plaintiffs identify faxes dated 16th May and 8th June, 2000 discovered by Bernard Murphy in his affidavit of discovery.

By letter dated 5th October, 2009 the defendants' solicitors confirmed:-

> *"All emails, faxes, other correspondence and documents between the first defendant and the above named non-party in the possession and power of the first defendant have already been discovered. To ensure complete discovery was made, the first defendant searched all of its own paper records and*

digital archives to ensure all such documentation in the possession or power of the first defendant was discovered." Motion papers Book 2 Tab 26

This has been confirmed in the affidavit of Terry Lagan of 2nd November, 2009 at paragraph 43 where he states:-

"The plaintiffs repeat again their assertion that the lack of communications between the defendants and Geoffrey Walton is evidence in and of itself that the first defendant has not complied with its obligations to make discovery of all such relevant documents. The first defendant repeats that all relevant documentation procured from Geoffrey Walton has previously been discovered. There simply are no additional documents." Motion papers Book 2 Tab 47

In respect of the two specific documents identified from the Bernard Murphy discovery the following unambiguous averment has been made by Mr. Lagan at paragraph 44 of his affidavit:-

"The letters referred to at paragraph 62 of Gerard Butler's Supplemental Affidavit of 20th October, 2009 did not emanate from Geoffrey Walton and came from another non-party to these proceedings. It is a possibility that the fax cover letters to these enclosures were not retained. Prior to the non-party discovery process, the first defendant certainly had no record or knowledge of these two communications."

vi. TMS Environment Documentation

The plaintiffs' complaint under this category is contained at pages 1-3 of the appendix to its letter dated 11th August, 2009. In short the plaintiffs' complaint is that emails and faxes between TMS and the defendants should have been discovered. This is one of the very many stale issues raised by the plaintiffs in this application. The failure to discover TMS documentation was explained by the defendants in the sixth supplemental affidavit of discovery of Terry Lagan sworn on 23rd February, 2009. At paragraph 5-7 of that affidavit he gave the following evidence:-

"5. During the course of the preparation of her witness statement, Dr. Imelda Shanahan, of TMS Environment Limited, realised that she had overlooked a report of TMS Environment Limited entitled "Application to Fingal County Council for a licence to discharge effluent waters from a quarry", dated 5th May 2004 together with a letter from TMS Environment Limited to Fingal County Council dated 5th May 2004 and a photocopy of a cheque payable to Fingal County Council dated 6th May 2005. Dr. Imelda Shanahan immediately submitted these documents for discovery and they were discovered in the fifth supplemental affidavit of Terry Lagan sworn on 10th February 2009.

6. Arising from this Dr. Shanahan conducted a further review to ensure there were no further documents which were in her possession. In carrying out this review, Dr. Shanahan became aware of documents contained within three folders which had been overlooked. These folders were found in an archive box which, I understand, had been misfiled out of chronological and reference order in the TMS Environment Limited archive system. I believe that TSM Environment Limited's archive system holds over 14,000 archived project files and the misfiling of these documents had prevented Dr. Shanahan from retrieving these documents during her initial search.

7. Dr. Shanahan's further search was completed on the 12th February 2009 and the documents were then brought into the offices of Lennon Heather solicitors for the purpose of assessing whether they specifically fell into the categories of discovery. It was decided that they were discoverable and these documents are now listed in the First Schedule, Par I of this affidavit." Motion papers Book 1 Tab 13

The staleness of this issue is recognised by Mr. Butler in his affidavit of 20th October, 2009 where he states at paragraph 64:-

"The issue in relation to TMS arose during the course of the application brought by the plaintiffs in February 2009." Motion papers Book 2 Tab 38

In respect of any outstanding TMS documentation, the affidavit of Mr. Lagan of 2nd November, 2009 states as follows at paragraph 47:-

"I can confirm that the first defendant has searched all of its paper and electronic records and that a cross-check with TMS Environment was carried out to complete discovery of all relevant records." Motion papers Book 2 Tab 47

vii. Frank Benson/Tom Phillips Documentation

Again, the complaint made by the plaintiffs under this category is a general complaint about the extent of the emails and communications between Frank Benson and the defendants and/or Geoffrey Walton. There was also a complaint about the amount of general communications involving Tom Phillips and Associates discovered. In replying to this general query by the plaintiffs' solicitors the defendants' solicitors have stated:-

"All emails and faxes and other correspondence and documents between the first defendant and the above named non-parties (Frank Benson and Tom Phillips) in the possession and power of the first defendant have already been discovered. To ensure complete discovery was made, the first defendant searched all of its own paper records and digital archives to ensure all such documentation in the possession or power of the first defendant was discovered." Motion papers Book 2 Tab 26

In his affidavit of 2nd November, 2009, Mr. Lagan confirmed this:-

"I confirm that a search of all the first defendant's paper and electronic records has been carried out and that Frank Benson and Partners were written to seeking discovery of their relevant records. No documents beyond those already discovered exist."

The issues raised by the plaintiffs are stale and, in fact, were identified by Mr. Butler in an affidavit he swore on behalf of the plaintiffs on 10th November, 2009. Motion papers Book 2 Tab 31

viii. Diaries

The plaintiffs complain in their solicitors' letter of 11th August, 2009 that there should be diaries from 14 named individuals. By reply dated 5th October, 2009 the defendants' solicitors informed the plaintiffs of the following:-

"The first defendant is not under a general obligation to discover all diaries of the persons named in category 9. Rather the discovery obligation relates to those portions of diaries that are relevant to the categories of discovery ordered. The first defendant has made discovery of all relevant diaries."

Subsequently, in the Affidavit of Mr. Butler of 20th October, 2009 the plaintiffs revealed for the first time, that they have in their possession diaries of Mr. Padraig Peters, a former employee of the defendants. In fact, they have had

in their possession since July 2008 extracts of Mr. Peters' diaries. These were not raised with the defendants or this Honourable Court anytime since July 2008. It should also be noted by the court that the plaintiffs paid Padraig Peters €2,000 *"travel expenses" "in cash"* to cover his expenses in relation to meetings that took place between him and the plaintiffs' solicitors.

The plaintiffs rely upon these diaries of Padraig Peters as evidence of non-compliance by the defendants in respect of their discovery obligations. This is expressly dealt with by Mr. Terry Lagan at paragraph 57 of his affidavit of 2nd November, 2009 where he states:-

> *"These documents were not within the first defendant's power or possession and were accordingly not discoverable. The first defendant has never had sight of these documents, nor has the first defendant had any opportunity to interrogate Mr. Peters in respect of the contents of same."* Motion papers Book 2 Tab 47

ix. E Discovery

The plaintiffs' complaint under this category, as contained at page 7 of the appendix to the letter from the plaintiffs' solicitors to the defendants' solicitors of 11th August, 2009, is that electronic documents have not been discovered. Again, this complaint is based upon a general assumption that there must be more electronic documentation. By reply dated 5th October, 2009 the defendants' solicitors confirmed:-

> *"The defendant performed a complete search of its digital archive, including email accounts. All relevant emailed correspondence that fall within the categories of discovery have already been discovered."*

The plaintiffs subsequently queried the use of the term "digital archive" and a further explanation was provided by the defendants' solicitors in their letter dated 14th October, 2009 which stated:-

> *"When the defendant performed a complete search as referred to at paragraph 9 in our letter of their electronic records, it included all email accounts and all relevant email correspondence that fell within the categories of discovery that have indeed already been discovered. If you wish to use the words "electronic records" as distinct from "digital archive" we have no difficulty in suggesting that that is perhaps a more correct layman's term for what the defendants currently have or have had since their commencement of operation."* Letter from Lennon Heather to BCM dated 14 October 2009

In his affidavit of 2nd November, 2009 Mr. Lagan has confirmed the following:-

> *"I confirm that the first defendant has carried out a search of all the first defendant's electronic records and I am satisfied that no other records exist."*

The limited number of emails discovered by the defendants is explained by Mr. Lagan at paragraph 64 of the same affidavit where he states:-

> *"The plaintiffs have merely raised speculative concerns as to the perceived dearth of email traffic. Such speculation is without merit or substance. The plaintiffs apparently failed to appreciate that the quarrying business is a very low tech, outdoor business. The quarrying end of the business operates on an extremely basic business model and simply did not generate email traffic of any volume or significance prior to the threat of these proceedings. Indeed many of the employees are sub-contractors of the first defendant who were directly responsible for the day to day operation of the Bay Lane quarry (or similar businesses) and would simply not have had any call to utilise electronic communication such as email. At the material times, email was not widely used by members of the first defendant's staff, in particular operational employees. Informal methods of communication were preferred."*

x. Invoices

The complaints raised by the plaintiffs in respect of invoices derived from the averment made by Mr. Terry Lagan in his affidavits of discovery on 30th October and 22nd December, 2008. In his affidavit of 22nd December, 2008, Mr. Lagan confirmed that invoices produced by the defendants to date were not originals, but rather replicas of the originals generated from the defendants' computer database. He explained that the invoices were printed on the then current (2008) headed paper and consequently any amendments to the headed paper would have been reflected on the invoice.

On 26th January, 2009 the original invoices were put up on a separate summation case by the defendants. The plaintiffs now complain that that case furnished in January 2009 by the defendants contains invoices not previously furnished or discovered including 14 invoices to FS Developments.

By reply dated 5th October, 2009 the defendants' solicitors stated as follows:-

> *"The 14 FS Developments invoices were discovered by the first defendant, albeit that when discovered initially the recipient name was omitted from the invoices due to an administrative error that occurred prior to the discovery process commencing."* Motion papers Book 2 Tab 26

The reply then set out a table showing where the 14 invoices were to be found on summation. It stated that these were to be found both in the summation case "Defendants Omnibus" and also in the summation case "Defendants Sale Invoices". It explained that two of the invoices were not included in both of the aforesaid summation cases, each only appearing in one.

The defendants' solicitors also informed the plaintiffs' solicitors that their request that the soft copy invoices now be deleted from summation is not possible since once summation goes live the first defendant no longer has access to it for the purposes of deleting material.

All of this is confirmed at paragraph 66-69 of Mr. Lagan's affidavit of 2nd November 2009 in which he states:-

> *"66. It is quite incorrect to say the first defendant has not made adequate discovery of all relevant invoices. All of the criticisms at paragraph 96-109 of Gerard Butler's supplemental affidavit of 20th October 2009 amount to a mere rehearsal of matters that had been raised and dealt with as far back as late 2008. The persisting complaints are purely ones of form over substance. No prejudice whatsoever can be attributed to them.*
>
> *67. The plaintiffs are well aware that since October 2008 all of the First Defendant's invoices were initially discovered by reprinting soft copies on current headed notepaper (2008) and it was these which were scheduled to the original Discovery Affidavit and scanned on to CT summation, where they are located within the database "Defendants' omnibus". As long ago as 30th October 2008, I explained that the first defendant initially believed reprinted hard copies of the soft copy, computer stored,*

original invoices would suffice. I explained that these were identical in every way to the originals, save that the earlier headed paper would have been used on the hard copy version. Inspection facilities of the originals were offered to the plaintiffs and availed of on 5th December 2008."
68. Subsequently, these original hard copy invoices were scanned and uploaded on to CT summation within a case entitled "Sales Invoices" and were uploaded on the BCM Hanby Wallace server on 2nd February 2009. This drew no comment for six months until August 2009, when the plaintiffs sought material to sustain what I believe is a retaliatory motion to distract from their own default of discovery. Now the plaintiffs object that a fresh affidavit of discovery, which was never sought, scheduling all the same dates and details as correlated to the July 2008 discovered invoices, was not sworn in respect of the contents of the "Sales Invoices" database whose only difference is the notepaper upon which the invoices are printed."

xi. Purchasers of Material from Bay Lane

The plaintiffs' complaint in respect of this issue is set out at pages 10-14 of the appendix attached to their solicitor's letter to the defendants' solicitors dated 11th August, 2009. The basis for their complaint is contained in the following section of that letter:-

"In particular, there is a very notable dearth of documents evidencing the concerns and/or queries and/or complaints which must have been expressed by purchasers of the said materials, particularly after the correspondence to customers of Irish Asphalt Limited in July 2007…" (Emphasis added) Motion papers Book 1 Tab 21

The plaintiffs thereafter list approximately 88 Limited Liability Companies and seek any documents which passed between those entities and the defendants. The plaintiffs have had possession of the letter from the defendants to their customers since the outset of these proceedings and raised this issue previously in their letter of 29th September, 2008. In that letter of September 2008 the plaintiffs' solicitors stated:-

"The plaintiffs anticipate that there must be documentation dated prior to December 2006 within this class/category" Motion papers Book 2 Tab 28 page 35

On 13 October 2008 the Defendants' solicitors confirmed:-

"There are no documents in existence prior to 20th December 2006 as far as the first named defendant is aware." Motion papers Book 2 Tab 30 page 26

The defendants' solicitors replied to the recent query raised by the plaintiffs' solicitors on 11th August, 2009 in their letter of 5th October, 2009 wherein they stated:-

"The defendants have discovered all complaints from other purchasers of material from the Bay Lane quarry relevant to the categories of discovery. Furthermore, we have furnished all complaints that came into existence on or before 30th June 2008 and up to April 2009 (by way of a separate mechanism) on foot of the Order of Judge Gilligan during the trial of this action."

These stale issues are again raised by Mr. Butler on behalf of the plaintiffs in his affidavit of 20th October 2009. The height of the plaintiffs' complaints under this heading appear to be:-

"One would have expected that the correspondence would have caused consternation among the purchasers of this material and that a flurry of correspondence would have ensued." Paragraph 113 of Affidavit of Gerard Butler of 20 October 2009, Motion papers Book 2 Tab 38

At paragraph 71 of Mr. Lagan's affidavit of 2nd November, 2009 he states:-

"It is an invidious exercise to be asked to explain a negative, namely the absence of replies from third parties. It should be borne in mind that the letter of May 2007 substantially post dated the initial Homebond correspondence which would have raised the pyrite issue widely within the construction industry. The letter was a proforma circular letter sent to all customers." Motion papers Book 2 Tab 47

xii. Minutes of Meeting

On page 5 of the letter of 9th September, 2009 the plaintiffs' solicitors raised queries in respect of minutes of meetings discovered by the defendants. Their complaints are prefaced with the following comment:

"We do not propose here to rehearse the background to our attempts to obtain comprehensive and proper discovery of minutes of the board of the defendant companies, save to observe that the sixth supplemental affidavit of discovery sworn by Terry Lagan on 23rd February 2009 purported to discover minutes of all meetings"

What the defendants omit to mention is that their "*attempts to obtain comprehensive and proper discovery of minutes*" ceased as of 23rd February, 2009 when they clearly accepted the averments made on affidavit by Mr. Lagan.

The plaintiffs then proceed to identify months for which there are no minutes for management meetings and Lagan/Irish Asphalt Management meetings. They also criticise the absence of agendas for minutes; Missing Minutes Referred to in other Minutes; Missing Minutes for an Aer Rianta Meeting of 11th July, 1996 and the absence of references in minutes to budgets, planning or testing.

By reply dated 5th October 2009 the solicitors for the defendants, whilst noting that there was no blanket discovery obligation with respect to minutes and agendas of meetings, provided the following response at paragraphs 22-25:-

"Agendas

22. All agendas in the possession of the first defendant were previously discovered. In response to the specific query raised by the plaintiffs regarding dates on agendas for meetings that do not correspond with dates and minutes for meetings, the position is as follows. An agenda for the next meeting was typed up immediately after each meeting. Each agenda was a soft copy amendment of the previous agenda. It has also been confirmed by the first defendant that meetings were frequently cancelled, postponed or amalgamated. Accordingly, simply because a meeting was scheduled to take place and an agenda was produced recording that a meeting would take place is in no way probative of whether that meeting did in fact take place. Minutes

23. Independent of the further review of documents instigated in response to the plaintiffs' letters, an

employee of the first defendant, Mr. Brian McManus, in the course of spring cleaning his house uncovered further minutes which he had in his personal possession. It had not been realised previous to this that Mr. McManus had retained any copies of minutes. It is obviously very regrettable that this has only come to light now and, on behalf of our client, we apologise for this. However, it should be noted that the content of these minutes refers to matters which do not relate to the Bay Lane quarry, except for a small number of references which do not, in the view of this firm, come under the categories of the discovery. These references relate to short statements on output levels and targets of Bay Lane. There is also reference to an incident with an employee on the Weigh Bridge in Bay Lane.
24. Notwithstanding this firm's view that these minutes do not come under the categories of discovery, we note the commitment of the first defendant to furnish all minutes, notwithstanding their relevance. Therefore, in keeping with that commitment, and in the interests of transparency, the first named defendant has agreed to furnish these additional minutes. These are attached to appendix 2 to this letter.
25. For the purposes of completeness, a further check of all attendees at meetings was carried out to confirm whether or not they retained any agendas or minutes arising from meetings of the first defendant. It is confirmed that no other agendas or minutes (other than previously discovered are now furnished herewith) or in the power or power (sic) of the first defendant." Motion papers Book 2 Tab 26

In the seventh supplemental affidavit of discovery of Terry Lagan sworn on 16th October, 2009 the following averment is made in respect of the aforesaid minutes:-

"Independent of our review an employee of the first named defendant furnished me with further minutes which unbeknown to himself and the first named defendant he had in his possession and has now found. I am advised by Lennon Heather that these minutes are not discoverable under any of the categories of discovery. However in light of paragraph 11 of my affidavit of discovery dated 23rd February, 2009, in which I averred to furnishing all minutes, I now discover these minutes listed in the First Schedule, Part I." Motion papers Book 2 Tab 36

Thereafter in the First Schedule Part I of Mr. Lagan's aforesaid affidavit of discovery all the aforesaid minutes, 23 in total, are discovered. Mr. Butler, on behalf of the plaintiff, devotes 14 pages of his affidavit of 20th October, 2009 to the issue of minutes. At paragraph 151 of his affidavit Mr. Butler, on behalf of the plaintiffs, complained that no assurance has been given on behalf of the defendants that all management meeting minutes have now been furnished. This complaint has been remedied on foot of the averment made by Mr. Lagan at paragraph 77 of his affidavit of 2nd November, 2009 where he states:-

"I confirm that all minutes, both "Irish Asphalt Management Minutes" and "Contract Managers Meeting Minutes" have now been discovered by the first defendant. The first defendant confirms that there are no other minutes in the possession or power of the first or fifth defendants." Motion papers Book 2 Tab 47

The plaintiffs also query when the minutes were received from Mr. Brian McManus. This has also been answered in Mr. Lagan's affidavit of 2nd November, 2009 at paragraph 74 where he states:-

"I confirm that, subsequent to the receipt of the plaintiffs' letters of 11 August and 9 September, I spoke with Brian McManus and all other attendees of the contracts managers meetings in relation to the possible existence of minutes of these meetings in their personal records. As an attendee of these meetings, Brian McManus was subsequently furnished with a copy of the minutes of these meetings. I say and believe that all attendees of these meetings were furnished with copies of these minutes. Brian McManus retained copies of the minutes of the contracts managers meetings with his personal files. Having checked with all of the attendees, I confirm that only Brian McManus retained copies of the minutes in this manner. No other attendee retained their personal copy of the minutes." Motion papers Book 2 Tab 47

It is apparent from the affidavit of Mr. Lagan that the reason these minutes were not discovered in February 2009 was that the first defendant, having searched its own records, was not aware of the existence of these minutes. He explains:-

"The minutes of contract managers meetings would not have been conducted on a particularly formal basis and would not have been attributed any great significance within the company at the time…" Motion papers Book 2 Tab 47

He also emphasised that the work of these meetings was heavily biased in favour of the Asphalt part of the business. Accordingly, references to the quarrying businesses, let alone the Bay Lane quarry itself are fleeting and insubstantial.

Mr. Lagan also answers the other queries raised by the plaintiffs in his affidavit:-

a. He confirms that the first defendant did not at any time produce the kind of minutes in respect of the Bay Lane quarry which the plaintiffs speculate may have been created at some stage, such as contract manager meetings; Paragraph 78 of Mr. Lagan's Affidavit of 2 November 2009

b. He confirms that there are simply no other existing minutes which have not been discovered; Paragraph 79 of Mr. Lagan's Affidavit of 2 November 2009

c. He confirms that there were no minutes of a meeting as referred to in the minutes of 17th January, 2005; Paragraph 80 of Mr. Lagan's Affidavit of 2 November 2009

d. He clarifies that the external audit referred to in the minutes of 21st March, 2005 refers to the Asphalt plant end of the business rather than quarries; Paragraph 81 of Mr. Lagan's Affidavit of 2 November 2009

e. He clarifies that the "quarry plant reconfiguration" referred to in the minutes of 22nd April and 11th July, 2005 refers to the Duleek quarry and has absolutely no relevance to Bay Lane; Paragraph 83 of Mr. Lagan's Affidavit of 2 November 2009

f. He confirms that there were no minutes during the period September 1999-July 2000 other than what has previously been discovered and notwithstanding the difficulty that the plaintiffs have in accepting this as is stated by Mr. Butler at paragraph 166 of his affidavit; Paragraph 84 of Mr. Lagan's Affidavit of 2 November 2009

g. He clarifies for the plaintiffs that the reason there were minutes missing in each year is because "meetings were cancelled". He states that there were simply irregular meetings and far fewer staff who operated from a small number of premises. Consequently, resort was rarely had to formal management minutes; Paragraph 85 of Mr. Lagan's Affidavit of 2 November 2009

h. He clarifies that no minute was kept of the meeting with Aer Rianta on 11th July, 1996 and he says that no-one who attended the meeting on behalf of the defendants would have been accustomed to generating minutes; Paragraph 86 of Mr. Lagan's Affidavit of 2 November 2009

i. He explains the computer reference on the bottom of the page of the minutes to the effect that Ciara Cassidy created a new minute by overwriting the existing minute; Paragraph 87 of Mr. Lagan's Affidavit of 2 November 2009

j. He confirms that Ciara Cassidy's computer and all other computers in the first defendant have been fully searched for any minutes of meetings which may exist; Paragraph 88 of Mr. Lagan's Affidavit of 2 November 2009 and
k. He confirms that there are no minutes in the first defendant's computer records which have not already been discovered and he confirms that there are no hard copies of minutes in existence other than those discovered. Paragraph 88 of Mr. Lagan's Affidavit of 2 November 2009"

xiii. Questions about Claims of Privilege

There is no motion before this Honourable Court challenging any claim to privilege made by the defendants in their affidavits of discovery and consequently it is submitted that the court should not entertain such a belated effort to challenge privilege. Notwithstanding the aforesaid, the issues raised by the plaintiffs in respect of the defendants' assertions of privilege were raised for the first time at page 14 of the appendix attached to the plaintiffs' solicitors letter to the defendants' solicitors dated 11th August, 2009. Motion papers Book 1 Tab 21 Attached to that appendix was a schedule listing 106 documents discovered by the defendants in their affidavits of discovery and in respect of which the defendants' claim of privilege was now, for the first time, being challenged by the plaintiffs. A detailed scheduled reply was furnished by the defendants' solicitors as an appendix attached to their letter to the plaintiffs' solicitors of 5th October, 2009. This document highlighted that certain documents had been discovered in error or had a mistaken claim of privilege made over them. Motion papers Book 2 Tab 26 Appendix 1
Again, it is apparent that all of these issues pertaining to privilege could have been raised earlier by the plaintiffs and should have been challenged in a proper motion to be heard by another judge during the long vacation just passed.

The plaintiffs' Delay in Raising the Aforesaid Issues
Most if not all of the issues raised by the plaintiffs in their correspondence of 11th August and 9th September, 2009 and which now forms the subject matter of this application could have been raised much earlier. The failure of the plaintiffs to raise these as issues confirms the defendants' suspicion that this is, in fact, a retaliatory motion rather than a motion of real substance based on a genuine grievance about the adequacy of the defendants' discovery.
We set out hereunder a list of when the aforesaid issues could have first been raised by the plaintiffs.

Bernard Murphy Documents	The plaintiffs had access to the Bernard Murphy documents shortly after 22nd May, 2009, yet raised no substantive complaint about the defendants' failure to discover until 11th August, 2009.
Celtest Documents	All of the queries about letters, emails and faxes passing between the defendants and Celtest could have been raised at the time the affidavits of discovery were sworn by the defendants in these proceedings.
Dynamic Cone Penetrometer Tests	The plaintiffs were given these tests on the 24th February, 2009 and could have raised this as an issue anytime since then.
Complaints about Bay Lane Quarry Products	The plaintiffs were given the CPM and IGSL report on 17th April, 2009 and could have raised their non discovery at any time since then. Further, the plaintiffs were in possession of the Duggan Brothers correspondence since 20th March, 2009 and could have raised the non-discovery of this anytime since then also.
Geoffrey Walton	The issue of Geoffrey Walton documentation was very much alive in February 2009 when this motion, by choice of the plaintiffs, was not pursued. The issue of Geoffrey Walton documentation was raised at page 32 of Gerry Butler's affidavit of 16th February, 2009, although the plaintiffs did not have the fax cover sheets which they recently got from discovery from Bernard Murphy.
TMS Environment	These are all issues that could have been raised in February 2009. In fact, this is recognised by the plaintiffs in the Affidavit of Mr. Butler of 20th October, 2009 where at paragraph 64 he says "The issue in relation to TMS arose during the course of the application brought by the plaintiffs in February 2009."
Frank Benson/Tom Phillips	This is just a general complaint about a perceived absence of communications. Again, this could have been raised last February.
Diaries	The plaintiffs' complaint in respect of diaries arises from their discussions with and inspection of the diaries of Mr. Padraig Peters. They met him in July 2008; they took extracts of his diaries in July 2008; they decided not to refer to this until October 2009.
E Discovery	This general complaint about the absence of emails could have been raised in February 2009.

Invoices	At paragraph 67 of Mr. Lagan's affidavit of 2nd November, 2009 he says that "As long ago as 30th October, 2008 I explained that the first Defendant initially believed we printed hard copies of the softcopy, computer stored, original invoices would suffice." This issue could have been raised by the plaintiffs back in October 2008.
Purchasers of Material from Bay Lane	The plaintiffs base this on the expectation that the letter of May 2007 should have caused "consternation". Clearly, this is a matter that could have been raised after discovery was made by the defendants.
Claim to Privilege	The court indicated in respect of the defendants' challenge to privilege that all privilege challenges should be dealt with promptly. This complaint is clearly not prompt.
Minutes	It is accepted that the minutes of Brian McManus were not known to the plaintiff in February 2009 but the issue of minutes was dealt with at page 26 of Mr. Butler's affidavit of 16th February, 2009.

Conclusion

Nowhere in any of the six affidavits sworn by the plaintiffs supporting this application is there any evidence that the plaintiffs have been prejudiced by any default of discovery on the part of the defendants. There is simply no evidence from the plaintiffs before this Honourable Court that they have been prejudiced by the alleged non-performance of discovery by the defendants, let alone irreparably prejudiced which the plaintiffs contend is the correct test for a strike out. Consequently, there is no stateable basis upon which the plaintiffs can seek to have the defendants' defence struck out on grounds of irreparable prejudice.

The basis for the plaintiffs' application appears to be what they allege is an ongoing and deliberate failure by the defendants to make discovery as ordered by this Honourable Court. The affidavits sworn and correspondence issued on behalf of the defendants provide a thorough and coherent account of the discovery made and provide full replies to the 13 issues identified by the plaintiffs in this application.

The plaintiffs' application consists of a broad and speculative attack upon the discovery made by the defendants. Full and detailed replies have been given by the Defendants in correspondence and on Affidavit to each of the issues raised. The plaintiffs conclude their written submissions of 30th November, 2009 by suggesting there are three types of ongoing default by the defendants. These are:-

> (a) There are documents which ought to have been discovered previously but which have only been discovered at a very late stage. These are identified as being the BMA documentation, the additional Celtest results and the TMS Environmental documents. The plaintiffs suggest that because of "the late discovery of these documents" and "the real prospect that there are other similar documents" that the court should therefore exercise its strike out jurisdiction. It is submitted that this is a baseless application. There is no evidence that there are other similar documents which have not been discovered.
>
> (b) There are documents which clearly exist (or which did exist) which ought to have been discovered. Under this category the plaintiffs refer to the BMA documents and the absence of Geoffrey Walton documentation. Bizarrely, the plaintiffs include in this category the cone penetrometer test of June 2008, notwithstanding the fact that they were in possession of this test since 24th February, 2009. Full explanations have been provided by the defendants in respect of all of these issues, including the BMA documentation and Geoffrey Walton documentation.
>
> (c) There is a credible basis for believing that other documents exist which have not yet been discovered. Under this category the plaintiffs suggest that "there remain outstanding Celtest and TMS documents". They also seek to challenge the search carried out by the plaintiffs of its computers. Again, there is no basis for this complaint considering the response of the defendants in correspondence and on affidavit. The plaintiffs conclude with generalities about how they find it "very difficult to accept" or "it is impossible to accept" that there are not more diaries. If the plaintiffs were as concerned about the issue of diaries as they now profess themselves to be it is surprising that they did not raise this issue back in July 2008 when they became aware of Mr. Peters diaries and received extracts therefrom.

For all of the reasons contained herein and for the reasons that will be outlined in more detail by counsel at the hearing of this motion the defendants submit that the defence herein should not be struck out.

Stephen Dowling
Jim O'Callaghan
David Barniville
Hugh O'Neill

SCHEDULE
PART II

VI. OUTLINE LEGAL SUBMISSIONS ON BEHALF OF THE SECOND, THIRD AND FOURTH NAMED DEFENDANTS IN RESPONSE TO THE PLAINTIFFS' SUBMISSIONS ON STRIKE-OUT APPLICATION

THE HIGH COURT
COMMERCIAL

Record No. 2007/4691P

BETWEEN

HANSFIELD DEVELOPMENTS
-and-
VIKING CONSTRUCTION
-and-
MENOLLY PROPERTIES
-and-
MENOLLY HOMES

Plaintiffs

-and-
IRISH ASPHALT LIMITED
-and-
LAGAN HOLDINGS LIMITED
-and-
LAGAN CONSTRUCTION LIMITED
-and-

By Order
LAGAN GROUP CEMENT LIMITED

And further by Order
LINSTOCK LIMITED

Defendants

OUTLINE LEGAL SUBMISSIONS ON BEHALF OF THE SECOND, THIRD AND FOURTH NAMED DEFENDANTS IN RESPONSE TO THE PLAINTIFFS' SUBMISSIONS ON STRIKE-OUT APPLICATION

Preliminary

These Outline Legal Submissions are filed on behalf of the Second, Third and Fourth Named Defendants who will be referred to hereinafter as '*the Northern Ireland Companies*'.

1. The Northern Ireland Companies respectfully submit that the legal principles to be applied on an application to strike out a pleading for proven failure to comply with an order to make discovery, or agreement to make voluntary discovery, are set out in the Northern Ireland Companies' submissions on their application to strike out the Plaintiffs' claim for failure to make discovery.
2. The Northern Ireland Companies categorically reject the assertion that they have not responded to the discovery issues raised by the Plaintiffs, As asserted by the Plaintiffs at page 1 of their Outline Submissions dated 30 November 2009 that they have not made full discovery and that they have '*adopted a highly evasive approach to their discovery obligations'*. As asserted at page 2 of the Plaintiffs' Outline Submissions Moreover, the assertion that the Northern Ireland Companies have engaged in a '*conscious attempt to evade their discovery obligations' Ibid* is wholly without merit. The Northern Ireland Companies moreover reject the assertion that there are '*demonstrable and admitted deficiencies'* in their discovery Page 4 of the Plaintiffs' Outline Submissions.
3. It is correct to say, as the Plaintiffs assert At paragraph 26, page 11of their Submissions , that Mr. Declan Canavan swore an Affidavit on behalf of the Northern Ireland Companies on 09 November 2009 and which averred that following a further search for documents relevant to issues raised by the Plaintiffs which search was conducted over the weekend from 30 October to 1 November 2009. This was n the context of a Directions Hearing the preceding Thursday on 29 October 2009 at which Counsel for the Northern Ireland Companies indicated that an Affidavit would be ready early the following week addressing the issues raised by the Plaintiffs. It was, accordingly, over the weekend following 29 October 2009 that Mr. Canavan carried out his searches. The suggestion (implicit in the Plaintiffs' oral Day 75: page 57, lines 21-24 and written submissions) that this was a casual exercised engaged in at the weekend is incorrect. This was a matter which was attended to by Mr. Canavan with all due urgency, bearing in mind the commitment given on behalf of the Northern Ireland Companies at the directions hearing the preceding Thursday.
4. The Northern Ireland Companies respectfully submit that in assessing a party's compliance, or otherwise, with an order for discovery, or agreement to make voluntary discovery, the proper test is as articulated by Budd J. in *The Atlantic Shellfish* case [2007] IEHC 215. Accordingly, in other words, the party must engage in a '*reasonable search*'. Mr. Canavan conducted such a search on behalf of the Northern Ireland Companies by way of enquiries and review of documents including electronic files. Affidavit of Declan Canavan dated 9 November 2009, paragraph 4 This was done by specific reference to the issues raised by the Plaintiffs in their motion. The suggestion that the Northern Ireland Companies have failed to engage with these issues is, it is respectfully submitted, without merit. Still less does it constitute a basis for an order striking out their Defence.

JOHN BRESLIN BL
LYNDON MACCANN SC