

BETWEEN:**UNIVERSITY COLLEGE CORK – NATIONAL UNIVERSITY OF IRELAND****Plaintiff****– and –****THE ELECTRICITY SUPPLY BOARD****Defendant****JUDGMENT of Mr Justice Max Barrett delivered on 24th October, 2017.****TABLE OF CONTENTS**

(Numbers in square brackets are paragraph numbers)

I. Application for Variation of Existing Discovery Order [1]**II. Order 31, rule 12(11), RSC [3]****III. Chronology and Basis for Variation Sought [7]****IV. Discovery and Proportionality [21]**

(i) Overview. [21]

(ii) *Ryanair*. [22](iii) *Framus and Taylor*. [23](iv) *Dome Telecom*. [25](v) *Thema International*. [28](vi) *Fingleton*. [32](vii) *Boehringer*. [36](viii) *Colgan*. [38]**V. The Decision in *Heatons* [40]****VI. Summary of Applicable Principle [46]****VII. Some Features of the Within Application [48]**

(i) The Burden Presenting. [48]

(ii) The Benefit to Be Derived. [51]

VIII. Conclusion [58]**IX. One Further Point [60]****I. Application for Variation of Existing Discovery Order**

1. By notice of motion dated 1st December, 2016, UCC seeks an order pursuant to O.31, r.12(11) of the Rules of the Superior Courts (1986), as amended, directing that the wording of category 14 of a discovery order made by the court (McGovern J.) on 3rd October 2012 (the 'Discovery Order'), be varied as follows (the underlined wording to be inserted in place of the crossed-out wording):

"All documents evidencing the quantum of[1] loss and damage suffered by the Plaintiffs, to include any loss inventory and correspondence between the Plaintiff and (whether with insurers or loss adjusters or any other person) which evidences the loss and damage, insofar as such documents relate to quantum."

[1] The words "quantum of" are not mentioned in the notice of motion but were mentioned at the hearing of the within application.

2. Notably, what is being asked of the court is that it now vary a category of discovery which requires UCC to discover documents evidencing its loss and damage in what will be a trial as to quantum (the court having previously reached a decision as to liability that is awaiting a hearing on appeal). That, the court notes, is an elementary category of discovery that routinely features in all sorts of cases that come before the High Court and where there is an issue as to loss.

II. Order 31, rule 12(11), RSC

3. Order 31, rule 12(11) of the Rules of the Superior Courts (1986), as amended, was introduced by the Rules of the Superior Courts (Discovery) 2009 (S.I. No. 93 of 2009). Those Rules amend O.31, rr.12 and 20, RSC and, in particular, make provision for the discovery of electronically stored information. Order 31, rule 12(11) provides as follows:

"Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the Court for an order varying the terms of the discovery order or agreement. The Court may vary the terms of such order or agreement where it is satisfied that –

(i) further discovery is necessary for disposing fairly of the case or for saving costs; or

(ii) the discovery originally ordered or agreed is unreasonable having regard to the costs or other burden of providing discovery."

4. As can be seen from the just-quoted text, rule 12(11) provides in effect for two scenarios:

(i) where it becomes apparent that the discovery that has been agreed or ordered is too narrow and that further discovery is necessary;

(ii) where discovery was ordered or agreed and it becomes apparent that what has been ordered or agreed is unreasonable, having regard to the costs or other burden of providing discovery.

5. As to (i), such a scenario might arise where there is correspondence, discovery is made, correspondence ensues, the party seeking discovery says 'You haven't made discovery of Document X', the party making discovery says 'Document X does not come within the terms of the order for discovery', and the party seeking discovery says, 'It should come within the category of discovery and, if it does not, I want the category expanded so as to bring Document X within its ambit'. As to (ii), this reflects the reality that often a party is not clear as to the nature and extent of the discovery that it will have to make until it actually starts the process; under sub-rule (ii) of r.12(11) a mechanism is established whereby a party may come back into court and say in effect 'Notwithstanding that the court has engaged in a proportionality analysis, having regard to the information now available, what falls to be discovered is an unreasonable burden'.

6. In passing, by way of general observation (though an observation which it is necessary for the court to return to later below) the court notes that the within application is one in respect of which UCC is the moving-party. Hence the burden of proof lies upon it before the power of the court to make the order sought can properly be invoked. UCC must show that the burden of making discovery exceeds what could have been anticipated in good faith, and that, accordingly, it is disproportionate to require UCC to comply with the Discovery Order. It is not for ESB to explain why it is not content to allow an amendment of the Discovery Order.

III. Chronology and Basis for Variation Sought

7. ESB made a request for discovery dated 6th June, 2012. Category 14 of the discovery sought was:

"All documents evidencing the loss and damage incurred by the Plaintiffs, to include any loss inventory and correspondence (whether with insurers or loss adjusters or any other person) in relation to same."

8. The reason given for this category was as follows:

"The loss and damage alleged are denied and these documents, which are not otherwise available to the defendant, are necessary for the fair disposal of the action."

9. Correspondence ensued, UCC agreed to make discovery of Category 14 in the terms sought, and that is reflected in the order for discovery made by McGovern J. on 3rd October, 2012. Notably, the recitals to that order refer, *inter alia*, to "Counsel for the Plaintiff indicating an application pursuant to Order 31, rule 12(11) to vary the terms of the Order may be made". It is not often that one finds a discovery order referring to the potential for a future order for variation order as having been flagged at the hearing of the motion for discovery. However, it appears that the reference derived from the fact that UCC had significant concerns, even at that early stage, as to proportionality generally.

10. In any event, following the making of the order, a methodology was developed by Matheson Solicitors, the firm of solicitors that had charge of the discovery process for UCC. A discovery process ensued and resulted in the discovery of 2,537 documents at the eye-watering cost of c. €1m. Notably, no steps were taken in relation to the discovery under Category 14. That is because of the following proposal made by Matheson in a letter of 14th December, 2012, under the heading "CATEGORY 14":

"As you know, the Plaintiff's claim was independently assessed and adjusted by OSG Loss Adjusters, who were appointed by the Plaintiff's insurers. The adjustment of any claim involves careful consideration of loss, mitigation and scrutiny of every element of the claim. Consequently, in addition to the files retained by OSG, which contain extensive vouching documentation, there is a significant volume of documentation across all custodian and other sources of documentation within UCC which potentially respond to this category. We have suggested that quantum should be agreed by way of engagement between the parties' respective loss adjusters and we understand that you have appointed a firm of loss adjusters for this purpose.

We propose that in the first instance, OSG provide your loss adjusters with the documents which OSG believe, based on their professional assessment, are necessary for your loss adjusters to carry out their review and that the loss adjusters should engage to identify any further documentation required for your loss adjusters.

With this proposal in mind, we have not included key custodians who are responsive to, or identified key-word search terms in respect of Category 14."

11. That proposal was agreed to by ESB in a letter of 17th January, 2013, which states, *inter alia*:

"We have appointed Mr. Graham Burgess and Ms. Susan Willmott of GAB Robins (UK) Limited to act as loss adjusters on behalf of the Defendant herein. We would be obliged if you would provide your consent to Mr. Burgess and Ms. Willmott

liaising directly with OSG Loss Adjusters so that they may obtain the relevant documentation retained by OSG in relation to the quantum of your claim."

12. At no point did ESB agree that in the event of the proposed engagement proceeding (as it did) to failure, it would not seek to rely on its entitlements under the law of discovery.

13. Engagement between the parties ensued. In May 2013, two days of meetings took place on the UCC campus when GAB Robins (ESB's loss adjusters) visited the campus, met a number of UCC persons, met OSG personnel and discussed how the claim had been adjusted and what had been involved in relation to that. Thereafter, GAB Robins sought the adjustment files, and these were provided. Then, in October/November 2013, a number of detailed queries in relation to those files and the adjustment of the claim were raised by GAB Robins. At this point, the UCC side became unhappy about the engagement process as it was developing. Its sense was that what was happening was that GAB Robins were readjusting the claim, whereas what had been hoped was that they would look at what had been done by OSG, broadly accept the OSG work as properly done and that there would not be a significant difficulty in agreeing quantum. (The court cannot but note that this seems a remarkably optimistic stance for UCC to have taken: insurers and their agents are not generally reputed for rushing to agreement on quantum calculations undertaken by others, even if those others are fellow insurance industry professionals).

14. It appears to be the differences presenting between the parties as to quantum that, at least in part, led to application being made for a split trial (liability/quantum) in the within-titled proceedings. Kelly J., as he then was, ordered a split trial on 9th December, 2013, with the result that the issue of quantum was, to borrow a colloquialism, completely 'parked' at that time. The High Court gave judgment on the liability module on 5th October, 2015. The issue of quantum reared its head swiftly thereafter, with Matheson Solicitors (acting for UCC) suggesting in a letter of 22nd October 2015 that further attempts should now be made to agree quantum, stating, *inter alia*, that

"We remain of the view that it should be possible for the parties to agree quantum given that UCC's claim was fully adjusted. We therefore suggest that prior to the quantum hearing dialogue should be re-opened between our respective clients' loss adjusters on the issue of quantum."

15. In a further letter of 12th November, 2015, Matheson notes that there has been a "process of engagement" between the parties in the Category 14 context, refers to the "50 pages of extremely detailed queries in relation to OSG's files", and moves on to state:

"In our view, this remains the most sensible and cost efficient way of agreeing quantum and we do not believe it is necessary to re-open discovery. While we remain of the view that it is unnecessary for GAB Robins to readjust the claim in minute detail, in the interests of moving forward we are instructing OSG to respond to the queries raised by GAB Robins."

It may also be helpful to arrange a meeting between the loss adjusters to discuss the responses tendered by OSG to the queries raised."

16. There followed some further correspondence in which ESB reminded UCC that Category 14 discovery had not been made. Then there is a letter of 27th November, 2015, from Matheson, suggesting that the loss adjusters engage, rather than making the Category 14 discovery. That letter states, *inter alia*:

"We note that you have proposed that our client comply in full with category 14 of the defendant's order of discovery by 1 February 2016. As outlined in our letter of 12 November 2015, we do not believe that it would be cost-effective for either party to produce an affidavit of discovery in respect of category 14 at this point. In the interests of reducing costs and avoiding what you described in your letter of 5 July 2013 as the 'lengthy discovery of documents', the parties had previously agreed a process for engagement between the loss adjusters. In our view, this remains the most sensible cost-efficient way of agreeing... and we believe the process should be reactivated at this point."

In this regard, we have instructed our loss adjusters to respond to 50 pages of queries raised in 2013 by your loss adjusters, GAB Robins..."

In our view, OSG's responses to your loss adjuster's queries should dispose of the majority of the issues in dispute between the parties. As such, we would suggest that, in addition to the additional queries which you will be raising on 29 April 2016, it would be helpful to also furnish us with a schedule of agreed items. Following further engagement between the parties during May 2016, we would suggest that the parties prepare a revised schedule of agreed items in advance of the first experts' meeting."

17. What happened thereafter was that, over February and March of 2016, UCC and OSG responded to the various queries that had been raised by GAB Robins. This process included providing hyper-linked spreadsheets with invoices taken from a cost management system (the 'Agresso' system) used by UCC. And there was various additional 'to-ing and fro-ing' between the parties at this time. There was a meeting that was proposed to take place at the end of August 2016; that was cancelled by UCC shortly before it was due to take place, and there is a considerable volume of correspondence on file concerning that, the affidavits before the court deal with it as well; suffice it to note here that there was a fair amount of recrimination between the two sides in relation to what happened and why the process broke down. It does not seem to the court that it is necessary for it in the context of the within application to determine which side (if either) was responsible for the breakdown, and sometimes, it might be noted, commercial arrangements of the type under consideration break down without anyone being at fault: it can happen that it is just not possible for parties acting even in the best of faith to arrive at agreement between them on particular matters. In any event, the upshot of the process breaking down was that ESB then said, by letter of 7th October, 2016 that it now wanted UCC to comply with its obligation under Category 14 to make discovery of quantum-related documents, which letter stated, *inter alia*:

"If no meeting of the loss adjusters on the basis previously agreed between our offices is possible, then we will have to insist on discovery being made so that it can be confirmed that our client has access to a complete set of documentation – both good and bad from UCC's perspective – relating to the quantum of the claim herein. Once discovery is made, we will review the matter further and will then be in a position to consider whether any aspects of your client's claim can be admitted."

18. It is at this point that the correspondence commences which, in effect, underpins the within application. Thus one finds Matheson writing in the following terms in a letter of 25th November, 2016:

"We refer to your letter of 13 November 2016. It is extremely disappointing that the process of engagement has been unsuccessful, particularly in circumstances where our client, and no doubt ESB have incurred significant cost in respect of this process to date. It must be recognised that despite your repeated complaints that we have failed to comply with category 14, we have provided you with extensive documentation to date, including documents and oral information that would not in fact be responsive to category 14 had discovery of this category been provided. For example, we have responded to over 500 individual queries raised by GAB Robins (at a considerable cost) and, in the spirit of cooperation, in addition to providing all invoices from UCC's Agresso costs management system we have provided you with a hyperlinked schedule to the invoices. Our responses to GAB Robins' queries included embedded documents where available. You have also been provided with a full copy of OSG's files in relation to the adjustment of the claim. It is notable that many of the documents which you are now seeking are not in fact responsive to category 14, for example, UCC's insurance policy.

We have previously expressed concerns in relation to the lack of materiality that is evident in the approach taken by your loss adjusters to date. This is apparent from queries relating to matters such as a €20 taxi [fare]...€27 spent on art supplies...the delay in (and not the cost of) replacing €365 worth of work clothing...queries in relation to fire extinguishers...a desk replaced at a cost of €115...tea and sandwiches at a cost of €68-€88...a further query in relation to the cost of sandwiches at a cost of €10-€54....All of these queries were answered by OSG however we note that further queries were raised by GAB Robins (by way of example one further query related to whether the tea and sandwiches were for students or staff.

Given the breakdown in the process to agree quantum and in light of your client's insistence that it requires additional documents to assess quantum, we have considered the scope of the original category. As you are aware, our agreement in 2012 to provide discovery of category 14 was prior to it becoming apparent to us during the course of the data retrieval process that there were significant issues regarding the proportionality of the agreed categories, given the volume of potentially relevant data to be reviewed. These issues were set out in detail in the affidavit of Sharon Daly sworn on 3 October 2012. We estimated at that time that the cost of the discovery would be between 2.7 million and 10 million [presumably these are euro amounts] which would be completely excessive and disproportionate. As a result, we invested considerable time and effort in formulating a methodology in order to provide discovery at a proportionate cost. This methodology was set out in detail in our letter of 14 December 2012 and included the use of key custodians and key word search terms to reduce the universe of potentially relevant documents. A key element of this methodology was our proposal in respect of category 14, namely the process of engagement by the parties' respective loss adjusters. We have at all times made clear our view that the process of establishing quantum in respect of this claim should take account of the fact that the claim was fully adjusted by OSG on behalf of Aviva and monitored by Crawford's. The loss and damage suffered by UCC was independently assessed and it is surprising that your adjusters have not been in a position to agree or even attempt to agree quantum despite very significant engagement.

To avoid further wasted and unnecessary costs insofar as possible in respect of what will undoubtedly be a costly discovery exercise, we believe it is both necessary and appropriate to vary category 14 and we have set out our proposed revised wording below. There is, as you are aware, a statutory basis for the categories of discovery to be varied in the event that it becomes apparent that they are disproportionate and this is set out in Order 31 rule 12. This is the basis upon which we are seeking a variation to category 14.

As acknowledged by your Counsel (Transcript, 27 November 2015 page 6, line 1), category 14 is 'capable of being very, very detailed'. It is extremely broad as currently drafted and captures a large volume of potentially responsive documents which we do not believe are relevant to quantum.

Our original concerns in relation to proportionality therefore apply equally to category 14, particularly given the lack of materiality that has been evident in your approach to quantum to date. We consider that there are potentially numerous custodians who hold documents which are potentially responsive to category 14, given the potentially broad interpretation which could be applied to the existing wording of the category. Given that the purpose of the category is to establish the quantum of the claim we hope that you can agree a variation to the wording of the category which is set out below in order to avoid the cost of producing documents that could respond to the category but which are not relevant or necessary to establish the quantum of the claim. In light of all of the above, we propose the following variation:

Category 14

All documents evidencing the loss and damage suffered by the Plaintiffs, to include any loss inventory and correspondence between the Plaintiff and (whether with insurers or loss adjusters or any other person) which evidences the loss and damage, insofar as such documents relate to quantum.

We believe that this variation is appropriate and should be acceptable to your client in circumstances where the clear rationale behind category 14 is [to] assess quantum and not, for example, to obtain all correspondence relating to the recovery process. We have deleted the reference to 'any other person' as we believe this wording captures a disproportionate number of internal emails and emails with third parties in particular which are not relevant to quantum albeit they may relate to the flood and/or the flood recovery process. As you are aware, the flood recovery process was extremely significant and took over a year and consequently a significant volume of documents and correspondence was generated during this time.

Having regard to the categories of documents set out in your letter of 13 June 2016, we propose to provide the following documents which we believe are responsive to the revised category:

- All correspondence between UCC and OSG or insurers in relation to loss and damage to the extent such correspondence is relevant to quantum;
- Photographs evidencing the damage;
- Asset registers, to the extent such documents exist;

- *Tender documents submitted by successful bidders, to the extent such documents exist (as your loss adjusters are aware a large proportion of the recovery works were not carried out on foot of tenders given the urgency involved and the fact that contractors were already on site in some instances);*
- *Material damage reports from external sources;*
- *Purchase orders.*

We will advise you as to the proposed timeline for the provision of discovery, our proposed methodology and the custodians for this process once this assessment is complete."

19. That then is the letter in which the variation (now as varied) is sought and, as a letter, it seems to the court to comply with the requirements of O.31, r.12(12).

20. In passing, the court would note from the foregoing that, in effect, what has transpired between the parties as regards what might loosely be termed category 14-related documentation has been a process of engagement that (not mentioned to this point but repeatedly referred to by ESB at hearing) was, in ESB's view, frustrated by the insistence of UCC's solicitors that they be centrally involved in what ESB had hoped (and repeatedly sought should be) direct engagement between the respective parties' lost adjusters, unimpeded by solicitors. Whether or not ESB's perception as to the role taken by UCC's solicitors is correct (and they no doubt were simply doing as UCC had requested of them), arising from that perception ESB has arrived at the view that, as stated by its counsel at hearing *"We have...been prepared to facilitate that process [of mutual engagement], but because it has been frustrated, we are simply saying, well, if that is the way you want to play it, fine, then please just discover the documents evidencing your loss and damage."* Counsel for UCC's answer to this is that the engagement process was intended to achieve something: *"The interaction is an interaction for a purpose. It is not an end in itself. It was designed to achieve something and that was agreement of quantum."* But merely to state matters as just quoted is to identify the problem that has arisen: despite the engagement, nothing has been achieved; and at no point did ESB agree that in the event of nothing being agreed then it would thereafter resile from seeking what it was entitled by law to obtain by way of discovery.

IV. Discovery and Proportionality

(i) Overview.

21. The starting point in an application such as that now presenting is for the court to satisfy itself as to relevance, necessity and proportionality. Relevance is not an issue of dispute between the parties to the within application and that brings with it certain consequences: hitherto the courts have generally taken the view that once relevance is established, necessity will typically arise and the issue that then comes into play is that of proportionality. When it comes to proportionality, it is useful to mention a few of the principal authorities, if only to demonstrate the increasing centrality of proportionality to the discovery process in general. The court will then address the specifics of the within application. However, it is perhaps useful for the court to make the preliminary observation, before proceeding into a consideration of applicable legal principle and theory, that that principle and theory ultimately falls to be applied to whatever evidence that is before the court. And the court must be provided with what might be styled 'hard' evidence in this regard, i.e. it is not sufficient for there to be general blandishments or comments about the provision of certain documentation being very expensive or very time-consuming, even if such concerns are proffered in good faith: a court needs detail, it needs evidence. Such evidence and detail, though not entirely lacking, are significantly lacking in the within application, and that deficiency has a most negative consequence for UCC in terms of obtaining the relief that it has come to court seeking.

(ii) *Ryanair*.

22. Turning first to *Ryanair plc v. Aer Rianta cpt* [2003] 4 I.R. 264, 277, Fennelly J. there observes, *inter alia*, as follows:

"The change made in to O. 31, r. 12, in 1999, exemplifies, however, growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy.

The court, in exercising the broad discretion conferred upon it by O. 31, r. 12(2) and (3), must have regard to the issues in the action as they appear from the pleadings and the reasons furnished by the applicant to show that the specified categories of documents are required. It should also consider the necessity for discovery having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. The court should be willing to confine categories of documents sought to what is genuinely necessary for the fairness of the litigation."

(iii) *Framus and Taylor*.

23. In *Framus v. CRH plc* [2004] 2 I.R. 20, 38, Murray J., as he then was, observes, *inter alia*, as follows:

"It seems to me that in certain circumstances a too wide ranging order for discovery may be an obstacle to the fair disposal of proceedings rather than the converse. As Fennelly J. pointed out, the crucial question is whether discovery is necessary for 'disposing fairly of the cause or matter'. I think it follows that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial."

24. One finds echo of this view in the judgment of Geoghegan J. in *Taylor v. Clonmel Healthcare Ltd* [2004] 1 I.R. 169, 182.

(iv) *Dome Telecom*.

25. In *Dome Telecom Ltd v. Eircom Ltd*, [2008] 2 I.R. 726, the plaintiff sought discovery of details of certain calls made to various free-phone numbers operated by its competitors over the relevant periods. In his judgment, Fennelly J., at 747, offers further insight on the issue of proportionality, stating, *inter alia*, as follows:

"I have come to the conclusion that the very unusual burden and heavy cost of the discovery in this case requires the court to have a clear view of the litigious benefit to the plaintiff from obtaining the extremely detailed breakdown of information which is the only remaining issue. The plaintiff has already had the benefit of discovery on a huge scale. It accepts that this enables it to establish that the alleged discriminatory pricing had a very significant market effect. I do not believe that it is established, at this stage of the litigation, that the likely benefit, if any, to the plaintiff of obtaining the category 9 discovery is sufficient to justify the highly unusual and burdensome form of discovery sought."

26. Notably, however, in *Dome Telecom*, it appears that, as was perhaps even more the case in *Heatons* (considered later below) there was comprehensive evidence before the court as to the detail of what would actually be involved in complying with the order in the terms in which it was sought. Thus, per Kearns J., at 763:

"There was evidence that the retrieval of such information from the system would impose an enormous burden on the defendant. For each month between August, 1999 to April, 2005 there would be approximately 450 million records which would occupy about 100 GB of disk space. Only one month at a time could be recreated. In order to restore the entire 66 months in question, this would require an estimated minimum of 132 days, following which data analysis would have to be run on the extracted records in order to identify the freephone traffic and separate it from non-freephone traffic, as only the former would be discoverable and the defendant would, in addition, possibly breach its obligations of confidentiality to its clients if it were to provide all the estimated C.D.R. in question."

27. It was against this background of hard evidence that the Supreme Court was able to form a view as to what level of discovery was appropriate.

(v) *Thema International*.

28. The judgment of Clarke J., as he then was, in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) and ors* [2011] IEHC 496 contains a number of helpful observations with regard to the discovery process generally, and many of these are well-known. Of especial relevance in the context of the within application, it seems to the court, are Clarke J.'s reference to the four stages of discovery adopted in that case in making discovery and (the court understands) generally adopted in making discovery of electronically-stored information, viz. (1) retrieval, (2) uploading and de-duplication, (3) search, and (4) review, later observing, at paras. 3.6-7,

"3.6....It seems to me, therefore, to be reasonable for the court to expect that parties will put themselves in a position to be able to comply with their discovery obligations, post order or agreement, by taking all appropriate preparatory steps so as to minimise the period that is likely to elapse between agreeing or having determined the scope of discovery and compliance with the obligations so determined. Where it is reasonable to assume, as here, that the proceedings will progress at least to the discovery stage and that that discovery will be extremely substantial, and where, therefore, something along the lines of the four stage approach adopted... in this case is anticipated as being necessary, it follows that a party has an obligation to use its best endeavours to progress stages one and two before the terms of discovery are finally determined."

3.7. Where, therefore, a party unreasonably fails to progress matters in that way, in advance of order or agreement, a court is likely to be less sympathetic to a plea on the part of the party concerned that it would be difficult, unfair, unreasonable or unduly expensive or resource consuming, to require the party to comply with its obligations post agreement or order in a very short period of time."

29. Those observations are directed to the question of compliance within a constrained time-limit with a discovery obligation; however, they apply with some force also in the present context. What Clarke J. is emphasising is that there are a number of stages to be gone through in terms of ascertaining the document universe and applying search terms, etc., the most time-consuming and costly part of the exercise being the last part, i.e. where documents are subjected to manual review.

30. Not surprisingly, given the facts of the within application, ESB points to Clarke J.'s suggestion that even in advance of the discovery order being made, it would be appropriate for a party in large commercial litigation to undertake steps (1) and (2), so as to have a sense of what the document universe is, in order that it can then put itself in a position to comply promptly with its discovery obligations. But here, of course, a slightly different position pertains. Yes, the discovery order was agreed to and made, but there followed the engagement between the parties described previously above. Pending the completion, successful or otherwise (as it happens it was otherwise) of that process of engagement, the court does not consider that it would have made sense for UCC to go down the route even of steps (1) and (2). UCC's engagement with ESB was, at the least, a 'scoping' exercise; it had the potential to become the entirety of the discovery exercise in respect of category 14 if matters went well; and it was costing money to undertake. In those circumstances it would have been absurd to expect that separately UCC would start undertaking the various steps of the very discovery exercise that its engagement with ESB regarding category 14 might yet render nugatory. What is perhaps a little surprising is that by the time of the within hearing – at which time the process of engagement clearly broken down – not only did UCC continue to be surprisingly inexact as to the scale of discovery that category 14 would require, but was also of the view (notwithstanding the contrary thrust of *Thema International*) that it should not identify the universe of potentially responsive documents until the within application was adjudicated upon. Thus Ms. McClements has averred, inter alia, as follows:

"In order to identify the universe of potentially responsive documents to category 14...it is necessary to carry out the additional collection, carry out de-duplication and apply key word searches. This is a costly and time consuming process and it is not appropriate to incur the costs associated with this exercise pending clarification from the Court on what is required to be provided under category 14...."

A high level review of these sources of additional documents indicated an additional 11,770 potentially responsive documents together with 6,000 photographs. These photographs are not responsive to word searches and, therefore, it will be necessary to review each photograph to determine whether they are responsive...."

31. The court accepts that having expended money on the engagement exercise, and having decided to come to court with the within application, UCC took (it seems) the view that it could be a waste of money to embark upon a *Thema*-style four-step discovery process when it was its hope, and perhaps even belief, that this Court would provide UCC with the variation order that it has come to court seeking. But in proceeding so, if it has so proceeded, UCC has, if the court might employ a metaphor, to some extent 'hoist itself on its own petard'. By failing to provide adequate evidence to the court as to the exact difficulties that will present if it is required to make discovery of category 14 as ordered, i.e. evidence of the type that was undoubtedly provided in *Heatons* (and something akin to which appears also to have been provided in *Dome Telecom*), UCC has failed to move beyond the essentially speculative (and a "high level" exercise of the type referred to Ms McClements seems, with respect, little more than that) and provide

the court with sufficient evidence for the court to conclude that it is disproportionate to require UCC to comply with category 14 as identified in the Discovery Order.

(vi) *Fingleton*.

32. No little emphasis has been placed by ESB in its submissions on the decision in *Irish Bank Resolution Corporation Ltd & Irish Nationwide Building Society v. Fingleton & ors* [2015] IEHC 296. The court was concerned there with two separate but linked cases where, arising from the banking crash, IBRC and Irish Nationwide Building Society brought claims for damages against certain directors, including Mr Fingleton. The claim was for a sum in excess of €6 billion and one of the issues that arose on the application for discovery was that the defendants had sought discovery on a 'thematic basis', so documents relating to X, documents relating to Y, whereas the plaintiffs wanted to make discovery on a 'documents basis', whereby a particular discrete category of documents would be identified and discovery then made. When it came to proportionality, Costello J. observed as follows, at para. 22:

"The requirement that the discovery sought is necessary for the fair disposal of the matters at issue introduces the concept of proportionality into the assessment as to whether or not a party is entitled to the discovery sought."

33. Costello J. then quotes from the judgment of Murray J. in *Framus* (considered previously above) continuing, at para. 23:

"[T]he primary test remains whether the documents are relevant to the issues between the parties. Once the applicant for discovery establishes that the discovery sought is relevant and necessary in the sense described above, then the party opposing the Order sought must establish to the satisfaction of the Court why it would be disproportionate to order the discovery sought. In essence the argument is why the Court should cut down or limit the discovery to which a party, prime facie, is entitled."

34. Next, Costello J. refers to the judgment of Geoghegan J. in *Dome Telecom*, moving on to observe as follows, at paras. 25 and then 27-29:

"The test proposed by Geoghegan J is whether it is oppressive to the extent that it is unreasonable to order the discovery sought and in answering this question the Court has to have regard to all of the circumstances."

...

"Significantly, despite the lengthy exchange of affidavits, no information is put before the Court as to the likely time or expense that may be incurred if discovery in the terms sought by the defendants is ordered as opposed to discovery in the terms offered by the plaintiffs...."

The plaintiffs emphasise the observations of Fennelly J in Ryanair to the effect that the proper administration of justice is not confined to the relentless search for perfect truth. They fairly acknowledge they cannot and do not say that the discovery which they offer will afford complete discovery of the documents sought by the defendants in the categories as the defendants have framed them. They fairly concede that what they are offering is a vast discovery but a discovery nonetheless that does not set out to discover all of the relevant documents within the categories which the defendants have identified as relevant to the issues in the cases as they have identified them...

Significantly, despite the lengthy exchange of affidavits, no information is put before the Court as to the likely time or expense that may be incurred if discovery in the terms sought by the defendants is ordered as opposed to discovery in the terms offered by the plaintiffs. Therefore, the Court is left with averments, no doubt made in good faith and based upon considerable experience, by the solicitor for the plaintiffs who is conducting the discovery exercise, that the proposed discovery will be extremely expensive and extremely lengthy. The difficulties involved in specific searches are highlighted but the Court is left with no information as to the likely or estimated cost of complying with the discovery sought by the defendants. There is no estimate of the difference between the cost of making discovery as offered by the plaintiffs and that sought by the defendants. This makes it very difficult for the Court to conclude how onerous or unreasonable the discovery sought actually is. Generalities are not sufficient in the context of this case. Furthermore, it is to be borne in mind that this case involves a claim for damages of up to €6 billion canvassing a wide range of allegations over a very wide period of time. In assessing the proportionality arguments of the plaintiffs this is a fact to which the Court should have regard. I disagree with the submission of the plaintiffs that it is not permissible to link the concept of proportionality to the perceived gravity and magnitude of the plaintiffs' claim. Where a party sues for damages of up to €6 billion, it is difficult to deny a defendant documents on discovery which may assist his defence, on the grounds that it is too expensive without establishing or attempting to establish precisely how unreasonably burdensome and onerous the request for discovery is. The possible injustice of unfairly, if unwittingly, withholding documents from a defendant so placed are too grave."

35. Perhaps two supplementary points might be made in passing. First, as will be seen later below, it is not the case in the within application that no information here has been put before the court. Second, notwithstanding the above-quoted observations, when Costello J. came to look at individual categories of discovery, she refused a number of them on the grounds that what was sought was disproportionate.

(vii) *Boehringer*.

36. In the relatively recent decision of the Court of Appeal in *Boehringer Ingelheim Pharma GmbH v. Norton (Waterford) Limited* [2016] IECA 67, Finlay Geoghegan J. observes as follows, at para. 45 of her judgment:

"[N]otwithstanding that the categories may contain relevant documents which may assist Teva in giving instructions to its own experts or instructing counsel to cross examine experts from Boehringer I have concluded that the trial judge was in error on the facts herein in concluding that discovery of the very significant volume of documents potentially within categories 2 and 3 is necessary for disposing fairly of these proceedings. The proportionality between the potential advantage to Teva in obtaining these documents for use in these proceedings and the probable cost and time involved in Boehringer making discovery and taking into account the position in the UK proceedings is such that discovery of categories 2 and 3 is not necessary for the fair disposal of the proceedings."

37. Finlay Geoghegan J. expressly acknowledged in *Boehringer* that she was taking an opposite view as to the discoverability of certain documentation to that taken by her, as a High Court judge, in *Schneider (Europe) GmbH v. Conor Medsystems Ireland Limited* [2007] 2 ILRM 300. However, she appears to have had affidavit evidence before her in *Boehringer* that set out in detail the difficulties that would be experienced here, the level of cost involved, the volume of documentation involved, the number of data sources

involved, the periods of time involved and the various confidentiality issues which affected this particular patent litigation. So again, she had hard evidence in relation to these issues, and that allowed her to form the view that, on the facts of *Boehringer*, there was a disproportionality presenting which had consequences for the discovery to be ordered.

(viii) *Colgan*.

38. *Colgan v. Irish Bank Resolution Corporation Ltd (in special liquidation) and anor* [2017] IEHC 43 was an application for discovery of certain reports of inquiries furnished to IBRC in connection with allegations of overcharging. In his judgment, O'Connor J. observes, at para. 18:

"Finally, in regard to the suggestion that the discovery of the category now sought will be in some way [be] disproportionate to the rights of privacy or confidentiality of the first named defendant, the Court is left wondering about the extent of the privacy and confidentiality rights sought to be protected. I again mention that the first named defendant is in liquidation pursuant to an Act of the Oireachtas. There comes a stage in a discovery application for the respondent to explain the extent of the loss of some right to privacy or commercial confidentiality or excessive workload when relying on the proportionality argument. There is no evidence before this Court about any cost or time involved in discovering whatever report(s) on overcharging exists. In those circumstances, the Court is not in a position to weigh the fairness which it wishes to bring to the determination of these proceedings against the proportionality argument which was mooted."

39. That is further confirmation of the point now repeatedly made by this Court in the within judgment, being that the court requires adequate evidence upon which to act when presented with an application of the type now being made. The requisite evidence is largely absent from the within application.

V. The Decision in *Heatons*

40. The decision of the High Court in *Heatons v. ASICs UK Ltd* (Unreported, Cooke J., 1st November, 2013) appears to be the only authority that is directly on point when it comes to r.12(11). *Heatons* was a case in which abuse of dominant position was claimed, and a consent order for discovery of seven categories of documents issued. Later the defendant applied, under r.12(11), to vary the terms of discovery on the basis that it had transpired that the burden involved in complying with the order was more onerous, time-consuming and expensive than could have been anticipated. Notably, remarkably detailed affidavit evidence was placed before the court in *Heatons* as to the burden of making discovery in the terms agreed to, as against the proposed variation. The extent of this evidence is not clear from the judgment of Cooke J. but happens to be known to the counsel on both sides of the within application, they having also acted in the *Heatons* application. That evidence established, for example, the following matters:

- (1) the number of relevant custodians (32), to which were added named third-party sources;
- (2) the number of documents in the set collated (1.5 million) in addition to the third-party sources;
- (3) the number of documents if the discovery was limited to twelve so-called 'Top Level Custodians' (595,760);
- (4) the time it would take to carry out the first level review of the documents (23 weeks) and the cost of doing so (over €1 million in paralegal costs alone);
- (5) the relationship of this cost to the total value of the business between the parties (€804,193);
- (6) the time and cost associated with discovering the documents proposed to be excluded by the application of a cut-off date (9 weeks and more than €395,000);
- (7) the number of documents that would be excluded by restricting discovery (as proposed) to so-called 'High Level Documents' (65,793 of the 127,126 documents responsive to key-word searches).

41. It was against this background of hard documentation that Cooke J. was able to form a view as to whether what was being proposed was genuinely disproportionate (and it was on that basis that the fairly limited restrictions asked for in that case were granted). Here, as mentioned in the context of *Dome Telecom* above, the converse applies: much more is sought by way of variation, and much less is provided by way of hard information.

42. In his judgment, Cooke J., at paras.4-7, observes as follows:

"4. Before giving the Court's ruling on this application, some general remarks may be of use. First, the application is brought on the basis of additions to O.31, r. 12 made in 1999 and 2009 and particularly what are sub-rules (11) and (12). Those amendments to the discovery procedure have the objective of both accommodating electronic discovery and of reducing the frequency of interlocutory disputes over discovery by encouraging parties and their legal representatives to undertake discovery by agreement and without recourse to the Court.

5. The facility of sub-rule (11) which enables both an order and an agreement for discovery to be varied effectively recognises that the scope of what was originally agreed independently of the Court may subsequently turn out to be inadequate or unreasonably costly or burdensome. This must be particularly relevant as a facility in commercial cases where electronic discovery, as we all know, can turn out to be a vast exercise.

6. The Court does not consider that there is any problem with jurisdiction [in] relation to making the variations sought in this instance by virtue only of the fact that the defendant may appear now to be resiling in part from what it had originally undertaken to do. That is precisely the situation which the new sub-rule is designed to enable the Court to address.

7. While the Court ought not lightly to permit a party to alter what has been agreed, there is clear jurisdiction to adjust the scope of agreed discovery categories if it is demonstrated that the exercise required has genuinely exceeded what could have been anticipated in good faith with the result that it is now shown to be unreasonably burdensome or costly having regard particularly to the significance of the role likely to be played by the discovered documents in the context of the issues to be tried at a hearing.

8. The second observation is that while the need for discovery and its extent and scope is relevant or necessarily, is primarily a matter for the parties in the first instance, these are also matters in which the Court has its own interest

from the point of view of economy in the use of resources and saving time. This is particularly so in cases in the Competition List such as the present one."

43. *Heatons* was a decision given in the competition law context; and it may be that it has a particular resonance when it comes to cases in the Competition List. Be that as it may, Cooke J.'s observations appear to the court to apply in any event with equal rigour to commercial proceedings generally. Cooke J. moves on, at para. 18, to observe as follows:

"The Court is...satisfied that on the basis of the detailed description given in the affidavits of the sheer volume of material found to come potentially within those categories and the difficulty and expense so far and still remaining to be encountered in making discovery, that some variation by way of limitation is now justified to adjust the discovery exercise to a reasonable level of burden and expense commensurate with the relevance of the documentation relating to product substitutability on the defence side to the essential issues to be tried."

44. So, Cooke J. was prepared to vary the order, not to the full extent sought but in some material respects. However, the analogy, such as it is, that falls to be drawn between *Heatons* and the within application faces what, for UCC, is a most challenging obstacle in the next paragraph (para.19) of the judgment in *Heatons*, where Cooke J. states, *inter alia*, as follows:

"In effect, the evidential value of material to be derived from the defendant's discovered documents is likely to be mainly corroborative support for the plaintiff's own first hand evidence of the factors relevant to product substitutability rather than constituting primary proof in its own right."

45. That observation, it seems to the court, highlights a significant ground of distinction between the within application and that before the court in *Heatons*, which is that here ESB does not hold any documentation in relation to loss, other than what has been given to is by UCC (because UCC is the only party that knows what losses it has suffered).

VI. Summary of Applicable Principle

46. In his written submissions, counsel for ESB, following a survey of the above-mentioned case-law and also the judgment of Brett L.J. in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.* (1882) 11 QBD 55, suggests the below-mentioned principles to be identifiable. Subject to the square-bracketed observations inserted by the court after certain of the principles advanced, the court respectfully accepts those principles to be a proper statement of current law:

(1) The court enjoys a power under O.31 r.12(11), to relieve a party from a discovery obligation to which it has agreed.

(2) A variation order may not be made unless the application is preceded by a letter requesting agreement to the variations, specifying them and giving the reasons why each is sought.

[This is not apparent from the above-considered case-law; rather it is an express requirement of O.31, r.12].

(3) The burden of establishing the factors necessary for the power to arise lies on the party seeking to invoke the jurisdiction.

(4) The jurisdiction should not be exercised lightly in the case of discovery to which the applicant has agreed. The party seeking the variation must show that the burden of actually making discovery has genuinely exceeded what could have been anticipated in good faith.

[This is in effect a summary of para.7 of Cooke J.'s judgment in *Heatons*. That is a judgment by which this Court is bound. However, while accepting the just-stated proposition as correct, the court respectfully does not consider that this is a factor to which especial weight should be given. After all, the whole predicate for O.12, r.11 is that there has been an order or agreement for discovery; in truth the court enters on stage, or at least becomes fully engaged in the second sentence of O.12, r.11].

(5) The existing discovery obligation must be shown to be unreasonable having regard to the cost or other burden of complying with it. This issue is to be assessed by reference to proportionality.

(6) Proportionality requires the court to consider the gravity and magnitude of the claim.

[The court respectfully considers this to be a mis-focused proposition. Yes, what is proportionate in the context of a claim for €Xm may not be proportionate in a claim for €Xk. But discovery is not, to use a colloquialism, a 'numbers game'. The essence of disproportionality is that what is being ordered is too large in comparison with something else. What is that 'something else' by which a claim of disproportionality falls to be construed? Finlay Geoghegan J. in *Boehringer Ingelheim Pharma GmbH v. Norton (Waterford) Limited* [2016] IECA 67, touches on this issue, at para. 45 of her judgment, when she observes that "The proportionality between the potential advantage to Teva in obtaining these documents for use in these proceedings and the probable cost and time involved in Boehringer making discovery and taking into account the position in the UK proceedings is such that discovery of categories 2 and 3 is not necessary for the fair disposal of the proceedings." So on one side of the scales the court looks to how relevant documents are, how important they are to the issues in the proceedings; on the other side the court balances time and cost. Thus, to put matters at their simplest, if there are documents that are not very relevant to a case and it is going to cost a lot of money to make discovery of them, a court will likely say that the discovery sought is disproportionate. By contrast, if discovery of certain documentation is going to cost a lot of money but the documents are very relevant, a court will likely say that that is not disproportionate, given how important the documents are to that particular case. (And the test falls always to be applied in the particular context of a particular case, i.e. what the issues are, what the costs are, etc., in that particular context). What is a 'lot of money'? In deciding that, a court may usefully have regard to the scale and quantum of the claim yielding the discovery application.]

(7) The need of the other party for the documents may also be a consideration in relation to proportionality. If the documents, although relevant, are merely likely to be corroborative of material available from other sources to the party restricting the application, that is a factor telling in favour of restriction.

(8) The party seeking to establish disproportionality must place before the Court hard information as to the likely time or expense that may be incurred if discovery in the agreed terms is made, as opposed to discovery in the varied terms proposed. Generalities are not sufficient, even if supported by averments in good faith made by the solicitor responsible

for the discovery exercise.

[The court accepts that it is not enough in an application of the type now presenting for a party to come to court making general assertions that discovery is burdensome or overbroad. However, what is required by the court in terms of detail (a) will vary from case to case and (b) must allow for the practicalities of what information can be put before the court.]

(9) Even where the power to make a variation order arises, the Court retains discretion as to whether to make the order or not.

[While this is true, the court would hazard that there will be relatively few instances in which a court, being satisfied that the burden imposed is unreasonable, would decide, nonetheless, not to vary the order].

47. In his submissions, counsel for UCC volunteered the following additional proposition that the court likewise respectfully accepts as correct, subject to the square-bracketed observation that follows the proposition:

(10) in deciding on an application such as that now presenting, the Court can (and should) have regard to (a) the documentation already discovered or disclosed, in terms of quantity/volume, content and cost, and (b) (by reference to *Framus*) any offers that have been made by the party seeking the variation.

[Clearly, when it comes to (a), the issue of proportionality falls to be assessed not just by reference to what has been provided but also by reference to what is yet to be provided. Even a sea of documentation already provided may not seem so very large in volume when viewed in the context of the ocean of relevant and necessary documentation that falls ultimately and properly to be provided.]

VII. Some Features of the Within Application

(i) The Burden Presenting.

48. There is no issue but that UCC suffered loss and damage due to the flooding at its campus back in 2009. This is acknowledged by ESB. Thus, leaving liability aside, the true issue presenting is one of quantum of loss and damage, a further point that has repeatedly been acknowledged by ESB. It is in this context that UCC maintains that category 14 as originally drafted is too broad because it will capture documents that relate to loss and damage but which do not. In terms of moving the within application, UCC has to satisfy the court that category 14 as drafted imposes an unreasonable burden. In this regard, UCC draws attention to the fact that category 14, on its terms, is very widely drafted. (Indeed, ESB has itself acknowledged that it would require extensive discovery, including in the above-referenced observation of its counsel that category 14, as is, is capable of yielding discovery that is "very, very detailed"). The particular focus of UCC's concerns in this regard is explained in the affidavit evidence of Ms McClements, a partner in Matheson, who, in her affidavit evidence has averred, *inter alia*, as follows:

"I say and believe that this variation is appropriate given that the clear rationale behind category 14 is to assess quantum only, and not, for example to obtain all correspondence/documents relating to the flood and/or the flood recovery process. I say and believe that the amended category 14 is appropriate to satisfy the Defendant's need for category 14, which was 'the loss and damage alleged are denied and these documents, which are not otherwise available to the Defendant, are necessary for the fair disposal of the action'.

...

In paragraph 40 of Ms. Davis' affidavit she states that 'it is unclear why the Plaintiff seeks to exclude correspondence with persons other than Aviva and the loss adjusters.' The Plaintiff's rationale for this amendment is that category 14 is extremely broad as currently drafted and this is clear from correspondence between the parties in my affidavit grounding this application. As currently drafted, category 14 captures correspondence with 'any other person' 'which evidences the loss and damage' and therefore captures a disproportionate number of internal e-mails and e-mails with third parties which are potentially responsive to the category but are not necessary to establish the quantum of the claim and as such are not therefore necessary for the fair disposal of the action. The post flood recovery process and the adjustment of the claim was extremely detailed, took over a year to complete and a significant volume of documentation was generated during this time."

49. In a further affidavit, Ms McClements briefly describes the discovery process undertaken to date. If nothing else, the affidavit points to the central importance that discovery now so often assumes in commercial proceedings, and the mini-industry that has grown up to facilitate and ensure compliance with discovery orders that rest ultimately on the principles identified in *Peruvian Guano*, a decision formulated in the late-19th century when no-one could conceive the level of data and documentation that would be generated and stored as a result of an Information Revolution, the consequences of which our legal system has yet properly to acknowledge and assimilate innovatively into its rules and case-law on discovery. Ms McClements avers, *inter alia*, as follows:

"In 2012, as part of the discovery process, Deloitte was engaged to carry out the soft copy collection and Glenbeigh Records Management Limited (GRM) completed the hard copy document collection. Deloitte and GRM collected in total approximately 1.9 million soft and hard copy documents (the 'Collection'). The Collection was carried out on the basis of the methodology formulated by Matheson to enable the Plaintiff to make discovery on a proportionate basis....

Matheson initially identified 47 custodians who potentially possessed documents responsive to the categories of discovery. Of the 47 potential custodians, data was retrieved from 20. As part of the methodology, Matheson identified nine key custodians who were likely to be in possession of the majority of the core relevant documents....

A process of electronic de-duplication was carried out on all soft copy documents to remove exact duplicates and a total of approximately 48,500 documents were collated for manual review. Manual de-duplication, to the extent that this was practicable, was also carried out on hard copy documentation. A review of the potentially responsive documents was then carried out by Matheson....

Pursuant to...Affidavit[s] of Discovery...the Plaintiff provided 2,537 documents to the Defendant. Notwithstanding the reduction in costs achieved by the methodology, the discovery process was still extremely time consuming and cost in

excess of €1 million (prior to formulating the methodology it was estimated that the discovery could cost between €2.7 and 10 million....

The exclusion of category 14 from the discovery process was a key part of the methodology. While some documents responsive to category 14 will have inevitably been collected as part of the Collection, there are custodians of this data which were not included in the Collection as they only hold category 14 data, and a targeted collection of potentially responsive documents to category 14 has not been carried out. It is now...necessary for documents to be collected from additional custodians. The review of Category 14 documents from the relevant universe of documents would then require a similar exercise to the original discovery, save that documents already reviewed and provided can be excluded....

In order to identify the universe of potentially responsive documents to category 14...it is necessary to carry out the additional collection, carry out de-duplication and apply key word searches. This is a costly and time consuming process and it is not appropriate to incur the costs associated with this exercise pending clarification from the Court on what is required to be provided under category 14....

A high level review of these sources of additional documents indicated an additional 11,770 potentially responsive documents together with 6,000 photographs. These photographs are not responsive to word searches and, therefore, it will be necessary to review each photograph to determine whether they are responsive....

As set out in my grounding affidavit and replying affidavit of 16 January 2017, category 14 as currently drafted is too broad and captures documents which are not necessary to assess quantum, such as internal e-mails and e-mails with third parties relating to the flood recovery process. As the flood recovery process was a very significant undertaking which took over a year, a substantial volume of documents and correspondence was generated".

50. It can be seen from the foregoing that in truth quite limited efforts have been taken in order to put information before the court in relation to volumes of documentation and in relation to cost. The term "high level review" embraces anything from a 'back of the envelope' calculation to something more substantial. The court has no idea what scale of exercise has been undertaken by UCC in this regard, though it appears from the paragraph preceding that in which the just-quoted phrase appears that in truth not a lot has been done. Moreover, an assessment of proportionality is a Janus-like exercise that involves both looking backwards to what has been done and forwards to what will likely need to be done in order to gauge the proportionality of the entirety of the documentation that may fall to be discovered. In the above-quoted text, the court is given a good sense of what was done in the past; it is given remarkably little sense by UCC (in an application brought by UCC and in which it bears the burden of proof) as to what remains to be done, leaving the court in no position properly to gauge the question of proportionality.

(ii) The Benefit to Be Derived.

51. In the previous section, the court addressed the burden that category 14 presents. What is the benefit to be derived from discovery of category 14 as ordered? In this regard, it is useful to look at what information ESB already possesses. To this time, ESB has been provided with: (1) all of OSG's loss-adjusting files (some 18 folders of documents). This includes all information that was received from UCC in relation to the quantum of the claim, so all of the queries raised, the answers received, the invoices provided, all of the information that Aviva found sufficient to adjust its claim; (2) 13 hyperlink spreadsheets and 1,963 invoices taken from UCC's Agresso system; (3) relevant invoices so that it can satisfy itself that monies claimed were in fact paid out by UCC; and (4) detailed responses to over 500 queries raised by ESB's loss adjusters – this last source of information being information that would not have been obtained on discovery. Additionally, there has been an offer by UCC to provide significant additional information sought by ESB, viz. all correspondence between UCC and OSG or insurers in relation to loss and damage to the extent such correspondence is relevant to quantum, photographs evidencing the damage, asset registers (to the extent same exist), tender documents submitted by successful bidders, material damage reports from external sources and purchase orders, comprising the bulk of the additional documentation that was sought by ESB. In fact, the only document of significance which appears to have been sought of UCC and sight of which has been declined (on grounds of (ir)relevance) is UCC's insurance policy. Is that a lot of documentation? At first glance, it seems like a lot; on reflection it seems less so. In this regard, the court cannot but agree with the below-quoted submission of counsel for ESB as regards the number of documents provided thus far:

"[I]n fact, it's somewhat surprising there aren't more. 18 lever arch folders is very close to what's on this desk at the moment and, in the context of an €18 million claim involving 11 separate physical locations, it is not actually a great deal of information. It may sound impressive, but, in my respectful submission, it is not. He [counsel for UCC] referred to the hyperlinked spreadsheets that have been provided. Now, that really is simply a provision of the invoices. The invoices have been provided. They are referred to in spreadsheets. There's a hyperlink from the spreadsheet to the invoice. But, ultimately, that is invariably done in these cases. When one is scheduling the documents, you get an Excel spreadsheet with a hyperlink to the relevant document and that is by no means something for which the plaintiff deserves to be commended. It is normal practice in relation to large scale electronically-stored information discovery."

52. Moreover, and perhaps more importantly, where UCC in any event falls down in terms of bringing home a successful conclusion to the within application is that it proceeds from the foregoing to ask in effect 'What else is there that ESB can fairly say that it needs in order to deal with the quantum of the claim?' But this is UCC's application for variation of a Discovery Order, it comes looking for a variation of the Discovery Order, it is for UCC to establish on the basis of the evidence before the court that the court ought now to make the variation sought. It does not suffice for UCC to come to court and say in effect 'We've given ESB loads of documentation, we don't know what more ESB could want, we haven't really done much of a scoping exercise in terms of what remaining discovery it would fall to us now to make, we think from a high level exercise it might be lots; over to ESB now to satisfy the court that ESB needs more.' That, with respect, is entirely to misconstrue the nature of an application under O.31, r.12(11) and the burden of proof to which UCC is subject as an applicant bringing such an application.

53. In passing, the court notes that it was referred by counsel for UCC to a number of documents exhibited in the affidavit evidence of Ms McClements, his intention being to indicate to the court how irrelevant they were, with the point of the within application being to exclude such documents because discovery of them would be pointless. Some of the documents exhibited do seem fairly worthless when it comes to a trial as to quantum. However, if one looks, for example, to a document headed "BUTLER BUILDING BRIEF SCOPE OF WORKS", this seems, with respect, a potentially quite important document. To take but one example, it points to the need for the retention of certain ironmongery, so if ESB were to find that such ironmongery had been disposed of and fresh ironmongery purchased it would know to challenge that expenditure. Additionally, the document sets out, for example, the specification of the different door types. So to the extent that doors are being replaced, ESB's loss adjusters are entitled to see this document and to proceed from that to challenge the price paid for a particular door. These may seem like minutiae but ESB, when it comes to paying money, is entitled to take the view that, to employ a colloquialism, if it 'looks after the pennies, the pounds will look after themselves'. Yet

counsel for UCC has held up, *inter alia*, this scoping document as an example of precisely the type of document that he is seeking in the within application to exclude. Nor is the court being selective in the example just given. There is also, for example, the "ENTERPRISE CENTRE BRIEF SCOPE OF WORKS", another document to which counsel for UCC pointed as the type of document that would fall to be excluded were the court to accede to the within application. Yet, as with the "BUTLER BUILDING BRIEF SCOPE OF WORKS" this document points to detail on which ESB could seek to challenge expenditure for which it is expected to pay. Nor is it just 'scope of works' documents that are in play. For example, among the exhibits is an e-mail of 1st December 2009 from a Mr O'Regan to what looks like the office e-mail address of a firm of electricians stating:

"Please find attached map of Mardyke and cable route details for all three pitches. Both the Rugby and the GAA pitches are radially wired, with 1 cable per column.

I understand that you are going to work with Des Murphy, QS, to develop overall costs involved in replacing any flood damaged cables."

54. Again, this has been pointed to by counsel for UCC as the type of document that would fall to be excluded were the court to accede to the within application. Yet this e-mail indicates the nature of the infrastructure which is alleged to have been damaged, where it is, what sort of cable lies there, and there is a reference to a named quantity surveyor being asked to provide a cost plan, which presumably was thereafter provided. Again, this seems to the court to be the type of document that is both relevant and necessary to a trial as to quantum, and not to present any issue as to proportionality.

55. The court will not run through all of the documents to which reference was made by counsel for UCC as being among the types of document that would fall to be excluded were the court to accede to the within application. Suffice it for the court to note that it is clearly troubling that documents which are held up to the court as documents which would fall to be excluded were it to accede to the within application are documents the discovery of which, on any fair analysis, would appear to be relevant and necessary to a fair disposition of the issues that will fall to be decided at a trial as to quantum, and discovery of which would not offend the requirement as to proportionality. Indeed, were these documents now to be excluded then, notwithstanding the protestations of UCC to the contrary, the process of adjudication as to quantum would, it seems to the court, quickly descend into an arid arithmetical exercise whereby UCC would say 'You have an invoice to indicate that we paid that' and ESB, the party 'writing the cheque', would be left in a position where it was deprived of relevant and necessary documentation by reference to which it could assess and challenge whether such invoice had been properly raised.

56. Ms Davis, a solicitor for ESB has averred, *inter alia*, as follows:

"[I]t is unclear why UCC seeks to exclude correspondence with persons other than Aviva and the loss adjusters. This might, for example, exclude any correspondence with third parties providing damage reports in connection with such reports....I am advised by Crawfords that documents passing between UCC/Aviva and third parties, or even between UCC's agents, might be highly relevant to the quantification of the claim. This may include documents such as material correspondence and documents passing between members of the relevant design team, their exchanges with the contractors, as well as any communications between UCC/Aviva and these parties, insofar as such documents relate to the value of the claim. Without prejudice to this, if the Court should take the view that an amendment is required, the Defendant reserves the right to contend that the amendment should be in terms different from those proposed by the Plaintiff."

57. What does the foregoing mean in the terms of the 'nuts and bolts' of the claims process? What it appears to mean is as follows. Suppose in respect of one of the flood-damaged buildings, UCC went out to tender for repair works and thereafter spent €1m repairing the flood-damage to the building, ESB wants to be able to say 'You didn't spend that amount of money' or 'Not all of the works arising were concerned with repairing flood damage; there was an element of upgrading'. Those are legitimate issues that can be raised. However, UCC's contention is that when ESB gets discovery of the successful tender, it will know the scope of works in terms of that building and can then say, e.g., 'That does not relate to flood damage', 'You can't recover for that', or 'That is an upgrade of the building'. But what Ms Davis is referring to is that there could be e-mails in the course of the job, e.g., e-mails between the contractor and a member of the design team relating to the works being carried out. ESB wants or potentially wants discovery of those to see if in some way they bear upon loss and damage. Those documents, UCC urges on the court, will not bear on quantum. The court must admit that it struggles to see how UCC can so assuredly state this to be so, not least in light of the analysis undertaken by the court above in respect of certain specific documents (i.e. the scope of works documents, etc.). The issue of quantum is not simply an issue of 'Did you pay this money?' but 'Should you have paid this money?' and even in the example just given (which was an example proffered by UCC in submission) it could clearly be the case that an exchange between a contractor and a member of the design team would be relevant to the issue of whether particular money should have been spent.

VIII. Conclusion

58. Returning to the various principles of applicable law identified and considered above, the court notes in particular that (to use the numbering deployed in the previous iteration of those principles:

(3) The burden of establishing the factors necessary for the power to arise lies on the party seeking to invoke the jurisdiction.

For the reasons stated previously above, the court does not consider that burden to have been discharged by UCC in the within application.

(4) The jurisdiction should not be exercised lightly in the case of discovery to which the applicant has agreed. The party seeking the variation must show that the burden of actually making discovery has genuinely exceeded what could have been anticipated in good faith.

For the reasons stated previously above, the court does not consider that UCC has shown that the burden of actually making discovery has genuinely exceeded what could have been anticipated in good faith. If anything, UCC still seems considerably uncertain as to what it will take for it to comply with category 14.

(5) The existing discovery obligation must be shown to be unreasonable having regard to the cost or other burden of complying with it. This issue is to be assessed by reference to proportionality.

For the reasons stated previously above, the court does not consider that UCC has come anywhere close to showing that discovery of category 14 as ordered would be unreasonable (or disproportionate).

(8) The party seeking to establish disproportionality must place before the Court hard information as to the likely time or expense that may be incurred if discovery in the agreed terms is made, as opposed to discovery in the varied terms proposed. Generalities are not sufficient, even if supported by averments in good faith made by the solicitor responsible for the discovery exercise.

For the reasons stated above, the court does not consider that it has been presented with anything other than generalities and good-faith averments and submissions. Certainly it has not been presented, for example, with anything approaching the type of evidence that was available to Cooke J. in *Heatons*.

59. Having regard to the factors identified in the preceding paragraph and to the entirety of the foregoing judgment, the court is coerced as a matter of law into declining to accede to the application made by UCC.

IX. One Further Point

60. The court, at the request of the parties notes (and will note in its order) that an appeal against its judgment in the liability portion of the within proceedings (*University College Cork –National University of Ireland v. The Electricity Supply Board* [2015] IEHC 598) is due to be heard imminently. In the meantime, agreement has been reached between the parties, subject to the approval of the court (which is given), to stay the quantum module of the within proceedings, including any discovery required under the Discovery Order, pending the determination of the said appeal.