Neutral Citation: [2016] IEHC 372

**THE HIGH COURT**

**COMMERCIAL**

**[2014 No. 2229 P]**

**[2014 No. 39 COM]**

**BETWEEN**

**JAMES ELLIOTT CONSTRUCTION LIMITED**

**PLAINTIFF**

**AND**

**KEVIN LAGAN, TERRY LAGAN, JOHN GALLAGHER, IRISH ASPHALT LIMITED AND LAGAN CEMENT GROUP LIMITED**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Costello delivered on 15th day of June, 2016**

1. This judgment is concerned with four motions for discovery: two brought by the plaintiff against the fourth named defendant and against the first, second, third and fifth named defendants; one by the fourth named defendant against the plaintiff; and one by the remaining defendants against the plaintiff. There is agreement between the parties in relation to the relevant principles but there was considerable disagreement as to the application of those principles in respect of the categories of discovery sought by each of the parties. The applications are brought pursuant to O. 31, r. 12 of the Rules of the Superior Courts.

2. Before making an order for discovery the court must be satisfied that:-

> (i) the documents sought are relevant to a matter in question in the proceedings;
>
> (ii) discovery is necessary either for disposing fairly of the cause or matter in question or for the saving of costs;
>
> (iii) the discovery sought must be proportionate.

3. In Ireland the test remains that set out in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55 at p. 63 where Brett L.J. held:-

> *"It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must —either directly or indirectly enable the party requiring the affidavit [of discovery] either to advance his own case or to damage the case of his adversary."*

4. The relevance must be determined by reference to the pleadings in the particular case, not the affidavits or submissions of the parties. Once it is established that a category of documents sought is relevant to an issue in the proceedings, the court must then assess whether the discovery sought is necessary. Fennelly J. in *Ryanair plc. v. Aer Rianta* [2003] 4 I.R. 264 stated at p. 277:-

> *"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. It may have regard, of course, to alternative means of proof, which are open to the applicant."*

5. In *Medtronic Inc. v. Guidant Corporation* [2007] IEHC 37 Kelly J. stated that:-

> *"The court should also consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. It should also be willing to confine categories of documents sought to what is genuinely necessary for the fair disposal of the litigation. Alternative means of proof which are open to the applicant should also be considered. In some circumstances an order which is too wide can constitute an obstacle to the fair disposal of proceedings rather than the converse."*

6. If the court is satisfied that a category of documents is both relevant to an issue in the proceedings and necessary, it must consider whether the request is proportionate. Fennelly J. addressed the issue of proportionality in *Ryanair plc. v. Aer Rianta* at p. 277:-

> *"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."*

7. In *Framus Ltd. v. CRH plc*. [2004] 2 I.R. 20, Murray C.J. endorsed at p. 38 the approach taken by Fennelly J. in *Ryanair plc. v. Aer Rianta* in the following terms:-

> *"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. That is not to gainsay in any sense that the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary for the fair disposal of those issues."*

8. A recent decision of the Court of Appeal in *Boehringer Ingelheim Pharma v. Norton Waterford Limited t/a Teva Pharmaceuticals Ireland* [2016] IECA 67 addressed the issue of proportionality. Finlay Geoghegan J. stated at para. 39 that the court must "*consider the proportionality of making the order sought having regard to the particular facts of the case and the reasons for which the applicants contend discovery is necessary and the grounds of objection made by the respondent"*. In assessing this, the court is to have regard to issues such as "*the number of documents sought, the costs of carrying out the discovery and potential confidentiality issues."*

9. In some of the categories of documents sought relevance or necessity was in dispute and in other instances the category was opposed on grounds of proportionality. In reaching my decision in relation to each of the categories in dispute, I have applied the principles set out in these authorities.

10. The parties engaged in very considerable negotiations to agree the categories of discovery, both subsequent to the issue of the original letters seeking voluntary discovery and during the hearing of the motions. The numbers used in this judgment refer to the numbering system in the original and revised requests for voluntary discovery.

11. The facts at issue in these proceedings have been more fully set out in previous judgments and I do not propose to repeat them here. In summary, the fourth named defendant operated a quarry at Bay Lane, Co. Dublin. It produced rock from the quarry referred to as Clause 804 and 3 Inch Down which it marketed for sale to the construction industry from February, 2003 up to August, 2007. The plaintiff purchased a considerable quantity of both Clause 804 and 3 Inch Down from the fourth named defendant and used it in a variety of construction projects. In or about 2007, it became apparent that some of these projects were sustaining damage due to the presence of pyrite in the rock sourced from the Bay Lane quarry. The plaintiff sued the fourth named defendant for breach of contract and negligence in proceedings entitled *James Elliott Construction Limited v. Irish Asphalt Limited* ("the contract proceedings"). The plaintiff succeeded in the High Court ([2011] IEHC 269) and the matter was appealed in the Supreme Court. The Supreme Court ([2014] IESC 74) made a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union and judgment in respect of the reference is awaited. The plaintiff also sued the fourth named defendant in relation to a development referred to as the Sillogue 4 project. There is reference in this judgment to each of these proceedings.

12. The plaintiff instituted these proceedings against the fourth named defendant and the other defendants alleging that they are guilty of the tort of deceit in respect of the supply to it of material from the Bay Lane quarry. The plaintiff has sued seeking an indemnity and damages from the defendants in respect of the alleged fraud. The defendants have denied all of the plaintiff's allegations and its entitlement to any of the reliefs sought.

**Plaintiff's request for discovery against the fourth named defendant**

**Category 7**

**All documents evidencing:**
**i. how the clause 804 and 3 inch down products produced from the Bay Lane quarry were classified in relation to quality procedures and documents in relation to testing (including the results of such tests) for conformity with the classification and quality procedures and showing what were the different production procedures employed in the production of each of these products; and**

**ii. the fourth Defendant's plea at paragraph 89 of its Defence that material supplied by it fulfilled all of the regulatory specifications and requirements for clause 804 and 3 inch down stone at the time.**

13. The parties were agreed that discovery should be made of category 7(ii) up to 31st August, 2007. In relation to category 7(i), they disagreed on the cut-off date and the fourth named defendant objected to the words in italics in this category. The plaintiff sought this category of discovery in response to the fourth named defendant's plea that it carried out regular testing and therefore had an honest belief regarding the quality of the rock at the Bay Lane quarry. In argument, the plaintiff justified the request by reference to its replies to particulars which referred to tests carried out at Bay Lane, many of which were carried out after 31st August, 2007. If the category was confined to 31st August, 2007, these tests would be excluded from discovery in this category. These tests were listed in replies to Particulars 42 and 43. These were particulars in relation to the plea that the aggregate failed specific industry standard acceptance tests for Clause 804 and 3 Inch Down. Both test results therefore relate to a different aspect of the plaintiff's claim and they specifically do not in any way relate to the defence of the fourth named defendant. The category is concerned with documents relating to products produced from the Bay Lane quarry. Specifically it is concerned with how the products produced were classified and how the products were tested for conformity with the classification. Such a category could not extend beyond the date of production at the quarry.

14. The plaintiff argues that it is entitled to documents relating to *"quality procedures and showing what were the different production procedures employed in the production of each of the products."* The fourth named defendant did not simply sell rock, it sold product which was produced by crushing rock: Clause 804 or 3 Inch Down. It argues therefore that quality procedures and production procedures are part of the case. At para. 28 of the amended statement of claim, the plaintiff pleads that it was fundamental to the operation of the quarry that the fourth named defendant undertook an acceptable level of ongoing product quality control testing to confirm compliance to the standards they were purporting to meet. At sub-para. H it is pleaded that the fourth named defendant:-

> *"failed to implement any appropriate system of testing or quality control during the operation of the quarry at Bay Lane to ensure the products sold from Bay Lane as Clause 804 or 3 inch down conformed with the relevant criteria or were suitable for construction purposes".*

15. In replies to particulars raised by the fourth named defendant in relation to this plea, the plaintiff stated:-

*"This is not a particular of the Statement of Claim. What is alleged is that the fourth Defendant either failed to implement any or any appropriate system of testing or quality control during the operation of the quarry at Bay Lane or if it did undertake such testing, disregarded the results and was knowingly reckless as to the consequence."*

When pressed further in relation to this reply, the plaintiff referred to failures to meet the requirement of certain particular tests. In other words where quality control was pleaded and was pursued in particulars the end result was testing. There is no reference anywhere in the pleadings to the production procedures employed by the fourth named defendant in the production of each of the products. This was a matter that was raised for the first time in these proceedings in the context of seeking discovery. I am satisfied that the inclusion of the words in italics in this category is neither relevant nor necessary for the case as pleaded and that the appropriate limitation in respect of this category should be 31st August, 2007. I order discovery of category 7(i) as amended by deleting the words in italics.

**Category 22**

**All documents evidencing test results and reports related to Bay Lane aggregate products carried out on behalf of customers and in the possession of the fourth Defendant.**

16. In this case the plaintiff recast the original category 22 in light of agreements that had been reached in respect of other categories. The fourth named defendant was prepared to accept the category as originally drafted but not as amended. The question was whether this category should extend to test results and reports related to aggregate products from Bay Lane carried out on behalf of third parties other than customers of the fourth named defendant. The plaintiff pointed to two parties who conducted tests on the products and who were not customers of the fourth named defendant: HomeBond and Fingal County Council. The fourth named defendant said that the period should be limited to the period when the quarry was in production and therefore any tests and reports generated after the date when the quarry ceased production i.e. 31st August, 2007, were not relevant in respect of this category.

17. This category is concerned with results of tests and reports indicating the quality of the rock and the products from Bay Lane. The products do not necessarily have to be tested during the lifetime of the production of the quarry. I therefore accept the plaintiff's suggested temporal limitation of 13th June, 2008. In view of the express pleaded reference to testing by HomeBond and testing as required by Fingal County Council, these test results are expressly part of the plaintiff's case. The plaintiff also points out that it is unaware of any other third party on behalf of whom tests on the aggregates produced at the Bay Lane quarry may have been produced and which may be in the possession of the fourth named defendant. I am satisfied that this is a narrow focused category and that the discovery sought should be granted in the terms as redrafted by the plaintiff.

**Category 23**

**All documents evidencing all correspondence , emails, instructions, test results, invoices for services, from testing companies/consultants retained by the fourth named defendant to inspect, sample or test, aggregate products supplied from the Bay Lane quarry, at a customer's project site.**

18. The fourth named defendant is prepared to make discovery in terms of category 23 save for the sections that appear in italics and it seeks to limit the period for this category of documents to March, 2003 to 31st August, 2007. The plaintiff has suggested no temporal limitation in respect of the category. The plaintiff seeks this category of documents on the basis that it will assist in establishing the extent of the fourth named defendant's actual knowledge in relation to the presence of pyrite/excessive sulphur and sulphates in the rock at Bay Lane.

19. Thus it is a category directed towards the knowledge of the fourth named defendant. If it were directed towards the quality of the product, then the temporal limitation contended by the fourth named defendant would be inappropriate. However, as it is a knowledge-based request, the knowledge of the fourth named defendant is only relevant during the period of production and, accordingly, the category should only be ordered to be discovered up until 31st August, 2007. It is of course inherent in the category that it cannot predate the production at the quarry.

20. The defendant argues that the core of the category was the test results. There was no justification for seeking all the correspondence and e-mails, instructions or invoices for services. Counsel on behalf of the plaintiff had speculated that an invoice might differentiate between different types of testing and this might be of assistance to the plaintiff. However, this is not a matter which is either pleaded or referred to in particulars or indeed even referred to in the letters seeking voluntary discovery or any of the affidavits exchanged in relation to the motion. In my opinion the wider terms of category 23 are not justified by either the relevance or necessity tests and certainly has the potential to be disproportionately oppressive, though the Court has no evidence in that regard. I therefore order discovery in terms of category 23 excluding the words in italics and limited to the period March, 2003 to 31st August, 2007.

**Category 25**
**Documents evidencing the relationship of the fourth Defendant with the first, second, third and fifth Defendants as well as with Antrim Asphalt Limited, Lagan Cement Group Limited, Lagan Cement Limited and Whitemountain Quarries Limited (now Lagan Construction Limited).**

21. The plaintiff justifies this category of discovery on the basis that the fourth named defendant was controlled by the other defendants, the fourth named defendant shared in knowledge of pyrite/excessive sulphur related matters with other companies controlled by them, certain named companies had a hand in activities relevant to the proceedings prior to the incorporation of the fifth named defendant and several invoices in respect of services rendered for the benefit of the fourth named defendant were provided to companies other than the fourth named defendant. It refers to the fact that there is express pleading in the statement of claim in relation to Lagan Cement Limited and generally states that the plaintiff is *"looking to understand the dynamic between the various companies and the role of the other companies."* In relation to Lagan Cement Limited, the plea is that the fourth named defendant knew from an EIS performed in 1998 by *"a related company, Lagan Cement (of which the Second and Third Named Defendants were directors at the relevant time) that the… geological rock formation within which the Bay Lane quarry is located, was made up [of stone]…. This was unsuitable for Clause 804 or 3 inch down."* The role of Lagan Cement Limited in the case advanced in the statement of claim is as a provider of information to the fourth named defendant in relation to the Tober Colleen geological formation. It is expressly pleaded that the second and third named defendants were directors of Lagan Cement Limited at the relevant time. There is no suggestion whatsoever that Lagan Cement Limited was involved in the deceit alleged by the plaintiff in these proceedings. The fact that the named companies or other companies may have had a hand in activities relevant to these proceedings falls very far short of an adequate explanation of the relevance of these documents. Furthermore, the category is far too vague and would be very difficult to comply with. Compliance by the fourth named defendant with an order for discovery in these terms would be a very onerous and imprecise task and would be oppressive and disproportionate in the circumstances. I refuse this

category of discovery.

**Categories 26 and 27**

**Category 26**
**All documents evidencing communications with consultants and sub-contractors by the fourth Defendant, its servants or agents in relation to the Bay Lane quarry from January 1995 to the 13th of June 2008. Discovery under this category should include but is not limited to instructions, draft reports, reports, tests, test results, samples, sample storage, valuations, residential and commercial building, construction, IS EN 13242:2002, NRA specifications and geological formations.**

**Category 27**
**All documents evidencing correspondence between the fourth Defendant and Frank Benson, GWP, BMA, Celtest, Whitemountain Quarry I Temple Laboratory and TMS during the course of the Bay Lane EIS preparation and subsequently.**

22. The fourth named defendant has agreed to make discovery in terms of category 27, though there is a dispute as to whether the discovery should be limited to 31st August, 2007, or 13th June, 2008. The fourth named defendant objected to making discovery as sought in category 26 on the basis that it was making the discovery sought in relation to category 27 and category 26 simply was not relevant and did not arise from the pleadings. It was also urged that to include subcontractors was far too wide, far too vague and unduly onerous as a result. During the course of the hearing of the motion counsel for the plaintiff accepted that it would not be necessary to order discovery in terms of category 26 if category 27 was amended to include other consultants and subcontractors.

23. I am not prepared to direct discovery in relation to subcontractors. Such an order for discovery would be far too wide and too onerous and the plaintiff has not established that as such discovery is relevant to the issues in the proceedings. I accept the point made by the fourth named defendant that this plaintiff is exceptionally well informed in relation to the issues in this case arsing from its analysis of the transcript of the Menolly proceedings and its own involvement in the proceedings *James Elliott Construction Ltd v. Irish Asphalt Ltd* ("the 2008 proceedings"). Considerable detailed discovery was ordered by Kelly J. in the 2008 proceedings and this explains the ability of the plaintiff to identify the consultants specifically listed in category 27. Nonetheless I accept the plaintiff's submission that there may be other consultants who were involved in relation to testing the rock at Bay Lane and the preparation of the EIS for Bay Lane of whom the plaintiff remains unaware. As the number of consultants employed by the fourth named defendant must be finite and relatively few in number I do not believe that the inclusion of other consultants in category 27 would be unduly onerous on the fourth named defendant. In view of the fact that discovery by the consultants named in category 27 is clearly both relevant and necessary it follows that any other unnamed consultants' communications must likewise be relevant and necessary. I therefore propose to make an order for discovery in relation to category 27 by amending it to insert after TMS the words "and any other consultants" but decline to make an order in relation to category 26. I am limiting the period to 31st August, 2007, as the reasons advanced by the plaintiff for these combined categories is to demonstrate the knowledge of the fourth named defendant. Knowledge is only relevant to the production phase of the quarry and therefore it is inappropriate to direct discovery beyond the date of production.

**Category 28**
**All documents evidencing the management structure of the fourth defendant including all reporting lines and communication channels.**

24. The plaintiff justifies this category of documents on the basis that knowledge of the fourth named defendant is a critical part of the allegation of the deceit and it is important for the plaintiff to be able to show that "*potentially important matters relevant to these proceedings about the Bay Lane quarry were passed up the chain of command to board level… discovery is critical in order for the plaintiff to show the elements of the decisions relative to the deceit, who controlled the company at all important times and who took the decisions which led to the alleged deceitful conduct."* They state that these are the only documents that will show the operation of the fourth named defendant at a management level. It is argued that the discovery sought goes to the knowledge of the deceit by the fourth named defendant and was described as the "nuts and bolts" of the deceit.

25. The management structure of the fourth named defendant is not an issue as such in the proceedings. Documents evidencing the reporting lines and communication channels of the fourth named defendant are not relevant to the knowledge of the fourth named defendant which is a limited liability company. If an employee or agent of the company has knowledge then the issue is whether or not the company is fixed with that knowledge. The reporting lines applicable are not relevant to addressing that issue. In addition, the category as drafted is impermissibly vague and for this reason I decline to make an order for discovery in respect of category 28.

**Category 30**
**Any non-IAL minutes of meetings between 1 January 1993 and 1 August 2007 in the power, possession or procurement of IAL relating to the quality and production of rock at the Bay Lane quarry, and in particular, the minutes of Board or management meetings of the fifth named defendant, Lagan Holdings Limited (the former fifth named defendant), Lagan Cement Limited, Lagan Construction Limited and any intragroup management meetings, together with the minutes of any meetings of any other company within the Lagan Group, which was attended by the first, second, third and fifth named defendants, relating to the quality and production of rock and production of aggregate at the Bay Lane quarry.**

26. While the fourth named defendant had a number of objections to this category, significantly it argued that the court did not have jurisdiction to order discovery in the terms of this category. It referred to the decision of *Thema International v. HSBC* [2013] 1 I.R. 274 where the Supreme Court held that a company cannot make discovery of documents which are not legally within its power or procurement. Clarke J. delivered the judgment of the court and he analysed the rule and whether or not the amendment of the rule in introducing the word "*procurement*" materially affected the power of the court. He held that it did not. The basic test is whether or not the party from whom discovery is sought has a legal entitlement to the document. If it does not then the court does not have jurisdiction to order discovery which would require a third party to itself engage in what would be a form of delegated discovery, even where the third party is a related company of a party to the proceedings. If a non-party was required to search through its own documents for the purposes of making documents available to a party to the proceedings so that the party to the proceedings in turn could include those documents in its affidavit of discovery, this amounted to delegated discovery and the court had no jurisdiction to make such an order. There was a narrow exception to this, where there was a single or small number of specified documents known to exist and where there was no reason to believe that there would be any difficulty in securing the documents concerned.

27. The plaintiff argued that the documents sought in this category fell within the scope of the exception identified in *Thema* and thus the court had jurisdiction to order discovery in terms of this category. I do not accept that this is the case. It is clear that each and every company referred to both expressly and by implication in the category would be obliged to search all of the minutes of its board meetings or management meetings or intra-group management meetings for a period of 14 years to ascertain whether the

minutes were related to the quality and production of rock at the Bay Lane quarry. This is very different to making discovery, for example, of a specific internal memorandum as occurred in the *Ciba Geigy* case referred to by Clarke J. in *Thema*. Furthermore, the category requires any company within the Lagan Group to search the minutes of any meeting to ascertain whether or not they were attended by either the first, second or third named defendants (or indeed a representative the fifth named defendant) and which related to the quality and production of rock and the production of aggregate at the Bay Lane quarry. Again, this amounts to a form of delegated discovery, in this case directed at an unknown number of entities. It is to be noted that in Johnston v. Church of Scientology [2001] 1 I.R. 682 Denham J. in the Supreme Court referred to the examples of this form of discovery as "rare exceptions" to the rule. I have no hesitation in concluding that the discovery sought in this instance far exceeds the jurisdiction of the court in the light of the Supreme Court decision in Thema and therefore I refuse the discovery sought in category 30. It is not necessary therefore to consider the other grounds relied upon by the fourth named defendant in objecting to this category of documents.

**Category 31**
**Copies of the diaries of the Bay Lane Quarry Manager and all the managerial level IAL employees involved in the management, production, quality control, deliveries, sales of aggregate from the Bay Lane Quarry.**

28. In the letter seeking voluntary discovery the reasons advanced in respect of category 31 were the same as those for category 30. In written submissions, it was argued that the proceedings concern the supply of a product in a deceitful manner and that it was clear that the plaintiff required discovery to show the operation of the fourth named defendant during the period the quarry was in production as the plaintiff needed to know what the quality control procedures were and who was responsible for production and quality control at Bay Lane. In submissions counsel on behalf of the plaintiff said that the diaries were relevant to the management of the quarry, the production of the rock, quality control issues and evidence as to who gave instructions in relation to the production at the quarry. She referred to the fact that these diaries were ordered to be discovered by the fourth named defendant in the *Menolly* proceedings. In reply the fourth named defendant argued that quarry management and the day-to-day operation of the quarry was not in issue in the proceedings. It was said that the category was oppressive and that it was not necessary for all the diaries to be provided for the entire period as *"the vast majority of the contents were irrelevant".*

29. I have considerable sympathy with the submission that the issue of the day-to-day management of the quarry is not in issue in the proceedings and therefore not a proper basis for the ordering of discovery in respect of this category. However, the issue of knowledge is a significant, if not a key, aspect of the proceedings. The diaries clearly could assist the plaintiff significantly in relation to issues of knowledge. While the fourth named defendant submits that the vast majority of the contents are irrelevant, this obviously implies that some of the content may well be relevant to the proceedings. Furthermore, the argument that the order would be oppressive is greatly undermined in this instance by the fact that discovery of these diaries has already been made in the *Menolly* proceedings and therefore much of the onerous work associated with making discovery of these documents has already been performed. I therefore direct that discovery be made in terms of category 31 and that it be limited to the period prior to 31st August, 2007.

**Categories 32 and 35**
**Documents evidencing the fourth named defendant's quarry management plan to include quality management and quality control plans for the operation of Bay Lane quarry and the implementation of the said plans and any protocols relating to the implementation of the said plans which the fourth named defendant or any third party had in place prior to 31st August, 2007.**

30. During the hearing of the motion the plaintiff revised and combined categories 32 and 35. It submitted that the case related not only to the deficient quality of the original product but also to deficiencies in relation to the production of the product, Clause 804 or 3 Inch Down. Had there been proper processes and quality control, the problems associated with the rock would have become apparent and therefore this category of documentation is relevant to either the knowledge of the fourth named defendant or its reckless disregard of relevant information. The plaintiff submits that testing the quality of the rock itself does not fully address the concerns that there was a continuation of the deficiencies in the process in relation to the production of the rock. In addition to pointing to its pleading at para. 28 of the amended statement of claim, it also refers to para. 64 of the defence of the fourth named defendant to support the contention that quality control is an issue in the case. It also referred to replies to particulars, Particular 84.

31. I accept that testing and testing regimes are central to the plaintiff's case. I do not accept that the pleadings advance a wider claim. Mr. Gleeson S.C., on behalf of the fourth named defendant, carefully traced the plea in the statement of claim in relation to quality control through the various requests for particulars and the replies thereto and they all cumulated in references to test results, test suites, and testing regimes. It was stated that there should be an appropriate testing regime in place to monitor, control and confirm the quality of the products being produced and their conformance to relevant standards and specifications. Therefore, while it is undoubtedly true to say that Clause 804 and 3 Inch Down are products of a quarry, that is not to say that quality procedures in the quarry – other than testing – are issues in this case. I have to assess this application for discovery in the light of the pleadings. This is particularly important in view of the fact that there have been two applications in relation to particulars and one application in relation to a proposed amendment to the statement of claim. It was argued that my earlier judgment of 19th October, 2015, on the plaintiff's motion to inspect the quarry and take samples of rock for testing, authorised a production trial by the plaintiff and acknowledged that production was an issue in this case. A careful reading of the judgment reveals that the focus of that decision was to ensure that the plaintiff had the opportunity to present the evidence it wished to lead at trial, and no more. I was not asked to hold and did not hold that production at the quarry was an issue in the proceedings. This category of discovery is not relevant to any of the issues in the proceedings as defined by the pleadings and is not necessary in view of the very extensive discovery that is to be made in relation to testing and testing regimes. I refuse this category of discovery.

**Category 33 and 44**

**Category 33**
**Copies of all correspondence, instructions, scope of services, equipment, production records, invoices, and credit notes between the fourth Defendant and any rock crushing service provider, including but not limited to McCabe Earthworks pertaining to rock crushing services at the Bay Lane Quarry.**

**Category 44**
**All documents relevant to the actions taken by the Defendants to dispose of product from the Bay Lane quarry deemed unsuitable for commercial use, the quantity of such waste material produced in the Bay Lane quarry, the manner in which it was disposed and the reasons, if any, why it was deemed unsuitable for commercial use.**

32. The plaintiff argued that these two next categories were necessary as they related to the production process at the quarry. The plaintiff pleads that the rock produced did not comply with the specifications for Clause 804 or the requirements for 3 Inch Down. It

was submitted that it was inherent in that plea that it captured not only the material taken from the ground but whatever was "done to it" prior to sale. It was asserted that the plaintiff was starting the case with one hand behind its back if all it knows about is the rock coming out of the ground and not what the defendant did to it thereafter. In the letter seeking voluntary discover it gave as a reason for category 33, that the quarry was managed in such a way as to conceal the presence of pyrite/excessive sulphur and a failure of Clause 804 test requirements in the material quarried. In oral submissions it was said that the two categories were required to assist in challenging the evidence the fourth named defendant was likely to lead in relation to tests it conducted for the purposes of its defence in these proceedings. Also it was alleged that the plaintiff needed to understand the process so that the plaintiff could replicate the process.

33. I am not satisfied that the latter two arguments are proper grounds for an order for discovery. It is not permissible to make an order for discovery with a view to challenging evidence which a party may lead at the trial of the action. The scope of discovery is to be governed by the pleadings, not the potential evidence. Secondly, attempting to replicate a process is not a reason for discovery of documents.

34. Nowhere do the pleadings refer to the manner in which the rock was crushed or the amount of waste rock remaining after the production of Clause 804 or 3 Inch Down products. There is no plea that the quarry was managed in such a way as to conceal the presence of pyrite/excessive sulphur. As I have already observed, these pleadings have been subject to particularly close scrutiny and analysis. I am not satisfied that inherent in a plea that the rock does not comply with the specifications of Clause 804 or 3 Inch Down is an allegation extending beyond the nature or quality of the material taken from the ground to encompass or capture whatever was done to the rock prior to its sale to the plaintiff. For this reason I am of the opinion that these two categories of discovery are not relevant to issues arising in the proceedings and I refuse discovery of these two categories.

**Category 34**
**All documents relevant to the process by which products were manufactured and the equipment and plant used by the Defendants to produce products from the Bay Lane quarry, including specifications and design details of the equipment, the operation of the equipment and any quality issues related to this equipment and the manufacturing process used by the Defendants.**

35. For the reasons given above I do not accept that discovery related to the manufacturing process and by extension to any equipment or plant used in the manufacturing process is relevant to the issues in these proceedings and I therefore refuse discovery of this category of documentation.

**Category 36**
**All documents (including correspondence, emails, memoranda or reports) in the year 1983 and in the period from 1 January 1993 up to the date of commencement of trading from the Bay Lane quarry which was sent to or from or retained by the fourth Defendant, and all documents recording or evidencing the fact of and/or the content of meetings or discussions with any of the First, Second or Third Named Defendants, or at which any of them were present, during the same period, referring to or concerning:**

**i. testing or drilling lands at Killaskillen, Lansdown, near Kinnegad, County Westmeath;**

**ii. an EIS in 1998 in respect of the cement plant of Lagan Cement Limited (including any former or prior names of that company) on those lands;**

**iii. planning permission in respect of the cement plant of Lagan Cement Limited (including any former or prior names of that company) on those lands;**

**iv. testing or reports by the Geoffrey Walton practice on other sites for a cement plant for Lagan Cement Limited (including any former or prior names of that company) during or prior to 1998;**

**v. the sites searched for suitable quarries in the Republic of Ireland from 1993 up to the opening of Bay Lane.**

36. This category relates to the lands at Killaskillen, Lansdown, near Kinnegad, Co. Westmeath where Lagan Cement Limited applied for planning permission to develop a cement plant. The plaintiff argues that this category of discovery is relevant as the very fact that the lands at Lansdown were suitable to produce cement meant that they could not be suitable to produce Clause 804 or 3 Inch Down. It is the plaintiff's case that the Bay Lane quarry and the Lansdown site were on the same Tober Colleen geological formation. The information available to the defendants in relation to the Lansdown lands is therefore relevant to the plaintiff's case concerning their knowledge of the suitability of the lands at Bay Lane for the production of Clause 804 or 3 Inch Down products. The plaintiff says that there was extensive drilling and testing of rock formations on the Lansdown site in 1983, 1998, 1999 and 2001. That being so, there is no reason why the period for discovery of this category should commence on 1st January, 1993, as opposed to 1st January, 1998, as suggested by the fourth named defendant. I accept the fourth named defendant's suggestion that discovery of documents in this category should be for the year 1983 and in the period 1st January, 1998, to February, 2003, when production started at the quarry. The fourth named defendant argues that the category should be amended to limit the category to documents in the possession of the fourth named defendant. This is an appropriate clarification and was not contested by the plaintiff. The fourth named defendant has agreed to make discovery in terms of subcategories (i) and (ii). It objects to subcategories (iii), (iv) and (v).

37. In relation to the planning permission in respect of the cement plant at Lansdown, the plaintiff agreed that this category should be limited to documentation relating to rock quality. Even with this limitation, I am not satisfied that this category of documentation is either relevant or proportionate. The planning application for such a large enterprise as a cement factory necessarily comprises a very considerable number of documents. The fourth named defendant would be obliged to analyse these documents in order to extract those documents which relate to the quality of the rock. In view of the fact that the fourth named defendant will make discovery of documents in its possession concerning testing or drilling of lands at Lansdown and an EIS in respect of the cement plant, this category of discovery is disproportionate in the circumstances and not truly necessary as described in *Ryanair v. Aer Rianta and Framus v. CRH*. Subcategories (iv) and (v) are even less relevant or necessary. They can truly be characterised as fishing. In the circumstances I refuse subcategories (iii), (iv) and (v). Discovery in respect of this category should be limited to 1983, 1st January, 1998, to February, 2003 and should be limited to the documents in the possession of the fourth named defendant and to subcategories (i) and (ii).

**Category 37**
**All documents evidencing or touching upon the 1998 EIS referred to at paragraph 28(a) of the Statement of Claim.**

38. In submissions counsel for the plaintiff clarified that the documentation sought in this category is documentation held by Lagan Cement Limited, a company not a party to these proceedings and not the company due to make the discovery. The fourth named defendant objected to this category, both on the grounds of relevance and also on the basis of the decision of Clarke J. in *Thema*. In my opinion there is no jurisdiction to direct the discovery sought in category 37. It is not a discreet limited category of one or more documents. It would amount to a delegated form of discovery. An EIS prepared for a cement factory would involve a very large number of documents and documents evidencing or touching upon such an EIS would by definition be an even greater category of documents. I refuse this request for discovery.

**Category 39**
**All documents:-**

**i. Evidencing the plea at paragraph 28 of the Defence of the first, second, third and fifth Defendants that the material produced by the fourth Defendant at Bay Lane was subjected to "appropriate regular periodic testing by both in-house and external laboratories, and that appropriate personnel were engaged to oversee such testing", to include, but not limited to, the results of such tests;**

**ii. Evidencing the plea at paragraph 21 (v) of that Defence that tests were carried out which "justified" the marketing of material as Clause 804 and/or 3 inch down, including, but not limited to all such test results;**

**iii. Evidencing (a) all other internal or external testing carried out on rock and aggregate material from the Bay Lane site prior to 20 July 2007 in addition to that responsive to the above requests, and/or (b) evidencing the results of all such tests, to include, but not limited to, all testing and test results concerned with sulphur or sulphates;**

**iv. Evidencing any other basis on which the Defendants determined that the rock at the Bay Lane site was suitable for the production of aggregate to be used in asphalt mixes and emulsions (coatings) as indicated in the Bay Lane EIS; and**

**v. Evidencing how the clause 804 and 3 inch down products produced from the Bay Lane quarry were classified in relation to quality procedures, including how such classifications were monitored on a continual basis, and showing what were the different production procedures employed in the production of each of these products;**

**to include all documents (including correspondence, emails, memoranda or reports) sent to or from or retained by the fourth Defendant, and all documents recording or evidencing the fact of and/or the content of meetings or discussions with any of the First, Second or Third Named Defendants, or at which any of them were present, and all documents created by (or on behalf of), or sent to, any person in the management of the Fifth Named Defendant and/or of Antrim Asphalt Limited, and/or of the companies from time to time owning Antrim Asphalt Limited (or the majority of its shares), referring to or concerning any of the matters in this category.**

39. The plaintiff seeks this category of documents on the basis of pleas raised not by this defendant, but by the first, second, third and fifth named defendants in their defence. Subcategories (i) and (ii) would require the fourth named defendant to make discovery of documents evidencing pleas made by these other defendants. While the documents may well be in the possession of the fourth named defendant, it is not the author of these pleas and, more importantly, it does not determine what the other named defendants describe as "*appropriate regular periodic testing*" or which tests "*justified*" the marketing of material as Clause 804 and/or 3 Inch Down. This is a subjective exercise which cannot be carried out by the fourth named defendant. The fourth named defendant may make discovery of various tests and test results but it cannot make the selection for and on behalf of its co-defendants. Furthermore, the fourth named defendant is already agreeing to make very extensive discovery in relation to testing as set out in categories 4 (viii), (ix), (x), (xi), 9, 10, 11 and 12. In submissions, counsel for the plaintiff accepted that the category of documentation sought in (iii) probably was captured by these earlier categories. I therefore am of the opinion that subcategories (i), (ii) and (iii) are neither relevant nor necessary for this defendant to make discovery. Subcategory (iv) is too vague and does not arise from the plaintiff's case. Insofar as it purports to arise from the defence of the first, second, third and fifth named defendants, it involves the fourth named defendant making a subjective assessment in relation to the defence of those defendants in order to comply with its obligations of discovery. Subcategory (v) relates to the production procedures at the quarry during its operation. I have already determined that this is not an issue in these proceedings and that discovery in relation to these matters therefore is not relevant. Finally, I should point out that the category is overly broad in that it requires the fourth named defendant, inter alia, to make discovery of all documents created by or on behalf of or sent to any person in the management of the fifth named defendant and/or of Antrim Asphalt Ltd. and/or of the companies from time to time owning Antrim Asphalt Ltd. (or the majority of its shares) referring to or concerning any of the matters in the category. This portion of the category clearly cannot be permitted on the basis of the decision in Thema. For these reasons, I refuse discovery of category 39.

**Category 40**
**Copies of laboratory test schedules, transmittal slips, requisition orders, packing slips, invoices, covering letters or other documents pertaining to any testing referred to in Categories 5 and 6 above, and records of telephone conversations, written correspondence, emails, and faxes with all third party laboratories, including Celtest and including those within the Lagan Group, used by the Fourth Named Defendant related to testing services pertaining to rock and aggregate at the Bay Lane site.**

40. The reasons advanced for seeking category 39 were also advanced in relation to category 40. In addition it was argued that:-

> *"discovery of the surrounding and related documents referred to [in category 42] are also necessary including because the necessarily concealed nature of the tort of deceit means that there can sometimes be a lack of direct documentary evidence, necessitating on occasion the drawing of inferences, in which respect the information sought, including schedules and invoices will assist."*

In submissions it was accepted that the documentation sought in category 40 was background documentation in relation to the test results that it was anticipated the defendants would rely upon at trial to justify the decision made to open the quarry. Because the plaintiff intended disputing the test results, it was urged that they needed to know all of the parameters of the testing and therefore required discovery in terms of this category. Counsel for the fourth named defendant argued that background documents to justify the decision to buy the quarry was so far removed from the pleadings that this category should be dismissed *in limine*. In light of the very extensive discovery that is to be made in these proceedings, I cannot accept that this category of discovery is either relevant or necessary and accordingly I refuse to order discovery in terms of category 40.

**Category 45**

**All documents relating to test results on rock from other quarries owned by IAL or within the Lagan Group of companies displaying the same or similar results to those results discovered in the 2008 proceedings (as defined at paragraph 8 of the original and amended Statement of Claim), and advanced in those proceedings as representing the results of testing on rock from Bay Lane.**

41. This category did not form part of the original request for voluntary discovery. The plaintiff brought an application to amend its statement of claim and it was directed to make any requests for discovery which might arise out of the amendment if permitted prior to the determination of the application to amend the statement of claim. Thus the plaintiff sought discovery of documents in this category. In the event, the amendment was not permitted but the plaintiff still seeks discovery of this category of documents. It says that the category is relevant as the defence of the other defendants pleads, at para. 21, that the fourth named defendant carried out a range of tests within the quarry both prior to the initial production and during the course of production which justified the marketing of material as Clause 804 and/or 3 Inch Down. The plaintiff seeks discovery against the fourth named defendant in order to enable the plaintiff to rebut the defence of the other defendants. In written submissions it argued:-

> *"To the extent that the same or similar result as the 'good result' discovered in the 2008 proceedings are discovered, the plaintiff will [be] able to undermine these by demonstrating that they in fact came from a different quarry."*

It seeks discovery in order, effectively, to challenge the evidence which the other defendants indicate will be adduced in the defence of these proceedings. It says this is necessary to address the fourth named defendant's plea that it had an honest belief that the stone sold as Clause 804 conformed with the appropriate standards. The plaintiff says that in order to challenge this honest belief in the validity of the test results from Bay Lane it wishes to see test results from other quarries similar to the ones which were in fact produced during the Menolly proceedings in the belief that for some reason the results presented as coming from rock at Bay Lane in fact relate to rock coming from some other source.

42. At para. 5 of my judgment refusing the plaintiff leave to amend its statement of claim, I stated that the ruling was not to preclude the plaintiff from dealing with the evidence the defendants may adduce at trial as they see fit within the normal rules governing a plenary hearing. However that does not assist the plaintiff in its application for this category of discovery. Until the evidence which the defendants intend to lead at the trial of the action is ascertained from the exchange of expert reports, it will not be possible to identify the tests and therefore it will not be possible to ascertain whether or not the defendant has complied with this category for discovery if it were ordered. This highlights the fact that the category as framed relates to evidence rather than to an issue arising from the pleadings and for this reason this category of discovery is also refused.

**Temporal limitation**
43. The plaintiff and the fourth named defendant reached an agreement in relation to categories 4, 9, 10, 11, 12, 19 – 21, 27 save that the plaintiff said that the discovery in respect of each of these categories should be made up to and including 13th June, 2008, and the fourth named defendant said that the limitation should be 31st August, 2007. The fourth named defendant points out that it is commonly accepted that the last load of material which was supplied to the plaintiff was delivered in August, 2007. It argues that documents which postdate the supply of such material could not be probative of the fourth named defendant's state of knowledge with respect of material actually supplied. The plaintiff accepts that the cut-off date of 31st August, 2007, is appropriate in respect of knowledge directed categories of discovery. However it says that where the categories of discovery are directed towards the nature of the rock, the logic for this date is inapplicable. In particular it refers to the fact that testing took place after 31st August, 2007, as complaints and difficulties in relation to pyrite became apparent. It argues that it is essential that categories that relate to the nature of the product itself, in particular categories that capture testing documentation or documentation surrounding testing and complaints, be discovered and a cut-off date of August, 2007 is neither logical nor fair in view of the fact that it is known that testing took place in late 2007 and early 2008. The plaintiff selects the end-date of 13th June, 2008, as the date of the institution of the 2008 proceedings. It accepts that it cannot exclude that relevant and necessary material exists after that date which is not the subject of a claim to privilege but it recognises that, in accordance with the principle of proportionality, that this would be an appropriate cut-off date.

**Category 4**
**All documents comprising direct or indirect evidence of ground conditions, rock formations and mineral deposits at the Bay Lane quarry operated by the fourth Defendant and out of which the material described as clause 804 and 3 inch down supplied was extracted both before quarrying works commenced and in the course thereof including, but not limited to, the following:-**

**i. the Soils and Geology chapter, including any previous drafts thereof, of the Environmental Impact Statement furnished in the course of any planning applications made by the Fourth Named Defendant in connection with the Bay Lane site;**

**ii. Documents relating to the testing and sampling carried out by or on behalf of the Defendants as part of the preparation of the Environmental Impact Statement dated July 2000 (EIS) submitted to Fingal County Council and as part of the planning application to Fingal County Council in respect of the Bay Lane quarry.**

**iii. Documents evidencing or in support of the statement at paragraph 1.5.1 of the EIS that "site investigations of the lands at Bay Lane, St. Margaret's have identified such a suitable limestone deposit".**

**iv. Documents relating to the site investigations, comprising borehole and trial pits, carried out at the Bay Lane quarry in September 1999 as referred to at page 37 paragraph 6.1 of the EIS. This should include copies of all field logs, site notes, draft and final versions of borehole logs, as well as any photographs of the recovered core or trial pits.**

**v. All documents, including laboratory testing schedules, core intervals used for testing and laboratory test results, relating to the testing of core samples taken for aggregate testing from DA01, DA02 and DA03 as referred to in paragraph 6.4 of page 38 of the Environmental Impact Statement.**

**vi. A copy of the technical paper by Jones, G.L., Somerville, I. D. and Strogen P., 1988. "The Lower Carboniferous (Dinantian) of the Swords area: Sedimentation and tectonics in the Dublin Basin, Ireland", V.23., 221-248 of the Geological Journal referred to at page 37 of the Environmental Impact Statement, as well as, for the avoidance of doubt, all documents evidencing the awareness of any of the Defendants in these proceedings of this paper including but not limited to its being sent to, or received by, any of them.**

**vii. information provided in respect of any of the foregoing or below subparagraphs of this category in the course of applying for and obtaining planning permission for the said quarry;**

**viii. the results of any geotechnical, geochemical, chemical hydrological, hydrogeological or geophysical tests or petrographic, SEM or XRD monitoring conducted in the said quarry together with any reports, memoranda, site diaries or correspondence interpreting or reporting, advising or commenting on such results;**

**ix. documents concerning ground water testing and monitoring conducted by the fourth Defendant at the said quarry or quarries whether in compliance with its IPP licence or with the relevant planning permission or otherwise; and**

**x. reports or other documentation concerning visual inspections, scan lines and reports on the said quarry;**

**xi. documents setting out the policy or protocol for the above-mentioned testing of material, or for any other material, extracted from the Bay Lane quarry;**

**limited to documentation concerning tests or investigations or the matters aforesaid conducted prior to 13th June, 2008.**

44. In my opinion, where the documents sought in a category of discovery relates to the nature of the rock, such as, for example, testing of the rock or monitoring of water at the quarry, then the later temporal limitation is appropriate. Where the category of discovery is relevant to the alleged deceit of the defendants, then it is a knowledge based category, and discovery postdating production can have no relevance to such a category and accordingly the shorter limitation period should apply. On that basis I direct that the temporal limitation in respect of category 4 should be 31st August, 2007, save in respect of subcategory (viii) in relation to tests and monitoring and (x) and (xi). It is implicit in subcategory (ix) that this relates to the production phase of the quarry and therefore the starter period is appropriate.

**Categories 9, 10, 11 and 12**

**Category 9**
**All documents evidencing records of all testing carried out on rock and aggregate material from the Bay Lane site carried out on site or at any external laboratory including but not limited to at the Whitemountain Quarry/Temple Laboratory, to include all testing carried out prior to opening the quarry until the 13th of June 2008.**

**Category 10**
**All documents evidencing records of all testing carried out on rock and aggregate material from the Bay Lane site carried out by any third party laboratories, including Celtest, to include all testing carried out prior to opening the quarry until the 13th of June 2008.**

**Category 11**
**Copies of laboratory test schedules, transmittal slips, requisition orders, packing slips, invoices, covering letters or other documents pertaining to the testing described in 9 and 10 above.**

**Category 12**
**Copies of records of telephone conversations, written correspondence, emails, and faxes between the fourth Defendant and Celtest and all other third party laboratories used by the fourth Defendant related to testing services pertaining to rock and aggregate at the Bay Lane site.**

45. In relation to categories 9, 10, 11 and 12 the fourth named defendant argues that tests are only relevant to the plaintiff's case insofar as they demonstrate a state of knowledge on the part of the fourth named defendant that the rock was unsuitable prior to the sale of the rock. Tests after the last sale to the plaintiff are neither relevant nor necessary. It therefore says that these categories, after 31st August, 2007, are not probative of the fourth named defendant's state of knowledge (whether constructive or otherwise) with respect to the material actually supplied and that accordingly these categories should be limited to 31st August, 2007.

46. I do not accept that test results are only relevant to the state of knowledge of the defendants. It has been accepted by all parties to these proceedings that the plaintiff will need to prove that the rock at Bay Lane was not capable of producing Clause 804 or 3 Inch Down products. That being so, the test results are relevant to this issue even if test results generated between 31st August, 2007, and 13th June, 2008, can have no bearing upon the state of knowledge of the defendants. I therefore allow discovery of these categories subject to the temporal limitation of 13th June, 2008.

**Categories 19, 20, 21**
47. Categories 19 – 21 were merged so that the agreed new category is:-

**All documents relating to complaints or expressions of concern from customers in relation to the presence of pyrite or an alleged failure to comply with Clause 804 (including excessive total sulphur or sulphates) with respect to materials supplied from Bay Lane from March 2003 to June 2008.**

48. The fourth named defendant says that the cut-off period should be 31st August, 2007, as this is a category directed towards the knowledge of the defendants of the alleged substandard products marketed as Clause 804 and/or 3 Inch Down. The plaintiff justified these categories of discovery on the basis that they would assist in establishing the extent of the fourth named defendant's actual knowledge in relation to the presence of pyrite/excessive sulphur and sulphates and the failure to meet the Clause 804 acceptance testing in the Bay Lane quarry. It is quite clear that this is a knowledge directed category of discovery rather than a category of discovery directed towards the nature or quality of the rock at Bay Lane. Therefore the appropriate temporal limit is 31st August, 2007, and I direct that discovery be made of this category up to 31st August, 2007.

**Category 27**
**All documents evidencing correspondence between the fourth Defendant and Frank Benson, GWP, BMA, Celtest, Whitemountain Quarry I Temple Laboratory and TMS during the course of the Bay Lane EIS preparation and subsequently.**

49. The plaintiff says that the reason it sought discovery of this category was because it alleges that the fourth named defendant knew from investigations carried out prior to the representation made that the quality of the rock at Bay Lane was not such as could be used to produce the Clause 804 or 3 Inch Down which it represented to the plaintiff it had for sale. It says this knowledge is based, inter alia, on information it received from its consultants and the plaintiff claims that the fourth named defendant ignored or suppressed the results of tests carried out by these consultants. On the basis of this submission it seems to me that this category should be confined to the period when product was supplied to the plaintiff as it is directed towards the knowledge of the defendant

rather than to the quality or nature of the rock. In separate categories for discovery the results of the tests carried out by these consultants will be provided to the plaintiff. Therefore I limit this category of discovery to 31st August, 2007.

**The plaintiff's motion for discovery against the first, second, third and fifth named defendants ("the non-IAL defendants")**

50. The plaintiff and the non-IAL defendants reached agreements in relation to some categories of discovery and they agreed to await the determination of the court in relation to categories of discovery sought by the plaintiff against the fourth named defendant in respect of other categories. There are six categories remaining in dispute between the plaintiff and the non-IAL defendants.

**Category 13**
**To the extent not captured by Category 12, all documents, from the date of the purchase of the Bay Lane site to 31st August 2007, referring to the sale of the Bay Lane quarry, including the proposed or putative sale thereof and explorations of the interest in the market in that regard.**

51. The plaintiff says that this category of discovery is relevant to the defendants' knowledge of the quality of the rock and the suitability of the quarry for the production of Clause 804 or 3 Inch Down. It says attempts to "*offload*" the quarry are corroborative of the plaintiff's pleas that the non-IAL defendants were aware of the problems which arose and the suitability of the quarry to produce the product sold. It is accepted that it does not arise specifically from the pleadings but they argue that the documentation would nonetheless confer a litigious advantage upon the plaintiff. The non-IAL defendants object that the category is speculative and a classic example of a fishing expedition. They submit that the request should have been addressed to the fourth named defendant and not to the non-IAL defendants. They submitted that even if there had been an attempted sale or a consideration about possibly selling the quarry, what the plaintiff is seeking is far too broad. They object on the basis that the category is neither relevant nor necessary and is too broad.

52. I accept the submissions of the non-IAL defendants. There is no case pleaded that the defendants may have sought to sell the Bay Lane quarry because it was unsuitable for the production of Clause 804 or 3 Inch Down. Furthermore, even if discovery were made of the documents in this category, inevitably nearly all of the documents could have no bearing whatsoever on the quality of the rock or its suitability for the production of Clause 804 or 3 Inch Down. I refuse discovery of this category of documents.

**Category 15**
**Documents evidencing directions from any other Lagan Group company (including Antrim Asphalt Ltd. and the companies from time to time owning it (or a majority of its shares), including its officers, servants or agents in their capacity as such, to the fourth named defendant and/or evidencing compliance by the fourth named defendant with directions, in respect of marketing and/or management matters, during the period 1st January 1999 to 31st August 2007, to include but not limited to, all documents concerning the selling of aggregate, including to the plaintiff, and how such material was described.**

53. The plaintiff seeks this category of discovery in order to demonstrate the control exercised by the non-IAL defendants over the fourth named defendant as is pleaded in the statement of claim. While undoubtedly the issue of control is a central issue in the proceedings, the discovery sought is sought against three named individuals and the fifth named defendant, a holding company. It seeks documents which prima facie are the property of companies which are not parties to these proceedings which give directions to the fourth named defendant. There is no information whatsoever to indicate that such documents, even if relevant or proportionate, are within the power of the first, second or third named defendants.

54. Both the plaintiff and the defendants rely upon the case of *B. v. B.* [1978] 3 W.L.R. 624. The court in that case was concerned with whether or not the husband could be ordered to make discovery of documents belonging to a company referred to as the operating company. 75% of the shares of the operating company were held by another private company referred to as the holding company. The husband was the owner of 51% of the registered share capital of the holding company and the majority of the remaining shares of the holding company were held by members of his family. The effect of the shareholding was that the husband, through the holding company, had a controlling interest in the operating company. At p. 635 Dunn J. stated:-

> *"Whether or not documents of a company are in the power of a director who is a party to the litigation is a question of fact in each case. 'Power' in this context means 'the enforceable right to inspect or obtain possession or control of the document.' If the company is the alter ego of such a director so that he has unfettered control of the company's affairs, he must disclose and produce all relevant documents in the possession of the company."*

The non-IAL defendants said that it was for the party seeking discovery from a director of company documents to establish that the director had an enforceable legal right to the documents or that the company was in effect his alter ego. It was submitted on their behalf that there was no evidence before the court at all of the relationship between the first three defendants and any other company in the Lagan Group as described in this category (other than Mr. Kevin Lagan's indirect 50% ownership of the fourth named defendant). It followed that B. v. B. in no way assisted the plaintiff in establishing that the three director defendants could make discovery in the terms sought in category 15.

55. In argument, counsel for the plaintiff accepted that it would be difficult to place reliance on *B. v. B.* in respect of any party other than Mr. Kevin Lagan. However, such evidence as was referred to related solely to the fourth named defendant and in no way would justify an order for discovery in terms of category 15. It is impossible for this Court to conclude that any unidentified company in the Lagan Group was the alter ego of any of the three director defendants. Each of the director defendants undertook at the hearing of the motion to swear affidavits to the effect that any such company documentation was not within their power and that the companies were not withholding the documentation simply for the purposes of frustrating any bona fide order for discovery which might otherwise be made by the Court.

56. The fifth named defendant objected to making discovery in terms of category 15 on the basis of the decision of the Supreme Court in *Thema* referred to above. As the category of discovery sought here could not be described as a discreet, limited category of documents, in effect an order for discovery in terms of category 15 would amount to an order for delegated discovery and is therefore beyond the jurisdiction of this Court. Accordingly, I refuse discovery of this category of documentation.

**Category 16**
**All reports, scientific or trade literature, correspondence, internal memoranda and other documentation relating to the domestic or international experience of pyrite, pyritic heave, sulphates and cement and sulphate attack, including in respect of quarried material in the possession of the first, second, third or fifth named defendant or Lagan Cement Ltd. at any time prior to 20th July 2007, to include but not limited to all documentation concerning pyrite in materials supplied from Bay Lane. This is subject to the stipulation that the first, second and third named defendants are only required to**

**schedule those documents which are in their possession (in whatever capacity) or were formally in their possession (in whatever capacity) and not any documents which are or were within their power or procurement.**

The only dispute in relation to category 16 is whether or not discovery should be extended to include material in the possession of Lagan Cement Limited. The director defendants objected to the inclusion of Lagan Cement Limited in this category on the basis that they had no legal entitlement to the possession of any documents owned by Lagan Cement Limited. They relied upon *B. v. B.* For the reasons given in respect of category 15, I uphold this objection. I likewise uphold the objection to the fifth named defendant to an order requiring it to make discovery of documents owned by Lagan Cement Limited based upon the decision in Thema. I therefore direct that discovery be made in respect of category 16 in the terms agreed with the deletion of the words *"Lagan Cement Ltd.".*

**Category 18**
**All documents evidencing**

**(i) The qualifications and employment and/or directorship history of each of the first, second and third named defendants.**

**(ii) All memberships held by the first, second and third named defendants as well as by other management of the fifth named defendant with engineering, construction, concrete, cement and quarrying organisations and committees.**

**(iii) Quality assurance programmes and ISO certifications relating to quarrying and production of aggregate of the fifth named defendant, the former fifth named defendant Lagan Holdings Ltd., Lagan Construction Ltd. and Lagan Cement Ltd. to include all documents preparatory to, or submitted as part of, the application for, assessment of, or granting of the same.**

Save for the portion of the category in italics, the non-IAL defendants agree to make discovery of this category. In relation to the first, second and third named defendants the discovery is up to 31st August, 2007. In relation to subcategory (ii) the objection was that the memberships held by management of the fifth named defendant with engineering, construction or other organisations was not relevant to the matters in issue. They also took issue with the meaning of the word "*management*". The plaintiff argued that this category was relevant to the experience and knowledge of the defendants of quarrying matters and therefore the knowledge they would or ought to have had in relation to pyrite and the suitability of the rock at Bay Lane for the production of Clause 804 or 3 Inch Down. The fifth named defendant is sued as a participant in the deceit the subject of the proceedings. Its knowledge is as relevant as that of any of the other defendants. Therefore the knowledge of its management team is a matter in respect of which the plaintiff is entitled to seek discovery. While there may be some ambiguity in the word "management", it was not submitted that the fifth named defendant could not identify its management personnel or that the numbers were such that this category would be oppressive or unreasonable. It was said that the membership of some of its management in professional bodies could well be irrelevant to the issues in the case. While this might well be so, nonetheless I am satisfied that the plaintiff is entitled to discovery of this category of documents, including the management of the fifth named defendant. The period is to be for two years prior to the purchase of the Bay Lane quarry until the fifth named defendant ceased to be the owner of the quarry i.e. 30th November, 1993, to 1st April, 2004.

57. The main objection by the non-IAL defendants was to subcategory (iii). The objection was on the grounds of procurement and relevance. I accept that there is no evidence to suggest that the former fifth named defendant, Lagan Construction Limited or Lagan Cement Limited were the *alter egos* of any of the first, second or third named defendants or that any of them has a legal entitlement to any of those companies' documentation. Thus discovery cannot be ordered on the basis of B. v. B. and the discovery sought is not within their power. Likewise, this category of discovery is wider than the narrow discreet category envisaged in *Thema* and therefore the documents of these companies cannot be ordered to be discovered by the fifth named defendant.

58. The objection was focused on the non-party companies rather than on the fifth named defendant. It was argued that quality assurance programmes and ISO certifications would include considerable material which would have no probative value or relevance in relation to the fifth named defendant's level of knowledge. However, it is important to note that the plaintiff has confined this category to those programmes and certifications relating to quarrying and the production of aggregate and therefore I am prepared to allow discovery of this subcategory solely against the fifth named defendant for the same period as subcategory (ii).

**Category 21**
**From 30th November 1993 to 31st August 2007 all documents evidencing or concerning:**

**(i) Company procedures, rules, circulars or guidance in respect of the testing of rock samples, the engagement of consultants, applying for planning permission in respect of quarrying and/or relating to environmental impact statements at any time in circulation, in effect or on file in the fifth named defendant or Antrim Asphalt Ltd., or the companies from time to time owning Antrim Asphalt Ltd. (or the majority of shares), including those referenced in Category 3 above.**

**(ii) Any EIS put together on behalf of any Lagan Group company in which details of rock samples were included.**

**(iii) From where material described as Clause 804 and/or 3 Inch down is or was sourced by any Lagan Group company, including Lagan Construction Ltd., in connection with its operations.**

**(iv) The reporting of excessive sulphate levels in respect of lands, properties or operations of any Lagan Group company, and the steps taken on foot of the reporting of such excessive levels.**

**(v) Non-compliance by any Lagan Group company with the requirements of an EPA license, evidencing the steps taking by way of redress.**

**The references to "any Lagan Group company" in this Category are limited to the fourth defendant, the fifth defendant, Lagan Cement Ltd. and those Lagan Group companies presently or formerly owning or operating quarries, in particular Lagan Asphalt Ltd. and Whitemountain Quarries Ltd. (the latter two companies being the only ones owning quarries of which the plaintiff is presently aware on the basis of its imperfect knowledge of the Group).**

The plaintiff seeks this category of discovery on the basis that it indicates background knowledge of the defendants in relation to matters at issue in these proceedings. It argued that these documents indicate knowledge acquired by the defendants from these other works which would have or should have informed decision making at Bay Lane. The practices at Bay Lane were the exception to the rule of the practices within the Lagan group of companies in relation to these matters. The plaintiff therefore says that this information will assist it in advancing the case that at Bay Lane the defendants turned a blind eye to all the indicators that the rock was not suitable for producing Clause 804 or 3 Inch Down and that this was no accident. They also seek the source of Clause 804

and/or 3 Inch Down used by Lagan Group companies including Lagan Construction Limited in connection with their operations. It says that if a Lagan company did not use products from Bay Lane that this is corroborative of the plaintiff's case that it was known that the quarry could not produce Clause 804 and/or 3 Inch Down.

59. In an effort to address the objections raised by the non-IAL defendants to this category, the plaintiff stated that it was not seeking non-party discovery as part of this category. The procurement issues arising out of *B. v. B.* therefore were not applicable. The category was directed solely towards those documents which were actually in the possession of the non-IAL defendants. The plaintiff also limited the reference to any Lagan Group company as set out. The period in respect of which discovery under this category is sought is from 30th November, 1993, to 31st August, 2007.

60. The non-IAL defendants objected that the category was not relevant, it was a fishing exercise, it was vague and disproportionate. The material could have no probative value. It was submitted that the plaintiff already knew that the test results for Bay Lane were not included in the Bay Lane EIS. The fact that the test results may be included in any other EIS prepared for another Lagan Group company was not going to advance the plaintiff's case in deceit in marketing the product from Bay Lane to the plaintiff.

61. Subcategory (i) is too wide and too vague and it would be disproportionate to order discovery in terms of this subcategory. On the other hand, subcategories (ii) and (iii) are focused and are relevant in the sense of being capable of giving litigious advantage to the plaintiff in respect of the case it makes against the defendants in these proceedings. Subcategories (iv) and (v) should be confined to quarries and so I will allow these subcategories with the following amendments. In relation to subcategory (iv) the words "lands, properties or operations" should be deleted and the word "quarries" substituted. In relation to subcategory (v), after the words "EPA license" the words "in respect of a quarry" should be inserted.

**Category 23**
**All documents for a period commencing on 30th November 1993 to 13th June 2008:**

**(i) relating to test results on rock from other quarries owned by IAL or within the Lagan Group of companies displaying the same or similar results to those results discovered in the 2008 proceedings (as defined in para. 8 of the original and amended statement of claim), and advanced in those proceedings as representing the results of testing on rock from Bay Lane; and**

**(ii) evidencing or relating to the first, second and/or third named defendant's knowledge of the aforesaid test results from other quarries.**

The argument in respect of this category was the mirror argument in respect of category 45 sought by the plaintiff against the fourth named defendant. For the reasons given in respect of category 45 on the plaintiff's motion against the fourth named defendant, I likewise refuse this category of discovery against the non-IAL defendants.

**Motion by the first, second, third and fifth defendants seeking discovery from the plaintiff**
62. The non-IAL defendants and the plaintiff reached agreement in respect of the discovery sought save for two disputed categories, category 3 and category 5.

**Category 3**
**All documents relating to the purchase and use by the plaintiff of material from the fourth named defendant (or from any other party where such material was used in the same project(s) as any material purchased from the fourth named defendant), including but not limited to the following:**

**(a) invoices, delivery dockets, any documents containing or referring to the terms and conditions of supply, credit notes, price offers or variations and/or any other contract documents;**

**(b) all documents relating to any reliance by the plaintiff on any alleged representations made by the fourth named defendant in the context of such a purchase(s);**

**(c) all documents relating to the use(s) of such material by the plaintiff in any project(s) undertaken by the plaintiff, including all relevant contractual specifications, requirements and instructions relevant to the use by the plaintiff and documents relating to where Clause 804 has been used and where 3 Inch down has been used;**

**(d) all documents relating to inspections and/or quality control measures and/or testing undertaken in connection with the use of fill material at any of the projects where material supplied by the fourth named defendant was used;**

**(e) all documents relating to the fourth named defendant's date of knowledge in respect of the purchase by the plaintiff of material from the fourth named defendant and the use(s) to which same would be put;**

**(f) all documents relating to the first, second, third and/or fifth named defendant's state of knowledge in respect of the purchase by the plaintiff of material from the fourth named defendant and the use(s) to which same would be put;**

**(g) all documents relating to the applicable contract(s), including terms and conditions, in respect of all such purchases.**

**Category 5 (ii)**
**All documents relating to testing and test results conducted by or on behalf of the plaintiff or by any third party which is or was in the possession of the plaintiff in respect of material supplied by the fourth named defendant to the plaintiff and material obtained by the plaintiff from any third party and used by the plaintiff at any project or construction works which also use material supplied by the fourth named defendant.**

63. The plaintiff refused to agree discovery in terms of categories 3(c) and (d) and category 5(ii).

64. The issue between the parties in respect of these categories is whether or not they should be confined to the 16 projects scheduled to the statement of claim or whether they should also extend to a project referred to as Sillogue 4. Sillogue 4 is not one of the scheduled projects and is the subject of separate proceedings brought by the plaintiff against the fourth named defendant. The plaintiff argues that the category should not be so extended as it is not relevant to the issues in these proceedings and is not necessary. There is no reference whatsoever to Sillogue 4 in these proceedings. The plaintiff's case is that the defendants knew or were reckless as to the poor quality of the rock which they were supplying and the quality of the product supplied by a third party

supplier is irrelevant to the defendants' state of knowledge.

65. The non-IAL defendants say that documentation provided to them by the plaintiff shows that remedial works at Sillogue 4 were carried out in respect of stone fill material provided by Roadstone as well as by the fourth named defendant. They state that the documentation indicates that the plaintiff believed that the material supplied by Roadstone was defective, there were high sulphate results and there was possible transportation of sulphates into the constructed houses and that the hardcore provided by Roadstone was not fully compliant with specification. They argue that this is highly relevant to the assessment of the conduct of the defendants in these proceedings. Firstly, in the context of a fraud allegation, they say that the fact that one of the largest material suppliers in the world was also supplying material from a nearby quarry which material was condemned by the plaintiff is highly relevant to considering whether or not the provision of material by the defendants was carried out in a deceitful manner. They say it will assist them in casting doubt on inferences which the court may be called upon to draw during the conduct of trial. It is relevant, according to these defendants, to the issue as to whether or not the defendants ought to have known of the risk posed by pyrite and/or the presence of sulphur or sulphates in the rock at Bay Lane. They say that if Roadstone was providing material which was similar to that provided by the fourth named defendant it is relevant to ask why one should conclude that Roadstone supplied the material in an honest fashion but that these defendants provided it in a fraudulent manner.

66. They also sought to justify the extension of the discovery to the Sillogue 4 project by reference to previous disputes in the 2008 proceedings regarding the quality of the rock at the Roadstone quarry and the Bay Lane quarry. In my opinion this is not a valid reason for seeking discovery as it in effect seeks discovery in anticipation of evidence that will be led rather than discovery in relation to issues as defined in the pleadings.

67. In my opinion the knowledge in Ireland at the relevant period of the possible problems caused by pyrite in hardcore and whether or not the defendants ought to have been aware of this problem at the time that it marketed and sold the product to the plaintiff is in issue in the proceedings. So too is whether or not the defendants knowingly marketed substandard product as Clause 804 or 3 Inch Down. If a competitor provided material to the plaintiff described as Clause 804 or 3 Inch Down and which in fact did not meet the standards or specifications of the products a court might well be persuaded that the defendants' actions were open to a more benign construction. Certainly, if the trial judge is required to infer certain matters from the fact, if established, that the hardcore supplied by the fourth named defendant did not meet standards or specifications, the fact, if fact it be, that neither did the product supplied by Roadstone, could well be relevant to any such inference the court may be required to make. I am satisfied that this category of documents is relevant to the issue of the alleged culpable knowledge of the defendants in supplying material from Bay Lane as Clause 804 or 3 Inch Down.

68. The justification advanced by the non-IAL defendants for seeking to extend the category of discovery beyond the sixteen scheduled projects was confined to testing of the third party materials used at Sillogue 4. No real effort was made to advance the case why the wider categories set out in category 3(c) and (d) was required. I agree with the submissions of counsel for the plaintiff that these categories are too wide and not necessary. In the circumstances I direct that the plaintiff make discovery in respect of category 5 (ii) in respect of the Sillogue 4 project. I decline to extend category 3(c) and (d) beyond the sixteen scheduled projects. In making this order I note that the non-IAL defendants accept that the word "material" is to be construed to mean "*stone fill material".*

**Motion of the fourth named defendant against the plaintiff**

**Category 42**
**All documents evidencing and/or relating to the losses claimed by the plaintiff to-date to include, but not limited to, alleged financial loss, loss of profits, consequential losses, costs, damages, claims and expenses to include all accounts books and records which evidence and record the basis for the financial state of the Company since 31st January 2008.**

69. The fourth named defendant seeks discovery of this category of documents on the basis that it is necessary to have comprehensive disclosure of the financial documents to adequately ascertain whether the losses are truly attributable to the supply of material or whether there are other causes for the significant losses claimed. The plaintiff responded by claiming that the category was too wide and volunteered to provide discovery of:-

> *"All accounts books and records which evidence and record the basis for the financial state of the Company since 31st January 2008."*

The fourth named defendant's position is that this is too narrow and that it would not encompass documents properly identifying the basis of the losses which the plaintiff claims to have suffered and that the plaintiff has not properly explained why the original category is too onerous for the plaintiff to discover. It points to the fact that the plaintiff is claiming aggravated and exemplary damages and loss of profit and consequential losses. The consequential losses are stated to include relocating well in excess of 100 businesses and clients into temporary accommodation and the resultant business disruption claims that this will incur. The major element of the damages claim will be the cost of providing a company which would have been in a position to tender for work (as the plaintiff says would have been the case had it not suffered the losses attributable to the supply of material contaminated by pyrite by the fourth named defendant) and that this will be in the region of approximately €20 million. It is clear that while some of the losses claimed will appear from the Company's accounts books and records, it is by no means clear that all of the plaintiff's claimed losses would be covered by this formulation. The plaintiff accepts that as a matter of principle the category is both relevant and necessary but takes issue with the scope and in particular with the words "*relating to*" as being both vague and too wide. In the circumstances of this case, documents relating to the plaintiff's losses which do not fall into the plaintiff's accounts books and records should be readily identifiable given the fact that the plaintiff was preparing for this trial more than two years before the proceedings were instituted. Indeed, the plaintiff has not indicated that compliance with an order for discovery in these terms as opposed to the terms they have offered would be unduly onerous. Rather it is concerned that it would have the potential to give rise to future disputes in relation to compliance with an order for discovery in these terms.

70. In my opinion the category as formulated by the fourth named defendant is neither too vague nor too wide and the plaintiff has not sufficiently explained why making discovery in terms of this category would be unreasonable or disproportionate. Accordingly I direct that the plaintiff make discovery in terms of category 42 of the fourth named defendant's notice of motion.

**Categories 39 and 40**
71. The plaintiff agreed to make discovery in terms of categories 39 and 40 of the fourth named defendant's request for discovery but suggested that discovery in respect of these two categories should be made by reference to a schedule of discovery prepared in the 2008 proceedings. It was indicated that this would result in a considerable easing of the burden of discovery upon the plaintiff. However, this was not explained on affidavit and it was difficult to assess precisely what was proposed and what the precise benefit

to the plaintiff would be if the proposal was accepted. The fourth named defendant objected that the plaintiff would nonetheless have to comply with its obligations in respect of discovery in these proceedings regardless of the discovery that in fact had been made in the 2008 proceedings. It also indicated that disputes could arise in relation to the discovery furnished for these categories if there was no exact correlation between the terms of the discovery in the 2008 proceedings and the terms of the discovery agreed in respect of categories 39 and 40 in these proceedings.

72. On balance, I believe it would not be appropriate in this case to permit the plaintiff to comply with its obligations to make discovery in terms of categories 39 and 40 by reference to previous affidavits of discovery in different proceedings. In so ruling, I am not to be taken as holding that in an appropriate case based upon persuasive evidence that such a cost saving approach could not be allowed.

73. I will hear the parties further in relation to the form of the orders to be made on foot of the four motions and the time for making discovery and the sequence of discovery as between the fourth named defendant and the non-IAL defendants in light of the agreement reached between the plaintiff and the non-IAL defendants in relation to their discovery obligations.