Neutral Citation Number: [2005] IEHC 432

THE HIGH COURT
COMMERCIAL

[2004 No. 4729 P]

BETWEEN

PJ CARROLL AND COMPANY LIMITED, JOHN PLAYER AND SONS LIMITED, VAN NELLE (IRELAND), REEMTSMA CIGARETTENFABRIKEN GmbH, GALLAHER (DUBLIN) LIMITED, SOCIETE NATIONALE D'EXPLOITATION INDUSTRIELLE des TABACS et, ALLUMETTES (SEITA), GERRY LAWLOR AND CONOR FULLER

PLAINTIFFS

AND

THE MINISTER FOR HEALTH AND CHILDREN, IRELAND,
THE ATTORNEY GENERAL AND THE OFFICE OF TOBACCO CONTROL

DEFENDANTS

Judgment of Mr. Justice Kelly delivered the 9th day of December, 2005.

The Application

1. The defendants seek an order requiring the plaintiffs to make discovery of two categories of documents. Both relate to materials dealing with point of sale advertising.

2. The first category relates to point of sale advertising within the State conducted on behalf of the corporate plaintiffs or any of them for the period from 1998 to date or planned but not yet executed. This has been referred to by the defendants in their correspondence with the plaintiffs as "objective" point of sale advertising documents.

3. The second category is in respect of what has been described as "subjective" documentation. It relates to instructions given by the corporate plaintiffs to any agencies, persons or bodies engaged by them including but not limited to marketing/advertising agencies, media agencies or public relations firms in respect of point of sale advertising within the State conducted on behalf of the corporate plaintiffs from 1998 to date or planned but not executed. The motion paper sets out a non-exhaustive list of such materials. Ten items are contained in that list. They are:

1. Client agency contract reports

2. Client briefs

3. Creative briefs

4. Media briefs

5. Media scheduler

6. Advertising budgets

7. Strategic and marketing planning documents

8. Market research reports relating to each campaign

9. Reports which establish links to other communications strategies such as public relations and

10. Reports which establish links between the advertising campaign and marketing strategies.

4. The defendant's application is resisted by the plaintiffs on three bases. They contend that:

(a) discovery is not appropriate in proceedings such as these

(b) it is neither relevant or necessary and

(c) ignores the effect of a ruling made by me on 17th January, 2003, in respect of earlier proceedings between the same parties touching upon the same issues.

The basis for the application

5. In these proceedings the plaintiffs claim a wide range of declaratory reliefs directed to provisions of the Public Health Tobacco Act 2002 and 2004 and the European Communities (Manufacture, Presentation and Sale of Tobacco Products) Regulations 2003. They challenge certain provisions of these enactments on a threefold basis. First, they claim that some of them are unconstitutional. Secondly they allege invalidity because the provisions are in breach of European law. Thirdly, they claim that certain sections of the provisions are incompatible with the State's obligations under the provisions of the European Convention on Human Rights. Insofar as the Regulations are concerned there is an additional claim that in making them the first defendant acted *ultra vires.*

6. By a long letter of the 4th July, 2004, the defendants made their request for the discovery in suit. That letter set out the documents being sought which I have already described.

7. During the course of argument the defendants modified their request in respect of the first category. They no longer seek all documents in relation to point of sale advertising within the State from 1998 to date or planned. They will be content with samples of such documents.

8. As this letter of 4th July, 2004, set out in some detail the reasons for the discovery sought I reproduce here the relevant portions of it. I will do likewise with the response since these letters demonstrate the approach of the parties to the issue.

Letter of 4th July, 2004

9. The letter states:

> *"The plaintiffs challenge, inter alia, the retail advertising ban put in place by s. 33A of the Public Health (Tobacco) Act, 2002 (as amended) (The 2002 Act) and a closed container requirement and display ban put in place by ss. 43(3), 43(4) (b) and s. 43(5). In this regard, we refer you to the relevant portions of the Statement of Claim.*
>
> *The defendants plead that the impugned sections of the 2002 Act are lawful and, in particular, that the advertising restriction put in place by s. 33A, insofar as it impinges on any constitutional rights which the plaintiffs or any of them assert, is justified and proportionate having regard to the public health threat posed by tobacco products. In particular, the defendants plead, at paragraph 33 of the defence, that the existing restrictions on advertising were not sufficient to achieve the public health objectives. Further, there were reasonable grounds for the Oireachtas to consider that a comprehensive ban on the advertising of tobacco products would better protect children and young people.*
>
> *In their Reply, the plaintiffs contend that the prohibition of communication of factual information, or expression of opinion, relating to their products resulting from the advertising ban put in place by the 2002 Act, is not justified or proportionate on the basis alleged by the defendants. Further, the plaintiffs deny the particulars relied upon at paragraph 33 of the Defence. The plaintiffs admit only, at paragraph 5 of the Reply, that the Oireachtas is entitled to enact legislation based on the belief that some restrictions on the advertising of tobacco products may achieve a public health objective or protect children and young people.*
>
> *In particular, the corporate plaintiffs rely on their right to communicate factual information to the seventh and eight named plaintiffs. The corporate plaintiffs have repeatedly asserted that the advertising ban impinges on their entitlement to communicate factual information such as the name of the brand, type or price of tobacco products or a variant thereof (or any new products) or as to their characteristics and attributes or as to the availability and existence, or as to the name of the manufacturer of such products, or relating to or comprising the trade marks, emblems, images or logos by reference to which such products are marketed or sold (replies to particular 6(a), June 3rd 2004).*
>
> *Having regard to the above, there is an issue between the parties as to the role of advertising and the use to which it is put and has been put by the corporate plaintiffs.*
>
> *As a result the defendants are entitled to ascertain the purposes for which advertising campaigns were launched by the corporate plaintiffs and the corporate plaintiffs perception of the effects of those campaigns, in order to ascertain whether those campaigns were in fact availed of to communicate the factual information which the corporate plaintiffs claim that the impugned sections of the 2002 Act now prevents them from communicating and to ascertain the nature of the factual information which the corporate plaintiffs chose to communicate to consumers, including the seventh and eight named plaintiff.*

(ii) "Objective" point of sale advertising documentation

> *As regards the documentation sought at 1 this covers point of sale advertising that was, of course, in the public domain at certain times in that it was installed at retail outlets. To this extent it may, in theory, be objectively ascertained. However, unlike advertising run in the print media, there is no method by which the defendants can collate the forms of advertising availed of (advertising on gantries, cashmats etc.). Unlike the position in respect of the print media, there are no archives that can be consulted to ascertain the extent and form of the campaigns run.*
>
> *In this regard, and with a view to narrowing the scope of the discovery which the defendants view as absolutely necessary, we confirm that we have consulted with our advertising experts to ascertain the information that they will require to test and address the claims made in these proceedings by the corporate plaintiffs. Our experts are satisfied that, in relation to forms of advertising other than point of sale advertising, documentation exists which will permit them to test the statements made by the corporate plaintiffs in relation to other forms of advertising. However, this is not the case in relation to point of sale advertising campaigns. This information can be garnered only through the corporate plaintiffs or their agents.*
>
> *This category of documentation is sought in respect of the period 1998 to date. In 2000, a ban on tobacco advertising in the print media was introduced. As a result, the defendants will contend that the role of point of sale advertising took on a vital importance for the tobacco industry from in or about the time when the ban was first envisaged (approximately 1998). In the circumstances, the defendants seek the point of sale documentation only in respect of the period when this form of advertising took on greater significance. In this regard, the campaigns currently envisaged, in the context of a changing regulatory environment are of fundamental importance and are, of course, not within the defendants' knowledge. The defendants will contend that, as channels for advertising are reduced, the tobacco industry focuses its efforts on the subsisting lawful channel. As the scope for advertising in various media narrowed by virtue of domestic and EU legislation over the last four years, the significance of the manner in which the industry has chosen and will to continue to seek to communicate through the point of sale increases.*

(iii) "Subjective" point of sale advertising documentation

> *As regards the documentation sought at (ii), this is designed to ascertain the tobacco industries perception of any communication of information to a target audience through advertising and the effect of such advertising.*
>
> *The documentation sought is also necessary in order to allow the court to consider the effectiveness of marketing or advertising campaigns, in particular on young people.*
>
> *The defendants accept that, to a certain extent, an analysis of the advertising campaigns conducted in the past, (through media which permitted consultation and collation), will be sufficient to ascertain the information which the corporate plaintiffs chose to disseminate and that which the corporate plaintiffs chose not to disseminate. To that extent, it is the objective manifestation of the behaviour of the tobacco companies that is important and this does not*

require the making of discovery. However, we have consulted with our advertising experts who advise that, in order to fully analyse the object and effect of any given advertising campaign, it is necessary to access documents internal to the advertiser. Firstly, in analysing the effect of an advertising campaign, it is vital to assess the subjective response to that campaign (i.e. whether the campaign particularly appealed to young women). The only mechanisms whereby the subjective response to an advertising campaign can be fully measured is through market research. Such research is conducted by the tobacco companies through their agents.

Secondly, in order to ascertain the objective of an advertising campaign, it is necessary to have regard to what the tobacco companies sought to achieve. Expert evidence can only surmise as to the object of a given campaign and hypothesise as to the result.

Proof as to the purpose and effect of advertising undertaken by the corporate plaintiffs is vital to the issue of the likely effect of the measures sought to be impugned, with a consequential effect on the question of proportionality.

Please note that the documentation specified is required in order for the defendants to properly ascertain the nature of the claim being made against them so that the claim can be disposed of in a cost effective and fair manner."

10. This was responded to by a letter of a single paragraph. It said:

"We refer to your discovery letter received on Friday morning. Firstly, we do not believe discovery is required in these proceedings. The documents you are seeking are not relevant. These issues have already been dealt with in the earlier proceedings and we will be relying on the decision by Mr. Justice Kelly in those proceedings. In any event, Mr. Justice Kelly has reserved his decision on the evidence which may be adduced at trial. That will have implications for your discovery request and we do not consider it appropriate to pursue the issue until Mr. Justice Kelly has delivered his ruling on the evidential issues. We will revert after Mr. Justice Kelly has delivered this ruling."

11. The judgment referred to upon the issue of admissibility of certain evidence had been reserved on the 9th day of July, 2004 and was delivered on the 29th July, 2004. I took the view that, having regard to admissions which were made in the pleadings, it was not open to the defendants to call evidence on facts that were not in contest. From that decision an appeal was taken to the Supreme Court which was heard on 25th November, 2004. That court delivered judgment on 3rd May, 2005. My order was discharged, not on the basis of the question which I had decided (which was specific to this case) but on a much broader question of the admissibility of evidence of the type proposed in general in support of a plea of proportionality. I expressly refused to adjudicate upon that broad issue because I took the view that it was not necessary for me to do so. The Supreme Court took the view that the defendants were not debarred from calling evidence in support of the proportionality of a legislative measure but as I read the judgment it did not decide whether it was open to them to do so in the instant case, leaving that question to be decided at some future time by, perhaps, the trial judge.

12. In any event with that decision this question of discovery resurrected itself and led to the bringing of the present motion.

13. The substantive reply to the defendant's letter of the 9th July, 2004, is therefore to be found in a reply dated 5th July, 2005. Insofar as it is relevant the letter reads as follows:

"At the outset, we do not believe that discovery is appropriate in this case for a number of reasons. Firstly, discovery is extremely rare in cases (such as the present case) which essentially seek declaratory relief and consist almost exclusively of legal argument concerning the validity of legislation having regard to the provisions of constitutional and EU law. Secondly, the documents in respect of which discovery has been requested on behalf of your clients are not relevant nor is it is necessary that your clients obtain such discovery in order to defend the claim or to reduce costs. Thirdly, your clients request is unnecessary and inappropriate for virtually the same reasons that led the High Court (Mr. Justice Kelly) to refuse a similar application for discovery on the part of your clients in the related proceedings referred to at paragraph 19 of the Statement of Claim."

Application for discovery in earlier proceedings

Your clients issued a discovery request by letter dated 26th November, 2002, in related proceedings involving the same defendants and many of the same plaintiffs (3480/2002P). Your client sought discovery of three categories of documents.

Your application for discovery was dealt with by the High Court (Mr. Justice Kelly) over two days on 13th January, 2003 and 17th January, 2003. Both sides prepared written submissions for that application and oral submissions were then made before the court. Your client's application was refused. It is clear from the judgment of Mr. Justice Kelly that the court did not consider that discovery was appropriate and that, even if the documents require to have been relevant, your client should have considered other less costly and time consuming alternatives to discovery.

In the course of his judgment, Mr. Justice Kelly observed that:

> *'Advertising and marketing campaigns or market research carried out in the ten years prior to the commencement of this litigation, do not, in my view, have any relevance to what has to be tried in the case…all of the material which is sought to be obtained on discovery was generated in a different regulatory regime to that which is envisaged in the Act. The purposes of such advertising campaigns, the instructions given, the research produced, does not in my view have relevance to the issues which fall to be tried in this action. I simply do not see how they can be relevant to it. What are relevant of course are documents or material which is or was in the public domain. They would clearly be relevant but they are in the public domain. They are already available to the defendants and they do not seek anything other than this documentation. Consequently, in my view, the documents which are sought are not relevant and on the ground of irrelevance to the issues to be tried, I therefore refuse to make the order for discovery.'*

Mr. Justice Kelly then went on to consider the discovery request and noted that there were other more appropriate applications which your client could have made to access the relevant materials if required.

'If the material was relevant and was admissible, it seems to me that it would have been more expeditious and would have given rise to more saving of time and the reduction in costs if this information had been sought by other means such as interrogatories rather than discovery which would inevitably involve a trawl through ten years of documents and would both delay these proceedings and add very significantly to their costs.'

It is clear that your clients have not had regard to the terms of the judgment and have made an almost identical request in the present case (albeit restricted to point of sale advertising documentation).

Current request

We remain of the view, expressed in the earlier proceedings, that discovery is not required in these proceedings. Our clients seek declaratory orders as to the scope and validity having regard to the provisions of the Constitution of Ireland and of European Law, of various sections of the Public Health (Tobacco) Acts 2002 and 2004. The questions raised in these proceedings present matter of law; indeed it is the invariable position of the State itself before the courts that discovery is neither necessary nor appropriate in actions raising questions of constitutional or statutory construction. You will be well aware of the many occasions in which the courts have accepted the correctness of that position, and in which applicants or plaintiffs in proceedings taken against the State or State bodies, have been refused discovery on the basis of arguments to this effect.

We believe it of note that your clients have now seemingly abandoned that position (ignoring the content of the judgment delivered by Mr. Justice Kelly on the 17th January, 2003) and decided that in this case, for whatever reason, it is necessary for the purposes of defending the validity of provisions of the Acts of 2002 and 2004 that they have access to documents in the possession or power of the plaintiffs. As we understand the position adopted in your letter under reply, your clients adopt the view that in order to establish the validity having regard to the Constitution of Ireland or of European law legislation enacted by the Oireachtas, it is necessary that your clients have access to documents and information which were not before the Houses themselves when they enacted this legislation.

We must confess to finding this proposition, to say the least, surprising. By definition, the documents in respect of which discovery is sought were not before the Oireachtas when the legislation was passed. In those circumstances we fail to see how it could be asserted that the discovery requested is at all relevant.

The irrelevance of the documents in respect of which discovery is sought by your clients appears from the pleadings. Your client's discovery request is apparently directed at the retail premises advertising ban. In that regard, the essential issue in the proceedings is whether it is lawful (having regard to the provisions of the Constitution and the law of the European Union) to prohibit the imparting of purely factual information in relation to the corporate plaintiffs product. In this regard reference may be made to paragraphs 31 and 61 of the statement of claim. In their defence, your clients have expressly pleaded that the Oireachtas had reasonable grounds for believing that the impugned provisions of the legislation were justified and proportionate and that there were reasonable grounds for the Oireachtas to consider that the restrictions on advertising were necessary and that the current restrictions were not sufficient to achieve the public health objective (at paragraphs 25, 27, 33, 34 and 35 of the defence). In their reply, the plaintiffs have admitted that the first named defendant (The Minister for Health and Children) is and was entitled to propose and the Oireachtas is and was entitled to enact legislation based on its concerns regarding the health consequences of smoking and on the belief that some restrictions on the advertising of tobacco products may achieve a public health objective or protect children. The plaintiffs do of course contend that any such legislation must be proportionate. In those circumstances, having regard to the matters actually in issue between the parties on the pleadings, it is impossible to see how the discovery requested by your clients is relevant. What the plaintiffs challenge is the proposition on the imparting of factual information in relation to the Corporate plaintiffs' products. Bearing that in mind, we do not see how any of the documents which your clients seek by way of discovery are relevant.

We would be grateful in replying to this letter, if your clients could state clearly the position they adopt in this regard.

Categories I and II

In the following paragraphs we set out some specific comments on the particular categories of documents sought by you. We do so without prejudice to our clients' fundamental objections to the making of discovery in this case, which applies in relation to each of the categories of documents identified by you. We should further observe that these various objections are without prejudice to our right to contend that your request is vague, uncertain in its terms, and that the period of time referred to in the request is illustrative of its oppressive character.

We do not believe that the documentation you are looking for is relevant or necessary to enable your client to defend the proceedings issued or to save legal costs.

The purpose for which any particular point of sale advertising campaign was undertaken is immaterial to the matters in issue in the proceedings, as is the question of whether any particular advertising campaign is subjectively perceived as effective. Once again, this is a matter which stands or falls quite independently of any documentation in the possession of the plaintiff. It is also very difficult to understand how the State can contend for the validity of wide-ranging legislation based on documents concerning the minutiae of specific advertising campaigns which were not available to the Oireachtas when the legislation was being enacted. In an effort to assist the court in defining the true issues as between the parties, our clients in their reply have admitted for the purposes of these proceedings, that the Oireachtas was entitled to enact legislation based upon the belief that some restrictions on the advertising of tobacco products may achieve a public health objective as set forth in paragraph (5) of the Reply. We find it puzzling in these circumstances that you propose to convert the proceedings into some form of enquiry by the court where it will "consider the purposes for which advertising campaigns were launched by the corporate plaintiffs and the corporate plaintiff's perception of the effects of those campaigns".

In your letter of 9th July, 2004, you sought to contend on behalf of your clients that the discovery sought is necessary

in order to ascertain the nature of the factual information relating to the corporate plaintiffs products which these plaintiffs chose to communicate to customers. With respect, this proposition does not withstand scrutiny. This information communicated to the public is evident from any such advertising itself which, by definition, is in the public arena.

You justify your request for documents over a seven year time span on a number of grounds, one being that –

> *"As the scope for advertising in various media narrowed by virtue of domestic and E.U. legislation over the last four years, the significance of the manner in which the industry has chosen and will continue to seek to communicate through the point of sale increases".*

It is clear from a review of the legislation that the scope for advertising in various media in Ireland has not narrowed at all in the last four years. Ireland already has a very highly regulated environment. Most forms of advertising (TV, radio, cinema etc.) have been banned for many years, the print media from 2000, and the only place where one could advertise tobacco products since 2000 was point of sale (the last material change was the ban on press advertising at that time). There have not been any significant developments at either domestic or E.U. level which have had a material impact on the media used to advertise tobacco in Ireland over that time period and your argument that discovery is required because of the narrowing of the channels during that period is flawed nor have you advanced any meaningful explanation for your request for discovery of documents brought into existence after the impugned provisions were originally enacted in 2002.

For those reasons, we believe that the discovery requested on behalf of your clients is irrelevant.

Furthermore, we believe that the period of time which you have stipulated is oppressive and unjustifiable in the context of this challenge to the 2002 and 2004 legislation. Such extensive discovery would lead to substantial cost being incurred by our clients providing documents with no obvious relevance to the real issues in this litigation.

In addition the scope of discovery you are seeking is extremely broad and will lead to significant and disproportionate costs being incurred by our client again with no apparent benefit. For example, much of the documentation which could be provided would by voluminous and repetitive. There are over 15,000 retail outlets selling tobacco products in Ireland. It would be impossible (and we submit, entirely unnecessary) to document all point of sale advertising documentation provided to each individual outlet over the course of the seven years referred to. Even if it was possible it is difficult to see such extensive and wide ranging discovery was necessary, relevant or appropriate.

You also seek documentation relating to point of sale advertising planned (but not yet executed). You have not explained why you would seek documentation for something that has not occurred. Documents for a campaign which was not in fact executed would clearly be neither relevant or necessary. There is no basis for any such requirement."

14. This letter was in turn responded to on the 8th July, 2005.

15. I quote from the relevant parts of this correspondence

"We note that your clients are refusing to make voluntary discovery for the following reasons:

I discovery is not appropriate in proceedings such as these;

II discovery is not relevant or necessary;

III the request for discovery ignores the terms of the ruling delivered by Mr. Justice Kelly on January 17th, 2003, in respect of the motion for discovery brought by the State defendants in the proceedings brought by your clients bearing record no. 8920P 2002 (the 2002 proceedings).

We propose dealing firstly with the latter issue.

Discovery in the 2002 proceedings

As appears from the affidavit sworn by Miss Neary grounding the application for discovery in the instant proceedings, which you will now have received, the defendants have exhibited all of the documentation relating to the discovery application made in the 2002 proceedings. Discovery was sought in those proceedings by letter dated November 26th, 2002. In response, by letter dated December 4th, 2002, your office refused to make voluntary discovery and again outlined the basis for its application (sic) for its discovery.

The discovery sought in that case differed radically from the discovery the subject of the current application to the court. Firstly, the documentation sought at category 3 of the requests made in the 2002 proceedings is not sought. Secondly, as regards categories 1 and 2, which were the principal categories of discovery, the documentation sought related to all forms of tobacco advertising. It was, as a result, much broader in its scope than the present application which by contrast is confined to documentation relating to point of sale advertising only.

Contrary to what you suggest, the defendants have not ignored the ruling of Mr. Justice Kelly. Rather, they have given extensive consideration to that ruling and discussed it at length with the advertising experts who will be called to give evidence on behalf of the defendants when this matter comes on for trial. Mr. Justice Kelly indicated in his ruling (page 32 of the transcript) that he was not of the view that the " internal documentation" sought to be obtained on discovery was relevant, as it was generated in a different regulatory regime and the purpose of such advertising campaign was not relevant to the issues in that case. He went on to hold that what was of course relevant was documents or material in the public domain, which would not, in any event, be necessary as the defendants would be in a position to access this material.

Lastly, he indicated that, even if he had been persuaded that the documents sought were relevant, they were not

necessary. In his view, the objective manifestation of the behaviour of the plaintiffs was what was important. The objective manifestation of the advertising and marketing campaigns of the plaintiffs were in the public arena and known to the defendants.

The defendants' current application was drawn up in the light of the judgment of Mr. Justice Kelly. The 'objective' documentation sought at category 1 is documentation that is not available in the public domain, as no archive exists for such documentation.

Secondly, the 'subjective' documentation sought at category 2 is necessary having regard to the advice received from advertising experts which was not before the court on the last occasion, to the effect that the objective manifestation of the behaviour of the tobacco companies is insufficient to allow them to fully analyse the object and effect of any given advertising campaign, and to give evidence in relation to same. Consequently, they have sought to address why it is that information in addition to the objective manifestation of advertising campaigns is required to enable the experts giving evidence and ultimately the Court in determining the matter, to understand the object and effect of an advertising campaign and, as a result, to assess the reality and validity of the corporate plaintiffs' claims that the right to communicate factual information as to their consumers has been unconstitutionally delimited by s. 33(a) of the 2002 Act, as amended.

In the circumstances, it is quite wrong to suggest that the defendants' application for voluntary discovery is virtually the same as the application made in the 2002 proceedings and fails to have regard to the ruling of Mr. Justice Kelly.

The form of the instant proceedings

As they did in the 2002 proceedings, your client seek to insist that discovery cannot be ordered in proceedings such as these, which our clients categorise as proceedings consisting almost exclusively of legal argument. This categorisation of the proceedings fails to take account of the State defendants intention to call evidence and, in particular, the evidence of advertising experts to assist the State defendants in demonstrating the proportionality of the impugned provisions. Consequently, it is incorrect to seek to categorise these proceedings as one presenting matters of legal argument only.

You also repeat the objection to the discovery relied upon by our clients in 2002 to the effect that it is 'inappropriate in actions raising questions of constitutional or statutory construction, for discovery to be sought, in particular in relation to information that was not before the Houses of the Oireachtas. This argument is clearly fallacious in the context of the instant proceedings and has been shown to be so. In its submissions made to Mr. Justice Kelly in the context of the discovery motion in the 2002 proceedings, the defendants asserted that they were entitled to lead evidence in support of objective justifications for legislation, even if the Oireachtas was not aware of that precise evidence or justification when the legislation was enacted. Consequently, regard may be had to all relevant evidence, even if that evidence was not formally before the Oireachtas. Mr. Justice Kelly appeared to accept this submission in that he examined the request for discovery made in the light of the principles of relevance and necessity. Further, the Supreme Court has, in its judgment of May 3rd, 2005, endorsed the relevance of contextual evidence in proceedings such as these which raised proportionality issues.

Consequently, we reject your assertion that the nature of the proceedings precludes the making of discovery.

Relevance and Necessity

(i) Objective Documentation

At the outset we note that in your lengthy letter you fail to address the State defendant's assertion that it is not possible for the State defendants to collate information as to the point of sale advertising campaigns run by the Corporate plaintiffs. You baldly assert that the information communicated to the public is in the public arena. However, our advertising experts have indicated that there is no archive or reference point for such material. Consequently, it is not in the public domain other than insofar as aspects of current campaigns could be viewed in grocery shops and garage forecourts throughout the country. It is clear that information in relation to the scope of advertising campaigns actually run is relevant and necessary to these proceedings but information in relation to past campaigns cannot be obtained by the defendants other than through the discovery process.

This information is sought in respect of the period from 1998 onwards. This request is justified on the basis that the regulatory environment has changed in that period. Your clients simply assert that the regulatory environment has not changed in the last four years. The ban on print media advertising was introduced in 2000. For completeness we are attaching a summary of legislation (other than E.U. directives) adopted since 1998. Your client accepts that a material change in advertising was the ban on press advertising in 2000. It is for that very reason that discovery in respect of the period prior to 2000 is sought. The defendants seek discovery commencing at the time when point of sale advertising took on a vital importance for the tobacco industry, i.e. from when the ban on print advertising was first envisaged, in approximately 1998.

Insofar as your clients contend that the discovery sought is oppressive because the discovery would be voluminous and repetitive if documentation in relation to the campaigns run in each of the 15,000 retail outlets selling tobacco products in the State were to be discovered, the defendants are happy to clarify that they do not seek and have not sought such broad discovery. They seek documentation in relation to each campaign, not in relation to each retail premises. Consequently repetition can be avoided and the scope of the discovery is clearly not oppressive.

(ii) Subjective Documentation

We note that, on the issue of the internal or subjective documentation your clients simply assert that (a) the purpose for which a campaign is run is irrelevant and (b) the effect of any campaign is irrelevant. We respectfully disagree for

the reasons outlined in the letter from Professor Hastings and Professor Pollay in their letters exhibited at exhibits EN4 and EN5 respectively to Ms. Neery's affidavit. We note that you assert that 'this is a matter which stands or falls quite independently of any documentation in the possession of the plaintiffs'. We take this to mean that an analysis of point of sale advertising can be conducted on the basis of an examination of the published campaign. We note also that you do not purport to rely on any particular advertising expertise in support of this proposition, which we cannot accept as correct.

In the circumstances, the State defendants reject the arguments put forward by your client as a basis for refusing discovery in this case. Our clients intend to pursue their application for discovery for the reasons outlined in Ms. Neery's affidavit in the letters of Professor Hastings and Professor Pollay and in this letter."

The Views of the Professors

16. Heavy reliance has been placed by the defendants upon the opinions of Professors Hastings and Pollay.

17. Professor Hastings is attached to the Department of Marketing at the University of Stirling in Scotland. Professor Pollay is Professor Emeritus of Marketing at the Sauder School of Business in the University of British Columbia in Canada.

18. Each professor wrote to the Chief State Solicitors Office in November, 2004. Professor Pollay wrote on 16th November and Professor Hastings on 30th November.

19. Both professors expressed themselves in identical terms in their respective letters on the topic of the necessity for the discovery sought. Each letter finishes with a paragraph which reads as follows:- "I confirm that the categories of documentation referred to in the defendants request for voluntary discovery were drawn up with my input and I believe that discovery of these categories of documentation is absolutely necessary in order for the court to assess the reality and validity of the claims made by the tobacco companies in these proceedings regarding the manner in which they have used point of sale advertising."

Applicable Legal Principles

20. Order 31, r. 12 of the Rules of the Superior Courts as amended requires an applicant for discovery to demonstrate that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs.

21. The *locus classicus* on relevance is to be found in the judgment of Brett L.J. in the *Peruvian Guano Case* [1882] 11 Q.B.D. 55. That judge described as relevant-

"Every document relating 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 either to advance his own case or to damage the case of his adversary."

22. That statement was considered by Murray J. (as he then was) in *Aqua Technolgie v. NSAI* (Supreme Court, 10th July, 2000) where he said:-

"… There is nothing in that statement which is intended to qualify the principle, that the document sought on discovery must be relevant, directly or indirectly to the matters in issue between the parties in the proceedings. Furthermore, an applicant for discovery must show it is reasonable for the court to suppose that the documents contain information which may enable the applicant to advance his own case or to damage the case of his adversary. An applicant is not entitled to discovery based on mere speculation or on the basis of what has been traditionally characterised as a fishing expedition."

23. In *Framus v. CRH* Plc [2004] 2 I.L.R.M. 439, the Supreme Court approved of the approach of McCracken J. in this court in *Hannon v. Commissioner of Public Works* [Unreported, 4th April, 2001] where he set forth the appropriate approach to relevance as follows:-

"(i) The court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant.

(ii) Relevance must be determined in relation to the pleadings in the specific case. Relevance is not to be determined by reasons of submissions as to alleged facts put forward in affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents. It should be noted that Order 31, r. 12 of the Superior Court Rules specifically relates to discovery of documents 'relating to any matter in question therein'.

(iii) It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other parties' documentation is not permitted under the rules.

(iv) The court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties."

24. There is much recent authority on the second part of the test which an applicant for discovery must satisfy. Such an applicant must show that the discovery sought is necessary for disposing fairly of the cause or matter or for saving costs. The burden of proving that the discovery falls within this rubric rests with the applicant for discovery. This is not "a mere formalistic requirement" (see *Ryanair Plc. v. Aer Rianta Cpt* [2003] 4 I.R. 264.)

25. In that case Fennelly J. dealt with the issue as to what is meant by this concept of necessity by reference to my decision in *Cooper Flynn v. Radio Telefís Éireann* [2000] 3 I.R. 344 where I had adopted the following statement of Lord Bingham M.R. in *Taylor v. Anderton* where he said:-

"The crucial consideration is, in my judgment, the meaning of the expression 'disposing fairly of the cause or matter.' Those words direct attention to the question of whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection.

It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test."

26. Fennelly J. having referred to that passage went on to say:-

"It may not be wise to substitute a new term of art 'litigious advantage', for the words of the rule. Nonetheless, the discussion gives guidance as to the context in which the matter has to be considered. Within that context, the court has to reach a conclusion as to the likely effect of the grant or refusal of the discovery on the fair disposal of the litigation.

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

The court, in exercising the broad discretion conferred upon it by Order 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. These may, no doubt, include the possible service of notices to admit facts or documents. But there are two sides to litigation. The behaviour of the opposing party is relevant. That party may, for example, have made or may offer to make admissions of facts, and thus persuade a court that discovery on some issues is not necessary. This is, perhaps, axiomatic. Those facts will no longer be an issue."

27. This approach has been maintained by the Supreme Court in *Taylor v. Clonmel Healthcare Limited* [2004] 1 I.R. 169, where Geoghegan J. stated:-

"The purpose of the amendment (to Order 31, r.12) was so that the Master or the court as the case may be and the respective parties would focus on what documents were really needed for the purpose of advancing the case of the moving party or defending as the case might be."

28. Again in *Framus v. CRH Plc*. Murray C.J. said:-

"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 critical 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 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."

29. It is these principles which I intend to apply on this application for discovery.

30. In accordance with the judgment of McCracken J. in Hannon v. Commissioner of Public Works I must turn to the pleadings to see whether the documents sought are relevant to the issues to be tried.

The Pleadings

31. Paragraph 31 of the statement of claim identifies the basic issue which will fall to be determined in the action. It is whether the defendants are behaving lawfully in prohibiting the imparting of factual information in relation to the corporate plaintiff's products. That paragraph and its seven sub-paragraphs set out the corporate plaintiff's complaints in this regard. They contend that the relevant sections of the legislation are contrary to the provisions of the Constitution because they *inter alia*:-

(a) Criminalise the imparting of any factual information concerning the corporate plaintiff's products,

(b) Prohibit the provision of information even when requested by a customer or consumer,

(c) Delimit the right of consumers to be provided with information so as to enable them to make a choice,

(d) Interfere with the property rights of the corporate plaintiffs,

(e) Having regard to both breadth and lack of specificity unjustly discriminate between persons engaged in the business of tobacco products on the one hand and non tobacco products on the other,

(f) Are too vague and broad,

and

(g) Exceed any permissible discretion conferred on the State under relevant European Directives.

32. The statement of claim was followed by a request for particulars. In their replies dated 3rd June, 2004, the factual information which the corporate plaintiffs claimed the right to impart is identified as follows:-

"Information as to the name of the brand, type and/or price of tobacco products or variant thereof or any new products, or as to their characteristics and attributes or as to their availability or existence, or as to brand history, or as to the name of the manufacturer of such products, or relating to or comprising the trademarks, emblems, images or logos by reference to which such products are marketed or sold."

33. The defence *inter alia* pleads a justification for the restrictions in suit. This is to be found at paras.33, 34 and 35.

34. Insofar as they are relevant those paragraphs read as follows:-

> *"33. There were reasonable grounds for the Oireachtas to consider that the restrictions on advertising provided for by s. 33(a) was necessary and the current restrictions were not sufficient to achieve the public health objective.*
>
> *34. Further, there were reasonable grounds for the Oireachtas to consider that it should give effect to the Recommendation and to the WHO Convention, both of which recommended that countries adopt comprehensive restrictions on tobacco advertising and promotion.*
>
> *35. Lastly, there were reasonable grounds for the Oireachtas to consider that more comprehensive restrictions on the advertising of tobacco products would better protect children and young people. Inter alia, the Oireachtas was entitled to have regard to the following factors:-*
>
> > *(a) The report of the Tobacco Free Policy Review Group concluded that the tobacco industry exploited the immaturity of young people when marketing their tobacco products,*
> >
> > *(b) Advertising plays an important role in the promotion of tobacco products to young people,*
> >
> > *(c) The 1999 Joint Committee Report states that research demonstrates that 34% of children in the 15 -17 year age bracket smoke,*
> >
> > *(d) A significant number of children commence smoking at an age when they are not lawfully permitted to be sold cigarettes."*

35. This is a case in which the pleadings have been drafted with very great care. They are extensive. They are detailed. They go beyond the norm in many respects. Unusually, a rejoinder has been delivered. An amended reply and amended rejoinder were delivered.

36. It is in my view no accident that paras.33, 34 and 35 of the defence, which provide the justification for the legislative provisions complained of, are in the past tense. They all assert that there were reasonable grounds for the Oireachtas to behave as it did. They set out with some particularity the various reports which parliament was entitled to have regard to. But how can it be said that information which was completely unknown to parliament at the time the legislation was passed can be relevant to the establishment of the defendant's defence? The bringing of this application makes it clear that at the time when the legislation was passed the materials sought to be discovered were not known to the defendants or parliament.

37. In these circumstances it does not appear to me that the documents which are sought by way of discovery can be relevant to the establishment of this defence of justification. That view applies equally to both the "objective" point of sale advertising documents and the "subjective" documentation.

38. In any event I am of opinion that the purpose for which any particular point of sale advertising campaign was undertaken is immaterial to the matters in issue in the proceeding. Likewise is the issue of whether any such advertising campaign was subjectively perceived as being effective or otherwise. These topics are not relevant to the questions which the court will have to address at trial.

39. I also find the documents being sought to lack relevance for the reasons given in my ruling of 17th January, 2003, to which I will turn later in this judgment.

40. Lest I am wrong in the view which I have formed as to the relevance of these documents I will go on to consider whether they are necessary for disposing fairly of the cause or matter or for saving costs. For the purposes of this exercise I will assume (contrary to the view which I have formed) that they are relevant.

Necessity

41. In the affidavit grounding this application for discovery reference is made to Professors Hastings and Pollay. I have already reproduced the identical final paragraphs from the letters written by those two gentlemen in November, 2004. The affidavit states that both experts take the view that the documentation sought is relevant and necessary to these proceedings.

42. Although the defendants have recently sought (unsuccessfully) to have this case removed from the commercial list there can be no doubt but that the conduct of this litigation has benefited from the procedures which are available under the provisions of Order 63(A) of the Rules of the Superior Courts. Thus, as a result of the application of those procedures, witness statements have been exchanged between the parties from all of the many witnesses who will be giving evidence in the case.

43. Professor Pollay's runs to some 27 closely typed pages (exclusive of the 39 pages of his *Curriculum Vitae* as of April 1st, 2004). Professor Hastings witness statement runs to some 22 pages exclusive of eight pages of *Curriculum Vitae*.

44. Both of these experts have been able to provide lengthy statements of evidence without recourse to the documents which are now sought by way of discovery. An examination of these statements demonstrates the extensive and comprehensive nature of the evidence which they are in a position to give without access to the documents now sought.

45. In the case of Professor Pollay it is clear that he is in a position to give evidence in relation to the situation in this jurisdiction. In the course of his statement under the legend "Assessing the uniqueness of tobacco marketing in Ireland" he says as follows:-

> *"I have seen and reviewed several types of materials to assess the extent to which tobacco marketing practices in Ireland are similar to that seen elsewhere, or are unique to Ireland. For example, I read Cigarette Advertising and Children Smoking (Ireland), Campaign Analysis, 1990 – 2000, and the companion report by Prof. Farrel Corcoran, Cigarette Advertising and Children Smoking (Ireland) for which I authored a preface. I have also reviewed A National Anti Smoking Strategy: A Report On Health and Smoking, published by the parliament of Ireland (downloaded via internet on October 6th, 2004). In addition I have also reviewed the Public Health (Tobacco) Act, 2002 and the Public Health (Tobacco) (Amendment) Act, 2004, along with a 'Background Note – Legislative History of Tobacco Control in Ireland'. I*

have also seen a 'Background Brief for Expert Witnesses' prepared by the State's legal team and have seen the pleadings exchanged in these proceedings, and a request for voluntary discovery (July 9th, 2004) and the ruling of Kelly J. made thereon."

46. He goes on to express the following view:-

> *"This exposure to the situation in Ireland and the current proceedings leads me to conclude that the industry's marketing practices, the public policy response, and the likely consequences of each, as anticipated by an understanding of the principles of marketing, in Ireland are likely to be very similar to that experienced and foreseen in other jurisdictions such as the U.S., U.K., and Canada. Nothing I have seen leads me to conclude that Ireland is so unique as to preclude the application of insights about tobacco marketing, its purposes and consequences, as acquired from other jurisdictions. Industry actions also rely on this belief."*

47. When one turns to the evidence of Professor Hastings one finds an entire section of his précis of evidence dealing with the importance of point of sale marketing to the tobacco industry. It cannot be said that he does not have considerable knowledge and insight into the position in Ireland since he is able to comment even on the high and uniform quality of the gantries which are used in Ireland to accommodate impulse buying. Later he observes that point of sale marketing and particularly the quality of tobacco display gantries is at least as – if not more – prominent and sophisticated in Ireland than in the United Kingdom.

48. It is also clear from the affidavit grounding this application that Professor Hastings prepared a report for the last named defendant entitled *"The Influence of Point of Sale Tobacco Marketing on Adolescent Smoking".*

49. In the light of the above it is difficult to see how these comprehensive statements of evidence could have been prepared, the conclusions arrived at and opinions expressed if the documents sought on discovery are necessary as alleged.

50. I am not satisfied that the defendants have demonstrated that discovery of this material is necessary for the purposes described in Order 31, r. 12.

51. Any doubt about that conclusion is put to flight when one considers that Professors Hastings and Pollay are not the only experts on marketing/advertising who will be called. The defendants are also going to call a home grown expert whose précis of evidence has also been provided.

52. He is Professor Farrel Corcoran. He is a professor of communication at Dublin City University. He has studied the role and effects of advertising for many years. In his précis he makes it clear that he has made a particular study of the research literature on cigarette advertising and children smoking. His statement of evidence is designed to rebut "four of the major main claims about point of sale advertising commonly made by apologists for the tobacco industry". In the course of his statement he deals extensively with what is described as the point of sale environment with particular reference to Ireland.

53. Not surprisingly Professor Corcoran shows great familiarity with his subject and with the activities of tobacco companies insofar as marketing is concerned in this jurisdiction. Nowhere does he suggest that the documents sought on discovery are desirable still less necessary for the fair disposal of this litigation.

54. In these circumstances I am not satisfied that the defendants have discharged the onus of demonstrating that the documents in suit are necessary for disposing fairly of this matter or for saving costs.

The earlier proceedings

55. The lengthy correspondence which I quoted earlier in this judgment sets out in some detail the history of the previous proceedings between these same parties. They began in June, 2002 and challenged certain provisions of the Public Health (Tobacco) Act, 2002. Prior to trial it was conceded by the defendants that they had failed to notify the European Commission of certain provisions of that Act as they were required to do by Directive 1998/34/EC as amended by Directive 1998/48/EC. As a consequence, an undertaking was given on behalf of the first defendant that certain sections of the Act would not be commenced in their original form. Those proceedings were then struck out with costs to the plaintiffs.

56. As is clear from the correspondence, in the course of those proceedings an application for discovery was heard and determined by me in an *ex tempore* ruling of 17th January, 2003.

57. The defendants have accepted that the pleadings in the earlier case were similar although not identical to those exchanged in the present case. (See their written submissions para.3.1) For the purposes of this application however it appears to me that the issues are little different and there is a very large overlap between the documents now requested and those sought in the earlier proceedings.

58. As to the "subjective" documents the only real difference is that the request is more limited in that it refers only to point of sale material limited to seven rather than the ten years requested in the 2002 proceedings.

59. There is of course the application for "objective" documentation now limited to samples of such documents. Strategic and marketing planning documents were not sought in the 2002 proceedings.

60. Despite these differences it appears to me that the same reasoning that led me to the conclusion that discovery should not be ordered of the material sought in the 2002 proceedings applies with equal force to the instant application. My decision of 17th January, 2003, was not appealed.

61. I do not propose to add to an already long judgment by a rehearsal of all that I said in the *ex tempore* ruling which I gave on 17th January, 2003. In the course of the ruling I made it clear that the material then sought was with a view to testing assertions made by the plaintiffs to the effect that the legislation was disproportionate in its effects. I said:-

> *"Advertising and marketing campaigns or market research carried out in the ten years prior to the commencement of this litigation do not, in my view, have any relevance to what has to be tried in this case.*
>
> *All of that material which is sought to be obtained on discovery was generated in a different regulatory regime to that which is envisaged in the Act. The purposes of such advertising campaigns, the instructions given the research produced, does not in my view have relevance to the issues which fall to be tried in this action. I simply do not see how*

they can be relevant to it.

The motivation of the plaintiffs in devising or implementing marketing or advertising campaigns in the past cannot in my view be a matter of relevance in the present case.

It is off course correct that para.25 of the amended defence contends that –

"The legislature was entitled to have regard to statements made by the first defendant to the effect that the tobacco industry generally has consistently striven to frustrate and undermine tighter regulation of tobacco and has, despite knowledge of the dangerous and addictive nature of tobacco products, denied that nicotine is addictive, that smoking and second hand smoke cause disease and death".

That paragraph of the defence also contends that the legislature was entitled to have regard to the fact, that none of the Irish cigarette manufacturing companies have publicly made available papers or internal company documentation to enable the State or the general public to be informed of research specifically undertaken by those companies.

Whilst that is asserted in the defence it is clear from the correspondence that the defendants do not seek these documents with a view to assisting them in bolstering that defence. Rather they seek the documents with a view to seeing whether the campaigns in question were availed of, with a view to communicating the factual information, the communication of which the corporate plaintiffs claim is unconstitutionally delimited by the Act, and to assess the nature of the information which the corporate plaintiffs in fact communicated and which they chose not to communicate in the past.

I am not persuaded that these species of documents are relevant to the issues which fall to be tried in that regard…I cannot see how the internal documents of the type which are sought here can be relevant to that issue."

62. I also ruled against the defendant's request for discovery in the earlier proceedings on the basis of lack of necessity. If anything, given the extensive nature of the evidence which the defendants are now in a position to call, the case on necessity is weaker than that which obtained in the 2002 proceedings.

Conclusions

63 For the foregoing reasons I am not satisfied that the defendants have demonstrated that the documents sought by way of discovery are either relevant or necessary for the fair disposal of these proceedings or for the saving of costs. It follows therefore that in the exercise of my discretion I refuse the orders sought.